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THE LEGAL BASIS FOR MUNICIPAL INCOME TAXES IN MICHIGAN

Arthur M. Wisheart*

I. *Introduction*

WRITERS in the field of municipal administration, as well as local officials, constantly and consistently tell us that the cities need more money. Is it true?¹ The answer to this question would seem to depend on the response of the electorate in a given municipality to the case made for the proposition by their city officials. To establish the validity of the contention that the cities need more money is not an objective of this article. Assuming the validity of this contention, however, the problem then becomes one of finding ways to increase municipal revenue.

The local real property tax is the leading source of income for cities at the present time, and it is capable of still greater productivity.² Although legal limitations may stand in the way of increasing property tax rates, the same result can be obtained by increasing the assessed valuation of property. This is possible since full value assessments in the United States are practically nonexistent.³

Aside from possible legal limitations, many municipalities are

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¹ Although a given city either may or may not need more revenue, the proposition that cities in general do not have enough revenue to meet their expenditures is not difficult to justify. "While the total spending of State and local governments has increased at a slower rate from 1950 to 1951 than the growth in receipts, the general situation can be characterized as one of inadequate revenue." U.S. TREASURY DEPARTMENT, FEDERAL-STATE-LOCAL TAX COORDINATION 2 (1952). From 1942 to and including 1951, total local tax revenue increased only 86.4%, while state tax revenue increased 128.9% and federal tax revenue increased 275.2% in the same period. Taxes on all levels of government rose 205.7% in the period from 1942 to 1951 inclusive. This figure does not reflect changes in governmental revenue from other sources such as business activities, contributions, and investment earnings. During the same period the national income rose 102%. U.S. BUREAU OF THE CENSUS, GOVERNMENT REVENUE IN 1951, Table II, p. 9 (1952).

² "Local governments, . . . relying heavily on the property tax, have not benefited proportionately from the high level of economic activity." This is explained by the fact that the property tax, although a relatively stable source of revenue, is not as sensitive to changes in the economic cycle as are most other tax sources of revenue. Reasons given for this are (1) the valuation of property at substantially less than market value, (2) the lag between changing economic conditions and the corresponding adjustments in assessments, and (3) the failure to anticipate increased inflationary demands for revenue. The stability of the property tax is helpful to local governments in times of economic recession, but it occasions difficulty in inflationary periods. U.S. TREASURY DEPARTMENT, FEDERAL-STATE-LOCAL TAX COORDINATION 2 (1952).

³ "The average adjusted rate decreased from \$24.93 per thousand in 1950 to \$23.65 in 1951—a drop of 5.1 per cent. Since the adjusted rate is computed by multiplying the

reluctant to add to the property tax burden, for they believe that direct economic participation in local governmental activities should not discriminate on the basis of the ownership of real property alone. Property owners themselves are inclined to feel that a diversification of the local tax base is long overdue.⁴ In such a situation, a municipality may turn to the comparatively recent nonproperty taxes.⁵

Nonproperty taxes may be classified into the "substantial revenue" and "nuisance" categories. The "nuisance" type is used to fill that "extra amount" which may be needed to balance a city's budget,⁶ while the "substantial revenue" taxes are levied more in accord with a long term fiscal program of tax diversification, capital improvement, and reduction of municipal indebtedness.

Chief in terms of revenue producing ability among taxes of the latter classification is the municipal income tax. It produced amounts of from 50 to 70 percent of the revenue of the property tax for the cities levying it in 1951.⁷ Chief in terms of utilization by municipalities is the municipal sales tax which was used by 92 cities in the same year.⁸

unadjusted or actual rate by the ratio of assessed value to current market value, the 1951 decrease indicates that assessed valuations have failed to increase along with the current upward trend of market values." Citizens Research Council of Michigan, "Tax Rates of American Cities," 41 NAT. MUN. REV. 18 (1952).

⁴ "For the country as a whole, real estate still accounts for almost 90 cents of every dollar of local tax revenue." Ecker-Racz, "Intergovernmental Tax Coordination: Record and Prospect," 5 NAT. TAX J. 245 at 249 (1952).

⁵ For the best general discussion of nonproperty taxes, see Hillhouse and others, *WHERE CITIES GET THEIR MONEY* (1945, with 1947, 1949, and 1951 supplements).

⁶ See Wisheart, "The Admissions Tax as a Source of Revenue for Michigan Municipalities," UNIVERSITY OF MICHIGAN BUREAU OF GOVERNMENT INSTITUTE OF PUBLIC ADMINISTRATION, PAPERS IN PUBLIC ADMINISTRATION (No. 10) (1954).

⁷ Thirty-four states and 24 cities of over 10,000 population utilized personal income taxes in 1951. Municipal income taxes customarily are imposed at a rate of 1%. It is estimated that a 1% income tax would yield \$17.51 per capita for cities over 500,000 population. In 1950 the tax yielded a total of \$65,632,500 in revenue for the 24 cities imposing it. The jurisdictions in which municipalities levy income taxes are Kentucky, Missouri, Ohio, Pennsylvania, and the District of Columbia. The economic effect of municipal income taxes generally is described as roughly proportionate. This proportionality is considered desirable since other local taxes have a regressive economic effect when measured in terms of personal income. Because they are imposed on nonresidents earning income within the city limits in addition to being imposed on residents, municipal income taxes have been found to facilitate movements for the annexation of outlying urban districts. Such taxes have been criticized because of the difficulties encountered in the municipal administration of them. They also are quite sensitive to change in the economic cycle. The characteristic last mentioned is an advantage from the standpoint of a taxpayer but a disadvantage from the standpoint of a municipality which relies too heavily on the revenue expectations of its income tax. For a discussion of the municipal income tax in terms of revenue produced, present utilization, and administrative operation, see Wisheart, "The Income Tax as a Source of Revenue for Michigan Municipalities," UNIVERSITY OF MICHIGAN BUREAU OF GOVERNMENT INSTITUTE OF PUBLIC ADMINISTRATION, PAPERS IN PUBLIC ADMINISTRATION (No. 10) (1954).

⁸ HILLHOUSE, *WHERE CITIES GET THEIR MONEY* 15 (1951 Supp.).

The purpose of this article is to explore the legal difficulties which might beset a Michigan municipality attempting to impose an income tax. Because of the similarity of some of these difficulties to those encountered in other jurisdictions, it is hoped that this study will be useful outside of as well as within the state of Michigan.

II. *The Saginaw Tax*

Saginaw is the only Michigan city which has attempted to impose a municipal income tax. On May 22, 1951, the city council asked the voters the following question:

"Shall section 45 of chapter 7 of the city charter be amended: To authorize a tax levy on property of not to exceed 1%; to authorize for 10 years only an excise tax of not more than 1% on salaries, wages, commissions, other compensation and profits of both residents and nonresidents; and to provide for the use of the net proceeds of such excise tax to reduce property taxes, defray annual sewage bond expense, and for public improvements?"⁹

On the advice of the attorney general that the city did not have authority to levy this tax, the governor refused to approve the proposed amendment. Notwithstanding the governor's disapproval, the required two-thirds of the council¹⁰ favored sending the proposition before the voters, and the amendment was passed by a vote of 9,030 to 5,432.¹¹

The tax was to go into effect on January 1, 1952. Before this date, however, an action was brought to enjoin the city from levying the tax. Plaintiffs contended that the tax was invalid both because of the form of the charter amendment proposed and because of the character of the tax itself. Circuit Judge Boardman granted the injunction.

The Michigan Supreme Court affirmed the injunction decree on the procedural ground that the form of the charter amendment was invalid. The proposed amendment was said to contain three separate propositions—(1) a 10 mill limitation on the property tax, (2) a municipal income tax, and (3) a disposition of tax revenue

⁹ This provision is set out in *House and Corson v. Saginaw*, 334 Mich. 241 at 245, 54 N.W. (2d) 314 (1952).

¹⁰ As this requirement was met by the exact number necessary, one of the subsequent controversies centered on the qualification of one of the council members to vote on the question because of his interest in the real estate business and consequent desire for low property taxes to increase real estate values.

¹¹ Tharp, "The City of Saginaw Adopts an Income Tax," 24 MICH. MUN. REV. 99 (1951).

