HOME RULE, REVISITED

Left to themselves, the institutions of a local community can hardly struggle against a strong and enterprising government; they cannot defend themselves with success unless they have reached full development and have come to form part of national ideas and habits. Hence, until communal freedom has come to form part of mores, it can be easily destroyed, and it cannot enter into mores without a long-recognized legal existence.

—A. deTocqueville [1]

It seems appropriate to recall Alexis de Tocqueville's prophetic words during an era in which "new federalism" is promoted as a panacea for social and economic ills. Home rule, introduced as a vehicle for providing cities, towns, and counties with self-governing powers, was developed in the late nineteenth century. The early home rule movement was "fueled by widespread public indignation over excessive legislative interference with and insensitivity toward local problems and concerns, and by a growing dissatisfaction with the enormously inefficient system of performing local lawmaking functions at the state level."[2] A century later, home rule powers are being explored and reconsidered, but the current movement is prompted not only by the public's continued dissatisfaction with the inefficiencies of lawmaking functions performed at the state level, but also by dissatisfaction at the other end of the political spectrum. Today, because of the federal government's focus on escalating administrative costs for federal level programs designed to remedy state and local problems, additional pressure exists to delegate power to local units of government.

Home rule returns legislative power to cities, towns, and counties under the philosophy that those closest to the people can best minister to their needs. In turn, such a delegation of power could in theory reduce the federal government's responsibility for the social and economic difficulties local units face.[3] A twofold problem exists, however, in that first, American cities seem unable to solve their current problems or control their future development, and second, there is a widespread perception of the powerlessness of American cities in this

1. A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 62 (Lawrence trans. 1969). After wandering across the country in the early 1830's deTocqueville reported that:

   [T]he 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 a spirit of liberty.

   Id. at 63.

2. Ritchmount Partnership v. Board of Supervisors of Elections for Anne Arundel County, 283 Md. 48, 388 A.2d 523, 528-29 (1978).

3. Lectures on State and Local Government by Professor Douglas Kmiec, Notre Dame Law School (Spring, 1982).

regard.[4] To compound the problem, case law reveals a distinct judicial reluctance to allow localities the freedom needed to effectively exercise whatever self-governing powers they may have.[5]

A discussion of the history and theory of home rule will provide a perspective through which to consider a case study of home rule in Indiana. The Indiana General Assembly's recent efforts to reexamine home rule and revitalize the "institutions of its local communities," resulted in a single volume of statutes pertaining to state and local government, Title 36.[6] Most of these provisions became effective on September 1, 1981.

Proponents of Title 36 suggest that consolidated provisions pertaining to local government will call more attention to the legal existence of municipal powers and rights, thus facilitating their exercise.[7] Despite this optimism, a number of obstacles and unresolved problems remain. A major concern centers around the ability of cities, towns, and counties with home rule authority to replace, reorganize, or eliminate institutions implemented pursuant to federal legislation.

This note will analyze Indiana's attempt to deal with such an institution, the housing authority, under the recently passed Title 36. This analysis will then be projected generally to speculate on the fate of other institutions within the new climate of home rule.

THE ORIGIN AND EVOLUTION OF HOME RULE

In the absence of home rule or other express grants of power to municipalities, state legislatures possess all legislative powers.[8] This stems from the common law doctrine that municipalities were agents of the state. As the Supreme Court noted in *City of Newark v. New Jersey*, "[t]he regulation of municipalities is a matter peculiarly within the domain of the State."[9]

State legislature's absolute power over municipalities, however, did not prove to vitiate local autonomy. In the mid-nineteenth century, counties or townships comprised the most prevalent units of local government. Although they were "not constituted everywhere in the same way," each operated under the same philosophy, "that each man is the best judge of his own interest and the best able to satisfy his private needs."[10] The township or county took responsibility for meeting the

4. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980).
5. *See, e.g.*, Cheeks v. Cedlair Corporation, 287 Md. 595, 415 A.2d 255 (1980); Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980); Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982).
6. 1980 Ind. Acts Public Law 211, § 1. Section 1 explains that Title 36 is "intended to codify, revise or rearrange applicable or corresponding provisions in prior statutes."
7. Interviews with Housing Authority directors at April 1982 NAHRO Convention in Elkhart, Indiana.
8. Unless otherwise prohibited by federal and state constitutions. McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299, 300-03 (1916).
9. 262 U.S. 192, 196 (1923).
10. DETOCQUEVILLE, *supra* note 1, at 82.

needs of its local interests. For example, in Indiana, case law reveals that the early nineteenth century was "a time when local autonomy was the rule of law in Indiana."[11] In the words of an observer of nineteenth century America, "the state rule[d] but [did] not administer."[12]

