

THE STRUGGLE FOR AUTONOMY IN MUNICIPAL EARNINGS TAXATION: THE ST. LOUIS EXPERIENCE

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Modern American cities exist in a Looking Glass World. The more they tax, the more they fall behind in the demand for revenue. In the past 15 years annual municipal revenue has increased from 10 to 33 billion dollars, but annual municipal expenditures have likewise increased from 11 to 34 billion dollars, and debt outstanding has skyrocketed from 16 to 44 billion dollars.¹ This increased revenue demand stems from several factors including, the wage and price inflation spiral, the need to replace the deteriorating physical plant of the older cities, and the demand for higher quality municipal services created by a higher standard of living and an increased level of social consciousness.² These problems are compounded by the fact that the single most important source of local tax revenue in the past, the property tax, has suffered a declining tax base in central cities as holders of personal and corporate wealth migrate to suburbia.³

Major cities have realized the inadequacy of present forms of municipal revenue production in the race to narrow the gap between municipal revenue and expenditures. Federal and state aid to local governments through grants-in-aid and revenue sharing is limited by the amount of new revenue produced and the purposes for which

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1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 426 (1972).

2. See J. HELLERSTEIN, STATE AND LOCAL TAXATION 11-12 (3d ed. 1969); R. SIGAFOOS, THE MUNICIPAL INCOME TAX: ITS HISTORY AND PROBLEMS ix-x (1955) [hereinafter cited as SIGAFOOS]; Hartman, *Municipal Income Taxation*, 31 ROCKY MT. L. REV. 123 (1959); Masotti & Kugelman, *The Municipal Income Tax as an Approach to the Urban Fiscal Crisis*, 45 J. URBAN L. 113 (1967) [hereinafter cited as Masotti & Kugelman]; Comment, *Municipal Personal Income Taxation of Nonresidents*, 31 OHIO ST. L.J. 770 (1970). See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 7-17 (1969).

3. Masotti & Kugelman 113.

the revenue can be spent.⁴ Metropolitanization, the union of political subdivisions in a metropolitan area, involves a substantial loss of city independence.⁵ Only self-imposed taxation preserves the complete independence of the city.

The mainstay of municipal taxation, the property tax, although a relatively stable tax, has proved inadequate. The property tax is inelastic; it cannot keep up with inflation. While rates and total valuation have increased sharply, the property tax as a percentage of total tax receipts has remained at approximately 14.5% over the past 20 years.⁶ Moreover, the property tax is increasingly criticized as exceedingly regressive and subject to inequality in treatment of taxpayers due to underassessment and incomplete rolls.⁷ Finally, the property tax is based on the theory that those who receive services are taxable within the district for their assessed property.⁸ The flight to suburbia has dispelled the validity of this theory.

Several major cities⁹ have turned to municipal earnings or income taxes,¹⁰ not to replace, but to supplement existing taxes, especially general property taxes.¹¹ The earnings tax is, most importantly, a significant revenue producer.¹² It is highly responsive to inflation, unlike the property tax.¹³ It is capable of relatively equitable and

4. See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FISCAL BALANCE IN THE AMERICAN FISCAL SYSTEM (1967); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE AID TO LOCAL GOVERNMENT (1969).

5. Comment, *Municipal Personal Income Taxation of Nonresidents*, *supra* note 2, at 771.

6. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 409 (1972). See generally TAX INSTITUTE OF AMERICA, THE PROPERTY TAX: PROBLEMS AND POTENTIALS (1967).

7. SIGAFOOS 145. See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 16-17 (1969).

8. See Hartman, *supra* note 2, at 123.

9. Some of the major cities with this type of tax include Kansas City, St. Louis, Philadelphia, Pittsburgh, Cleveland, Cincinnati, Columbus, Akron, Dayton, Toledo and Louisville.

10. This type of tax has been variously referred to as an earnings tax, payroll tax, wage tax, earned income tax, occupational license tax, net profits tax, and gross receipts tax. Taylor, *Local Income Taxes After Twenty-One Years*, 15 NAT. TAX J. 113, 115 n.7 (1962).

11. See TAX FOUNDATION, INC., CITY INCOME TAXES 39 (1967).

12. Masotti & Kugelman 114; Taylor, *supra* note 10, at 117.

13. Masotti & Kugelman 115; Phillips, *Philadelphia's Income Tax After Twenty Years*, 11 NAT. TAX J. 241, 243 (1958).

low-cost administration.¹⁴ Finally, it relieves the resident taxpayers of some of the burden of providing city services by making nonresidents who work in the city pay for services that are provided there.¹⁵

Based on the belief that even more cities will soon turn to the municipal earnings tax, this Note will focus on the St. Louis Earnings Tax as a vehicle for an exposition of the problems that beset a city seeking municipal autonomy in income taxation. The St. Louis tax incorporates most of the basic features of municipal earnings taxes and has faced almost every possible legal and political attack throughout its 25 year history. A comparison of problems encountered in other jurisdictions will also be made. An understanding of the pitfalls that plague municipal earnings taxes can help municipal leaders decide if earnings taxation is desirable and feasible for their city.

