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Home Rule Hits the Road in Illinois: American Telephone and Telegraph Co. v. Village of Arlington Heights

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Notes

Home Rule Hits the Road in Illinois: *American Telephone and Telegraph Co. v. Village of Arlington Heights*

The strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.1

I. INTRODUCTION

The modern structure of American municipal government is rooted in the structure of the English municipal borough2 as it existed before the colonization of the New World.3 Most English municipal boroughs vested control in a small group of politically powerful men who filled every vacancy from within, much like a close corporation.4 As a general rule, the people of the boroughs did not have a voice in their government.5 The people were willing, however, to subject themselves to the caprices of their local rulers in exchange for protection from the tyrannical rule of the central government.6

In response to the growth of urban centers in the New World, the American colonists adopted the familiar system of the English borough.7 In 1686, New York City became the first urban center to adopt a charter which confirmed the borough's "ancient customs,

1. 37 Me. L. Rev. 313, 315 (quoting Alexis de Tocqueville, Democracy in America 55-56 (G. Lawrence trans., J. Mayer & M. Lerner eds., 1966)).
2. The municipal borough included any incorporated urban area, making it the predecessor to the American city. Austin Faulks MacDonald, American City Government and Administration 45 (5th ed. 1954).
3. In 1790, the first American census indicated that more than four-fifths of the total white population was of English descent. Id. Thus, the majority of American city governments were originally run by persons of English descent. Id.
4. Id. at 46.
5. Id.
6. MacDonald, supra note 2, at 46.
7. Id. at 47.
privileges, and immunities." Yet one important distinction separated American municipalities from their English counterparts: The American people controlled the composition of their governing councils through the popular vote, while the English councils were self-perpetuating bodies.

The purpose of the American municipal corporation is to perform "local public functions as a subordinate branch of the state government." The municipal corporation works for the benefit of its people, but it is limited in its powers by its role as an arm of the state. Consequently, the municipality finds itself torn at times between the competing interests of state government and municipal citizens.

To accommodate the local interests of individual municipalities, state legislatures often give municipalities the authority to grant certain franchises. A franchise is essentially a government-granted privilege given to a private entity to pursue certain activities for private profit. Activities that have been permitted by franchise include supplying city inhabitants with natural gas, collecting wharf tolls, and operating a

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8. Id. Although the city of Agamenticus, Maine adopted a charter in 1641, and the city of Kittery, Maine adopted one in 1647, New York's charter was the first one to provide a stable long-term government. Id.

9. Id. at 49.

10. 12 MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 36.02 (3d ed. 1986). A municipal corporation is defined as "[a] legal institution formed by charter from sovereign (i.e. state) power erecting a populous community of prescribed area into a body politic . . . for the purpose and with the authority of subordinate self-government and improvement and local administration of affairs of state." BLACK'S LAW DICTIONARY 1017 (6th ed. 1990). According to McQuillan, however, "while [the municipal corporation] is invested with full power to do everything necessarily incident to a proper discharge of those public functions, no right to do more can ever be implied." 12 MCQUILLAN, supra, § 36.02.

11. It has been said that the municipal corporation:
   [possesses] a dual character, the one public and the other private, and exercises correspondingly twofold functions and duties—one class consisting of those acts performed by it in exercise of delegated sovereign powers for benefit of people generally . . . and the other consisting of acts done . . . for its own benefit, or for benefit of its citizens alone, or citizens of the municipal corporation and its immediate locality.

12. 12 MCQUILLAN, supra note 10, § 34.01.

13. See BLACK'S LAW DICTIONARY 658 (6th ed. 1990). In California v. Central Pac. R.R., 127 U.S. 1 (1888), the Court defined a franchise as "a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents." Id. at 40; see also 12 MCQUILLAN, supra note 10, § 34.01.
community antenna television service.\textsuperscript{14}

As a general rule, municipalities may not exercise a power—such as granting a franchise—unless specifically authorized to do so by state statute.\textsuperscript{15} This rule can be qualified, however, by a state constitution that grants select municipalities powers more extensive than those specifically enumerated in statutes.\textsuperscript{16} For example, a constitution may provide that municipalities enjoying "home rule"\textsuperscript{17} status possess all powers related to their government and affairs, except for those specifically withheld by law.\textsuperscript{18} Such broad powers contrast with those of non-home rule municipalities, which generally possess only those powers specifically granted by statute.\textsuperscript{19}

Most states give municipalities, whether home rule or not, the power to grant public utilities the right to erect, maintain, and operate their systems under franchise agreements.\textsuperscript{20} Such an agreement may, for example, allow the utility to use the city's public streets.\textsuperscript{21} The

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14. 12 McQUILLAN, supra note 10, § 34.03.
15. See infra notes 31-34 and accompanying text.
16. 12 McQUILLAN, supra note 10, § 36.02.05.
17. For a full discussion of home rule powers, see infra notes 31-61, 88-95 and accompanying text.
18. 12 McQUILLAN, supra note 10, § 36.02.05.
19. Id.
20. Roger D. Colton & Michael F. Sheehan, Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It, 21 URB. 55, 56-57 (Winter 1989). Municipalities often grant franchises to gas companies, water companies, telephone companies, and other public utilities. 12 McQUILLAN, supra note 10, § 34.01.
21. Colton & Sheehan, supra note 20, at 56-57. The grant of a right to use the public streets of a city for water, light, heat, power, gas, telephone, telegraph services, or railway services is a franchise and not a license or easement. McCutcheon v. Wozencraft, 255 S.W. 716, 718 (Tex. Ct. App. 1923), aff'd, 294 S.W. 1105 (Tex. 1927). Contra Southern Bell Telephone and Telegraph Co. v. City of Nashville, 243 S.W.2d 617, 619 (Tenn. Ct. App. 1951) (holding that the right to use a public street is an easement and constitutes a property right "capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts") (quoting City of Chattanooga v. Tennessee Elec. Power Co., 112 S.W.2d 385, 390 (Tenn. 1938)).

In the past, the power to:

grant franchises to use the streets was to a large extent withheld from municipalities and vested in the legislature . . . but the tendency of modern legislation is to delegate to the local authorities the exclusive dominion over the streets of the respective municipalities, and the value of local self-government in this respect is self-evident, except perhaps where the public utility is one in which the municipality is only incidentally interested, because only a very small part of its operations are within its boundaries, as in the case of an interstate telegraph company.

12 McQUILLAN, supra note 10, § 34.01 (citations omitted). For a discussion of the history and development of municipal franchises, see 10A McQUILLAN, supra note 10, §
municipality may exact a franchise fee from the utility as compensation for the right granted under the franchise agreement. In charging such fees, however, the city must be careful to avoid imposing an unauthorized tax for the purpose of raising general revenue.

Questions regarding the full nature and extent of the powers that can be properly ascribed to municipalities formed the core of the debate in American Telephone and Telegraph Co. v. Village of Arlington Heights ("AT&T II"). In AT&T II, the Illinois Supreme Court held that an Illinois municipal corporation may not charge a telephone company a franchise fee for the right to lay cable under public streets. The supreme court thereby reversed its previous decision in American Telephone and Telegraph Co. v. Village of Arlington Heights ("AT&T I").

This Note analyzes the legal and practical implications that the AT&T II decision will have on home rule and non-home rule municipalities in Illinois. First, this Note outlines the history of home rule power in the United States and the development of home rule power in Illinois. Next, it reviews the Illinois Supreme Court's interpretation of a municipality's power over the use of its streets in AT&T II. The Note then addresses how the AT&T II decision conflicts with Illinois precedent and statutes. Finally, this Note examines the way in which the AT&T II decision may alter the scope of home rule powers in Illinois.

II. BACKGROUND

A. The History of Home Rule Power

Prior to the development of home rule power, all municipalities were subject to "Dillon's Rule," which states:

34.01.
22. Colton & Sheehan, supra note 20, at 60-61.
23. Id. at 62.
25. Id. at 1042.
27. See infra part II.
28. See infra part III.
29. See infra part IV.
30. See infra part V.
It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . .

