

# Municipal Taxation

## A Study of the Pre-emption Doctrine

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The rapacious force of inflationary costs and the inexorable public demand for improved governmental services have placed many Ohio municipalities in near catastrophic financial straits. The general picture of governmental finance in Ohio is apparent to all. The state government has been accumulating an ever-mounting surplus of revenues while local governments have encountered increasing difficulties in balancing their budgets. There are no esoteric reasons lurking behind this situation. For the past five or six years we have been living in a period of soaring prices induced by a war-time economy. In such a period excise revenues increase more rapidly than those from property taxes, and hence, tend to keep in step with or even outrun increasing costs of government. When it is remembered that excises are the chief support of the state while property taxes are the mainstay of local governments, the reason for our situation in Ohio becomes patent.

In property taxation, municipalities are restricted by the ten mill limitation of Section 2, Article XII<sup>1</sup> of the Ohio Constitution and Section 5625-2<sup>2</sup> of the General Code. Two methods are available to taxing officials which permit the levying of property taxes in excess of the ten mill limitation:

- (a) Section 5625-14, General Code, renders the ten mill limitation inapplicable to a municipality which, by its charter or amendment thereto, provides for a limitation

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<sup>1</sup>OHIO CONST. Art. XII, §2, reads in part: "No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. . . ."

<sup>2</sup>"The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit of the state shall not in any one year exceed ten mills of each dollar of tax valuation of such subdivision or other taxing unit, except taxes specifically authorized to be levied in excess thereof. . . ." OHIO GEN. CODE §5625-2.

of the total tax rate. Section 5625-14 further provides for the levying of taxes by a municipality outside of said charter limitations upon approval of a majority of the electors.

- (b) It is generally provided in Sections 5625-7 and 5625-13, General Code, that the taxing authorities of any subdivision may make levies outside of the ten mill limitation when authority to do so is granted by vote of the people.

Even though the Ohio Constitution and the statutes enacted pursuant thereto make it possible for municipalities to levy property taxes beyond the ten mill limitation, there is little likelihood that a great deal of additional revenue may be derived therefrom because such excess levies are subject to the approval of the voters. Sections 8 and 9, respectively, of Article XVIII of the Constitution provide that a municipal charter may be adopted and amended by a majority of electors, but for non-charter municipalities and for municipalities that have not placed a tax rate limitation in their charters, the permanent provisions of Section 5625-13, General Code, require that a levy in excess of the ten mill limitation be voted by sixty-five per centum of the electors.<sup>3</sup> Municipal history in Ohio is replete with examples of public aversion to attempts to levy taxes beyond the ten mill limitation provided by law.

As a means of supplementing the limited revenue which could be derived from property taxation, municipalities turned to the more remunerative excise taxes; but here too, they met rebuff. In July, 1946, the Ohio Supreme Court severed the thin strand of hope which suspended the sword of Damocles over the heads of municipal-taxing officials. This sword has been personified by the doctrine of pre-emption as this rule of preclusion has been given stature by judicial construction. The Supreme Court rendered a decision which invalidated the consumers' utility tax levied by the City of Youngstown.<sup>4</sup> The conclusion reached in the case was that while "municipalities have power to levy excise taxes to raise revenue for purely local purposes . . . such power may be limited by statutory provision or by implication flowing from state legislation which

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<sup>3</sup>Temporary legislation, Amended Senate Bill No. 360, enacted at the special session of the General Assembly in December, 1947, reduced the percentage of electors required to vote a tax levy in excess of the ten mill limitation from sixty-five to sixty per cent. In substance, this legislation provides that the taxing authority of any subdivision, other than the board of education of a school district, may at any time prior to the 31st day of December, 1948, adopt a resolution to levy taxes beyond the ten mill limitation for any of the purposes set forth in Section 5625-15, General Code, and for other specified purposes; and that such levy may be voted by sixty per cent or more of the electors voting. Such a levy, if given a favorable vote by the electors, could not be effective for more than a period of two years.

<sup>4</sup>Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E. 2d 64 (1946).

pre-empts the field by levying the same or a similar excise tax." The judicial growth of the pre-emption doctrine in connection with the interrelation of state and municipal taxing powers had reached its zenith.

This decision not only invalidated the Youngstown tax but also rendered nugatory similar taxes levied by the cities of Columbus, Zanesville and Portsmouth. Columbus thereby lost approximately one million dollars in revenue annually. While the decision is undoubtedly sound as predicated on the factual pattern before the court, the fact remains that commendable municipal efforts to be self-reliant were frustrated. Although these municipalities had sought to provide for their own financial requirements without running to the state government for a hand-out, the means at their disposal proved ineffective. To city-taxing officials the concomitant effect of the decision was to exclude another large segment of the excise field from municipal taxation.

In view of the mentioned results of the prohibitive effect of the pre-emption doctrine, the need arises to examine this doctrine to determine the legal rationale upon which it is based, and also whether or not it will render ineffectual proposed attempts to strengthen the taxing position of Ohio municipalities. Municipal officials have sought to lessen the rigidity of the pre-emption doctrine through the enactment of permissive legislation by the General Assembly. The contention behind such proposed legislation was that municipalities could, with the approval of the Assembly, enact any excise tax, even though the Supreme Court had ruled the field pre-empted by the state.

While the cynosure of attention must be cast upon those municipal excise taxes affected by the pre-emption rule because these excises have provoked the judicial delineations of the comparative powers of state and municipal taxation in the same field, consideration will also be given to the possible legal repercussions from the enactment of city income taxes. Principal cities, such as Toledo and Columbus, have utilized the income tax as a substitute method for the excise taxes which have been thwarted by decisions of the Supreme Court. The enactment of such income taxation gives rise to the question as to whether municipalities may face an even more formidable legal barrier in this field than in that of the already pre-empted fields of excise taxation. The possibility of a constitutional pre-emption of income taxation for the state is the specter which looms on the horizon.

The paramount importance of the pre-emption doctrine which prevents municipal taxation in a field already occupied by the state cannot be over-emphasized. In addition to aggravating the need of Ohio municipalities for adequate operating funds, the pre-emption

of tax fields has made local government more dependent on state generosity. Certainly the trend toward centralized government which is rampant in the world today makes it manifest that in accepting doles from higher levels of government, the local governing subdivisions must ultimately assume the role of helpless sycophants. The drift to governmental collectivism has vindicated the perspicuity of the old adage that, "He who pays the piper calls the tune." Nothing can be more debilitating to the traditional independence of local government than to have municipalities seek the solution to their problems by continually turning to the state for assistance.