As urban areas developed and became more densely populated, state legislatures began exercising their powers to govern these areas. Railroads spanned the country, thus facilitating travel and linking state and local regions.[13] State legislatures involved themselves in the internal affairs of municipalities to assure that citizens obtained the needed public services, such as water, gas, and transportation. At this time there was a pervasive feeling that local officials were corrupt or inept, and either case warranted increased state control and direction of municipal affairs.[14] By the late nineteenth century, "[l]egislation descended into regulation of the minutest details of municipal government."[15]

Incidents of local resistance to increased state involvement in municipal affairs could be detected by the 1870's. In those states where local independence was politically backed, it achieved constitutional protection in one of two ways. First, local units could gain initiative power, which enabled them to provide particular services to their constituents without prior state authorization.[16] Second, municipal governments could be shielded from state legislation by a constitutional provision limiting the state legislature's powers. Common limitations during this period included the prohibitions of special or local legislation.[17]

> In the absence of such prohibitions, the plenary power of the legislature over municipal corporations permitted the enactment of legislation directed at particular situations, thus enabling the legislature to intervene in local affairs . . . the legislature's power to enact legislation applicable only to a single city deprived the city of the normal political safeguards of statewide interest in the legislation; none but the residents of a single city would have any interest in such legislation and they frequently lacked sufficient political influence to prevent the interference.[18]

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11. City of South Bend v. Krovitch, 149 Ind. App. 438, 443, 273 N.E.2d 288, 291 (1971). For a thorough discussion of the parameters of local autonomy in the early nineteenth century in Indiana, consult Ice, *Municipal Home Rule in Indiana*, 17 IND. L.J. 375, 376-81 (1942).
12. DETOCQUEVILLE, *supra* note 1, at 82.
13. WILSON, INDIANA, A HISTORY 188-90 (1977).
14. LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 8 (1962).
15. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 647 (1964).
16. *See* IDAHO CONST. art. XII, § 2 which still empowers municipalities to enact, among other things, local police and sanitation regulations. Additionally, art. I, § 2 provides that all political power inheres in the people and that government is instituted for their benefit and equal protection. *See also* CAL. CONST. art. II, § 1, MONT. CONST. art. 2, § 1, UTAH CONST. art. 1, § 2.
17. Walker, *Toward a New Theory of Home Rule*, 50 NW. U.L. REV. 571, 572 (1955). *Cf.* IND. CONST. art. IV, § 22.
18. Sandalow, *supra* note 14, at 648-49.

The two theories generally advanced to describe the distribution of legislative powers among state and local government were the "creature theory" and "Dillon's Rule." These theories served, and continue to serve, as guidelines for courts and legislatures in clarifying the status and powers of municipalities, states, and seemingly autonomous agencies.

Justice Peckham's 1905 Supreme Court decision in *City of Worcester v. Worcester Consolidated Street Railway Company*[19] concisely laid out the creature theory. In Peckham's words, a municipality's power of self-government could be revoked in the same manner as it was granted because a "municipal corporation" was

> simply a political subdivision of the State, and which exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the *creature* of the State (emphasis added).[20]

Dillon's Rule, a corollary of the creature theory, marked the specific limits of the powers of municipal corporations. Named after Chief Judge John J. Dillon, of the Iowa Supreme Court, the Rule provided that municipal corporations possessed and could 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,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.[21]

Some courts developed the doctrine of "an inherent right of self-government" to support claims of autonomy made by municipal corporations which lacked political clout.[22] Essentially the doctrine proposed that,

> the people possess an inherent right, which antedates the Constitution,

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19. 196 U.S. 539 (1905).

20. 196 U.S. 539, 548-49 (1905). *cf.* Massey v. City of Mishawaka, — Ind. App. —, 378 N.E.2d 14, 17 (1978): "Indiana municipal corporations are entities created by the State Legislature and possess only those powers granted to them by the State."

21. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-50 (5th ed. 1911). Expressed by Judge Dillon in Merriam v. Moody's Executors, 25 Iowa 163 (1868). The Iowa legislature overruled Dillon's rule in 1951. The very court which a century before had announced the rule accepted its repeal. Richardson v. City of Jefferson, 257 Iowa 709, 134 N.W.2d 528 (1965).

Cf. City of Logansport v. Public Service Commission, 202 Ind. 523, 530-31, 177 N.E.2d 249, 251 (1931): "Municipal corporations are subordinate branches of domestic government of the state and possess only those powers expressly granted to them by the Legislature, those necessarily or fairly implied in or incident to powers expressly granted, and those indispensable to the declared objects and purposes of the corporation."