Relying on Dillon's Rule, the Illinois Supreme Court and other high state courts historically treated municipal corporations as creations of the legislature with no inherent powers. Even today, a municipality that does not meet its state's requirements for home rule status is subject to Dillon's Rule.

Home rule power, which is unique to the United States and is the antithesis of Dillon's Rule, is the power given to local governments to create and adopt their own charters and to act in their own self-interests. The only restraints on home rule power are those expressly
imposed by a state's constitution or laws. Notwithstanding the greater powers given to home rule municipalities, most are ultimately subject in practice to the same state control over their affairs as non-home rule municipalities. Generally, the state legislature holds concurrent or superior power over local governments, particularly in those areas which courts deem to be of state as opposed to local concern.

In 1875, Missouri became the first state to depart from the essence of Dillon's Rule and adopt a provision for home rule power in its constitution. The provision gave home rule power to any city with more than 100,000 inhabitants. At the time, St. Louis was the only city in Missouri that met the population requirement. In 1879, California adopted a home rule provision identical to Missouri's provision. California, however, later amended the provision in order to limit municipalities' power over statewide concerns. Washington, Minnesota, and New York also adopted home rule provisions before the turn of the century.

In 1953, the American Municipal Association devised model home rule constitutional provisions (the "Model"), which granted complete autonomy to home rule municipalities with respect to "executive, legislative and administrative structure, organization, personnel and procedure." Under the Model, the only limits on home rule power

Reform, supra note 31, and Libonati, supra note 32.
36. ADRIAN, supra note 34, at 117.
37. Id. at 118.
38. Id. On the subject of distinguishing local and statewide concerns, one commentator noted:

Even though every municipal ordinance or charter provision may have some adverse impact on non-residents, there are numerous areas in which the impact is so remote or is sufficiently counterbalanced by the interests of the municipality that a court could not justifiably invalidate the ordinance or charter provision on that ground alone.

Terrance Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643, 708-09 (1954); see infra note 90.
39. MACDONALD, supra note 2, at 82.
40. Id. The provision allowed "[a]ny city with a population of more than one hundred thousand inhabitants . . . to frame a charter for its own government." Id.
41. Id. at 83.
42. MACDONALD, supra note 2, at 84.
43. Id. at 85. The amended provision stated: "All charters framed or adopted by virtue of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." Id. (emphasis omitted).
45. MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (JEFFERSON
are the requirements of a popular election of the members of legislative bodies and judicial review of administrative proceedings. Currently, more than forty state constitutions contain a provision for home rule, which has been labeled "the most . . . flexible power system" in American local government.


Before 1970, Illinois did not recognize home rule power. Indeed, in 1954 the influential Chicago Home Rule Commission advised the legislature that, although attractive, home rule was not a practical choice for the State of Illinois. Nonetheless, the Illinois legislature


46. A Reappraisal of Constitutional Home Rule, supra note 45, at 86. The Model has been criticized for its limitations on the courts' power to curb home rule powers. Sandalow, supra note 38, at 679. Opponents note that a court may not be able to limit home rule powers under the Model, unless the court is "prepared to hold that the legislature could not confer the power upon a municipality." Id. at 691.

47. BARBARA W. SOLOMON & C. ALLEN BOCK, UNIV. OF ILLINOIS, HOME RULE IN ILLINOIS 1 (1977). By 1975, all states except Indiana, Mississippi, and Alabama had authorized home rule power either by constitution or by statute. Cavanna, supra note 44, at 805 n.56 (quoting Judith A. Stoll, Note, Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place, 49 BROOK. L. REV. 259, 262 n.4 (1983)). Of the forty states with constitutionally derived home rule power, half had adopted their constitutional provisions by 1953. Id. Ten state constitutions allow county home rule, although few counties have actually adopted their own charters. SOLOMON & BOCK, supra, at 4.

Depending on the particular state constitution or statute, home rule power may be available to all cities and villages (as in Oregon and Wisconsin), to cities over a certain population (as in Illinois and Louisiana), as a self-executing provision of the state constitution (as in Arizona and Nebraska), or only after legislation has specifically authorized a city to avail itself of home rule power (as in Texas and Wisconsin). ADRIAN, supra note 34, at 117.


49. The Commission reported that the states with home rule had "effect[ed] a dilution of the political concept of constitutional home rule to an extent which renders it a symbol almost wholly devoid of substantive content and meaning." Samuel K. Gove & Stephanie Cole, Illinois Home Rule: Panacea, Status Quo, or Hindrance, in PARTNERSHIP WITHIN THE STATES: LOCAL SELF-GOVERNMENT IN THE FEDERAL SYSTEM 153, 153-54 (1976) (quoting CHICAGO HOME RULE COMMISSION, CHICAGO'S GOVERNMENT: ITS STRUCTURAL MODERNIZATION AND HOME RULE PROBLEMS 309 (1954)). The Commission was uncertain what the practical effects of including the term "home rule" in the Illinois Constitution would be because "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.'" CHICAGO HOME RULE COMMISSION, MODERNIZING A CITY GOVERNMENT 123 (1954).
faced continual problems as it tried to formulate laws that could be applied to both the large city of Chicago and smaller farming municipalities.50

Prompted by increased legislative frustration, the delegates at the Sixth Illinois Constitutional Convention debated the merits of establishing home rule municipalities in Illinois.51 Ultimately, a home rule provision was added to the 1970 Illinois Constitution.52 In Illinois, a home rule "unit"53 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."54 Home rule power is not absolute, however. Although home rule power generally extends to all matters of local concern, it does not include actions expressly prohibited by the Illinois Constitution55 or by United States constitutional provisions requiring equal protection and due process.56 Still, the Illinois Constitution provides that home rule powers should be liberally construed.57

In 1958, out of the ten largest cities in the nation, only three—Chicago, Boston, and Pittsburgh—did not possess home rule power. ADRIAN, supra note 34, at 117.


51. 4 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION: RECORD OF PROCEEDINGS 3038 et. seq. (1972). Most delegates clearly supported home rule. Id.

52. ILL. CONST. art. VII, § 6. The constitution was ratified by a vote of 1,122,425 to 838,168 in a special election held December 15, 1970. SAMUEL K. GOVE, ILLINOIS COMMISSION ON INTERGOVERNMENTAL COOPERATION, CONSTITUTIONAL DEVELOPMENTS IN ILLINOIS 8 (1987).

53. In Illinois, any county that has a chief executive officer elected by the county's constituents, and any municipality that has a population greater than 25,000, is considered a home rule unit. ILL. CONST. art. VII, § 6(a). Other municipalities may elect home rule status by referendum. Id.

54. Id.

55. See generally ILL. CONST. art. VII, §§ 6(d)-(m). Specifically, Illinois courts have held that home rule power extends to control of cigarette taxes, parking taxes, clerk appointments, police chief appointments, admissions tax for racing, demolition procedures, zoning for landfill sites, handgun prohibition, and the prohibition of Chicago Cubs night baseball games. Froehlich, supra note 50, at 227-28.

Illinois courts, however, have declined to recognize home rule power over noise regulation, an unwritten zoning moratorium, department head hiring and firing, certain penal ordinances conflicting with the criminal code, discrimination based on personal appearances, and disposition of unclaimed property. Id. at 229.

56. SOLOMON & BOCK, supra note 47, at 1.

57. ILL. CONST. art. VII, § 6(m). Section 6(m) was meant to halt the custom of
Home rule power is valued by communities because it strengthens the local government's autonomy and ability to respond flexibly to the concerns of its constituents. An important purpose of home rule power is freeing local governments from the fear that their every move will be scrutinized by the judiciary. In effect, home rule status allows a local government to implement its own policies in furtherance of its goals without fear of reprisal.