#### EVOLUTION OF THE PRE-EMPTION DOCTRINE

The prelude point in a study of municipal taxing power is Section 3, Article XVIII of the Ohio Constitution known as the home-rule amendment. The salutary provisions of this section are as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The home-rule amendment was found to be the fount of municipal taxing power in the case of *Zielonka v. Carrel*,<sup>5</sup> decided in 1919. Speaking specifically, as to the authority of a municipality to levy an occupational tax, the court made the following observation:

"Whatever power the City of Cincinnati possesses in this respect comes in the first instance, not from the general assembly but from the constitution itself. Section 3, Article XVIII, provides that municipalities shall have authority to exercise all powers of local self-government. . . . There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation, for without this power local government in cities could not exist for a day."

The conclusion of the court that the home-rule amendment gave municipalities power of taxation was indeed significant because it served as a partial extinction of the unfettered control which the General Assembly had previously possessed over Ohio municipalities. Before the enactment of the home-rule amendment in 1912, municipalities possessed only those taxing and other governmental powers as were granted by legislative authorization. Thus, the *Carrel* decision is predicated on the principle that the taxing power of a municipality stems not from the General Assembly but from the constitution.

In holding valid an ordinance of the City of Cincinnati which levied a tax on occupations, the court laid down certain seminal

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<sup>5</sup>99 Ohio St. 220, 124 N.E. 134 (1919).

rules which have formed the basis for the pre-emption doctrine in Ohio. The essence of the rule announced by this case is discernible in paragraph 2 of the syllabus, where it was said:

"Under the grant of power of local self-government provided for in Section 3, Article XVIII, of the State Constitution, the City of Cincinnati, as long as the State of Ohio through its general assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes."

Ostensibly, the quest of municipalities for new avenues of taxation was ended, for the court construed the home-rule amendment in such a way as to grant municipalities the inherent power to levy taxes. However, there is also found in the decision the ominous indication that municipalities did not receive from the home-rule amendment a carte blanche authority of taxation because the court prefaced its original observation relative to municipal taxing power by saying that the City of Cincinnati could levy an occupational tax as long as the State of Ohio did not occupy the same field.

The pre-emption doctrine was set forth in its inchoate stages in the following statement of the court:

"It is enough to say the general assembly has not expressly limited the authority of municipalities to levy an occupational tax, nor has it impliedly limited such authority by invading the field on its own account."

The court exoterically points out that the General Assembly may pre-empt a given tax field by an express interdiction or by implication when the state occupies a tax field.

The doctrine of the *Carrel* case<sup>6</sup> was reiterated in *Loan Company v. Carrel*,<sup>7</sup> and in *Marion Foundry v. Landes*,<sup>8</sup> but in these two cases the court did little more than give a cryptic affirmance of the pre-emption ruling. In both cases, a municipality had levied an occupational tax; the court concluded that such taxes were valid until such time as the General Assembly precluded municipal taxation in that field. In *City of Cincinnati v. American Telephone and Telegraph Company*,<sup>9</sup> the court was more lucid in its expression concerning the conclusions enunciated in the *Carrel* case. The City of Cincinnati had enacted an ordinance which levied an occupational tax on certain businesses already subjected to a similar tax enacted by the General Assembly. The court held that the taxing power of a municipality under the home-rule amendment did not extend to fields already occupied by the state. It was said in paragraph 2 of the syllabus:

"The power granted to the municipality by Section 3,

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<sup>6</sup>The *Carrel* case referred to throughout the paper is that cited in note 5.

<sup>7</sup>106 Ohio St. 43, 138 N.E. 364 (1922).

<sup>8</sup>112 Ohio St. 166, 147 N.E. 302 (1925).

<sup>9</sup>112 Ohio St. 493, 147 N.E. 806 (1925).

Article XVIII, of the Constitution of the state of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state."

In this decision the court commented upon the rationale of the *Carrel* case. The court must have found the *Carrel* decision something less than a model of clarity, for it suggested three possible principles upon which the pre-emption rule had been predicated. Speaking conjecturally with reference to the ruling of the *Carrel* case holding that the City of Cincinnati could levy an occupational tax as long as the State of Ohio did not, the court offered three possible reasons for such a conclusion:

- (1) That the levy of an occupational tax by the state would operate as a limitation upon the right of a municipality to levy such a tax by an analogy to the rule declared by the United States Supreme Court in reference to the interstate commerce clause of the Federal Constitution to the effect that with reference to the subjects that are in interstate commerce, a state may enact laws only as long as Congress fails to act; but when Congress has legislated, a state is precluded from the field.
- (2) That the decision was based upon the theory that the home-rule amendment grants to municipalities only such powers of local government as are not in conflict with general laws and that once the state has enacted a tax, an ordinance attempting to levy a similar tax is in conflict with general law.
- (3) That under Section 6, Article XIII<sup>10</sup> of the Ohio Constitution, which grants the General Assembly the power to limit municipal taxation, the enactment of the tax by the state operates as a restriction of municipal taxing power in the same field.

The court also expressed doubt as to whether or not a municipality possessed any constitutional power to levy an excise tax but bowed in obeisance to the rule of the *Carrel* case that such power did stem from the home-rule amendment.

The prohibitive aspect of the pre-emption rule was again presented in the case of *Firestone v. City of Cambridge*,<sup>11</sup> it was there held that a municipality could not levy an excise tax for the privilege of operating an automobile on its streets because such a tax had already been levied by the General Assembly. Another tangent of the pre-emption doctrine was discussed in this case in that the court gave specific consideration to Section 13, Article

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<sup>10</sup>OHIO CONST. Art. XIII, §6, reads as follows: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

<sup>11</sup>113 Ohio St. 57, 148 N.E. 470 (1925).

XVIII<sup>12</sup> of the Constitution, which grants to the General Assembly the authority to limit the power of municipalities to levy taxes. It was concluded that the General Assembly could exercise the powers of limitation granted to it under Section 13, Article XVIII of the Constitution, either expressly or by implication. The court based its decision on the premise that the General Assembly had pre-empted the field of excise taxation upon the owners of motor vehicles by enacting a state tax levy.

The dubiety which existed in the mind of the court in the *Carrel* case concerning the inhibitive force of the General Assembly's authority to limit municipal taxation under the provisions of Section 13, Article XVIII of the Constitution was swept away, for the court adjudged that the General Assembly could employ such power expressly or by implication when the state entered a tax field which a municipality was seeking to invade. In the *Carrel* case, the court was indecisive as to whether or not Section 13, Article XVIII, granted the General Assembly the power to prevent the levying of an excise tax by a municipality, or whether the restriction contemplated by this constitutional section meant simply that the General Assembly could place limitations on the rate of taxation on property. That the purport of Section 13, Article XVIII, was to give the General Assembly restrictive powers relative to municipal taxation was made manifest by the instant case.