—without affording the electors the opportunity to vote for or against each proposition separately, as is required by Michigan law.¹² Judge Dethmers termed the tax limitation proposition as nothing more than “attractive bait to win approval of the income tax.”¹³ From a legal standpoint, the Michigan Supreme Court decision constitutes a rather strict interpretation of the statute referred to above, but perhaps a justifiable result in terms of the express wording of this enactment.¹⁴

The failure of the Saginaw tax on procedural grounds leaves the substantive legal questions challenging the municipal income tax in Michigan unanswered. It is for this reason that these substantive legal problems are considered in this article.

The tax on earned income proposed in Saginaw is typical of the kind that any other city in Michigan might desire to impose. It is similar to the income taxes levied by most other cities, contains most, not all, of the provisions about which controversy has arisen, and has been considered on its merits in one Michigan court.¹⁵ Since the injunction granted by the circuit court was based upon questions of substantive law posed by the tax rather than on the procedural grounds of the supreme court's affirmance, the opinion of Judge Boardman and the arguments of the plaintiffs in their briefs before the supreme court are sources of some of the principal contentions made against the tax.

Plaintiffs House and Corson, members of the UAW-CIO, brought the equity action in their own behalf and in behalf of the membership of the union. Interests claimed to be represented in this action included those of residents of the city subject to the tax, nonresidents working in the city who could not vote on the proposed charter amendment, shareholders in corporations engaged in interstate commerce, and representatives of units of local governments interested in tax revenue (such as nearby school districts).

“In the opinion of the Court, the basic question involved in the entire litigation is the question of whether a home-rule municipality in this state has the power to impose a tax, such as the one here in question, under the existing general law and the state constitution.”¹⁶

¹² “Any proposed amendment shall be confined to 1 subject and in case a subject should embrace more than 1 related proposition, each proposition shall be separately stated to afford an opportunity for an elector to vote for or against each such proposition.” Mich. Comp. Laws (1948) §117.21.

¹³ House and Corson v. Saginaw, 334 Mich. 241 at 248, 54 N.W. (2d) 314 (1952).

¹⁴ See note, 51 MICH. L. REV. 609 (1953).

¹⁵ House and Corson v. Saginaw, 334 Mich. 241, Record on Appeal from the Circuit Court of the County of Saginaw (Chancery), No. 45441, p. 104 (December 28, 1951).

¹⁶ Id. at 89.

The circuit court took the view that municipalities are creatures of the state, exercising only those powers expressly delegated to them, or necessarily implied therefrom. Taxation, especially, is a power attributable to sovereignty which must be specifically delegated since only the state may exercise sovereign powers.¹⁷ In the opinion of the court, the constitutional provision specifying that "The legislature shall provide by a general law for the incorporation of cities . . ."¹⁸ assumes the non-existence of organic powers in Michigan municipalities and should be compared with similar provisions in the Missouri Constitution.

Deciding that Saginaw, a home rule city, had no organic power on which it could rely to levy the tax, the court then turned to the question of whether the home rule act¹⁹ delegated the city power to accomplish the same result. This brought up the question of whether the income tax, termed a "specific excise" in the ordinance²⁰ as well as in the charter amendment proposal, was an excise tax within the meaning of the "permissible" provision in the home rule act.²¹

In answering this question, the court quoted from divergent definitions of "excise," said that the inclusion of income tax within the meaning of this word was the broad view, and emphasized the rule that tax laws are to be strictly construed in favor of the taxpayer. It found that "virtually without exception, an excise tax has been judicially determined to be an *indirect* tax,"²² whereas an income tax, relying on the decision in the *Pollock* case,²³ is a direct tax. The court concluded that an income tax cannot be an excise, and therefore could find no express legislative authorization for such a tax. Accordingly, the charter amendment and the ordinance were declared invalid.

The court further expressed doubt as to whether the state legislature could authorize the cities to levy such a tax since, in its opinion, it is dubious whether the state itself could impose an income tax. This conclusion is based upon (1) conflicting opinions of the attorney general and (2) the failure of a constitutional amendment authorizing a state income tax on four different occasions (in 1922,

¹⁷ *Id.* at 103.

¹⁸ Mich. Const., art. VIII, §20.

¹⁹ Mich. Comp. Laws (1948) c. 117.

²⁰ Saginaw Ordinances, §102.1.

²¹ Mich. Comp. Laws (1948) §117.4(i).

²² *House and Corson v. Saginaw*, 334 Mich. 241, Record on Appeal from the Circuit Court of the County of Saginaw (Chancery), No. 45441, p. 90 (December 28, 1951).

²³ *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601, 15 S.Ct. 912 (1895).

1924, 1934, and 1936).²⁴ The state intangibles tax was distinguished from an income tax by calling it a specific tax measured by income. The court pointed out that if an income tax is considered to be a tax on property, a constitutional question of uniformity arises.²⁵

In the opinion of the court, the "mandatory" home rule charter provision to the effect that the "subjects of taxation for municipal purposes shall be the same as for state, county, and school purposes under the general law" should be applied to the municipal income tax. Since income as a tax subject had not been authorized for state, county, and school purposes under general law, the cities could not utilize this tax subject.²⁶

III. *Municipal Power in Michigan—Before 1908*

A development of the historical and judicial context in which present constitutional and statutory provisions relating to municipal powers were framed is a desirable aid in the interpretation of what powers a Michigan municipality may exercise today. It therefore seems proper to inquire into what powers were exercised by municipalities in Michigan before the constitutional change in 1908 and to compare with them (1) the purposes sought to be accomplished by the change and (2) the powers that have been exercised since that time.

From what sources are municipal powers derived? The traditional answer to this question is that municipalities are agencies of the state and exercise only those powers delegated to them by the state. The delegated powers commonly are grouped into four classifications: (1) expressly delegated powers, (2) powers necessarily implied from those expressly granted, (3) inherent powers, and (4) powers implied from the declared objects and purposes of the municipality.²⁷

Express grants of power to municipalities are found in state constitutions, statutes, and municipal charters. "A municipal corporation possesses and can exercise all powers granted in express terms, so far as consistent with the United States Constitution, treaties and laws, and the state constitution and the general laws of the state."²⁸

²⁴ *House and Corson v. Saginaw*, 334 Mich. 241, Record on Appeal from the Circuit Court of the County of Saginaw (Chancery), No. 45441, p. 102 (December 28, 1951).

²⁵ Mich. Const., art. X, §3.

²⁶ *House and Corson v. Saginaw*, 334 Mich. 241. Record on Appeal from the Circuit Court of the County of Saginaw (Chancery), No. 45441, pp. 104-105 (December 28, 1951).

²⁷ 2 McQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §10.09 (1949).

²⁸ *Id.*, §10.10.

Only some of the states recognize the doctrine of inherent municipal powers. Even where it is accepted, the doctrine is difficult to pin down in terms of definition. "There is some authority for defining inherent powers as those necessary to the existence and due functioning of a municipal corporation. . . ." ²⁹ The inherent powers doctrine can be used both as a limitation on state legislative interference with municipal affairs and as an affirmative source of power for municipalities. In Michigan the inherent powers doctrine has been limited, in the main, to use as a restriction on the power of the state rather than an affirmative source of municipal power. Some of the cases subsequently cited illustrate such a use.

Implied powers are those powers (1) necessary to the exercise of those expressly granted and (2) indispensable to the purposes of the municipal corporation.³⁰ These are determined according to rules of constitutional and statutory interpretation and with some reference to powers customarily exercised by municipalities.

The Michigan court was a leader in asserting that there is an inherent right to local self-government possessed by municipalities. This right found its most positive assertion as a limitation on the power of the state in Judge Cooley's concurring opinion in *People v. Hurlbut*.³¹ In the *Hurlbut* case the court held that provisional appointments to the Detroit Board of Public Works by the state legislature were valid. But, by way of dictum, Judge Cooley addressed himself to the question of "whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure?"³² In answering this question, Judge Cooley wrote:

"The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people. . . . We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our gen-

²⁹ Id., §10.11.

³⁰ Id., §10.12.

³¹ 24 Mich. 44, 9 Am. Rep. 103 (1871). Cf. *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N.W. 953 (1916).

