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MUNICIPAL POWER TO TAX— ITS CONSTITUTIONAL LIMITATIONS

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Throughout the United States a great many municipalities have found that in recent years their revenue from taxes has not kept up with their expenses. While inflation spiralled municipal costs, while demands for municipal services increased terrifically during the last few decades, and while financial burdens, such as the three-platoon fire department, were readily imposed upon the municipal corporations by the state legislatures, the tax bases available to municipalities were too often insufficient to meet the expanding local requirements. Older taxes, such as the tax upon real property, have proved more and more inadequate as residents moved beyond city limits, not only thereby depriving the municipalities of property taxes but often leaving behind only greatly depreciated properties. At the same time municipal corporations found many sources of tax revenue being pre-empted by the federal and state governments. Lastly, the municipal corporations have quite generally been underrepresented in state legislatures with an unhappy effect upon applications for new powers to tax. Basically, then, municipal corporations are inhibited in raising revenue by taxes first of all by lack of power and, secondly, by the force and effect of federal and state constitutional limitations. This paper is devoted to a study of the principles governing municipal power to tax and its constitutional limitations.

Power to tax

The power to tax is generally not considered inherent in municipal corporations.[1] However, in 1878 Mr. Justice Field of the United States Supreme Court indicated that to him taxation was an essential or inherent power of every municipal corporation. Said he:

> "A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose."

Justice Field added:

> "When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence,

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1. Village of Lombard v. Illinois Bell Tel. Co., 405 Ill. 209, 90 N.E.2d 105 (1950); Carter Carburetor Co. v. St. Louis, 356 Mo. 646, 203 S.W.2d 438 (1947); "It is an established rule of law that the power to tax is not inherent in a municipal corporation." Eugene Theater Co. v. City of Eugene, 194 Ore. 603, 243 P.2d 1060, 1067 (1952); Walker v. Morgantown, 71 S.E.2d 60 (W. Va. 1952).

> unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have power to raise money and control its expenditure."[2]

There are a few other cases to the same effect in which courts have implied a municipal power to tax, usually from granted powers to erect buildings and to contract debts, but they are in the distinct minority.[3] The doctrine of inherent municipal power to tax cannot be accepted as a general proposition and it is not the law anywhere today except possibly in California, and the result there is really posited upon constitutional home rule.[4]

Power to tax must be found in constitutions, charters and statutes. Constitutional municipal power to tax exists in some of the so-called home rule states. Thus, in California[5] and in Ohio[6] the constitutional home rule provisions are deemed to confer directly upon municipal corporations the power of taxation for municipal affairs and purposes. Even in the "constitutional" home rule states considerable variations in municipal power to tax can be found. For instance, in California municipal corporations can impose any "municipal" tax unaffected by general laws of the state legislature on the same subject and limited only by express inhibitions contained in the municipal charter.[7] In Ohio municipal corporations can impose any tax not prohibited by general laws or pre-empted by a similar state tax. Illustratively, the Ohio Supreme Court without any legislative grant recognized the power of Toledo under the home rule clause of the state's constitution to impose a municipal income tax.[8] On the other hand, in Missouri the municipal corporations must seemingly find power either in an express provision in the charter or in a legislative grant.[9] Thus, the Missouri Supreme Court has denied home rule cities power to impose particular taxes on the theory that the people of the community had not authorized in their charter the imposition of these taxes upon themselves.[10] Whereas in home rule California the charter is only a limita-

2. United States v. New Orleans, 98 U.S. 381, 393 (1878).
3. Taylor v. McFadden, 84 Iowa 262, 50 N.W. 1070 (1892); Oconto v. Oconto City Water Co., 105 Wis. 76, 80 N.W. 1113 (1899).
4. Ainsworth v. Bryant, 34 Cal. 2d 465, 211 P.2d 564 (1949).
5. *In re* Braun, 141 Cal. 204, 74 Pac. 780 (1903); Franklin v. Peterson, 87 Cal. App. 2d 727, 197 P.2d 788 (1948); Ainsworth v. Bryant, 34 Cal. 2d 465, 211 P.2d 564 (1949).
6. Andrews Espy Realty v. Burton-Rodgers Inc., 94 Ohio App. 417, 116 N.E.2d 14 (1952).
7. See cases cited in note 5, *supra*.
8. Angell v. Toledo, 153 Ohio St. 179, 91 N.E.2d 250 (1950). See also Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919) (occupation tax).
9. Carter Carburetor Co. v. St. Louis, 356 Mo. 646, 203 S.W.2d 438 (1947); Kansas City v. Frogge, 352 Mo. 233, 176 S.W.2d 498 (1943); *cf.* Siemens v. Shreve, 317 Mo. 736, 296 S.W. 415 (1927).
10. Carter Carburetor Co. v. St. Louis, *supra* note 9; Kansas City v. Frogge, *supra* note 9.

tion upon municipal power to tax, in home rule Missouri it becomes the source of power to tax and, hence, when the charter does not mention power to impose a particular tax there is no municipal power, unless, as in non-home rule states, the legislature can be importuned into granting power. And in practice begging the legislature may be less difficult than educating the people to amend the charter. In the "non-constitutional" home rule states, such as Pennsylvania and Michigan, the home rule corporations receive their power to tax from statutory grants.

Municipal power to tax in non-home rule states depends upon legislative grant. Illustratively, the West Virginia Supreme Court remarks: "A municipality being without inherent power to levy taxes, if such power exists, it must be delegated by the legislature."[11] Sometimes, as in that state, the statutory grant makes municipal power to impose certain levies, such as license taxes, hinge upon the licensing of the same activity or occupation by the state.[12] In theory, from an express grant to tax additional powers can be implied if absolutely necessary but there is no great judicial willingness to expand the legislative grants. Typically the Oregon Supreme Court states:

> "The principle is universal that whenever a municipality . . . seeks to impose the burden of taxation upon a citizen or upon his property, it must be able to show the grant of such power by express words or necessary implication. No doubtful inference from other powers granted or from obscure provisions of the law, nor mere matter of convenience, or even necessity, will answer the purpose. The grant relied upon must be evident and unmistakable, and all doubts will be resolved against its exercise, and in favor of the taxpayer."[13]

Even courts in home rule states have applied this same rule of necessary inference. For instance, the Missouri Supreme Court has announced: "Power to tax is an extraordinary one which does not inhere in municipal corporations and will not be implied unless the implication be necessary and the grant unmistakable."[14] These courts should re-examine the rule and inquire if the principle governing grants by the legislature is equally applicable when the grant is from the people to their own officers, which is the case in home rule charters, or when the grant to the municipal corporation comes from an amendment to the state constitution passed to expand liberally municipal powers.

It is a fundamental proposition of municipal law that the power to

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11. Walker v. Morgantown, 71 S.E.2d 60, 63 W.Va. (1952).
12. W. VA. CODE ANN. § 497 (1949): "Whenever anything, for which a state license is required, is to be done within such town the council may, unless prohibited by law, require a municipal license therefor, and may impose a tax thereon for the use of the town."
13. Corbett v. Portland, 31 Ore. 407, 48 Pac. 428, 429 (1897).
14. Carter Carburetor Co. v. St. Louis, 356 Mo. 646, 203 S.W.2d 438, 441 (1947).

impose license taxes for revenue will not be implied from the municipal power to regulate by licensing.[15] Courts are also everywhere agreed that the municipal power to tax is to be construed strictly against the municipal corporation and in favor of the taxpayer.[16] Typically the Pennsylvania Supreme Court states:

> "Neither municipalities nor school districts are sovereigns; they have no original or fundamental power of legislation or of taxation. They have the right and power to enact only those legislative and tax ordinances or resolutions which are authorized by an act of the legislature; and if such ordinance or resolution is unauthorized or conflicts with the enabling statute or with some of its provisions it is in that respect or to that extent void. . . . Moreover, the grant of the right or power to levy taxes must be strictly construed; tax statutes should receive a strict construction and in cases of reasonable doubt, the construction should be against the government."[17]

The rule of *expressio unius est exclusio alterius* is applied to legislative grants of tax powers to municipal corporations.[18] Thus, power to levy particular taxes by implication rules out power to levy others.[19] In other words, it is assumed that the state legislature by grant has given all that it intended should be exercised by the municipality.[20] Typically, when the granted power was authority to impose property taxes, St. Louis was denied power to impose an earnings tax.[21] Again, power to impose occupation taxes rules out an additional power to impose license taxes upon the owners of autmobiles.[22]

There are literally hundreds of municipal taxes which have been judicially invalidated because the courts concluded there was no

15. Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941); Chicago v. R & X Restaurant, 369 Ill. 65, 15 N.E.2d 725 (1938); Lyons v. Minneapolis, 63 N.W.2d 585 (Minn. 1954); Solomon v. Jersey City, 12 N.J. 379, 97 A.2d 405 (1953).

16. Gotlieb v. Birmingham, 243 Ala. 579, 11 So. 2d 363 (1943); "The grant . . . is to be strictly construed. Where municipal authority to tax is doubtful, the doubt is to be resolved against the tax and in favor of the taxpayer," Eugene Theater Co. v. City of Eugene, 194 Ore. 603, 243 P.2d 1060, 1067 (1952); Williams v. Richmond, 177 Va. 477, 14 S.E.2d 287 (1941); "Statutes delegating power to municipalities to levy taxes must be construed strictly, and if any doubt exists, it should be resolved against the municipality and in favor of the taxpayer." Walker v. Morgantown, 71 S.E.2d 60, 63 (W. Va. 1952).

17. Appeal of School District of City of Allentown, 370 Pa. 161, 87 A.2d 480 (1952).

The rule of strict construction is used at times to deny power to impose double taxation. "An intent to impose double taxation will not be presumed. . . . The presumption of law is against it and continues until overcome by express words of the Legislature showing such intent." Arrott's Estate, 322 Pa. 367, 185 Atl. 697, 698 (1936).

18. Appeal of Dixon, 138 Pa. Super. 385, 11 A.2d 169 (1940).

19. Decatur Transit Co. v. City of Gadsden, 249 Ala. 314, 31 So. 2d 339 (1947).

20. The authority to tax is not only a delegated authority conferred by the state, but it is assumed that the state has given all it intended should be exercised. . . ." Eugene Theater Co. v. City of Eugene, 194 Ore. 603, 243 P.2d 1060, 1067 (1952).

21. Carter Carburetor Co. St. Louis, 356 Mo. 646, 203 S.W.2d 438 (1947).

22. *Ex parte* Phillips, 64 Okla. 276, 167 Pac. 221 (1917).

municipal power to tax. This was so, for instance, in 1950 when municipal corporations in Illinois endeavored to impose gross receipts taxes upon utilities.[23] It was similarly the result when Oklahoma City endeavored to levy a license tax upon automobiles.[24] A number of municipal admissions and income taxes have been invalidated because of lack of power.[25] Municipal taxes upon the professions have often been set aside because of lack of power.[26] Similarly voided have been some municipal taxes upon interurban carriers.[27] And there is a noticeable judicial inclination to hold that municipal corporations do not have the power to impose discriminatory taxes upon non-residents and out-of-town merchants.[28] Again, courts have often ruled municipalities had no power to impose taxes upon the property and activities of other municipal corporations.[29] Illustratively, a borough was ruled without power to force a school district to collect an admissions tax upon its athletic events.[30]

Although it is, as above indicated, well established that statutes authorizing municipal corporations to tax are to be construed strictly against the corporation and in favor of the taxpayer, courts every once in a while remind us that this should not take precedence over the fundamental rule that a statute is to be construed in accordance with its real intent and meaning, and not so strictly as to defeat the legislative purpose.[31] Furthermore, even though the rule of *ejusdem generis* is conventionally applied to statutes conferring tax powers upon municipal corporations, courts can subordinate the rule and permit reasonable if not liberal constructions. Sustaining Chicago's power to tax bowling alleys as within a grant of power to tax "amusements," the Illinois Supreme Court stated:

> "In the construction and application of a statute, words are to be given their generally accepted meaning, unless there is something in the act indicating that the legislature used them in a different sense. . . . The rule of ejusdem generis is only a rule of construction to aid in ascertaining and giving effect to the legislative intent. It cannot be applied to defeat the evident purpose of the statute or to restrict the scope of subjects the legislature intended to include within the act."[32]

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23. Village of Lombard v. Illinois Bell Tel. Co., 405 Ill. 209, 90 N.E.2d 105 (1950).
24. *Ex parte* Phillips, *supra* note 22.
25. Eugene Theater Co. v. City of Eugene, 194 Ore. 603, 243 P.2d 1060 (1952).
26. State *ex rel.* Cole v. Keller, 129 Fla. 276, 176 So. 176 (1937); Siemens v. Shreve, 317 Mo. 737, 296 S.W. 415 (1927).
27. Argenta v. Keath, 130 Ark. 334, 197 S.W. 686 (1917); Parker v. Silverton, 109 Ore. 298, 220 Pac. 139 (1923).
28. Decatur Transit Co. v. City of Gadsden, 249 Ala. 314, 31 So.2d 339 (1947).
29. Collector of Taxes of Milton v. Boston, 278 Mass. 274, 180 N.E. 116 (1932). The matter is covered more fully in the following section.
30. Borough of Wilkinsburg v. Wilkinsburg School Dist., 365 Pa. 254, 74 A.2d 138 (1950).
31. Ingalls Iron Works v. Birmingham, 248 Ala. 417, 27 So. 2d 788 (1946).
32. Stiska v. Chicago, 405 Ill. 374, 90 N.E.2d 742, 745-47 (1950).

It is crystal clear that state legislatures can delegate power to tax to municipal corporations.[33] And it is just as clear that where municipal power to tax depends upon legislative grant the legislature can modify or terminate the municipal power at will, subject only to constitutional provisions such as the contract clause of the United States Constitution.[34]

The courts recognize that though the existence of municipal power to tax is tested by rules of strict construction these rules do not apply to questions involving municipal exercise of admitted powers to tax. So, subject only to constitutional limitation, municipal corporations with power can determine for themselves the amount of taxes they will levy.[35]

Effect of state pre-emption, prohibition and exemption

Municipal power to impose particular taxes is denied in a number of states upon the theory that the state has pre-empted a field of taxation. This doctrine has often been applied in Ohio to deny municipal tax power. To illustrate, the Ohio Supreme Court because of pre-emption has denied home rule cities power to impose (a) a tax on charges by utilities,[36] (b) a tax upon gasoline filling stations,[37] and (c) a vehicle license tax.[38] Probably the most frequent application of the pre-emption doctrine is found in Pennsylvania. There, for example, the existence of an identical or even similar state tax has been held to preclude municipal levies (a) upon corporate property,[39] (b) upon corporate income,[40] (c) upon the privilege of using tangible property,[41] and (d) upon the tower of a television company.[42] Nevertheless, the Pennsylvania Supreme Court has ruled that even though a taxpayer is subjected to the state property tax, he can be forced to respond to a municipal mercantile license tax.[43] Pittsburgh has also been sustained

33. Reference should be made to the Pennsylvania Home Rule Taxation Act, PA. STAT. ANN., tit. 53, § 2015.1 (Purdon Supp. 1949) for what is probably the broadest grant. It permits municipal corporations to tax anything not taxed by the state. Its constitutionality was affirmed in English v. Robinson Tp. Sch. Dist., 358 Pa. 45, 55 A.2d 803 (1947).

34. Von Hoffman v. Quincy, 4 Wall. 535 (U.S. 1867).

35. "A different rule applies in testing the exercise of a power to tax, from that which applies in determining the existence of such power. If the power exists, then the legislative body has the right to finally determine the amount or rate of a tax, in the absence of constitutional prohibitions. It may levy a tax of any amount it sees fit." Eugene Theater Co. v. City of Eugene, 194 Ore. 603, 243 P.2d 1060, 1067 (1952).

36. Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 65 (1946).

37. Cincinnati v. Oil Works Co., 123 Ohio St. 448, 175 N.E. 699 (1931).

38. Firestone v. Cambridge, 113 Ohio St. 57, 148 N.E. 470 (1925).

39. Dick Contracting Co. v. Hazle Tp. Sch. Dist., 362 Pa. 387, 65 A.2d 381 (1949).

40. Murray v. Philadelphia, 364 Pa. 157, 71 A.2d 280 (1950).

41. Hampton v. Township Sch. Dist., 362 Pa. 395, 67 A.2d 376 (1949).

42. The court reasoned that the telecasting company paid a state-imposed capital stock tax which it deemed a tax on the property of the corporation. Panther Valley TV Co. v. Borough of Summit Hill, 376 Pa. 375, 102 A.2d 699 (1954).

