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STUBHUB'S TUG AT THE MUNICIPAL PURSE STRING: WHY THE HOME-RULE TAXING POWERS ENUMERATED IN THE ILLINOIS CONSTITUTION MUST REMAIN BROAD AND STRONG

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> It was widely assumed at the [1970 Constitutional Convention] that [Mayor Richard J. Daley's] four top priorities were: 1) the solidification of Cook County's power to classify real estate for taxes; 2) the retention of the ad valorem personal property tax in some form in Cook County; 3) the retention of the election system of choosing judges; and 4) some home rule power for Chicago. The Mayor realized that he had achieved the first two goals only partially and that the third was left to an uncertain fate as an item to be voted upon separately at the referendum. Surely he also realized that the home rule provisions were probably the most liberal of any in the country.
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> —Joan Anderson and Ann Lousin, 1975[2]

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2. Joan Anderson and Ann Lousin, *From the Bone Gap to Chicago: A History of the Local Government Article of the 1970 Constitution*, 9 J. MARSHALL J. PRAC. & PROC. 697, 722 (1975).

> [Chicago's] ordinance—specifically the imposition of a joint and several duty on internet auction listing services to collect and remit its amusement tax . . . and the requirement that internet auction listing services are primarily responsible for collecting and remitting this tax . . . does not pertain to its own government and affairs. The City has overstepped its home rule authority.
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> —Illinois Supreme Court majority, 2012[3]

I. INTRODUCTION

In 2010, the Illinois Supreme Court received what appeared to be a narrowly certified question from the 7th Circuit Court of Appeals: "whether [Illinois] municipalities may require electronic intermediaries to collect and remit amusement taxes on resold tickets."[4] The defendant in the case was Stubhub!, Inc. ("Stubhub"), a web-based auction forum where sellers can resell tickets to buyers. At the time, a state statute provided electronic, web-based intermediaries, such as Stubhub, with two options: (1) collect and remit amusement taxes arising from ticket resales from the individual ticket resellers; or (2) publish a warning to prospective sellers on the website that failure on the part of the seller to collect and remit applicable taxes could subject the seller to criminal and civil liability.[5] The city of Chicago, however, passed an ordinance after the state statute that, in part, required the intermediaries to collect and remit the tax.[6] The Illinois Supreme Court ultimately answered the certified question from the federal court of appeals by finding that the City of Chicago lacked the authority to force Stubhub and similarly situated auction websites to collect the tax because the Illinois legislature had given those businesses a choice by statute.[7]

Directly at issue throughout the case was the concept of "home rule," a power granted to certain municipalities by the 1970 Illinois Constitution. The constitutional home rule provisions in Illinois are among the broadest and most powerful in the nation, a fact that was not lost upon, and in fact was sought expressly by, the framers of the 1970 constitution.[8] Cities in 1970 were growing and facing new challenges that somewhat isolated, and often politically intractable, state legislatures seemed to be unable to

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3. City of Chicago v. Stubhub!, Inc. (*Stubhub III*), 2011 IL 111127, ¶ 36, 979 N.E.2d 844, 855 (2011), *modified upon denial of reh'g*, Nov. 26, 2012.

4. City of Chicago v. Stubhub!, Inc. (*Stubhub II*), 663 F.3d 933 (7th Cir. 2011).

5. *See* 720 ILL. COMP. STAT. 375/1.5(c)(6) (West 2010).

6. Chicago Municipal Code § 4-156-030(F) (2010).

7. *Stubhub III*, 2011 IL 111127, ¶ 42, 979 N.E.2d at 858.

8. *See* Anderson and Lousin, *supra* note 2, at 722.

quickly and efficiently address.[9] By placing the "reins" of self-determination into larger municipalities' hands, the home rule provisions in the 1970 constitution have allowed those communities to make important decisions without constantly having to approach the state legislature for approval.[10]

The issues facing Illinois cities are equally, if not more, important today as in 1970 and will require local leaders to be able to use all governance tools at their disposal. The ability of a municipality to raise revenue is arguably one of the most important expressly granted by home rule. Accordingly, the *Stubhub* case should be viewed with caution going forward, as it raises the possibility of potentially serious challenges to municipal home rule power in the future.

This article, then, will do several things. First, it will give the reader a concise definition and history of the constitutional home rule powers in Illinois. Second, it will discuss the *Stubhub* case in more detail. Finally, the article will reflect upon the plight of Detroit, Michigan, a home rule municipality which suffered financially after a constitutional amendment in the 1970s severely limited its ability to tax or incur debt.