³² 24 Mich. 44 at 96 (1871).

eral framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy."³³

Judge Cooley noted, "these corporations are of a twofold character; the one public as regards the state at large; in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens." This public-private analysis has been used as a test in subsequent cases to help determine (1) whether the state could interfere with municipal operations and (2) whether a given exercise of municipal power was valid in the absence of express authority by the state.

The dictum of the *Hurlbut* case was followed in other Michigan cases. In *Board of Park Commissioners v. Common Council of Detroit*,³⁴ the court refused to mandamus the common council to appropriate funds for the acquisition of a park area by the Board pursuant to an enabling act by the state legislature. Judge Cooley characterized this as within the area of private concern of the municipality, and said the state could permit but not compel the exercise of power. The power of the legislature to prescribe duties for municipal officers was said to be limited in order to give meaning to the constitutional guarantee of local self-government.³⁵ The subsequent case of *Attorney General v. Common Council of Detroit*³⁶ was distinguished from the preceding cases on the ground that it concerned the local division of powers rather than usurpation of local powers by the state.

The power of the state to impose excise taxes in the absence of specific constitutional authority was declared at an early date.³⁷ The *Walcott* case involved the validity of a gross receipts tax imposed on express companies as a condition precedent to the granting of the privilege to do business in the state. The Constitution of 1850 expressly authorized certain types of excises and provided that other taxes should be uniform. The court refused to find a negative implication in the constitutional provisions prohibiting the tax in

³³ *Id.* at 97.

³⁴ 28 Mich. 228 (1873).

³⁵ Cf. *Board of Park Commissioners v. Mayor of Detroit*, 29 Mich. 343 (1874); *Allor v. Wayne County Auditors*, 43 Mich. 76, 4 N.W. 492 (1880).

³⁶ 29 Mich. 108 (1874).

³⁷ *Walcott v. The People*, 17 Mich. 68 (1868).

question. It said that power to levy such a state tax was inherent in the constitution, and added that it is difficult to believe that the people of Michigan would create a government without providing adequate sources of support.

The supreme court held that municipal corporations also had implied power to levy excises.³⁸ The *Kitson* case involved the validity of an occupational excise imposed on saloon keepers by the City of Ann Arbor. The court held that this levy was a valid exercise of the police power even though the license fee was of a substantial amount and yielded revenue. The case turned on the uniformity and cash value clauses of the Constitution of 1850, and the court held they did not apply to the excise tax in question, following the authority of the *Walcott* case.

The philosophy underlying these cases was drawn together by Judge Cooley in *Youngblood v. Sexton*.³⁹ That case involved the imposition by the state of a flat rate excise tax on liquor dealers. The tax was to be collected by county sheriffs for the benefit of the cities, towns, and villages wherein the liquor businesses were carried on. The action was to enjoin the collection of the tax. In this case there is no question of authority, the pivotal question being whether this tax was valid in light of the constitutional provision that the proceeds of state specific taxes must be paid into the primary school fund.

Judge Cooley first observed that equity did not have jurisdiction to grant an injunction because of the adequacy of the legal remedy, but he went on to decide the other questions because of the public interest involved. Since this was a local tax levied for a local use (but by the state), he said that it did not come within the scope of the constitutional provisions relating to state specific taxes. (This would seem to answer the contention that municipal income taxes cannot be authorized by the state if the state itself cannot levy income taxes.)

Judge Cooley added more dictum on the matter of authority. He referred to the distinction he had made in the *Hurlbut* case between the public and private powers of a municipal corporation, and classified taxation, along with police power,⁴⁰ as a matter of general public concern.⁴¹ Noting that it was decided in the *Walcott* case that the

³⁸ *Kitson v. Ann Arbor*, 26 Mich. 325 (1873).

³⁹ 32 Mich. 406 (1875).

⁴⁰ See *People v. Mahaney*, 13 Mich. 481 at 497 (1865).

⁴¹ This generally is the view taken in other jurisdictions. See *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 203 S.W. (2d) 438 (1947).

state might enact new specific taxes and in the *Kitson* case that local excises were authorized, Judge Cooley went on to say, "All taxation must be authorized by the state. . . ." He added, however, that "we know of no reason why all taxation for the ordinary purposes of government may not be levied under general laws when no express provision of the constitution forbids it."⁴²

In the absence of home rule, municipalities traditionally have been considered agencies of the state, exercising only the powers expressly or impliedly delegated to them. This doctrine was not accepted without qualification in Michigan. By his dictum in the *Hurlbut* case, Judge Cooley showed a disinclination to follow the fiction that states were created prior to cities and that the cities therefore derived their powers from the state. Since the cities could be proved to be in actual existence before the states had been formed, he argued that the constitution of the state should be interpreted to take cognizance of this historical fact rather than strictly construed against the powers "delegated" to municipalities.

The second qualification upon the "agency of the state" interpretation in Michigan has been the recognition of inherent powers ascribable to municipalities. The inherent power doctrine was used in a line of cases as a limitation upon the power of the state to interfere with the activities of municipalities, and was limited to private activities of municipalities as distinguished from those having a more general import. Police power and municipal taxation both expressly were designated as matters of general concern for which state interference was permitted and state authority for municipal activity was required. In regard, however, to state authority for taxation, a broad interpretation was given, the court indicating that taxes for the ordinary purposes of government might be levied under general laws when they are not forbidden by express constitutional provisions.

IV. *The Michigan Constitutional Change (1908)*

Having surveyed briefly the power of Michigan municipalities before 1908, we now shall turn to a consideration of the constitution adopted in 1908 and its influence upon municipal powers.

Article XV, section 13 of the 1850 Constitution provided that "The legislature *shall provide* for the incorporation and organization of cities and villages, and shall *restrict* their *powers* of taxation, borrowing money, contracting debts, and loaning their credit [emphasis

⁴² *Id.* at 414.

supplied].” Section 14 of the same article was a further elaboration of the scheme of legislative control. It provided that “Judicial officers of cities and villages shall be elected and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct.”

The general features of these provisions were carried over by the Constitution of 1908 in article VIII, section 20. “The legislature *shall provide* by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their *rate* of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts [emphasis supplied].”

The first point of similarity to note in these provisions is that words of direction are used. In each case it is stated clearly that the legislature “shall provide” for the establishment of municipal corporations and for their organization. In each constitution it also was deemed important to direct that the legislature either restrict or limit municipal fiscal powers.

Despite the similarities in the directions given by the people speaking through their constitution to the legislature, however, there are significant differences in the language of the constitutional change. The 1908 Constitution requires that the legislative provisions pertaining to municipalities be by general law. Nothing is said in this regard in the 1850 Constitution.

In the 1850 Constitution it is provided expressly that the legislature must restrict the *power* of taxation of municipal corporation, whereas nothing is said in the 1908 Constitution about limiting the municipal tax power. It says only that the *rate* of taxation for municipal purposes shall be limited by the legislature. Because of this difference in the language used, it would seem reasonable to suppose that the framers of the 1908 Constitution did not think it necessary to require the legislature to restrict municipal tax powers, apparently feeling that the legislature was competent to make adequate provisions itself in this matter of general concern.

Article IV, section 38 of the Constitution of 1850 provided that the “legislature *may confer* upon . . . incorporated cities . . . such powers of a local, legislative and administrative character as they may deem proper [emphasis supplied].” This section, discretionary on the part of the legislature as distinguished from the mandatory provisions set out in the preceding paragraph, seems to indicate that the constitutional intent was to vest in the legislature complete control over municipal powers in the sense that municipalities could

be considered not only as agencies of the state, but also as agencies of the state legislature. Under this scheme of 1850 it is apparent that municipalities could exercise only those powers expressly or impliedly delegated to them by the legislature, and, in addition, perhaps, those inherent in the nature of municipal corporations or units of local government in existence at the time the constitution was formulated. Note the change in the language found in article VIII, section 21 of the 1908 Constitution:

“Under such general laws the *electors* of each city and village [rather than the members of the legislature] *shall have power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village* [Emphasis supplied. The immediately preceding italicized words were added by amendment in 1912 to make it clear that cities operating under legislative charters also were to have home rule powers. MICHIGAN SENATE JOURNAL, Extra Session, 1912, Second Session, p. 89] and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of the state.”

