Masthead Logo

Volume 64 | Issue 1 Article 5

4-1-2019

The Coca-Cola Capitation Conundrum: The Supreme Court of Pennsylvania Leaves Philadelphians Thirsty for Soda and Certainty in Williams v. City of Philadelphia

John T. Morgan Jr.

2019]

Note

THE COCA-COLA CAPITATION CONUNDRUM: THE SUPREME COURT OF PENNSYLVANIA LEAVES PHILADELPHIANS THIRSTY FOR SODA AND CERTAINTY IN *WILLIAMS v. CITY OF PHILADELPHIA*

John T. Morgan, Jr.*

"[T]he power to tax involves the power to destroy . . . ."[1]

I. Breaking the Ice: An Introduction to the Preemption of Local Taxes in Pennsylvania

Over two centuries after prominent Philadelphia resident, Benjamin Franklin, equated the certainty of taxes to that of death, Philadelphians pay some of the highest taxes in America.[2] Residents of Philadelphia, Pennsylvania pay almost four percent of their annual income to the city, in addition to state and federal income tax.[3] Those choosing to forego the city life and commute to work fare only slightly better, as they are subjected to a three-and-a-half-percent city income tax.[4] Philadelphia taxes result in the inflation of ticket prices for Eagles, Phillies, and Flyers games,

* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.S.Ed. 2016, Emporia State University. This Note is dedicated to my fiancée and law school sweetheart, Brittany Saxton, who I'm sure is quite thrilled to be acknowledged in an article about municipal taxing authority, and who so patiently tolerated many long hours apart so I could research, write, and edit. I also want to thank Lydia Ellsworth, Tanner McCarron, Peyton Carper, Timothy Muyano, Thallia Malespin, Ryan Ahrens, Meaghan Geatens, and Abigail Glascott for their meticulous and attentive feedback which made this Note possible.

1. *See* McCulloch v. Maryland, 17 U.S. 316, 431 (1819) (opinion of Chief Justice John Marshall) ("[T]he power to tax involves the power to destroy . . . .").

2. *See* Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), *in* The Writings of Benjamin Franklin, 1789–1790, 68–69 (Albert Henry Smith, ed., 1907) ("Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes."); *Cities with the Highest Tax Rates*, Intuit Turbo Tax (2016), https://turbotax.intuit.com/tax-tips/fun-facts/cities-with-the-highest-tax-rates/L2WEdS802 [https://perma.cc/4LFB-HC3D] (ranking Philadelphia, Pennsylvania second in the United States for highest municipal taxes).

3. *See* Phila., Pa., Code ch. 19-1500, § 19-1502 (2018) (imposing tax of 2.3809% on income of Philadelphia residents as of July 1, 2018); Phila., Pa., Code ch. 19-2800, § 19-2803(2018) (imposing additional tax of 1.5% on income of Philadelphia residents).

4. *See* Phila., Pa., Code ch. 19-1500, § 1502 (2018) (imposing tax of 3.4567% on nonresidents of Philadelphia as of July 1, 2018).

along with many similar "amusements."[5] In fact, Philadelphians cannot stay in a hotel, purchase a dog, park a car, or play a game of ski-ball without being subjected to a city tax.[6] Philadelphia residents pay roughly forty-five different types of taxes despite legislation designed to limit the taxing authority of Pennsylvania cities, boroughs, and municipalities.[7]

Although cities like Philadelphia appear to possess immense taxing authority, it may come as a surprise that, independently, local governments are effectively powerless in their ability to levy taxes.[8] In fact, townships, cities, and municipalities rely exclusively on delegations from state legislatures to police their citizens, organize their communities, and—importantly—raise revenue through taxation.[9] While the extent of a local government's authority varies dramatically from state to state, one principle remains ubiquitous: local ordinances must not be inconsistent with state law.[10] Parties seeking to evade enforcement of municipal legislation

5. *See* PHILA., PA., CODE ch. 19-600, § 19-603 (1937) (imposing tax on admission fees for concerts, movies, and sporting events). Other amusements subject to the tax include:

> Any theatrical or operatic performance, concerts, motion picture shows, vaudeville, circuses, carnivals, side shows, exhibitions, shows, displays, dancing, all forms of entertainment at fair grounds, amusement parks and athletic contests, including wrestling matches, boxing and sparring exhibitions, baseball, football and basketball games, golfing, tennis, hockey, archery and shooting, where a charge, donation, contribution or monetary charge of any character is made for admission.

Id. § 19-601.

6. *See* PHILA., PA., CODE ch. 19-2400, § 19-2402 (1986) (imposing tax on price to stay in hotel rooms in Philadelphia); PHILA., PA., CODE ch. 10-100, § 10-103 (1986) (imposing licensing fee of forty dollars per unsterilized dog and sixteen dollars per sterilized dog); PHILA., PA., CODE ch. 19-1200 (1937) (imposing tax on parking or storing vehicles in city); PHILA., PA., CODE ch. 19-900, § 19-1903 (1945) (imposing tax of one hundred dollars per year per "mechanical amusement device").

7. *See* Gene Marks, *44 Taxes We Pay as Residents of the Great City of Philadelphia*, PHILA. MAG. (Mar. 6, 2015, 10:38 AM), https://www.phillymag.com/news/2015/03/06/43-taxes-pay-residents-great-city-philadelphia/ [https://perma.cc/T7FH-UP5L] (listing various taxes for which Philadelphia residents are liable to pay). Other taxes imposed by Philadelphia include the Vehicle Rental Tax, the Excise Tax on Outdoor Advertising Transactions, and the Tobacco and Tobacco-Related Products Tax. *See generally* PHILA., PA., CODE tit. 19 (governing finance, taxes, and collections).

8. *See, e.g.*, 1Pt1 MATTHEWS MUNICIPAL ORDINANCES § 1A:2 (2d ed. 2018) (noting that a municipality's inherent lack of power is "practically a universal rule in all 50 states").

9. *See, e.g.*, United Tavern Owners v. Sch. Dist. of Phila, 272 A.2d 868, 870 (Pa. 1970) (plurality opinion) (restating that local governments have no authority apart from that which is granted by a state legislature).

10. *See, e.g.*, 1Pt1 MATTHEWS MUNICIPAL ORDINANCES § 2:3 (2d ed. 2018) ("[I]n case of conflict between an ordinance and a state law, the latter prevails."); 5 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 15:18 (3d ed. 2018) ("It is fundamental that municipal ordinances are inferior in status and subordinate to the laws of the state.").

routinely invoke this principle to argue that state law preempts the local ordinance.[11]

In Pennsylvania, the Sterling Act and the Local Tax Enabling Act primarily govern the power of local municipalities to levy taxes.[12] Appropriately known as the "Tax Anything Act," these laws empower municipalities with the authority to impose taxes on anything the Commonwealth does not already tax.[13] Thus, a local tax is preempted if it is merely a duplicate of an existing Commonwealth tax.[14] In the more than seven decades since its inception, the Sterling Act has been the focal point of numerous legal challenges to Philadelphia's authority to levy taxes.[15] Unfortunately, the existing body of case law interpreting municipal taxation power under the Sterling Act lacks the cohesion necessary for predictable and consistent boundaries on local tax power.[16]

---

11. *See, e.g.*, 24 FLA. PRAC., FLORIDA MUNICIPAL LAW AND PRACTICE § 3:10 (2018) ("A Florida municipality may not make any law on a matter preempted to the state or county government by the Florida Constitution, by general law, or pursuant to a county charter."). *See generally* 16 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS § 44:222 (3d ed. 2018) (listing pursuit of injunction as a remedy against taxes forbidden by law).

12. *See* 53 PA. STAT. AND CONS. STAT. ANN. §§ 15971–15976 (West 2018) (codifying the Sterling Act). The Sterling Act applies only to "cities of the first class," which is a municipality with a population of at least one million residents. *See* 53 PA. STAT AND CONS. STAT. ANN. § 101 (West 2018) (defining different classes of cities); 53 PA. STAT. AND CONS. STAT. ANN. §§ 15971–15976 (West 2018). Philadelphia is the only city in Pennsylvania qualifying as a city of the first class. *See* 53 PA. STAT. AND CONS. STAT. ANN. §§ 6924.101–6924.901 (West 2018) (codifying the Local Tax Enabling Act). The Local Tax Enabling Act applies virtually everywhere in Pennsylvania besides Philadelphia, to:

> [C]ities of the second class, cities of the second class A, cities of the third class, boroughs, towns, townships of the first class, townships of the second class, school districts of the second class, school districts of the third class, and school districts of the fourth class, in all cases including independent school districts. . . .

See id.

13. *See, e.g.*, Coe v. Duffield, 138 A.2d 303, 305 (Pa. Super. Ct. 1958) (referring to the Sterling Act as the "Tax Anything Act"); Kenneth H. Ryesky, *Devil's Dictionary of Taxation*, 6 HOUS. BUS. & TAX L. J. 54, 73 (2005) (citing 53 P.S. § 15971) (defining Pennsylvania's Sterling Act as the "Tax Anything Act"); *In re* N.E. Sch. Dist. Res No. 979-1974, 1974 WL 15788, at *1 (Erie Cty. Ct. Common Pleas August 30, 1974) (referring to the Local Tax Enabling Act as the "Tax Anything Act") (internal citation omitted).

14. *See* 27 SUMM. PA. JUR. 2D TAXATION § 14:5 (2d ed. 2018) (explaining Pennsylvania's tax preemption doctrine).

15. *See* James A. Moore, *The "Home Rule" Tax Act—A Solution or a Challenge?*, 97 U. PA. L. REV. 811, 820 (1948) (referring to Act as a "super litigation-breeder"). *See generally The Sterling Act: A Brief History*, PHILA. ECON. LEAGUE (Mar. 1999) (summarizing history of challenges to Philadelphia's taxing authority since passage of Sterling Act).