A harbinger of things to come was also indicated in this case in that in reaching the decision that the City of Cambridge could not levy a fee upon the owners of motor vehicles for the privilege of using the streets because the state had pre-empted this tax field, the court placed emphasis upon the provision in the state statute which provided that fifty per cent of all the taxes collected should be returned to the municipalities where such revenue originated. Thus, the state, from the money derived through an excise tax upon the owners of motor vehicles, made distribution of one-half of such taxes to the municipalities. Implicit in this observation of the court is the impression that the court considered such a distribution of revenue back to the municipalities as being indicative of the legislative intent to pre-empt that tax field.

In *Cincinnati v. Oil Works Company*,<sup>13</sup> the court again re-affirmed the rule that a municipality may not levy a tax in a field

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<sup>12</sup>OHIO CONST. Art. XVIII, §13, reads as follows: "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

<sup>13</sup>123 Ohio St. 448, 175 N.E. 699 (1931).

which has been invaded by the state. Here the City of Cincinnati sought to levy an occupation tax on the operators of gasoline stations. The court held that the city ordinance was invalid for the reason that the state had pre-empted this field by the enactment of a gasoline tax which the court felt was imposed by the state upon the business of the owner of the station and not upon the consumer of the gasoline.

Before giving attention to *Haefner v. City of Youngstown*<sup>14</sup> which is the latest pronouncement of the court upon the doctrine of pre-emption, it would be well to state certain principles which have evolved from a consideration of the *Carrel* case, and cases following, dealing with the relative powers of the state and its municipalities in levying excise taxes in the same general field. The deducible propositions may be epitomized as follows:

1. The Ohio Supreme Court by adhering to the doctrine of the *Carrel* case has committed itself to the position that the taxing power of municipalities is derived from Section 3, Article XVIII of the Constitution known as the home-rule amendment.
2. The General Assembly has the constitutional power under Section 13, Article XVIII of the Constitution to limit or restrict the taxing power of municipalities.
3. The General Assembly may limit municipal taxing power by express declaration or by implication where the state enters a given tax field.
4. A municipality may levy excise taxes as long as the State of Ohio, through its General Assembly, has not levied the same or similar tax and thus pre-empted the field.

A dissimilitude exists between the factual pattern which confronted the court in the *Youngstown* case and that presented in previous cases. Prior to this decision, the court was faced with situations in which municipalities were attempting to levy the same type of tax which had already been levied by the state. In the *Youngstown* case, however, the tax imposed was not of the same nature as those taxes levied by the General Assembly which the court concluded were designed by the Assembly to preclude further municipal taxation. The City of Youngstown enacted an ordinance which imposed a tax of two and one-half per cent on the net rate charged by public utilities for natural gas, electricity and water and for local service and equipment furnished to telephone subscribers. The ordinance provided that such tax should be added to the consumer's bill for the specified utility service and that the charge for both the service and the tax should be collected at the same time. This tax the Supreme Court held invalid.

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<sup>14</sup>147 Ohio St. 58, 68 N.E. 2d 64 (1946). This case is referred to throughout the paper as the *Youngstown* case.

The court confirmed the principle of the *Carrel* case that a municipality may levy an excise tax so long as it is not precluded by state legislation. At this point, the court was more explicit than it had been in the *Carrel* decision, for it was observed that the General Assembly has the authority under Section 13, Article XVIII of the Constitution to limit or preclude taxation by municipalities.

The sequent proposition announced by the court in reaching its conclusion that the Youngstown ordinance was invalid was that the General Assembly could limit municipal taxation either expressly or impliedly and that the limitation is imposed by implication where the state levies the same or similar excise tax and thus pre-empts the field. The gist of the court's decision is found in paragraph 3 of the syllabus, where it was said:

"Municipalities have power to levy excise taxes to raise revenue for purely local purposes; but under Section 13, Article XVIII of the Constitution, such power may be limited by express statutory provision or by implication flowing from state legislation which pre-empts the field by levying the same or a similar excise tax."

It was concluded that the consumers' utility tax of the City of Youngstown was invalid because such field had been pre-empted by the state. This decision was predicated on the fact that the General Assembly had exempted sales by a public utility from the retail sales tax<sup>15</sup> pursuant to Section 5546-2<sup>16</sup> of the General Code, and that such exemption from the sales tax existed because public utilities are subject to a state excise tax on their gross receipts<sup>17</sup> under the provisions of Section 5483<sup>18</sup> of the General Code. The court was of the opinion that the exemption of sales of public utilities from the retail sales tax under Section 5546-2 of the General Code was in compliance with a legislative policy of exempting from the sales tax, sales which were taxed in the same or a similar way. The court further opined that a legislative intent had been indicated to avoid the duplicate taxation of receipts of public utilities, and hence concluded that by levying a sales tax<sup>19</sup> and a gross receipts tax,<sup>20</sup> the General Assembly had pre-empted the field of

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<sup>15</sup>OHIO GEN. CODE §§5546-1 to 5546-24b, 5546-26a, 5546-26b and 5546-26d.

<sup>16</sup>This section levies the excise tax on retail sales and provides for certain exemptions therefrom including the sales of gas, electricity, water and other public utility services.

<sup>17</sup>Public utilities rendering the usual home services are among those utilities subject to an excise tax for the privilege of carrying on intra-state business in Ohio. OHIO GEN. CODE §§5417, 5474, 5475 and 5483.

<sup>18</sup>Levies the excise tax on gross receipts of certain public utilities including utilities rendering electric, gas, water and telephone services.

<sup>19</sup>*Supra*, note 15.

<sup>20</sup>*Supra*, note 17.

taxation which included receipts by utility companies from the services rendered to consumers.

The court also voiced the sentiment found in an earlier case when it was pointed out that the revenue derived from the sales tax and the gross receipts tax is partially distributed to municipalities. It was pointed out that Sections 5546-18 and 5546-19 of the retail sales tax provide for a distribution of the taxes derived therefrom to municipalities and that a similar distribution pursuant to Section 5491, General Code, is made of the gross receipts tax on utilities. From these distributive sections of the two tax laws, the court seemed to infer that the General Assembly indicated its desire to preclude a municipality from levying a consumers' utility tax based upon the charge for services rendered by the utility. The court's invalidation of the Youngstown consumers' utility tax must have left municipal officials with the impression that the pre-emption doctrine had been given an illimitable scope. Sanguine, indeed, were those who felt that the levying of additional excise taxes was the solution to the financial needs of municipalities.