I. THE DRIVE FOR AN EARNINGS TAX

A. *The St. Louis Dilemma*

The fiscal crisis faced by the City of St. Louis, similar in varying degrees to that of other large metropolitan areas, has its roots in the Missouri Constitution of 1875. That document set up two procedures especially relevant to the St. Louis region. First, it authorized a "Scheme of Separation" to be drawn up by the Board of Freeholders of St. Louis County.¹⁶ Secondly, it enabled the City of St. Louis to draft its own constitutional home rule charter.¹⁷ On August 22, 1876, the voters of St. Louis County approved both the Scheme of Separation and the charter.¹⁸

The separation of the City of St. Louis from St. Louis County carved out an independent city, subordinate to no other state political unit other than the state itself. Anticipating considerable growth, the city was enlarged from the then predominantly urban area of 17.98 square miles to a total of 61.37 square miles.¹⁹ The remaining

14. SIGAFOOS 59; Masotti & Kugelman 117; Taylor, *supra* note 10, at 118.

15. SIGAFOOS 71; Masotti & Kugelman 117.

16. Mo. CONST. art. 9, § 20 (1875).

17. *Id.*

18. R. COHN, *THE HISTORY AND GROWTH OF ST. LOUIS COUNTY, MO.* 7-8 (rev. ed. 1968). The original vote reported that the charter had won by 618 votes and the scheme had lost by 107 votes, but a recount was ordered, and it was later announced that both had carried. *Id.*

19. *Id.* at 14.

rural area became St. Louis County, encircling St. Louis on the west, just as the State of Illinois does on the east.

The urban city of St. Louis continued to grow until it peaked in 1930 at a population of 821,960, approximately 59.3% of the metropolitan area.²⁰ Since then, the area surrounding the city has experienced considerable population growth and urbanization. St. Louis County jumped from a population of 211,593 in 1930 (15.2% of the metropolitan area)²¹ to 951,700 in 1970 (almost 40% of the metropolitan area).²² The city of St. Louis, on the other hand, has declined to an estimated population of 586,400 in 1972 (23.9% of the metropolitan area).²³ Optimal economic land utilization in the city, inability to annex new land, decay of old buildings without new development, the lure of open spaces and lower taxes in suburbia, and mobility resulting from automobiles and expressways have all contributed to the growth of suburban St. Louis at the expense of the urban city. Business and industry have followed money and population to the land-rich suburbs, leaving the city with the poor and the elderly.

B. Revenue Crisis

Pressures for increased expenditures by the City of St. Louis during the post-World War II years were similar to those facing other old urban centers. The strongest pressures came from demand for higher quality city services (such as rat control and rubbish collection), the need to maintain and replace capital equipment, and the upward inflation spiral affecting the cost of providing services.²⁴

Sources of revenue were seriously hampered by the isolation and decline of St. Louis. The general property tax was the major source

20. ST. LOUIS CITY PLAN COMM'N, POPULATION 5 (1964). The population of St. Louis dropped to 816,048 in 1940, but rose again to 856,796 in 1950. By this latter date the population of the St. Louis region exceeded 1,681,281, so that St. Louis had declined to about 49% of the population of the St. Louis region. B. AXELROD, A STATISTICAL SURVEY AND REFERENCE GUIDE TO THE ST. LOUIS SMSA 1900-1960, at 3 (1964).

21. ST. LOUIS CITY PLAN COMM'N, POPULATION 5 (1964).

22. St. Louis Post-Dispatch, Aug. 21, 1973, at 3A, col. 1.

23. *Id.*

24. D. Mundinger, An Appraisal of the Fiscal Autonomy of St. Louis, A Home Rule City: The St. Louis Earnings Tax, A Case Study, June 1956, at 77 (unpublished thesis at Washington University) [hereinafter cited as The St. Louis Earnings Tax].

of revenue, but it had reached its optimum in the 1940s.²⁵ The rate of the property tax was at the constitutional maximum, and assessments were already higher than in the surrounding suburbs.²⁶ The vast majority of new housing construction was in the suburbs.²⁷ Affluent suburbanites could not be reached through the property tax, even if they worked and consumed city services in St. Louis. The next most important sources of tax revenue were license fees and excise taxes. These were high in the 1940s and also could not be raised because of competition with surrounding suburbs.²⁸ Other sources of revenue were static and not highly productive of revenue.²⁹

A crisis was reached in 1946 when the new city budget appropriations exceeded the total from the previous year by approximately four million dollars.³⁰ On May 24, 1946, the first earnings tax bill was introduced before the St. Louis Board of Aldermen.³¹

C. *Enactment of the First St. Louis Earnings Tax*

The earnings tax was viewed as a means to alleviate continued deficit spending and as a way to provide better municipal services. It was modeled after successful municipal earnings taxes enacted earlier in Philadelphia and Toledo.³² A proposal for a payroll tax had been made previously in St. Louis, but it died in a storm of protest by nonresidents working in the city.³³ Opposition to the earnings tax bill was just as strong. Suburban leaders threatened retaliation. The Mayor of East St. Louis, Illinois, said, "While we have no desire to pass retaliatory legislation, I believe we would feel it our duty . . ." ³⁴ The Mayor of nearby Maplewood, Missouri, threatened to put toll gates at all entrances to that city and charge each car with a St. Louis sticker 25¢ for the use of his city's streets. He added, "My proposal

25. *See generally id.* at 49-67.

26. *Id.* at 76.