43. National Biscuit Co. v. Philadelphia, 374 Pa. 604, 98 A.2d 182 (1953).

in imposing its amusement tax upon taverns having liquor licenses and amusement permits from the state.[44] Similarly, the California Supreme Court has held that notwithstanding the state constitutional provision that the state shall have exclusive control over the sale of liquor, the state has not pre-empted the taxation of liquor distributors so that municipal corporations can at least impose upon such retailers of liquor the collection of municipal "purchase and use" taxes.[45] On the other hand, local statutes giving state boards and commissions plenary regulatory powers over certain occupations or activities may be interpreted to preclude municipal power to tax. Thus, the Oregon Supreme Court has held that an intercity carrier subject to the regulation of the state commission could not be subjected to a three hundred dollar annual municipal license tax.[46]

Even municipal corporations having quite broad power to tax are at times denied power to impose particular levies. To illustrate, municipal power to tax vehicles is denied in a number of states.[47] In Missouri all cities have been denied power to impose sales taxes.[48] Even in home rule states such as this it is usually theorized that taxes, especially where they can be imposed upon non-residents of the municipal corporation, are matters of "general" rather than "local" concern and hence subject to the paramountcy of the state.[49] Utilization of legislative denials of power obviously constitute a greater limitation than the doctrine of pre-emption for, in the former, even though a tax source has not been tapped by the state it is effectively denied to the municipal corporation.

In addition to states withholding power to impose certain kinds of taxes, municipal corporations are regularly subject to state denials of authority to impose taxes upon particular individuals and properties. Some constitutions directly exempt certain properties.[50] Others

44. Puntureri v. Pittsburgh, 170 Pa. 159, 84 A.2d 516 (1951).

45. Ainsworth v. Bryant, 34 Cal. 2d 465, 211 P.2d 564 (1949).

46. Parker v. City of Silverton, 109 Ore. 298, 220 Pac. 139 (1923).

47. All Minnesota cities are denied power to impose taxes upon motor vehicles for which the owner has a permit from the state. MINN. STAT. ANN. § 168.013, subd. 9 (Supp. 1954). Duluth v. Northland Greyhound Lines, 236 Minn. 260, 52 N.W.2d 774 (1952). See also *Ex parte* Phillips, 64 Okla. 276, 167 Pac. 221 (1917).

48. MO. REV. STAT. ANN. § 71.610 (1949).

49. Carter Carburetor Co. v. St. Louis, 356 Mo. 646, 203 S.W.2d 438 (1947); Kansas City v. Frogge, 352 Mo. 233, 176 S.W.2d 498 (1943); Siemens v. Shreve, 317 Mo. 736, 296 S.W. 415 (1927).

50. *E.g.*, ARK. CONST., art. XVI, § 5: "Provided, further, that the following property shall be exempt from taxation: public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity." So, also: ARK. CONST., Amend. 12; ARIZ. CONST., art. IX, § 2; COLO. CONST., art. X, §§ 4, 5; IDAHO CONST., art. VII, § 4; MONT. CONST., art. XII, § 2.

authorize the legislatures to exempt designated classes of property.[51] The Idaho Constitution is rather alone in giving the legislature authority to allow such exemptions as seem to it necessary and just.[52] State exemptions from municipal taxation are as varied as they are numerous. Georgia, for instance, exempts traveling salesmen who take orders for goods to be delivered later.[53] Pennsylvania exempts from municipal taxation "quasi-public corporations" and the term is used to include, railroads, motor carriers, street railways, power, gas and water utilities.[54] Massachusetts, in imposing its franchise tax, has exempted "manufacturing corporations" from local taxation and the exemption has occasioned much litigation as to its scope.[55] Maryland has also withdrawn from Baltimore's personal property tax raw materials, manufactured products in the hands of manufacturers, and tools, engines and machinery. This effectively takes from the city approximately twenty-five percent of its levy. It is extremely doubtful if such state-imposed exemptions bring or hold industry. Since these properties are protected by the municipality, state legislatures should further explore the desirability of subjecting such assets to municipal taxation.

In most states by constitution or statute, state property is exempt from local taxation.[56] In an interesting case, the Pennsylvania Supreme Court has decreed that state employees resident in Philadelphia could be compelled to pay that city's earnings tax. The court pointed out, however, that the state could refuse the municipal demand that it furnish the city authorities a list of such employees and that it collect the tax.[57] County properties used for necessary governmental purposes are similarly generally immune from local taxation.[58] But it has been held that lands within a village purchased by a county at a tax sale are not exempt from village taxes.[59] Likewise immune from municipal taxes are the properties of other municipal corporations and local governmental units, at least if used for public purposes.[60] The Massa-

51. IND. CONST., art. X § 1; MISS. CONST., art. VII, § 192; OHIO CONST., art. XII, § 2; S.C. CONST., art. X, § 1.
52. IDAHO CONST., art. VII, § 5.
53. GA. CODE ANN. § 92-4105 (1933). Held not to prevent a municipal corporation taxing dairymen selling and delivering milk in the city. Rossman v. City of Moultrie, 189 Ga. 681, 7 S.E.2d 270 (1940).
54. Atlantic Freight Lines v. Rankin, 373 Pa. 517, 96 A.2d 870 (1953).
55. Commissioner of Corps. v. Boston, 324 Mass. 32, 84 N.E.2d 531 (1949); City of Boston v. Commissioner of Corps., 323 Mass. 730, 84 N.E.2d 129 (1949). See also: United Shoe Mach. Corp. v. McCracken County, 265 S.W.2d 929 (Ky. App. 1953).
56. COLO. CONST., art. X § 4; IDAHO CONST., art. VII, §4. Town of Weaverville v. Hobbs, 212 N.C. 684, 194 S.E. 860 (1938).
57. Marson v. Philadelphia, 342 Pa. 369, 21 A.2d 228 (1941).
58. Worcester County v. Worcester, 116 Mass. 193 (1874).
59. Herkimer County v. Village of Herkimer, 279 N.Y. 560, 18 N.E.2d 854 (1939).
60. Ford Motor Co. v. Detroit, 267 Mich. 177, 275 N.W. 272 (1934). Included within this group is usually the municipally-owned utility. Anoka County v. St. Paul, 194 Minn. 554, 261 N.W. 588 (1935).

chusetts court has said in a leading case:

> "Property taken or held for a public use by one municipality within the territorial limits of another or within its own boundaries, is not subject to taxation so long as it is actually devoted to a public use. The reason is that property held and used for the benefit of the public ought not to be made to share the burden of paying the public expenses. That exemption does not rest on any provision of statute, but is founded on general principles of expediency and justice."[61]

The customary exemptions apply even where the property is located outside the city.[62]

However, municipal property has been held not exempt when it was neither actually used for a public purpose nor held with the design to make such a use within a reasonable time.[63] And where a municipality engages in business at times property so used has been held taxable.[64] A broader view of municipal exemption is indicated by the Indiana court which has said:

> "Since municipal corporations are authorized and designed to serve public purposes only, any property which they may acquire in the exercise of their powers to accomplish such purposes or as an incident thereto, may lawfully be exempted from taxation."[65]

The extent of withdrawal of municipal property from taxation by the municipal corporation itself can be understood by the figures for New York City where, in total exemptions from taxation of five billion, six hundred million dollars, city-owned property accounts for four billion, one hundred million dollars. Note should be taken here that certain local governmental units have in some states been ruled not municipal corporations within constitutional exemptions. Such is the case, for instance, of irrigation districts.[66]

The properties of "religious" organizations are customarily exempt from municipal taxation. Such exemption precipitates much litigation as to whether a particular organization qualifies and as much more controversy as to what percentage of property should be exempted.[67] The same problems frequently exist regarding "scientific," "charitable," "educational" organizations and, to a lesser extent, the hospitals, all of which are rather regularly withdrawn from municipal

61. Collector of Taxes of Milton v. Boston, 278 Mass. 274, 180 N.E. 116, 117 (1932).
62. Stewart v. Denver, 70 Colo. 514, 202 Pac. 1085 (1921).
63. Collector of Taxes of Milton v. Boston, 278 Mass. 274, 180 N.E. 116 (1932).
64. Phoenix v. Bowles, 65 Ariz. 315, 180 P.2d 222 (1947).
65. Chadwick v. Crawfordsville, 216 Ind. 399, 24 N.E.2d 937 (1940).
66. Lewiston Orchards Irrig. Dist. v. Gilmore, 53 Idaho 377, 23 P.2d 720 (1933); Buffalo Rapids Irrig. Dist. v. Colleran, 85 Mont. 466, 279 Pac. 369 (1929).
67. See, for example: Dawn Bible Students Ass'n v. Borough of East Rutherford, 3 N.J. Super. 71, 65 A.2d 532 (1949); Sisterhood of Holy Nativity v. City of Newport, 73 R.I. 445, 57 A.2d 184 (1948).

taxation by state action.[68] In the absence of contrary statutory provision, the general rule is that the exemption extends to all properties reasonably necessary to the fulfilment of the exempted objective.[69] Also quite frequently exempted from municipal taxation are homesteads,[70] housing developments,[71] and libraries.[72]

Additional state exemptions are at times expressed in terms not of ownership but according to the nature of the property. Thus, in Wisconsin, farm machinery is exempt from local taxation by statute.[73] In Kentucky and a number of other states "machinery and products in the course of manufacture" have been withdrawn from municipal taxes.[74] "New industrial plants" similarly are immune from taxation by cities in Maryland and some other states.[75] Agricultural produce grown in the state has been exempted by Georgia.[76]

Exemptions from local taxation must be defined in precise and definite terms and an exemption cannot successfully rest on ambiguities or on conjecture as to the policy behind the statute.[77] It is firmly established that exemptions will be strictly construed against a person claiming such an exemption from municipal taxation.[78] The California Supreme Court typically states:

> "Contract provisions and statutes granting exemption from taxation are strictly construed to the end that such concessions will be neither enlarged nor extended beyond the plain meaning of the language employed."[79]

To illustrate the rule, a state exemption of "machinery" did not free from municipal taxation the tower of a telecasting station.[80] And state

68. See, for example: Cedars of Lebanon Hospital v. Los Angeles County, 35 Cal. 2d 729, 221 P.2d 31 (1950); Forman Schools v. Town of Litchfield, 134 Conn. 1, 54 A.2d 710 (1947); Engineering Society of Detroit v. Detroit, 308 Mich. 539, 14 N.W.2d 79 (1944); Hoboken v. Division of Tax Appeals, 134 N.J.L. 594, 49 A.2d 587 (1946); Croton Community Nursery School v. Coulter, 283 App. Div. 716, 127 N.Y.S.2d 416 (1954); *In re* Ogontz School, 361 Pa. 284, 65 A.2d 150 (1949); Troy Academy v. Town of Poultney, 115 Vt. 480, 66 A.2d 2 (1949).

69. Cedars of Lebanon Hospital v. Los Angeles County, 35 Cal. 2d 729, 221 P.2d 31 (1950) (tennis court for nurses held exempt in connection with hospital).

70. FLA. CONST., art. X, § 7. Fort Lauderdale v. Carter, 71 So.2d 260 (Fla. 1954).

71. Laws of Kansas 1953, c. 106. So. also, Wells v. Housing Authority of Wilmington, 213 N.C. 744, 197 S.E. 693 (1938).

72. COLO. CONST., art. X, § 4; IDAHO CONST., art. VII, § 4.

73. WIS. STAT., § 70.111(9) (1949).

74. KY. REV. STAT. § 132.200(4) (Baldwin 1943).

75. Maryland Laws of 1953, c. 18.

76. GA. CODE ANN. § 92.201 (1935).

77. Union Free Sch. Dist. v. Steuben County, 264 App. Div. 945, 36 N.Y.S.2d 440 (1942).

78. Lexington v. Lexington Leader Co., 193 Ky. 107, 235 S.W. 31 (1921); Jersey City v. Liggett & Myers Tobacco Co., 14 N.J. 112, 101 A.2d 555 (1953); Mitchell v. City of Horicon, 264 Wis. 350, 59 N.W.2d 469 (1953).

79. Cedars of Lebanon Hospital v. Los Angeles County, 35 Cal. 2d 729, 221 P.2d 31, 34 (1950).

80. W.A.V.E. v. Louisville, 248 S.W.2d 701 (Ky. 1952).

exemption of a concern from "franchise" taxes did not immunize it from license or occupation taxes imposed by a municipal corporation for doing business within the community.[81] So, too, a chamber of commerce has been ruled not to be a charitable, scientific or educational institution within the constitutional language and hence not exempt from municipal taxation.[82] The burden of proof is upon a party claiming an exemption from municipal taxation to show clearly and unequivocally that he comes within the terms of the exemption.[83] However, it has been held with some validity that exemptions of governmental properties from municipal taxation are not to be given such a strict construction.[84] And Colorado has further ruled that its exemption to schools is to be liberally construed.[85] Although in general strict construction is the rule, in practice it often amounts to a "reasonable" construction.[86] Constitutional and statutory provisions exempting property from state taxation at times are interpreted as not extending the immunity to local taxes.[87]

Not only have the states exempted properties and persons from local taxation, but municipal corporations have themselves extended exemptions. Often the practice is unconstitutional.[88] For instance, under its state constitutional provision requiring uniformity and equality, the Tennessee court has ruled that municipal corporations could not exempt farm lands.[89] In a similar case negating power to exempt industrial establishments, the same Court said:

> "Exemptions from taxation are contrary to public policy and can only be allowed when granted in clear and unmistakable terms. They are not creatures of intendment or presumption. If the language in which they are claimed to be granted leaves it doubtful, the benefit of the doubt must be given to the State, the life of which is taxes."[90]

In still other cases the grant of an exemption from taxes has been ruled ultra vires. For instance, when in exchange for the use of a lot for parking, a municipality conferred an exemption from all taxes to the owner, the granted exemption was invalidated as ultra vires.[91]

81. Atlanta v. First Fed. S. & L. Ass'n, 209 Ga. 517, 74 S.E.2d 243 (1953).
82. Memphis C. of C. v. Memphis, 144 Tenn. 291, 232 S.W. 73 (1921).
83. Assessors of Framingham v. First Parish, 329 Mass. 212, 107 N.E.2d 309 (1952).
84. Hanover Tp. v. Town of Morristown, 4 N.J. Super. 22, 66 A.2d 187 (1949).
85. Pitcher v. Miss Wolcott School, 63 Colo. 294, 165 Pac. 608 (1917).
86. Cedars of Lebanon Hospital v. Los Angeles County, 35 Cal. 2d 729, 221 P.2d 31 (1950).
87. Union Free Sch. Dist. v. Steuben County, 264 App. Div. 945, 36 N.Y.S.2d 440 (1942).
88. Milo Water Co. v. Inhabitants of Town of Milo, 133 Me. 4, 173 Atl. 152 (1934).
89. Bell v. Pulaski, 182 Tenn. 136, 184 S.W.2d 384 (1939); Sevierville v. King, 182 Tenn. 143, 184 S.W.2d 381 (1945).
90. American Bemberg Corp. v. Elizabethton, 180 Tenn. 373, 175 S.W.2d 535, 537 (1943).
91. Whipple v. Teaneck Tp., 135 N.J.L. 345, 52 A.2d 44 (1947).

Constitutions in a few states, such as Mississippi, provide that the state legislature shall by general laws provide for cities to aid and encourage the establishment of industry by exempting such properties from taxation.[92] As noted earlier, many state constitutions spell out what properties can be exempt from municipal taxation and the problem is frequently raised as to whether a particular immunization is within the constitutionally permitted classes.[93] When the state constitution spells out the exemptions, it is generally exclusive and the legislature cannot add others.[94] This is directly decreed in the Arkansas Constitution which reads: "All laws exempting property from taxation other than as provided in this Constitution shall be void."[95]

Where the state constitution is silent on the point, state statutes ordinarily indicate what persons and properties can be exempted from taxation by municipal corporations. As in the interpretation of statutes granting exemptions, municipal ordinances conferring exemptions from taxation will be strictly construed.[96] Exemptions from municipal taxation are far larger than is customarily realized and very frequently favoritism spells out injustice to the remaining municipal taxpayers. In 1953 in Detroit, to illustrate the extent of exemptions from local taxation, the exempted real property of benevolent, charitable, educational, and religious institutions, as well as hospitals, cemeteries, parsonages and veterans' memorial homes amounted to $193,824,740. Furthermore, all personal property (of unknown amount) of these organizations was exempt. Add to this the fact that one hundred and six clubs were given exemptions up to 66 2/3% of their assessments, amounting to a total withdrawal from tax rolls of another $5,040,000. Clearly all the aforementioned groups receive municipal benefits and protection and in almost any municipality many similar organizations should be put back on the tax rolls. It would be naive, however, not to realize that strong pressures exist upon municipal legislators and assessors to keep off the tax rolls particular properties. Municipal authorities should at least explore contractural agreements whereby the exempt institution realizes its obligation to the community for protection afforded. One such agreement reported in Ann Arbor, Michigan, returns to that city from the state university located there payments of approximately a million dollars over a ten year period.

Failure to tax for a number of years will not create against the

92. MISS. CONST., art. VII, § 193.

93. Byrd v. Larrimore, 212 S.C. 281, 47 S.E.2d 728 (1948) (holding such to be for a "municipal" purpose within the state constitution).

94. Weller v. Phoenix, 39 Ariz. 148, 4 P.2d 665 (1931); Tieman v. Indianapolis, 69 Ind. 375, 35 Am. Rep. 223 (1879); Daly Bank v. Board of Comm'rs, 33 Mont. 101, 81 Pac. 950 (1905).