22. McBain, *supra* note 8.

> to govern themselves locally, that the Constitution is a grant of power, and that all power not delegated by it remains in 'the local communities,' rather than in the state, exempt from legislative interferences.[23]

First advanced in the late nineteenth century by Judge Cooley,[24] the doctrine never overcame Dillon's Rule in a majority of the states. In effect, a majority of the states had "inherent right of self-government" language in their constitutions, but, under Dillon's Rule, the judiciary had acquired a veto power of sorts. The judiciary played the role of super-legislature by determining when a municipality had properly exercised its authority and when the state had overstepped its bounds.[25]

Meanwhile, state-local relationships continued to grow more complicated and it became increasingly difficult for state legislatures to keep local governments functioning properly. The functions of cities had expanded beyond the simple and limited areas of the past. "[A]s state legislative burdens increased, cities received less attention and began to feel the pinch of Judge Dillon's legacy to local government."[26]

Missouri pioneered the first constitutional grant of home rule in 1875.[27] Under the grant's criteria only one Missouri municipality qualified, St. Louis. The avowed purpose of home rule was to alleviate the limitations Dillon's Rule imposed upon the exercise of local government functions. The Missouri legislature assumed that if it gave cities exclusive powers by constitutional provision(s), the state legislature would refrain from enacting laws which interfered with local powers of self-government.[28]

California followed the Missouri model four years later.[29] California learned, however, that its courts had maintained the spirit, though they did not purport to apply the letter, of Dillon's Rule by literally construing the constitutional grant of home rule. The phrase "subject to and controlled by general laws," within California's grant of home rule, had the effect of eviscerating most self-government efforts. This created such great problems for local units that in 1896 California had to amend this clause by adding, "except in municipal affairs."[30] Finally in 1914 California revised its home rule provisions to give an af-

23. *City of Logansport*, 202 Ind. at 530-31, 177 N.E. at 251. This doctrine was first announced in Indiana cases in State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N.E. 252 (1889). Indiana's 1816 Constitution provided that "[a]ll power is inherent in the people, and free government is founded on their authority and instituted for their peace, safety and happiness."

24. People ex rel. LeRoy v. Hurlbut, 24 Mich. 44 (1871). Indiana and Michigan were two of the four states in which this doctrine met with success.

25. Courts borrowed the rule of ultra vires from the law of corporations and used it in conjunction with Dillon's Rule. "Expressio unius excluso alterius" and the "ejusdem generis" doctrines were also used to "fetter local units." Walker, *supra* note 17, at 578.

26. Sharp, *Home Rule in Alaska: A Clash Between the Constitution and the Court*, 3 U.C.L.A.-ALASKA L. REV. 1, 2 (1973).

27. MO. CONST. art. IX, §§ 16-25 (1875).

28. Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385.

29. CAL. CONST., art. XI, § 6 (1879).

30. Sato, *Municipal Affairs in California*, 60 CALIF. L. REV. 1055, 1055-56 (1972); Peppin, *Municipal Home Rule in California: I*, 30 CALIF. L. REV. 1, 6-37 (1941).

firmative grant of power to municipalities.[31] By this time eleven other states had authorized constitutional home rule provisions.[32]

To date, forty states have written grants of home rule power into their constitutions.[33] Other states, like Indiana and North Dakota, relinquished their powers in a piecemeal legislative fashion rather than by amending the state constitution.

A constitutional grant of home rule authority differs markedly from a legislative grant. On the surface, a constitutional grant of home rule authority establishes the domain of local units of government. Although the local governments must continue to comply with the state's constitutional provisions and statutes, they remain free to fashion for themselves a system of government.[34] In many jurisdictions, "as a prerequisite to exercising home rule powers, municipalities have been required to adopt charters or 'municipal constitutions' drafted by local charter commissions selected according to terms prescribed by the state constitution or by state law."[35] State legislatures may not revoke local units' autonomy because the unit derives its authority from the very source of the legislature's authority, the state constitution.

A closer inspection of the constitutional grant of home rule authority indicates, however, that power distribution between a local governing body and the state involves a "subtle blend" of state legislation and constitutional provisions. State and local governmental powers, rights, duties, and obligations expand and contract in accordance with the mandates and prohibitions contained in the legislation and constitutional provisions.[36]

Regardless of the source of municipal corporations' powers of self-government, home rule never constitutes a grant of absolute autonomy within the state. "[H]ome rule cities must always remain integral parts of state government and must assume, like non-home rule cities, responsibility for enforcement of state law."[37] Consequently, a legislature or court reviewing grants of home rule authority must carefully consider whether local units of government will be able to meet the unique demands of their constituents while functioning effectively as one of many distinct units in the state.[38]