#### PERMISSIVE LEGISLATION

The repercussive effects of the *Youngstown* case became apparent when the General Assembly convened in January, 1947. Municipalities made supplicant pleas to the Assembly for permissive laws and consequently, legislation designed to lessen the restrictions of the pre-emption doctrine was introduced.<sup>21</sup> The common purpose of various bills was to enable municipalities to levy the tax on utility services which the Supreme Court had declared unconstitutional in the *Youngstown* case. The method adopted in this proposed legislation was the amendment of the retail sales tax act<sup>22</sup> and the gross receipts tax<sup>23</sup> on utilities by inserting in such laws a provision to the effect that nothing therein was a manifestation of legislative intent to limit the power of a municipality to levy a consumers' utility tax. The method was typified by Senate Bill No. 229 which sought to amend the levying sections of the retail sales and gross receipts taxes, Sections 5546-2<sup>24</sup> and 5483,<sup>25</sup> respectively, General Code, by inserting in each section the following language:

"Nothing contained in this section shall be construed as expressing or imposing a limitation on the power of a municipality to assess, levy or collect a consumers' utility tax."

This legislation was judiciously drafted in that precautionary measures were taken lest it should appear the General Assembly was attempting to increase the taxing power of municipalities. A

<sup>21</sup>This legislation was not enacted by the General Assembly.

<sup>22</sup>*Supra*, note 15.

<sup>23</sup>*Supra*, note 17.

<sup>24</sup>*Supra*, note 16.

<sup>25</sup>*Supra*, note 18.

statute attempting to augment municipal taxing power would undoubtedly be declared a nullity because the Ohio Supreme Court has adhered to the position that municipal power of taxation comes not from the General Assembly but from the constitution under the home-rule amendment. As has been pointed out, some doubt was expressed by the court in *City of Cincinnati v. American Telephone & Telegraph Company*<sup>26</sup> as to the source of municipal taxing power. This same dubiousity was expressed by the court in the *Youngstown* case and in contrast to the holding of the *Carrel* case, the court merely said municipalities possessed the power to tax but the home-rule amendment was not specifically mentioned as the source thereof. However, the court referred to the *Carrel* case as a binding precedent relative to the source of municipal taxing power being lodged in the home-rule amendment.

Because the constitution is the source of municipal taxing power, the General Assembly cannot grant to municipalities that which they already have; thus, the legislation spoken of was drafted in such a manner as to manifest the wish of the General Assembly that the state's operation in a tax field should not be construed as a preclusion of municipal taxation. The drafters concluded that the most expedient way to express this legislative intent was to amend those laws which the court previously said prevented the levying of a municipal consumers' utility tax by providing that their enactment was not designed as a pre-emption for the state. The questions which were raised thereby are of lasting significance, for it is only reasonable to assume that there will be increasing municipal pressure upon the General Assembly for the passage of this type of permissive legislation.

The suggested expressions of intent by the General Assembly through legislation that the sales tax and the gross receipts tax on utilities were not designed to prevent municipalities from levying a consumers' utility tax, gave rise to speculation as to the constitutional power of the General Assembly to enact such legislation. The pivotal inquiry in considering the validity of such legislation is the determination of the legal basis of the doctrine of pre-emption announced by the Ohio Supreme Court in the various cases previously discussed.

It should be stated prefatorily that the cases announcing the pre-emption doctrine touch upon the present problem only from a negative standpoint. These cases are not dispositive of the validity of permissive legislation for they have said what municipalities could not do in taxation, but the possible effect of express legislative consent was not before the court. All that permissive legislation would do is to nullify that part of the pre-emption doctrine which

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<sup>26</sup>*Supra*, note 9.

affects municipal consumers' utility taxes, but in all other respects the doctrine would remain operative. Certain it is that the cases may lend themselves to antithetical conclusions as to the rationalization of the court. One view is well represented by the second paragraph of the syllabus in *Firestone v. City of Cambridge*<sup>27</sup> where it was said: "No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes." Did the Supreme Court in announcing the pre-emption doctrine intend to rule that a municipality's taxing power is completely destroyed when the state enters the same tax field? Did the court further intend to say that once the field is pre-empted by state taxation, there can never be a concurrent levying of a tax by a municipality? If the answer to these questions is affirmative, then permissive legislation would seem to be of no avail, for once the state has pre-empted the field it could not then turn around by express legislation and repudiate such pre-emption. It is submitted, however, that a negative answer to these questions is clearly presented in the cases.

It is the view of the writers that the Ohio Supreme Court did not rule that a condominium of the state and municipal government could not exist relative to levying an excise tax in the same general field. It is further submitted that the court has nowhere indicated that it is unconstitutional, with the exception of the pre-emption rule, for the state and a municipality to share the same tax field. A consideration of all the apposite cases leads the writers to believe that the legal basis for the pre-emption doctrine is the theory which is implicit in any constitutional government, i.e., that the sovereign is supreme and must possess the inherent power to control its political subdivisions.

In determining whether or not the doctrine of pre-emption prevents the General Assembly from enacting legislation which would enable municipalities to tax in a field occupied by the state, consideration should be given to the situations which confronted the court in those cases giving rise to the doctrine. The principal rule of our court has been that the state is the supreme sovereign possessing the authority to limit the taxing power of a political subdivision such as a municipality. It has been held by the court that the General Assembly has, by invading a tax field, impliedly precluded municipal taxation in the same area. At this point the following questions seem pertinent: What provision of the Ohio Constitution would be violated if the General Assembly were to remove this implied limitation by express legislation? Cannot the General Assembly clarify its position relative to municipal taxation

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<sup>27</sup>*Supra*, note 11.

by declaring that it does not desire to preclude such taxation in a field in which the state is already exercising its taxing power?

The recurring inquiry is the meaning of the numerous statements by the court that a municipality may not levy a tax in a field which has been invaded by the state. The opinions contain no indication that this rule is based upon any express constitutional provision other than Section 13, Article XVIII, which grants the General Assembly the authority to limit municipal taxation. It seems reasonable to assume that if the Ohio Constitution contained a provision which would make it unconstitutional for both a municipality and the state to levy excise taxes in the same field, the court would have so declared. The tenor of all the court has declared is that an inferior political subdivision, such as a municipality, may not challenge the superior taxing power of the state without the state's consent, for under a constitutional government the sovereign is supreme.

Under Section 13, Article XVIII of the constitution, the General Assembly has authority to limit municipal taxing power, and the court has interpreted the levying of a tax by the state in a given field as a limitation on municipalities. The decisions announcing the pre-emption doctrine have not been legal aberrations, for in every case presented to the court a municipality was seeking to encroach upon the taxing power of the sovereign. In the absence of express legislative consent thereto, the rulings of the court are eminently correct; but in reaching this conclusion the court has held that the state's invasion of a tax field is by implication a preclusion of municipal taxation. Certainly, the General Assembly can remove any such implication by express legislation because the court is interpreting Section 13, Article XVIII, and under that section of the Ohio Constitution the state alone may limit the taxing power of municipalities. The only constitutional provision with which the court was concerned was the above mentioned Section 13, Article XVIII. There has been no judicial denial of the constitutional authority of municipal and state occupation of the same tax field when the General Assembly consents to such municipal taxation. What the court did was to interpret Section 13, Article XVIII, to mean that there may be a limitation or restriction of municipal taxing power by implication as well as by direct prohibition. Thus, it appears to follow that the pre-emption doctrine would not apply where the General Assembly expressly declares that it does not wish the enactment of certain state tax levies to be a limitation on municipal taxing power. In other words, if the General Assembly makes it clear that the levy of a tax by the state is not to be considered as a limitation on municipalities, then the implied limitation found by the court would be completely rebutted. By conforming to the traditional function of searching for the in-

tent of the legislature, the court would be bound to recognize the express declaration of legislative policy rather than the implied policy which the court has found present when the state has invaded a tax field.