16. *See, e.g.*, City of Philadelphia v. Tax Rev. Bd., 601 A.2d 875, 877 (Pa. Commw. Ct. 1992) ("[I]t is difficult to extract a comprehensive analysis to be used whenever preemption of local taxation is claimed."), *appeal denied sub nom.* Janney Montgomery Scott, Inc. v. City of Philadelphia, 612 A.2d 986 (Pa. 1992). For a

In 2018, in *Williams v. Philadelphia*,[17] the Supreme Court of Pennsylvania applied the preemption doctrine to a city-imposed tax on sugary beverages—better known as a "soda tax".[18] Despite conflicting authority concerning the level of deference granted to city legislatures and the legal standard for evaluating a local tax's alleged state tax duplication, the court upheld the city's authority to implement the soda tax under the Sterling Act.[19] In fact, the *Williams* court unwaveringly upheld the dismissal of the plaintiffs' complaint before the City of Philadelphia even responded to the allegations therein.[20] However, even after *Williams*, the precise scope of municipal taxing authority in Pennsylvania remains unclear, and any attempt to definitively clarify the bounds of this authority will likely require legislative action.[21]

This Note analyzes the Supreme Court of Pennsylvania's decision in *Williams* and observes that this decision fails to reconcile decades of disagreement regarding the application of the Sterling Act's preemption doctrine.[22] This Note further advocates for a legislative cure for the uncertainty affecting this frequently litigated area of law.[23] Part II examines the historical development of the preemption doctrine in Pennsylvania and in the United States.[24] Part III outlines the procedural history and facts of *Williams*.[25] Part IV summarizes the Supreme Court of Pennsylvania's rationale for upholding Philadelphia's sugary beverage

discussion of conflicting decisions interpreting the Sterling Act, see *infra* notes 74–101 and accompanying text.

17. 188 A.3d 421 (Pa. 2018).

18. *See id.* at 424 (announcing subject of appeal).

19. *See id.* at 433 n.14 (acknowledging the heavily conflicted and contradictory body of law comprising local tax preemption doctrine). For a discussion of the inconsistencies inherent in Pennsylvania tax preemption doctrine, see *infra* notes 74–101 and accompanying text.

20. *See Williams*, 188 A.3d at 427 n.4 (stating procedural posture of litigation). The Pennsylvania Supreme Court reviewed the trial court's grant of the City's preliminary objections in the form of a demurrer. *See id.* (noting that the trial court sustained preliminary objections in favor of the City). If a party files preliminary objections to a complaint, it does not have to file an answer unless the court overrules its preliminary objections. *See* PA. R. CIV. P. NO. 1028(d) (2016) (allowing objecting party time to answer complaint if court denies preliminary objections).

21. *See id.* at 435–37 (acknowledging conflicting interpretation of Sterling Act in precedent, but refusing to reconcile disharmony, believing that legislative action is more appropriate).

22. For an overview of the inconsistencies inherent in Pennsylvania's local tax preemption doctrine, see *infra* notes 74–101 and accompanying text. For a complete critical analysis of the *Williams* decision's pragmatic shortfalls, see *infra* notes 139–90 and accompanying text.

23. For a complete argument in favor of a legislative solution to uncertainty in the doctrine of state preemption of local taxes, see *infra* notes 179–90 and accompanying text.

24. For an outline of the history, development, and significance of state preemption of local taxes, see *infra* notes 29–101 and accompanying text.

25. For an explanation of the facts leading up to the *Williams* decision, see *infra* notes 103–13 and accompanying text.

tax.[26] Part V analyzes the *Williams* court's interpretation of the Sterling Act and advocates for legislative clarification.[27] Finally, Part VI discusses the potential implications on the actions of businesses, industries, and municipalities in light of the questions regarding the scope of local tax authority that Williams left unanswered.[28]

II. SHARING A COKE AND CONTROL: THE HISTORY OF LOCAL DELEGATION AND PREEMPTION

In the American multi-tiered system of government, laws frequently overlap and conflict.[29] At any given moment, a person in the United States is simultaneously subject to federal, state, county, and municipal jurisdiction, as each tier of government may enact its own policies and levy its own taxes.[30] Generally, where two governments' laws conflict (for example, federal and municipal), the doctrine of preemption provides that the supreme law will govern.[31]

A. *Who's Got "the Juice?" An Overview of Preemption and Local Government Power*

In the historic struggle between federal and state power, *McCulloch v. Maryland*[32] unequivocally established that where a state law interferes with a federal law the latter must prevail over the former.[33] In *McCulloch*, Mary-

26. For a summary of the Pennsylvania Supreme Court's reasoning in the *Williams* decision as it relates to state preemption of local taxing authority, see *infra* notes 114–38 and accompanying text.

27. For a critical analysis of *Williams*, see *infra* notes 139–90 and accompanying text.

28. For a discussion of the *Williams* decision's significance and impact, see *infra* notes 191–96 and accompanying text.

29. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (AM. LAW INST. 1971) ("The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.").

30. *See, e.g.*, I.R.C. § 1 (West 2018) (imposing federal income tax on every individual); 72 PA. STAT. AND CONS. STAT. ANN. § 7202 (West 2017) (imposing state tax on retail sales of personal property or services); ALLEGHENY CTY., PA., CODE § 475-12 (2017) (imposing county sales tax); PHILA., PA., CODE ch. 19-1500, § 1502 (2018) (imposing city tax on salaries, wages, commissions, and other compensation).

31. *See, e.g.*, OHIO CONST. art. XVIII, § 3 ("Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*" (emphasis added)); PA. CONST. art. IX, § 2 ("A municipality which has a home rule charter may exercise any power or perform any function *not denied by this Constitution, by its home rule charter or by the General Assembly* at any time." (emphasis added)); *cf. preemption*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.").

32. 17 U.S. 316 (1819).

33. *See id.* at 405–06 (noting supremacy of federal law over state law).

land's objections to the Second Bank of the United States manifested in the state levying a special tax exclusively targeting national bank transactions.[34] Although the Tenth Amendment granted residual powers to the states, Justice Marshall ultimately relied on the Supremacy Clause in upholding the national bank and invalidating the Maryland tax.[35] Today, almost 200 years after *McCulloch*, the Supremacy Clause remains the bedrock for federal preemption doctrine.[36]

Apart from the federalism context, preemption can also refer to the nullification of a local law because it interferes with state law.[37] Much like a state law's inferiority to its federal counterpart, municipal laws are likewise subject to state supremacy.[38] Cities, municipalities, and other local governments have no inherent power to create or enforce laws.[39] Rather, local governments derive their power to enact legislation, including taxing policies, from the state government.[40] The precise manifestation of this authority varies from state to state.[41] However, most states choose to dele-

34. *See id.* at 317–18 (describing Maryland tax on national bank).

35. *See id.* at 405–06 (quoting U.S. CONST. art. VI, § 2) (invalidating Maryland tax because United States law is "supreme law of the land" under Constitution). *See generally* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); U.S. CONST. art. VI, § 2. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

36. *See, e.g.*, JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW 5 (Am. Bar Ass'n 2006) (calling *McCulloch* a "major historic milepost on the road to today's federal preemption . . . .").

37. *See* Nicole DuPuis et al., *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT'L LEAGUE CITIES 3 (2018), https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf [https://perma.cc/5TZD-P3JE] (defining concept of preemption at the local-state level).

38. *See* Jesse J. Richardson, Jr. et al., *Is the Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management*, THE BROOKINGS INSTITUTION 3 (Jan. 2003) (analogizing Tenth Amendment and federal preemption with state preemption of local law).

39. *See, e.g.*, City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state."); United Tavern Owners v. Sch. Dist. of Phila., 272 A.2d 868, 870 (Pa. 1971) (observing that Pennsylvania cities have no inherent authority absent state delegation); *see also* 1 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89 (5th ed. 1911) (stating that municipalities, as creations of states, have no inherent right of self-government).

40. *See, e.g.*, 1Pt1 MATTHEWS MUNICIPAL ORDINANCES § 1A:1 (2d ed. 2018) (explaining that municipalities draw all authority through constitution or legislation of states).

41. *Compare* IOWA CONST. art. III, § 38A ("Municipal corporations . . . shall not have the power to levy any tax unless expressly authorized by the general assem-

gate local autonomy powers—or "home rule" powers—to its cities and municipalities.[42] The bundle of home rule powers the state grants to local governments generally includes varying degrees of structural, functional, fiscal, and personnel powers.[43] Typical delegations of home rule authority include law enforcement, sanitation, and safety powers, as well as authority reasonably necessary and expedient to exercise these powers.[44]

After a state delegates legislative authority to its municipalities, residual issues may arise regarding the precise scope of that authority as applied to specific initiatives.[45] When a municipality's authority is chal-

---

bly."), *with* MASS. CONST. amend. art. 2, § 1 (granting "the right of self-government in local matters"), *and* OR. CONST. art. IV, § 1(5) (granting powers to municipalities to adopt legislation); *see also* Richardson, *supra* note 38, at 17–28 (providing fifty state survey of local authority delegation); *Preemption Watch*, GRASSROOTS CHANGE, https://grassrootschange.net/preemption-watch/ [https://perma.cc/2HPC-QGYK] (providing fifty state survey of state preemption of local authority on selected issues) (last visited Nov. 18, 2018); *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT'L LEAGUE CITIES (Apr. 2, 2018), https://www.nlc.org/resource/city-rights-in-an-era-of-preemption-a-state-by-state-analysis [https://perma.cc/DJJ5-S8WS] (providing fifty state visual aid showing areas of preemption by state).

42. *See* CAL. CONST. art. 11, § 7 (bestowing home rule powers to cities and counties); COLO. CONST. art. 20, § 6 (delegating home rule to cities and towns); IDAHO CONST. art. XII, § 2 (delegating local police and sanitary authority to cities, counties, and towns); ILL. CONST. art. 7, § 6 (permitting municipalities to "perform any function pertaining to its government and affairs. . ."); IOWA CONST. art. 3, § 38A (granting home rule authority to municipal corporations); LA. CONST. art. 6, § 5 (establishing home rule for local governmental subdivisions); PA. CONST. art. 9, § 2 (providing for municipal home rule powers). The term "home rule" means "a state legislative provision or action allocating a measure of autonomy to a local government conditional on its acceptance of certain terms." *Home rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

43. *See Cities 101—Delegation of Power*, NAT'L LEAGUE CITIES (Dec. 13, 2016), https://www.nlc.org/resource/cities-101-delegation-of-power [https://perma.cc/RY8F-HTQ2] (listing categories of powers delegated to cities). Each subset of authority is defined as follows:

> Structural—power to choose the form of government, charter and enact charter revisions
>
> Functional—power to exercise local self-government in a broad or limited manner
>
> Fiscal—authority to determine revenue sources, set tax rates, borrow funds and other related financial activities
>
> Personnel—authority to set up employment rules, renumeration rates, employment conditions and collective bargaining

Id.

