The Authority to Tax in Wisconsin

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I. INTRODUCTION

For several reasons it is important to identify precisely the taxing authority bestowed on Wisconsin units of government. Because tax revenue is the lifeblood of governments, all tax questions have some significance, and the question of the authority to tax is the most fundamental of all. Its fundamental nature becomes obvious if one realizes that successfully challenging the authority of an entity to impose a certain tax discontinues that tax; whereas, other types of successful litigation by taxpayers merely reduce or eliminate liability for some persons who are subject to the tax or otherwise lessen the tax's effect.

The issue of the authority to tax is especially important in times like the present, when the public's resistance to taxes entices governmental officials to tax in novel ways, perhaps by going beyond their authority or shifting to another entity the responsibility for imposing a tax, which, as explained below, may be done in such a way that it violates one of the limits on taxing authority. Finally, if a bond issue is to be funded with a revenue stream that includes a tax that the issuer may not have the authority to impose, bond counsel who are aware of the difficulty will not approve the issuance and, if the bonds are issued, bond holders may litigate later if they discover the possible abuse of authority.

II. THE STATE'S AUTHORITY TO TAX

Wisconsin's authority to tax differs substantially from that of local units of government in the state. The most fundamental taxing authority of this state is derived from the state constitution. The finance article of the constitution includes a number of statements that indirectly grant to the state its taxing authority. For example, one statement requires that "[t]he legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year."¹ This statement implies that there is also authority to enforce compliance with the requirement. An early case held that this edict was "simply intended as a regulation or


¹ Wis. Const. art. VIII, § 5.
provision covering the levying of a direct tax upon property, if such a tax be necessary."² At the time that was an accurate statement, but since then the constitution has been amended to allow other taxes as well.³

A second indirect conferral of taxing authority to the state by the constitution is the requirement that "every . . . law [contracting debts] shall provide for levying an annual tax sufficient to pay the annual interest of such debt and the principal within five years from the passage of such law."⁴ This provision is almost totally irrelevant today because it appears in a section that authorizes the state to incur a total debt of only $100,000. Another portion of the constitution states that "[t]he full faith, credit and taxing power of the state are pledged to the payment of all public debt created on behalf of the state pursuant to this section."⁵ Another section requires that "any law which imposes, continues or renews a tax" must have been passed by the Legislature in a roll-call vote rather than a voice vote.⁶ There also is a reference to money "raised by taxation."⁷

All of these statements stop short of actually authorizing a tax. However, there is a statement that explicitly authorizes a state tax: "Of the moneys appropriated under the authority of this subsection [for forestry purposes] in any one year an amount not to exceed two-tenths of one mill of the taxable property of the state . . . may be raised by a tax on property."⁸ This constitutional provision resulted in the enactment of a statute that imposes just such a tax;⁹ this is the only state tax that applies to all taxable property.

The major constitutional source of the state’s taxing authority is the section that includes the uniformity clause, a portion of which specifies that "taxes shall be levied upon such property . . . as the legislature shall prescribe."¹⁰ Beginning with the early days of statehood and lasting for many decades, a broad-based property tax was a major source of state

³. Wis. Const. art. VIII, § 1.
⁴. Id. art. VIII, § 6.
⁵. Id. art. VIII, § 7(2)(f).
⁶. Id. art. VIII, § 8.
⁷. Id. art. VIII, § 10(2).
⁸. Id. art. VIII, § 10(3).
¹⁰. Wis. Const. art. VIII, § 1. Occasionally the entire section is called the uniformity clause. I will distinguish between the statement that taxation shall be uniform (the uniformity clause in the strict sense) and the section as a whole.
revenue.11 Now, however, authorization of a broad-based tax merely duplicates the authorization of a property tax for forestation purposes.12 However, the above statement also authorizes a more narrow tax—a state tax imposed at the statewide average rate on the property of certain utilities.13 Utilities that pay this tax are railroads, sleeping car companies, air carriers, pipeline companies, and conservation and regulation companies (companies that regulate the height and flow of water in reservoirs). Beginning on May 10, 1997, telephone companies will also be subject to that tax rather than to the current license fee based on gross receipts.