The briefs of counsel filed in the cases announcing the pre-emption rule center around the contention that it would be unwise to permit municipalities to challenge the state's taxing power. Of course, these briefs contain the statement of the rule that a municipality may not levy a tax in a field occupied by the state, but the underlying theme seems to be predicated on the theory that the state is the supreme sovereign and must have the constitutional power to limit the encroachment of municipalities on its taxing power. In most of the cases decided by the court in connection with the pre-emption doctrine, a municipality was endeavoring to levy a tax in a field invaded by the state. In the absence of express legislative approval of such municipal action, it was only proper that the court should interpret the state's occupation of a tax field as an implied restriction on municipal taxing power; but the arguments advanced in these cases are divested of their germaneness when the General Assembly expressly declares that it does not wish to limit municipal taxing power in any given field. Then, the theory that the state is the supreme sovereign, which appears to be the basis of contention in the pre-emption cases, loses its cogency because the sovereign power of the state is not being challenged by municipalities; but rather the supreme sovereign is expressing approval of an inferior sovereign's exercise of taxing power.

The court in the case of *City of Cincinnati v. American Telephone & Telegraph*<sup>28</sup> states in the following language what appears to be the controlling force behind the pre-emption doctrine:

"To the end that the sovereignty of the State may be superior to that of any of its subdivisions in a matter so essential to that sovereignty as that of taxation, this Court adheres to the interpretation of the power conferred by the constitution upon municipalities to levy an excise tax announced in *State ex rel. Zielonka v. Carrel*, supra, with the limitation therein expressed."

It seems significant that the court came to its conclusion in order that the sovereignty of the state might continue to be superior to that of any of its political subdivisions. Apparently, it was the opinion of the court that the General Assembly did not want to share the same tax field with a municipality. The express approval of such an arrangement by permissive legislation would eliminate the basis of the court's decision. As in other cases, the court considered the attempt of a municipality to levy a tax in a field already occupied by the state as a challenge by an inferior political sub-

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<sup>28</sup>Supra, note 9.

division to the superior sovereign. This challenging of power or clash of sovereignty does not exist when the superior sovereign by express declaration manifests its desire not to restrict the constitutional taxing power of a political subdivision.

The conclusion of the writers that the General Assembly could validly enact legislation which would permit municipalities to levy excise taxes in a field already occupied by the state is borne out by the recent decision of the Supreme Court in the *Youngstown* case. The contention that the determinant cause of the pre-emption doctrine is not any express constitutional provision prohibiting the state and municipalities from occupying the same tax field but that the doctrine is based rather on the theory that taxation is an important attribute of sovereignty in which the state must be the supreme authority, is reflected in a statement of the court in the above-mentioned case. In reference to the power of the General Assembly to control municipal taxation, it was said at page 61:

“Power of the General Assembly to limit or preclude taxation by municipalities would no doubt exist even in the absence of an express constitutional grant; but such grant is not lacking.”

Here the court was espousing the view that under our constitutional form of government the state is the supreme sovereign, and, as such, has the inherent power to limit municipal taxation—this same power is made specific by Section 13, Article XVIII of the Ohio Constitution. This decision is the result of the court's interpretation of Section 13, Article XVIII, in such a way that an implied limitation upon municipal taxation is found in the levying of a sales and gross receipts tax by the State of Ohio.

The opinion contains the implicative theory of the court that in holding the state's invasion of a tax field to be a limitation on municipal power, it is merely following the desire of the state as expressed by the General Assembly. What the court did was to place in mental juxtaposition two constitutional provisions—the taxing power granted to municipalities by Section 3, Article XVIII and the restrictions of Section 13, Article XVIII, which grants the General Assembly power to limit municipal taxation. It was then inferred by the court that the General Assembly had exercised its interdictive powers by levying state taxes. These two constitutional provisions, which were enacted at the same time, were the only ones given consideration by the court. It was presumed that the General Assembly had exercised its constitutional power of limitation by enacting the sales and gross receipts taxes.

The reasoning process which the court followed in the *Youngstown* case may be easily perceived. In the levying of the sales and gross receipts taxes and in the returning of a portion of such revenue derived therefrom to municipalities, the court found the

implied will of the legislature to preclude the enactment of a consumers' utility tax by a municipality. In its opinion, the court made this explicatory statement:

"*Inferentially* the whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the 'gross receipts' of utilities that are subject to the excise tax under Section 5483." (Writers' emphasis.)

The pivotal word in the quoted portion is "inferentially" for it fixes attention on the legal reasoning of the court in that case. The court did nothing more than infer what it thought was the desire of the General Assembly to pre-empt the tax field there under consideration.

Section 13, Article XVIII of the Constitution states that: "Laws may be passed to limit the power of municipalities to levy taxes. . . ." Thus, it may be said with certitude that the General Assembly alone is the body to which the people have entrusted the control of municipal taxation. That the General Assembly is the municipal protectorate further makes it apparent that the pre-emption doctrine did not result from an absolute prohibition in the constitution which prevents state and municipal excise taxation in the same field.

The intent of the drafters of Section 13, Article XVIII, can be seen in the following statement of the court in the case of *State ex rel. v. Cooper*,<sup>29</sup> where the court was concerned with this constitutional provision:

"If there was any doubt about the construction to be given this whole section [Section 13, Article XVIII], it is clarified by the official explanation of the constitutional convention submitted to the people of the state when the section was adopted. This explanation was printed and sent broadcast over the state under the title 'municipal home rule'. It is as follows: 'To the General Assembly is explicitly reserved the authority to limit the power of a city to levy taxes and to incur debts for local purposes, to control elections, to examine into the financial condition and transactions of all municipalities.'"

It is observed that it was the intention of the drafters of the constitutional amendment to entrust the control of municipal taxation to the General Assembly, and thus, it would seem that the people have deemed it proper that this governmental branch alone should decide when and how municipalities are to be limited concerning their powers of taxation.

The position of the court in reference to the General Assembly's power to limit municipal taxation was discussed in *Walker v. City of Cincinnati*,<sup>30</sup> and *Parsons v. City of Columbus*.<sup>31</sup> It is true that

<sup>29</sup>97 Ohio St. 86, 119 N.E. 253 (1917).