C. Judicial Interpretation of Municipalities' Power Over Their Streets

1. The Power of Non-Home Rule Municipalities

The authority and power of non-home rule municipalities over the use of their streets was established prior to the 1970 Illinois Constitution, before which all Illinois municipalities were necessarily non-home rule municipalities. During that period, Illinois courts recognized a city's power to impose a charge, in the form of a rental fee, for the use of its streets. This power derives from the city's narrowly construing municipal power pursuant to Dillon's Rule. Froehlich, supra note 50, at 225. In practice, however, courts generally wield broad discretion in limiting a municipality's power and do not "liberally construe" the power. Note, City Government in the State Courts, 78 Harv. L. Rev. 1596, 1604 (1965). This approach contrasts sharply with that typically used by courts reviewing state and federal powers. Id. at 1602-03.

Local autonomy has been defined as "the capacity of local governments to act in terms of their interest without fear of having every decision scrutinized, reviewed, and reversed by higher tiers of the state [government]." Libonati, supra note 32, at 653 (quoting G. CLARK, JUDGES AND THE CMES 6 (1985)).

Libonati, supra note 32, at 653.

Id.

For a discussion of the powers of local governments, see Libonati, supra note 32. Although this Note does not address a conflict between a local government and the state, in such cases courts consistently favor state power over home rule power. Cavanna, supra note 44, at 820. Such bias "'ignores the state's interest in supporting effective local government, and in encouraging localities to develop their own decision making mechanisms governing their own institutions.'" Id. at 820-21 (quoting Michael E. Libonati, Home Rule: An Essay on Pluralism, 64 Wash. L. Rev. 51, 68 (1989)).

In discussing the courts' role in municipal decisions, one commentator noted that "[t]o decide that a local question should be answered at a higher level one must overcome the argument that local people will be better informed about local problems and local feeling and will have greater incentive to act." City Government in the State Courts, supra note 57, at 1612.

See AT&T v. Village of Arlington Heights, 585 U.S. 568, 585 (2018) (noting that "all of the cases that specifically discuss a municipality's power to prohibit use of its streets and . . . charge franchise fees" pre-date the 1970 Illinois Constitution and, consequently, "involved the statutory power of municipalities that were not home rule units").

See City of Springfield v. Postal Telegraph-Cable Co., 97 N.E. 672, 674 (Ill. 1912) (holding valid an ordinance that required a telegraph company to pay a municipality one dollar per telegraph pole as reasonable compensation for the use of its streets);
general power to determine which uses of its streets are in the public’s best interests. Specifically, a city may exercise its power by conditioning a utility’s use of the streets upon the utility executing a franchise agreement. Once executed, a franchise agreement becomes a binding contract that cannot be revoked or rescinded by either the city or the utility except for good cause.

Generally, the powers of non-home rule municipalities are limited to those specifically granted by the state legislature. Yet even where no express statutory grant of power exists, Illinois non-home rule municipalities may have implied statutory authority to act. For example, in the 1942 case *City of Geneseo v. Illinois Northern Utilities Co.*, the Illinois Supreme Court recognized that municipalities have implied statutory authority to require private and public companies to enter franchise agreements before they may use public streets. In support of its ruling, the *Geneseo* court identified provisions in the Cities and Villages Act that individually and collectively grant municipalities

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64. *City of Springfield*, 116 N.E. at 638; *see* *City of Elmhurst v. Buettgen*, 68 N.E.2d 278, 281 (Ill. 1946) (stating that Illinois cities hold streets in trust for the public for the purposes of travel and access to private property); *Salem Nat’l Bank v. City of Salem*, 198 N.E.2d 137, 140 (Ill. App. Ct. 1964) (noting that under the Illinois Municipal Code, streets and sidewalks are held in trust by the city for public use); *accord* *City of Waterloo*, 21 N.W.2d 705, 707 (Iowa 1946) ("[M]unicipalities hold the streets in trust for the public, and cannot put them to any use inconsistent with street purposes.


66. *City of Vandalia v. Postal Telegraph-Cable Co.*, 113 N.E. 65, 66 (Ill. 1916); *see*, e.g., *Village of London Mills v. White*, 70 N.E. 313, 316 (Ill. 1904) (holding a resolution granting the right to erect telephone poles and wires to be a contract binding upon the city and telephone company); *City of Belleville v. Citizens’ Horse Ry.*, 38 N.E. 584, 588 (Ill. 1894) (stating that an ordinance permitting the use of city streets constitutes a valid and binding contract when granted for valuable consideration); *Chicago Mun. Gaslight Co. v. Town of Lake*, 22 N.E. 616, 617 (Ill. 1889) (holding that a town ordinance that grants the right to lay pipes constitutes a contract upon acceptance by the gas company).

67. *See supra* notes 15-19 and accompanying text.

68. 39 N.E.2d 26 (Ill. 1941), *cert. denied* 316 U.S. 670 (1942).


power over their streets. Specifically, the provisions grant the power to regulate the property of the municipality, the use of the streets, the placement of telegraph poles and street signs, the use of sidewalks and the space under them, and the use of space over the streets. The Geneseo court found implicit in these powers the power of a municipality to grant or withhold from utilities the use of city streets.

Although Geneseo allows a municipality to impose a franchise fee under its implied statutory authority, that authority may be limited by constitutional prohibitions on a local government's ability to tax. Nine years after Geneseo, in Village of Lombard v. Illinois Bell Telephone Co., the supreme court determined that absent specific statutory authority, a municipality may not impose an occupational tax upon a utility under the guise of a rental fee. Courts of other states have similarly and consistently held that a local government has no inherent power to tax. Moreover, even an explicitly granted power to tax will be strictly construed by the courts.

The Village of Lombard court also held that a municipality must have specific statutory authority to charge public utilities rent for the use of public property. Some have argued, however, that in passing

72. Id. 39 N.E.2d at 33 (citing Ill. Rev. Stat. ch. 24, para. 65 (1939)).
73. Id. (citing Ill. Rev. Stat. ch. 24, para. 65.8 (1939)).
74. Id. (citing Ill. Rev. Stat. ch. 24, para. 65.16 (1939)).
75. Id. (citing Ill. Rev. Stat. ch. 24, para. 65.13 (1939)).
76. Id. (citing Ill. Rev. Stat. ch. 24, para. 65.98 (1939)).
77. Geneseo, 39 N.E.2d at 34.
78. Id.
79. 90 N.E.2d 105 (Ill. 1950), limited by Thorpe v. Mahin, 250 N.E.2d 633, 637 (Ill. 1969) (disavowing the statement in Village of Lombard that sections 1 and 2 of article IX of the Illinois Constitution of 1870 limited the General Assembly to levying property taxes, occupation taxes, and franchise or privilege taxes).
80. Village of Lombard, 90 N.E.2d at 108-10. See also City of Chicago Heights v. Western Union Tel. Co., 94 N.E.2d 306, 309 (Ill. 1950) ("[i]f the collection of revenue is the sole purpose for which the licenses are imposed, and such an ordinance . . . exacts a license fee . . . [i]t is a tax measure.").
81. See, e.g., Walker v. City of Morgantown, 71 S.E.2d 60, 63 (W.Va. 1952). Indeed, courts narrowly construe any power to tax granted by the legislature. See, e.g., Pepin v. City of Danbury, 368 A.2d 88, 94 (Conn. 1976). Furthermore, any ambiguities in a local government's power to tax will be resolved against the local government. See, e.g., Consolidated Diesel Elec. Corp. v. City of Stamford, 238 A.2d 410, 412 (Conn. 1968).
83. Village of Lombard, 90 N.E.2d at 110. The Village of Lombard court reasoned that municipalities have no inherent powers of their own to license or exact payment for a privilege. Id. at 108. A municipality may derive any power in the nature of a tax only
the 1955 amendment to the Revised Cities and Villages Act, the legislature nullified this holding. The amendment appears to authorize cities to levy certain taxes over and above other compensation the cities receive for the use of their streets. The language of the statute, which is still in effect today, may override any prior statute or judicial decision prohibiting a municipality from collecting compensation for the use of its streets.

2. The Power of Home Rule Municipalities

The 1970 Illinois Constitution brought home rule to Illinois, granting municipalities the authority to exercise any powers pertaining to their "government and affairs." This power includes the authority to by way of an express legislative grant from the Illinois General Assembly. Id.