In 1908 a more significant authorization to tax was added to the section of the constitution that contains the uniformity clause. That year the people of the state ratified an amendment that stated "[t]axes may also be imposed on incomes, privileges and occupations."14 The main purpose for the amendment was to permit a state income tax, the enactment of which would solve some of the difficulties of the property tax—especially the difficulty of applying property tax to intangible property.15 The amendment's most important effect was a great expansion of the kinds of taxes that the constitution specifically authorizes. No longer did the state have to depend so heavily on the property tax.

Some statutes explicitly impose taxes on incomes, authorization for which is clearly derived from the 1908 amendment to the uniformity clause of the Wisconsin Constitution. These taxes are the individual income tax;16 the tax on fiduciaries, which applies to the income of trusts and estates;17 the income tax applicable to partnerships;18 the corporate income tax;19 the tax on the income of tax-option corporations (which are referred to as S corporations in the Internal Revenue Code);20 the

12. Wis. Const. art. VIII, § 10(3).
17. Id. §§ 71.02(1), 71.125.
18. Id. § 71.19 (imposing the tax indirectly by subjecting partnerships to the liabilities of other entities as set forth in chapter 71).
19. Id. § 71.23.
20. Id. § 71.32. Again the imposition is done indirectly, by making these entities subject to the liabilities that apply to other entities under chapter 71.
tax on the income of urban transit companies; and the tax on the income of insurers.

A number of Wisconsin taxes are explicitly imposed in return for privileges. The franchise tax is imposed on corporations "[f]or the privilege of exercising [their] franchise or doing business in this state in a corporate capacity." Insurers are also subject to a franchise tax through a statute that is worded similarly to the statute that imposes the franchise tax on other corporations. Virtually every corporation (including insurance corporations) which may be subject either to an income tax or a franchise tax is subject to a franchise tax, because such tax allows the state to tax the income from certain federal securities.

The distinction between the income tax and the franchise tax clearly indicates the formalism of tax law and the importance that labels often have in this area of the law. Assuming that "right" is a synonym of "privilege," as the Wisconsin Supreme Court held in an early case, the forest cropland severance tax is a privilege tax because it is imposed "on the right to cut and remove wood products." The sales tax is imposed twice, once for goods and once for services, and both imposition statutes make it clear that the sales tax is a privilege tax. The statute imposing the tax on goods begins: "[f]or the privilege of selling, leasing or renting tangible personal property." The statute imposing the tax on services begins: "[f]or the privilege of selling, performing or furnishing . . . services." The temporary recycling surcharge, which is actually a tax because it is not regulatory and because for most taxpayers it is a percentage of their income tax or franchise tax, or is based on amounts calculated in determining liability for one of those taxes, is imposed "[f]or the privilege of doing business in this state."

Although several state taxes have the very narrow base characteristic of excise taxes, they are imposed as occupational taxes, thereby deriving their authority from the reference to occupational taxes in the constitut-

21. Id. § 71.37. This imposition is even more indirect than the impositions for partnerships and tax-option corporations: "urban transit corporations are subject to this chapter."
22. Id. § 71.43(1).
23. Id. § 71.23(2).
24. Id. § 71.43(2).
27. Id. § 77.52(1) (emphasis added).
28. Id. § 77.52(2) (emphasis added).
29. Id. § 77.93 (emphasis added).
tional section that includes the uniformity clause.\textsuperscript{30} An example is the fermented malt beverages tax, which is referred to as an occupational tax in its imposition statute.\textsuperscript{31} The same is true of the liquor tax,\textsuperscript{32} the tobacco products tax,\textsuperscript{33} the bingo gross receipts tax,\textsuperscript{34} and the tax on controlled substances.\textsuperscript{35}