<sup>30</sup>21 Ohio St. 14 (1871). <sup>31</sup>50 Ohio St. 460, 34 N.E. 677 (1893).

both of these cases were decided prior to 1912, and hence before the adoption of the home-rule amendment which granted taxing powers to municipalities. When these cases were decided, the source of municipal taxing power was the General Assembly, but the Assembly then by Section 6, Article XIII of the Constitution, as now by Section 13, Article XVIII, was given express constitutional power to limit municipal taxation.

That the function of the court is to interpret the will of the General Assembly would seem to be the import of paragraph 5 of the syllabus in *Walker v. City of Cincinnati*,<sup>32</sup> which reads in part:

“The authority and duty to prevent abuse of the powers of taxation and assessment by municipal corporations, is entrusted by the Constitution to the General Assembly, and not to the courts of the state. . . .”

In the opinion, at page 46, the court made this expository observation concerning the authority of the General Assembly to limit municipal taxation:

“The constitution itself provides where the power of preventing such abuse shall be vested. It declares in Section 6, Article XIII, that the General Assembly shall provide for the organization of cities and incorporated villages, by general laws, and restrict their powers of taxation. . . . It is very clear that this constitutional mandate cannot be enforced according to judicial discretion and judgment. In the very nature of the case, the power which is to impose restrictions so as to prevent abuse must determine what is an abuse and what restrictions are necessary and proper . . . .”

In *Parsons v. City of Columbus*,<sup>33</sup> the court made the following observation concerning the authority of the General Assembly under Section 6, Article XIII of the constitution to limit the governmental powers of municipalities:

“The injunction, it will be observed [Section 6, Article XIII], applies as well to the power of taxation, of borrowing money, of contracting debts and loaning their credit, as to the power of assessment, and is no more imperative in one case than in the others. It has engaged the attention of some of our ablest courts and judges, and all, with a remarkable consensus of opinion, have held that, while it is a most salutary provision, it is addressed to the conscience and judgment of the legislature, and is not a subject for judicial correction.”

Thus, it seems evident that being the body to which the constitution has entrusted the authority to limit municipal taxation, the General Assembly alone decides when municipal taxing power should be limited. Legislation which provides that the state does not wish to pre-empt certain fields of taxation clearly manifests

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<sup>32</sup>*Supra*, note 30.

<sup>33</sup>*Supra*, note 31.

the will of the General Assembly not to limit municipal taxing power. Any fear that such legislation would result in the destruction of the state tax structure loses its significance when one considers the fact that if ever the General Assembly feels that the state alone should occupy a given field of taxation, municipalities may be precluded by express legislation to that effect.

In discussing the polemics concerning permissive legislation, the writers have not viewed the pre-emption doctrine with disapprobation. The decisions formulating the doctrine are concededly creditable because the court had before it the audacious challenge of state taxing power by a political subdivision. This rule of preclusion serves as a wholesome safeguard against a pernicious multiplicity of municipal taxes. In the absence of legislative approval of a municipal tax, the rulings of the Supreme Court would remain effectual. The resultant effect is that in excise fields occupied by the state, a municipality may levy only those taxes specified in permissive legislation. The judiciary thus functions to interpret the enactment of state taxes as implied pre-emptions, and the General Assembly, to the extent it deems necessary to aid struggling municipalities, can express its approval of sharing a given tax field.

A prototype of the proposed relationship between the judiciary and the General Assembly relative to the home-rule powers of municipalities is found in the statutes pertaining to intoxicating liquors. Section 6064-22, General Code, which provides that no sales of intoxicating liquor shall be made after 2:30 a.m. on Sunday or on any election day between the hours of 6:00 a.m. and 7:30 p.m. contains the following provision:

“Nothing in this Section shall prevent a municipal corporation or village from adopting an earlier closing hour for the sale of intoxicating liquor on Sunday or to provide that no intoxicating liquor may be sold on Sunday.”

The regulation of liquor is a matter in which the General Assembly has the supreme power. Municipal corporations under the provisions of Section 3, Article XVIII of the Constitution may enact such police regulations as are not in conflict with general laws. The power of a municipality to enact police regulations under the home-rule amendment to control the business hours of liquor establishments is set forth in *Neil House Hotel v. City of Columbus*.<sup>34</sup> This case points out that the state has the paramount power to control intoxicating liquors and that any municipal ordinance in conflict with a state law on the same subject is invalid.

But the quoted provision of Section 6064-22, General Code, is an express indication that the General Assembly did not wish to

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<sup>34</sup>144 Ohio St. 248, 58 N.E. 2d 665 (1944).

regulate closing hours of liquor establishments to the complete exclusion of municipalities, and thus the statute provides that municipalities may enact earlier closing hours than those set up by the state. The validity of such permissive legislation in the field of liquor control was upheld in *City of Akron v. Scalera*.<sup>35</sup>

By this provision the General Assembly has expressly declared that an earlier closing hour adopted by municipalities shall not be construed to be in conflict with the general provisions of Section 6064-22.<sup>36</sup> This same principal can be used so as to amend state tax laws in order that the Assembly can remove the implied pre-emption which the court found to exist in the *Youngstown* case.

If, at a future time, legislation were enacted which would enable municipalities to levy excise taxes indetical with taxes already levied by the State, it is not unlikely that objection would be made thereto upon the contention that a tax by the state and by municipalities upon the same excise subject would result in double taxation.<sup>37</sup> The doctrine of double taxation has been a rather illusory one in the judicial history of Ohio. An examination of Ohio authorities discloses no judicial pronouncement that the Ohio Constitution precludes double taxation except as to the taxation of property, whether it be land and improvements thereon required to be taxed by uniform rule under the provisions of Sec-

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<sup>35</sup>135 Ohio St. 65, 19 N.E. 2d 279 (1939). The defendant in this case was charged with the offense of selling beer on Sunday in violation of the provisions of an ordinance of the city of Akron prohibiting the sale of beer in that city on Sunday. The court stated in paragraph 2 of the syllabus: "An ordinance of a municipality prohibiting therein the sale of beer on Sunday is a valid local police regulation and is not in conflict with the provisions of the Liquor Control Act (Section 6064-1 *et seq.*, General Code)."

<sup>36</sup>The validity of permissive legislation by Congress which sanctioned the right of the state to legislate concerning the importation of intoxicating liquors unhampered by the exclusive power of Congress granted by the "commerce clause," U. S. CONST. Art. I, §8, was upheld in *Wilkerson v. Rahrer*, 140 U. S. 545 (1891), and in *Clark Distilling Company v. American Express Company*, 242 U. S. 311 (1917).