95. ARK. CONST., art. XVI, § 6.

96. Spaulding v. City of Rutland, 110 Vt. 186, 3 A.2d 556 (1939).

municipality an exemption from taxation.[97] Legislatures can provide that, although the tax day has passed, one who purchases property from a tax-exempt organization for non-exempt purposes becomes at once subject to the tax for the current year.[98]

Where property is immune from municipal taxation, one purchasing it at a tax sale acquires no title.[99]

Inability to tax the property and functions of the Federal Government and its instrumentalities

Without congressional consent neither the state nor its lesser political subdivisions can tax the property of the Federal Government. So a county was denied power under the Constitution to impose a property tax upon machinery used by a private corporation but owned by the United States.[100] Similarly, the Massachusetts Court has ruled that a city could not tax machinery belonging to the United States and leased to a private corporation for the production of ordnance.[101] Again, the wartime taking over of piers by the Government immunized them from local taxation.[102] In an interesting case where the Federal Government held legal title to land but the equitable title was in a private party purchasing the land from the Government under contract, it was ruled that a municipal corporation could tax the latter's interest in the property.[103] And a New York court has decided that a municipal corporation could tax the property of an enemy alien while legal title was in the United States from 1942 to 1949, the court remarking that it could find no claim of immunity from taxation while the property was in the custody of the Alien Property Custodian.[104] While the result is quite proper, it is questionable that the immunity of federal property hinges upon a claim of immunity.

Furthermore, it is quite clear that Congress can withdraw from municipal taxation the property and functions of federal instrumentalities.[105] In holding that the Congress could withdraw stock of na-

97. Powers v. Harvey, 103 A.2d 551 (R.I. 1954).
98. Bronx Garment Center v. City of New York, 199 Misc. 513, 106 N.Y.S.2d 720 (1951).
99. Winn v. Little Rock, 165 Ark. 11, 262 S.W. 988 (1924).
100. United States v. Allegheny County, 322 U.S. 174 (1944).
101. Board of Assessors v. General Elec. Co., 330 Mass. 453, 115 N.E.2d 359 (1953).
102. United States v. Hoboken, 29 F.2d 932 (D.N.J. 1928). See also, Springfield v. United States, 99 F.2d 860 (1st Cir.), *cert. denied* 306 U.S. 650 (1938) (municipal corporation cannot tax former post office site held for sale). Personalty owned by the United States is similarly exempt. East Orange v. Joshua Hendy Iron Works, 134 N.J. 154, 46 A.2d 383 (1946).
103. S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946). To the same effect: Bancroft Inv. Co. v. Jacksonville, 157 Fla. 546, 27 So. 2d 163 (1946). It had been decided earlier that a city could tax the equitable interest of a purchaser in a land contract from the United States Housing Corporation, a federal instrumentality. New Brunswick v. United States, 276 U.S. 547 (1928).
104. Simonelli v. City of New York, 276 App. Div. 405, 95 N.Y.S.2d 316 (1950).
105. McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819).

tional banks owned by the Reconstruction Finance Corporation from local taxation, the United States Supreme Court observed:

> "Congress has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation."[106]

Again, in sustaining congressional legislation exempting servicemen from taxation in states where they are required to be by military service, and in denying Denver power to tax the personal property of an Air Force officer under this statute, the United States Supreme Court stated:

> "The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service, cannot be doubted."[107]

Indeed, even in the absence of congressional statutes of exemption, it is usually indicated that the property and functions of federal instrumentalities are necessarily exempt from state and municipal taxation.[108]

There are many congressional statutes conferring power upon states and municipal corporations to tax the federal instrumentalities, and their constitutionality is unquestioned. Under a typical statute municipal corporations are permitted to tax the "real property" of the Reconstruction Finance Corporation and its subsidiaries, and the United States Supreme Court has indicated that local law governs what is to be considered "realty."[109] Similarly, the real property of national banks has been exposed to local taxation.[110] The sole problem under such a statute is one of interpretation of the congressional grant of power to tax. By way of illustration, it has been ruled that authorization to tax the realty of national banks does not permit a municipal corporation to tax the franchise and intangible property of the institution.[111] Again, this grant did not justify a municipal corporation

106. Maricopa County v. Valley Nat'l Bank, 318 U.S. 357 (1943).
107. Dameron v. Brodhead, 345 U.S. 322, 324 (1953).
108. McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819). And cf. Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931). The implied immunity of a private concern serving as a federal instrumentality should only be so extensive as to prevent local taxes impeding the private concern in carrying out its federal responsibilities.
109. 15 U.S.C.A. §§ 606f(3), 610 (1948). Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wash. 2d 652, 171 P.2d 838 (1946); Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946); Borough of Homestead v. Defense Plant Corp., 356 Pa. 500, 52 A.2d 581 (1947).
110. 12 U.S.C.A. § 548 (1945). Trabue Pittman Corp. v. Los Angeles County, 29 Cal. 2d 385, 175 P.2d 512 (1946).
111. Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664 (1899).

in imposing a discriminatory tax upon the real property of such a bank.[112] The Federal Congress should, it is suggested, explore the propriety and justice of exposing to municipal taxation all of the property of private concerns serving for the moment as federal instrumentalities. The effect of removing from local tax rolls a sizable industrial plant is considerable. For instance, it is reported that when one plant was taken over by the Air Force in the City of Adrian, Michigan, it removed $87,958 in taxes from the city, or nine percent of its total budget.[113] Putting one factory in Detroit into the classification of federal instrumentality took approximately ten million dollars worth of machinery and inventory from the tax rolls of the city, incurring a tax loss of $390,000. The expenses of maintaining the military establishment should not be concentrated upon particular municipal corporations but should, it is urged, be spread over the national taxpayers.

As early as 1829 it was decided that a municipal corporation could not tax the ownership of United States securities held by a resident of the city.[114] Again, the United States Supreme Court has ruled that a municipality could not for tax purposes include in the assets of a local bank securities of the United States held by the bank.[115] Furthermore, the Court ruled that the income from bonds of the Federal Government was also exempt from state and local taxation.[116] On the other hand, it is now definitely established that municipal corporations can constitutionally tax the income and earnings of federal employees so long as they are residents of the community.[117]

Inability to impose tonnage duties

The United States Constitution provides that "No state shall, without the consent of Congress, lay any duty of tonnage. . . ."[118] It is well established that this is a prohibition upon municipal corporations and other political subdivisions of the states.[119]

This prohibition prevents states, cities, port authorities and the like from charging duties upon vessels coming in from other ports without having rendered services to the vessels.[120] Thus, in 1874 the United States Supreme Court invalidated New Orleans' charge of ten cents per ton on steamboats. Whatever, said the Court, "which is . . . in its

112. First Nat'l Bank of Hartford v. Hartford, 273 U.S. 548 (1927).
113. It is similarly reported that taking off the tax roll one aircraft plant meant an annual tax loss of $60,840 to Southington, Connecticut, a town of 6,000.
114. Weston v. City Council, 2 Pet. 449 (U.S. 1829).
115. Home Sav. Bank v. Des Moines, 205 U.S. 503 (1907).
116. Miller v. Milwaukee, 272 U.S. 713 (1927).
117. Graves v. New York, 306 U.S. 466 (1939). See also Howard v. Louisville, 344 U.S. 624 (1953).
118. U.S. CONST., art. I, § 10, cl. 2.
119. Southern SS. Co. v. Port Wardens, 6 Wall. 31 (U.S. 1867).
120. State Tonnage Tax Cases, 12 Wall. 204 (U.S. 1871).

essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition."[121] Again, in 1877 the same court invalidated a fee for entering the port of New York, the Court noting that "the charge is not exacted for any services rendered or offered to be rendered."[122] And, if the fee or duty imposed by a municipal corporation is for the privilege of entering the port it is invalid even though not measured by tonnage. As early as 1867 the United States Supreme Court voided such a charge, explaining that the Constitutional provision banned "any duty on a ship." "It was not only a pro rata tax which was prohibited," said the Court, "but any duty on the ship, whether a fixed sum upon its whole tonnage or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."[123]

In the famous case of *Cooley v. Board of Wardens of the Port of Philadelphia*[124] the United States Supreme Court ruled in 1851 that a pilotage fee, not in fact amounting to a privilege charge for entrance into the port, did not violate the constitutional prohibition on tonnage duties. The Supreme Court has since made it clear in a number of decisions that a municipal corporation can charge for wharfage provided to vessels without violating the clause.[125] More recently the Court has indicated that if the municipal levy is but reasonable recompense for any services rendered it does not violate the ban on tonnage duties, even though the fee is measured by tonnage. The constitutional prohibition, said the Court, "does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, or wharfage, or charges for the use of locks on a navigable river, or fees for medical inspection."[126]

The United States Supreme Court has held since 1878 that a municipal corporation, without violating this clause, can tax as personal property boats used in interstate commerce on a river so long as the city was the home port and principal office of the owner.[127] A recent ruling of the Court indicates that such a municipal corporation will likely be limited to an apportioned tax if the vessel is subject to taxation by other jurisdictions.[128] It is indeed debatable whether the mere threat of taxation in the remote future should require that the home port be limited to an apportioned tax.

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121. Cannon v. New Orleans, 20 Wall. 577 (U.S. 1874).
122. Inman SS. Co. v. Tinker, 94 U.S. 225 (1877).
123. Southern SS. Co. v. Port Wardens, 6 Wall. 31 (U.S. 1867).
124. 12 How. 299 (U.S. 1851).
125. Parkersburg & Ohio River Transp. Co. v. Parkersburg, 107 U.S. 691 (1882); Keokuk Northern Line Packet Co. v. Keokuk, 95 U.S. 80 (1887).
126. Clyde Mallory Lines v. Alabama *ex rel.* Docks Comm'n, 296 U.S. 261, 266 (1935).
127. Wheeling Transp. v. Co. v. City of Wheeling, 99 U.S. 273 (1878).
128. Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

Inability to tax imports and exports

The so-called import-export clause of the United States Constitution reads: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.[129] The necessity for the clause is ably conveyed by the footnoted utterances of Hamilton and Justice Miller.[130] This clause, it has always been recognized, is a limitation upon municipal tax power.

After the United States Supreme Court had established that the original package doctrine protected both the goods and the importer from state taxation,[131] the Court in 1872 ruled that a city could not impose an ad valorem personal property tax upon champagne imported from a foreign country and still in the original cases, unbroken and unsold, in the hands of the importer. Said the Court:

> "The goods imported do not lose their character as imports, and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional limitation."[132]

The immunity of property imported from abroad and still in the original package has been recognized in many cases.[133]

The "original package" is the principal container used for shipping goods into this country. When this protective container is broken, the goods become taxable. In a leading case the Supreme Court indicated

129. U.S. CONST., art. I, § 10, cl. 2.

130. "The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey, would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in her own markets. Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to retain the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other? These are questions that temerity alone will answer in the affirmative." THE FEDERALIST, No. 7. See also: Cook v. Pennsylvania, 97 U.S. 566 (1878).

131. Brown v. Maryland, 12 Wheat. 419 (U.S. 1827).

132. Low v. Austin, 13 Wall. 29 (U.S. 1872).

133. Detroit v. Lake Superior Paper Co., 202 Mich. 22, 167 N.W. 852 (1918).

that "when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."[134] The principles can be stated more generally to the effect that whenever imported goods can be said to be incorporated into the general mass of property within the municipality it becomes subject to local taxation. Such incorporation or commingling is found by a sale in this country to one who was not the importer. So, Mobile was sustained in imposing a tax equal to one-half of one percent of gross sales, as applied to a merchant who purchased from importers goods in the original packages and who re-sold the goods. "It is settled . . . ," said the Supreme Court, "that merchandise in the original packages once sold by the importer is taxable as other property."[135]

Although there have been temporary deviations from the view, it can be accepted as thoroughly established that the original package doctrine is no limitation upon municipal taxation of goods brought in from sister states, the term "import" in the instant clause having reference only to goods entering from foreign countries.[136]

Not only are municipal corporations prohibited from imposing imports or duties upon imports, but the ban extends as well to exports. The basic principle here is that for the protective cloak of the clause to avail in the case of exports the goods must have begun moving into foreign commerce and nothing short of this will immunize the goods from local taxation. The United States Supreme Court has, by way of illustration, sustained a California county in imposing a personal property tax upon a dismantled cement plant intended for export but not yet in the stream of export. Notwithstanding the fact that part of the plant had actually been shipped, the balance was subject to the local tax. Said the Supreme Court:

> "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."[137]

Similary, the Court has upheld a Michigan city in imposing an ad valorem property tax on gasoline stored there for fifteen months, even though clearly intended for export and actually exported at a later date. Indicating that even a certain probability of export in the future will not immunize the goods from local taxation, the Supreme Court remarked:

134. May v. New Orleans, 178 U.S. 496 (1900).
135. Waring v. Mobile, 8 Wall. 110 (U.S. 1869).
136. Woodruff v. Parham, 8 Wall. 123 (U.S. 1869).
137. Empresa Siderurgica v. County of Merced, 337 U.S. 154 (1949).

> "Petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. . . . The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."[138]

The present rule is sound in making such goods participate in paying for local protection received, and conferring immunity at any earlier step would too readily make it possible for the diversion of goods into the domestic market after having been exempted from state and local taxes.

It seems quite clear that municipal taxes, measured by gross receipts or otherwise, upon individuals or concerns engaged solely in importing[139] or exporting[140] would violate this clause, as well as the Commerce Clause. Offensive to the same constitutional clauses would be a local tax on the amount of sales of imported goods in the original packages made by either the importer or an auctioneer acting for him. Apropos of the latter situation, the United States Supreme Court has said:

> "The tax on sales made by an auctioneer is a tax on the goods sold . . . and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports."[141]

Taxation of property in interstate and foreign commerce

As a result of the Commerce Clause of the United States Constitution, municipal corporations can not tax goods or property moving in interstate or foreign commerce.[142] However, property is not immune from municipal taxation simply because at a later date it will probably move into interstate commerce.[143] And preliminary movements to prepare the goods or articles for interstate commerce are not themselves a part of interstate commerce for this purpose.[144] So, even though there had been some movement of logs, a village was permitted by the United States to tax the logs when they were in the waters of the village for a considerable period of time before being

138. Joy Oil Co. v. State Tax Comm'n, 337 U.S. 286 (1949).
139. Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933).
140. Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917). See also, as applicable to both imports and exports: Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U.S. 90 (1937) (Stevedore); Martin Ship Service Co. v. Los Angeles, 34 Cal. 2d 793, 215 P.2d 24 (1949) (concern rendering repair services only to ships engaged in foreign and interstate commerce.)
141. Cook v. Pennsylvania, 97 U.S. 566, 573 (1878).
142. Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366 (1922).
143. Coe v. Town of Errol, 116 U.S. 517 (1886).
144. Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933).

sent on to the mill as needed.[145] So, too, where logs had been cut and put into a stream and upon the banks of the stream within a municipality, the corporation could tax the logs even though later the logs were all to go into a larger stream and interstate commerce. Reasoned the Supreme Court:

> "Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state. . . ."[146]

Even though goods moving in interstate commerce have paused within a municipal corporation or state, if the delay is solely to protect the goods from the perils or vicissitudes of the journey, a municipal corporation cannot tax the goods during such a pause within its limits. For instance, when logs were detained because of high water, the Commerce Clause immunized the logs from local taxation. Said Chief Justice Taft:

> "The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative, unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another in the course of such an uninterrupted journey it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken."[147]

So, too, when oil was brought into a state and held in storage awaiting ships or the accumulation of enough oil to load a ship, the oil was held immune from local property taxation on the ground that the storage was incidental to the transit of the oil through the state.[148] Similarly, the California Supreme Court has exempted from local taxation goods going through that state for Hawaii but held up during the war for lack of ships.[149]

When goods have paused for a discernible break and are being kept within a municipal corporation for the economic advantage of the owner they can be taxed by the municipality giving protection, even though they will surely resume their interstate journey at a subsequent date. So, in 1913, the Supreme Court ruled that the City of South Amboy could tax coal stored there even though it came

145. Diamond Match Co. v. Village of Ontonagon, 188 U.S. 82 (1903).
146. Coe v. Town of Errol, 116 U.S. 517 (1886).
147. Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366 (1922).
148. Carson Petrol. Co. v. Vial, 279 U.S. 95 (1928).
149. Von Hamm-Young Co. v. City & County of San Francisco, 29 Cal. 2d 798, 178 P.2d 748 (1947).

from another state and was destined for other states upon the receipt of orders. The Supreme Court recognized that the coal received the protection of the local community and emphasized that the delay was occasioned for a business purpose and advantage.[150] The same year, the Supreme Court sustained the power of an Illinois county to tax grain there for sorting, grading and the like, notwithstanding the grain came from other states and was destined for still others, and even though the delay within the county was for but a short period. The Court indicated that the grain could be disposed of within the county and that so long as this was a distinct possibility the local community could tax.[151] More recently, the United States Supreme Court upheld a license tax of a New Jersey township imposed upon a company storing coal and keeping it within the township until ordered out by the owner. The Court was influenced by the fact that "the duration of the cessation of transit is indefinite," and again it emphasized that "at the time the tax is laid it cannot be determined what the ultimate destination or use of the property may be." The earlier authorities indicated above involving property taxes apply, according to the Court, "equally to franchise or other taxes upon the business of furnishing the storage facilities."[152]