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31. *Id.* Sato, *supra* note 29.
32. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 277 (1968).
33. *See* Appendix, *infra*, p. 244.
34. *But see* Litten v. City of Fargo, 294 N.W.2d 628, where the North Dakota Supreme Court held that a home rule city does not have authority to select any form of government it may desire.
35. Vanlandingham, *supra* note 32, at 280. Arguably, the Indiana General Assembly wishes to have home rule units fashion their own systems of government by codifying and enacting their statutes.
36. For an interesting discussion of the interplay of the state's and municipality's powers in Hohfeldian terms consult Anderson, *Resolving State/Local Governmental Conflict - A Tale of Three Cities*, 18 URB. L. ANN. 129 (1980).
37. Vanlandingham, *supra* note 32, at 280.
38. *Id.*

The attention American courts and legislatures have devoted to the concept of home rule for over one hundred years has resulted in countless meanings and descriptions. "Home rule" has served as both "a political symbol and a legal doctrine."[39] Legislatures purport to adopt home rule to immunize municipalities from the control and direction of state legislatures or to give local governments the initiative to exercise police power, license trades, and businesses, or regulate health and human services without specific state authorization. In these senses, home rule serves as a political symbol. When used as a means for allocating powers among state and local governments and agencies, home rule serves as a legal doctrine.

In any case, "home rule" has escaped precise definition. Legal scholars suggest that "any legal change which strengthens the legal position of cities in relation to the state"[40] constitutes a form of home rule. Such usage is referred to as the "state of mind" form of home rule or as the application of federalism to the state-local relationship.[41] At the other end of the spectrum, home rule in its most comprehensive sense includes:

> (1) the choice of the character of the municipal organization, that is, the selection of the charter, (2) the nature and scope of the municipal service, and (3) all local activity, whether in carrying out or enforcing state law or municipal regulations, in the hands of city or town officers, selected by the community.[42]

Home rule may be more accurately described as "the autonomy of local government in the sovereign state over all purely local matters."[43] First, this formulation reflects a desirable jurisprudential effect of home rule, to allow the governmental unit closest to the people to minister to their needs and afford them the privileges and protections of the law. Second, no home rule grant provides a city, town, or county with blanket immunity from state and federal laws and regulations.[44] This definition makes it clear that a properly functioning local governmental unit must meet the unique needs of its people in those areas that laws targeted at the general public cannot address. Unfortunately, this definition leaves the decision of what constitutes a "purely local matter" up to the judiciary.[45]

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39. Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEX. L. REV. 682 (1959).
40. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 U.C.L.A. L. REV. 671, 674 (1973).
41. Vanlandingham, *supra* note 32, at 279.
42. 1 MCQUILLAN, MUNICIPAL CORPORATION § 43 (1940).
43. Vanlandingham, *supra* note 32, at 280. Seemingly this is the formulation of home rule the Seventh Circuit Court of Appeals had in mind when it decided Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980) (p. 6, n.17).
44. *See, e.g.*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).
45. Note, *Defining "Municipal or Internal Affairs:" The Limits of Power for Indiana Cities*, 49 IND. L.J. 482 (1974). Since there is no agency to interpose a more neutral judgment as to what constitutes a state affair and what is really a municipal affair, the author of this law review note suggests that the courts are the best supervisors.

HOME RULE IN INDIANA

In 1978 Indiana organized the Local Government Study Commission to study the organization, financing, and management of local government units over a three-year period.[46] The Commission used the data it collected to stimulate annual legislative proposals. Ultimately, the Commission drafted legislation designed to create a political climate conducive to local units handling the responsibilities of self-government.[47]

Article I of Title 36 provides the "cornerstone" for the Commission's comprehensive recodification.[48] At the heart of Article I lies the "home rule" chapter.[49] By synthesizing the provisions of the Powers of Cities Act (Indiana Code § 18-1-1.5), Powers of Counties Act (Indiana Code § 17-2-2.5) and Unigov Act (Indiana Code § 18-4-2) the Commission intended to strengthen the local units' powers of self-government. The Commission declared,

> This new Home Rule law should serve to clarify that these units do indeed have extensive discretion in carrying out their local functions, but it does not extend to them certain powers that are denied under present law. For instance, the local units are still prohibited from imposing any tax not specifically provided by statute, and they are still unable to regulate activity that is subject to regulation by a state agency. . . . As one might expect, the Home Rule powers are not without their limits. . . . Like traditional local government powers, Home Rule powers are *delegated* powers; they have been freely given and may be freely limited or taken away by the General Assembly.[50]

This built-in concept of "delegation" creates a conflict. Although the statute concentrates on the local units' powers, the drafters' approach focuses on the power of the legislature to assign its functions to a variety of governmental units. Among the strata of governmental units, home rule units do not occupy a preferred spot.[51]