Other occupational taxes provide revenue for both the state and local units of government. Each is specifically identified as an occupational tax in the imposition statute. These occupational taxes include the mining tax,\textsuperscript{36} the tax on operating an iron ore concentrates dock,\textsuperscript{37} the tax on grain storage,\textsuperscript{38} the tax on operating a coal dock,\textsuperscript{39} the tax on refining petroleum and petroleum products,\textsuperscript{40} and the tax on owners of domestic mink.\textsuperscript{41}

If these were the only state taxes, each state tax would be firmly anchored in Article VIII, section 1, the constitutional section that includes the uniformity clause. However, there are other state taxes. Among them are the oil and gas severance tax, which is called a “severance tax;”\textsuperscript{42} the estate tax, which is simply referred to as a “tax;”\textsuperscript{43} the license fee for light, heat and power companies, which is called “an annual license fee”\textsuperscript{44} and which, despite its name, is a tax because it provides general revenue rather than merely being an imposition under the police power to fund the costs incurred to regulate the utilities; the “annual license fee” (another tax, for the same reasons) on telephone companies;\textsuperscript{45} the car line tax, which is called “a gross earnings tax;”\textsuperscript{46} the real estate transfer “fee”\textsuperscript{47} (which probably would indeed be a fee if the state did not receive 80% of the proceeds); the use tax;\textsuperscript{48} the motor vehicle

\textsuperscript{30} Wis. Const. art. VIII, § 1.
\textsuperscript{31} Wis. Stat. § 139.02(1).
\textsuperscript{32} Id. § 139.03.
\textsuperscript{33} Id. § 139.06.
\textsuperscript{34} Id. § 563.80.
\textsuperscript{35} Id. § 139.88.
\textsuperscript{36} Id. § 70.375(2m).
\textsuperscript{37} Id. § 70.40(1).
\textsuperscript{38} Id. § 70.41(1).
\textsuperscript{39} Id. § 70.42(1).
\textsuperscript{40} Id. § 70.421(1).
\textsuperscript{41} Id. § 70.425(1).
\textsuperscript{42} Id. § 70.397(2).
\textsuperscript{43} Id. § 72.02.
\textsuperscript{44} Id. § 72.28(2)(a).
\textsuperscript{45} Id. § 76.38(4)-(6).
\textsuperscript{46} Id. § 76.39(2).
\textsuperscript{47} Id. § 77.22(1).
\textsuperscript{48} Id. § 77.53(1).
fuel tax;\textsuperscript{49} the alternate fuels tax;\textsuperscript{50} the general aviation fuel tax;\textsuperscript{51} and the cigarette tax;\textsuperscript{52} each of which is called an "excise tax"; the cigarette inventory tax, which is simply called a "tax";\textsuperscript{53} and the racing admissions tax, which has no label.\textsuperscript{54} Oddly enough, the cigarette tax was changed from an occupational tax to an excise tax,\textsuperscript{55} thereby losing its anchorage in the constitution, because a United States Supreme Court case provided that such a change would allow the state to tax certain sales of cigarettes by American Indians to non-Indians.\textsuperscript{56}

However, taxes that do not fit within the categories specified in Article VIII, section 1 are in no danger of being invalidated. One way to defend them is to assert that, despite their labels, each of them can be characterized as either a privilege tax or an occupational tax. "Privilege tax" is so broad that it would probably include all of these taxes and perhaps even include any tax the statutes would authorize. This strategy runs counter to the formalistic nature of tax law, as illustrated in the substantive effect of changing the cigarette tax's label. A second and probably more effective line of defense is to avoid dependence on constitutional authorization and to rely instead on a line of cases. The line of cases provides an interesting illustration of how a probable misreading of a vague statement, unsupported by authority, can change that statement into a more precise legal rule.