<sup>37</sup>In *Carley and Hamilton v. Snook*, 281 U. S. 66 (1930), the court was faced with the constitutionality of a California statute imposing a tax on the operation of motor vehicles; similar taxation had been enacted by municipalities in that state in the form of so-called registration fees upon motor vehicles. The court held such municipal registration fees to be excise taxes on the privilege of operating motor vehicles. In the course of the opinion, Mr. Justice Stone said: "The objection that the appellants should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject-matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause."

tion 2, Article XII of the Constitution or other property taxed on the basis of value. That double taxation can result only where two property taxes are being levied is the purport of *Bradley v. Bauder*,<sup>38</sup> *Ohio River and Western Railway Company v. Dittey*<sup>39</sup> and *Southern Gum Company v. Laylin*.<sup>40</sup>

It was said in *Bradley v. Bauder* that:

"... Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdiction. . . ."

In the *Ohio River and Western Railway* case, the company raised the objection to the Ohio gross receipts tax on utilities on the basis that such tax, in addition to the taxation of their property, resulted in an invalid double taxation because the resultant effect of the two taxes did not meet the test of uniformity required by the State Constitution. The court brushed aside this contention by pointing out that the gross receipts tax imposed on utilities in Ohio is an excise tax and as said by the court:

"... Plaintiffs in error pay one tax with respect to property, another with respect to the privilege of occupation; hence, the tax is not double."

In *Southern Gum Company v. Laylin*, the court stated in response to the argument that the Ohio franchise tax on the issued and outstanding capital stock of corporations was an additional tax on the same property and that double taxation thereby resulted:

"... But this second proposition is not true, because the exaction of one-tenth of one per cent is not a property tax on property owned by the corporation, but is an excise tax, the amount of which is fixed and measured by the amount of subscribed or issued and outstanding capital stock. To constitute double taxation, both taxes must be property taxes, and both on the same property. Here one is a property tax, and the other an excise or franchise tax, and, therefore, there is no double taxation."

Thus, it seems irrefutable that the levying of similar excise taxes by the state and by municipalities would not result in the prohibited double taxation which can arise only when property is the subject of the taxes levied.

Certain language in the case of *State ex rel. v. Cooper*,<sup>41</sup> when considered apart from its context, conceivably could furnish the basis for an argument against the constitutionality of legislation seeking to enable municipalities to levy taxes in fields already occupied by the state.

Here, the court was concerned with a contention by counsel for the City of Toledo that "there is no limit upon the powers of municipalities that have adopted charters in the levy that they

<sup>38</sup>36 Ohio St. 28 (1880).

<sup>40</sup>66 Ohio St. 578, 64 N.E. 564 (1902).

<sup>39</sup>232 U. S. 576 (1914).

<sup>41</sup>*Supra*, note 29.

make of taxes for purely municipal and governmental purposes." It was also argued for the City of Toledo that the provision of Section 13, Article XVIII of the Constitution which gives the General Assembly the authority to limit municipal taxation, did not apply to chartered cities. To these bold assertions of unlimited municipal taxing power, the court answered that the General Assembly has the constitutional power under Section 13, Article XVIII, to limit or entirely preclude municipal taxation. In rejecting the claim that the taxing power of a chartered city was unlimited, the court utilized certain expressions which, when read apart from the entire case, might be considered as an indication that the General Assembly could not share a given tax field with a municipality. Such language is found in paragraph 3 of the syllabus, where it was said:

"Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed that a part of the state sovereignty is yielding to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous."

It is submitted that this statement of the court was designed to mean nothing more than that under the provisions of Section 3, Article XVIII of the Constitution, known as the home-rule amendment, a municipality does not have unlimited taxing power but rather that those powers of taxation granted to a municipality are subject to the steady hand of the General Assembly.

#### MUNICIPAL INCOME TAXES

The closing of most of the excise tax fields as a result of judicial interpretation of the General Assembly's power to limit municipalities in their taxing attempts, forced municipalities to search for other revenue methods. As previously mentioned, such major cities as Toledo and Columbus have enacted income tax ordinances. Of course, there have been rumblings as to the constitutionality of municipal income taxes. At first blush, it would seem that this type of tax legislation would not run afoul of the prohibitive aspects of the pre-emption doctrine. In its announcement that a given field of taxation is pre-empted by the enactment of the state taxation, the court has given an affirmative and a negative aspect to the doctrine. It has been said affirmatively that a municipality may levy an excise tax so long as the state has not invaded the field—the initial judicial expression concerning this rule was enunciated in the *Carrel* case. The negative aspect of the rule was that municipal taxation could be limited by the General Assembly either expressly or by implication.

Because the State of Ohio has not enacted an income tax, it apparently follows that municipalities would face no barrier in

enacting such legislation, for a municipality may tax until such time as the state enters the field. It thus becomes manifest that the General Assembly has not placed any implied limitations on the power of a municipality to levy an income tax.

It should be remembered, however, that the pre-emption doctrine in connection with the cases discussed has resulted from the court's interpretation of state tax laws as being indicative of an intent to pre-empt such fields of taxation. There the pre-emption is on a statutory level because the court has concluded that the General Assembly may exercise its constitutional power to limit municipal taxation, expressly or by implication flowing from the enactment of state tax legislation. In contradistinction, the possible pre-emption of the income tax field by the state is on a constitutional rather than a statutory basis. The state is authorized by Section 8, Article XII<sup>42</sup> of the Ohio Constitution to levy an income tax, and Section 9, Article XII<sup>43</sup> contains a mandatory provision to the effect that not less than fifty per centum of any income tax levied by the state shall be returned to the city, village or township in which said tax has its origin.

The pre-emptive effect of this constitutional provision was the subject of obiter discussion by Judge Nichols in the *Carrel* case where legal birth was given to the pre-emption doctrine. The court expressed prescient insight of a future problem when it made the following statement in reference to income taxation:

"It may be said in this connection that it is clearly to be implied from the constitution that municipalities are without power to levy an income or inheritance tax.

"This implication necessarily arises from the language of Section 9, Article XII, where we find the mandatory provision to the effect that 'not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the city, village or township in which said income and inheritance tax originate.'

"It would seem quite certain, then, that the state alone can initiate taxation of this character."

By a parity of reasoning from the pre-emption doctrine on a statutory level, the court infers that the constitution contains an implied pre-emption of the field of income taxation. The court

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<sup>42</sup>OHIO CONST. Art. XII, §8, reads: "Laws may be passed providing for the taxation of incomes, and such taxation may be either uniform or graduated, and may be applied to such incomes as may be designated by law; but a part of each annual income not exceeding three thousand dollars may be exempt from such taxation."