44. *See, e.g.*, IDAHO CONST. art. XII, § 2 (delegating local police and sanitary authority to cities); ILL. CONST. art. 7, § 6(a) (allowing home rule units to "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare. . ."); KAN. CONST. art. 12, § 5(b) (empowering cities to determine local affairs, determine local government, and levy taxes).

45. *See* Richardson, *supra* note 38, at 3–4 (observing that courts may be required to interpret precise scope of local authority granted by state legislatures). In most cases, the standard of review may be found in the state's constitution or within the statute granting the subject authority; however, in the absence of consti-

lenged in court, judges must generally determine whether to construe the statutory or constitutional authority at issue restrictively or liberally.[46] Under the restrictive approach, local government power is limited to that which the state legislature has expressly authorized.[47] This approach is better known as "Dillon's Rule" and restricts the powers of local governments to those: (1) expressly granted, (2) necessarily or fairly incident to those express powers, and (3) essential and indispensable—not merely convenient.[48] Moreover, any ambiguity related to local power is construed against the city.[49] Even in some home rule states, courts will apply Dillon's Rule and construe statutory delegations against the municipality.[50] Several jurisdictions oppose Dillon's Rule and expressly prohibit this approach when interpreting the extent of a city's home rule authorities.[51]

---

tutional or legislative guidance, the court sets its own standard of review. *See id.* at 4–5 (diagraming state and local relationship as it relates to determination of standard of review).

46. *See id.* at 6 (noting two main cannons of interpretation).

47. *See, e.g.*, Caesar v. State, 610 P.2d 517, 519 (Idaho 1980) (applying Dillon's rule). The name "Dillon Rule" traces its origins to Judge John F. Dillon's treatise on municipal corporations. *See* 1 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 98 (5th ed. 1911) (describing limitations on local government powers). With respect to the powers of localities to govern, Dillon writes:

> 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 accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

Id. Home rule and Dillon's Rule are often incorrectly characterized as dichotomous in nature. *See* Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?* 84 N.C. L. REV. 1983, 2011–12 (Sep. 2006) (distinguishing between Dillon rule and home rule). The distinction is described by one critic as follows:

> Home rule describes the source and extent of delegation by the state, whereas Dillon's rule is a rule of judicial interpretation that may be used regardless of the form of delegated authority, unless the legislature has expressed an intention for a more liberal standard.

Id.

48. *See* 1 JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 98 (5th ed. 1911) (listing powers possessed by local governments).

49. *See id.* (describing rules of construction for statutes granting authority to local governments).

50. *See, e.g.*, State *ex rel.* St. Louis Hous. Auth. v. Gaertner, 695 S.W.2d 460, 462 (Mo. 1985) (en banc) (citation omitted) (construing home rule statute against grant of power).

51. *See* IOWA CONST. art. 3, § 38A (abrogating Dillon's Rule); N.M. CONST. art. 10, § 6(E) (requiring construction of municipal authority so as "to provide for maximum local self-government."; IND. CODE. ANN. § 36-1-3-4 (West 2018) (abrogating Dillon's Rule); N.C. GEN STAT. ANN. § 160A-4 (West 2018) (requiring broad construction of powers granted to municipalities and all supplementary powers

Although the power to tax certainly seems to accompany the power to self-govern, taxation is not traditionally recognized as a power delegated to municipalities through home rule provisions.[52] To the contrary, restraint over municipal fiscal power is quite common among the several states.[53] Most limits on taxing authority arose during the 1970s as voters objected to high taxes and a dangerously inflating dollar.[54] As a result, even states granting broad bestowments of home rule power nonetheless exclude the power to levy taxes and borrow money in the interest of curtailing the abuse of this power.[55] Kentucky's constitution, for example, permits the legislature to allow cities to perform "any function" that furthers a governmental purpose, yet also places restrictions on the taxes these cities may levy.[56] Forty-two states, including Kentucky, limit taxation or expenditure powers of municipalities in some way.[57]

---

necessary or expedient for their execution); S.C. CODE ANN. § 5-7-10 (2018) (requiring liberal construction of home rule powers in favor of municipality).

52. *See* 1 MCQUILLIN MUN. CORP. § 2:10 (3d ed. 2018) (stating that taxing authority is not required when forming a municipality).

53. *See, e.g.*, ARK. CONST. art. 12, § 4 (limiting municipal taxes levied on property); IOWA CONST. art. 3, § 38A (abrogating Dillon's Rule with respect to every home rule power except the power to levy taxes); 53 PA. STAT. AND CONS. STAT. ANN. § 41305(1)(viii) (West 2018) (excluding power to limit rates and fix subjects of taxation from powers granted to cities of the third class); 53 PA. STAT. AND CONS. STAT. ANN. § 41305(1)(viii) (West 2018) (excluding "fixing subjects of taxation" from powers granted under home rule charter to municipalities); *see also* George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 461–66 (1995) (noting that fiscal powers of municipalities are most frequently and significantly curtailed). *But see* ILL. CONST. art. 7, § 6 (allowing local taxes except those imposed on income, earnings, or occupations); KAN. CONST. art. 12, § 5 (enumerating taxation as a power granted to cities); MICH. CONST. art. 7, § 21 (granting cities and villages power to levy "taxes for public purposes"); UTAH CONST. art. 11, § 5(a) (listing power to levy, assess, and collect taxes among powers conferred upon cities by home rule amendment). Ironically, the concept of taxation as it is known today originally developed in ancient cities. *See* 16 MCQUILLIN MUN. CORP. § 44:3 (3d ed. 2018) (noting that taxation as a means for generating government revenue developed in ancient cities and towns).

54. *See* DuPuis, *supra* note 37, at 23 (explaining origins of state limits on local taxation and expenditure authority).

55. *See, e.g.*, OHIO CONST. art. XIII, § 6 (restricting cities' taxation powers "so as to prevent the abuse of such power").

56. *Compare* KY. CONST. § 156b (authorizing state legislature to grant broad home rule powers to cities), *with* KY. CONST. § 157 (capping tax rates that may be imposed by cities). This exclusion of taxation from home rule powers is likely due to a key distinction between police and taxing authority: while the purpose of police power is ensuring individual compliance, the purpose of taxing power is to raise revenue for social programs. *See* 16 MCQUILLIN MUN. CORP. § 44:2 (3d ed. 2018) (distinguishing taxing powers from policing powers).

57. *See City Rights in an Era of Preemption: A State-by-State Analysis*, *supra* note 41 (listing states limiting taxation and expenditures). The states that do not limit taxation or expenditures are Connecticut, Vermont, Delaware, Hawaii, Georgia, New Hampshire, Virginia, and Tennessee. *See id.* (listing states that do not limit taxation and expenditures).

B. *The Sterling Act: Pennsylvania Cities Get Their First Taste of Taxing Authority*

During the Great Depression, Pennsylvania faced an onslaught of economic turmoil and political challenges.[58] Budgetary deficits and rampant unemployment jeopardized the citizens and institutions of the Commonwealth.[59] Legislators viewed the Sterling Act's local delegation framework as the most politically feasible solution—removing the need for a constitutional amendment and avoiding the unpopularity of increased Commonwealth sales taxes.[60] The Pennsylvania General Assembly passed the law with little debate or modification, hoping to quickly grant cities the autonomy necessary to handle the impacts of the depression.[61] In the words of one senator, the Sterling Act would be "the salvation of Philadelphia."[62]

The Sterling Act, and later the Local Tax Enabling Act, gave cities and municipalities the authority to levy their own taxes so long as they did not tax subjects, privileges, transactions, occupations, or personal property already subject to Pennsylvania taxes.[63] In other words, if Pennsylvania *can* tax something, but does not, a city, township, or other municipality then has the power to collect a tax on that item.[64] Conversely, a local taxing policy is an invalid exercise of power when it is duplicative of a Commonwealth tax under the Sterling Act's preemption doctrine.[65] For

58. *See The Sterling Act: A Brief History*, *supra* note 14, at 2 (noting the economic turmoil facing Pennsylvania influencing the decision to enact the Sterling Act).

59. *See id.* at 2–3 (describing economic conditions present during the Great Depression).

60. *See* Moore, *supra* note 15, at 812–14 (describing economic and political climate surrounding passage of Sterling Act). The Supreme Court of Pennsylvania had already rejected an attempted graduated income tax, rendering a constitutional amendment the only path to that solution. *See id.* (citing Kelly v. Kalodner, 181 A. 598 (Pa. 1935)) (explaining failure to pass graduated income tax). Another option, a general sales tax, would have been "political suicide," which left only one solution—aggregation of numerous small taxes. *See id.* (explaining process of Pennsylvania's selection of tax delegation). Supporters of the law believed that it would succeed in combatting poverty and unemployment where action on the state level had previously failed. *See* S. 14-17, Ex. Sess., at 665 (Pa. 1932) (acknowledging failure of state solutions and supporting passage of Sterling Act).

61. *See generally* S. 14-17, Ex. Sess. (Pa. 1932) (recording procedural steps of enacting Sterling Act and containing unanimous approval and little debate); *see also The Sterling Act: A Brief History*, *supra* note 58, at 2 (summarizing historical and procedural circumstances surrounding passage of Sterling Act).

62. *See* S. 14-17, Ex. Sess., at 665–66 (Pa. 1932) (quoting Senator Samuel W. Salus) (praising the Sterling Act for its projected success in combatting poverty and unemployment).

63. *See* 53 PA. STAT. AND CONS. STAT. ANN. § 15971(a) (West 2018) (delegating taxing authority to cities of the first class); 53 PA. STAT. AND CONS. STAT. ANN. § 6924.301.1 (West 2018) (delegating taxing authority to other municipal bodies).

64. *See generally* 27 JOSEPH C. BRIGHT, SUMM. PA. JUR. 2D TAXATION § 14:1 (2d ed. 2018) (summarizing Pennsylvania's statutory delegation of taxing authority to cities and municipalities).