84. This amendment was named "An Act to amend Section 23-1 of the 'Revised Cities and Villages Act,'" 1955 Ill. Laws 1900 (1955) (current version at ILL. COMP. STAT. ch. 65, § 5/8-11-2 (West 1992)). The amendment stated in relevant part:

Any of the taxes enumerated in this Section may be in addition to the payment of money, or value of products or services furnished to the municipality by the [public utility] as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the [public utility's] business.

ILL. REV. STAT. ch. 24, para. 23-113 (1957) (emphasis added).

85. In AT&T I, Justice Bilandic, writing for the majority, took the position that the legislature repudiated Village of Lombard when it passed "An Act to amend Section 23-1 of the 'Revised Cities and Villages Act.'" AT&T I, 1992 WL 356097, at *13; see ILL. REV. STAT. ch. 24, para. 23-113 (1957). According to Justice Bilandic, the amendment recognized that the powers granted therein were "in addition to" the powers that the municipalities already had, namely to collect money for the use of streets and other common places. See AT&T I, 1992 WL 356097, at *13. Thus, in his view, the amendment superseded the portion of Village of Lombard that restricted municipal authority to charge compensation for the use of streets. Id.

In AT&T II, however, the court majority took a different view of the impact the amendment had upon Village of Lombard. AT&T II, 620 N.E.2d at 1045. The court reasoned that if the legislature had intended to give municipalities the power to collect money for the use of their streets, it would not have provided for municipal taxation of electronic messages originating within a city and traveling under or through those streets. Id.; see infra notes 125-30 and accompanying text.

86. See ILL. REV. STAT. ch. 24, para. 23-113 (1957) (current version at ILL. COMP. STAT. ch. 65, § 5/8-11-2 (West 1992)).

87. AT&T I, 1992 WL 356097, at *13 (citing ILL. REV. STAT. ch. 24, para. 8-11-2 (1987)).

88. ILL. CONST. art. VII, § 6(a). "Home rule units thus have the same power as the sovereign, except where such powers are limited by the General Assembly." Triple A Servs., Inc. v. Rice, 545 N.E.2d 706, 711 (Ill. 1989).

In contrast, other state constitutions allow a municipality to: (1) enact laws or regulations "in respect to municipal affairs," (CAL. CONST. art. 11, § 8(j)), pertaining to their "organization, government or affairs," (MD. CONST. art. XI-E, § 3), and "relating to [their] property, affairs or government," (N.Y. CONST. art. 9, § 16); or (2) to "adopt and
grant a franchise for the privilege of using public property for private gain.99 The authority to grant the franchise, however, must constitute authority over a local and not a statewide concern.90 Local and statewide concerns are distinguished by examining several factors, including the character of the concern, the governmental units involved, and the roles traditionally taken by state and local government in addressing the concern.91 Specifically, the manner in which a municipality’s streets or other public property should be used has been generally characterized as a matter of local concern.92

In addition to controlling the use of streets, Illinois courts have recognized that home rule power includes the authority to require dedications of land for schools or parks as a condition of subdivision approval,93 to prohibit the sale of produce on public ways,94 to grant a

enforce within their limits . . . local police, sanitation and other similar regulations,” (OHIO CONST. art. XVIII, § 3). Sandalow, supra note 38, at 660. Because the use of these phrases and the meanings ascribed to them vary among the states, courts have reached different and sometimes conflicting interpretations of them. Id.

89. See AT&T I, 1992 WL 356097, at *15 (upholding a municipality's power to require a public utility to enter a fee-exacting franchise agreement for the privilege of using municipal property), superseded on reh'g, 620 N.E.2d 1040 (Ill. 1993); ILL. ANN. STAT., ILL. CONST., art. VII, § 6, Constitutional Commentary, at 24 (Smith-Hurd 1971); Triple A Servs., Inc. v. Rice, 545 N.E.2d 706, 711 (Ill. 1989) (upholding the City of Chicago's power to regulate or prohibit use of its streets within the Chicago Medical Center District).

90. AT&T I, 1992 WL 356097, at *15. Neither “local” nor “statewide” concerns have been well defined. Even judicial definitions are often less than illuminating: “Municipal affairs . . . comprise the internal business of a municipality.” Burkett v. Youngs, 199 A. 619, 621 (Me. 1938) (citation omitted). However, “matters which relate, in general, to the inhabitants of the given community and the people of the entire State, are the prerogatives of State government.” Id. at 622.


93. Krughoff v. City of Naperville, 354 N.E.2d 489, 494 (Ill. App. Ct. 1976), aff'd on other grounds, 369 N.E.2d 892 (Ill. 1977). The mandatory dedication of subdivision land for roads and utility use was one of the earliest forms of control that courts deemed as a reasonable means of ensuring responsible land development. Wendy U. Larsen & Michelle J. Zimet, Impact Fees: Et Tu, Illinois? 21 J. MARSHALL L. REV. 489, 491 (1988). Yet Illinois—which is known as a “developer state”—has generally been restrained in exacting fees or land from developers as a precondition for subdivision approval. Id. at 492 (citing 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 6.17 (1974)). These practices are being more widely used, however, as alternatives to raising property taxes. Id.

94. Witvoet v. City of Chicago, 354 N.E.2d 524, 528 (Ill. App. Ct. 1976); Triple A
railroad franchise to a private business, and to vacate public streets for the economic benefit of the city.\textsuperscript{95}

III. THE AT&T II DECISION

A. The Facts and the Lower Courts' Opinions

American Telephone and Telegraph Company\textsuperscript{96} ("AT&T") planned to lay an underground fiber optic cable to carry long distance communications along an eighty-five mile route in northern Illinois.\textsuperscript{97} The Chicago and North Western Transportation Company ("CNW") granted AT&T an easement to lay the cable beside a railroad roadbed.\textsuperscript{98} Although located on CNW's private property,\textsuperscript{99} the roadbed intersected 140 public streets, roads, and highways along the eighty-five mile route.\textsuperscript{100} Except for five municipalities—Arlington Heights, Palatine, Barrington, Lake Barrington, and Crystal Lake—each municipality along the route granted AT&T permits for the resultant "undercrossings" of municipal streets, at either no charge or for minimal administrative fees.\textsuperscript{101}

The five municipalities that refused to grant AT&T the permits did not object per se to the undercrossings; instead, they required that AT&T assent to individual franchise agreements that would exact a fee from AT&T.\textsuperscript{102} The fees or tolls alternatively demanded by the municipalities included a percentage of AT&T's gross revenues and a

\begin{itemize}
  \item Servs., Inc. v. Rice, 545 N.E.2d 706, 713 (Ill. 1989).
  \item The FCC has designated AT&T the "dominant carrier" in the telecommunications marketplace on the basis of three factors:
    \begin{enumerate}
    \item AT&T controls local access facilities for more than 80 percent of America's telephones;
    \item AT&T possesses the majority of the share of the most popular long distance services; and
    \item The revenues for AT&T's private line services were thirteen times greater than the combined private line revenues of the other common carriers.
    \end{enumerate}
  \item AT&T II, 620 N.E.2d at 1042.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item AT&T II, 620 N.E.2d at 1042. For a discussion of the nature of franchise agreements, see supra notes 12-14 and accompanying text.
\end{itemize}
charge for each foot of cable installed.\textsuperscript{103} After AT&T and the five municipalities failed to agree on a fee arrangement, AT&T mailed the municipalities notices announcing that it would begin cable installation in ten days under the eminent domain authority granted to it by the Illinois Telephone Company Act.\textsuperscript{104} Ten days after serving notice under the Telephone Company Act, AT&T began construction in Palatine and Arlington Heights.\textsuperscript{105} The municipalities then ordered AT&T to cease construction.\textsuperscript{106}