Even though goods have come into a municipal corporation from interstate commerce, if the interstate transit has come to an end and the property has become part of the common mass of goods within the municipality, it is clear that the municipal corporation under delegated powers can impose property taxes, non-discriminatory in their operation, upon the goods.[153] This is so, too, even though the goods are still in their original packages in which they were brought in from other states.[154]

Taxation of carriers used to move interstate and foreign commerce

For a long time it has been accepted that a municipal corporation can tax a seagoing vessel if the owner of the vessel is domiciled within the municipality.[155] The same rule has regularly been applied to vessels engaged in commerce between the different states and used on inland waters. For instance, in 1879 the United States Supreme Court ruled that the City of Wheeling could impose a property tax on

150. Susquehanna Coal Co. v. South Amboy, 228 U.S. 665 (1913).
151. Bacon v. Illinois, 227 U.S. 504 (1913).
152. Independent Warehouses v. Scheele, 331 U.S. 70 (1947).
153. Wiloil Corp. v. Pennsylvania, 294 U.S. 169, 175 (1935); Cudahy Packing Co. v. Minnesota, 246 U.S. 450, 453 (1918); Brown-Forman Co. v. Kentucky, 217 U.S. 563, 575 (1910); Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937).
154. Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923); Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937); American Steel & Wire Co. v. Speed, 192 U.S. 500, 519 (1904); Woodruff v. Parham, 8 Wall. 123 (U.S. 1869).
155. Hays v. Pacific Mail SS. Co., 17 How. 596 (U.S. 1855); Morgan v. Parham, 16 Wall. 471 (U.S. 1873); Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911).

vessels plying between different ports on the Ohio River when Wheeling was the home port and home office, and it was not determinative that the boats were enrolled as coasting vessels under the laws of the United States.[156] Until 1952 the only exception was that where vessels had acquired a situs for taxation in some other jurisdiction, the municipal corporation or state in which the owner resided could not tax,[157] but the situs could.[158] In that year the Supreme Court announced that a state, and *ipso facto* a municipal corporation, which was the domicile of the owner of a vessel, the home port and place of registration, could impose only an *apportioned* property tax if the vessel was subject to taxation in non-domiciliary jurisdictions. The Court indicated its disfavor to multiple taxation in this kind of a situation and stated that an unapportioned tax by the domicile "would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."[159] This case involved taxation of vessels used in inland waterways and is not to be deemed controlling with respect to domiciliary taxation of vessels used on the high seas.

In 1871 the Supreme Court would not permit St. Louis to levy a property tax on boats enrolled there but laid up in Illinois which was the home port and which levied a tax on the boats.[160] And in 1906 the Court would not permit Kentucky to tax a vessel enrolled at Paducah and plying inland waters but owned by a foreign corporation.[161] More recently, however, the Court has ruled that states and presumably municipal corporations can levy property taxes upon boats owned by non-domiciliaries and used on inland waters within the local jurisdiction so long as a reasonable apportionment formula was used.[162] The power of a non-domiciliary jurisdiction to tax vessels used on the high seas on an apportioned formula is not yet established. In 1855 the United States Supreme Court held that though a vessel regularly docked in California and was repaired there, the vessel, owned by a New York corporation, could not be taxed by California.[163] And in 1873 even though a vessel was enrolled at the Port of Mobile and stopped there tri-weekly and was there on tax day, the Supreme Court ruled that it was not there subject to tax so long as owned by a New York corporation, and this even though there was no proof that New York taxed the vessel.[164]

156. Wheeling, Parkersburg and Cincinnati Transp. Co. v. City of Wheeling, 99 U.S. 276 (1879).
157. Old Dominion SS. Co. v. Virginia, 198 U.S. 299 (1905).
158. Old Dominion SS. Co. v. Virginia, *supra* note 157; Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906).
159. Standard Oil Co. v. Peck, 342 U.S. 382 (1952).
160. St. Louis v. Ferry Co., 11 Wall. 423 (U.S. 1871).
161. Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906).
162. Ott v. Mississippi Valley Barge Lines, 336 U.S. 169 (1949).
163. Hays v. Pacific Mail SS. Co., 17 How. 596 (U.S. 1855).
164. Morgan v. Parham, 16 Wall. 471 (U.S. 1873).

In these Cases there was no appointment and, in line with the tendency to uphold local taxation when the community has given a quid pro quo, the *Ott* decision may well presage the constitutionality of a local tax upon ocean-going vessels owned outside the state so long as a reasonable apportionment formula can be devised and utilized.

States, and presumably municipal corporations under delegated power, can when they are the domiciles of railroads tax all of the rolling stock of the railroad where it is not shown by the carrier that any specific cars or any average of cars was so continuously in another state as to be taxable there.[165] Where property of such a carrier has acquired situs in another jurisdiction, the domicile can no longer subject it to tax.[166] Non-domiciliary states and their municipalities can tax the rolling stock of railroads by any reasonable apportioned formula.[167]

It is well settled that the Commerce Clause does not prevent municipal corporations from taxing property used by highway carriers in interstate commerce, so long as the local charge levied is but reasonable compensation for the use of the roads.[168] State courts have indicated that mileage and weight formulae are proper,[169] and so, too, in the case of personnel carriers, seating capacity.[170] Recently, the Supreme Court has indicated that almost any formula used by local authorities will be constitutional so long as the amount actually levied is a fair charge for the use of the municipal streets.[171] Where the local charge is an unreasonable fee for the use of the roads the Supreme Court will readily invalidate the local exaction.[172]

Analogies drawn from the railroad and vessel cases can be applied to the properties of airlines used in interstate commerce. The United States Supreme Court has held that a domiciliary state which was also the home port could tax all of the property of the airline so long as "a defined part of the domicile corpus" has not acquired a situs in another state and so long as no other jurisdiction could impose an apportioned tax.[173] A non-domiciliary state, and by inference an authorized municipal corporation in such state, which provides protection to an airline and its property, can levy upon such property

165. New York Cent. R.R. v. Miller, 202 U.S. 584 (1906).
166. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 195 (1905).
167. Pullman's Car Co. v. Pennsylvania, 141 U.S. 18 (1891).
168. Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931); Hicklin v. Coney, 290 U.S. 169 (1933); Morf v. Bingaman, 298 U.S. 407 (1936); Huston v. Des Moines, 176 Iowa 455, 156 N.W. 883 (1916); *Ex parte* Parr, 82 Tex. Crim. R. 525, 200 S.W. 404 (1918).
169. Brooks Transp. Co. v. Lynchburg, 185 Va. 135, 37 S.E.2d 857 (1946).
170. Northern Kentucky Transp. Co. v. Bellevue, 215 Ky. 514, 285 S.W. 241 (1926); Jefferson Transp. Co. v. St. Cloud, 155 Minn. 463, 193 N.W. 960 (1923).
171. Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1949).
172. Sprout v. South Bend, 277 U.S. 163 (1928). See also: Clark v. Poor, 274 U.S. 554 (1927); Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928).
173. Northwest Airlines v. Minnesota, 322 U.S. 292 (1944).

a reasonably apportioned tax, and this, too, even though the airline's home port is elsewhere.[174]

Municipal Sales and Use Taxes

Even though the goods have come into a municipal corporation through the channels of interstate commerce, the municipal corporation can impose a sales tax upon the transfer of the goods within the municipality. As far back as 1869 the United States Supreme Court ruled that the City of Mobile could tax the sales of merchandise in the original package when the goods were brought in, not from foreign countries, but from sister states.[175] Then, in 1940, the same court sustained New York City's sales tax as applied to coal coming in from Pennsylvania, where the sales contract had been entered into in New York City by a Pennsylvania corporation having a sales office in the City, and title having passed in New York City.[176] At the same time, the Supreme Court upheld the same sales tax in application to a sale of machines delivered to a New York City buyer by a sales office in New York City whose salesmen secured the order, even though the order was sent to Illinois for approval and the machines came into New York from there, and even though the remittances were made by the purchaser directly to the Illinois office.[177] In another United States Supreme Court decision involving the same tax, it was held constitutional in its application to sales to a New York City buyer even though the goods were shipped direct to such purchaser from out-of-state, and even though the order was accepted in Massachusetts, the Court once more noting the presence of a sales agent in New York City.[178] Again, the Supreme Court has sustained New York's tax in application to sales in the City by an oil company to a foreign owner of vessels plying between New York and France, which owner had an office in New York, when the oil was moved from New Jersey tanks to the vessels within New York City.[179] Furthermore, by per curiam decisions the Supreme Court has affirmed decisions of New York's highest court ruling constitutional the New York City sales tax in application to orders (a) received by telephone in a New York office, phoned for approval to New Jersey and filled from New Jersey by delivery to the buyer in New York City; (b) received by telephone in New Jersey and filled by delivery to a customer in New York City; and (c) in writing sent by a New York purchaser to New Jersey and delivery

174. Braniff Airways v. Nebraska, 347 U.S. 590 (1954).
175. Woodruff v. Parham, 8 Wall. 123 (U.S. 1869.)
176. McGoldrick v. Berwind White Coal Mining Co., 309 U.S. 33 (1940).
177. McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940).
178. McGoldrick v. DuGrenier, 309 U.S. 70 (1940).
179. McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940).

made from a New Jersey yard to customers in New York.[180] The action of both courts emphasizes the importance to be attached to delivery within the taxing municipality.

The case of *McLeod v. Dilworth*,[181] however, indicates care is necessary so that local as well as state sales taxes are not applied to transactions where title passes outside the locality and where by the terms of the contract delivery to a common carrier outside the taxing jurisdiction fulfills the seller's obligations. There, even though ultimate "delivery" was within the taxing jurisdiction, the Court invalidated the local sales tax when applied to a foreign corporation having no sales office in the state, sales being secured by solicitation within the state but subject to home office approval, title thus passing outside the state, and collections being made outside the state.

Municipal corporations can constitutionally reach goods coming into the community under the circumstances of the *McLeod* case by imposing a use tax upon the goods, for it is clear that a local use tax can be applied to goods used within a municipality even though at some earlier time they moved in interstate commerce.[182] And it is no barrier to the constitutionality of a use tax imposed by a municipal corporation that the goods were subject to property taxes in some other state before they moved into interstate commerce, or subject to a sales tax by some other state for an earlier transfer there.[183]

A state, and by analogy an authorized municipal corporation, can require out-of-state sellers to collect their local sales and use taxes for them under certain circumstances. Recently, the United States Supreme Court would not permit Maryland to force collection of its use tax from a Delaware store that delivered into the state goods purchased by Maryland residents in Delaware.[184] This decision to the author is questionable for if the store could deliver the goods throughout Maryland in its own trucks it seems neither unfair nor unreasonable to make it account to Maryland for that State's use tax, considering further that Maryland compensated the store for its efforts. The four dissenters quite properly felt the case is within the principle governing earlier cases sustaining collection procedures upon out-of-state sellers having sufficient contacts within the state to make it fair and reasonable that they collect the sales or use tax. In 1944 the Supreme Court had upheld the State of Iowa in forcing a Minnesota concern that delivered goods to Iowa purchasers to

180. Jagels v. Taylor, 280 N.Y. 766, 21 N.E.2d 526 (1939); 281 N.Y. 664, 22 N.E.2d 487, *aff'd per curiam*, 309 U.S. 619 (1940).

181. 322 U.S. 327 (1944).

182. Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939).

183. Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939).

184. Miller Bros. v. Maryland, 347 U.S. 340 (1954); 8 VAND. L. REV. 124 (1954).

collect the Iowa use tax.[185] Here the orders were secured by solicitors sent into Iowa, and the majority of the Court in the *Miller* case seemed to think there was a constitutional difference in how the orders were secured. It should be noted that in the *General Trading* case the orders were not delivered by the vendor's vehicles, which was frequently the case in the *Miller* situation, but by the lesser contacts of parcel post and common carriers. The manner of solicitation simply should not be controlling as to the adequacy of contacts. This is illustrated by a 1941 decision of the Supreme Court where solicitation within the taxing jurisdiction was only by mail and yet, from the existence of retail stores within the state, adequate contacts were found to justify compulsory collection by the out-of-state concern.[186] In a companion case at that time the Court very aptly remarked: "The fact that solicitation was done through local advertisements rather than by local agents . . . is immaterial."[187]

The constitutionality of occupation, privilege, license taxes and the like

The privilege of engaging in interstate commerce is granted by no state or municipal corporation, hence no municipality can impose any tax, however denominated, for the privilege of doing within it such business. For instance, in 1890 San Francisco's license tax was held unconstitutional by the United States Supreme Court when applied to an agent of a railroad whose task it was to stimulate business for the interstate carrier.[188] Again, the Supreme Court has invalidated under the commerce clause the application of a local privilege tax applicable to all trade, business or commercial activity within the city when it was imposed upon a stevedoring company serving only interstate and foreign commerce.[189] And similarly the Court ruled that the Port of Mobile could not impose a tax upon the business of sending and receiving telegraph messages. Said the Court:

> "No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce. . . ."[190]

185. General Trading Co. v. Tax Comm'n, 322 U.S. 335 (1944).
186. Nelson v. Sears Roebuck & Co., 312 U.S. 359 (1941).
187. Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941).
188. McColl v. California, 136 U.S. 104 (1890).
189. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).
190. Leloup v. Port of Mobile, 127 U.S. 641 (1888). So, also, in 1914 the Court invalidated New York City's ordinance imposing a license fee of five dollars per express wagon as applied to wagons of the Adams Express Co. whose business in New York City was 98% in interstate commerce. Said the Court: "Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license." Adams Express Co. v. City of New York, 232 U.S. 14, 31 (1914).

Because very often the flow of goods in interstate commerce is begun by solicitors, their work is deemed an essential part of that commerce and municipal taxes upon such solicitors for out-of-state concerns shipping goods into the community in response to orders secured there are regularly invalidated. In 1887 the United States Supreme Court annulled a tax upon a solicitor or drummer for an out-of-state concern in the amount of ten dollars per week or twenty-five per month.[191] Again, in 1925 the Supreme Court ruled unconstitutional under the commerce clause another municipal ordinance imposing a license fee of twelve and a half dollars per quarter upon each solicitor taking orders for goods for future delivery and receiving payment or deposit in advance, and imposing a charge of twenty-five dollars per quarter if a vehicle was used.[192] It was immaterial, according to the Court, that the solicitors were paid through retention of the advance payments. Said the Court in conclusion: "The ordinance materially burdens interstate commerce and conflicts with the commerce clause." More recently the same court invalidated another municipal imposition upon solicitors in the amount of fifty dollars per year plus one-half of one percent of the gross earnings in excess of one thousand dollars for the preceding year.[193] In most of these cases the Supreme Court has expressed its fears that such taxes were used or could readily be used to discriminate against persons in interstate commerce in favor of local merchants, and the Court further indicated its apprehension that the cumulative burden of many of these municipal taxes would spell the end of interstate commerce. Under the mandate of the United States Constitution state courts have rather regularly joined in striking down local taxes imposed upon solicitors for out-of-state concerns.[194]

There are other instances in which municipal levies upon the privilege of engaging in interstate commerce have been set aside by the courts. Thus, when South Bend levied a license tax of fifty dollars per year upon buses carring twelve or more persons, which the Indiana Supreme Court assumed could be applied to buses engaged exclusively in interstate commerce, the United States Supreme Court invalidated the municipal tax. Said the Court: "The privilege of engaging in such commerce is one which a state cannot deny. A state is equally inhibited from conditioning its exercise on the payment of an occupation tax."[195] Once again, a New Orleans license tax on firms running boats into the Gulf of Mexico was set aside.[196] So, too,

191. Robbins v. Taxing District, 120 U.S. 489 (1887).
192. Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925).
193. Nippert v. Richmond, 327 U.S. 416 (1946).
194. Best & Co. v. Omaha, 149 Neb. 868, 33 N.W.2d 150 (1948); 35 VA. L. REV. 114 (1949).
195. Sprout v. South Bend, 277 U.S. 163 (1928).
196. Moran v. New Orleans, 112 U.S. 69 (1884).

a Chicago license fee upon tugboats used in interstate commerce, the Supreme Court noting in this case that "The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement."[197]

Where a concern engaged in interstate commerce is also engaged within a municipal corporation in local or intrastate activity the firm can be taxed by the municipality for the privilege of doing the local business. To illustrate, in the leading case the United States Supreme Court sustained a Saint Louis tax imposed as a condition of the grant of a license to carry on a manufacturing business in the city, the amount of the tax being ascertained by the amount of the sales of manufactured goods, including the goods sold out of the state and in interstate commerce. The Supreme Court reflected that the city could have measured the tax by a percentage of the value of all goods as manufactured, and that the computation used in effect postponed the tax until the goods were sold and thus benefitted the taxpayer. The Supreme Court stated:

> "In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce."[198]

Even though goods have come into a municipal corporation from the channels of interstate commerce, the peddling of the goods within the city is deemed a local activity after commerce has ended, and municipalities can tax the peddling of such goods.[199] There is a much closer case when municipal corporations tax the delivery of goods sent into the community from interstate commerce, but there is reason to believe such taxes are constitutional when the delivery is a separate incident removed in essence from the interstate commerce or where the amount of the tax is not a great burden upon the commerce. In this situation the absence of a possibility of multiple burdens may well influence the United States Supreme Court to sustain such a levy. In sustaining a tax of two dollars a day, ten dollars a week or twenty-five dollars a year for the deliverers of fuel oil in an Alabama town even as applied to a Florida concern delivering into the municipality, the Alabama Supreme Court has explained:

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197. Harmon v. Chicago, 147 U.S. 396 (1893).
198. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). See, further, Ingalls Iron Works v. Birmingham, 248 Ala. 417, 27 So. 2d 788 (1946).
199. Wagner v. City of Covington, 251 U.S. 95 (1919). See, further, Erwin v. Omaha, 118 Neb. 331, 224 N.W. 692 (1929).