65. *See* 53 PA. STAT. AND CONS. STAT. ANN. § 15971(a) ("[S]uch council shall not have authority to levy, assess and collect, or provide for the levying, assessment

example, Pennsylvania collects a tax on sales and use, which is measured by the price of a good sold at retail and ultimately borne by consumers.[66] Philadelphia is therefore preempted from imposing its own sales and use tax measured by the price of a good sold at retail and borne by consumer—in short, a consumer in Philadelphia, Pennsylvania will not be responsible for paying two different taxes on the same retail good.[67]

Despite this prohibition, the Sterling Act provides cities like Philadelphia instructions for avoiding preemption.[68] The Sterling Act provisions can be, and have been, read permissively rather than restrictively.[69] The prohibition on double taxation is an exception to the general rule of allowing cities to levy taxes.[70] Moreover, the taxing power afforded to cities under the Sterling Act is granted "subject only to the foregoing provisions" regarding tax duplication.[71] Since taking effect, municipalities have invoked the Sterling Act to enact taxes on virtually everything from pinball machines to roller skating rinks.[72] These provisions ultimately enabled Philadelphia to even impose the nation's first city income tax.[73]

---

and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee.").

66. *See* 72 PA. STAT. AND CONS. STAT. ANN. § 7202 (West 2018) (imposing six percent tax on purchase price of each sale of tangible property or service in Pennsylvania).

67. *See, e.g.*, United Tavern Owners v. Sch. Dist. of Phila., 272 A.2d 868, 873 (Pa. 1970) (invalidating local tax on alcohol for duplicating Commonwealth sales tax). For further discussion on *United Tavern Owners*, see *infra* notes 95–101 and accompanying text.

68. *See* 53 PA. STAT. AND CONS. STAT. ANN. § 15971(a) (West 2018) (permitting cities of the first class to levy certain taxes for general revenue).

69. *See, e.g.*, Breitinger v. City of Philadelphia, 70 A.2d 640, 645 (Pa. 1950) (interpreting Sterling Act broadly in favor of local tax).

70. *See* 53 PA. STAT. AND CONS. STAT. ANN. § 15971(a) (West 2018) (allowing local taxes with the exception of taxes imposed by Pennsylvania). The law reads:

> [T]he council of any city of the first class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee.

Id.

71. *See id.* ("[T]his section [confers] upon cities of the first class the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provisions . . . .").

72. *See, e.g.*, Coe v. Duffield, 138 A.2d 303, 306 (Pa. Super. Ct. 1958) (upholding a local tax on pinball machines, drive-in theaters, and roller-skating rinks).

73. *See The Sterling Act: A Brief History*, *supra* note 58, at 3 (citation omitted) (observing that Philadelphia was the first city in the United States to tax the income of its citizens).

C. *Coke or Pepsi? Courts Face Conflicting Choices Construing the Sterling Act*

Applying Sterling Act preemption doctrine proved to be easier said than done.[74] Although appearing to concur in dicta regarding the operation of the law, Pennsylvania judges and justices have routinely disagreed on more detailed inquiries of statutory interpretation.[75] Over the roughly eighty-year lifespan of the Sterling Act, courts have quarreled over what constitutes a duplicative "privilege, transaction, subject or occupation . . . subject to a State tax".[76] The Sterling Act also contains no reference to the level of deference intended for municipal policies, adding further confusion over whether to err in favor of a city or taxpayer.[77]

1. *The Debate over "Dew"-plication*

To determine whether a local tax duplicated a Commonwealth tax, the Supreme Court of Pennsylvania in *Philadelphia v. Samuels*[78] examined the language of the city ordinance at issue.[79] The plaintiffs in *Samuels* argued that a city tax on gross receipts from parking revenue unlawfully duplicated the Commonwealth stock and corporate income taxes.[80] Because the word "transaction" appeared in the ordinance, the court reasoned that Philadelphia's tax on parking lots was an excise tax and thus did not duplicate Pennsylvania's stock or corporate income taxes.[81] The court concluded this despite the tax's practical effects, which, like the state

74. *See, e.g.*, City & Cty. of Philadelphia v. Samuels, 12 A.2d 79, 81 (Pa. 1940) (describing preemption doctrine as "often illogical and arbitrary"); City of Philadelphia v. Tax Review Bd. *ex rel.* Scott, 601 A.2d 875, 877 (Pa. Commw. Ct. 1992) (noting difficulty of "extract[ing] a comprehensive analysis" from cases interpreting local tax preemption doctrine), *appeal denied sub nom.* Janney Montgomery Scott Inc. v. City of Philadelphia, 612 A.2d 986 (Pa. 1992); *see also The Sterling Act: A Brief History*, *supra* note 58, at 1 (observing that "[t]he amorphous manner in which the Sterling Act was written has provided opponents and proponents of the legislation with a great deal of interpretive and implementation flexibility over the years").

75. *Compare Samuels*, 12 A.2d at 81 (focusing on language in ordinance to determine whether local tax was duplicative), *with* Murray v. Philadelphia, 71 A.2d 280, 284 (Pa. 1950) (*Murray I*) (focusing on "the practical operation of the two taxes" over "mere difference in terminology" to determine whether local tax was duplicative).

76. *See* 53 PA. CONS. STAT. ANN. § 15971(a) (West 2018) (precluding local taxes on duplicative "persons, transactions, occupations, privileges, subjects and personal property"). For a complete discussion of the conflicting precedent deciding whether a tax is duplicative, see *infra* notes 78–87 and accompanying text.

77. For a discussion of the court's opposing rules of construction with respect to the Sterling Act, see *infra* notes 88–94 and accompanying text.

78. 12 A.2d 79 (Pa. 1940).

79. *See id.* at 81–82 (focusing duplication analysis around "the word used in the ordinance").

80. *See id.* at 80–81 (stating issue on appeal).

81. *See id.* at 81–82 (finding city tax on parking lots not preempted).

corporate net income tax, would increase taxes proportional to the parking lot's revenue.[82]

A decade later, in *Murray v. City of Philadelphia*,[83] the Supreme Court of Pennsylvania invalidated Philadelphia's tax on dividends received from corporations.[84] However, that court examined the economic impact of the tax rather than the language of the ordinance in holding the tax was unlawfully duplicative.[85] Drawing the line between distinct subjects, persons, privileges, or transactions is complex enough.[86] However, these issues are often compounded given that most taxes involve multiple subjects, persons, privileges, and transactions.[87]

2. *Half-Full or Half-Empty: Should Taxpayers or Governments Benefit from Statutory Ambiguity?*

To complicate matters further, the Supreme Court of Pennsylvania delivered two opinions on the same day that applied diametrically-opposing rules of construction to the Sterling Act.[88] First, in *Breitinger v. City of Philadelphia*,[89] the court applied great deference to the city council and presumed that Philadelphia "did not intend to levy a tax which it had no authority to impose."[90] However, in its next decision, *Murray v. City of*

82. *See id.* (rejecting argument that city tax duplicated state tax).

83. 71 A.2d 280 (Pa. 1950) (*Murray I*).

84. *See id.* at 290 (finding tax preempted under Sterling Act).

85. *See id.* at 283–84 (deciding issue of duplicity by assessing practical operation of taxes over "mere difference in terminology"). Notably, the court remarked:

> In ascertaining the scope of the taxing power conferred, the court must deal with the realities of the situation and may not be misled by ambiguous words used to describe taxes in other contexts. It is often said that taxation is a practical matter, frequently arbitrary and illogical, and that words used to describe taxes in one context are not always used in the same sense nor with the same meaning in another.

Id.

86. *See, e.g.*, National Biscuit Co. v. City of Philadelphia, 98 A.2d 182, 198 n.2 (Pa. 1953) (Bell, J., concurring in part) (calling the standard for distinguishing taxes "so nebulous, flexible and fluctuating, that the decisions on point throughout the entire country are ofttimes vacillating, confused and contradictory").

87. *See* 27 JOSEPH C. BRIGHT, SUMM. PA. JUR. 2D TAXATION § 14:5 (2d ed. 2018) (asking how many subjects, persons, transactions, etc. must duplicate a Commonwealth tax before a court will find preemption of a local tax under the Sterling Act).

88. *Compare* Murray v. City of Philadelphia, 70 A.2d 647, 651 (Pa. 1950) (*Murray II*) (construing Sterling Act strictly against city in favor of tax payers), *with* Breitinger v. City of Philadelphia, 70 A.2d 640, 645 (Pa. 1950) (applying presumption of taxing authority in favor of Philadelphia). The presumption applied in *Breitinger* appears even more misplaced considering that, earlier in the opinion, the court noted that the city's taxing power must be "plainly and unmistakeably [sic] conferred" and "[i]n cases of doubt the construction should be against the government." *See Breitinger*, 70 A.2d at 642 (citations omitted).

89. 70 A.2d 640 (Pa. 1950).

90. *See id.* at 645 (applying presumption in favor of city's taxing authority).

Philadelphia,[91] the court strictly construed the Sterling Act in favor of the taxpayers in resolving the ambiguity regarding the scope of the city's taxing authority.[92] Without clear standards governing judicial construction of municipal authority, Pennsylvania courts have struggled to apply this doctrine consistently.[93] The aftermath of these cases is a jurisprudence replete with uncertainty.[94]

3. *The Original Beverage Case*—United Tavern Owners v. Philadelphia School District

United Tavern Owners v. Philadelphia School District[95] illustrates the inherent uncertainty in the doctrine of intrastate preemption.[96] In *United Tavern Owners*, Philadelphia attempted to enact a ten percent tax on retail sales of alcohol.[97] After a lengthy discussion of the often-contradictory case law, a plurality of justices summarily announced that the proposed tax was preempted "because the sales of liquor are already subject to two state taxes . . . ."[98] Oddly, the plurality offered little legal justification for its

91. 70 A.2d 647 (Pa. 1950) (*Murray II*).

92. *See id.* at 651 (applying strict construction of Sterling Act).

93. *Compare* Middletown Twp. v. Alverno Valley Farms, 524 A.2d 1039, 1041 (Pa. Commw. Ct. 1987) (upholding business privilege tax), *appeal denied*, 535 A.2d 1058 (Pa. 1987), *and* Fish v. Twp. of Lower Merion, 128 A.3d 764, 771 (Pa. 2015) (upholding business privilege tax), *with* Baltimore Life Ins. Co. v. Spring Garden Twp., 699 A.2d 847, 849 (Pa. Commw. Ct. 1997) (finding preemption of business privilege tax).

94. *See* 27 JOSEPH C. BRIGHT, SUMM. PA. JUR. 2D TAXATION § 14:4 (2d ed. 2018) (noting that in Pennsylvania "there are no clear guidelines defining what will and will not preempt a local tax"). One commentator argues for the abolishment of the doctrine:

> As long as the doctrine continues in its present mute form, it will remain impossible to predict with any rational assurance whether it has been violated. Since the doctrine now presents an unascertainable standard of conduct, it seems legitimate to suggest that is offers the antithesis of law, and therefore should be abandoned.