27. *Id.* at 56.

28. *Id.* at 76.

29. *Id.* at 72, 76.

30. *Compare* St. Louis, Mo., Ordinance 43628, May 3, 1946, *with* St. Louis, Mo., Ordinance 43174, May 4, 1945.

31. The St. Louis Earnings Tax 114.

32. St. Louis Star-Times, March 8, 1946, at 1, col. 1.

33. *Id.* at 2, col. 1.

34. St. Louis Star-Times, Apr. 17, 1946, at 3, col. 3.

is no more ridiculous than [the earnings tax]."³⁵ A suburban state legislator introduced a bill in the Missouri General Assembly to prohibit municipalities from levying local income taxes.³⁶ It was killed in conference committee.³⁷ Some opposed the bill for less parochial reasons. The *St. Louis Star-Times* opposed the tax structure:

Each time it's tinkered with, Mayor Kaufmann's proposed municipal income tax becomes more outrageous. Now the Aldermanic Ways and Means Committee has decided to cut out all exemptions and deductions. In other words, the charwoman supporting half a dozen children would be taxed at exactly the same rate as a \$100,000-a-year corporation executive with no dependents! And coupon-clippers, of course, would not have to pay the levy at all!³⁸

The threat of a strike by municipal employees for higher wages spurred the bill through the Aldermanic Committee.³⁹ The first St. Louis Earnings Tax was signed into law,⁴⁰ effective August 1, 1946.⁴¹

More than 100 firms refused payment due for the first tax period.⁴² Carter Carburetor Corporation won a declaratory judgment and injunction in a state circuit court;⁴³ appeal to the Supreme Court of Missouri was taken by the City of St. Louis.⁴⁴

II. HOME RULE AND EARNINGS TAXATION IN MISSOURI

A. *Constitutional Home Rule*

The Missouri Constitution of 1875 established a new innovation in American political structures⁴⁵—a constitutional home rule provision.⁴⁶ Under this provision, St. Louis became the first charter home rule

35. *St. Louis Globe-Democrat*, Apr. 26, 1946, at 8A, col. 4.

36. *The St. Louis Earnings Tax* 114.

37. *Id.* at 115.

38. *St. Louis Star-Times*, June 19, 1946, at 26, col. 1. *See also* *St. Louis Star-Times*, July 10, 1946, at 16, col. 1.

39. *St. Louis Globe-Democrat*, June 30, 1946, at 3A, col. 5.

40. *St. Louis, Mo.*, Ordinance 43783, July 18, 1946.

41. *The St. Louis Earnings Tax* 115.

42. *St. Louis Globe-Democrat*, Oct. 15, 1946, at 9A, col. 1.

43. *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 651, 203 S.W.2d 438 (1947).

44. *Id.*

45. Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385 [hereinafter cited as Schmandt].

46. Mo. CONST. art. IX, § 16 (1875).

city.⁴⁷ The theory behind establishing home rule cities is simply that a community can best deal with its problems by itself.⁴⁸ The scope of the municipality's power to enact revenue producing measures to deal with local fiscal problems has been unsettled under Missouri home rule. Both the 1875 and 1945 constitutions contained substantially the same home rule provision for charter cities: "Any city . . . may frame and adopt a charter . . . consistent with and subject to the Constitution and laws of the state . . ."⁴⁹ This language leaves much unanswered when the question is whether an earnings tax can be enacted by a home rule city in the absence of supportive state legislation.

Whatever the drafters of the home rule provision may have envisioned as to the scope of local autonomy,⁵⁰ any hopes of broad municipal powers were dispelled by judicial decision. The first line of limitation developed by the Supreme Court of Missouri was set in *State ex rel. Garner v. Missouri & Kansas Telephone Co.*,⁵¹ in which the court held that a home rule city needs legislative approval to exercise a governmental, as distinguished from a proprietary, function.⁵² This decision superseded the previous test that required local charters to be subject only to general laws of the state.⁵³ Now cities had no power to act unless the activity was proprietary. Fortunately, a second line of cases qualified *Garner*. These cases allowed a home rule city to act when the governmental function exercised was primarily of

47. See text at notes 16-18 *supra*.

48. See Schmandt 385-86.

49. MO. CONST. art. VI, § 19 (1945). The provision of the 1875 constitution especially relevant to the St. Louis charter provided somewhat more lyrically that the charter "shall always be in harmony with and subject to the Constitution and laws of Missouri" MO. CONST. art. IX, § 23 (1875).

50. One commentator has suggested:

[T]he whole thrust of the [1875] convention's efforts does cast doubt upon a construction of the constitution that limits municipal legislative power to proprietary functions and governmental functions "of primarily local concern" or which "paramountly concern local matters."

Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 MO. L. REV. 45, 51 (1968).

51. 189 Mo. 83, 88 S.W. 41 (1905).

52. *Id.* at 99-100, 88 S.W. at 43.

53. *E.g.*, *City of St. Louis v. Meyer*, 185 Mo. 583, 84 S.W. 914 (1904).

local concern and no general state law denied the city power to act.⁵⁴ The fate of city autonomy in earnings taxation under these two lines of thought depended on the classification of the tax. Under the *Garner* line, since it was settled that taxation is a governmental function,⁵⁵ the city clearly needed legislative authorization to enact an earnings tax. Under the second line of cases, however, it must be decided whether the tax is primarily of statewide or local concern. If classified as local, no legislative authorization was necessary so long as there was no conflict with state law.