The unspoken assumption is that the state legislature represents the

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46. Ind. Pub. L. 170 (1978).
47. Local Government Study Commission, Understanding the New Local Government Law (June 1, 1981) (unpublished report). Proposed constitutional amendments granting "home rule" powers to local units were twice rejected by the Indiana legislature. H.J. Res. 5, ch. 243 [1941] Ind. Acts 967; S.J. Res. 2, ch. 289 [1953] Ind. Acts 1021. *See* Note, *Local-State Relations in Indiana: Proposed Charter Making Powers for Municipalities*, 30 IND. L.J. 265, 266 n.7 (1955).
48. Art. I, General Provisions; art II, Government of Counties; art. III, Government of Consolidated Cities and Counties (Unigov); art. IV, Government of Cities and Towns Generally; art. V, Government of Towns; art. VI, Government of Townships; art. VII, Planning and Development; art. VIII, Public Safety; art. IX, Transportation and Public Works; art. X, Recreation, Culture, and Community Facilities.
49. Although the Cities & Towns Act of 1905 authorized cities to license, tax, and regulate under specified circumstances, the General Assembly never really accepted the concept that local governments should have broader authority to determine the scope of their own governmental activities until the passage of the Consolidated Cities and Counties Act of 1969 (Unigov Act – Former I.C. § 18-4 et seq.). See note 47.
50. Local Government Study Commission Report, *supra* note 47.
51. *See* IND. CODE § 36-1-3-5 (1980).

sole safe bursar of governmental power. Any legislative attempt to grant home rule authority to local units must operate against a backdrop of judicial reluctance to part with common law rules regarding municipal corporations. To overcome a local unit's exercise of home rule authority, a court can merely challenge the legislature's power to delegate such authority without state constitutional authority.[52] Given the hostile judicial attitude in this state toward self-governed local units, this speculation is not far-fetched. For example, Indiana's Supreme Court recently held that,

> [t]he Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. An administrative body can be delegated the responsibility, methods, or details necessary to implement the law enacted by the Legislature.[53]

The Indiana legislature appears to have charged local units seeking self-government with the difficult task of navigating between Scylla and Charybdis. In conducting local or municipal affairs,[54] local units must not come within the jurisdiction of federal, state, and local agencies or any superior law-making body. Even if nimble local units avoid this many-faceted problem and the state legislature does not revoke its grant in the interim, a strict judicial interpretation of legislative delegation may swallow any remaining powers of self-government possessed by the home rule unit.

To complicate the problem, Indiana's legislature has neither made an absolute grant of home rule authority, nor has it extended the home rule provisions to all municipal corporations. According to Title 36, "all units except townships" may exercise home rule powers.[55] "Units" includes county, municipality, or township.[56] The statute defines "municipality" as a city or town.[57] The home rule provisions, therefore, apply only to cities, towns, and counties.

The Indiana Constitution and statutes limit the power that a home rule unit may exercise.[58] Home rule units may not exercise any powers expressly granted to other entities,[59] nor may they exercise their powers in areas outside their geographical boundaries.[60] Additionally, section eight[61] of the home rule chapter lists eleven powers a unit does not

52. *See, e.g.*, Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953); Elliott v. City of Detroit, 121 Mich. 611, 84 N.W. 820 (1899); State v. Thompson, 149 Wis. 488, 137 N.W. 20 (1912).
53. Stanton v. Smith, — Ind. —, 429 N.E.2d 224, 228 (1981).
54. IND. CODE § 36-1-3-6 describes the specific manner for exercising a power.
55. IND. CODE § 36-1-3-1 (1980).
56. *Id.* § 36-1-2-23.
57. *Id.* § 36-1-2-11.
58. *Id.* § 36-1-3-5(1).
59. *Id.* § 36-1-3-5(2).
60. *Id.* § 36-1-3-9 provides that home rule units may enter into an express agreement under § 36-1-7.
61. *Id.* § 36-1-3-8. Curiously, other than a municipality's exclusive jurisdiction over bridges

have in the absence of state law authorization. This list includes: the power to regulate activities which the state already regulates; the power to impose duties on other governmental units; the power to impose a license fee in an amount which exceeds reasonable administrative costs; and the power to regulate private civil relationships.

In light of these restrictions, it appears that Title 36 fails to clarify the "extensive discretion" local governmental units have in carrying out their local functions. Additionally, the Repealer Bills may have local government decision-makers so buried in paperwork that adopting ordinances which may be totally inconsistent with neighboring units' ordinances will become the sole function of home rule units. If local government units fail to replace the statutes with ordinances, they may no longer exercise the powers currently granted by the statutes. Ironically, Title 36, intending to grant extensive powers to local units, may have reduced those powers thus impairing their ability to function as integral parts of state government.