See Stewart Dalzell, *The State Preemption Doctrine: Lessons from the Pennsylvania Experience*, 33 U. PITT. L. REV. 205, 230 (1972).

95. 272 A.2d 868 (Pa. 1971).

96. *See generally id.* at 873–74 (providing contradictory reasoning in holding that the challenged tax was preempted).

97. *See id.* at 869 (describing challenged tax imposed by Philadelphia).

98. *See id.* at 873 (announcing the holding of the court). The court's prior articulation of the doctrine is, at times, contradictory; for example, at one point, the plurality noted that it will rely on the "general tenor" of a statute to determine the intent of the legislature. *See id.* at 870 (citation omitted) ("But if the general tenor of the statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation must be held invalid."). Later, the court stated that it would not invalidate a local law absent express preemption. *See id.* at 871 ("[W]e will refrain from striking down the local ordinance unless the Commonwealth has explicitly claimed the authority for itself . . . .").

holding.[99] The dissenters in *United Tavern Owners* believed the doctrine of preemption did not even apply to taxation.[100] Despite these sharply opposing viewpoints over the application of the Sterling Act, the statute has remained virtually unchanged for over eighty years.[101] Against this backdrop, lawmakers, lawyers, and judges were tasked with applying state tax preemption to Philadelphia's tax on sugary beverages in *Williams*.[102]

III. CRACKING OPEN THE COLD FACTS OF *WILLIAMS V. CITY OF PHILADELPHIA*

On June 16, 2016, the Philadelphia City Council (the City) passed the "Sugar-Sweetened Beverage Tax," imposing a tax of one and one-half cents per fluid ounce on sugary beverages purchased by dealers from distributors.[103] Under the ordinance, any nonalcoholic beverages listing sugar or artificial sweeteners as ingredients were subject to the tax.[104] The tax applied any time a restaurant, street vendor, or other retailer purchased a sugar-sweetened beverage from a supplier for the purpose of selling the drinks to consumers.[105]

The City's soda tax imposition quickly became the subject of sharp public controversy.[106] Several consumers, retailers, distributors, and as-

99. *See generally id.* (invalidating local tax with little legal analysis on why taxation would not be appropriate).

100. *See id.* at 875 (Pomeroy, J., dissenting) ("To my knowledge there has not heretofore existed in Pennsylvania a doctrine of preemption in the field of taxation, nor do I see any basis or need for creating one.").

101. *See* 53 PA. STAT. AND CONS. STAT. ANN. § 15971 (West 2018) (noting only one amendment since the passage of the Sterling Act). The Act contained a sunset provision which applied the taxing authority to cities of the second class for three years. *See* S. 14-17, Ex. Sess., at 665–66 (Pa. 1932). In 1961, the legislature amended the Sterling Act solely to remove any reference to cities of the second class. *See* Act of July 26, 1961, P.L. 904, § 1 (eliminating references to second-class cities); *see also* Williams v. City of Philadelphia, 188 A.3d 421, 429 n.8 (Pa. 2018) (observing that the Sterling Act has not changed since 1961).

102. For a discussion of the circumstances culminating in the *Williams* decision, see *infra* notes 103–13 and accompanying text.

103. *See generally* PHILA., PA., CODE ch. 19-4100 (codifying Philadelphia's Sugar Sweetened Beverage Tax); *id.* § 19-4103(2) (setting the tax rate on various beverages).

104. *See id.* § 19-4100(3) (defining the term "sugar-sweetened beverage"). The tax would not apply to, *inter alia*, baby formula, drinks made up of more than fifty percent fruit or vegetable juice, or drinks which could have sugar added to them at the request of the customer. *See id.* § 19-4100(3)(c).

105. *See id.* § 19-4103(1) (describing the transactions to which the tax would apply).

106. *See* Neighborhood Night Hearing, COMM. OF THE WHOLE, COUNCIL OF THE CITY OF PHILA. 17–22 (Apr. 12, 2016), http://legislation.phila.gov/transcripts/Public%20Hearings/whole/2016/wh0412b6.pdf [https://perma.cc/3XCW-EG4M] (testimony of Coca-Cola employees) (arguing that soda tax would cause hundreds of lost jobs); *see also id.* at 9–16 (testimony of Parks Alliance representatives) (arguing in favor of soda tax for benefit of public park and recreation center access); *Working Class Neighborhoods are Paying the Price in Philadelphia*, AM. BEVERAGE ASS'N (Nov. 3, 2017), https://www.ameribev.org/education-resources/blog/post/

sociations filed a complaint in the Philadelphia County Court of Common Pleas challenging Philadelphia's authority to levy the tax under the Sterling Act.[107] The tax, the plaintiffs argued, unlawfully duplicated and conflicted with the Commonwealth's sales and use tax on soft drinks.[108] Ultimately, the plaintiffs sought a declaration from the court stating that Pennsylvania law preempted the Philadelphia soda tax.[109] In response, Philadelphia moved to dismiss the complaint for failure to state a cause of action.[110] According to the City, the Sterling Act expressly authorized Philadelphia to tax sugary beverages based on volume at distribution.[111]

The Philadelphia County Court of Common Pleas concluded that, as a matter of law, the tax was not duplicative of the Commonwealth sales tax, and dismissed the complaint with prejudice.[112] On appeal, the Com-

working-class-neighborhoods-are-paying-the-price-in-philadelphia/ [https://perma.cc/HSS3-KL6D] (criticizing Philadelphia soda tax's adverse effects on small business owners and working-class families); *The Philly Beverage Tax Facing Major Shortfall*, AM. BEVERAGE ASS'N (June 13, 2017), https://www.ameribev.org/education-resources/blog/post/the-philly-beverage-tax-facing-major-shortfall/ [https://perma.cc/EKL8-42DY] (criticizing Philadelphia soda tax for failing to raise projected revenue); Franklin Liu, *Sin Taxes: Have Governments Gone Too Far in their Efforts to Monetize Morality?*, 59 B.C. L. REV. 763, 77–81 (2018) (criticizing Philadelphia soda tax and other "sin taxes").

107. *See* Complaint at 7–9, Williams v. City of Philadelphia, No. 160901452, 2016 WL 7422362, at *1 (Phila. Cty. Ct. Common Pleas Dec. 19, 2016) (listing and describing the plaintiffs). Among the plaintiffs were the American Beverage Association, the Pennsylvania Beverage Association, the Philadelphia Beverage Association, and the Pennsylvania Food Merchants Association. *See id.* (naming challengers to the city's authority to levy soda tax). The plaintiffs further asserted that the tax violated the Uniformity Clause of the Pennsylvania Constitution. *See id.* at 6 (alleging that the soda tax violated the Uniformity Clause).

108. *See id.* at 1–2 (stating the grounds of the complaint).

109. *See id.* at 49 (requesting declaratory relief and a permanent injunction from the court).

110. *See* Memorandum of Law in Support of Defendants' Preliminary Objections at 1, Williams v. City of Philadelphia, No. 160901452, 2016 WL 7422362, at *1 (Phila. Cty. Ct. Common Pleas Dec. 19, 2016) (seeking dismissal of the complaint with prejudice for failure to state a claim upon which relief may be granted).

111. *See id.* at 20–38 (arguing the Sterling Act did not preempt the soda tax, but rather expressly granted Philadelphia the authority to levy the tax).

112. *See* Williams v. City of Philadelphia, No. 1452, 2016 WL 7422362, at *3 (Phila. Cty. Ct. Common Pleas Dec. 19, 2016) ("[T]his court finds as a matter of law that the PBT is not duplicative of the Commonwealth's Sales and Use Tax and is therefore not preempted.").

monwealth Court affirmed the dismissal.[113] The Supreme Court of Pennsylvania granted review in early 2018.[114]

IV. The Taxpayers' Challenge to the Soda Tax Fizzles Out: A Narrative Analysis of *Williams*

The principal issue on appeal at the Supreme Court of Pennsylvania was whether, under the Sterling Act, the Philadelphia soda tax was unlawfully duplicative of the Commonwealth sales tax.[115] According to the Court, the Sterling Act afforded "an enormously broad and sweeping power of taxation" to Philadelphia.[116] Thus, Philadelphia had the power under the Act to tax that which "the Commonwealth has the power to tax—but does not tax".[117]

Initially, the question of duplication required the court to examine the tax's "incidence."[118] Incidence, in the context of taxation, refers to "the subject matter of the tax" and "the measure of the tax."[119] Phrased differently, the incidence of a tax falls upon the one with the ultimate burden of paying the tax.[120] The court discussed two approaches to the incidence inquiry—economic and legal.[121]

First, economic incidence examines the practical economic impact of the tax.[122] In the case of the beverage tax, the consumers bore the economic burden as retailers around the city raised prices to offset increased

113. *See* Williams v. City of Philadelphia, 164 A.3d 576, 596 (Pa. Commw. Ct. 2017) (affirming trial court's order). The court also held that the soda tax did not violate the Uniformity Clause of the Pennsylvania Constitution. *See id.* at 595–96 (affirming trial court's dismissal of Uniformity Clause counts). Finally, the Commonwealth Court held that the Food Stamp Act did not preempt the soda tax. *See id.* at 593–94 (affirming trial court's dismissal of Food Stamp preemption counts). In-depth discussions of the Uniformity Clause and Food Stamp Act preemption issues are beyond the scope of this Note.

114. *See* Williams v. City of Philadelphia, 180 A.3d 365 (Pa. 2018) (per curiam) (granting limited appeal).

115. *See id.* (stating issue on appeal). The issue on appeal in *Williams* was, "Does the City's Tax violate the Sterling Act, 53 P.S. § 15971, which prohibits Philadelphia from imposing a tax on a transaction or subject that the Commonwealth already taxes?" *See id.*

116. *See* Williams v. City of Philadelphia, 188 A.3d 421, 429 (Pa. 2018) (internal quotations omitted) (citation omitted) (describing Philadelphia's taxing authority under Sterling Act).

117. *See id.* at 429–30 (explaining preemption doctrine).

118. *See id.* at 431 (articulating standard for determining whether local tax duplicates Commonwealth tax).

119. *See id.* at 425 (internal quotations omitted) (citations omitted) (defining incidence as it relates to tax duplication under the Sterling Act).