II. HOME RULE: STRAIGHTFORWARD IN THEORY

> There is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meaning than "home rule."
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> —Chicago Home Rule Commission, 1954.[11]

Any reader hoping to gain a quick understanding of the concept of home rule might understandably be discouraged when, after procuring a 415-page volume produced by the "Home Rule" commission and turning to the chapter of that volume entitled "The General Meaning of Home Rule," she finds that the first sentence of that chapter begins with the quote listed directly above.[12] Yet, after completing a review of the literature and cases on home rule in Illinois as it exists and has existed over the years, it is difficult for the author to begrudge the home rule commission the frank assessment that body made of the challenges associated with home rule 60 years ago.

What is meant by the *absence* of home rule, however, is perhaps more clear: a municipality has, and can, exercise only

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9. Donald A. Hicks, *Revitalizing Our Cities or Restoring Ties to Them? Redirecting the Debate*, 27 U. MICH. J.L. REFORM 813, 817 (1994).

10. *Id.*

11. CHICAGO HOME RULE COMMISSION, CHICAGO'S GOVERNMENT: ITS STRUCTURAL MODERNIZATION AND HOME RULE PROBLEMS 193 (1954).

12. *Id.*

those powers which the state grants to it.[13] Generally, non-home rule municipalities "possess only those powers expressly granted, powers incident to those expressly granted, and powers indispensable to the accomplishment of the declared objects and purposes of the municipal corporation."[14] This philosophy is known as "Dillon's Rule," after an Iowa Supreme Court Justice known for his mistrust of local municipalities who authored several opinions strictly defining the powers of municipalities around the turn of the 20th century.[15]

Illinois once followed Dillon's Rule for all municipalities throughout the state,[16] but saw fit to roundly jettison this policy in favor of one of the broadest[17] home rule grants[18] of power to municipalities containing at least 25,000 residents (and others by referendum) with the ratification of the 1970 Constitution.[19] The relevant provision in its entirety reads: "[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."[20]

This constitutional grant, then, established "home rule" in Illinois by vesting in municipalities with over 25,000 people at the time, and with all others through voluntary future referendum, the critical powers to regulate, tax and incur debt which had been once reserved by the state.[21] After a flurry of activity in the courts with both municipalities and plaintiffs testing the constitutional provisions related to home rule, the activity generally subsided to one case every several years in the Illinois Supreme Court.[22] It was not until *Stubhub* that the Illinois Supreme Court found itself at the intersection of home rule and taxation presented by transactions performed on Internet auction websites.

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13. David Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, U. ILL. L.F. 137 n.4 (1972).

14. Hawthorne v. Village of Olympia Fields, 328 Ill. App. 3d 301, 307 (1st Dist. 2002).

15. Sharon Eisenman and Peter Friedman, *Five Things Every Lawyer Should Know About Representing a Local Government*, CHI. B. ASSN. REC. 49 (2004).

16. *Id*.

17. *See, e.g.*, Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1158 (Ill. 1992) (finding that section 6(a) of the Illinois Constitution "was written with the intention that home rule units be given the broadest powers possible").

18. *See, e.g.*, Rubin Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27, 32–40 (1956) (discussing often "illusory" grants of home rule authority to municipalities in other states, particularly when those states hamper other enumerated powers by limiting a municipality's ability to raise revenue through taxation or by incurring debt).

19. ILL. CONST. of 1970, art. VII, § 6(a).

20. *Id*.

21. *Id*.

22. James Banovetz, *Illinois Home Rule: A Case Study in Fiscal Responsibility*, 32 J. REG'L ANALYSIS & POL'Y 1, 92 (2002).

III. *STUBHUB* BUYS US A TICKET TO A HOME RULE DEBATE

> The automobile, modern skyscrapers, the airplane, the radio, television, high-speed mass production, mass merchandising . . . these are but a few of the developments of the last quarter century, all of which necessarily are factors in taxation.
>
> —Professor John Fairlie, 1910[23]

Before delving into *Stubhub* itself, it is useful to examine the background of the case.[24] As the introductory quote to this section indicates, and to rather poorly paraphrase a famous 1980s movie, "if you build it, they will [tax]."[25] Constantly evolving industries always are subject to new regulations and taxes from different levels of government.

In *Stubhub*, the new industry was that of web-based auction sites for event tickets. More specifically, the Illinois Supreme Court was asked to determine "whether municipalities may require electronic intermediaries to collect and remit amusement taxes of resold tickets," with the underlying question being whether the City of Chicago, had exceeded its home rule authority.