The line of cases begins with one in which a means of equalization\textsuperscript{57} was at issue. In validating the challenged equalization process, the court stated that "this whole matter is within the control of the legislature."\textsuperscript{58} Although the meaning of "this whole matter" is not completely clear, the most plausible interpretation is that the court was referring to equalization, not to every facet of taxation. Twenty years later the meaning of "this whole matter" changed, and the legislature's power was stated in

\textsuperscript{49} Id. § 78.01(1).
\textsuperscript{50} Id. § 78.40(1).
\textsuperscript{51} Id. § 78.555.
\textsuperscript{52} Id. § 139.31(1).
\textsuperscript{53} Id. § 139.315(1).
\textsuperscript{54} Id. § 562.08.
\textsuperscript{55} 1983 Wis. Laws 55.
\textsuperscript{57} Equalization is an adjustment by the Department of Revenue of property tax assessments made by various units of government so that all assessments are at full market value and so that, as a result of the adjustment, the taxes imposed by units of government (such as counties) that extend over several smaller units (such as municipalities) will be fairly apportioned among the smaller units.
\textsuperscript{58} State \textit{ex rel.} Brown County v. Myers, 52 Wis. 628, 632, 9 N.W. 777, 778 (1881).
more sweeping terms when the court, citing the earlier case, wrote that "the legislature has plenary power over the whole subject of taxation within constitutional limitations."\textsuperscript{59} In six cases that followed, the court again held that the legislature's authority to tax was bound only by the state constitution.\textsuperscript{60} More recently, the court softened its position: "The courts have recognized that the state legislature has wide latitude to select the subjects of taxation and to grant exemptions."\textsuperscript{61} Thus, despite the very insubstantial foundation on which these cases are built, there is considerable precedent for the view that the state government may enact whatever taxes it pleases as long as it does not violate a constitutional provision. Failure to denominate a tax as one of the types specified in the constitution is not a violation of the constitution. It will be evident later, however, that several non-constitutional limits on the state's authority to tax exist.

III. THE CONSTITUTIONAL AUTHORITY FOR LOCAL TAXES

There is also constitutional authority for the imposition of local taxes. Several constitutional provisions recognize the existence of local taxes or command local units of government to tax. One provision states that "the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods."\textsuperscript{62} Presumably the legislature may also authorize units of government to impose taxes on real estate; however, this provision does not explicitly grant them the authority to do so.

Another provision directs counties, cities, towns, villages, school districts, sewerage districts, and other municipal corporations to levy a direct annual tax to retire their debt.\textsuperscript{63} In the constitution a "direct" tax is a property tax. As noted earlier, Article VIII, section 1 implicitly authorizes a property tax for a specific purpose; it stops short of authorizing a broad-based property tax or any other kind of tax. Another section directs, and therefore implicitly authorizes, towns and cities to raise a tax

\textsuperscript{59} State \textit{ex rel.} Ellis \textit{v.} Thorne, 112 Wis. 81, 85, 87 N.W. 797, 798 (1901).
\textsuperscript{60} Thompson \textit{v.} Kenosha County, 64 Wis. 2d 673, 684, 221 N.W.2d 845, 851 (1974); City of West Allis \textit{v.} Milwaukee County, 39 Wis. 2d 356, 369, 159 N.W.2d 36, 42 (1968), \textit{cert. denied}, 393 U.S. 1064 (1969); City of Plymouth \textit{v.} Elsner, 28 Wis. 2d 102, 106, 135 N.W.2d 799, 801 (1965); State \textit{ex rel.} Thomson \textit{v.} Giessel, 265 Wis. 207, 213, 60 N.W.2d 763, 766 (1953); Milwaukee County \textit{v.} Dorsen, 208 Wis. 637, 640-41, 242 N.W. 515, 516 (1932); State \textit{ex rel.} Hessey \textit{v.} Daniels, 143 Wis. 649, 653, 128 N.W. 565, 566 (1910).
\textsuperscript{61} WKBH Television, Inc. \textit{v.} Dep't. of Revenue, 75 Wis. 2d 557, 566, 250 N.W.2d 290, 294 (1977).
\textsuperscript{62} Wis. Const. art. VIII, § 1.
\textsuperscript{63} Id. art. XI, § 3(3).
for the schools equal to at least one-half of the amount that the town or city receives for school purposes from the income of the school fund. That amount was minuscule in the past and is now nothing because the income from that fund is presently allocated entirely to libraries.