A comparison of these provisions in the 1850 and the 1908 constitutions demonstrates clearly an intent on the part of the people of the state to shift the locus of power relating to the activities of municipal corporations. Both constitutions directed the legislature to provide for the incorporation of municipalities. But, once that was done, the Constitution of 1850 indicated that the municipalities should exercise only those powers delegated from the legislature, whereas the Constitution of 1908 shifted power to the municipalities by providing that the electors of each city, incorporated under the general laws of the state and acting through its regularly constituted authority, should have power (1) to frame, adopt and amend its charter and (2) to pass all laws and ordinances relating to its municipal concerns.

This change is demonstrated further by the fact that the 1850 Constitution saw fit to direct that the legislature restrict the power of municipal taxation whereas the 1908 Constitution provided only that the legislature should limit the rate of municipal taxation, saying nothing about the power. This is another illustration that the new constitutional provisions (1908) contemplated a change in the locus of municipal power from the state and in the direction of the municipalities. Recognizing, however, that the state still had an

interest in the general property tax, and that both the state and local units would continue to use it, the 1908 Constitution directed that the legislature limit the rates of that tax which the municipalities might levy in order that there be some measure of tax coordination between state and local units of government. It does not appear from this language that the constitution was intended to limit the power of the electorate of municipalities to impose upon themselves non-property taxes in which the state, by its failure to legislate on the matter, had demonstrated no interest whatever.

The purpose of these provisions of the Constitution of 1908 was explained by Mr. Lawton T. Hemans, of Ingham County, before the committee of the whole of the constitutional convention on January 16, 1908:

"We have here departed from what has been the rule in many of the state Constitutions, for we have left to the legislature the broad powers of framing what those general principles and fundamental ideas should be. We have not followed the Constitution of Minnesota or the other states which have placed all that great mass of legislation in their Constitution, but we have said that it should be under the general law enacted by the legislature, we have confined the provision to the parts that should be embraced in a Constitution, leaving the legislature to work out the details that belong to it."⁴³

The question then arises as to whether these constitutional provisions are self-executing—whether they can be given effect in and of themselves—or whether they require legislation to put them into effect. "Generally, constitutional provisions as to taxation are not self-executing."⁴⁴ This rule seems especially applicable to the constitutional provisions under consideration, for they expressly require that the "legislature shall provide by general law" and that "under such general laws" the home rule powers are to be exercised.⁴⁵ A provision of the constitution is not self-executing where its language plainly indicates that the subject-matter is referred to the legislature for action.⁴⁶

The procedural guide for a Michigan municipality seeking to levy a tax, therefore, is not in the constitution itself, but in the general law enacted by the legislature.

⁴³ Michigan Constitutional Convention, PROCEEDINGS AND DEBATES, vol. 2, p. 809 (1907).

⁴⁴ 1 COOLEY, TAXATION, 4th ed., §132 (1924).

⁴⁵ See *Bay City v. State Board of Tax Administration*, 292 Mich. 241, 290 N.W. 395 (1940).

⁴⁶ 1 McQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §321 (1949).

V. *Home Rule in Michigan*

Two types of home rule generally are recognized—legislative and constitutional. Although derived from constitutional authority, the general structure of home rule in Michigan was outlined by the legislature in the home rule act of 1909.⁴⁷ As indicated above, the home rule sections of the Michigan Constitution are not self-executing.⁴⁸

Although home rule in Michigan is legislative in character, a question arises as to whether the home rule act should be interpreted as grants of power from the legislature to municipalities traditionally are interpreted, or whether the fact that it was enacted under constitutional direction has a bearing on the interpretation to be given it. The Michigan Supreme Court, in a case decided soon after the passage of the home rule act, commented:

“The act was passed in obedience to a mandate of section 20, Article VIII, of the Constitution. . . . The new system is one of general grant of rights and powers, subject only to certain enumerated restrictions, instead of the former method of only granting enumerated rights and powers definitely specified.”⁴⁹

The court in subsequent cases followed this reasoning, and held that the constitutional provisions and the home rule act were to be construed together,⁵⁰ that “it was sought fundamentally to place in the hands of the electors of the cities chartered thereunder increased power of governmental control,”⁵¹ that the home rule charter constitutes the organic law of the city and is to be treated as other organic acts are treated,⁵² that the distinction between local functions and those performed by a municipality as an agent of the state should be preserved,⁵³ and that the provision for a general law for the incorporation of municipalities was intended to confer upon them almost exclusive rights in the conduct of their affairs when the exercise of such rights are not in conflict with the constitution or the general laws applicable thereto.⁵⁴ From these decisions, the conclusion that

⁴⁷ Mich. Pub. Acts (1909), Act 279, p. 497.

⁴⁸ *Gallup v. Saginaw*, 170 Mich. 195, 135 N.W. 1060 (1912); *Bay City v. State Board of Tax Administration*, 292 Mich. 241, 290 N.W. 395 (1940). It has been stated, however, that the words of the constitution made it mandatory on the legislature to pass such legislation. *People v. Sell*, 310 Mich. 305, 17 N.W. (2d) 193 (1945).

⁴⁹ *Gallup v. Saginaw*, 170 Mich. 195 at 199-200, 135 N.W. 1060 (1912).

⁵⁰ *Streat v. Vermilya*, 268 Mich. 1, 255 N.W. 604 (1934).

⁵¹ *School District of Pontiac v. Pontiac*, 262 Mich. 338, 247 N.W. 474 (1933).

⁵² *Streat v. Vermilya*, 268 Mich. 1, 255 N.W. 604 (1934).

⁵³ *Attorney General ex rel. Lennane v. Detroit*, 225 Mich. 631 (1923).

⁵⁴ “The purpose of these and other provisions which follow undoubtedly was to secure to cities and villages a greater degree of home rule than they formerly possessed. The

municipal powers in general should be construed more broadly than they were before the Constitution of 1908 seems a safe one.

The general rule has been that the scope of tax laws is not to be extended by implication or forced construction. When the power granted is dubious, it is to be construed strictly and in favor of the taxpayer.⁵⁵ It has been said that "The mischief of a strict construction is easily obviated by the legislature; but the mischief of a liberal construction may be irremedial before it can be reached."⁵⁶ However, the same author also pointed out that "Strict construction does not mean such a construction so as to defeat the intention of the legislature. Where there is really no ambiguity, the rule that ambiguities must be resolved in favor of the taxpayer does not, of course, apply."⁵⁷

Do these rules of interpretation apply to tax powers conferred by a legislature under a constitutional mandate to provide home rule to municipalities? The answer to this question, it is fair to say, is not clear. The power to tax has been called the "highest prerogative of sovereignty."⁵⁸ In a Michigan school district tax case the court quoted with approval the following statement from an opinion involving a state tax: "The presumption of constitutionality following taxing statutes is stronger than applies to laws generally. . . ."⁵⁹ This would seem to indicate its belief that local taxes are to be tested by the same standards that are applicable to state taxes.

Does this presumption applicable to state taxes also apply to municipalities levying taxes under home rule powers required to be formulated for them by the state constitution? Or, to put the question in another way, does article VIII, section 21 of the Michigan Constitution invest municipalities with their own tax sovereignty when acting in conformance with the constitution and general laws of the state? If we are to accept the statement of the *Streat* case, that home rule charters are to be considered organic acts, our answer to this question should be in the affirmative. If not considered grants of organic power, of what significance are the provisions of the constitution requiring the legislature to provide municipal home rule?

provision for a general law for their incorporation was intended to confer upon them almost exclusive rights in the conduct of their affairs. . . ." *Village of Kingsford v. Cudlip*, 258 Mich. 144 at 148, 241 N.W. 893 (1932).

⁵⁵ See *In re Dodge Bros.*, 241 Mich. 665 at 669, 217 N.W. 777 (1928).

⁵⁶ 1 COOLEY, *TAXATION*, 3d ed., 469 (1903).

⁵⁷ 2 COOLEY, *TAXATION*, 4th ed., 1125 (1924).

⁵⁸ *Union Steam Pump Sales Co. v. Secretary of State*, 216 Mich. 261, 185 N.W. 353 (1921).