In response, AT&T sought to enjoin the municipalities from interfering with the installation of the cable.\textsuperscript{107} The trial court granted a preliminary injunction allowing AT&T to install its cable under any

\begin{itemize}
  \item \textsuperscript{103} AT&T \textsuperscript{II}, 620 N.E.2d at 1042. AT&T rejected the proposal of the Northwest Municipal Conference, an organization of municipalities appointed to represent the five cities in this case. The Conference proposed that AT&T enter franchise agreements similar to an existing agreement between AT&T and the City of Chicago, under which AT&T agreed to pay a minimum of $5 million per year. AT&T \textsuperscript{I}, 1992 WL 356097, at *1; AT&T \textsuperscript{II}, 620 N.E.2d at 1042-43. AT&T also rejected an alternative proposal that would have required it to pay $2.50 per foot of cable installed within a municipality regardless of whether the cable crossed any public streets. AT&T \textsuperscript{II}, 620 N.E.2d at 1043. The municipalities rejected AT&T's counteroffer to pay $1 per foot of cable located under a public way plus administrative fees of $5,000 per year. \textit{Id}.
  \item \textsuperscript{104} AT&T \textsuperscript{II}, 620 N.E.2d at 1043. The Telephone Company Act states, in pertinent part:

Every such company may, when it shall be necessary for the construction, maintenance, alteration or extension of its telephone system, or any part thereof, enter upon, take or damage private property . . . and every such company is authorized to construct, maintain, alter and extend its poles, wires, cables and other appliances as a proper use of highways . . . under and across any highway, street, alley, water or public ground in this state, but so as not to inconvenience the public in the use thereof: Provided, that nothing in this act shall interfere with the control now vested in cities, incorporated towns and villages in relation to the regulation of the poles, wires, cables and other appliances, and provided, that before any such lines shall be constructed along any such highway it shall be the duty of the telephone company . . . to give . . . notice in writing of the purpose and intention of said company to construct such line . . . [within] ten days before said line shall be placed . . . and upon the giving of said notice it shall be the duty of said highway commissioners to specify the portion of such road or highway upon which the said line may be placed . . . but in the event that the said highway commissioners shall, for any reason, fail to make such specification within ten days after the service of such notice, then the said company . . . may proceed to . . . erect its said line . . . by placing its posts, poles and abutments so as not to interfere with other proper uses of said road or highway.

  \item \textsuperscript{105} AT&T \textsuperscript{II}, 620 N.E.2d at 1043.
  \item \textsuperscript{106} \textit{Id}.
  \item \textsuperscript{107} \textit{Id}.
\end{itemize}
public way controlled by the five municipalities. The court also ordered the parties to enter arbitration. The municipalities appealed, and the appellate court affirmed the injunction but reversed the arbitration order.

AT&T subsequently moved in the trial court to make the preliminary injunction permanent. In granting a permanent injunction, the trial court determined that AT&T not only had the right to lay the cable pursuant to the Public Utilities Act and the Telegraph Act, but also had the right under those Acts to operate the cable without disruption or interference. The appellate court affirmed, with one justice dissenting.

B. The Rulings of the Supreme Court

On review, the Illinois Supreme Court reversed, holding that the five municipalities had the power both to prohibit AT&T from laying cable under public ways without a franchise agreement and to demand

108. Id.
109. Id.
110. AT&T II, 620 N.E.2d at 1043.
111. Id.

[E]very corporation, company, association . . . or individual . . . that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with . . . telecommunications services between points within the State which are specified by the user.

Id.


No such company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines . . . upon any public ground within any incorporated city, town or village, without the consent of the corporate authorities of such city, town or village.

Id.

114. AT&T II, 620 N.E.2d at 1043-44.
115. 576 N.E.2d 984, 991 (Ill. App. Ct. 1991). The appellate court held that:

[The] defendants do not have an absolute right to require a franchise agreement as a prerequisite for the use of their public streets by plaintiffs, and that a franchise agreement is not a necessary precondition for plaintiffs to utilize the public streets of the defendant municipalities.

Id. at 992.

116. Justice Mary Ann McMorrow joined the Illinois Supreme Court after the AT&T I decision. Since she authored the appellate court dissenting opinion prior to joining the Illinois Supreme Court, she was unable to participate in the AT&T II decision. AT&T II, 620 N.E.2d at 1047.
a toll or franchise fee under the agreement. Following that ruling and the retirement of three of its justices, the supreme court granted AT&T's petition for rehearing. In reversing its previous decision, the court affirmed the appellate court's decision, holding that municipalities "do not have a proprietary interest in the public streets and may not raise revenue by coercing telephone companies into franchise agreements."

Writing for the majority, Justice Heiple began the analysis by distinguishing the character of AT&T's fiber optic cable installation from other uses of public streets. In particular, the court reasoned that because the cable would traverse a substantial portion of Illinois, interest in the cable was statewide rather than purely local. The court opined that allowing every affected municipality to charge a "toll" such as that proposed by the five municipalities would amount to "legalized extortion and a crippling of communication and commerce as we know it."

In assessing the powers held by the five municipalities, the court characterized all powers over public streets granted to municipalities by the General Assembly as regulatory, rather than proprietary, in nature. The court concluded that the only compensation such regu-

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117. AT&T I, 1992 WL 356097, at *3. See infra notes 145-73 and accompanying text for a full discussion of the majority's decision in AT&T I, which was fully incorporated into the dissenting opinion in AT&T II.


119. AT&T II, 620 N.E.2d at 1042.

120. Id.

121. Justice Heiple delivered the opinion of the court. AT&T II, 620 N.E.2d at 1041. Justice Freeman wrote a concurring opinion. Id. at 1047. Justice Bilandic wrote a dissenting opinion. Id. at 1048.

122. AT&T II, 620 N.E.2d at 1044.

123. Id. at 1045.

124. Id. Justice Heiple noted that "there are 1,281 cities and villages in Illinois, 102 counties and 1,434 townships, each of which maintain traveled ways." Id.

125. AT&T II, 620 N.E.2d at 1044. "A 'proprietary function' is one designed to promote comfort, convenience, safety and happiness of citizens." BLACK'S LAW DICTIONARY 1219 (6th ed. 1990). The Illinois Supreme Court has characterized proprietary powers as "private" ones. AT&T I, 1992 WL 356097, at *4. The supreme court has also suggested that revenue-raising measures, such as charging franchise fees or property rents, are exercises of proprietary powers, whereas recovering actual costs incurred by a municipality in accommodating a private enterprise constitutes an exercise
ulatory powers would permit the five municipalities to demand from AT&T would be the actual costs incurred by the municipalities in allowing the installation and operation of the cable. Specifically addressing a provision of the Revised Cities and Villages Act that permits a municipality to collect compensation for the use of its streets, the court found it regulatory in nature and thus not valid authority for a municipality to impose a "toll" on wires placed under the streets. The court viewed a second statutory provision, which expressly allows municipalities to impose a 5% tax on the gross receipts of electronic communication businesses that "originate" within municipal boundaries, as reinforcement for its position that municipalities hold only regulatory powers over the use of their streets.

The court next shifted its focus from the five municipalities' powers to the rights of AT&T. The court accepted AT&T's argument that the of a municipality's regulatory powers. AT&T II, 620 N.E.2d at 1042, 1046. In sum, whether a municipality is wielding its "proprietary power" in a particular situation is particularly difficult to determine.

126. AT&T II, 620 N.E.2d at 1046.
127. ILL. REV. STAT. ch. 24, para. 8-11-2(4) (1987) (current version at ILL. COMP. STAT. ch. 65, § 5/8-11-2 (West 1992)). The relevant provision provides:

Any of the taxes enumerated in this section may be in addition to the payment of money . . . to the municipality by the taxpayer as compensation for the use of its streets, alleys or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business.

128. AT&T II, 620 N.E.2d at 1045.
129. ILL. REV. STAT. ch. 24, para. 8-11-2(4) (1987) (current version at ILL. COMP. STAT. ch. 65, § 5/8-11-2 (West 1992)). Section 8-11-2 provides in pertinent part:

The corporate authorities of any municipality may tax any or all of the following occupations or privileges:

1. Persons engaged in the business of transmitting messages by means of electricity or radio magnetic waves, or fiber optics, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality.

Any of the taxes enumerated in this section may be in addition to the payment of money, or value of products or services furnished to the municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business.

Id.