To briefly illustrate how Stubhub and similar electronic intermediaries work, this article will use an example of tickets to a Chicago Cubs baseball game. Even if the Cubs are unable to shake the purported Billy Goat curse that certainly has played a role in the team's dismal 107-year drought of World Series victories to date,[26] it is very likely that demand for tickets to Cubs ballgames during the 2015 baseball season will remain among the highest in Major League Baseball.[27] However, simply because one purchases a ticket from the Chicago Cubs does not mean that the purchaser will attend the game. Though "scalping" of tickets remains illegal, where a ticketholder would sell a ticket outside the venue above face value, the Illinois General Assembly and the City of Chicago have each authorized varying degrees of ticket resale, thereby supporting potential secondary markets for tickets to sporting

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23. BARNET HODES, ESSAYS IN ILLINOIS TAXATION 5 (1935).

24. *Stubhub III*, 2011 IL 111127, ¶ 1, 979 N.E.2d at 845.

25. *See* FIELD OF DREAMS (Universal Studios 1989) ("If you build it, they will come.").

26. The curse of the dreaded Billy Goat yet lingers. *Curse of the Billy Goat*, WIKIPEDIA, http://en.wikipedia.org/wiki/Curse_of_the_Billy_Goat (last visited Jan. 28, 2014).

27. *See Major League Baseball—Revenue by Team in 2010*, STATISTA, http://www.statista.com/statistics/193645/revenue-of-major-league-baseball-teams-in-2010 (last visited Jan. 28, 2014) (noting that the Chicago Cubs in 2012 enjoyed the fourth-highest revenues in Major League Baseball at $274 million).

events, concerts, and other amusements.[28]

With the advent and rise of commercial online "auction" sites like eBay and Stubhub, the General Assembly went further in 2005, replacing the Ticket Scalping Act ("Scalping Act") with the Ticket Sale and Resale Act ("Sale and Resale Act").[29] The Sale and Resale Act allowed ticketholders to place their respective tickets for resale on such websites as Stubhub, name their own price, and avoid criminal liability under previous anti-scalping provisions.[30] Thus, where it would still be illegal for a person to sell a ticket with a face value of $50 for $50.01 outside of Wrigley Field, the same seller would be legally permitted to sell the same $50 ticket for $300 to a willing, though arguably foolish, buyer online.

Stubhub was not, and is not, directly involved with the sales, charging buyers a 10% fee, and the sellers a 15% fee, based on the price of the ticket.[31] The result is an appreciable number of tickets that are listed for sale for any given game or event and within a price range that buyers believe will be palatable for sellers. For instance, when the first draft of this article was prepared in January of 2014, a cursory glance at Stubhub revealed that one could still purchase any number of nearly 2,000 tickets to the Cubs' home opener at Wrigley Field on April 4 against the Philadelphia Phillies, at prices ranging from around $50 to $1,000.[32]

The Sale and Resale Act required companies, such as Stubhub, either to (1) collect and remit all applicable local, state and federal taxes or (2) notify resellers of their respective potential legal obligation to pay any applicable local amusement tax.[33] Not surprisingly, Stubhub opted for the latter option.[34] Perhaps unimpressed when legions of private ticket resellers failed to emerge from the thicket of internet commerce to pay their respective share of the amusement tax, the City of Chicago changed its amusement tax ordinance to impose a joint and several liability upon both ticket resellers and reseller's agents for the collection and remittance of the tax.[35] Soon thereafter, the City notified Stubhub that it might be considered a "reseller's agent"

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28. City of Chicago v. Stubhub (*Stubhub I*), 622 F. Supp. 2d 699, 700 (N.D. Ill. 2009), *rev'd*, 2011 IL 111127 (2011).

29. 720 ILL. COMP. STAT. 375/0.01 *et seq.* (West 2010).

30. *Stubhub I*, 622 F. Supp. 2d at 701.

31. *Stubhub III*, 2011 IL 111127, ¶ 7, 979 N.E.2d at 848.

32. *See* http://www.stubhub.com/chicago-cubs-tickets/cubs-vs-phillies-4-4-2014-4402368/ (last visited Jan. 28, 2014). The ticket quotations provided on the Stubhub site are only valid for a limited time. However, similar prices for sporting events like a Cubs game can be viewed by visiting stubhub.com.

33. *Stubhub III*, 2011 IL 111127, ¶ 33, 979 N.E. 2d at 855 (citing 720 ILL. COMP. STAT. 375/1.5(c)(6)).

34. *Stubhub III*, 2011 IL 111127, ¶ 7, 979 N.E.2d at 848.