At first glance, the home rule section of the constitution grants broad authority, perhaps even taxing authority, to cities and villages. It states that home rule municipalities “may determine their local affairs . . . subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.” However, case law makes it clear that taxation is a matter of statewide concern. Two cases decided in a rather recent year established that principle. A later case, which considered the validity of a county (as opposed to municipal) assessment system, echoed the view of the two earlier cases by stating, “equality in taxation is a matter of particular statewide concern.” An even more recent case stated the corollary of the holding that taxation is a matter of statewide concern—local units of government may enact only those taxes that the state government authorizes by legislation.

Because the authority of local units of government to tax has no substantial roots in the state constitution, it is necessary to look for statutory authorization. Before doing so, however, it is worth noting that two statutes prohibit certain taxes: a local income tax and a local motor vehicle fuel tax. The case law on the home rule section of the constitution makes it obvious that local units of government have no inherent taxing authority and must rely on state authorization; thus, the statutes are redundant. The same effect is attained by the failure to authorize, by statute, local income taxes and local motor vehicle fuel taxes. Another statute provides that, notwithstanding the statutory prohibition against local income taxes, municipalities may impose franchise fees on cable television companies based on income.

64. *Id.* art. X, § 4.
65. *Id.* art. XI, § 3(1).
68. Blue Top Motel, Inc. v. City of Stevens Point, 107 Wis. 2d 392, 395, 320 N.W.2d 172, 173 (1982).
70. *Id.* § 78.82.
71. *Id.* § 66.082(3)(c).
The number of local taxes authorized by statute in Wisconsin is quite small, smaller than the number in most other states. One such local tax, the franchise fee that may be imposed on cable television companies, has already been mentioned. In actuality it is a tax, not a fee, because it may be imposed at a rate exceeding the cost of regulation and thus may produce general revenue for the municipality imposing it, although the authorizing statute mentions that the fee is imposed in the regulation of those systems. Another statute allows towns, villages, and cities to impose a "room tax," a tax on the furnishing of rooms to transients. Counties are allowed to impose sales and use taxes. Municipalities and counties are also allowed to impose vehicle registration fees (the "wheel tax"). Local exposition districts may impose a tax on the rental of hotel and motel rooms, a tax on the sale of certain food and beverages, and a tax on car rentals.

The tax that is available to most local units of government and provides by far the most local tax revenue is the property tax. Authority to impose the property tax appears in many statutes. Counties and villages are explicitly given authority. Under two statutes towns may assume the powers of villages, making their authority derivative. The authority for cities to tax property is tersely conferred in a list of the means that the common council may employ to perform its general duties. Vocational, Technical and Adult Education Districts have clear authority. There are four grants of authority to school districts: one to the Milwaukee School District, authorizing it to require the City of Milwaukee to levy for the district, one to the annual meeting of common or union high school districts, one to the boards of common or union high school districts, and one to the boards of unified districts. Three types of special districts have property tax authority. They include public inland lake protection and rehabilitation districts (which actually are

72. Id. § 66.75(1).
73. Id. § 77.70.
74. Id. § 341.35(1).
75. Id. § 66.75(1).
76. Id. § 77.98.
77. Id. § 77.99.
78. Id. §§ 59.07(5), 61.46.
79. Id. §§ 60.10(2)(c), 60.22(3).
80. Id. § 62.11(5).
81. Id. § 38.16.
82. Id. §§ 119.46-.48.
83. Id. § 120.10(6)-(10).
84. Id. § 120.12(3).
85. Id. § 120.44(1).
required to impose a property tax), metropolitan sewerage districts, and the Milwaukee Metropolitan Sewerage District. There are also specific property tax authorizations that apply only to forest land.