⁵⁹ *Thoman v. Lansing*, 315 Mich. 566 at 576, 24 N.W. (2d) 213 (1946).

Considered together with the constitutional requirements, it would seem fair to suppose that the legislative home rule act should not be considered or construed as a grant from the legislature to the municipalities of the state in the traditional sense. The grant is from the people of the state, assembled in convention, directing that the legislature establish general rules for the guidance of municipalities in the exercise of their home rule powers.⁶⁰ When municipal activities are matters of local concern, as municipal finances surely are in at least some respects, it would appear that the municipalities, in pursuing these activities, are acting in a capacity other than merely as agents of the state legislature. Rather, they are exercising power which is, in the absence of conflicting state legislation, sovereign in their own electors. Even the doctrine of preemption, which is applied by the courts in Ohio and, by reason of express language of Act 481, in Pennsylvania,⁶¹ cannot be invoked for finding an implied legislative intent contrary to a municipal income tax in Michigan, for the state (1) does not levy such a tax and (2) has not adopted the preemption doctrine.

The problem here is not one of interpreting the scope of the power conferred by the constitution, as it is in California⁶² and Ohio, but is one of construing the legislative act made under the authority of constitutional provisions. As to the final determination of the question, no conclusive statement can be made, other than to refer again to the tenor of Michigan decisions which repeatedly say that the constitutional change in 1908 was to give municipalities more power than they had had previously.⁶³ What is the source of this added power, developing contemporaneously with the constitutional change, if it is not the 1908 constitution itself? And if that is the case, what is the nature of this added power if it is not a constitutional share of the sovereignty reserved to the people of the state? If this is true, then, should not the legislative provisions, compelled by the language of the constitution to effectuate its intent, be construed accordingly?

We now shall turn to a consideration of the home rule act itself. The home rule act includes both "mandatory" and "permissible" charter provisions. "Mandatory" provisions must be included in the

⁶⁰ *Gallup v. Saginaw*, 170 Mich. 195, 135 N.W. 1060 (1912).

⁶¹ Fordham and Mallison, "Local Income Taxation," 11 OHIO ST. L.J. 217 (1950).

⁶² See 9 CALIF. L. REV. 350 (1921) for an interpretation of §§6 and 8 of article XI of that state's constitution.

⁶³ See Dexter, "Legal Aspects of Local Excise Taxes in Michigan," UNIVERSITY OF MICHIGAN BUREAU OF GOVERNMENT INSTITUTE OF PUBLIC ADMINISTRATION, PAPERS IN PUBLIC ADMINISTRATION (No. 2) 67 (1948).

home rule charter whereas "permissible" provisions are optional and within the discretion of the electors of the municipality.⁶⁴

The distinction between mandatory and permissible provisions in itself might be a clue to interpretation of the legislative intent. It seems logical to assume that the fact that mandatory provisions are mandatory discloses an intention on the part of the legislature to treat the matters so designated as of general concern to the state. Such provisions therefore are obligatory on the municipality and should be construed with due regard for the general public interest to which they refer. On the other hand, permissible provisions are directory in nature. They concern matters in which the general interest of the state is not so emphatically asserted. Hence they are in the area of local concern by hypothesis, are optional, and should be construed in keeping with the traditional Michigan distinction between matters of general concern in respect of which the municipality acts as an agent of the state and matters of local concern in respect of which the desirability of a larger share of local self-determination is more apparent. Considered in the context of the "general law" form imposed on the home rule act by the constitution,⁶⁵ the validity of this interpretation seems, a fortiori, strengthened.

This interpretation also is consistent with the tenor of the provisions found in the home rule act. For example, the act, by a mandatory provision, authorizes the levying of property taxes.⁶⁶ This seems to demonstrate a recognition on the part of the state legislature that property taxation will be a part of the scheme of state, county, and school district taxation in the state as well as that of municipalities and that a degree of tax coordination with respect to property taxes is in the general interest of the state. To effectuate this purpose, the section in question provides that municipal property taxes shall be levied on the same subjects as are taxed for state, county and school purposes.⁶⁷ In support of the proposition that the purpose of the mandatory provision is to make a degree of tax coordination possible with respect to the property tax, note that the language of the section, by its very terms, is directed at making the *form* of property taxes actually levied meet certain requirements in regard to the subject matter and the rates imposed rather than providing that the property tax itself shall be mandatory as a source of revenue. Presumably the

⁶⁴ Mich. Comp. Laws (1948) §§117 et seq.

⁶⁵ Art. VIII, §20.

⁶⁶ Mich. Comp. Laws (1948) §117.3(a).

⁶⁷ *Ibid.*

city council could refuse to impose any property tax if city expenses could be met in some other way.

Having provided a mandatory form for property taxation, the legislature recognized the desirability of allowing Michigan municipalities a certain amount of discretion in their sources of revenue and authorized, by a permissible charter provision, municipalities to lay and collect nonproperty taxes in the form of "rents, tolls, and excises."⁶⁸ "Rents" and "tolls" belong to the class of municipal charges made for specific services rendered by the municipal government.

But what of the meaning of "excise" in this context? Does a municipality, having included this provision in its home rule charter, have authority to levy a municipal earned income tax? Or, put in a different way, does such a tax come within the definition of "excise"? This question has not yet been answered by the Michigan Supreme Court, so we shall turn to other sources of definitions of the term.

". . . excises have been said to be taxes laid upon the manufacture, sale or consumption of commodities, upon licenses to pursue certain occupations, and upon corporate privileges." Or, "According to some authorities, they include any taxes which do not fall within the classification of a poll or property tax."⁶⁹

"Taxes fall naturally into three classes, namely, capitation or poll taxes, taxes on property, and excises. In general, it may be said that all taxes fall into one or the other of the foregoing classes, any exaction which is clearly not a poll tax or a property tax being an excise."⁷⁰ "It is, however, difficult to arrive at any all-inclusive definition of the term 'excise tax,' since it has long since been changed from its original connotation of an impost upon a privilege. In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax. . . ."⁷¹ "Although there is considerable confusion on the subject, an income tax is generally regarded as in the nature of an excise tax, and a distinction has been recognized between an income tax on one hand and a property tax on the other."⁷²

⁶⁸ "Each city may in its charter provide . . . for laying and collecting rents, tolls and excises. . . ." Mich. Comp. Laws (1948) §117.4(i).

⁶⁹ 16 McQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §44.190 (1949).

⁷⁰ 51 AM. JUR., Taxation §24 (1944).

⁷¹ Id., §33.

⁷² 27 AM. JUR., Income Taxes §2 (1940). "The federal tax, so far as based on the income from property, is a 'direct' tax as that term is used in the federal constitution; but a tax on the income from a trade, profession or employment, as distinguished from a tax on the income from property, is an excise." 4 COOLEY, TAXATION, 4th ed., §1745 (1924).

There has been no attempt to be exhaustive in the definitions set out above, nor has any effort been made to show any chronological development in the meaning of "excise," although such has existed. As some of the definitions indicate, there has been confusion in the usage of the term. But it also is clear that some very respectable authority, especially that which is more recent, supports the inclusion of "income tax" within the meaning of "excise."

Since good authority does exist for this, the view that the permissible excise provision in a home rule charter should be interpreted to include an income tax seems a reasonable one. It certainly is consistent with the "general grant" theory under the home rule act⁷³ as well as with the idea that a city charter is to be construed as the organic law of the city.⁷⁴

If "excise" is interpreted to mean all taxes except property and capitation taxes, the statutory framework for municipal taxation falls into a pattern of meaning. Municipalities have been authorized to levy two of the three great classes of taxes pursuant to the constitutional mandate to provide for the incorporation of cities by general law: property and excise taxes. Capitation (poll) taxes have not been authorized. The effect of the general law would be to authorize municipalities to levy all taxes, in conformance with the procedural forms prescribed by statute and constitutional provision, other than poll taxes for which express authority has not been provided. The act thus takes on a posture of consistency, and judicial interpretation would not be difficult.

But what if a more restricted view of the meaning of excise is taken? First, is such a view consistent with the interpretation that should be given a statute passed under a constitutional direction? Second, how would the courts go about determining what is and what is not an excise? What criteria would they use in view of the confusion that can exist in the definition of the term? Granted that expediency is not a shortcut to justice, is the problem solved by taking a position which will inject uncertainty into the area of municipal taxation by judicial hair-splitting? Or, do hard cases still make bad law?