35. *Id.* ¶¶ 8–9, 979 N.E.2d at 848 (citing Chicago Municipal Code § 4-156-030(A) (amended May 24, 2006).

for purposes of the ordinance and sought information of the transactions between buyers and sellers dating back to 2000.[36]

Stubhub refused, setting into motion a case with a unique procedural history that reached the Illinois Supreme Court after the 7th Circuit for the U.S. Court of Appeals certified the state law question of "whether municipalities may require electronic intermediaries to collect and remit amusement taxes of resold tickets."[37] The question sounds straightforward enough, but it forced the court to wade into the challenging legal realm of "home rule" and to make some difficult determinations that could have very real and long-term consequences for the powers enjoyed by certain municipalities in Illinois since the ratification of the 1970 Illinois Constitution.

IV. MUNICIPAL HOME RULE IN ILLINOIS

> It is in the area of municipal revenue powers that the pinch of the doctrine of state supremacy is most keenly felt.
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> —Rubin Cohn, 1956[38]

Stemming from our country's origin and common law, municipal subdivisions have typically enjoyed only the powers that are granted to them by the state, a structure eventually known as "Dillon's Rule."[39] From the very beginning, states, such as Illinois, have authorized local municipalities in their respective charters to exert a wide range of powers generally associated with complete self-governance, including, for instance, the ability to raise funds through the issue of licenses.[40] Eventually, states began to recognize a greater ability for municipalities to govern themselves, bestowing upon them either by statute or constitutional provision "home-rule" status.[41] Depending on the state, home-rule communities have had access to a variety of powers related the ability to incur debt, borrow money, or levy taxes, all of which can typically be secured without grant by the legislature or a direct democracy action, such as a referendum.[42] Today, Illinois home-

36. *Id*.

37. *Id*. ¶ 1, 979 N.E.2d at 845.

38. Rubin G. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27, 31 (1956).

39. Gary T. Schwartz, *Reviewing and Revising Dillon's Rule*, 67 CHI.-KENT L. REV. 1025 (1991)

40. *See* JOHN FAIRLIE, A REPORT ON THE TAXATION & REVENUE SYSTEM OF ILLINOIS, PREPARED FOR THE SPECIAL TAX COMMISSION OF THE STATE OF ILLINOIS 108 (1910) (noting that local license fees benefiting local coffers were authorized by Illinois' first general assembly, then strengthened in 1833 with the creation by the legislature of special charters for cities).

41. Schwartz, *supra* note 39, at 1025–26.

42. *Id*.

rule municipalities enjoy among the broadest powers in all fifty states—that is to say, powers with the least influence from the state. These powers are particularly broad when compared to such communities as New York City and Boston, which may only levy taxes or borrow money with authorization from the state legislature.[43]

In Illinois, it was not always this way. In fact, one of the primary[44] issues with which delegates to the 1970 Illinois Constitutional Convention wrestled was how much—if any—additional powers municipalities should gain above those which they had been given in the previous version of the constitution in 1870.[45] Previous efforts to instill even marginally more power in municipalities had failed. In the early 1920s, Illinois provided voters with the opportunity to ratify an updated Illinois Constitution after a constitutional convention.[46]

In that final document, the proposed language for the section dealing with the City of Chicago included additional powers for the City. That section began with a show of strength, providing that "[e]xcept as expressly prohibited by law the [C]ity of Chicago is hereby declared to possess for all municipal purposes full and complete power of local self-government and corporate action."[47] The proposed section went on to note that the grant of power "shall be liberally construed and no power of local self-government . . . shall be denied the city by reason not specified herein."[48] However, the document also provided that Chicago may "impose taxes and borrow money only as authorized by the general assembly or by this article," thus, exhibiting a deference to Dillon's Rule.[49]

Subsequent sections expanded the power slightly, giving the city, *inter alia*, the power of eminent domain and the ability to incur debt to a ceiling if ratified by Chicago residents through referendum, both subject to regulation by the General Assembly.[50] The limits of Chicago's power at that time were even more stark when one considers that the City's first zoning ordinance, passed one year after this draft constitution, was only possible because

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43. FAIRLIE, *supra* note 37, at 66–69.

44. *See* ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION: A REFERENCE GUIDE 175 (2010) (suggesting that securing home rule powers in the forthcoming 1970 was chief amongst the concerns held by the mayor of Illinois's largest city, Mayor Richard J. Daley).