B. *Carter Carburetor*

With a confusing background of cases, the Supreme Court of Missouri faced the question of the validity of the St. Louis Earnings Tax in *Carter Carburetor Corp. v. City of St. Louis*.⁵⁶ The City argued that its charter authorized enactment of an earnings tax and that legislative authorization was unnecessary since the tax relates solely to local municipal concerns.⁵⁷ *Carter Carburetor* argued that the tax should be declared void because it was of statewide concern and no legislative authorization existed for the tax.⁵⁸

In invalidating the earnings tax, the court took a restrictive view of the Charter of the City of St. Louis. That charter stated that the City shall have power "to assess, levy and collect taxes for all general and special purposes on all subjects or objects of taxation."⁵⁹ The court strictly construed the charter grant of power⁶⁰ and held that the charter provision did not specifically authorize a municipal earnings tax.⁶¹

54. *E.g.*, *Coleman v. Kansas City*, 353 Mo. 150, 182 S.W.2d 74 (1944); *Kansas City v. J.I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935); *State ex rel. Carpenter v. City of St. Louis*, 318 Mo. 870, 2 S.W.2d 713 (1928).

55. *Grant v. Kansas City*, 431 S.W.2d 89, 92 (Mo. 1968); *Coleman v. Kansas City*, 353 Mo. 150, 161, 182 S.W.2d 74, 77 (1944); *Kansas City v. J.I. Case Threshing Mach. Co.*, 337 Mo. 913, 927, 87 S.W.2d 195, 203 (1935).

56. 356 Mo. 646, 203 S.W.2d 438 (1947).

57. Brief for Appellant, 356 Mo. at 647.

58. Brief for Respondent, 356 Mo. at 650.

59. CHARTER OF THE CITY OF ST. LOUIS art. 1, § 1, para. 1 (1914).

60. It has been suggested that, although the general practice is to strictly construe grants of municipal power, the home rule philosophy should indicate that limitations on municipal power, rather than grants of power, should be strictly construed. *Westbrook*, *supra* note 50, at 69.

61. 356 Mo. at 658, 203 S.W.2d at 444.

By holding the charter authorization insufficient, the court could have avoided the difficult issue of whether a city can enact an earnings tax with proper charter authorization by relying solely on the power of the constitutional home rule provision. Nevertheless, the court did indicate in dictum that even with proper charter authorization the tax would be invalid. The court clearly rejected the City's claim that the earnings tax was purely of local concern, pointing out that the tax fell on nonresidents also.⁶² The court said that the requirement that charter powers be subject to and consistent with state law⁶³ meant that specific or implied statutory authority to tax was necessary when the tax was of statewide concern.⁶⁴ The court apparently followed the traditional restrictive judicial approach of Dillon's rule,⁶⁵ which treats a home rule provision as a grant, not a limitation of municipal power.

C. *Earnings Taxation After Carter Carburetor*

After the earnings tax was struck down by the Missouri supreme court, every cent collected in the past year was to be refunded.⁶⁶ The City's revenue problems remained and increased. Shortly thereafter, the City announced that 1947-48 appropriations would exceed anticipated revenue by nearly five million dollars.⁶⁷ St. Louis needed an earnings tax; the question was how to enact it. Some felt that, despite the dictum in *Carter Carburetor*, a charter amendment to authorize the earnings tax would be sufficient.⁶⁸ St. Louis could not risk an-

62. *Id.* at 659, 203 S.W.2d at 444.

63. *See* text at note 49 *supra*.

64. 356 Mo. at 655, 659, 203 S.W.2d at 442, 444. The court purported to follow *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498 (1943), which invalidated a compensating use tax imposed by the City on goods for which the state sales tax had not been paid.

65. J. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 55 (2d ed. 1873) states Dillon's rule of statutory construction:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in, or incident to the powers expressly granted*; third, those *essential to the declared objects and purposes of the corporation*—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

66. \$373,758 had been collected. Declared but unpaid taxes totaled \$1,052,947. *St. Louis Star-Times*, June 10, 1947, at 1, col. 4.

67. *St. Louis Star-Times*, June 16, 1947, at 2, col. 2.

68. Schmandt 398. Even the Attorney General of Missouri issued an opinion that a charter amendment could supply municipal power to enact an earnings tax. *Id.*

other invalidation. Enabling legislation for city earnings taxation was introduced in the Missouri General Assembly in February 1948.⁶⁹

Attempts were made to remove nonresidents from the earnings tax enabling legislation and to have taxes levied on St. Louis County residents paid to the County Collector of Revenue.⁷⁰ These attempts were defeated, and the earnings tax enabling legislation was passed in 1948, effective for two years only.⁷¹ The City quickly enacted a new earnings tax ordinance,⁷² and the earnings tax was levied successfully for two years. In the meantime, a new mayor was elected on a no-earnings tax platform.⁷³ Within six months of taking office he reversed his position, but the delay was fatal to any chances of calling a special session of the Missouri General Assembly to enact new enabling legislation to continue the tax.⁷⁴ The St. Louis Earnings Tax lapsed from 1950 until new enabling legislation was passed in 1952, authorizing the tax for two more years.⁷⁵ Finally, in 1953 a new mayor pushed for enabling legislation that would authorize a permanent earnings tax.⁷⁶ Withstanding attempts to provide exemptions and to require a vote by St. Louis County residents before the tax could be levied on county residents working in the city, state enabling legislation was passed in 1954.⁷⁷ It provided that the tax

69. The St. Louis Earnings Tax 118.

70. *Id.* at 119.