> "The taxing power of a state is not to be regarded as having been exercised in an unconstitutional manner where the levy is not discriminatory by character, does not materially impede the commerce, and is not subject to local levy in some other sovereignty."[200]

In a related situation the United States Court of Appeals for the Second Circuit has upheld New York City's privilege tax when imposed upon a railroad and as it included in the gross income subject to tax demurrage charges imposed upon the shippers who delayed in picking up the goods after the interstate transit had ended.[201]

Even though a transaction seen as a whole may be deemed interstate commerce, there may be certain "intrastate events" or "local activities" in connection therewith that justify the imposition of municipal taxes. As early as 1892 the United States Supreme Court upheld a county in imposing a license tax upon the general business of brokers, remarking: "the fact that the business done chances to consist, for the time being, wholly or partially, in negotiating sales between resident and non-resident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."[202] The tax was measured by a percentage of the gross annual commissions received, but the Court did not consider this constitutionally objectionable. Said the tribunal: ". . . it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount is arrived at by reference to his profits. This tax is not on the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."[203] Comparably, the Pennsylvania Supreme Court has held that Pittsburgh can apply its mercantile license tax and include in its gross receipts used as the measure of tax, sales there to buyers there even though delivery was made out of the state.[204] Similarly, though photographs were sent out of the state for development, and after approval of proofs the photos were sent in from out of the state, the Mississippi Supreme Court sustained a municipal privilege tax on persons engaged in photography, pointing out that the tax was solely on the local privilege of taking the picture.[205] Also in point are the decisions of the United States Supreme Court in sustaining local license taxes upon the privilege of interstate telegraph companies in doing local

200. Sanford v. City of Clanton, 31 Ala. App. 253, 15 So. 2d 303, 307, *cert. denied*, 244 Ala. 671, 15 So. 2d 309 (1943). See, also, City of Enterprise v. Fleming, 240 Ala. 460, 199 So. 691 (1940).
201. *In re* New York, O. & W. Ry., 161 F.2d 518 (2d Cir. 1947).
202. Ficklen v. Taxing Dist., 145 U.S. 1, 21 (1891).
203. *Id.* at 24.
204. Keystone Metal Co. v. Pittsburgh, 374 Pa. 323, 97 A.2d 797 (1953).
205. Craig v. Mills, 203 Miss. 692, 33 So. 8d 801 (1948).

business and in maintaining poles throughout the city. A state or municipal corporation, announced the Supreme Court, in approving Richmond's annual license tax of two dollars per pole: "may lawfully impose a license tax restricted . . . to the right to do local business within its borders where such tax does not burden, or discriminate against, interstate business and where the local business purporting to be taxed . . . is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce." The Court added:

> "Even if the net returns from the intrastate business should not equal such tax and it must be paid from interstate earnings, this alone would not be conclusive against its validity. If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way. . . ."[206]

If any local business is done by interstate carriers they can be subjected therefor to municipal occupation, privilege and license taxes. In 1883 the Supreme Court held that the levying of a license fee upon keepers of ferries was constitutional in its application to one who used the ferries in interstate commerce but who kept them in the taxing jurisdiction. Imposition of a license tax such as this by the situs "is not a regulation of commerce within the meaning of the Constitution of the United States," according to the Court.[207] Recently the same court has sustained a Chicago annual license tax imposed upon persons operating carts and trucks in the city, even as applied to an Illinois corporation having its principal place of business in the city and transporting goods in interstate, as well as in intrastate, commerce. Considerable significance was attached by some members of the Court to the fact that Chicago was the "home port" of the truck line.[208] The conditions under which municipal corporations can impose license and occupation taxes and the like upon concerns engaged in both local and interstate business were enunciated by the Supreme Court in 1928. Said the Court at that time:

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206. Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252 (1919). The same year the Court could say it was "well settled" "that a reasonable tax upon the maintenance of poles and wires erected and maintained by a telegraph company within the limits of a city pursuant to authority granted by its ordinances is not an unwarranted burden upon interstate or foreign commerce." Mackay Tel. & Cable Co. v. Little Rock, 250 U.S. 94 (1919).

207. Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365 (1883).

208. Chicago v. Willett Co., 344 U.S. 574 (1953). See further: American Transit Co. v. Philadelphia, 28 F.2d 736 (3d Cir. 1928) (sustaining a license fee of fifty dollars per bus on the operators of such buses); Southern Fruit Co. v. Porter, 188 S.C. 422, 199 S.E. 537 (1938) (indicating that there could be no license fee upon concerns from out of state taking orders and delivering within a municipality by trucks unless the charge was clearly apportioned to the use of the streets).

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged in interstate commerce would not be subject to the imposition; and that the person could discontinue the intrastate business without withdrawing also from the interstate business."[209]

Income and receipt taxes; taxes discriminatory against persons or products of interstate commerce.

It seems well established at this writing that municipal corporations cannot tax the gross receipts of concerns engaged therein exclusively in interstate commerce. For this reason municipal levies upon the gross receipts of stevedoring concerns[210] and interstate carriers[211] have been invalidated.

However, following the hint offered by the United States Supreme Court in *Central Greyhound Lines v. Meader,* [212] the City of New York amended its business receipts tax so as to get at the percentage of receipts from tickets sold by carriers in interstate commerce that might be deemed properly attributable to New York City business. The city apportioned the receipts on the basis of mileage, wages and salaries paid in the city, and income from tickets sold in the city. As so apportioned, even though the taxpayer is engaged solely in interstate commerce, the New York City tax has been sustained by the state courts. Said the court of first instance: "The plaintiff maintains a terminal and transacts business within the City of New York. The said business, including maintenance of the terminal, may be, and no doubt is, interstate commerce. Nevertheless, it is interstate commerce to which the city bears a special relation. Under such circumstances, a tax is not repugnant to the commerce clause unless it constitutes a burden on interstate commerce. If the tax is fairly apportioned, the commerce clause is satisfied."[213]

If the taxpayer does both an interstate and a local business within the municipality, it can be subjected to a gross receipts tax upon the severable and distinct local business.[214] Since a state can, under the commerce clause, tax the net income of a concern engaged therein in an exclusively interstate commerce, presumably the same tax can be levied by an authorized municipal corporation.[215]

209. Sprout v. South Bend, 277 U.S. 163, 171 (1928).
210. Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947).
211. Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948); All American Bus Lines v. New York, 268 App. Div. 508, 52 N.Y.S.2d 689, *aff'd,* 296 N.Y. 571, 68 N.E.2d 869 (1944).
212. 354 U.S. 653 (1948).
213. M & M Transportation Co. v. New York, 84 N.Y.S.2d 128, 130, *aff'd,* 275 App. Div. 1027, 91 N.Y.S.2d 834 (1948).
214. Ficklen v. Shelby County Taxing Dist., 145 U.S. 1 (1892); Matter of New York, O. & W. Ry., 161 F.2d 518 (2d Cir. 1947); O. H. Martin Co. v. Borough of Sharpsburg, 376 Pa. 242, 102 A.2d 125 (1954).
215. United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918).

It has long been appreciated that municipal, like state, taxes that discriminate against the persons or products of interstate commerce are unconstitutional under the commerce clause. Thus, in 1880 the United States Supreme Court invalidated a Baltimore ordinance imposing a license fee for wharfage because it discriminated against products coming in from other states. Said the Court:

> "Municipal corporations, owning wharves upon the navigable waters of the United States . . . cannot be permitted, by discriminations of that character, to impede commercial intercourse and traffic among the several states and with foreign nations."[216]

Later, the Supreme Court ruled that local governmental units and states cannot exempt locally grown agricultural products while taxing those brought in from interstate commerce. The Court was willing to generalize quite properly that the commerce clause will invalidate "all taxes of a discriminatory character levied by a state upon the products of other states."[217]

Due process of law

Although it has been suggested from time to time that due process of law places no limitation upon the amount of authorized municipal taxation,[218] there are nevertheless a number of decisions to the effect that due process is violated if the local tax is prohibitive, confiscatory, arbitrary, capricious or unreasonable. The Georgia courts have consistently followed this doctrine,[219] and the Florida court indicates that it, too, "is committed to the doctrine that if a tax is such that it impairs one's right to engage in a lawful business or tends to drive large numbers out of business, it will be stricken down."[220] And the Kentucky Supreme Court acknowledges that the amount of a municipal tax is ordinarily for the legislative body to determine, but adds: "The rule is subject to the limitation that the tax imposed should not amount to a prohibition of any useful or legitimate occupation."[221] Similarly, the Nebraska court has gone on record as requiring that occupation and business taxes "must be reasonable, considering the nature of the business, and not so high as to prohibit the carrying on of the business."[222] Again, the Virginia Supreme Court has ruled unconstitutional under the Fourteenth Amendment due process clause a Richmond license tax of fifty dollars

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216. Guy v. Mayor & City Council, 100 U.S. 434, 443 (1880).
217. Darnell & Sons v. Memphis, 208 U.S. 113 (1908). *Cf.* Best & Co. v. Maxwell, 311 U.S. 454 (1940) (discriminatory state statute invalid).
218. 1 COOLEY, TAXATION § 72, p. 181 (4th ed. 1924).
219. Morton v. City of Macon, 111 Ga. 162, 36 S.E. 627 (1900); National Linen Serv. Corp. v. Milledgeville, 51 Ga. App. 167, 179 S.E. 837 (1935).
220. St. Petersburg v. Florida Coastal Theaters, 43 So. 2d 525, 527 (Fla. 1949).
221. Louisville v. Pooley, 136 Ky. 286, 124 S.W. 315, 316 (1910).
222. Caldwell v. City of Lincoln, 19 Neb. 569, 27 N.W. 647, 649 (1886).

upon all businesses not subject by other ordinances to special license taxes. The Court was concerned with what might happen to newsboys, bootblacks and similar entrepreneurs when subjected to such a levy.[223] Even in jurisdictions such as these, it is clear that the burden of proving a municipal tax is unreasonable and confiscatory is upon the complaining party, and strong evidence is required.[224]

When a tax has been authorized by the state legislature and adopted by the representative body of a municipal corporation, and then approved by state courts, the United States Supreme Court is not inclined, in the name of due process of law under the Fourteenth Amendment, to invalidate the local levy as arbitrary. For instance, in refusing to invalidate a municipal tax imposed upon the owner of farm lands recently brought into the city and only remotely benefitting from municipal services, the Supreme Court said: "This court cannot say in such cases, however great the hardship or unequal the burden that the tax collected for such (municipal) purpose is taking the property of the taxpayer without due process of law."[225]

Bans on "double taxation" are not to be read into due process clauses in the federal and state constitutions, and the fact that a municipal corporation twice taxes the same incident, activity or property is influential only in determining if the legislation is confiscatory or discriminatory.[226] Though double taxation is not per se unconstitutional under due process, at times it violates other constitutional provisions and many courts indicate that "it is to be avoided when possible."[227] The judicial antipathy is effectuated at times by holdings that the municipal corporation had no *power* to double tax. "An intent to impose double taxation will not be presumed," says the Pennsylvania Supreme Court. "The presumption of law is against it and continues until overcome by express words of legislation showing such intent."[228] Absent a specific state constitutional provision to that effect, there is no need for municipal taxes to be reasonable in amount according to the majority view. Typically the California Supreme Court has said:

> "It follows, therefore, that short of being confiscatory or prohibitory, there is no rule of law that requires a tax to be reasonable in amount, for the function of taxation is a vital legislative function."[229]

223. Williams v. Richmond, 177 Va. 477, 14 S.E.2d 287 (1941).
224. National Linen Serv. Corp. v. Milledgeville, 51 Ga. App. 167, 179 S.E. 837 (1935); Gooch Products Co. v. Rothman, 131 Neb. 523, 268 N.W. 468 (1936).
225. Kelly v. Pittsburgh, 104, U.S. 78, 82-83 (1881).
226. Fox Bakersfield Theater Corp. v. Bakersfield, 36 Cal. 2d 136, 222 P.2d 879 (1950).
227. Appeal of School Dist. of Allentown, 370 Pa. 161, 87 A.2d 480 (1952).
228. Arrott's Estate, 322 Pa. 367, 185 Atl. 697, 698 (1936).
229. Fox Bakersfield Theater Corp. v. Bakersfield, 36 Cal. 2d 136, 222 P.2d 879, 882 (1950).

In the United States jurisdiction to tax is a matter of federal constitutional law, and the United States Supreme Court has used the due process clause of the Fourteenth Amendment to demarcate local tax competence. The Court has indicated that the test of whether a local tax violates the due process clause is whether it bears some fiscal relation to the protections, opportunities, and benefits given by the local government, or in other words, whether the local government has given anything for which it can ask a return.[230] The test has been applied by the Ohio Supreme Court which found it satisfied by the application of a municipal income tax to a non-resident of the taxing city who earned income within the city. Said the Court:

> "The municipality certainly does afford protection against fire, theft, et cetera, to the place of business of the plaintiff's employer and the operation thereof without which plaintiff's employer could not as readily run its business and employ help. In other words, the city of Toledo does afford to plaintiff not only a place to work but a place to work protected by the municipal government of Toledo."[231]

Jurisdictional due process permits the domicile of an owner of chattels that have not acquired situs elsewhere to tax the chattels.[232] On the other hand, due process is violated where a municipal corporation taxes a tangible chattel owned by a resident but having acquired a situs elsewhere.[233] Where tangible property or intangible rights represented by negotiable documents have acquired situs in a municipality they can be taxed by that corporation although owned by non-residents.[234] Where intangibles are concerned any jurisdiction which affords protection to the right, the owner or the user, can demand a reasonable charge for the protection afforded. For a long time it has been accepted that where the intangible was not represented by a negotiable document situated elsewhere the domicile of the owner could tax on the theory of *mobilia sequuntur personam*.[235] Since *Greenough v. Tax Assessors of the City of Newport*,[236] the broader rule just stated has prevailed. In that case it was rule that the City of Newport could impose upon a local trustee a tax measured by half of the value of intangibles held by him and another trustee who was a non-resident. The letters of trusteeship had been granted by a court in another state; the evidence of ownership was at all times in another state; and the life beneficiary resided in another state; yet, because some protection to the intangibles or the one trustee resident in the city was found, the United States Supreme Court sustained the tax.

230. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1941).
231. Angell v. Toledo, 153 Ohio St. 179, 91 N.E.2d 250, 253 (1950).
232. Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911).
233. Frick v. Pennsylvania, 268 U.S. 473 (1925).
234. Old Dominion SS. Co. v. Virginia, 198 U.S. 299 (1905).
235. Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917).
236. 331 U.S. 486 (1947).