45. JOSEPH P. SCHWIETERMAN, BEYOND BURNHAM: AN ILLUSTRATED HISTORY OF PLANNING FOR THE CHICAGO REGION 148–49 (2009).

46. CHICAGO BUREAU OF PUBLIC EFFICIENCY, THE PROPOSED NEW CONSTITUTION FOR ILLINOIS TO BE VOTED UPON DECEMBER 12, 1922 69 (1922).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 74–75.

enabling legislation had been enacted a year earlier by the General Assembly, thereby allowing municipalities to regulate the form and function of real estate development within their corporate limits.[51]

The 1922 constitution was rejected on December 12, 1922 by a margin of almost five-to-one, 900,000 against versus 200,000 in favor,[52] killing any hopes that the City of Chicago—let alone any other community in the state at the time—had of gaining a greater control over its affairs. If anything, the growing urban area around Chicago saw an uphill battle in its future for any self-governance measure it wished to present at the state capital: though Cook County's population at the time of the vote represented 47% of Illinois' population, its state senators and congressmen represented only 37% of the General Assembly.[53]

However, the call for home rule was far from extinguished, and as urban areas within the state continued to expand, so too did interest in discussing home rule as a possible solution to a multitude of issues. One study published by the University of Chicago in the 1930s frankly noted that "Chicago's powers are not commensurate with its responsibilities."[54] The author went on to note a tragically comic example of Chicago's subservience when a special state law needed to be enacted before Chicago could authorize permits to sell peanuts on Navy Pier.[55] Peanuts aside, the study showed that the city at the time lacked the authority to act more than one-third of the time in "borderline" cases involving the exercise of its powers.[56] Two decades later, a committee on home rule reported, in an exhaustive volume to Chicago's mayor in 1954, that it was necessary to "emphasize the rigidity of the present situation and to point out the need for greater local initiative in the determination of governmental structure."[57] Finally, a commission was created in 1967 to explore the possibility of launching another constitutional convention tasked with updating the 1870 Illinois constitution. In its final report recommending a convention, the commission noted that one of the "major criticisms" of the 1870 constitution was that it "fail[ed] to provide flexibility to solve problems which have developed with urbanization, population mobility, changes in sources of taxable

51. JOSEPH P. SCHWIETERMAN, THE POLITICS OF PLACE: A HISTORY OF ZONING IN CHICAGO 17–21 (2006).

52. Walter F. Dodd, *Legislative Notes and Reviews*, 17 AM. POL. SCI. REV. 70, 71 (1923).

53. *Id.*

54. ALBERT LEPAWSKY, HOME RULE FOR METROPOLITAN CHICAGO xiii (1935).

55. *Id.*

56. *Id.*

57. CHICAGO HOME RULE COMM'N, CHICAGO'S GOVERNMENT: ITS STRUCTURAL MODERNIZATION AND HOME RULE PROBLEMS 225 (1954).

wealth and industrialization."[58]

The subsequent Constitutional Convention of 1970 formed the Committee on Local Government and tasked it with developing a comprehensive constitutional article dealing with municipal governments in the region.[59] In presenting its final draft, the committee noted that it had taken care to enumerate "four important powers—to regulate, to license, to tax and to incur indebtedness" as expressly included in the powers given to home-rule units."[60] The grant of power contained in section 3.1(a) was divided into two sections: the "general" grant and then a more specific outlining of powers which fall within that general grant—regulation, licensing, taxation and ability to incur debt.[61] More to the point, the committee emphasized that these specific powers were outlined to avoid the "danger" of "possible limitation" of these powers by judicial interpretation.[62] The committee then discussed the taxing power, pointing out that, though no citizen likely relishes the idea of higher taxes, allowing home rule governments to raise their own funds—provided the governments did not attempt to implement occupation or income taxes—was of great importance.[63]

The committee finally noted that the General Assembly was free to constrain taxation, or any other home rule financial power, provided that it did so with a three-fifths majority of both houses.[64] After ratification, the newly minted 1970 Constitution had greatly departed from its predecessor in the area of local government, creating a brand-new section to proscribe the important home-rule powers now granted to municipalities.[65] That critical section, again, reads, "a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."[66]

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58. STATE OF ILLINOIS CONSTITUTION STUDY COMM'N, REPORT OF THE CONSTITUTION STUDY COMMISSION 66–69 (Feb. 1967).

59. SIXTH CONSTITUTIONAL CONVENTION COMMITTEE ON LOCAL GOVERNMENT COMMITTEE REPORT (July 9, 1970).

60. *Id.* at 27.

61. *Id.* at 45.

62. *Id.* at 48.

63. *Id.* at 53.