71. Law of May 28, 1948, [1947] Mo. Laws 308.

72. St. Louis, Mo., Ordinance 44678, July 27, 1948.

73. The St. Louis Earnings Tax 126-27.

74. Frantic efforts were made by St. Louisans to get the Governor to call a special session. The St. Louis Star-Times, now supporting the earnings tax, delivered a particularly impassioned plea in an open letter to the Governor:

You see, governor, it comes to this: A cut in the city budget, especially so deep a one as this, would mean a cut in city services. And city services affect people intimately.

When you cut a city hospital budget, you don't just make a mark on the paper. You condemn a Mrs. John Johnson and a Mrs. Richard Smith and a 3-month-old Roberta Roe to die because you've deprived them of a hospital bed.

When you cut a rat-control budget, you don't just change the figures on a calculating machine. You condemn a baby in this house and a teenager in that other one over there to being bitten by rats because the control has lapsed.

St. Louis Star-Times, May 15, 1950, at 14, col. 2.

75. MO. REV. STAT. §§ 92.110-200 (Supp. 1951).

76. The St. Louis Earnings Tax 135.

77. *Id.* at 142.

would be unlimited in duration if a charter amendment to that effect were adopted by a three-fifths vote of St. Louis city residents.⁷⁸ A special election for the charter amendment was called for September 30, 1954. Many residents of St. Louis County led the fight against the amendment, calling the earnings tax "taxation without representation."⁷⁹ Support in the city was thrown behind the tax, with leading citizens running a grass-roots campaign.⁸⁰ The charter amendment was passed by a vote margin of six to one.⁸¹

D. *Earnings Taxation Under Enabling Legislation*

A constitutional attack on the authority to impose an earnings tax under the state enabling legislation was made in *Walters v. City of St. Louis*.⁸² The Supreme Court of Missouri had little trouble upholding the state enabling legislation and the city earnings tax ordinance. The case was affirmed on appeal to the United States Supreme Court,⁸³ but there was no discussion of authority to tax. Subsequent attacks on the earnings tax did not challenge the authority to impose an earnings tax as authorized by state enabling legislation.⁸⁴

E. *Grant v. Kansas City*

Some of the issues in *Carter Carburetor* re-emerged recently in another challenge to city autonomy in earnings taxation. Kansas City, Missouri, had been imposing an earnings tax under enabling legislation providing that the tax shall not exceed one-half per cent a year.⁸⁵

78. MO. REV. STAT. § 92.200 (Supp. 1955).

79. St. Louis Post-Dispatch, Apr. 23, 1954, at 1A, col. 1. For a complete account of the earnings tax charter amendment campaign see The St. Louis Earnings Tax 265-91.

80. One newspaper ran several full pages of pictures showing the services at stake in the election: pollution control, rat control, mosquito control, ambulance and school health service, rubbish collection, and street repairs. One picture of a property assessor looking at a house was entitled "An Unsatisfactory Substitute." Another picture of a stream of commuters' autos was entitled "Earnings Tax Compels County Residents to Pay Their Share of Benefits Received." St. Louis Post-Dispatch, Sept. 26, 1954, Pictures, at 1-3.

81. The St. Louis Earnings Tax 288-89.

82. 364 Mo. 56, 259 S.W.2d 377 (1953).

83. 347 U.S. 231 (1954).

84. See *Barhorst v. City of St. Louis*, 423 S.W.2d 843 (Mo. 1967); *Arnold v. Berra*, 366 S.W.2d 321 (Mo. 1963).

85. MO. REV. STAT. § 92.230 (Supp. 1963).

The City had then sought a charter amendment that would authorize an earnings tax on up to one per cent.⁸⁶ In *Grant v. Kansas City*,⁸⁷ the City sought to sustain the levy, arguing that the holding in *Carter Carburetor* only required clear charter authorization for the earnings tax,⁸⁸ and that the enabling statute and its rate limitation was unnecessary and ineffective because the people of a constitutional home rule city had the power to authorize an earnings tax for local government purposes.⁸⁹ Respondent relied on the *Carter Carburetor* dictum that an earnings tax needed state enabling legislation since it was a matter of statewide concern;⁹⁰ therefore Kansas City could not exceed the specific statutory tax rate limitation.⁹¹ Ten home rule cities of Missouri, asserting that their right to self-government through local taxation was at stake,⁹² argued in support of Kansas City's assertion that home rule power can sustain the earnings tax,⁹³ and that the state enabling legislation was unnecessary and ineffectual.⁹⁴ The Supreme Court of Missouri affirmed *Carter Carburetor's* view of the earnings tax as a matter of statewide concern.⁹⁵ The court held that the tax increase would be invalid under the constitutional home rule provision requiring charters to be consistent with and subject to the laws and constitution of the state.⁹⁶

86. See generally 35 Mo. L. Rev. 108 (1970).

87. 431 S.W.2d 89 (Mo. 1968).