130. AT&T II, 620 N.E.2d at 1045. The court stated: "If the General Assembly intended to give municipalities the right to use the public streets as revenue-raising devices, it would have been unnecessary to explicitly provide for a way to tax electronic messages and to impose a 5% cap upon such a tax." Id.
Telephone Company Act granted AT&T eminent domain authority to use any public street for the installation of wires. Acknowledging that the Telephone Company Act requires that AT&T give notice and obtain municipal consent prior to wire installation, the court stressed that a municipality must consent to a reasonable request. Because AT&T's undercrossings would not interfere with public health or similar concerns, the court reasoned, the five municipalities were not permitted to withhold consent.

The court did not address in detail the differences between home rule and non-home rule municipalities. In the court's view, because neither the Illinois Constitution nor any statute expressly grants any municipality the right to charge tolls, both home rule and non-home rule municipalities alike are prohibited from charging tolls.

C. The Concurrence

In his concurring opinion, Justice Freeman limited his agreement with the majority's judgment to the specific facts of the case. He identified two aspects of the case that the majority had not stressed but which he viewed as justifying the result reached by the majority.

First, Justice Freeman stressed that the fees were improper because the proposed undercrossings would effect only an incidental presence in the municipalities and would facilitate a service that did not originate or terminate within the individual municipalities. Still, Justice Freeman did not preclude the possibility of municipalities imposing tolls under different circumstances. By his reasoning, the justifica-

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132. AT&T II, 620 N.E.2d at 1045.
133. Id. at 1046 (citing City of Vandalia v. Postal Telegraph-Cable Co., 113 N.E. 65, 66 (Ill. 1916)). The AT&T II court characterized a reasonable request as one that takes into account public health, safety, necessity, and convenience. AT&T II, 620 N.E.2d at 1046.
134. Id. The court found that the collection of a fee was not sufficient grounds for denying AT&T's request. Id.
135. Id. at 1047. The court glossed over any distinction between the two types of municipalities by concluding that "[m]unicipal governments, whether home rule or non-home rule, are creatures of the Illinois Constitution." AT&T II, 620 N.E.2d at 1046.
136. Id.
137. AT&T II, 620 N.E.2d at 1047 (Freeman, J., concurring).
138. Id. (Freeman, J., concurring).
139. Id. (Freeman, J., concurring). Justice Freeman stated: "It merely happens that completion of the network requires AT&T to snake the cable alongside railroad track into and out of the municipalities, inevitably intersecting public streets. AT&T is just passing through, as it were." Id.
140. Id. (Freeman, J., concurring). Justice Freeman merely concluded that the unique
tion for a toll becomes stronger "[t]he closer a private entity is joined, economically speaking, to a municipality through use of municipal property." 141

Second, Justice Freeman reasoned that it was unnecessary for the majority to conclude that the imposition of franchise fees by the municipalities would constitute an impermissible exercise of proprietary power. 142 He asserted that the mere presence of underground cable does not justify the assertion of any municipal power over city streets, because such cable will not affect the municipality or the public in any discernible way. 143 Therefore, Justice Freeman reasoned, the majority need not have classified fees on underground cable as either proprietary or regulatory, because the five municipalities could not have exercised even regulatory power over the cable unless the installation or presence of the cable could be characterized as compromising the use or enjoyment of the streets by the public as a whole. 144

D. The Dissent

In his dissenting opinion, 145 Justice Bilandic criticized the majority for effectively repeating the dissenting opinion found in AT&T I. 146 Justice Bilandic stated that in addition to his own argument, his dissent in AT&T II incorporated the opinion of the court in AT&T I. 147 Accordingly, that opinion is reviewed below.

In AT&T I, the court began by positing the rule that municipalities hold title to the streets in trust for the public's benefit. 148 The court

facts of AT&T II warranted the rejection of such a toll. AT&T II, 620 N.E.2d at 1047 (Freeman, J., concurring).

141. Id. (Freeman, J., concurring).
142. AT&T II, 620 N.E.2d at 1047-48 (Freeman, J., concurring).
143. Id. at 1048 (Freeman, J., concurring). Justice Freeman stated that the imposition of a fee had been found justified in the past when the use could "be characterized as one that compromises enjoyment by the public of the whole of city streets for their normal object: facilitating travel." Id. at 1047.
144. Id. (Freeman, J., concurring). Justice Freeman explained as follows:

Existence of fiber optic cable under streets does not impede the public's enjoyment of the whole of city streets for permitting travel over and upon. The need to declare that no municipal proprietary power exists is eliminated by the absence of a type of use sufficient to invoke it .... I would not discount such municipal power without greater exploration by the court as to why that should be so.

Id. at 1048 (Freeman, J., concurring).
145. AT&T II, 620 N.E.2d at 1048-57 (Bilandic, J., dissenting).
146. Id. at 1049 (Bilandic, J., dissenting).
147. Id. (Bilandic, J., dissenting).
stated further that the public has a vested right to use the public streets for traveling in the ordinary course of business. Concluding that running cable beneath the streets is an extraordinary use of the streets, the court suggested that a municipality has the right to impose conditions on extraordinary uses pursuant to its role as trustee for the public.

The court next addressed the role of franchise agreements in municipal affairs, observing that the legislature is the original holder of the power to grant franchises, but may delegate that power to municipalities. In order to determine whether the legislature had indeed delegated that power to the five municipalities—two of which were home rule and three of which were not—the court distinguished between the broad powers of home rule municipalities and the more limited powers of non-home rule municipalities.

The court first noted that non-home rule municipalities may grant franchise agreements only if authorized to do so by statute. The court recognized that under Illinois case law, non-home rule municipalities have implied statutory authority to prevent a public utility from using their streets without a franchise, to permit all uses of their streets that are consistent with normal use, to enter franchise agreements permitting utilities to use the streets for purposes other than normal use, and to impose conditions on a utility before the rights granted under a franchise may be exercised. Based on this prece-
dent, the court concluded that a non-home rule municipality may impose a fee as a condition to a franchise agreement allowing an extraordinary use of public streets.\textsuperscript{160}

The court next noted that in contrast to non-home rule municipalities, home rule municipalities derive their power from the Illinois Constitution, which allows a home rule unit to "‘exercise any power and perform any function pertaining to its government and affairs.'"\textsuperscript{161} The court added that the General Assembly may pass legislation that limits the powers of home rule municipalities or declares that the state's exercise of certain powers shall be exclusive.\textsuperscript{162} The court observed that the legislature has not limited home rule units' power to impose fees on public utilities under franchise agreements.\textsuperscript{163} Consequently, the court reasoned, such a fee is valid as long as it pertains to a unit's "‘government and affairs.'"\textsuperscript{164} The court concluded that the fees sought by the five municipalities met this requirement.\textsuperscript{165}

After he incorporated the \textit{AT&T I} majority opinion into his dissent, Justice Bilandic criticized the \textit{AT&T II} majority for not acknowledging the differences between the powers possessed by home rule and non-home municipalities.\textsuperscript{166} He suggested that this oversight may ultimately reduce the powers home rule units are allowed to exercise.\textsuperscript{167}

Further, Justice Bilandic concluded that the oversight violated the separation of powers doctrine, arguing that the majority's ruling constituted a legislative act.\textsuperscript{168} He stressed that the legislature will be

\textsuperscript{160}Id. at *8 (citing City of Springfield v. Inter-State Indep. Telephone and Telegraph Co., 116 N.E. 631 (Ill. 1917); City of Springfield v. Postal Telegraph-Cable Co., 97 N.E. 672 (Ill. 1912); Chicago General Ry. v. City of Chicago, 52 N.E. 880 (Ill. 1898)).

\textsuperscript{161}Id. at *14 (quoting ILL. CONST. art. VII, § 6(a))(emphasis omitted).

\textsuperscript{162}Id. (citing ILL. CONST., art. VII, § 6(i)).

\textsuperscript{163}AT&T I, 1992 WL 356097, at *14.

\textsuperscript{164}Id. at *15.

\textsuperscript{165}AT&T II, 620 N.E.2d at 1051 (Bilandic, J., dissenting).