IV. LIMITATIONS ON THE POWER TO TAX

As shown above, the state’s power to tax and authorize local units of government to tax is not quite plenary. Certain limits, some of them constitutional and some firmly established in case law, apply. One of those limits is the principle that the unit of government that imposes a tax must also be the unit of government that spends the tax proceeds. It might be argued that this principle does not exist, given two cases in which challenges to “impact fees” were unsuccessful. Prior to the enactment of a law to prevent the practice, a few municipalities had been charging impact fees to developers and giving some of the proceeds to school districts. (These “fees” are actually taxes because the revenue that they generate is not dedicated to regulatory purposes.) However, the above principle was not an issue in either case; if it had been, the impact fees almost certainly would have been invalidated.

This result would have occurred because the courts in five cases prior to the two impact fee cases ruled that the taxing and spending units of government must be identical. The court made the same ruling in three cases that were litigated after the impact fee cases. The earliest case was litigated in 1865 and was followed by two early twentieth-century cases. In the fourth case, the court set forth a clear statement of the rule: “[A] tax must be spent at the level at which it is raised.” Two years later, the court reiterated the principle. The doctrine remained viable thirty-five years later. When next addressing this principle, the court acknowledged its long history and connected it to the public pur-

86. Id. § 33.31(3).
87. Id. § 66.25(2).
88. Id. § 66.91(6).
89. Id. §§ 77.01-77.17, 77.84.
90. Black v. City of Waukesha, 125 Wis. 2d 254, 371 N.W.2d 389 (Ct. App. 1985); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).
91. 1993 Wis. Laws 305(1)-(2).
92. Brodhead v. City of Milwaukee, 19 Wis. 658 (1865).
93. State ex rel. New Richmond v. Davidson, 114 Wis. 563, 576, 88 N.W. 596, 596 (1902); State ex rel. Owen v. Donald, 160 Wis. 21, 125, 151 N.W. 331, 365 (1915).
94. State ex rel. Wisconsin Dev. Auth. v. Dammann, 228 Wis. 147, 183, 280 N.W. 698, 709 (1938).
pose doctrine: "Wisconsin has long recognized this rule of constitutional interpretation, i.e., the purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised."\textsuperscript{97} The court most recently affirmed this rule in 1980.\textsuperscript{98}

This principle does not mean that one unit of government may not collect tax revenue, commingle it with other funds, and then make payments to other units of government. The state annually distributes billions of dollars in aid to other units of government. Because money is fungible and thus cannot be traced, it cannot plausibly be argued that aid programs violate the principle that the taxing unit and the spending unit must be identical. Nevertheless, a municipal ordinance imposing a tax or fee and specifying that part or all of its proceeds shall be given to another unit of government would violate this principle, as would a state statute authorizing a municipality to do so.

The next limit on the taxing authority of governmental units in Wisconsin follows from the limit just delineated. If a unit of government imposing a tax must be the unit of government spending the tax proceeds, one can conclude that only a unit of government may tax. Otherwise, the rule would be stated more broadly; for example, the rule could refer to taxing authorities rather than units of government. Common sense would also suggest that taxation is a function peculiar to units of government. These two rather slender reeds are reinforced by a number of cases which hold that only units of government may impose taxes.