88. Brief for Appellant at 9-17.

89. *Id.* at 25-34.

90. Brief for Respondent at 8-10.

91. *Id.* at 10-18.

92. Brief for Amici Curiae at 4.

93. *Id.* at 8-10.

94. *Id.* at 10-13.

95. 431 S.W.2d at 92-93.

96. *Id.* at 93. Note that the issue in *Grant* differs from *Carter Carburetor* in that the former involves a charter provision exceeding power given by statute, while the latter involves an attempt to exert new taxing power without any statutory authority. Nevertheless, *Grant* indicates the problems arising from the city having to go to the legislature for enabling legislation as suggested by *Carter Carburetor*; the city cannot even change its rates without permission of the General Assembly.

Two interesting concurring opinions in *Grant* seem to reject the *Carter Carburetor* assertion that enabling authority is necessary for enactment of an earnings tax, but they agree that while the enabling statute stands the city cannot exceed its express limitations. 431 S.W.2d at 94 (Eager & Seiler, JJ., concurring). The majority also indicates some hesitancy to follow the *Carter Carburetor* dic-

F. *Conclusions*

The Missouri Constitution of 1875 presented a grand experiment in municipal autonomy and initiative in local self-government. Restrictive judicial interpretation of the constitutional home rule provision has effectively emasculated autonomy in the field of local earnings taxation. As a result, the cities of Missouri must return to the state legislature whenever a new form of tax or a new rate is desired. This result belies the theory behind home rule: that a community can best deal with its problems by itself. What can a legislator from Kirksville or Branson, Missouri, realizing that he is elected to represent his constituency, be expected to know or care about the forms of taxation that are necessary to sustain city services in the urban core city of St. Louis?

Several other disadvantages flow from this restrictive judicial attitude.⁹⁷ Chief among these is the fact that municipal requests for enabling legislation draw state legislators away from their primary responsibility for formulation of statewide policy. Other disadvantages are that special city enabling legislation may not receive the time and considered attention that it needs, and that the city may tend to bargain away its legislative power by marshalling support for recurring requests for new legislation.

III. MUNICIPAL EARNINGS TAXATION AUTONOMY UNDER OTHER CONSTITUTIONAL HOME RULE PROVISIONS

The Ohio constitution confers upon municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local . . . regulations, as are not in conflict with general laws."⁹⁸ Although similar to the Missouri home rule provision, the "general laws" limitation has been interpreted only to qualify the second of the two grants in the Ohio provision.⁹⁹

tum: "We have not considered the question as to whether a special charter city would have the authority to amend its charter to provide an earnings tax in the absence of an applicable conflicting state statute on the subject." 431 S.W.2d at 94.

97. See generally Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 655-56 (1964); Westbrook, *supra* note 50, at 72-74.

98. OHIO CONST. art. XVIII, § 3.

99. See generally Fordham & Mallison, *Local Income Taxation*, 11 OHIO ST. L.J. 217, 224 (1950).

In *State ex rel. Zielonka v. Carrel*,¹⁰⁰ the Supreme Court of Ohio interpreted this section so as to uphold a Cincinnati occupational tax in the absence of state enabling legislation. The court stated: "There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation . . ." ¹⁰¹ The court went on, however, to state in dictum that the constitutional home rule provision¹⁰² impliedly restricts municipal taxing power whenever state legislation results in city-state competition for revenue.¹⁰³ This dictum was quickly blown into a full-fledged doctrine of pre-emption.¹⁰⁴ In varying degrees, this doctrine has been applied to invalidate city taxes whenever there is the same or similar levy on the state level.¹⁰⁵ Significantly, the Ohio supreme court has limited this pre-emption doctrine to situations where the state is in actual competition with the city.¹⁰⁶ The field of municipal earnings taxation therefore belongs solely to the home rule cities of Ohio unless they are clearly pre-empted by the state entering the field. Under this legislative-judicial attitude, municipal income taxes have flourished in Ohio, with levies in all the major cities and numerous smaller home rule cities.¹⁰⁷

Under the Colorado home rule provision, power is given to cities to exercise "the full right of self-government in both local and mu-

100. 99 Ohio St. 220, 124 N.E. 134 (1919). See also Glander & Dewey, *Municipal Taxation: A Study of the Pre-emption Doctrine*, 9 OHIO ST. L.J. 72 (1948).

101. 99 Ohio St. at 227, 124 N.E. at 136.

102. OHIO CONST. art. XVIII, § 13 states: "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes . . ."

103. 99 Ohio St. at 228, 124 N.E. at 136.

104. See *Firestone v. City of Cambridge*, 113 Ohio St. 57, 148 N.E. 470 (1925); *City of Cincinnati v. American Tel. & Tel. Co.*, 112 Ohio St. 493, 147 N.E. 806 (1925).

105. See *East Ohio Gas Co. v. City of Akron*, 7 Ohio St. 2d 73, 218 N.E.2d 608 (1966); *Youngstown Municipal Ry. v. City of Youngstown*, 154 Ohio St. 311, 95 N.E.2d 585 (1950); *Haefner v. City of Youngstown*, 147 Ohio St. 58, 68 N.E.2d 64 (1946). But cf. *Benua v. City of Columbus*, 170 Ohio St. 64, 162 N.E.2d 467 (1959), in which the court upheld a municipal income tax against the contention that the tax as applied to rents was a tax upon the property itself, which the state had pre-empted through property taxation.