120. *See generally* Ian Clark, *Burden of a Tax - Economic vs. Legal Incidence*, ATLAS OF PUBLIC MANAGEMENT, http://www.atlas101.ca/pm/concepts/burden-of-a-tax-economic-vs-legal-incidence/ [https://perma.cc/PZ3B-NBTJ] (last visited Sep. 2, 2018) (distinguishing between legal and economic incidence).

121. *See Williams*, 188 A.3d at 431 (discussing legal and economic incidence).

122. *See* Clark, *supra* note 119 (defining economic incidence as "who bears the burden" of tax liability).

supplier costs.[123] Thus, the city soda tax had the same economic incidence as the Commonwealth sales and use tax because both taxes resulted in the increase of consumer prices.[124]

In contrast, legal incidence focuses on the persons intended by the legislature to bear the tax—the party responsible for submitting payment to the government.[125] The advantage of using legal incidence over economic incidence, the court noted, was that legal incidence is prophylactic in nature, and therefore easier to apply.[126] The legal incidence test also appeared to be more consistent with Pennsylvania precedent.[127] Moreover, utilizing the economic incidence test seemed contrary to the apparently broad delegation of taxing authority in the Sterling Act.[128] Accordingly, the court compared the legal incidence of the Philadelphia soda tax and the Commonwealth sales and use tax to determine whether the former duplicated the latter—excluding economic incidence from its analysis.[129]

Applying the legal incidence test, three distinctions protected the soda tax from preemption: "subjects, measures, and payers."[130] The "subject" of the Commonwealth sales tax was retailer-consumer transactions, while that of the Philadelphia soda tax was supplier-retailer transactions.[131] Moreover, unlike the state sales tax, which measured the tax

123. *See Williams*, 188 A.3d at 426–27 (noting that economic burdens of tax fell upon consumers purchasing sugary beverages).

124. *See* Brief for Appellants at 20–21, Williams v. City of Philadelphia, 164 A.3d 576 (Pa. Commw. Ct. 2017) (arguing that soda tax unlawfully duplicated Commonwealth sales tax due to identical economic incidences).

125. *See* Clark, *supra* note 120 (defining legal incidence as "who writes the cheque to the government"). Stated differently, the legal incidence falls on the persons "hit" by the tax, and the economic incidence falls on the persons "hurt" by the tax. *See* Jacqueline M. Moen, *Federal Immunity and the Arizona Transaction Privilege Tax on Prime Contracting: Is Arizona's Tax Unconstitutional?*, 34 ARIZ. L. REV. 615, 617 n.18 (citing Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 706 n.104 (1976)) (distinguishing between legal and economic incidence).

126. *See Williams*, 188 A.3d at 432 (internal quotations omitted) (internal citation omitted) (describing legal incidence test as a "reasonably bright line standard").

127. *See id.* at 431 (citing Commonwealth v. Nat'l Biscuit Co., 136 A.2d 821 (Pa. 1957)) (summarizing past decisions where the court applied the legal incidence over the economic incidence).

128. *See Williams*, 188 A.3d at 431 (concluding that legislature did not intend to limit local taxing authority absent express provision to the contrary).

129. *See id.* at 433 (stating legal incidence determines whether local taxes are duplicative and using that standard in this case's comparison).

130. *See id.* at 434–35 (holding soda tax had distinct legal incidence from Commonwealth sales tax).

131. *See id.* at 433–35 (describing differences between subjects of soda tax and sales tax).

based on *price*, the City's tax liability was based on *volume*.[132] Finally, the respective tax burdens fell on different payer classifications—retailers bore the price of the soda tax, while consumers carried the burden of paying the sales tax.[133] As a result, the court found that Philadelphia's soda tax could not be a duplicate of the Commonwealth sales tax.[134]

While the court in *Williams* unanimously agreed that the legal incidence test applied, the dissenters argued that the majority nonetheless should have weighed the soda tax's economic realities.[135] The dissent pointed to statements from the mayor and city council members arguing that the tax was specifically intended to discourage consumers.[136] Specifically, the dissent disagreed with the majority's failure to justify its stance that economic realities are wholly irrelevant.[137] The dissent looked to the practical effects of the tax and reasoned that the soda tax was imposed on beverages, not distributors.[138] The dissent accordingly disagreed with the majority's broad construction of the Sterling Act.[139]

---

132. *See id.* (describing differences between measures of soda tax and sales tax).

133. *See id.* (describing differences between payers of soda tax and sales tax).

134. *See id.* at 435 (finding sufficient legal incidence distinctions between soda and sales tax to avoid preemption).

135. *See id.* at 446 (Mundy, J., dissenting) (agreeing with doctrinal framework articulated by majority); *id.* at 444–46 n.14 (Wecht, J., dissenting) (agreeing that legal-incidence test applied, but rejecting categorical exclusion of economic impact of tax for purpose of determining whether local tax is duplicative).

136. *See id.* at 440 (Wecht, J., dissenting) (citing Interview by Michael Smerconish with Jim Kenney, Mayor, Philadelphia (Apr. 7, 2016)) (noting statements from mayor implying that aim of soda tax is to influence consumer behavior).

137. *See id.* at 441 (Wecht, J., dissenting) (emphasizing majority's failure to reconcile incohesive precedent). Justice Wecht specifically criticized the majority's overly-literal approach, writing:

> I do not find the Majority's effort to find the safe harbor of clarity in the bright-line of the "legal incidence" test reconcilable with a test requiring the assessment of a tax's *practical effect*. Indeed, speaking generally, I find irreconcilable the very notions of a practical inquiry and a bright-line test, and I discern no substantive benefit in this context to abandoning our long-standing if messier approach to such questions. For this reason, I find it incongruous to imply, as the Majority does, that we cannot seek a given levy's "legal incidence" by looking beyond nomenclature to focus upon its foreseen, and even intended, effects—regardless of whether that entails some consideration of economic effects.

See id. at 444–45 (Wecht, J., dissenting).

138. *See id.* at 446–47 (Mundy, J., dissenting) (arguing that subject of tax is beverages).

139. *See id.* at 444–45 (Wecht, J., dissenting) (criticizing the majority's broad interpretation of local taxing authority granted under the Sterling Act); *id.* at 447 (Mundy, J., dissenting) (concluding that true subject of beverage tax was retail sales).

V. A THIRST FOR PREDICTABILITY QUENCHED ONLY BY LEGISLATION: A CRITICAL ANALYSIS OF *WILLIAMS*

Notwithstanding whether the soda tax itself is an advantageous policy, *Williams* is a win for municipalities around Pennsylvania, which may now be empowered to levy taxes on virtually anything absent future legislative constraint.[140] The dismissal of the complaint in *Williams* at the pleadings stage may have been premature, especially considering the disharmony of the court's precedent.[141] Despite the court's effort to create a workable framework in *Williams*, the decision does not appear to provide any clear guidance towards rectifying past discrepancies.[142] The court in *Williams* applied the legal incidence test mainly out of necessity, as the Sterling Act itself offers no guidance regarding its interpretation.[143] However, neither the legal incidence test nor the economic incidence test adequately bal-

140. *See* Nat'l Biscuit Co. v. City of Philadelphia, 98 A.2d 182, 184 (Pa. 1953) ("It has become a mere platitude to state, what has so often been proclaimed, that courts are concerned, not with the wisdom of legislation, but with the right of the legislative body to enact it, -not with policy but with power."); *see also Williams*, 188 A.3d at 436 (deferring responsibility for reigning in unintended consequences of decision to Pennsylvania legislature); Brief for Appellants at 14, Williams v. City of Philadelphia, 188 A.3d 421 (Pa. 2018) (Nos. 2 & 3 EAP 2018) (arguing that upholding soda tax signals judicial approval of unlimited local taxing power). One amicus opposing the tax listed examples of taxes which would be permissible if the court found for Philadelphia:

> Lancaster may decide to discourage automobile ownership by imposing a tax on the delivery of automobiles to retail automotive dealerships within city limits; Scranton may decide to impose a similar tax on the delivery of bicycles for sale at retail; Altoona may opt for a tax on periodicals delivered to newsstands for retail sale . . . .

Amici Curiae Brief of the National Federation of Independent Business Small Business at 21–22, Williams v. City of Philadelphia, 164 A.3d 575 (Pa. Commw. Ct. 2017) (Nos. 2077 & 2078 C.D. 2016). Moreover, Philadelphia's success in defending the ordinance may influence the approach other localities in Pennsylvania and around the United States take in implementing tax policies. *See* 1 MATTHEWS MUNICIPAL ORDINANCES, *supra* note 8, § 1:4 (noting that "new legal trends" may affect how municipalities may enact policy).

141. *See* Williams v. City of Philadelphia, 164 A.3d 576, 600–01 (Pa. Commw. Ct. 2017) (Covey, J., dissenting) (arguing for reversal because matter was issue of first impression), *aff'd*, 188 A.3d 421 (Pa. 2018). To win a motion to dismiss, or "demurrer," in Pennsylvania, the movant is entitled to relief only if it is "clear and free from doubt" that the complaint is legally insufficient. *See* C.G. v. J.H., 172 A.3d 43, 55 (Pa. Super. Ct. 2017) (internal citation omitted) (stating legal standard for demurrer), *appeal granted on other grounds*, 179 A.3d 440 (Pa. 2018). On appellate review, the demurrer will only be affirmed if "the law says with certainty that no recovery is possible." *See* Cooper v. Church of St. Benedict, 954 A.2d 1216, 1219 (Pa. Super. Ct. 2008) (reciting standard of appellate review applied to demurrers); *see also* PA. R. CIV. P. 1028(a)(4) (2016) (listing demurrer as potential ground for preliminary objections to pleadings).

142. *See Williams*, 188 A.3d at 433 n.14 (Pa. 2018) (stating intent for legal incidence test to provide clarity to incohesive precedent); *id.* at 441 (Wecht, J., dissenting) (criticizing majority for failing to harmonize conflicting case law).