The Michigan Supreme Court has expressly adopted the broad definition of "excise" as applied to a state tax—the corporate franchise fee.⁷⁵ The general philosophy of enlarged municipal powers was

⁷³ Gallup v. Saginaw, 170 Mich. 195, 135 N.W. 1060 (1912).

⁷⁴ Streat v. Vermilya, 268 Mich. 1, 255 N.W. 604 (1934).

⁷⁵ Union Steam Pump Sales Co. v. Secretary of State, 216 Mich. 261 at 264, 185 N.W. 353 (1921).

accepted by the Michigan court in a case dealing with a property tax limitation.⁷⁶

There is authority for including an income tax within the meaning of excise, and this authority becomes more forceful when considered in the context of the constitutional direction that the legislature provide by general law for the incorporation of cities. Even if these views of definition and interpretation are not accepted, however, a tax similar to the one attempted in Saginaw could be sustained on the narrower ground that it is an occupational excise measured by income. "An *excise* upon those engaged in a particular occupation, although graded in accordance with income, is an occupation tax and not an income tax."⁷⁷ It was for this reason that Louisville and Paducah (Kentucky) levied occupational excises upon persons earning income within the city limits rather than the Saginaw type of municipal income tax.

There is Michigan judicial rationale going to the support, by analogy, of the proposition that a municipal occupational tax, measured by earned income, is an excise. The state imposes "a specific tax upon the privilege of ownership of intangible personal property."⁷⁸ The measure of this privilege tax is 3 percent of the income produced by income-producing intangibles, except that the tax is not to fall below an amount equivalent to 1/10 of 1 percent of the face, par, or contributed value of the intangible property concerned.⁷⁹ The court held this tax valid as a specific tax on the privilege of owning intangible property. In order to avoid the argument that according to the opinion in the *Pollock* case⁸⁰ an income tax is a tax on property and therefore should be subject to the property tax uniformity clause in the constitution,⁸¹ the court said that "The income basis for measuring the tax does not constitute it an income tax."⁸² State inheritance taxes, also measured by income, were held to be specific excises.⁸³ A corporate franchise tax is an excise, even though the amount is measured by the capitalization of the corporation.⁸⁴

⁷⁶ *School District of Pontiac v. Pontiac*, 262 Mich. 338 at 349, 247 N.W. 474 (1933).

⁷⁷ 4 COOLBY, TAXATION, 4th ed., §1742 (1924). Emphasis supplied.

⁷⁸ Mich. Comp. Laws (1948) p. 3242.

⁷⁹ Mich. Comp. Laws (1948) §205.132.

⁸⁰ *Pollock v. Farmer's Loan and Trust Co.*, 158 U.S. 601, 15 S.Ct. 912 (1895).

⁸¹ Mich. Const., art. X, §3.

⁸² *Shivel v. Kent County Treasurer*, 295 Mich. 10 at 19, 294 N.W. 74 (1940). See *Shapero v. Department of Revenue*, 322 Mich. 124, 33 N.W. (2d) 729 (1948); *Goodenough v. Department of Revenue*, 328 Mich. 502, 44 N.W. (2d) 161 (1950).

⁸³ *Union Trust Co. v. Durfee*, 125 Mich. 487, 84 N.W. 1101 (1901).

⁸⁴ *Union Steam Pump Sales Co. v. Secretary of State*, 216 Mich. 261, 185 N.W. 353 (1921).

Arguing analogically from these state excises, it seems plausible to suppose that a municipal tax, levied on the privilege of earning income in the city, could be treated as an occupational excise measured by the income of the persons benefiting from this privilege. Such a tax would apply to income earned within the city, whether by residents or nonresidents, and would be similar in form to the municipal income taxes in Kentucky referred to above. It would seem rather clearly to be authorized by the "permissible" excise enabling provision of the Michigan home rule act. This type of occupational excise would differ from Saginaw's proposed income tax in that it would be applicable only to income earned in the city by residents rather than to all of their earned income. Its effect on nonresident earned income would be the same as the Saginaw proposal—limited to income earned in the city.

In summarizing the conclusions reached on this branch of the question, we see that there is good authority for saying that an income tax comes within the scope of the excise classification. This "good authority" is the weight of modern authority and represents the trend of the recent cases. In view of the constitutional provisions requiring the legislature to provide for the incorporation of cities by general law and the broad interpretation that should be given the "general law" philosophy of the home rule act by the courts, it would seem particularly desirable, in this legal context, to define "excise" to include an income tax. Even if this view is not accepted, however, there is authority for saying that a tax levied on the privilege of earning income within the city limits and measured by the income earned is an occupational excise.

VI. *Uniformity and Other Legal Questions*

Having concluded that the permissible home rule excise provision can and should be construed to authorize the imposition of a municipal income tax, we now shall consider whether there are legal impediments to alter this conclusion.

One of the arguments most frequently made against such a tax is that it violates the uniformity clause of the state constitution. If an income tax is considered a property tax on the authority of the *Pollock* case, it is assumed that the following provision would prohibit it: "The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."⁸⁵

⁸⁵ Mich. Const., art. X, §3.

But should a municipal income tax be considered a property tax so as to come within this prohibition? No. In the first place, we already have defined it as an excise under the meaning of the permissible home rule provision.

In the second place, the contemporary authority does not consider a tax on income to be a tax on property. "Although the distinction is sometimes a close one, a tax on an occupation or privilege, whether it is called a 'license tax,' an 'occupation tax,' or a 'privilege tax,' is not a tax on property."⁸⁶ It usually is said that the result in the *Pollock* case, can be explained by the provision in the Federal Constitution that direct taxes must be apportioned among the states according to population.⁸⁷ The Michigan court has stated the rule that an income tax is not a property tax. "In construing the covenant it is plain that taxation upon real estate means one thing, and taxation upon income means another."⁸⁸

"The rule of uniformity is not applicable to specific taxes. License taxes, privilege taxes, and occupation taxes are specific taxes and not *ad valorem* taxes upon property."⁸⁹

The same rule also has been applied in Michigan to excise taxes in which the amount of the tax is measured by income. "An income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived."⁹⁰

Undeniably the line between an *ad valorem* tax on intangible property and an excise tax on the privilege of owning such property is a narrow one, but the courts have had no difficulty in drawing it in cases involving state taxes. Even narrower, perhaps, is the line to be drawn between an *ad valorem* tax imposed on property and an annual corporate franchise fee measured by the paid in capital and surplus of the corporation, but the courts also have been able to draw this line.⁹¹

Both the intangible privilege tax and the corporate franchise fee

⁸⁶ 37 C.J. 171 (1925).

⁸⁷ U.S. Const., art. I, §2.

⁸⁸ *Park Bldg. Co. v. Yost Fur Co.*, 208 Mich. 349 at 361, 175 N.W. 431 (1919).

⁸⁹ *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659 at 673, 259 N.W. 352 (1935), concerning a chain store privilege tax, the amount of the tax being graduated in accordance with the number of stores owned.

⁹⁰ *Young v. The Illinois Athletic Club*, 310 Ill. 75 at 81, 141 N.E. 369 (1923), cited with approval in *Shivel v. Kent County Treasurer*, 295 Mich. 10, 294 N.W. 74 (1940). The court concluded that article X, §3 had no application to the tax in question as it related only to *ad valorem* taxes. This reasoning was approved in *Shapero v. Department of Revenue*, 322 Mich. 124, 33 N.W. (2d) 729 (1948).

⁹¹ "That it is not a property tax but is a tax on the franchise to do business as a corporation within the state is . . . clear." *Union Steam Pump Sales Co. v. Secretary of State*, 216 Mich. 261 at 264, 185 N.W. 353 (1921).

seem, as a matter of degree, at least as closely akin to an ad valorem tax on property as a municipal excise on the privileges of earning income or living within the city limits. Two distinctions appear between these excises and property taxes, although neither admittedly is very great. The ad valorem taxes are imposed according to some sort of valuation of the property, supposedly related to its intrinsic worth,⁹² whereas the excises in question are imposed according to measures, such as income or capitalization, related to but distinct from the intrinsic value of the property itself. The second distinction is one of form only. The property taxes are imposed directly on property itself (in theory) whereas the excises are imposed on privileges related to the ownership or use of property. The tenuousness of this can be illustrated by considering the circumstances in which a property interest is a privilege and when a privilege is a property interest.