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

107. CCH STATE TAX GUIDE, ALL STATES ¶¶ 15-735 to 15-739 (2d ed. 1967). The recent enactment of an Ohio state personal income tax included a specific provision that the state tax does not pre-empt local income taxes. OHIO REV. CODE ANN. § 5747.02 (Page 1973).

nicipal matters . . .”¹⁰⁸ In *City & County of Denver v. Sweet*,¹⁰⁹ the Supreme Court of Colorado applied Dillon’s rule to hold that Denver’s home rule taxing autonomy is limited to express or reasonably implied fields of local concern.¹¹⁰ The court then held that the existence of constitutional authority for the state to enact an income tax indicates that earnings taxation is a matter of statewide concern;¹¹¹ therefore the City of Denver could not tax earnings without legislative approval.¹¹² An interesting exception to this lack of autonomy in earnings taxation developed in *City & County of Denver v. Duffy Storage & Moving Co.*¹¹³ In that case, eleven years after *Sweet*, the Colorado supreme court faced a new Denver income tax of 1.4% and an occupational privilege tax of two dollars a month on employers and employees. The court adhered to *Sweet*, albeit reluctantly, on the principle of stare decisis and invalidated the city income tax;¹¹⁴ but the court upheld the levy of the occupational privilege tax as within the authority of the home rule city.¹¹⁵ A strong dissent argued that the tax amounted to an income tax.¹¹⁶ Thus it appears that home rule cities of Colorado may enact an earnings tax, even without legislative approval, as long as the tax is hypertechnically disguised as an occupational privilege rather than an income tax.

Several other states have cities with broad home rule powers, but these cities have refrained from entering the field of earnings taxation. In Oregon it is contended that the Oregon home rule provisions¹¹⁷ and the Oregon supreme court’s interpretations of these provisions allow cities to enact local income taxes without enabling legis-

108. COLO. CONST. art. XX, § 6.

109. 138 Colo. 41, 329 P.2d 441 (1958).

110. *Id.* at 46-47, 52, 329 P.2d at 444, 447.

111. *See, e.g.*, COLO. CONST. art. X, § 17.

112. 138 Colo. at 52, 329 P.2d at 446. *See generally* Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964).

113. 168 Colo. 191, 450 P.2d 339 (1969).

114. *Id.* at....., 450 P.2d at 342.

115. *Id.* at....., 450 P.2d at 343-45. *See also* State Farm Mut. Auto Ins. Co. v. Temple, Colo., 491 P.2d 1371 (1971) (upholding the tax in spite of a state statute prohibiting local taxes on insurers).

116. 168 Colo. at, 450 P.2d at 346-49 (Hodges, Kelley & Lee, JJ., dissenting). The Supreme Court of Kentucky has likewise upheld an occupational license tax despite the fact that the court refused to accept a city income tax. *City of Louisville v. Sebree*, 308 Ky. 420, 214 S.W.2d 248 (1948).

117. *See* ORE. CONST. art. XI, § 2.

lation.¹¹⁸ A similar contention has been made in California,¹¹⁹ where the constitutional home rule provision gives a city power to enact "all laws and regulations in respect to municipal affairs . . ." ¹²⁰ Autonomy in California local taxation results from judicial interpretations that taxation is a local concern¹²¹ and that the home rule provision is only a limitation, not a grant, of power to the city.¹²²

IV. THE NEW MISSOURI HOME RULE PROVISION

In late 1971 voters at a special election adopted a new Missouri home rule section that provides:

Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly . . . has authority to confer upon any city, provided such powers are consistent with the Constitution of this State, and are not limited or denied either by the charter or adopted [sic] or by statute.¹²³

The new home rule provision appears to be a powerful one for Missouri cities. The ambiguity of the previous home rule provision has been practically eliminated. The new provision is quite similar to that in Dean Fordham's "Model Constitutional Provisions for Home Rule," which were drafted for the American Municipal Association.¹²⁴

118. Kehrli & Mattis, *The Authority of Home Rule Cities and Counties in Oregon to Levy Sales and Income Taxes—An Affirmative View*, 5 WILLAMETTE L.J. 183 (1969). *Contra*, Stoyles, *Versus Oregon City or County Income or Sales Taxes*, 4 WILLAMETTE L.J. 462 (1967).

119. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U.L. REV. 27, 42 (1956).

120. CAL. CONST. art. XI, § 8(j).

121. *See* Franklin v. Peterson, 87 Cal. App. 2d 727, 197 P.2d 788 (Dist. Ct. App. 1948).

122. *West Coast Advertising Co. v. City & County of San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939). In this case, the California supreme court held that cities need not seek legislative authorization to levy taxes for revenue purposes, and that the absence of express charter authority is not a bar to the exercise of a particular taxing power unless the charter itself expresses a limitation. *See generally* Antieau, *Municipal Power to Tax—Its Constitutional Limitations*, 8 VAND. L. REV. 698 (1955).