\textsuperscript{166}See AT&T II, 620 N.E.2d at 1052 (Bilandic, J., dissenting). Justice Bilandic also took issue with the majority's assertion that home-rule units do not possess the power to regulate issues of statewide concern; he contended that "even matters extensively regulated by the State are matters which properly fall within the exercise of a home rule municipality's power." Id.

\textsuperscript{167}Id. at 1054 (Bilandic, J., dissenting). The 1970 Illinois Constitution provides: "The General Assembly may provide specifically by the law for the exclusive exercise
found to have limited home rule power only if it "specifically and expressly states its intent to do so," and concluded that the legislature has expressed no such intent. Thus, Justice Bilandic reasoned that the majority had usurped a legislative power by limiting the authority of home rule municipalities. He asserted that the majority's exercise of a legislative power is the exact situation that the drafters of the home rule provisions were trying to prevent. Finally, Justice Bilandic cautioned the majority that they might have implicated the Fourteenth Amendment due process rights of Illinois citizens by violating their right to be governed under a tripartite system.

IV. ANALYSIS

The AT&T II decision directly conflicts with Illinois Supreme Court precedent and applicable statutory law, and ignores the constitutional distinction between the powers of home rule and non-home rule municipalities. Consequently, AT&T II will likely cause confusion as courts try to discern the contours of home rule power. Moreover, AT&T II suggests that the supreme court is strictly construing the powers of home rule units under the Illinois Constitution, rather than liberally construing them as expressly specified in the constitution.

by the State of any power or function of a home rule unit . . . ." ILL. CONST. art. VII, § 6(h). Section 6(i) of the constitution states: "Home rule units may exercise and perform concurrently with the state any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." ILL. CONST. art. VII, § 6(i). The Illinois Constitution further provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1.


170. AT&T II, 620 N.E.2d at 1054 (Bilandic, J., dissenting). 171. Id. (Bilandic, J., dissenting).

172. Justice Bilandic posited that "the home rule provisions were specifically drafted in their present form to eliminate the possibility that courts might preempt or limit home rule powers through judicial interpretation." Id. (Bilandic, J., dissenting) (citing Scadron v. City of Des Plaines, 606 N.E.2d 1154 (Ill. 1992)).

173. Id. at 1055 (Bilandic, J., dissenting). Justice Bilandic remarked: "Illinois citizens' right to be governed by a system of separated powers is a matter of liberty—a substantive due process right—granted to us by the fundamental law of our State constitution." Id.

174. The Illinois Constitution states that the "[p]owers and functions of home rule units shall be construed liberally." ILL. CONST. art. VII, § 6(m). The role of the court is not to set limits on municipal power, but merely to "police the boundaries that have been placed around legislative action without undermining the basic assumption that the people's representatives are the best qualified and safest group to which to entrust most
By not acknowledging and applying the distinction between home rule and non-home rule powers, the *AT&T II* court disregarded the intent behind the 1970 Illinois Constitution. The delegates at the Sixth Illinois Constitutional Convention adopted home rule because they were seeking "to strengthen local government—to free the General Assembly from having to deal with a host of minor bills . . . in areas where they have little knowledge . . . to encourage local initiative . . . to encourage people at the local level to meet new and expanding responsibilities." The delegates emphasized that the powers of home rule units would derive from the constitution and were not embodied in any specific statute. Hence, contrary to the court's reasoning in *AT&T II*, the absence of specific statutory authority is an insufficient reason to conclude that home rule municipalities may not require public utilities to pay fees for the extraordinary use of municipal streets. Home rule power comes from the constitution, not from statutes.

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decisions." *City Government in the State Courts*, supra note 57, at 1603.

The Illinois Supreme Court recognized the importance of drawing a distinction between home rule and non-home rule powers. In that case, the court criticized the appellate court for basing its decision on case law involving non-home rule municipalities when ruling on a case involving a home rule municipality. *Id.* Because the appellate court failed to draw the distinction, the Illinois Supreme Court declared that the appellate court had never even reached the proper issue. *Id.* at 712.

In *AT&T II*, the Illinois Supreme Court did not take its own criticism to heart. The minimal discussion of home rule power in the majority's decision suggests that the opinion is analytically deficient, especially in light of the court's prior emphasis on the differences between home rule and non-home rule municipalities.

The Illinois Supreme Court is not the only court to fail to draw a proper distinction between home rule and non-home rule powers. See, e.g., *Wilshire v. Newman*, 31 P. 564 (Cal. 1892). Such shortcomings in judicial analysis have been criticized:

[A]fter nearly a century of experience with home rule, no definition of the extent of municipal initiative has evolved. Courts have sometimes used their power to determine whether a city has stayed within its home-rule grant in much the same way that courts in non-home-rule states decide whether municipal decisions conform to state policy. In determining whether home rule gives a city the power to make a certain decision, courts sometimes look to decisions in non-home-rule states and to pre-home-rule decisions in the same state.

Sandalow, *supra* note 38, at 645.

176. 4 *SIXTH ILLINOIS CONSTITUTIONAL CONVENTION*, supra note 51, at 3039.

177. *Id.* at 3040. One delegate stated: "The powers . . . are not powers that come by way of statute. [T]hese are autonomous powers that home rule units can exercise within their corporate limits without regard to statutory enablement." *Id.*

178. See *supra* notes 161-62 and accompanying text. In states where home rule power is granted by the state constitution, courts should ask two questions to determine if a particular action is outside the scope of home rule powers:

1. "Was the action undertaken for a municipal purpose?"
Moreover, even non-home rule municipalities, which do derive their power from statutes, have the authority to charge a fee under a franchise agreement. The Illinois Supreme Court has consistently recognized the implied statutory authority of municipalities to impose a fee as a condition of a franchise agreement that allows an extraordinary use of public streets. In sum, the AT&T II court erred both by failing to distinguish between home rule and non-home rule powers and by disregarding Illinois precedent on the powers generally held by all municipalities.

The AT&T II court expressed concern that franchise fees like the ones demanded by the five municipalities would cause "a crippling of communication and commerce as we know it." Yet AT&T already pays millions of dollars per year in franchise fees similar to those challenged in AT&T II. Since AT&T apparently faces no danger of financial ruin from these fees, the court’s concerns seem misleadingly exaggerated.

The court also incorrectly relied on Village of Lombard, thereby leaving AT&T II without a solid foundation in Illinois law. Although the Village of Lombard court ruled that a municipality did not possess the power to rent its public streets, the legislature specifically amended the Revised Cities and Villages Act five years after Village of Lombard to include a provision recognizing a municipality's authority to collect such compensation. The AT&T II court dismissed this amendment with the terse statement that it “neither allows municipalities to tax the user of public streets nor does it allow the taxation of wires under the

2. "If so, was that action expressly prohibited by the constitution, general or special law, or charter?"

12 McQuillan, supra note 10, at § 36.02.05. In AT&T II, the majority did not undertake any specific analysis of the actions taken by the two home rule municipalities.

In general, a court may deny a power to a home rule municipality “upon the ground that the legislature has determined that the state has a greater interest or that it is a more appropriate forum than the city council for resolving the problems dealt with by the regulation.” Sandalow, supra note 38, at 665-66.

179. See supra notes 64-77 and 156-60 and accompanying text.

180. AT&T II, 620 N.E.2d at 1044.


182. For a discussion of Village of Lombard, see supra notes 79-86 and accompanying text.

streets." Yet the court failed to recognize that the five municipalities did not seek to impose a tax based on the municipal authority to tax, nor did the municipalities rely upon the power to exact revenue through licensing. Rather, the municipalities premised the franchise fees upon the municipal power to regulate the streets—a power historically recognized in Illinois. Therefore, the court's focus on statutes restricting the municipal power to tax was inappropriate; the court should have focused instead on a municipality's power to regulate the use of its streets.