143. *See id.* at 430–32 (finding that legal incidence analysis applied based on intent and context of Sterling Act).

ances the competing interests at play in the tax preemption doctrine.[144] Ultimately, the Pennsylvania General Assembly should determine its intended mode of interpretation and amend the Sterling Act accordingly.[145]

A. *Watered Down: The Sterling Act's Lack of Specificity Creates Issues with Statutory Interpretation*

The Sterling Act's silence on its own construction is perhaps the principal source of the preemption doctrine's inconsistencies.[146] When a statute governs the disposition of a dispute, courts ordinarily must follow the statute's express language.[147] If the text of the statute is ambiguous, courts attempt to resolve this doubt by examining the intent of the legislature.[148] If, after this inquiry, the meaning of a statute remains unclear, only then may a court substitute its own judgment in light of policy, equity, or other considerations.[149]

The Sterling Act does not define "privilege," "transaction," "subject," or "occupation."[150] The Sterling Act further fails to specify whether to construe the statute in favor of cities or taxpayers.[151] These key omissions have forced Pennsylvania courts to create a framework of interpretation where one otherwise does not exist.[152] *Williams*' legal incidence approach is simply the most recent manifestation of this struggle.[153] Although conceding the possibility of "unintended consequences," the Supreme Court of Pennsylvania refused to amend the Sterling Act from the bench.[154]

144. For a further discussion of the advantages and disadvantages of the legal incidence test, see *infra* notes 156–70 and accompanying text. For a further discussion of the advantages and disadvantages of the economic incidence test, see *infra* notes 171–78 and accompanying text.

145. For a complete argument in favor of legislation clarifying the scope of local taxing authority under the Sterling Act, see *infra* notes 179–90 and accompanying text.

146. *See, e.g.*, *Williams*, 188 A.3d at 432 (relying on omissions from text of Sterling Act as partial justification of utilizing the legal incidence test rather than the economic incidence test).

147. *See* McClellan v. Health Maint. Org. of Pa., 686 A.2d 801, 805 (Pa. 1996) (describing concept of statutory construction and interpretation).

148. *See id.* (outlining procedure for interpretation of ambiguous statutory provisions).

149. *See generally* 73 AM. JUR. 2D *Statutes* §§ 58–98 (2018) (describing various considerations which aid in statutory construction and interpretation).

150. *See generally* 53 PA. STAT. AND CONS. STAT. ANN. § 15971 (West 2018) (using terms "privilege, transaction, subject or occupation" without accompanying definition).

151. *See generally id.* (neglecting to provide deference to taxpayers or municipalities).

152. *See, e.g.*, *supra* notes 74–101 and accompanying text (discussing conflict in the interpretation of the Sterling Act).

153. *See* Williams v. City of Philadelphia, 188 A.3d 421, 433 (Pa. 2018) (interpreting the Sterling Act to prohibit local taxes with duplicative legal incidence of state tax).

154. *See id.* at 436 (declining to adopt taxpayers' interpretation despite policy concerns with legal incidence test). These "unintended consequences" included

Rather, the court declared that it would await legislative clarification before altering its approach.[155] Thus, so long as the Sterling Act remains silent on key issues of interpretation, the doctrine of local tax preemption will likely remain inconsistent.[156]

B. *The Legal Incidence Test: Opening the Floodgates to Local Taxes*

The legal incidence test applied by the Supreme Court of Pennsylvania is narrow almost to the point of nullifying state preemption.[157] Avoiding preemption under this literal interpretation may now be a matter of word choice rather than any meaningful distinction.[158] If a city can avoid preemption with clever ordinance drafting, the rules governing preemption are rendered meaningless.[159] The result of this "lawyer's game" could continue to create a plethora of administrative and litigative wastefulness.[160] Even ardent advocates of increased local autonomy acknowl-

---

opening the door to unlimited city taxing authority, according to the taxpayers. *See id.* (citation omitted) (responding to policy concerns of petitioners). For a further discussion of the potential consequences of the legal incidence framework, see *infra* notes 156–70 and accompanying text.

155. *See Williams*, 188 A.3d at 436 (finding statutory language to be "clear enough" so that any subsequent modification would require legislative intervention).

156. *See id.* (deferring to the legislature, in part, because of the legislature's "superior resources . . . in assessing matters of social policy"). In relevant part, the majority stated:

> The concern that unintended consequences may unfold are prevalent relative to the promulgation of experimental, remedial legislation such as the Sterling Act. Where the language of the governing statute is clear (or clear enough), however, the solution is legislative—and not judicial—adjustment. In this regard, this Court regularly alludes to the superior resources available to the General Assembly in assessing matters of social policy.

Id. (footnote omitted).

157. *See* James Edward Maule, *What's Next? A Tax on Exiting the Store? How Unwise Taxes Undermine Tax Policy*, MAULEDAGAIN (July 23, 2018), http://mauledagain.blogspot.com/2018/07/#4198292661757349926 [https://perma.cc/945B-XGE6] (criticizing *Williams* as too technical and narrow).

158. *See* Nat'l Biscuit Co. v. City of Philadelphia, 98 A.2d 182, 198 (Pa. 1953) (Bell, J., concurring in part and dissenting in part) (criticizing the majority approach to preemption in favor of a practical effect test).

159. *See* 27 SUMM. PA. JUR. 2D *Taxation*, *supra* note 14, § 14.5 (2018) ("It is a waste of governmental and private time to lay down rules which can be evaded by clever drafting and which, in any event, have no practical meaning.").

160. *See id.* (criticizing preemption doctrine as a "lawyer's game" resulting in both wasteful litigation and administrative nightmares). Costly litigation results primarily from the uncertainty in the jurisprudence of preemption. *See id.* (explaining why Pennsylvania's preemption law encourages wasteful litigation). When the hundreds of municipalities, boroughs, cities, towns, counties, and districts each levy discrete taxes, the result is "pointless complexity." *See id.* (describing the "administrative wastefulness" resulting from the Sterling Act).

edge that erratic applications of the law erode the confidence necessary to develop businesses.[161]

To further complicate this issue, an overly-literal interpretation of the Sterling Act may make avoiding tax liability as easy as evading tax preemption.[162] Given the relatively cramped jurisdiction of the entity levying the tax, circumventing some taxes can be achieved by simply completing the desired transaction in a neighboring municipality.[163] Since the passage of the Philadelphia Sugar-Sweetened Beverage Tax, one study found that while soda sales in Philadelphia fell by 55%, purchases increased by 38% outside the city limits.[164] Certainly, this loophole frustrates the public health and revenue generation objectives of taxes like the soda tax.[165]

Broadening local taxing authority may also risk subjecting a vulnerable minority of city residents to the tyranny of the majority.[166] With the

161. *See* Dupuis, *supra* note 37, at 24 (acknowledging positive effects of preemption legislation on business development).

162. *See* Williams v. City of Philadelphia, 188 A.3d 421, 439 (Pa. 2018) (Wecht, J., dissenting) (questioning application of soda tax to extraterritorial transactions). One critic points out that the ordinance contains explicit instructions for avoiding the tax. *See* James Edward Maule, *How Unsweet a Tax*, MAULEDAGAIN (June 24, 2016), http://mauledagain.blogspot.com/2016/06/#8172255688598900675 [https://perma.cc/LS7W-SKM2] (noting that soda tax contains a "road-map for evasion"). Under the provisions of the soda tax, a beverage could theoretically be sold to retailers in unsweetened form, then subsequently sweetened with added sugars on-site. *See id.* (describing theoretical loophole in soda tax).

163. *See* Christian Britschgi, *Philly Tax Spurs Black Market Soda Smuggling*, REASON (Mar. 16, 2018, 1:30 PM), https://reason.com/blog/2018/03/16/phillys-beverage-tax-spurs-black-market [https://perma.cc/M4U6-WAHU] (internal citation omitted) (noting that consumers are purchasing soda in neighboring counties and smuggling it into Philadelphia to avoid paying taxes).

164. *See id.* (internal citation omitted) (describing trends in soda sales since the passage of Philadelphia's soda tax).

165. *See* Neighborhood Night Hearing, COMM. OF THE WHOLE, COUNCIL OF THE CITY OF PHILA. 23–26 (Apr. 12, 2016), http://legislation.phila.gov/transcripts/Public%20Hearings/whole/2016/wh0412b6.pdf [https://perma.cc/5WHT-MXH6] (testimony of Dr. Barbara Gold) (discussing public health concerns to be addressed by soda tax).

166. *Cf.* THE FEDERALIST NO. 10 (James Madison) (advocating for a republican form of government as a means to control the effects of factions, which have threatened the stability of past pure democracies). Madison argued that a pure democracy is susceptible to emotionally-driven actions, which risk harming the rights of other citizens:

> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

See id.

power to impose additional taxes, a local government may yield to a majority that will face little or no consequences from the new law at the expense of a tiny minority.[167] Many restrictions on municipal financial powers are also aimed at preventing local governments from spending themselves into bankruptcy.[168] Defining stricter boundaries of municipal fiscal authority protects the government and its constituents against creditors.[169] The resulting constraint could force local authorities to reign in excessive spending and preserve their creditworthiness.[170] Given that limiting local taxation aims to prevent the abuse of power, this concern should be at the forefront of any legislative cure.[171]

C. *The Economic Incidence Test Could Leave Cities Parched for Power*

On the other hand, an overly-broad interpretation of state preemption doctrine vis-à-vis the economic incidence test would tremendously hinder a municipality's financial self-sufficiency.[172] The court in *Williams* correctly noted that basing the duplicity analysis on economic incidence would invalidate virtually all local taxes.[173] Weighing the economic consequences of a tax results in more cases of preemption because the burden will almost always fall on consumers.[174] An increase in state authority in this manner may result in totally eclipsing local authority.[175]

---

167. *See* Vaubel, *supra* note 53, at 464–65 (observing that limitations on local taxing authority are intended to protect citizens from themselves and their local governments).

168. *See, e.g.*, JOHN E. GOTHERMAN et al., OH. MUN. L. § 3:8 (2018) (noting limits on Ohio cities' fiscal authorities, in part, to reduce risk of over-borrowing).

169. *See* 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 527 (2018) (explaining rationale for constraining local authority over financial affairs). Incurring too much debt could risk a situation where a local government's creditors force the government to either liquidate its assets or raise taxes to repay the loan. *See id.* (describing scenario risked by excessive municipal debt).

170. *See, e.g.*, Taxpayers for Improving Pub. Safety v. Schwarzenegger, 91 Cal. Rptr. 3d 370, 377–78 (Ct. App. 2009) (recognizing that constraints on fiscal authority are intended to reduce deficit spending and preserve credit of government).

171. *Cf.* OHIO CONST. art. XIII, § 6 (restricting cities' taxation powers "so as to prevent the abuse of such power."); *see also* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1132–33 (2007) (recognizing criticism that limiting local authority helps reduce the use of power for selfish and nefarious purposes).