<sup>43</sup>OHIO CONST. Art. XII, §9, reads: "Not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income or inheritance tax originates, or to any of the same, as may be provided by law."

found this implied preclusion in the requirements of the constitution that fifty per centum of any income tax levied by the state must be returned to local subdivisions. This contention, that a distribution of tax money back to local government indicates the desire of the state to pre-empt those tax fields, permeates the cases in which the court considered the pre-emption doctrine. In the recently decided *Youngstown* case, the fact that a partial distribution of revenue from the retail sales tax and the gross receipts tax on utilities was made to municipalities, seemed influential in the decision reached. Apparently, the court reasoned that if the state was willing to share this revenue with municipalities, it had thereby manifested its desire that municipalities should not levy in the same tax field.

It may be said in behalf of the constitutionality of municipal income taxes that the distribution of revenue back to municipalities was only one factor which the court considered in laying down the rule of statutory pre-emption. In the cases in which the court mentioned this distribution of revenue to local government by the state as being indicative of a pre-emptive intent, one additional factor was present—the state had entered the tax field. For example, the court in the case of *Firestone v. The City of Cambridge*,<sup>44</sup> noted that a portion of the revenue derived from the state tax levied upon owners of motor vehicles was distributed to municipalities. This fact alone was not considered dispositive by the court, for the state had also levied the same tax which the city was attempting to enact. Thus, the prerequisite condition in the pre-emption doctrine is not present when a municipality levies an income tax because the State of Ohio has not invaded this field. Certainly, this conclusion is warranted by the statement of the court in the *Youngstown* case to the effect that:

“It must now be regarded as settled law in this jurisdiction that a municipality may levy and collect an excise tax for local purposes so long as it is not precluded by state legislation.”

There is merit in the view that the requirement of the constitution that the state must return a portion of any income tax levied to municipalities is not to be viewed as a pre-emption by the state because the pre-emption doctrine requires that the state enter the tax field. In this view, the state has not expressly pre-empted the field of income tax nor has it done so impliedly by enacting such legislation.

However, the antipodal argument that the income tax field has been pre-empted by the state is substantiated in that the requirement of a distribution of revenue to municipalities is found not in legislation but in the constitution. That the drafters of the

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<sup>44</sup>*Supra*, note 11.

constitution provided for a return to local government of a portion of any revenue derived from a state income tax gives persuasiveness to the contention that the field has been precluded from municipal taxation. If there existed no constitutional intent that the state alone should levy an income tax, the sharing of such revenue seems illogical. Why should the state distribute revenue from income taxation to municipalities if these subdivisions possess the power to levy this same tax?

The Supreme Court has found pre-emptive intent in the distribution provision of state taxing statutes—the limitation of municipal taxing power would seem even more evident when it appears in the supreme law of the constitution. By statute, the intent of the General Assembly may be clarified, but the pre-emptive indication of the constitution remains immutable. The power to tax is conferred upon the General Assembly under the general grant of legislative authority in Section 1, Article II<sup>45</sup> of the Ohio Constitution—the power to levy a state income tax is made specific by Section 8, Article XII.<sup>46</sup> The Constitution provides, however, in Section 9, Article XII, that fifty per centum of any revenue derived from income taxation shall be returned to local government. Such a provision is not present, for instance, in Section 10, Article XII of the Constitution, part of which specifically grants to the General Assembly the power to levy excise taxes. The absence of this distributive requirement in all other constitutional grants of taxing power makes the pre-emptive force of Section 9, Article XII, quite conspicuous. The linking together of the specific grant of power to levy income taxes provided in Section 8, Article XII, with the mandatory requirement of Section 9, Article XII, that such revenue be shared with the subdivisions from whence such taxes arose, lends credence to the views expressed in the quoted statement of Judge Nichols from the *Carrel* case.

If the question as to whether or not a constitutional pre-emption exists in the field of income taxation is decided in the affirmative by our Supreme Court, it would seem that municipalities will have no recourse. It has been submitted that the Ohio General Assembly possesses the constitutional authority to declare by statutes that it does not wish to pre-empt municipal taxation, and hence municipalities could levy taxes in those fields designated by legislation. This method of express legislative denial of pre-emption would, of course, be of no avail if a constitutional pre-emption prevails in income taxation. Any legislation enacted by the General Assembly expressing willingness to have municipalities levy income

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<sup>45</sup>OHIO CONST. Art. II, §1, reads in part: "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives. . . ."

<sup>46</sup>*Supra*, note 42.

taxes would be of no legal effect, for the pre-emption, if it exists, is of constitutional origin. Legislative declaration could not remove the implication of the higher law—the constitution. If the pre-emption of the income tax field is the result of the distributive requirements of Section 9, Article XII, the field is foreclosed to municipalities until such time as the constitutional implication is clarified by amendment.

The judicial future of municipal income taxation is one that may not be presaged with assurance.

#### CONCLUSION

The power of municipalities to levy excise taxes has been greatly restricted by the operation of the judicially developed pre-emption doctrine. Municipal taxing power is granted by Section 3, Article XVIII of the Ohio Constitution, known as the home-rule amendment, but this power may be limited by the General Assembly under the authority of another constitutional provision, Section 13, Article XVIII. The General Assembly may manifest this restrictive authority either by express statutory interdiction or by implication flowing from state tax legislation. An implied preclusion of municipal taxation has been found whenever a tax field is occupied by the state.

Permissive legislation has been suggested as a method of clarifying legislative intent so as to permit municipalities to enact the consumers' utility tax declared invalid in the recent *Youngstown* case. The theory upon which the pre-emption doctrine seems to be predicated is that the state as the supreme sovereign must possess the authority to control an inferior political subdivision. From the enactment of state taxes, the court has inferred the will of the General Assembly to preclude any municipal taxation in the same tax field. The legislative branch of government has been entrusted with the control of municipal taxation—the purpose of permissive legislation is to indicate that the General Assembly does not wish to exercise its power of limitation in certain designated tax fields. The cases announcing the pre-emption doctrine are correctly decided, but their application should be confined to those factual situations in which a municipality is seeking, without the express consent of the General Assembly, to tax in a field already occupied by the state.

The Supreme Court has held that the General Assembly by invading a tax field has impliedly precluded municipal taxation in the same area. It is submitted, however, that an express declaration of legislative policy not to pre-empt a given field of taxation would remove the impediment which the court has by inference found to exist.

The operation of the pre-emption doctrine has made it necessary for municipalities to search for additional sources of revenue. Of current interest is the levying of municipal income taxes. The mandatory provisions of Section 9, Article XII of the Constitution relative to the distribution of revenue from income taxation back to local government raises the question as to whether or not this field has been constitutionally pre-empted by the state. The distributive provisions in the state tax statutes have been construed by the Supreme Court as indicating a pre-emptive intent. It may be contended, however, that pre-emption does not exist because the state has not entered the field of income taxation and that this condition is a prerequisite to the preclusion of municipal taxation.