THE FATE OF HOUSING AUTHORITIES: A CASE IN POINT

In effect, the home rule provisions of Title 36 do not differ in substance from the home rule provisions which have been in effect for the past decade.[62] The Indiana statutes which establish housing authorities remain virtually unchanged since their enactment in 1937.[63] Meanwhile, as the Local Government Study Commission examined home rule and prepared Title 36, Indiana courts continued to apply the spirit, if not the letter, of Dillon's Rule. Within this context, if a city, town, or county tried to exercise its home rule powers to abrogate or eliminate the authority of an agency functioning within its territory, the provisions of the Indiana Code would likely receive a strict judicial interpretation which would keep the municipality in check.

In 1937, Indiana enacted the Housing Authorities Act (the "Act") intending to eliminate unsanitary, unsafe, and unhealthy dwellings.[64] In each city, county, and town where these conditions existed, the legislature provided for the creation of a "public body corporate and politic," the "housing authority."[65] The Act has always provided the following three methods for a city, town, or county to determine whether or not it needed a housing authority: the governing body could, on its own motion, make a proper resolution declaring that such a need existed; the governing body could make a proper resolution following a petition signed by twenty-five residents of the city, town, or

(subject to § 8-16-3-1), streets, alleys, sidewalks, watercourses, sewers, drains and public grounds, home rule units are not given the express power to *do* anything in particular.

62. IND. CODE § 36-1-3-1 et seq. (1980) (formerly §§ 18-1-1.5, 18-4-2, and 17-2-2.5).

63. Now IND. CODE § 36-7-18-1 et seq. as added by Acts 1981, P.L. 309, § 37. Formerly IND. CODE § 18-7-11-1 et seq. (and before that, § 48-8101 et seq.). These provisions have been rewritten for clarity's sake since 1937 but otherwise remain unchanged.

64. Edwards v. Housing Authority, 215 Ind. 330, 19 N.E.2d 741 (1939).

65. Formerly IND. CODE § 18-7-11-4 [48-8104], now § 36-7-18-4 (1981).

county who asserted that the city, town, or county needed a housing authority functioning there; and, the state housing board could direct the governing body to create a housing authority.[66]

Once a city, town, or county created a housing authority, the mayor appointed five housing commissioners. These commissioners were authorized to select technical experts, social workers, lawyers, and other advisers to assist them in improving the quality and increasing the quantity of housing for persons of low income. As a municipal corporation, the housing authority's powers have always included the following: to sue and be sued; to prepare, carry out, acquire, lease, and operate housing projects; to arrange or contract for the furnishing of services and facilities in connection with a housing project; to invest any funds held in reserves and to purchase bonds at a price not more than the principal amount and accrued interest; and to make studies and recommendations pertaining to the problems of replanning and reconstructing slum or blighted areas.[67] Under no circumstances may a housing authority initiate a project without first receiving approval of the city, county, or town which activated it.[68]

Now that the home rule provisions of Title 36 have become effective, it is doubtful that cities, towns, or counties will have more power to interfere with the activities of housing authorities than they had prior to September 1, 1981. For example, article I, section 24 of Indiana's Constitution provides that no "law impairing the obligation of contracts, shall ever be passed." Since the relation between a city, county, or town and its housing authority in itself is a contract, the state legislature cannot empower local government units to back out of their arrangement with a housing authority in the name of exercising its home rule authority. Additionally, when viewed as separate contracts housing projects approved prior to September 1, 1981, must remain in force.[69]

Moreover, if a constitutional or statutory provision sets out a specific manner for exercising a power, a unit remains bound, under the home rule chapter, to exercise the power in the manner specified.[70] Any city, deciding to rehabilitate a housing project could act only "to the extent that the power . . . is not expressly granted to another entity."[71] Clearly the Act empowers housing authorities to exercise this

66. IND. CODE § 36-7-18-4 (1981); now the "fiscal body" declares when there is a need for an authority in the unit, rather than the "governing body." § 36-1-2-6 defines "fiscal body" as: (1) county council, for a county not having a consolidated city; (2) city-county council, for a consolidated city or county having a consolidated city; (3) common council, for a city other than a consolidated city; (4) board of trustees, for a town; (5) advisory board, for a township; or (6) governing body or budget-approval body, for any political subdivision.

67. IND. CODE §§ 36-7-18-1 et seq.

68. § 36-7-18-14.

69. *See, e.g.*, Cuyahoga Metropolitan Housing Authority v. Harmody, 474 F.2d 1102 (6th Cir. 1973); Housing Authority of the City of Los Angeles v. City of Los Angeles, 38 Cal. 2d 853, 243 P.2d 515, *cert. denied* 344 U.S. 836 (1952).