If a corporation has acquired a "commercial domicile" within a municipal corporation the local community can tax not only the corporation's realty located there and tangible property having situs there, but also all tangibles not having acquired situs elsewhere and all intangible values of the corporation.[237]

Where property has acquired a "business situs" in a municipality it can be taxed there even though owned by nonresidents or by foreign corporations. Illustratively, the Supreme Court has sustained taxes by the City of New Orleans upon (1) credits evidenced by notes secured by mortgages, where the owner, a nonresident who had inherited them, left them in New Orleans in possession of an agent, who collected the principal and interest as they became due; [238] (2) funds in the hands of a local agent of a foreign banking company, which agent lent the money evidenced by checks drawn upon the agent, treated as overdrafts and secured by collateral, the checks and collateral being regularly in the hands of the New Orleans agent;[239] and (3) funds lent and re-lent in New Orleans by an agent of a foreign insurance corporation where the loans were negotiated, notes signed, security taken, interest collected and the debts paid in New Orleans even though the notes were customarily kept out of town.[240]

Lastly, due process of law demands that municipal tax ordinances be reasonably clear. Where tax ordinances fail to indicate what is being taxed, or where in any manner such an ordinance is so vague that courts are unable to determine with any reasonable degree of certainty whom or what the city intended to tax, the ordinance will be declared inoperative.[241]

As specially limited to license and privilege taxes, the idea of the just and reasonable tax has been incorporated into the South Carolina Constitution. It provides: "License or privilege taxes imposed shall be graduated so as to secure a just imposition of such tax upon the classes subject thereto."[242] Where a municipal license tax on a business did not graduate fairly according to either business or investment, it was set aside by the South Carolina Court.[243]

Requirement of a "public," a "corporate," or a "municipal" purpose

Many courts feel that the taking of taxpayers' moneys for anything but a public purpose is taking property without due process of law. Thus, the Illinois Supreme Court states: "It is well settled that

237. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936).
238. New Orleans v. Stempel, 175 U.S. 309 (1899).
239. Board of Assessors v. Comptoir National, 191 U.S. 388 (1903).
240. Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395 (1907).
241. Puget Sound P. & L. Co. v. Seattle, 291 U.S. 619 (1934).
242. S.C. CONST., art VIII, § 6.
243. *Ex parte* Bates, 127 S.C. 167, 120 S.E. 717 (1923).

the taking of taxpayers' money for a private purpose is a violation of the Due Process clause."[244]

However, it should be pointed out that when the United States Supreme Court first gave recognition to the public purpose limitation upon municipal taxation in 1874 in the case of *Loan Association v. Topeka*,[245] it did not ground the decision or the doctrine upon the due process clause of the Fourteenth Amendment. Rather, it seems to have been treated as an inherent limitation of government. Today, a number of state constitutions specifically provide that "all taxes shall be levied and collected for public purposes only."[246]

No exact and satisfactory definition of public purpose can be given. Historical criteria have often been applied in deciding what tax is for a public purpose, but such determinants should not be exclusive. In the *Topeka* case the United States Supreme Court indicated that courts:

> "must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."[247]

Other courts attest that historical tests are not to be deemed the exclusive criteria.[248] What is a public purpose is in the first instance for the legislative body. Since the prime responsibility for seeing that municipal taxes are levied only for public purposes is in the legislature, the courts customarily defer to the legislative judgment on whether a particular purpose is a public one.[249] Consequently, by law a large discretion is vested in the legislature and courts will not find a violation of the public purpose test except in clear and extreme cases. The Texas Supreme Court has typically observed that: "unless a court can say that the purposes for which public funds are expended are clearly not public purposes, it would not be justified in holding invalid a legislative act or provision in a city charter providing funds

244. Cremer v. Peoria Housing Authority, 339 Ill. 579, 78 N.E.2d 276, 281 (1948). So, also, Robbins v. Kadyk, 312 Ill. 290, 143 N.E. 863 (1924).

245. 87 U.S. 655 (1874).

246. ARIZ. CONST., art. IX, § 1; MONT. CONST., art XII, § 11; OKLA. CONST., art. X, § 14. So, also, N.C. CONST., art. V, § 3; S.C. CONST., art VIII, § 3.

247. Loan Ass'n. v. Topeka, 87 U.S. 655, 665 (1874).

248. City of Tombstone v. Macia, 30 Ariz. 218, 245 Pac. 677 (1927); Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209, 212 (1947).

249. "The courts can only be justified in interposing when a violation of this principle is clear and the reason for the interference cogent." Loan Ass'n v. Topeka, 87 U.S. 655, 664-65 (1874). So, also, Robbins v. Kadyk, 311 Ill. 290, 143 N.E. 863 (1924).

for such purposes."[250] Even more strongly the Illinois Supreme Court says:

> "To justify a court in declaring a tax invalid on the ground it was not imposed for a public purpose, the absence of a public interest must be clear and palpable."[251]

More realistically the public purpose limitation can be seen as a brake upon municipal spending and municipal borrowing, rather than upon municipal taxation, and the issues are customarily precipitated by bills to enjoin local borrowing and spending. In practice, cases involving the public purpose limitation upon spending and borrowing can be used analogically here. Some of the principal decisions involving the public purpose limitation upon the municipal tax power follow. Taxation to aid private concerns and individuals has customarily been accepted as not for a public purpose.[252]

In an interesting case it has been ruled that taxing to erect a municipal hotel violated the doctrine.[253] Spending to aid sectarian schools is usually thought to be violative.[254] The Constitution of Arizona specifically provides that "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[255] Similar clauses exist in a few other states.[256] And the Arizona Court has ruled that it was not a proper public purpose of a city for it to tax to erect an armory to belong to and be used by the state.[257]

On the other hand, courts have ruled that within the public purpose doctrine was municipal taxation for:

schools[258]	parks[261]
hospitals[259]	playgrounds[262]
libraries[260]	water works[263]

250. Davis v. City of Taylor, 123 Tex. 39, 67 S.W.2d 1033, 1034 (1934).
251. People *ex rel.* Thompson v. Chicago & N.W. Ry., 397 Ill. 319, 74 N.E.2d 510, 512 (1947). See, Taylor v. Thompson, 42 Ill. 9 (1866); Hays v. Kalamazoo, 316 Mich. 443, 25 N.W.2d 787 (1947).
252. Loan Ass'n v. Topeka, 87 U.S. 655 (1874).
253. Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209, 25 N.C.L. REV. 504 (1947).
254. Atchison, T. & S.F. Ry. v. Atchison, 47 Kan. 712, 28 Pac. 1000 (1892).
255. ARIZ. CONST., art. IX, § 10.
256. NEV. CONST., art. XI, § 10; N.M. CONST., art. IV, § 31; ORE. CONST., art. I, § 5; UTAH CONST., art. I, § 4.
257. McClintock v. Phoenix, 24 Ariz. 155, 207 Pac. 611 (1922).
258. Cook v. School Dist., 266 Ill. 164, 107 N.E. 327 (1914). People *ex rel.* Carr v. Railway, 316 Ill. 410, 147 N.E. 492 (1925); Collie v. Franklin County, 145 N.C. 171, 59 S.E. 44 (1907).
259. Burleson v. Spruce Pine, 200 N.C. 30, 156 S.E. 241 (1930).
260. Westbrook v. Southern Pines, 215 N.C. 20, 1 S.E.2d 95 (1939).
261. Yarborough v. Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928).
262. Twining v. Wilmington, 214 N.C. 655, 200 S.E. 416 (1939).
263. Speas v. Kansas City, 329 Mo. 184, 44 S.W.2d 108 (1931).

public fairs[264]	electric lighting plant[270]
advertising the city[265]	auditorium[271]
airports[266]	community building[272]
laying out streets[267]	paying legitimate municipal debts[273]
subway systems[268]	filling station [274]
coal yards[269]	recreation center & swimming pool[275]

Courts seem well agreed that it is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every person in the municipal corporation.[276] The Supreme Court has indicated that it will defer both to the legislative determination of the state and municipal governing bodies, and also to the state courts, and the Court is not inclined readily to hold that local taxation is violative of the public purpose doctrine.[277]

In addition to the requirement that municipal taxation be for a public purpose, in a number of states it must be for a "corporate" purpose.[278] Thus, the Tennessee Constitution reads: "The General Assembly shall have power to authorize the several counties and incorporated towns in this state, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law."[279]

This concept can be no more readily and satisfactorily defined than the public purpose limitation. As to it the Illinois Supreme Court once admitted that in many cases "the most intelligent and candid minds would differ."[280] What is a proper "corporate" purpose depends intrinsically upon what kind of a municipal corporation is involved. Something that would be a proper corporate purpose for an irrigation

264. Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 576 (1928).
265. Miller v. Ryan, 54 So. 2d 60 (Fla. 1951); Davis v. City of Taylor, 123 Tex. 39, 67 S.W.2d 1033 (1934).
266. Turner v. Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944).
267. *In re* Lockitt, 58 Misc. 5, 110 N.Y. Supp. 52. (1908).
268. City of Boston v. Jackson, 260 U.S. 309 (1922).
269. Jones v. Portland, 245 U.S. 217 (1917).
270. Mitchell v. City of Negaunee, 113 Mich. 359, 71 N.W. 646 (1897).
271. Adams v. Durham, 189 N.C. 232, 126 S.E. 611 (1925); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947).
272. Robbins v. Kadyk, 312 Ill. 290, 143 N.E. 863 (1924).
273. People *ex rel.* Thompson v. Chicago & N.W. Ry., 397 Ill. 319, 74 N.E.2d 510 (1947).
274. Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N.W. 962, *aff'd*, 275 U.S. 504 (1927).
275. Marshall v. Rose, 213 S.C. 428, 44 S.E.2d 720 (1948).
276. Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 597, 599-600 (1928).
277. Jones v. City of Portland, 245 U.S. 217 (1917); Standard Oil Co. v. City of Lincoln, 275 U.S. 504 (1928).
278. COLO. CONST., art. X, § 7; IDAHO CONST., art. VII, § 6; ILL. CONST., art. IX, § 9; KY. CONST., § 181; MONT. CONST., art. XII, § 4; OKLA. CONST., art. X, § 20; UTAH CONST., art. XIII, § 5; WASH. CONST., art. XI, § 12; S.C. CONST., art. X, § 5.
279. TENN. CONST., art. II, § 29.
280. Taylor v. Thompson, 42 Ill. 9, 11 (1866).

district might well be an improper corporate purpose for a port authority. The Illinois Supreme Court has well said:

> "Corporate purposes for which taxes can be levied by a municipal corporation are only such as are germane to the objects of the creation of the municipality or have a legitimate connection with those objects and a manifest relation thereto."[281]

At times the "corporate" purpose limitation is understood to be something very similar to the public purpose rule. Thus, both are violated by aiding private business. Illustratively, when merchants desired to have a city tax and to borrow for the purpose of erecting a bridge outside of the city to bring in as customers farmers living in the area, the taxing and borrowing were judicially forbidden as not being for a corporate purpose.[282] So, also, it has been held by the Tennessee court that there is no corporate purpose in using tax funds to erect a manufacturing plant to aid private industry.[283] In fact, the Utah Supreme Court has expressed the view that the state constitutional clause, "for all purposes of such corporation," is synonymous with the public purpose rule.[284]

At other times the "corporate" purpose limitation appears as a requirement that the local taxes be used to the advantage principally of the people of the municipal corporation. To illustrate, because a Missouri court felt that a tourist camp to be erected with tax funds would primarily benefit outsiders rather than the residents of the municipality, it was held not to be a "corporate" purpose.[285] Similarly Justice Barnhill of the North Carolina Court has stated:

> "It must be a corporate purpose directly connected with the local government and having for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity or contentment of the inhabitants or residents within the political division from whence the revenue for its support is derived."[286]

However, as in the public purpose concept, it is clear that a tax can be for a "corporate" purpose even though not every single person in the municipality is benefitted.[287] And taxing to be constitutional under a corporate purpose limitation need not be solely for the bene-

281. People *ex rel.* Brenza v. Fleetwood, 413 Ill. 530, 109 N.E.2d 741, 753 (1952). So, also: People v. Chicago, 413 Ill. 83, 108 N.E.2d 16, 19 (1952); Koscis v. Chicago Park Dist., 362 Ill. 24, 198 N.E. 847 (1935).

282. Manning v. City of Devils Lake, 13 N.D. 47, 99 N.W. 51 (1904).

283. Ferrell v. Doak, 152 Tenn. 88, 275 S.W. 29 (1925). *Cf.* Weismer v. Douglas, 64 N.Y. 91 (1876).

284. Denver & R.G. R.R. v. Grand County, 51 Utah 294, 170 Pac. 74, 76 (1917).

285. Kennedy v. City of Nevada, 222 Mo. App. 459, 281 S.W. 56 (1926).

286. Greensboro-High Point Airport Authority v. Johnson, 226 N.C. 1, 36 S.E.2d 803, 813-14 (1946) (concurring in part and dissenting in part).

287. Taylor v. Thompson, 42 Ill. 9 (1866).

fit of the people of the corporation. Thus, in sustaining a tax for a municipal park, the Missouri Supreme Court overrode objections that it would not be corporate if outsiders used it freely, remarking:

> "The fact that people residing beyond the corporate limits of the city may receive occasional benefit and enjoyment from the use of the park does not deprive that purpose of its corporate character."[288]

In some states it is required that taxes by municipal corporations be for "municipal" purposes.[289] The requirement is very close to the corporate purpose limitation and, at times, like the public purpose doctrine, in preventing taxation for private benefits. The analogies can be detected from the language of a California appellate court which says that "the true test" of what is a municipal affair or purpose "is that which requires that the work should be essentially public, and for the general good of all the inhabitants of the city."[290] The same point is reinforced by the statement of the North Carolina Supreme Court to the effect that:

> "In the case of a municipality, the tax to be valid must be for a city or municipal purpose, in a legal sense, as well as for a public one, that is, the objects to be attained must affect the people as a community and not merely as individuals."[291]

Courts in states requiring that local taxation be for a municipal purpose have found the limitation satisfied by taxing: (a) to construct a state highway through a city,[292] (b) to finance a survey of an area sewage problem by a number of municipalities,[293] and (c) to develop a park.[294] There is no more possibility of announcing a general satisfactory test for "municipal" or "corporate" purposes than for public purposes. These constitutional provisions were probably intended in those states not having specific public purpose limitations

288. Vrooman v. St. Louis, 327 Mo. 933, 88 S.W.2d 189, 193 (1935). In addition to such park, courts have illustratively found corporate purposes in taxing: (a) to pay off the debts of a municipal corporation, Denman v. Tacoma, 172 Wash. 406, 16 P.2d 596 (1932); (b) to maintain schools, People *ex rel.* Carr v. Railway, 316 Ill. 410, 147 N.E. 492 (1925); (c) to maintain libraries, Robbins v. Kadyk, 312 Ill. 290, 143 N.E. 863 (1924); Dickinson v. Salt Lake City, 57 Utah 530, 195 Pac. 1110 (1921); (d) to provide a water supply, Kenton Water Co. v. City of Covington, 156 Ky. 596, 161 S.W. 988 (1913); (e) to pay bounties to volunteers in time of war, Taylor v. Thompson, 42 Ill. 9 (1866); (f) for civil defense, People v. Chicago, 413 Ill. 83, 108 N.E.2d 16 (1952); and (g) to pay legitimate debts of the municipality, Stone v. Chicago, 207 Ill. 492, 69 N.E. 970 (1904).

289. CAL. CONST., art. XI, § 12; FLA. CONST., art, IX § 5; N. C. CONST., art. X; MONT. CONST., art. XII, § 3.

290. Bank v. Bell, 62 Cal. App. 320, 217 Pac. 538, 542 (1923).

291. Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 597, 599 (1928).

292. Perez v. City of San Jose, 107 Cal. App. 2d 562, 237 P.2d 548 (1951). See, Jackson v. Rome, 182 Ga. 848, 187 S.E. 386 (1936).

293. Oakland v. Williams, 15 Cal. 2d 542, 103 P.2d 168 (1940).

294. Yarborough v. Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928).

in their constitutions to hold municipalities to some such limitation, and in states having specific public purpose limitations to ensure that taxing by a city is primarily for the benefit of the taxpayers of the city, rather than for the advantage of those living in adjacent areas or the state generally. As in the public purpose limitation there is considerable judicial deference to legislative determinations that particular tax purposes are "municipal." Thus, the North Carolina Supreme Court indicates:

> "Where the question is doubtful . . . and the Legislature has decided it one way, and the people to be taxed have approved that decision, it is the general rule of construction that the will of the lawmakers, thus expressed and approved, should be allowed to prevail over mere doubts of the courts."[295]

Similarly, historical considerations influence the courts in these states in determining what is for a municipal purpose although a California court has noted that once the test seems satisfied "novelty should impose no veto."[296] The remark is appropriate, indeed, whether the test be one of "municipal," "corporate," or "public" purpose.