172. *See* Williams v. City of Philadelphia, 188 A.3d 421, 442–43 (Pa. 2018) (Wecht, J., dissenting) (internal citation omitted) (conceding that broad interpretation of preemption doctrine would render virtually all taxes duplicative). *But see id.* at 443 (noting that narrow interpretation "eliminate[s] any practical likelihood that any tax will be deemed duplicative of another, provided they differ in any trivial detail").

173. *See id.* at 432–33 (Wecht, J., dissenting) (noting issues with broad economic incidence test).

174. *See* Dalzell, *supra* note 94, at 226 (rejecting economic incidence test to determine duplicity of taxation because "the consumer ultimately bears all taxes").

175. *Cf.* McCulloch v. Maryland, 17 U.S. 316, 433–34 (1819) (summarizing argument that federal supremacy may eventually destroy state governments). The

The overshadowing of municipal authority through the broadening of state powers is problematic considering the very purpose of local government—to more efficiently serve the needs of the community.[176] Cities have historically been at the forefront of social change and innovation, thanks to broad discretion and authority from state legislatures.[177] After all, cities are no less democratic "laboratories" than the states.[178] As such, preserving this local autonomy should be prioritized by any reconciliation of the taxing preemption doctrine.[179]

---

argument that federal supremacy may eventually overshadow state sovereignty was first addressed in the Federalist Papers:

> As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might, at any time, abolish the taxes imposed for state objects, upon the pretence [sic] of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus, all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments.

See id. (quoting THE FEDERALIST NO. 31 (Alexander Hamilton)). *But cf.* THE FEDERALIST NO. 31 (Alexander Hamilton) (noting that "[t]he moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning").

176. *See* 1 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS *supra* note 52, § 2:11 (noting that managing, regulating, and advancing community affairs is "chief purpose" of establishing municipalities); United States v. City of New Orleans, 98 U.S. 381, 393 (1878) ("A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.").

177. *See* Diller, *supra* note 170, at 1117–19 (citations omitted) (commending cities for developing policies that have been models for state or federal laws). Among these accomplishments are policies affecting workers' rights, affordable housing, gay rights, and smoking prevention. *See id.* (listing policy initiatives originating as city policies).

178. *See id.* at 1114 (citing New State Ice Co. v. Liebermann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)) (describing cities as "laboratories" of democracy, alluding to Justice Brandeis' similar description of states).

179. *See* 1 MATTHEWS MUNICIPAL ORDINANCES, *supra* note 8, §§ 1:1–1:4 (noting advantages to local government solutions). Specifically, local leaders are usually more accessible to the populace and familiar with issues of local significance. *See id.* § 1:2 (listing local access as an advantage of local government). One commentator summarizes the advantages of local government as follows:

> The importance of local government can be easily seen if we look at the effect it has on our daily lives. We all use streets, water, garbage disposal, and parks, which are provided by local government. Our children are educated in schools operated by a local school board. Our protection from crime comes principally from local government and our fire protection and ambulance services are local. Local government has also become our line of first defense in meeting homeland security challenges, and local law enforcement and local government leaders are crucial in meeting these goals. Zoning and planning regulations affect our quality of life as well as the value of our homes. Fire and building safety are protected by local ordinances. Last, but not least, noise pollution control is also a local government responsibility.

See id. § 1.1 (footnote omitted).

D. *Amending the Sterling Act: A Refreshing Solution*

Moving forward, the legislature should clarify the standard of judicial construction for the Sterling Act and to what extent economic incidence of a tax should be considered—if at all—for determining duplicity.[180] The Pennsylvania General Assembly could take an approach similar to its 1977 enactment capping nonresident income taxes.[181] By expressly imposing limitations or providing latitude, the legislature could establish further clarity, certainty, and consistency for future courts interpreting the Sterling Act.[182] For example, Iowa's home rule constitutional provision delegates authority to municipalities which is "not inconsistent" with state law.[183] Later, the Iowa state legislature clarified that, to meet the vague "not inconsistent" test, a city law must be "irreconcilable with the state law."[184] The Iowa Supreme Court immediately responded, applying greater leniency to policies enacted by local municipalities.[185] Similarly, the Illinois Constitution handles preemption ambiguity issues by requiring express legislation providing that a certain power is exclusively reserved for the state.[186]

The *Williams* decision shows that certainty in the area of local tax preemption will require legislative intervention.[187] If the Pennsylvania legisla-

---

180. *See* Bluestein, *supra* note 47, at 2026–27 (proposing legislative solutions where home rule statute's scope and standard of review are inconsistently applied by courts).

181. *See* 72 PA. STAT. AND CONS. STAT. ANN. § 7359(b)(1) (West 2018) (limiting tax rate of nonresidents under the Sterling Act to a maximum of four and five-sixteenths percent).

182. *See* Vaubel, *supra* note 53, at 449 (noting that "the overall magnitude of conflict . . . depends not upon constitutional provisions, but upon the clarity with which the legislature expresses itself." (footnote omitted)).

183. *See* IOWA CONST. art. 3, § 38A ("Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly . . . .").

184. *See* IOWA CODE ANN. § 364.2(3) (West 2018) ("An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law.").

185. *See* Green v. City of Cascade, 231 N.W.2d 882, 890 (Iowa 1975) (citation omitted) (acknowledging that "irreconcilable" was a higher standard than "inconsistent" in upholding local law).

186. *See* ILL. CONST. art. 7, § 6 (upholding home rule authority of home rule units unless expressly preempted by legislation).

187. *See* Williams v. City of Philadelphia, 188 A.3d 421, 436 (Pa. 2018) (deferring to the General Assembly's "superior resources" in declining to deviate from precedent to serve policy objectives). The Supreme Court of Pennsylvania further stated that any consideration of economic incidence would require legislative authorization:

> We discern no evidence from the text of the Sterling Act suggesting that Pennsylvania courts are to embark upon such an inquiry into economic incidence for purposes of evaluating the permissibility of local taxes. Indeed, had the Legislature wished for the courts to eschew the "reasonably bright-line standard" of a legal-incidence litmus . . . it would have been a simple matter for the Assembly to have so provided.

See id. at 432 (citations omitted).

ture intends the Sterling Act to apply either restrictively or liberally, then it should amend the Act or the Constitution to reflect this intent.[188] By clarifying the aim of the powers vested under the Sterling Act and articulating the level of Commonwealth oversight, the General Assembly can properly tailor local taxing authority to balance autonomy, certainty, and liberty.[189] The legislature can also properly investigate which level of application or construction will best balance the independence of municipalities with the prosperity of its businesses and its citizens.[190] Whichever approach is ultimately selected, the resulting certainty will help reduce wasteful administration and legal challenges.[191]

VI. WILL PENNSYLVANIA CONTINUE TO "TASTE THE FEELING" OF DOUBLE TAXATION? THE IMPACT OF *WILLIAMS*' LACK OF CLARITY

The uncertainty perpetuated by the *Williams* decision will likely prolong the precarious landscape of local tax preemption in Pennsylvania.[192] Unless, and until, the Pennsylvania legislature intervenes, municipalities around the Commonwealth will be free to draft similar taxing schemes while businesses and citizens look for alternatives to judicial intervention.[193] Pennsylvania lobbyists may follow the cue of their colleagues in other states who have refocused their efforts to avoid tax increases in vari-

188. *See* Bluestein, *supra* note 47, at 2026–27 (advocating for legislative clarity regarding scope and applicability of statutory construction); *cf.* S.C. CONST. art. VIII, § 17 ("The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor.").

189. *See* Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 54–55 (1989) (citing Gordon Clark, *A Theory of Local Autonomy*, 74(2) ANNALS ASS'N AM. GEOGRAPHERS 195–208 (1984)) (summarizing four archetypes levels of local autonomy). According to Clark, there are two fundamental principles of autonomy: (1) initiative and (2) immunity. *See id.* (defining concept of "local autonomy."). There are four permutations of initiative and immunity which range in overall autonomy from "the autonomous city-state" on one end to "local government under Dillon's rule" on the other:

Type 1: initiative and immunity
Type 2: initiative and no immunity
Type 3: no initiative and immunity
Type 4: no initiative and no immunity.

See id.

190. *See* Richardson, *supra* note 38, at 14–16 (comparing advantages and disadvantages of liberal and restrictive standards of review).

191. *See id.* (listing increased certainty and reduced litigation as advantages for both liberal and restrictive standard of review). Based on a difference in search volume for cases using the phrase "Dillon Rule" and cases using the phrase "home rule," the Brookings Institution concludes that Dillon's Rule results in fewer legal challenges. *See id.* (comparing Westlaw search volume for "Dillon Rule" and "home rule," but noting errors in methodology).

192. *See* Williams v. City of Philadelphia, 188 A.3d 421, 441 n.11 (Pa. 2018) (Wecht, J., dissenting) (observing that "the text of the Sterling Act is anything but a model of clarity").

193. *See* Brief for Appellants at 24, Williams v. City of Philadelphia, 164 A.3d 576 (Pa. Commw. Ct. 2017) (arguing that upholding tax creates roadmap for evading preemption).

ous industries by specifically seeking the passage of express preemption statutes.[194] Municipalities will respond by attempting to enact the desired tax before private interest groups can succeed in these endeavors.[195] One commentator argues that, as more municipalities seize their newly-recognized authority, state legislative bodies will be less likely to thwart these efforts with new preemption laws.[196] Whoever wins this race to the top, one thing is clear: individuals, business owners, and local governments in Pennsylvania will continue to suffer the consequences until the legislature brings certainty to this area of law.[197]

---

194. *See* David A. Dana et al., *Soda Taxes as a Legal and Social Movement*, 13 NW. J. L. & SOC. POL'Y 84, 96 (2018) (describing food industry's efforts to lobby states for preemptive legislation). Ten states—Kansas, Utah, Ohio, Wisconsin, Mississippi, Alabama, Georgia, Florida, Tennessee, and North Carolina—have adopted legislation proposed by the American Legislative Exchange Council (ALEC) which preempts local governments from regulating certain food service operations. *See id.* (listing states adopting ALEC legislation in whole or in part).

195. *See id.* at 103–04 (postulating that municipalities will seek to evade preemption efforts by state government by passing desired taxing policies before the state passes preemption legislation).

196. *See id.* (observing that states are less likely to enact preemptive legislation if municipalities pass desired legislation first).

197. *See id.* at 101 (noting that continuing uncertainty "may disrupt the basic allocation of authority between the State and localities upon which a range of public and private actors have relied").