70. IND. CODE § 36-1-3-6.

71. *Id.* § 36-1-3-5(2).

power. Were a city to decide to assume such a project, their acts could be subject to the review and regulation of the local housing authority.[72] Unless the need for a housing authority ceases to exist, it does not seem possible for a home rule unit to alter its relation with the housing authority.

The vast majority of courts have held that the housing authority, rather than being subject to the control and direction of the municipal corporation, becomes a complete corporate entity in itself.[73] Courts have generally reached this conclusion by considering the municipality and housing authority as co-equal entities with identical territorial jurisdictions[74] or by classifying the housing authority as a state agency "created to discharge a public object essential to the public interest."[75] In a few cases courts have held that "[t]he housing authority is not a political subdivision of the state. Once created it becomes an autonomous body, subject only to the limits of power imposed by law. [Housing authorities are not created for political purposes and [are] not instruments of the government created for its own use or subject to its direct control."[76]

The matter of the housing authorities dramatizes the actual effect on municipalities of Indiana's legislative home rule grant. To place cities, towns, and counties in a climate more conducive to the genuine exercise of home rule powers, the legislature could have perhaps shielded local units of government from the "pinch of Judge Dillon's legacy," by attempting a constitutional grant of home rule rather than a revision of statutes.

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72. *Id.* § 36-1-3-7.

73. *See, e.g.*, Wilmington Housing Authority v. Williamson, 228 A.2d 782 (Del. 1967); Johnson-Forster Co. v. D'Amore Const. Co., 314 Mass. 416, 50 N.E.2d 89 (1943); Finance Commission of City of Boston v. McGrath, 343 Mass. 754, 180 N.E.2d 808 (1962); Atherton v. City of Concord, 109 N.H. 164, 245 A.2d 387 (1968); City of Paterson v. Housing Authority of City of Paterson, 96 N.J. Super, 394, 233 A.2d 98 (1967); Kelly v. Cohoes Housing Authority, 280 N.Y.A.2d 250, 27 A.D.2d 463 (1967), *aff'd*, 243 N.E.2d 746, 23 N.Y.2d 692, 296 N.Y.S.2d 139 (1968); Virginia Electric & Power Co. v. Hampton Redevelopment and Housing Authority, 217 Va. 30, 225 S.E.2d 364 (1976); Mercy v. City of Seattle, 71 Wash. 2d 556, 429 P.2d 917 (1967).

74. Boardman v. Oklahoma City Housing Authority, 445 P.2d 412 (Okla. 1968), holding that a housing authority is not an agency or instrumentality of the city or county in which it operates, nor is it a political corporation of subdivision of the state and therefore it is not subject to debt limitations placed on cities, counties or other political subdivisions of the state.

75. *See, e.g. Wilmington Housing Authority*, 228 A.2d 782, City of Fort Smith v. Housing Authority of the City of Fort Smith, 256 Ark. 254, 506 S.W.2d 534 (1974); Arrowhead Redevelopment Citizens Council v. Bd. of Cmmrs. of Denver, 42 Colo. App. 27, 595 P.2d 262 (1978).

76. Housing Authority of City of Woonsocket v. Fetzik, 110 R.I. 26, 289 A.2d 658, 662 (1972). Two decisions cannot be reconciled with the virtually unanimous majority view. Jones v. Middlesex County Bd. of Elections, 259 F. Supp. 931 (D.C.N.J. 1966) holds that the housing authority of the city of Perth Amboy is an agency of the city—yet later New Jersey cases reach opposite conclusions and do not cite this decision. In 1980 the Seventh Circuit Court of Appeals held that under Illinois' new constitutional grant of home rule municipalities could supersede pre-existing legislative provisions limiting their authority through valid legislative action. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980). Perhaps this decision is what triggered the local housing authorities' concern.

CONCLUSION

In states like Indiana, the judiciary holds tight reins on local autonomy. Decisions indicate that regardless of legislative enactments and the policy the legislature seeks to further, courts remain wed to common law doctrines pertaining to municipal corporations.[77]

"Home rule begins at home." Somehow in light of the judicial resistance to home rule in Indiana it seems more plausible that "communal freedom" in deTocqueville's sense has not yet come to form part of Indiana's mores. The courts have demonstrated how easily the home rule illusion of communal freedom can be destroyed.