The roots of this doctrine lie in the opening statement of \textit{Cooley on Taxation}, as quoted in a Wisconsin case: A tax is "levied by the state by virtue of its sovereignty for support of government and for all public needs."\textsuperscript{99} A later case makes it clear that "state" was intended as a generic term for a unit of government. The court, citing the passage from the earlier case, held that a charge was not a tax because it was "not imposed by the city in the exercise of its sovereign power."\textsuperscript{100} In another case, the court arrived at the same destination by following a different route, stating that "[a]ny payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining govern-

\begin{itemize}
  \item \textsuperscript{97} Buse v. Smith, 74 Wis. 2d 550, 577, 247 N.W.2d 141, 153 (1976).
  \item \textsuperscript{98} Sigma Tau Gamma Fraternity House v. City of Menomonie, 93 Wis. 2d 392, 412-13, 288 N.W.2d 85, 94 (1980).
  \item \textsuperscript{99} Fitch v. Wisconsin Tax Comm'n, 201 Wis. 383, 387, 230 N.W. 37, 38 (1930).
  \item \textsuperscript{100} City of De Pere v. Public Serv. Comm'n, 266 Wis. 319, 325, 63 N.W.2d 764, 768 (1954).
\end{itemize}
mental functions . . . is a tax."\textsuperscript{101} Subsequently, this holding was cited by the court when it declared that "[a] tax is an exaction, usually of money, by the government for the support of government."\textsuperscript{102} Later, in yet another case, the court stated the rule, by then firmly established, in slightly different terms: A tax is "levied by the state or municipality for the support of its government and its public needs."\textsuperscript{103} Two years later the court approvingly quoted the earlier version of the rule.\textsuperscript{104} The most recent statement of the rule also quoted the earlier version.\textsuperscript{105}

In order to apply the rule that only units of government may tax, it is necessary to define "unit of government." Unfortunately, the seven cases that enunciate the rule do not define the term. Nor is the term defined in other tax cases. One logical reaction to this vacuum is to proceed inductively. Common sense suggests that the state, counties, cities, villages, and towns are units of government. An attempt to devise a definition by identifying the attributes that these entities share would perhaps result in a statement such as "a unit of government is an entity that performs a wide variety of functions for the general public in its jurisdiction and that has elected officials." Difficulty with this definition soon arises.

The two next most obvious candidates for the status of unit of government are school districts and vocational, technical, and adult education districts. The first difficulty with the definition above is that these districts with taxing authority perform narrow functions for the public within their jurisdictions. A second difficulty is that the elected officials test eliminates vocational, technical and adult education districts and the special districts that have taxing authority, because all of these entities have appointed - not elected - officials. It also casts some doubt on the inclusion of certain school districts, since the annual meetings of common and union high school districts have taxing authority.

However, one can resolve these difficulties by asking not "what is a unit of government?" but "what is not a unit of government?" If the latter question can be answered, the principle that only units of government may tax can be applied, and one can determine at least some of the entities that may not tax. Although identifying every entity that is not a

\textsuperscript{101} City of Milwaukee v. Milwaukee Suburban Transp. Corp., 6 Wis. 2d 299, 304, 94 N.W.2d 584, 588 (1959) (quoting 51 Am. Jur. § 3 Taxation (1944)).

\textsuperscript{102} State ex rel. Bldg. Owners & Managers Ass'n v. Adamany, 64 Wis. 2d 280, 289, 219 N.W. 274, 279 (1974).

\textsuperscript{103} Buse v. Smith, 74 Wis. 2d 550, 575, 247 N.W.2d 141, 153 (1976).

\textsuperscript{104} State ex rel. La Follette v. Torphy, 85 Wis. 2d 94, 108, 270 N.W.2d 187, 192 (1978).

\textsuperscript{105} O'Donnell v. Reivitz, 144 Wis. 2d 717, 725, 424 N.W.2d 733, 735 (Ct. App. 1988).
unit of government is impossible, many entities employ the strategy of avoiding classification as a unit of government in order to avoid constitutional limitations. Surely those entities cannot argue both that constitutional limitations do not apply to them because they are not units of government and that they have taxing authority because they are units of government.