Equality and uniformity

The equal protection clause in the Fourteenth Amendment of the United States Constitution and comparable clauses in state constitutions demand that all taxpayers be treated by municipal corporations with substantial equality. So, the United States Supreme Court has held that a clearly discriminatory assessment on personal property is violative of the equal protection clause. The Court stated:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."[297]

There are state constitutional clauses as well requiring municipal taxation to be applied with equality.[298]

Discrimination against groups in favor of other groups equally situated violates the equal protection clause. A Texas court has well

295. Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 597, 600 (1928).
296. Bank v. Bell, 62 Cal. App. 320, 217 Pac. 538, 542 (1923).
297. Township of Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946).
298. IND. CONST., art. X, § 1; MISS. CONST., art. IV, § 112.

observed that "the courts uniformly hold that taxing authorities cannot lawfully discriminate in favor of one group of property owners against another group and that such action is void if and when attempted."[299]

Precise and exact equality of treatment is often impossible in the administration of municipal tax laws and it is not demanded of municipal corporations by the courts. The United States Supreme Court has indicated:

> "The Equal Protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."[300]

Similarly, the majority of state courts hold that equal protection is satisfied when no person or class of persons in the municipal corporation is taxed at a different rate than are other persons in the municipality upon the same value or the same thing, and where the objects of taxation are the same by whomsoever owned, or whatever they be.[301]

Equal protection requires that classifications in municipal tax ordinances be reasonable and not arbitrary. Classifications must be based upon real and substantial differences having a reasonable relation to the subject of the municipal legislation. So, the California Supreme Court has stated: "While the state may classify broadly the subjects of taxation, it must do so on a rational basis so that all persons similarly circumstanced shall be treated alike."[302] When irrational classifications have been used in municipal tax ordinances they have been judicially invalidated. For instance, an Ohio court set aside Youngstown's income tax ordinance because it fixed one rate for individuals and another and higher rate for corporations.[303] So, too, the Kentucky Supreme Court has held violative of equality and uniformity constitutional provisions an ordinance imposing a tax of two hundred and fifty dollars a year upon businesses at a fixed place less than a year. The Court concluded:

> "The fact alone that a merchant is in business for less than a year is not a sound reason for placing him in a different classification for tax purposes than that occupied by a competitor who stays in business for more than a year. The difference upon which the classication is based must be substantial and upon a natural and reasonable basis."[304]

299. Reynolds v. Crudgington, 266 S.W.2d 430, 434 (Tex. Civ. App. 1953).
300. Lawrence v. State Tax Comm'n, 286 U.S. 276, 284 (1932).
301. Norris v. Waco, 57 Tex. 635 (1882).
302. Barker Bros. v. Los Angeles, 10 Cal. 2d 603, 76 P.2d 97, 99 (1938).
303. Youngstown Sheet & Tube Co. v. Youngstown, 91 Ohio App. 431, 108 N.E.2d 571 (1951).
304. Louisville v. Koehler, 264 S.W.2d 80, 84 (Ky. 1954).

There are many additional illustrations of judicial invalidation of municipal tax ordinances where the discrimination bears no reasonable or just relation to the tax ordinance in respect to which the classification is made or, in other words, when it is arbitrary and without a rational basis. So, the classification of instalment sellers into those selling house furnishings and wearing apparel and all others was ruled invalid.[305] And a California court has held unconstitutional an ordinance taxing the sale after a fire of others' goods but not the sale of one's own goods. Said this Court:

> "A municipality may not discriminate between persons similarly situated and engaged in similar businesses, by imposing different license taxes upon them. It may only classify various businesses carried on within its boundaries when each group of classified businesses naturally falls into one class and such classification must be based upon reasonable or natural distinctions."[306]

Because distinctions in municipal tax ordinances discriminating against out-of-town merchants are often regarded as unreasonable, such discriminations are frequently set aside by the courts. So, the California Supreme Court invalidated a San Francisco ordinance taxing merchants having goods in the city one hundred dollars a year while imposing a levy of two thousand dollars a year upon merchants selling in the city from stocks outside.[307] Another California court similarly set aside an ordinance taxing local laundries at twelve dollars a year but imposing a tax ten times that amount upon out-of-town laundries serving customers within the city.[308] And the Florida Supreme Court has voided an ordinance imposing a tax of two hundred and fifty dollars per truck upon wholesale bakeries from outside the city but delivering in the city when there was no comparable tax upon local wholesale bakeries.[309] However, it is not to be concluded that all differences in treatment involving out-of-town concerns are unreasonable and invalid. To illustrate, a California court has sustained a municipal ordinance imposing a license tax of one hundred and fifty dollars per year upon out-of-town bakeries selling within the city but only fifty dollars upon local bakeries, when it was proved that the local establishments also had to pay the municipal corporation additional taxes under other ordinances so that the end result produced a rough equality.[310]

305. Puget Sound P. & L. Co. v. Seattle, 291 U.S. 619 (1934).
306. *Ex parte* Hoskins, 16 Cal. App. 2d 51, 60 P.2d 535, 537 (1936).
307. *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642 (1877).
308. *In re* Hines, 33 Cal. App. 45, 164 Pac. 339 (1917).
309. O'Connell v. Kontojohn, 131 Fla. 783, 179 So. 802 (1938). See also: Town of St. Helena v. Butterworth, 198 Cal. 230, 244 Pac. 357 (1926); *In re* Robinson, 68 Cal. App. 744, 230 Pac. 175 (1924).
310. Continental Baking Co. v. City of Escondida, 21 Cal. App. 2d 388, 69 P.2d 181 (1937).

From what has been said, it should be clear that the equal protection clauses do not prevent all classification and, in fact, a wide discretion is accorded municipal legislative bodies in the imposition of taxes.[311] The permissible degree or extent of legislative discretion is variously described by the courts. The Kentucky Supreme Court, by way of illustration, states:

> "It is familiar law that the selection of subjects of classification for taxation founded upon a natural and reasonable basis, with a logical relation to the purposes and objectives of a statute or ordinance, does not offend the principles of equality or uniformity in the imposition of a tax . . . so long as it operates equally upon all within a class."[312]

Under such principles municipal corporations can thus impose lighter burdens upon some classifications or taxpayers, and even exempt some classes or businesses from municipal taxation, without violating equal protection of the laws.[313] "It is not necessary," says the California Supreme Court, "for the validity of a general occupational license tax ordinance that the legislative body include every kind of a business or occupation within its provisions if the discrimination is based upon some reasonable distinction."[314] In effect most courts indulge in a presumption that the classifications used by legislative bodies for tax purposes are reasonable, and strong proof of unreasonableness is required to prove a denial of equal protection. Typically, the Nebraska Supreme Court remarks:

> "The municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxes in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that the classification is unreasonable and arbitrary."[315]

Generally, adjusting the amount of a municipal tax to the size or amount of business in a class does not violate requirements of equal protection and uniformity. Thus, the United States Supreme Court has sustained an ordinance taxing merchants five dollars if their sales amounted to less than a thousand dollars a year, ten dollars if sales were between one thousand and twenty-five hundred, fifteen dollars if sales were between twenty-five hundred and five thousand,

311. Barker Bros. v. Los Angeles, 10 Cal. 2d 603, 76 P.2d 97 (1938).
312. Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248, 256 (1948).
313. Fox Bakersfield Theater Corp. v. Bakersfield, 36 Cal. 2d 136, 222 P.2d 879, 884 (1950).
314. Barker Bros. v. Los Angeles, 10 Cal. 2d 603, 76 P.2d 97, 99 (1938).
315. Norris v. City of Lincoln, 93 Neb. 658, 142 N.W. 114, 115 (1913). The classification must be "palpably arbitrary" before violative of the Fourteenth Amendment. Metropolis Theater Co. v. Chicago, 228 U.S. 61 (1913) (upholding license tax on theaters classified by price of admission). Fox Bakersfield Theater Corp. v. Bakersfield, 36 Cal. 2d 136, 222 P.2d 879 (1950).

twenty-five dollars if sales were between five and ten thousand dollars, and increasing to one hundred dollars if sales were over sixty thousand dollars a year. Only reasonable uniformity in dealing with parties similarly situated is required by the equal protection clause, said the Court.[316] There are many more illustrations of municipal tax ordinances sustained by the courts as utilizing constitutional classifications. Recently, for instance, the Supreme Court sustained the St. Louis municipal income tax which taxed workers upon their earnings, but taxed business concerns upon their net profits.[317] The same classification has been upheld by state courts.[318] Again, by way of illustration, the Washington Supreme Court has upheld a municipality in classifying for tax purposes concerns making chattel loans differently than other banking institutions.[319] And, as suggested earlier, a number of municipal corporations have been sustained in distinguishing between itinerant merchants and others with regular places of business.[320] And, as suggested earlier, so long as over-all tax obligations to the municipality of local merchants approximately equal the particular levy upon out-of-town merchants doing business in the city, courts are inclined to find that constitutional requirements of equality and uniformity have not been violated.[321]

Many state constitutions contain a requirement that there be uniformity of taxation.[322] The demands are substantially similar to the requirements of equal protection indicated above. As there, the courts are agreed that mathematical precision in uniformity and equality is not demanded, but reasonable approximations will suffice.[323] The same reasonable classification adequate for equal protection has been held to satisfy a uniformity clause. So, in sustaining Philadelphia's income tax ordinance subjecting workers to a tax on their earnings, while taxing business on its net profits, the Pennsylvania Supreme Court said that classification "may properly be made according to reasonable, just and practical rules . . ."[324] In some states the

316. Clark v. Titusville, 184 U.S. 329 (1902). So, also, Brannen v. Statesboro, 210 Ga. 474, 80 S.E.2d 805 (1954).

317. Walters v. St. Louis, 347 U.S. 231 (1954).

318. Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248 (1948).

319. Austin v. Seattle, 176 Wash. 654, 30 P.2d 646 (1934).

320. *Ex parte* Haskell, 112 Cal. 412, 44 Pac. 725 (1896).

321. Bueneman v. Santa Barbara, 8 Cal. 2d 405, 65 P.2d 884 (1936); Hoffman Candy Co. v. Newport Beach, 102 Cal. App. 525, 8 P.2d 235 (1932); Richmond Linen Co. v. Lynchburg, 160 Va. 644, 169 S.E. 554 (1933).

322. *E.g.*, "Taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." S.C. CONST., art. VIII, § 6. So, also: ARIZ. CONST., art. IX, § 1; COLO. CONST., art. X, § 3; GA. CONST., art. X, § 1; IND. CONST., art. X, § 1; MICH. CONST., art. X, § 3; MISS. CONST., art. IV, § 112; OHIO CONST., art. XII § 2; TENN. CONST., art. II, § 28.

323. Sweet v. Auburn, 134 Me. 28, 180 Atl. 803 (1935). Some typical state uniformity clauses are: ILL. CONST., art. IX, § 1; MICH. CONST., art. X, § 3; PA. CONST., art. IX, § 3; TEX. CONST., art. VIII, § 1.

324. Dole v. Philadelphia, 337 Pa. 375, 11 A.2d 165, 166 (1940).

constitutional requirement of uniformity applies to all taxes,[325] but in others the state constitutional provision applies only to direct taxation of property.[326] In these jurisdictions municipal corporations can impose excise taxes free of the restraint and here the constitutional limitation does not prevent variety or differences in taxation of privileges, or the exercise of wide discretion in the selection of subjects or classification of business, trades, professions or occupations.[327]

Even where these constitutional provisions apply to all municipal taxes they do not require license and privilege taxes upon different occupations, professions and trades to be alike, so long as there is uniformity as to all members of a class.[328] Accordingly, when the classification is reasonable, different taxes can be imposed upon out-of-town firms delivering in a municipality than those upon local firms in the same trade. Illustratively, the South Carolina court has upheld a municipal tax of twenty-five dollars a year upon local bakeries as compared with one of fifty dollars upon out-of-town bakeries, over objections based upon this clause.[329] So, too, chain stores can be subjected to higher taxes when the classification is reasonable.[330] Again, money lenders upon personal property can be treated apart from bankers.[331]

The Illinois Supreme Court has set forth what is necessary to secure uniformity under the constitution of that state. Says this Court:

> "Two things are essential: First, the assessments shall be just an equal, in proportion to the value of the property liable to assessment; and secondly, when thus assessed, the rate shall be uniform as to every person, and on every species of property, returned by the assessor for taxation."[332]

Accordingly, where only one kind of property is taxed, or only property in one part of the municipal corporation, or where assessments or rates are unjustifiably different as to property or persons of the same class, the uniformity requirement is violated.[333] Furthermore, exemptions in municipal tax ordinances may well violate such constitutional clauses. Thus, the Pennsylvania Supreme Court struck

325. As in Pennsylvania. Butcher v. Philadelphia, 333 Pa. 497, 6 A.2d 298 (1938).
326. As in Georgia and Kentucky. Solomons v. Savannah, 183 Ga. 631, 189 S.E. 230 (1937); Louisville v. Weis, 269 Ky. 554, 108 S.W.2d 515 (1937).
327. Jackson v. Glenwood Springs, 122 Colo. 323, 221 P.2d 1083 (1950). See, also, cases cited in note 326, *supra*.
328. Hill v. City Council, 59 S.C. 396, 38 S.E. 11 (1901).
329. American Bakeries Co. v. Sumter, 173 S.C. 94, 174 S.E. 919 (1934).
330. Great A. & P. Co. v. Spartanburg, 170 S.C. 262, 170 S.E. 273 (1933).
331. Cowart v. City Council, 67 S.E. 34, 45 S.E. 122 (1903).
332. Sherlock v. Village of Winnetka, 68 Ill. 530, 535 (1873).
333. Village of Lemont v. Jenks, 197 Ill. 363, 64 N.E. 362 (1902); People

down the sections of the Philadelphia income tax ordinance exempting domestic servants, farm laborers and farmers selling their own produce as well as a credit to all those who filed returns of fifteen dollars.[334] And the Mississippi court has emphasized that such a clause requires exemptions to extend to all in a class within the city, such as all hotels, and not but a single one.[335]

In states having uniformity clauses, lack of uniformity in valuation of property is not proved by showing merely the proximity of property assessed at lower figures, as it is a matter of common knowledge that land values in cities even in one block vary considerably and it is up to a complainant to establish that other properties selected by him for comparison are similar.[336]

Uniformity requirements in some states are interpreted to prohibit double taxation. Thus, the Michigan court has ruled: "The state constitution requires that there be a uniform rule of taxation and this forbids double taxation."[337] And this court has held a city could not tax both the capital of a domestic corporation and the interests of shareholders. It observed: "The taxation of shares to the shareholder, and property to the corporation, is clearly double taxation, within the spirit of the constitutional provisions. . . . The constitution does not permit the taxation of both property and shares."[338] A similar interpretation is found in Mississippi.[339] And the Idaho uniformity clause adds specifically: "provided, further, that duplicate taxation of property for the same purpose during the same year, is hereby prohibited."[340]

Requirements of uniformity and equality do not demand equality and uniformity between all municipal corporations in a state in the matter of local taxes. It is only necessary that taxes be uniform and equal within the municipal corporation where they apply.[341] This is spelled out specifically in the constitutions of a number of states.[342]

New Hampshire has a constitutional provision to the effect that taxes shall be proportional and reasonable which the Supreme Court of that state has construed to mean equal and just.[343] According to the court the requirement demands that there shall be uniformity

ex rel. Johnson v. Robinson, 406 Ill. 280, 94 N.E.2d 151 (1950); Premm v. Belleville, 59 Ill. 142 (1871); Chicago B. & Q. R.R. v. Aurora, 99 Ill. 205 (1881).

334. Butcher v. Philadelphia, 333 Pa. 497, 6 A.2d 298 (1938). *Contra*: Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248 (1948).

335. Jackson v. Edwards House, 145 Miss. 135, 110 So. 231 (1926).

336. People *ex rel.* Johnson v. Robinson, 406 Ill. 280, 94 N.E.2d 151 (1950).

337. First Nat'l Bank v. Detroit, 253 Mich. 89, 95, 234 N.W. 151 (1931).

338. Stroh v. Detroit, 131 Mich. 109, 114, 90 N.W. 1029 (1902).

339. Panola County v. Carrier, 92 Miss. 148, 45 So. 426 (1908).

340. IDAHO CONST., Art. VII, § 5.

341. Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947); Nashville C. & St. L. R.R. v. Marshall County, 161 Tenn. 236, 30 S.W.2d 268 (1930).

342. IDAHO CONST., art. VII, § 5; MONT. CONST., Art. XII, § 11.

343. N.H. CONST., part II, art. V. Opinion of the Justices, 4 N.H. 565 (1829).

both in the mode of assessment and the rate of taxation, and when a New Hampshire municipal corporation assessed stock in trade at its full value while other properties were assessed at only a percentage of full value the tax was invalidated.[344]

Where discriminations that are unreasonable and unfair are imposed upon out-of-state citizens in taxing their activities within a municipal corporation, the courts have at times set aside such municipal levies as violative of the privileges and immunities clause of the Fourth Article of the United States Constitution.[345] Since this clause is in the language of "citizens" it avails neither corporations nor aliens.