The court also misconstrued other statutory authority. It observed that the Telephone Company Act grants telephone companies "eminent domain authority over private property and the power to use any public ground of this State which is necessary for the extension of telephone poles, wires, cables or other appliances." The court recognized that AT&T was required to seek municipal consent prior to laying its cable. It reasoned, however, that the failed franchise agreement negotiations between AT&T and the five municipalities constituted an unreasonable and thus invalid refusal of consent by the municipalities. Yet the municipalities' actions were not unreasonable. The municipalities did not completely refuse to allow the installation of the cable. Rather, they attempted to negotiate a valid franchise agreement for the undercrossings.

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184. AT&T II, 620 N.E.2d at 1045.
185. See City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 97 (1893) (holding that a charge imposed for the right to erect telephone poles is a rental fee and not a tax).
186. See supra notes 62-66 and accompanying text.
187. See AT&T II, 620 N.E.2d at 1045 (citing ILL. REV. STAT. ch. 24, para. 8-11-2 (1987)).
188. ILL. REV. STAT. ch. 134, para. 20 (1987). For the relevant text of the statute, see supra note 104.
189. AT&T II, 620 N.E.2d at 1045. In her dissenting opinion at the appellate court level, Justice McMorrow observed that the Illinois Commerce Commission has issued AT&T a certificate of public necessity and convenience to operate its telecommunications system in Illinois. American Telephone & Telegraph, 576 N.E.2d at 993 (McMorrow, J., dissenting). She noted that under the Public Utilities Act, the certificate should not be interpreted as conferring a franchise, license, or other power on AT&T. Id. (McMorrow, J., dissenting) (citing ILL. REV. STAT. ch. 111 2/3, para. 8-406 (1987)). Justice McMorrow concluded, therefore, that the certificate does not grant AT&T "the automatic right to use public streets for its stated business purpose." 576 N.E.2d at 993 (McMorrow, J., dissenting).
190. AT&T II, 620 N.E.2d at 1046.
191. Id.
192. "It is to be noted that none of the municipalities object to the installation of the cable per se." Id. at 1042.
V. IMPACT

The *AT&T II* decision both nullifies a municipality's power to regulate a public utility's use of its streets and grants public utilities the right to use public streets for private gain without compensation. Additionally, the *AT&T II* court's failure to take into account the important distinction between home rule and non-home rule municipalities may lead to similarly confused treatment by lower courts and, ultimately, to improper restrictions on the home rule powers granted by the 1970 Illinois Constitution.

The court's implicit endorsement of AT&T's refusal to negotiate franchise agreements in good faith sets the stage for similar abuses in the future. The court has rendered virtually meaningless the statutory requirement that a telephone company obtain a municipality's consent before using public streets for private gain. When a telephone company requests consent from a municipality in the future, it need do so only as an administrative formality, rather than as a genuine effort to obtain consent. The company may merely serve notice, pretend to negotiate for ten days, reject any proposals, and begin installation after ten days—for free. Thus the court has effectively stripped municipalities of their ability to negotiate. Telephone companies now possess the power to unilaterally invoke eminent domain authority without any substantial checks, either judicial or statutory.

Ultimately, then, AT&T and other similar utilities can now routinely

194. For the relevant text of the statute, see *supra* note 104.

195. It has been observed that in cases like *AT&T II*, "[t]he question to be answered is not whether an issue is political, for courts are regularly charged with the responsibility of deciding political issues, but whether it is the type of political issue toward the resolution of which the courts can make a contribution." Sandalow, *supra* note 38, at 688.

The question in *AT&T II* is clearly political. The court, however, is not the proper forum to rehabilitate failed negotiations. By stepping into the midst of negotiations and orchestrating the outcome, the court severely undercut the possibility of the parties reaching a genuine compromise. Like fighting siblings who run to their parents, two parties who have failed to compromise will be able to submit their dispute to the courts with the knowledge that they do not need to even attempt to negotiate because the court will ultimately decide the issue.

This is not to say, however, that the courts do not have a role in issues regarding home rule powers. A lawsuit filed by an individual who is "disadvantaged by municipal legislation provides an opportunity for continuous, if nonetheless episodic, review of such legislation to determine its consistency with the welfare of the larger community. In discharging this responsibility, the courts have the advantage of comparative freedom from local pressures." Sandalow, *supra* note 38, at 702. Moreover, interest groups may receive fairer treatment on the state level, where greater objectivity may exist, than at the local level, where individual and more parochial interests may prevail. *City Government in the State Courts, supra* note 57, at 1612.
reject proposed franchise agreements and then merely invoke their unprecedented and largely unqualified right to use the public streets for private purposes.\textsuperscript{196} The \textit{AT&T II} decision thus directly contradicts more than 100 years of Illinois case law.\textsuperscript{197} Consequently, lower courts now have little guidance on how to restrain utilities when future disputes over municipal franchise agreements arise.

Furthermore, the \textit{AT&T II} decision may ultimately reduce the powers rightly held by home rule municipalities. The court's failure to honor the distinction between home rule and non-home rule powers implicitly condones a narrowed judicial interpretation of the home rule powers granted by the Illinois Constitution. Specifically, the court's analysis tacitly rejects the notion that the powers possessed by home rule municipalities exceed those of non-home rule municipalities.\textsuperscript{198} This proposition of course directly contradicts the Illinois Constitution.\textsuperscript{199} As it stands, the Illinois Supreme Court has strictly construed the powers of home rule units—to the point of a reversion to

\textsuperscript{196} In her dissenting opinion, Justice McMorrow noted that the decision of the Illinois Appellate Court could result in improvident judicial intrusions into municipal affairs:

\begin{quote}
In place of . . . negotiation, the majority allows AT&T to obtain a judicial interpretation of whether the various proposed and non-binding franchise fees suggested by the municipalities were reasonable . . . [T]he imposition of a franchise fee for use of public streets is an inherently legislative function, and whether a particular franchise fee arrangement should be imposed is, in the first instance, a matter within the province of the municipalities and their residents. This court is certainly not the proper forum to debate the relative merits of the various franchise arrangements . . . that should be resolved by the residents of the municipalities through their elected officials.
\end{quote}

\textit{American Telephone & Telegraph Co.}, 576 N.E.2d at 997 (McMorrow, J., dissenting)(citation omitted). Justice McMorrow's position is similar to Justice Bilandic's dissenting opinion in \textit{AT&T I}. See supra notes 145-173 and accompanying text.

\textsuperscript{197} See supra notes 62-95 and accompanying text.

\textsuperscript{198} One commentator summarily rejects the notion that courts have restricted home rule power, noting: "Contrary conclusions by commentators are frequently unsupported by reference to judicial decisions . . . These unsupported conclusions are then relied on as tending to prove similar conclusions by later commentators." Sandalow, \textit{supra} note 38, at 663 n.87. In \textit{AT&T II}, however, the restriction placed on home rule powers is clear: Although case law has firmly established municipalities' power to control use of their streets, the Illinois Supreme Court has ruled to the contrary. For a list of cases upholding municipal power over their streets, see supra notes 156-60 and accompanying text.

\textsuperscript{199} See supra note 161 and accompanying text.
Dillon’s Rule.\textsuperscript{200} The people have been stripped of a portion of their power to effectively govern themselves at the local level.

VI. CONCLUSION

In \textit{AT&T II}, the Illinois Supreme Court ruled that a municipal government may not charge a franchise fee for the right to lay cable under public streets.\textsuperscript{201} The court thus reduced the authority of municipalities to control the use of their streets and broadened the right of utilities to use public streets for private gain without compensation. Because the court implicitly condoned AT&T’s refusal to compromise, municipalities have lost the effective ability to negotiate franchise agreements. As frustrated attempts to negotiate agreements lead to lawsuits, \textit{AT&T II} will leave courts struggling to resolve disputes with an inconsistent body of case law.

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\textsuperscript{200} According to one commentator, the same situation has arisen in Nebraska: “[T]he law of municipal home rule in Nebraska is embalmed in Dillon’s Rule instead of being enshrined in the state’s constitution.” Arthur B. Winter, \textit{Municipal Home Rule, A Progress Report?} 36 NEB. L. REV. 447, 471 (1957); see supra note 32 and accompanying text for Dillon’s Rule.

\textsuperscript{201} \textit{AT&T II}, 620 N.E.2d at 1042.