64. *Id.*

65. LOUSIN, *supra* note 41, at 175.

66. ILL. CONST. of 1970, art. VII, § 6(a).

V. BACK TO *STUBHUB*: THE COURT INVALIDATES A HOME-RULE TAX ORDINANCE FOR ONLY THE FOURTH TIME IN 22 CHALLENGES SINCE 1970 YET FINDS THE TAX ITSELF VALID

At the outset, we should note that the Illinois Supreme Court has generally upheld home rule taxes. Not surprisingly, challenges to the taxes began immediately in the wake of the ratification of the 1970 constitution, with *Mulligan v. Dunne*.[67] In *Mulligan*, the Illinois Supreme Court found a Cook County home rule tax on liquor to be valid even in the face of extensive regulation of the liquor industry by the state.[68] The court discussed, *inter alia*, the importance of deferring to the intent of the 1970 Constitution framers that courts construe home rule powers liberally, that concurrent exercise of a power by a home rule unit and the state is permissible, and that the legislature must specifically strip a home rule tax power away from a municipality and can only do so with a three-fifths majority vote.[69]

The basic framework presented in *Mulligan*, and stemming from the 1970 constitution, appears to have guided the court since that decision. Noted home rule scholar James Banovetz found that, between 1970 and 2002, the court heard twenty cases challenging municipal home rule taxes and upheld the taxes in all but three of them.[70] The only three cases that did not uphold the home rule taxes involved either an improper occupation tax, which is exempted from the home rule purview by the constitution, or a sales tax on a seller.[71] *Stubhub* marks only the fourth time the court has invalidated a tax and, as the dissent points out, the first time it has done so under section 6(a) of the constitutional home rule article "solely on the basis of state regulation."[72]

With this additional perspective, we look more deeply at *Stubhub*. Recall from our earlier discussion that the Illinois Supreme Court addressed the certified question of whether the City of Chicago exceeded its home rule authority when it required businesses like Stubhub to collect and remit amusement taxes from transactions arranged through their websites.[73] Early into its analysis, citing section 6 of the relevant constitutional provisions, the court declared that the City's amusement tax—as applied to

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67. Mulligan v. Dunne, 338 N.E.2d 6 (1975).

68. *Id.* at 558.

69. *Id.*

70. James Banovetz, *Illinois Home Rule: A Case Study in Fiscal Responsibility*, 32 J. REG'L ANALYSIS & POL'Y 1, 92 (2002).

71. *Id.* at 94.

72. *Stubhub III*, 2011 IL 111127, ¶ 71, 979 N.E.2d at 865.

73. *Id.* ¶ 20, 979 N.E.2d at 851.

ticket resales—*did not* exceed the home rule authority.[74]

With the constitutionality of the tax firmly settled, the court focused its attention on the propriety of forcing companies like Stubhub to collect the tax.[75] The court conceded that its role was "narrow" in interpreting the constitutionality of municipal home rule power.[76] It resolved to determine whether the City's tax and collection method "pertained to" its local affairs, and if the state's interest was "so paramount" as to place the subject of ticket resale regulation beyond the purview of the City.[77] String-citing four earlier cases, the court finally settled upon the "threshold" inquiry of whether "the state has a vital interest and a traditionally exclusive role" in regulating such matters.[78] After reviewing legislative history related to the passage of the state's Sale and Resale Act, along with the fact that the state had regulated scalping tickets longer than the city, the court concluded that the state had both a vital interest and a traditionally exclusive role. Moreover, the court found that the Chicago had exceeded its home rule authority in forcing Stubhub and like businesses to collect taxes.[79]

In its analysis, the *Stubhub* court cited, but sidestepped, another case, *City of Evanston v. Create*.[80] In that case, the court upheld a municipal ordinance, thereby rejecting the defendant's contention that the state expressly sought to control landlord-tenant relations through state statute.[81] In particular, the *Create* court noted that such a challenge was brought in *Mulligan*, but that the *Mulligan* court found no evidence of intent by the legislature to have exclusive control of taxation of the liquor industry.[82] Additionally, in *Village of Bolingbrook v. Citizens Util. Co.*, the court also addressed, and upheld, a local ordinance that was more restrictive than the concurrent state statute.[83] The *Citizens* court found that, even though the General Assembly had provided comprehensive state regulation in the Public Utilities Act, a home rule municipality was not precluded from requiring adherence to additional environmental regulations where the legislature had not expressed exclusive control in a particular field.[84]

The *Stubhub* court likewise minimized an earlier decision it

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74. *Id.* ¶ 26, 979 N.E.2d at 853.

75. *Id.*

76. *Id.* ¶ 23, 979 N.E.2d at 852.

77. *Id.*

78. *Id.* ¶ 25, 979 N.E.2d at 852.

79. *Id.* ¶ 36, 979 N.E.2d at 855–56.

80. *Id.* ¶¶ 18, 23, 979 N.E.2d at 850, 852 (citing City of Evanston v. Create, Inc., 421 N.E.2d 196, 198–99, 201–02 (Ill. 1981)).