Conceptual overlapping clearly is possible. The elimination of both of the narrow distinctions referred to above would be possible in a hypothetical situation. Suppose the intangibles tax were imposed on the privilege of owning such property with the rate measured by the cash value of the property (rather than the income it produces). What then: an excise or an ad valorem tax? Fortunately this hard question has not yet had to be answered in Michigan. By eliminating distinctions of measure and form, the only remaining distinction would be one of words, i.e., what tag did the legislature attach to the tax? Since the ultimate distinction in such a hypothetical situation is one of words only, it would seem that the traditional presumption of constitutionality of legislative acts would control the court in its application of conflicting constitutional provisions. As a policy matter, any tax is, after all, subject to the political restraints inherent in a representative form of government. When the people elect to tax themselves in the interest of the public weal, it should, it would seem, take a clear showing of abrogation of some "fundamental" constitutional concept to induce the court to upset the act of sovereignty reflected in a good faith legislative choice.

When the discussion reaches the point of presumptions, opponents of a tax will argue that ". . . in case of doubt a tax statute should be construed strictly in favor of the taxpayer and against the municipality."⁹³ But this, it should be pointed out, is a rule pertaining

⁹² "All assessments hereafter authorized shall be on property at its cash value." Mich. Const., art. X, §7.

⁹³ 16 McQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §44.13 (1949).

to ambiguity in tax statutes. We are assuming a case in our hypothetical situation in which the legislative body has authorized "by clear warranty of the law"⁹⁴ a certain kind of tax to be imposed on designated taxpayers.

Construed as a specific tax rather than a property tax, article X, section 4, of the constitution applies to the municipal income tax: "The legislature may by law impose specific taxes, which shall be uniform on the classes on which they operate."⁹⁵ Is a flat rate income tax uniform on the classes on which it operates? A flat rate tax would seem as uniform as a tax on income can be.⁹⁶

Is the classification itself reasonable, or is it a discriminatory violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution? To take an extreme example, if the tax were levied against just one citizen in a city of 20,000 population, the classification would fail as arbitrary and capricious. The tax in question, however, is levied on all earned income in the city and that earned by residents outside of the city as well. Taken together with the presumption in favor of the reasonableness of legislation, this clearly appears to meet the equal protection test as a reasonable classification.

A more serious problem would arise under the Michigan constitutional provision cited above if the municipality attempted to impose a progressive tax with the rates graduated according to the income of the taxpayer. Although several of the states have imposed such a tax, all municipal taxes, other than that imposed by Washington, D.C., have been imposed at a flat rate.⁹⁷

In the case of a graduated rate, the legal argument for such a tax centers on the question of whether the setting up of various income brackets is a reasonable classification under the Michigan Constitution.⁹⁸ Notice again that the only constitutional limitation is that such taxes be uniform on the classes on which they operate. This limitation pertains to uniformity only, not classification itself.

⁹⁴ *Id.* at pp. 42-43.

⁹⁵ "The only constitutional requirement applicable to specific taxes is that they shall be uniform upon the classes upon which they operate." *C. F. Smith Co. v. Fitzgerald*, 270 Mich. 659 at 673, 259 N.W. 352 (1935). See *Walcott v. The People*, 17 Mich. 68 (1868), for an application of the uniformity clause of the constitution of 1850 to a specific tax.

⁹⁶ See Judge Cooley's opinion in *Youngblood v. Sexton*, 32 Mich. 406 at 414, 20 Am. Rep. 654 (1875).

⁹⁷ *Wisehart*, "The Income Tax as a Source of Revenue for Michigan Municipalities," UNIVERSITY OF MICHIGAN BUREAU OF GOVERNMENT INSTITUTE OF PUBLIC ADMINISTRATION, PAPERS IN PUBLIC ADMINISTRATION (No. 10) 42 (1954).

⁹⁸ Art. X, §4.

The only limitation on classification would seem to be the reasonableness test imposed by the equal protection clause of the Federal Constitution. It is self-evident, from the graduated rate taxes imposed both by some states and by the federal government, that this federal limitation does not prohibit progressive income taxation. For the purpose of compliance with the Michigan constitutional provision, it would seem plausible to consider that a separate specific tax is imposed upon each income bracket at a different rate. In other words, a graduated rate tax could be argued to be a valid classification by income in which the rates are uniform within the various income classifications.

In *Union Steam Pump Sales v. Secretary of State*,⁹⁹ the Michigan court had the opportunity to consider the uniformity question in regard to an annual corporate franchise fee imposed at different rates on large and small corporations. The unanimous court, speaking through Judge Fellows, treated the application of the federal equal protection and the state uniformity provisions together, saying that they both have the same legal effect in this regard. The court pointed out that the problem basically is the same as the taxation of some property and the exemption of other property.¹⁰⁰ It also compared it to a revenue license fee imposed by the State of Illinois with rates graduated according to the amount of business done and to inheritance taxes imposed at different rates, both types of taxes having been upheld by the United States Supreme Court.¹⁰¹ In upholding the Michigan tax, the Court said:

"That absolute uniformity, absolute equality in taxation is Utopian has long been recognized. That the legislature has the power to classify has also long been recognized. That it is the abuse of such power, not its exercise, that is within the constitutional inhibition, numerous decisions demonstrate."¹⁰²

From the material considered here, it would seem reasonable to conclude that a municipal income tax imposed at a flat rate does not conflict with article X, section 3 or section 4 of the Michigan Constitution, and a graduated rate tax, although more doubtful, is arguably valid as a reasonable classification under article X, section 4.

In order to reach the conclusion stated above, it has been necessary for us to decide that a municipal income tax is not an ad valorem

⁹⁹ 216 Mich. 261, 185 N.W. 353 (1921).

¹⁰⁰ See *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 33 S.Ct. 833 (1913).

¹⁰¹ *Clark v. Titusville*, 184 U.S. 329, 22 S.Ct. 382 (1902); *Magoun v. Savings Bank*, 170 U.S. 283, 18 S.Ct. 594 (1898).

¹⁰² At pp. 275-276.

tax. This point is important in deciding another question which challenges the municipal income tax. Mandatory home rule charter provision "(f)" under the title, "Taxation," states that "the subjects of taxation for municipal purposes shall be the same as for state, county and school purposes under the general law."¹⁰³ It has been argued that a municipal income tax does not meet the requirements of this mandatory provision in that the other units of government named do not impose municipal income taxes.¹⁰⁴ The latter part of the argument is clearly true, for no state, county, or school district income taxes are imposed in Michigan, but the contention as a whole avoids the real question: Was the mandatory home rule section in question meant to apply to excises imposed under permissible charter provisions, such as the municipal income tax? The answer to this question seems just as clearly to be no, and for two reasons. In the first place, it hardly seems likely that the legislature would have intended to authorize one form of taxation in one part of the home rule act under the permissible excise provision and then provide in the same act that such a tax would be invalid unless imposed also by the state, counties, and school districts. If a conflict does exist in the statutory provisions, which seems doubtful, then the rule of legislative interpretation should be applied by which the courts will adopt the interpretation which gives the greatest effect possible to all parts of the statute. In the second place, there seems to be no real conflict. Immediately following the section referred to above is section 117.3(g). First notice that the title to this section is "Same," obviously referring to the prior title of "Taxation." The provisions of this section, referred to above, pertain only to property tax limitations. Read in connection with the preceding section, with which it bears the same title, it becomes manifest that the legislature intended to impose a mandatory system of property taxation which would provide a measure of tax coordination through the use of uniform tax bases. In view of this legislative intent, section (f) is meaningful only as applied to property taxes and does not limit the power by which are authorized municipalities to levy excises.

The argument also is made that municipalities cannot levy income taxes because, it is urged, the state government does not have the power to levy such taxes itself and therefore cannot empower municipalities to do so. Even if this statement that the state lacks

¹⁰³ Mich. Comp. Laws (1948) §117.3(f).