*Leslie Bender**

77. (a) Dillon's Rule (with ultra vires analysis)—City of Hammond, Lake County v. Indiana Harbor Belt Railroad Company, — Ind. App. —, 373 N.E.2d 893, 897 (1978): "as an instrumentality of the State, a City derives *all* its powers *from* the State and, unless a power is expressly or impliedly given, it must be assumed that the power is non-existent."
(b) Creature Theory—Massey v. City of Mishawaka, — Ind. App. —, 378 N.E.2d 14, 17 (1978): "Indiana municipal corporations are entities created by the State Legislature and possess only those powers granted to them by the State." (c) Occupation of the Field—Board of Public Safety v. State, — Ind. App. —, 388 N.E.2d 582, 585, (1979): "If the state does not choose to occupy an area to the exclusion of the municipal regulation, then a city may impose additional, reasonable regulations. However, a city may not impose regulations which are in conflict with rights granted or reserved by the General Assembly."
(d) Legislative Powers Not Delegable (decided three months after Title 36 became effective)—Stanton v. Smith, — Ind. —, 429 N.E.2d 224, 228 (1981).

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APPENDIX

SURVEY OF HOME RULE IN THE UNITED STATES

State	*Source of Authority*	*Comments*
Alabama	ALA. CODE §§ 11-44-1 *et seq.* (1975)	Commission form
Alaska	ALA. CONST. art. X, §§ 1, 9-11	
Arizona	ARIZ. CONST. art. XII, §§ 1-6	
Arkansas	ARK. STAT. ANN. §§ 19-1042 *et seq.* (1980)	
California	CAL. CONST. art. XI, §§ 1-3, 5, 7	
Colorado	COLO. CONST. art. XX, §§ 1, 6	
Connecticut	CONN. CONST. art. X, §§ 1-2	
Delaware	DEL. CONST. tit. 22, §§ 801-836	
Florida	FLA. CONST. art. VIII, §§ 1-6	
Georgia	GA. CONST. § 2-6001 GA. CODE ANN. ch. 69-10 (1976)	Gen. Assembly empowered to enact legis. granting self-govt.
Hawaii	HAWAII CONST. art. VII, § 2	
Idaho	IDAHO CONST. art. XII, § 2	
Illinois	ILL. CONST. art. VII, § 6	
Indiana	IND. CODE § 36-1-3-1 (1980)	
Iowa	IOWA CONST. art. 3, §§ 38A, 39A	
Kansas	KAN. CONST. art. XII, § 5	
Kentucky	KY. REV. STAT. §§ 83, 410 *et seq.* (1982)	Empowered by Ky. Const. § 156
Louisiana	LA. CONST. art. VI, §§ 4-9	
Maine	ME. CONST. art. VIII, pt. 2, § 1	
Maryland	MD. CONST. art. XI-A, §§ 1-7; art. XI-E, §§ 3-6; art. XI-F, §§ 1-10	
Massachusetts	MASS. CONST. pt. 1, art. 5	
Michigan	MICH. CONST. art. VII, §§ 21, 22	
Minnesota	MINN. CONST. art. XII, § 4	
Mississippi	MISS. CONST. art. 4, § 88 MISS. CODE ANN. §§ 17-13-1 *et seq.* (1972 & Supp. 1982)	not exercised—Interlocal Coop. of Govt. Act (1974)
Missouri	MO. CONST. art. XI, §§ 1-9	
Montana	MONT. CONST. art. XI, §§ 5, 6	
Nebraska	NEB. CONST. art. XI, §§ 2, 5	
Nevada	NEV. CONST. art. VIII, § 8	
New Hampshire	N.H. CONST. pt. 1, art. 39	
New Jersey	N.J. CONST. art. 4, § 7911 N.J. REV. STAT. §§ 40:69A-29-30 (1967)	
New Mexico	N.M. CONST. art. X, §§ 4-6	
New York	N.Y. MUN. HOME RULE LAW, §§ 1 *et seq.* (McKinney 1969).	

North Carolina	N.C. GEN. STAT. ch. 153A (1978)
North Dakota	N.D. CONST. art. VII
Ohio	OHIO CONST. art. XVIII, § 7
Oklahoma	OKLA. CONST. art. XVIII, §§ 1-7
Oregon	OR. CONST. art. xi, § 2
Pennsylvania	PA. CONST. art. IX, § 2
Rhode Island	R.I. CONST. amend. XXVIII, §§ 1-12
South Carolina	S.C. CONST. art. VIII, §§ 1-16
South Dakota	S.D. CONST. art. IX, § 2
Tennessee	TENN. CONST. art. XI, § 9
Texas	TEX. CONST. art. XI, § 5
Utah	UTAH CONST. art. XI, § 5
Vermont	VT. STAT. ANN. tit. 17, § 2630 et seq. (1977)
Virginia	VA. CONST. art. VII VA. CODE §§ 15.1-833-837
Washington	WASH. CONST. art. XI, § 10
West Virginia	W. VA. CONST. art. VI, § 39(a)
Wisconsin	WIS. CONST. art. XI, § 3
Wyoming	WYO. CONST. art. XIII, § 1(c)