123. MO. CONST. art. 6, § 19(a).

124. The draft reads:

A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all

This formulation places the power to control excesses by home rule cities primarily in express statutes of the legislature, not in interpretation by the judiciary.¹²⁵

Several modifications of previous case law should flow from this new provision. Both the holding and the dictum of *Carter Carburetor* may be constitutionally overruled. As for the specific holding,¹²⁶ it seems clear that a restrictive approach is no longer to be followed in construing city charters. The Charter of the City of St. Louis should no longer be viewed as only an express grant of power, but all powers that the state legislature may devolve upon any city may be exercised by a home rule city unless its charter expressly limits those powers. Municipal earnings taxation should be upheld under a charter that grants power "to assess, levy and collect taxes for all general and special purposes on all subjects or objects of taxation." As for the dictum in *Carter Carburetor*,¹²⁷ the new home rule provision seems to reject implicitly any requirement that enabling legislation is necessary for municipal earnings taxes. The elimination of the requirement that the charter be "subject to the laws"¹²⁸ indicates that state statutes must either clearly imply a limitation or expressly prohibit the power in order to restrict municipal taxing autonomy. Dillon's rule is clearly to be rejected in a construction of the Missouri constitutional home rule provision.

A serious problem remains under the new Missouri home rule provision—what to do with the holding of *Grant*? Both the majority and the concurring opinions agreed that once a city receives enabling legislation, it cannot avoid the express statutory limitations on the rate.¹²⁹ If the dictum of *Carter Carburetor* is rejected under the new

home rule charter municipal corporations by statute and is within such limitations as may be established by statute.

Reprinted in D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 126 (2d ed. 1971).

125. In speaking of the Fordham formulation, one commentator states:

A court sensitive to the limitation on its own competence that is postulated by the separation of powers, would rarely, if ever, hold that a particular power . . . exceeded municipal initiative. To do so would require . . . that the court also be prepared to hold that the legislature could not confer the power upon a municipality

Sandalow, *supra* note 97, at 691.

126. See text at notes 59-61 *supra*.

127. See text at notes 62-65 *supra*.

128. See text at note 49 *supra*.

129. See notes 95-96 and accompanying text *supra*.

home rule provision, then the enabling legislation is unnecessary. Nevertheless, *Grant* would apparently require that any express limitations in state statutes be given effect. Failure to repeal certain provisions of the enabling legislation (such as rate limitations)¹³⁰ may seriously hamper the home rule city's power to tax despite the apparent intent that the city be given more freedom to act under the new home rule provision.¹³¹ This result should be avoided at all costs. If not, a technical loophole can be used to avoid constitutional overruling of a judicial interpretation.

CONCLUSION

The experience in Missouri with state enabling legislation indicates its undesirability in the field of municipal earnings taxation. Forcing a city to turn to the state legislature for power to enact local earnings taxes flies in the face of the purpose behind home rule provisions.

Under the different forms of constitutional home rule provisions discussed above, it seems apparent that no provision dictates a finding of invalidity for local attempts at autonomy in earnings taxation. The Missouri and Colorado results flow from a restrictive attitude of judicial interpretation prevalent in the era prior to 1960. Missouri especially seems to have suffered from judicial doctrines originating in the early years of experimentation with home rule. The urban

130. See MO. REV. STAT. §§ 92.110-300 (1971).

131. While the rate limitations of enabling legislation may be inconsistent with the apparent attempt to prevent the necessity for such enabling legislation, not all state limitations would be detrimental to autonomy in municipal earnings taxation. Since the new Missouri home rule provision could devolve municipal earnings tax power on all charter cities, a further restriction on the class of cities in Missouri that can enact such a tax may be necessary if it is felt that an earnings tax is only appropriate for cities such as St. Louis and Kansas City. The disadvantages of allowing taxation in smaller charter cities, especially in suburban areas, are numerous. Costs of administration usually are higher per capita in smaller cities. SIGAFOOS 59-61. Credits or reciprocal agreements between neighboring cities may also be necessary to prevent taxation of the same income for a person who resides in one earnings tax city but works in another. This situation can be especially complex if the rates or tax base in neighboring earnings tax cities are different. Restricting the tax to large urban cities by express state statute is justifiable. Those areas are the type that have a large percentage of nonresident workers who would otherwise escape almost all taxation for services provided them in the central cities. Perhaps it was such a fear of fiscal irresponsibility in small charter cities or a chaotic situation resulting from proliferation of competing earnings taxes that led to the restrictive judicial interpretations of local autonomy in earnings taxation.

fiscal crisis has now clearly dictated the need to resort to home rule provisions for quick and effective local action.

The original Missouri home rule provision could have been interpreted in the same manner as the Ohio provision. This approach would have allowed municipal autonomy in earnings taxation subject only to express or clearly implied state statutory limitations. The contrary result developed from an ambiguous home rule provision requiring excessive judicial interpretation.¹³²

The intent to establish the home rule provision as only a limitation on home rule powers, as in Ohio and California, and not as a grant of powers, clearly appears in the new Missouri home rule provision. Undercurrents in the *Grant* and *Duffy* cases indicate that the present Missouri and Colorado supreme courts may welcome a chance to reject previous restrictive judicial decisions as outmoded elements in ancient home rule history. The new home rule provision allows Missouri a chance to make a fresh start and to pioneer a new modern attitude toward municipal autonomy in earnings taxation.

132. Sandalow, *supra* note 97, at 658-59; Schmandt 387.