¹⁰⁴ Brief for Plaintiffs and Appellees on Appeal to the Michigan Supreme Court, *House and Corson v. Saginaw*, pp. 16-18.

power to levy such a tax be accepted as true, although it can be questioned in the light of two opinions of the attorney general, limitations on state power to tax in Michigan have been held not necessarily to limit municipal taxing powers.¹⁰⁵ This result seems particularly persuasive when considered together with the fact that the municipal authorization was passed under the direction of constitutional provisions.

It has been argued that the well-known Missouri case of *Carter Carburetor Corporation v. City of St. Louis*¹⁰⁶ is, analogically speaking, authority against Michigan municipalities having the power to levy income taxes. This case involved an action by a taxpayer to secure a declaratory judgment and injunction on the St. Louis income tax. The tax itself was similar to the one proposed in Saginaw.

Prior to the imposition of the St. Louis tax, the Missouri court had held valid a state tax imposed on income.¹⁰⁷ The court decided that a tax on income is not a tax on property so as to bring it within the prohibition of the uniformity clause of the state constitution, that uniformity need be only by class, that the state legislature had power to pass the tax in the absence of an express constitutional limitation, and that the tax therefore was valid. This answered all of the questions with respect to an attempted municipal income tax in the same state other than that of whether the municipality had authority to levy the tax.

The Missouri Constitution provides that "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state. . . ."¹⁰⁸ This was adopted in 1945, but is substantially the same as the corresponding provision in the 1875 constitution under which the St. Louis charter was adopted (except that the latter constitutional provision applied only to cities over 100,000 rather than 10,000 population). Under this authority, the City of St. Louis had included in its charter power to "assess, levy, and collect taxes for all general [and] special purposes on all subjects or objects of taxation."¹⁰⁹ In the *Carter* case, the court held that the municipal income tax was an excise tax, but said that the city needed specific authorization in order to impose such a tax.¹¹⁰ It did not find the authority

¹⁰⁵ *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654 (1875).

¹⁰⁶ 356 Mo. 646, 203 S.W. (2d) 438 (1947).

¹⁰⁷ *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196 (1918).

¹⁰⁸ Art. VI, §19.

¹⁰⁹ Art. I, §1(1).

¹¹⁰ See *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W. (2d) 498 (1943).

required in the charter provision set out above, however, saying that the residents of the city voting for the charter in 1914 could not have intended to give the Board of Aldermen "free rein" to impose the tax in question on them.¹¹¹

This interpretation of a home rule charter provision enacted under such a sweeping grant of constitutional authority perhaps is subject to criticism. But there are elements in the Missouri situation which serve to distinguish it from the situation confronting a similar tax imposed by a Michigan municipality. In the first place, the constitutional grant itself is not as broad as it might seem from a consideration of article VI, section 19 alone. Article X, section 1 of the Missouri Constitution provides, "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes." Article X, section 11(f) adds, "Nothing in this Constitution shall prevent the enactment of any general law permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes." And, "The term 'other political subdivision,' as used in this article, shall be construed to include . . . cities . . . having the power to tax."¹¹² These latter sections, new to the Constitution of 1945, clearly seem to imply that the subject of municipal taxation is to be treated as of general concern and suggest that the general grant of home rule powers in article VI, section 19 is to be qualified by the power of the state legislature in the area of municipal taxation. By way of contrast, the Michigan legislature specifically has provided that municipalities may levy excises, a term which, as indicated above, the Missouri court would construe as including a municipal income tax. In regard to the construction of the St. Louis charter itself, it also should be pointed out that state statutes provide for the levying of municipal ad valorem taxes and that city charter provisions specifically authorize certain nonproperty taxes, indicating an intention not to rely on the general charter grant itself for taxing authority.

Rather than being analogical authority against the imposition of a municipal income tax in Michigan, the *Carter* case, because of its definition of an income tax as an excise, would seem to be good authority to the effect that Michigan municipalities, acting under explicit statutory provision, could impose such a tax.

¹¹¹ At p. 658.

¹¹² Art. X, §15.

Remaining legal questions are those which have been raised concerning municipal income taxes generally and therefore are not peculiar to the Michigan legal environment. Since they have been discussed and decided elsewhere, the purpose here is only to refer to them, their dispositions, and sources of further elaboration.

An Ohio case is authority for the proposition that the imposition of the Toledo income tax on nonresidents working within the city limits is not a violation of the due process or equal protection clauses, even though such nonresidents do not have the opportunity of voting on the tax. The reasoning is that the amount of tax paid by the nonresident wage earner bears a reasonable relation to the benefits which the taxpayer derives from the city by his employment therein.¹¹³ In the same state, minimum income exemptions have been upheld as a reasonable classification.¹¹⁴

It also has been held that the fact that the withholding provisions cannot be applied to all taxpayers does not violate a uniformity clause relating to property taxes.¹¹⁵ As has been indicated, the Michigan constitutional uniformity provision relating to specific taxes permits a reasonable classification—apparently one that would meet the requirement of giving equal protection under the law.¹¹⁶

A body of enlightening case law with respect to municipal income taxes has developed in the Pennsylvania courts. Contrary to the Ohio experience, a minimum income exemption was held an invalid violation of the state's constitutional uniformity clause.¹¹⁷ The right of Philadelphia to tax city and federal employees' income was upheld, although the city could not force the respective governments concerned to withhold the tax.¹¹⁸ The difference in the tax imposed on business net income as distinguished from that imposed on the salaries, wages, commissions, and other compensation of individuals was held not to invalidate the Philadelphia tax.¹¹⁹

Because of express statutory preemption given taxes already imposed by the state, extension of the municipal income tax to reach unearned

¹¹³ *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E. (2d) 250 (1950).

¹¹⁴ *Stockwell v. City of Columbus*, Court of Common Pleas of Ohio, Franklin County, 86 N.E. (2d) 822 (May 23, 1949).

¹¹⁵ *Alaska Steamship Co. v. Mullaney*, (D.C. Alaska 1949) 84 F. Supp. 561; *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S.W. (2d) 251 (1937); *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228 (1920).

¹¹⁶ For a general discussion of this whole topic, see Roberts, "Pay-As-You-Go' Withholding Under State and Local Income Tax Laws," 5 NAT. TAX J. 335 (1952).

¹¹⁷ *Butcher v. Philadelphia*, 333 Pa. 497, 6 A. (2d) 298 (1938).

¹¹⁸ *Marson v. Philadelphia*, 342 Pa. 369, 21 A. (2d) 228 (1941); *Philadelphia v. Schaller*, 148 Pa. Super. 276, 25 A. (2d) 406 (1942).

¹¹⁹ *Dole v. Philadelphia*, 337 Pa. 375, 11 A. (2d) 163 (1940).

and corporate income was held invalid in Pennsylvania.¹²⁰ This problem would not concern Michigan municipalities levying income taxes since there is no statutory preemption in regard to local taxation, nor has the state adopted the doctrine of implied preemption applied in Ohio. In addition, Michigan does not impose a state corporation income tax to which the doctrine of preemption would apply.

VII. *Conclusion*

The question of whether a Michigan municipality may impose an income tax under its home rule powers remains unanswered. Michigan decisions, as well as those from other jurisdictions, offer good authority for such a tax. From the standpoint of policy alone, it would seem (1) that municipalities should be encouraged to be both financially independent and solvent and (2) that the electors of municipalities should be given a large area of discretion, within the confines of the general interest of the state, in which to determine their manner of realization of the above objectives.

¹²⁰Murray v. Philadelphia, 364 Pa. 157, 71 A. (2d) 280 (1950). For a discussion of the early legal problems of the Philadelphia tax, see the following article: Green and Wernick, "The Philadelphia Income and Wage Tax," *MUNICIPALITIES AND THE LAW IN ACTION* 148 (1944). This article, written by the City Solicitor and the Assistant City Solicitor of Philadelphia, includes the original city income tax ordinance, the amended city income tax ordinance, and the income tax regulations, set out in full. This is brought up to date by Wernick, "Philadelphia Income and Wage Tax," *MUNICIPALITIES AND THE LAW IN ACTION* 148 (1952).