81. *Create*, 421 N.E.2d at 199.

82. *Id.* at 200–01 (citing *Mulligan*, 338 N.E.2d 6).

83. Vill. of Bolingbrook v. Citizens Utils. Co., 632 N.E.2d 1000 (Ill. 1994).

84. *Id.* at 1002.

had delivered in *City of Chicago v. Roman*.[85] In *Roman*, a defendant was convicted of assault against the elderly, in violation of a provision of the Municipal Code of Chicago.[86] The relevant section of the Code imposed a mandatory minimum sentence of 90 days imprisonment.[87] The trial court found that, although the ordinance was not unconstitutional, the ordinance's imposition of a mandatory minimum sentence exceeded the City of Chicago's home rule authority.[88] The trial court sentenced the defendant to 10 days of community service and one year probation.[89] On appeal, the appellate court reversed, concluding the sentencing scheme was within the City's home rule powers.[90]

On appeal to the Illinois Supreme Court, the defendant contended that state statutes "specifically defined" the offense of aggravated assault against the elderly and provided for "up to 364 days of imprisonment" with no mandatory minimum and the potential of probation or conditional discharge.[91] He argued that these statutes were "comprehensive" and evinced a legislative intent to preempt the City's home rule power to establish a mandatory minimum sentence.[92] The court disagreed with the defendant, noting that the Illinois constitution provides that home rule units may "exercise any power of the sovereign concurrently with the state" so long as the General Assembly does not "specifically" limit such concurrent exercise.[93] The *Roman* court further noted that it had previously found the "purpose of section 6(i) is to 'eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention.'"[94] The court stated that it was no longer enough for the state to "comprehensively regulate" an area which could otherwise be regulated by a municipality under home rule and that, more specifically, "'comprehensive scheme' preemption" was no longer law in Illinois.[95] After listing examples of eleven acts[96] of the

85. City of Chicago v. Roman, 705 N.E.2d 81 (Ill. 1998).
86. *Roman*, 705 N.E.2d at 84.
87. *Id.* at 85.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 88.
92. *Id.*
93. *Id.* (quoting ILL. CONST. of 1970, art. VII, §§ 6(h), 6(i)).
94. *Id.* (quoting *Scadron* at 1163).
95. *Id.* at 89.
96. *See, e.g.*, Illinois Insurance Code § 2.1, 215 ILL. COMP. STAT. 5/2.1 (West 2010) ("It is declared to be the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution of 1970, that any power or function set forth in this Act to be exercised by the State is an exclusive State power or function. Such power or function shall not be exercised concurrently, either directly or indirectly, by any unit of local government, including home rule units, except as otherwise provided in this

Illinois legislature, which expressly relied upon section 6(h) or section 6(i) of the Illinois constitution to expressly preempt home rule power over a certain subject, the court concluded that "comprehensiveness does not equal an express statement" prohibiting home rule units from exercising a power.[97]

It is difficult to understand the outcome of *Stubhub* against the backdrop of the above-mentioned case law. Like *Roman*, there was no express preemption in *Stubhub*, despite citation by the court to the legislative floor debates, which did not mention preemption or home rule. Like *Create* and *Citizens*, *Stubhub* involved a more restrictive local ordinance viewed alongside a concurrent state statute. And, unlike those cases, *Stubhub* involved an enumerated power—taxation—which could only be superseded by the General Assembly expressly *and* with a three-fifths majority vote.[98]

VI. THE CITY OF THE BIG SHOULDERS[99] AND ALL ILLINOIS HOME-RULE COMMUNITIES MUST HAVE BROAD POWERS[100]: WHY IT WILL BE IMPORTANT TO LIMIT JUDICIAL INTERPRETATION OF HOME-RULE AUTHORITY IN THE NEXT DECADES

> It is no overstatement to say that empowering cities to better serve their population is one of the critical tasks of public policy.
>
> —Gerald E. Frug[101]

It is possible that future courts will interpret *Stubhub* as a case that pertains specifically to a very narrow set of facts and limit its application accordingly. Indeed, evidence of this can be found in the more recent case, *Palm v. Lake Shore Drive*

Act.").

97. *Id.* at 517–18.

98. ILL. CONST. art. VII, § 6(g).

99. *See* Carl Sandburg, *Chicago*, *in* CHICAGO POEMS 3 (1916):

> Hog Butcher for the World,
> Tool Maker, Stacker of Wheat,
> Player with Railroads and the Nation's Freight Handler;
> Stormy, husky, brawling,
> City of the Big Shoulders

100. *See* Baum, *supra* note 13, at 157 (stating "[I]f the constitutional design is to be respected, the courts should step in to compensate for legislative inaction or oversight only in the clearest cases of oppression, injustice, or interference by local ordinances with vital state policies.").

101. GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 233 (2008).

Condominium Ass'n, in which the court again considered conflicting regulations set forth by a state statute and a concurrent home rule city ordinance.[102] In *Palm*, however, the subject regulations pertained to the rights of condominium owners to inspect the books of their respective condominium associations.[103] The state statute required owners to state a "proper purpose" for the inspection, limited production to 10 years, and allowed the association 30 days for the production.[104] Conversely, the later-enacted City of Chicago ordinance did not require a "proper purpose" for the request, did not limit requesters to the preceding 10 years, and allowed only 10 days for production.[105] In finding that the City's ordinance did not exceed its home rule authority, the court noted that it was up to the General Assembly to expressly weigh in and preempt home rule authority if it so chooses.[106]

What if, however, *Stubhub* is relied upon in subsequent successful home rule tax challenges, resulting in a decreased home rule authority? Though it is generally unwise and scientifically unacceptable to compare "apples to oranges" where care has not been taken to properly control for all variables not under the microscope, the chilling experiences of Detroit warrant at least a brief mention in the context of municipal home rule tax.

Michigan was one of the earliest adopters of home rule principles, granting all municipalities power to "assess, levy or collect" taxes for "public purposes."[107] This power, however, was subject to regulation by the state.[108] Interestingly, in the 1970s, as Illinois municipalities were tentatively flexing their new-found home rule muscle in front of voters and in the courts, Michigan underwent an opposite transformation *against* local authority, culminating with the ratification of a proposed constitutional amendment in 1978.[109] The "Headlee" amendment—named for one of its chief advocates—prohibited local governments from adding new, or increasing existing, taxes without voter approval and required voter approval of new debt.[110] Since the amendment's ratification in 1978, municipalities seeking to end-run the prohibition on new or increased taxes have largely met with little success in the Michigan Supreme Court. For instance, in the 1998

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102. Palm v. Lake Shore Drive Condo. Ass'n, 2013 IL 110505, 988 N.E.2d 75 (2013).

103. *Id.*

104. *Id.* ¶37, 988 N.E.2d at 83.

105. *Id.* ¶38. 988 N.E.2d at 83.

106. *Id.* ¶44, 988 N.E.2d at 85.

107. Mich. Const. Art. VIII, Sec. 25 (1908).

108. *Id.* at Sec. 20.

109. Cynthia B. Faulhauber, *"No New Taxes:" Article 9, Section 31 of the Michigan Constitution Twenty Years After Adoption*, 46 WAYNE L. REV. 211, 212 (2000).

110. *Id.*

case, *Bolt v. City of Lansing*, the court found that a usage fee levied against businesses for use of a stormwater system—thereby seeking to fund upkeep of the same—was a "tax" and not a permissible regulatory fee.[111]

The potential effect of such a gutted home rule provision and correspondingly stunted municipal authority is massive—especially in difficult economic times with limited resources. If all municipal governments must "eat" out of the same piece of "pie" unless authorized by the electorate, voters might have to choose whether to purchase a new fire truck or to reauthorize a garbage pick-up contract.[112] Likewise, without the ability to easily levy new taxes after 1978, the City of Detroit had no real incentive to search for additional revenue sources. For example, such revenue may have come from the establishment of a new casino or attraction of a new shopping development.

Is it too bold to state that the Headlee amendment alone is responsible for the "ghost city" that Detroit has become? Most certainly. But, given what we know about what strong municipal home rule communities can achieve in Illinois, is it fair to suggest that the Headlee Amendment contributed, at least in part, to Detroit's decline? And, if so, how useful is this knowledge to us in Illinois, given that Michigan's stripping of home rule authority occurred forcefully and through constitutional amendment? Moreover, what is the likelihood of a similar situation occurring in our own future here in Illinois?

These questions are difficult to answer, certainly beyond the scope of this article and situated firmly in the realm of political science. However, we respectfully submit that Carl Sandburg's "City of the Big Shoulders"—namely, Chicago—as well as all other home rule units of government in our state would serve as a poor laboratory for any experiments seeking to limit home rule authority in Illinois.

111. *Id.* at 248 (citing Bolt v. City of Lansing, 587 N.W.2d 264, 272–73 (Mich. 1998)).

112. *Id. See also* BURN: THE DETROIT FIREFIGHTER DOCUMENTARY, https://www.kickstarter.com/projects/detroitfirefilm/burn (last visited October 1, 2014) (providing a sobering and stirring account of the financial pressures faced by the Detroit Fire Department).