Freedom of communication; Freedom of religion

It has been categorically announced that privileges secured by the First Amendment of the United States Constitution cannot be taxed by municipal corporations.[346] This seems to be quite true so far as municipal license taxation of religious colporteurs is concerned. For example, the United States Supreme Court has invalidated, as applied to distributors of religious books, a municipal license tax of a dollar and a half per day, seven dollars a week, twelve dollars for two weeks, or twenty dollars for three weeks. The fact that the distributors sold pamphlets for five cents and booklets for twenty-five cents did not strip them of their constitutional protection under the First Amendment. The Court indicated its apprehension that the cumulative effect of many such municipal taxes would stamp out the distribution of such religious literature, and used broad language indicating that no municipal *license* tax upon religious activities would be constitutional. The opinion also indicates that distributors of religious literature are to be given greater constitutional protection than distributors of other printed materials. Said the Court: "The constitutional rights of those spreading their religious beliefs through the spoken and written word are not to be gauged by standards governing retailers or wholesalers of books."[347] The following year the Court indicated that the home town of religious colporteurs had no greater power to subject them to license taxes.[348] There are additional decisions indicating the unconstitutionality of all license taxes upon distributors of religious literature.[349]

The Supreme Court has indicated that publishers of newspapers and magazines are not immune from the general forms of local taxation. Said the Court in the *Grosjean* case: "It is not intended by anything

344. Bemis Bros. v. Claremont, 102 A.2d 512 (N.H. 1954).
345. O'Connell v. Kontojohn, 131 Fla. 783, 179 So. 802 (1938).
346. Dameron v. Brodhead, 345 U.S. 322, 327 (1953) (Douglas, J., dissenting).
347. Murdock v. Pennsylvania, 319 U.S. 105 (1943).
348. Follett v. McCormick, 321 U.S. 573 (1944).
349. Jones v. City of Opelika, 319 U.S. 103 (1943); Busey v. District of Columbia, 138 F.2d 592 (D.C. Cir. 1943).

we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for the support of the government."[350] And there is further dictum in the *Murdock* case indicating the probable constitutionality of municipal property and income taxes in their applicability to publishers or preachers. There the Court stated:

> "We do not mean to say that religious groups and the press are free from all financial burdens of government. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is quite another to exact a tax from him for the privilege of delivering a sermon."[351]

Accordingly, the imposition of a general ad valorem property tax upon the personal property of a religious organization has been sustained as constitutional, even when the property taxed consisted of religious literature. Said the California Supreme Court: "Instrumentalities used in connection with the press and the publication business are subject to normal uniform general taxation."[352] And, should it be considered proper tax policy, there is good reason to sustain the constitutionality of municipal income taxes in their application to the earnings of ministers.[353]

The dictum in the *Murdock* case that the usual publisher need not be accorded the full constitutional protection from local taxes enjoyed by the distributors of religious literature has encouraged municipal corporations to impose business and license taxes upon both publishers and also upon distributors of advertising matter. The Tampa business license tax upon the gross receipts of newspaper publishers has been upheld by the Florida Supreme Court, and the United States Supreme Court dismissed the appeal for want of a substantial federal question.[354] In another opinion in which the United States Supreme Court denied certiorari the California courts found no violation of freedom of the press from a non-discriminatory business tax upon newspapers.[355] Recently the New Jersey Supreme Court indicated that the "Legislature has adequate constitutional power to authorize a municipality to impose reasonable non-discriminatory license fees on local newspaper publishing businesses."[356] And there is additional evidence that

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350. Grosjean v. American Press, 297 U.S. 233, 250 (1936).
351. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).
352. Watchtower Bible & Tract Society v. Los Angeles County, 30 Cal. 2d 426, 182 P.2d 178, 181 (1947).
353. Ross v. Philadelphia, 149 Pa. Super. 33, 25 A.2d 834 (1942).
354. Tampa Times Co. v. Tampa, 158 Fla. 589, 29 So. 2d 368, *appeal dismissed*, 332 U.S. 749 (1947).
355. City of Corona v. Corona Daily Independent, 115 Cal. 2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 327 (1953).
356. City of Absecon v. Vettese, 13 N.J. 581, 100 A.2d 750, 753 (1953).

occupation, business and license taxes can constitutionally be imposed upon publishers by municipal corporations,[357] although in doubtful cases courts will hold municipal *power* did not exist.[358]

On one hand, distributors of advertising material are probably entitled to even less immunity from municipal taxation than are newspapers.[359] On the other hand, distributors of tracts on economics, government and philosophy are in theory entitled to share the broader immunity of religious colporteurs which means freedom from all local license taxes.

Constitutional, statutory and charter limitations upon the amount of municipal taxation

Constitutional limitations upon the amount of municipal taxation are common. Similar limitations are at times found in statutes and in municipal charters. Some of these are expressed in terms of mills per dollar value of property,[360] with at times a slight variation being stated in terms of percentages of valuation.[361] The Alabama Constitution, for instance, provides: "No city, town, village or other municipal corporation . . . shall levy or collect a higher rate of taxation in any one year on the property situated therein than one-half of one percent of the value of such property so assessed for state taxation during the preceding year."[362] Some limitations are expressed in terms of dollars per capita,[363] while yet others are indicated in terms of absolute amounts.[364] In some jurisdictions a positive limitation is stated but municipal authorities are permitted to impose additional taxes with the approval of the local electorate. The Michigan Constitution, for example, reads:

> "The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half percent of the assessed value of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums, shall be separately assessed in all cases: Provided, that this limitation may be increased for a period not to exceed twenty years at any time, to not more than a total of five percent of the assessed valuation, by a majority vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation."[365]

357. Giragi v. Moore, 48 Ariz. 33, 58 P.2d 1249, 64 P.2d 819 (1936), *appeal dismissed,* 301 U.S. 670 (1937); *In re* Jager, 24 S.C. 438, 7 S.E. 605 (1888); Norfolk v. Norfolk Landmark Publishing Co., 95 Va. 564, 28 S.E. 959 (1898).

358. City of Absecon v. Vettese, 13 N.J. 581, 100 A.2d 750 (1953).

359. Reuben H. Donnelly Corp. v. City of Bellevue, 283 Ky. 152, 140 S.W.2d 1024 (1940).

360. People v. Banks, 168 Misc. 515, 6 N.Y.S.2d 41 (1938).

361. Harsha v. Detroit, 261 Mich. 586, 246 N.W. 849 (1933).

362. ALA. CONST. 1901, art. XI, § 216.

363. Minnesota Laws of 1921, c. 417, § 1 (one hundred dollars).

364. In addition to the New York constitutional limitation to two percent of the average of the last five property valuations, the 1953 state legislature limited New York City's taxes from real estate to fifty million dollars.

365. MICH. CONST., art. X, § 21 (as amended 1932).

In North Carolina no tax can be levied by municipal corporations, except those for "necessary expenses," without the consent of a majority of the voters in the municipality.[366]

In some states constitutional provisions are interpreted as allowing home rule cities and those with freeholders charters to exceed the usual limit. Thus, in Michigan the court has ruled that the fifteen mill limitation in the amendment does not apply to cities which come within the exception noted therein.[367] However, the same court has ruled that the home rule cities are subject to legislative control in the matter of tax limitations and collections.[368] And Ohio, an even stronger home-rule state, has brought the taxing power of municipal corporations under the supremacy of the legislature which can preclude particular municipal taxes by itself "pre-empting the field."[369]

The limitations indicated above are generally binding not only on the governing body of the municipal corporation but also on all agencies acting for the corporation in any way, such as fire and police pension boards.[370] When a municipal levy exceeds the limitation, the excess is void.[371] When a local tax is illegal because in excess of one of the indicated limitations, the county and local officials can refuse to spread the tax over the rolls.[372]

Notwithstanding these limitations it is customarily possible for a municipal corporation to tax above the limit to pay for municipal obligations not voluntarily entered into by the municipality. So, taxes can generally be levied by a city to pay for tort judgments even when it means exceeding the applicable limitation.[373] And so, too, taxes can be levied by a municipal corporation to finance obligations imposed by higher governmental authorities.[374] However, where as in Missouri the constitutional limitation extends to "taxes of every kind and description," the courts have held that a tax cannot be levied to pay for a judgment against a municipality in a personal injury action.[375] And it is the general rule that municipal corporations cannot

366. N.C. CONST., art. VII, § 7. What are "necessary expenses" within the clause is ably indicated in Coates and Mitchell, *Necessary Expenses,* 18 N.C.L. REV. 93 (1940), and in a Note, 25 N.C.L. REV. (1947).

367. School Dist. of Pontiac v. City of Pontiac, 262 Mich. 338, 247 N.W. 474 (1933).

368. Simonton v. City of Pontiac, 268 Mich. 11, 255 N.W. 608 (1934).

369. OHIO REV. CODE § 5705.49 (Baldwin 1954).

370. Adamson v. Little Rock, 199 Ark. 435, 134 S.W.2d 558 (1939).

371. Connors v. Detroit, 41 Mich. 128 (1879); Thomson v. City of Chadron, 145 Neb. 316, 16 N.W.2d 447 (1944).

372. State *ex rel.* Village of Buhl v. Borgen, 231 Minn. 317, 43 N.W.2d 95 (1950).

373. Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 Pac. 1003 (1926); Menar v. Sanders, 169 Ky. 285, 183 S.W. 949 (1916); Baker v. State *ex rel.* Napoleon, 39 N.M. 434, 49 P.2d 246 (1935); Morris v. Sheridan, 86 Ore. 224, 167 Pac. 593 (1917).

374. Wise v. First Nat'l Bank of Nogales, 49 Ariz. 146, 65 P.2d 1154 (1937).

375. State *ex rel.* Emerson v. Mound City, 335 Mo. 702, 73 S.W.2d 1017 (1934).

tax above the limitation to pay off contractual obligations.[376] However, the Michigan contractual provision is interpreted to authorize the legislature to require municipal corporations to levy and collect taxes necessary to pay bond issues regardless of the limitation in the constitution or in city charters.[377]

In some states the constitutional, statutory or charter limitation is not applicable to non-property taxes or exercises.[378] In others, special taxes of all kinds seem to be included within the governing limitation.[379] What municipal taxes are to be included is a question of interpreting the wording of the enactment and the intent of the draftsmen.

The contract clause of the United States Constitution will prevent the imposition of state constitutional or legislative limitations upon municipal taxation if the result is to prevent the payment of municipal obligations incurred prior to that time, and state constitutional provisions prohibiting legislative bodies from impairing the obligation of contracts will invalidate legislative attempts to limit municipal tax powers under the same circumstances.[380] And it has been ruled by a federal court that where a city had power to levy taxes for the payment of a judgment when it was rendered, no subsequently imposed tax limitation could preclude the levy of taxes sufficient to pay off the judgment.[381]

Conclusion and Commentary

There is generally no lack of power in municipal corporations to impose a real property tax and, although it is of diminishing importance in the larger cities, it will probably continue to constitute the most important single source of municipal tax revenue. Since many municipal services, such as fire protection and sewage disposal bear a very good relationship to real property values, it is fitting that this tax be granted to and used by municipalities. Constitutional and statutory exemptions from this tax should be re-examined and in many cases repudiated. County and even state properties might well be subjected to local taxes to more effectively make the larger group support governmental services provided thereto. There is even less to be said for state-imposed exemptions of private concerns for

376. United States v. County of Macon, 99 U.S. 582 (1878); City of Austin v. Cahill, 99 Tex. 172, 88 S.W. 542 (1905).

377. Hazel Park v. Municipal Finance Comm'n, 317 Mich. 582, 27 N.W.2d 106 (1947).

378. People *ex rel.* Toman v. New York Cent. R.R., 380 Ill. 581, 44 N.E.2d 549 (1942); *Ex parte* Marler, 140 Okla. 194, 282 Pa. 353 (1929).

379. Vaughan v. City of Searcy, 199 Ark. 585, 135 S.W.2d 319; Schneewind v. City of Niles, 103 Mich. 301, 61 N.W. 498 (1894).

380. Von Hoffman v. Quincy, 4 Wall. 535 (U.S. 1867); State *ex rel.* Markel v. Columbus, 139 Ohio St. 351, 40 N.E.2d 145 (1942).

381. City of Wheeling v. John Casey Co., 89 F.2d 308 (4th Cir.), *cert. denied*, 302 U.S. 697 (1937).

it can be doubted if they ever satisfy expectations in bringing and retaining industry, and they should be held violative of equal protection and uniformity clauses when imposed by the legislature. The power of municipal corporations themselves to exempt properties from the tax must be spelled out much more specifically than at present, and local officials in many instances need a good deal more resistance to pressure from local groups desiring to escape the tax.

With the shift in the nature of property from real to personal municipal corporations should be given power to tax personalty. Collections from business and financial institutions and manufactories is relatively simple, but collection from individual residents can not, to be effective, hinge upon divulgence alone. Sales, purchase and use taxes have been authorized for municipal corporations in a number of states but they are regressive and—on the municipal level—fairly easy to avoid. The sales tax is potentially very productive, accounting for 132 million dollars in 1950 in New York City, and power to levy such a tax should be given to municipalities if, on policy levels, they see fit to adopt it. Power should also be given to impose admissions and amusement taxes. Such a tax produced 3.7 millions in Philadelphia in 1950, and is not particularly objectionable.

Especially, it seems to this writer, should municipal corporations be empowered to levy income or earnings taxes. This is the most effective method of making individuals who live outside a city but earn therein contribute to the cost of services rendered them, such as traffic control, police protection, fire protection and the like to their places of employment. Furthermore, rates should be graduated and courts finding this somehow objectionable to a state uniformity of taxation clause should re-examine their position. As so levied, and as embracing unearned as well as earned income, it is just and it is practical of administration at the municipal level. There is no doubt of its productivity. Philadelphia's tax in 1948 at one percent brought in thirty-one million, and in 1950 at one and a quarter percent it returned thirty-seven and a half million. The national average yield from twenty-four cities is approximately $12.93 per capita, with Toledo producing the highest per capita return from a one per cent tax, $19.93.

Municipal corporations in twenty-six states are authorized to levy gross receipts taxes upon businesses, and a more limited gross receipts tax upon utilities is found in thirty-three states. In 1950 the average revenue produced in 196 municipal corporations by gross receipts taxes averaged $5.08 per capita. Such taxes should be within municipal power in all states. Somewhat comparable are the occupation and business taxes, sometimes referred to as "license" taxes. At times selected groups of enterprises are taxed and here the problem of equal protection is ever present, although the legislative judgment

should be given great weight. In other cities all businesses are taxed, often, as in New York City, measured by gross receipts. The tax there produced over sixty million dollars in 1950. Municipal corporations should be empowered to levy business and occupation taxes and also such other utilized and effective taxes as cigarette or tobacco taxes, poll taxes, deed transfer taxes, alcoholic beverage taxes, hotel accommodation taxes, gasoline or motor fuel taxes, and motor vehicle taxes, all of which have been used successfully and efficiently by municipal corporations in this country.

The author is convinced that the power to tax problem can best be solved by constitutional grant of home rule power to tax, interpreted in some way comparable to the California experience, and giving municipal authorities power to impose all taxes not specifically denied to them by the people in the municipal charter. In non-home rule states as well as in the "legislative" home rule jurisdictions municipal power to tax can best be posited upon a broad legislative grant of power to impose all taxes, as in Pennsylvania, free, however, of that state's limitation denying municipalities power to tax the subjects of state taxation. The whole doctrine of state pre-emption should be repudiated. Furthermore, there is need and justification for Congressional enactments subjecting at least some properties of federal instrumentalities to local taxation.

On the level of constitutional limitations, present judicial interpretation of both the tonnage and export-import clauses seems reasonable and eminently fair to taxing municipalities. And it will not be error if the commerce clause is used even more than presently to invalidate local discriminations against the persons and products of interstate commerce. The clause should, it is suggested, permit full taxation of a carrier by the domicile plus reasonable taxation by any other municipal corporation rendering protection and service to a carrier. Both the commerce clause and the due process clause are fairly interpreted today in reference to use taxes, but sales taxes should be constitutional so long as ultimate delivery in a physical sense is made by the seller or his agent into the municipal corporation. And a municipality should under due process be permitted to force a foreign corporation to collect for it the sales or use tax in a transaction involving a purchase by a resident of the corporation when the foreign corporation has sufficient contracts with the state to make it appear fair and reasonable that it collect.

The author feels that gross receipts taxes upon local concerns engaged in interstate commerce should not be struck down simply because they are gross receipts taxes, but that municipal taxes measured in this way should as so imposed be unconstitutional only when discriminatory or amounting to unreasonable burdens upon that com-

merce. Municipal taxation should not readily be invalidated by the courts in the name of due process of law. The United States Constitutional due process ban upon double taxation of tangibles should be re-examined as today many chattels have contacts with multiple municipalities justifying at least apportioned taxes by various municipal corporations. At least, automatic reference to the domicile of the owner as justification for either denial or power to tax should be severely questioned. The present rule regarding intangibles seems fair to municipal corporations. The public purpose limitation should be replaced by specific constitutional clauses banning the donation of tax funds to private individuals. Once the state legislature, the municipal council and the electors of the corporation have approved taxation for a particular property it is hardly appropriate that such taxes be set aside on the theory that the property desired is not "public." And the same can be said of constitutional mandates that municipal taxation be for "corporate" or "municipal" purposes.

Present judicial interpretation of equal protection clauses is satisfactory, with considerable weight being given to the municipal classification and the clause being utilized to invalidate local taxes only when the discrimination is extreme. Uniformity clauses should not be interpreted to prevent graduation of rates in municipal income or earning taxes. Not all municipal taxes upon those who would speak, print, worship or assemble need be unconstitutional under the First Amendment made applicable to the states through the Fourteenth. Certainly all local taxes upon the privilege of worshiping, speaking, publishing and assembling should be invalid as the privilege comes from no local government. However, net income taxes upon the individuals and corporations who engage principally in such endeavors should not be unconstitutional, nor should taxes upon the property, real or personal, of those who so engage unless they become unreasonable burdens upon the communication of ideas or faith. Such a test, quite comparable to the limitation presently utilized for the national privilege of interstate commerce, should be practical and fair. All constitutional controls upon the rate or amount of municipal taxes should be eliminated in favor of more flexible controls in the hands of state commissions or, in the case of home rule cities, in the hands of the local electors.