The entities that have worked themselves into this corner are a number of authorities and similar entities created by statute which have labels that make them look like units of government. Examples include industrial development agencies ("public instrumentality and body corporate and politic"),\(^{106}\) county housing authorities (no label is given, but because statutes that apply to city housing authorities also apply to county housing authorities, each is a "public body corporate and politic"),\(^{107}\) regional transportation authority (not labeled),\(^{108}\) veterans' housing authorities ("public body corporate and politic"),\(^{109}\) housing authorities for elderly persons ("public body corporate and politic"),\(^{110}\) city housing authorities ("public body corporate and politic"),\(^{111}\) redevelopment authorities ("body corporate and politic"),\(^{112}\) housing and community development authorities ("body politic"),\(^{113}\) metropolitan transit authorities ("political subdivision, body politic and corporate"),\(^{114}\) the Health and Educational Facilities Authority ("public body politic and corporate"),\(^{115}\) the Bradley Center Sports and Entertainment Corporation ("public body corporate and politic"),\(^{116}\) the Wisconsin Housing and Economic Development Authority ("public body corporate and politic"),\(^{117}\) and the World Dairy Center Authority ("public body corporate and politic").\(^{118}\) None of these entities has statutory taxing authority and probably none, despite the statutory descriptions of their nature, could constitutionally be given taxing authority.

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107. Id. § 59.075.
108. Id. § 59.966.
109. Id. § 66.39(2).
110. Id. § 66.395(4)(a).
111. Id. § 66.40(4)(a).
112. Id. § 66.431.
113. Id. § 66.4325.
114. Id. § 66.94(2).
115. Id. § 231.02(1).
116. Id. § 232.03(1).
117. Id. § 234.02(1).
118. Id. § 235.02(1).
A case about the Housing Finance Authority illustrates the machinations involved in avoiding constitutional prohibitions by avoiding being labeled a unit of government.\textsuperscript{119} In the case, the court held that the Housing Finance Authority (predecessor to the Wisconsin Housing and Economic Development Authority) had been put together in such a way as to prevent it from being subject to the constitutional debt limits, the prohibition against pledging the credit of the state, and the prohibition against constructing internal improvements.\textsuperscript{120} That is, the court held that the authority was not a unit of government and was not part of the state. In another case, the court held that a local entity that was akin to an authority, an industrial development agency, was not subject to the constitutional limit on municipal debt\textsuperscript{121} because it was not a municipality.\textsuperscript{122}

Two important determinations must be made in accordance with the rule that only units of government may tax. First, the extent to which non-governmental bodies may participate in imposing taxes for governmental units must be determined, and second, it must be determined whether the legislature has delegated legislative authority to tax contrary to the state constitution.\textsuperscript{123} In an early case, the court addressed these issues by distinguishing between two meanings of "levy a tax."\textsuperscript{124} One meaning refers to the determination of the amount of revenue to be raised and the vote to impose the tax, while the other meaning refers to the carrying out of mere ministerial duties in regard to a tax.\textsuperscript{125} The court held that the State Board of Assessors, which was not a governmental unit, exercised only ministerial duties when it assessed railroad property and applied the statewide average property tax rate to the assessed value.\textsuperscript{126} Since the tax was previously approved by the legislature, it was imposed by the state and was valid. However, in a later case involving non-governmental officials and taxation, the court invalidated a tax.\textsuperscript{127} At issue was a statute that allowed a group of freeholders, under certain circumstances, to force a town board to levy a tax for highways. The court held that "the tax power must be exerted by the legislative

\begin{itemize}
  \item \textsuperscript{119} State \textit{ex rel.} Warren v. Nusbaum, 59 Wis. 2d 391, 208 N.W.2d 780 (1973).
  \item \textsuperscript{120} Wis. Const. art. VIII, §§ 4, 6, 7; art. VIII, § 3; art. VIII, § 10.
  \item \textsuperscript{121} \textit{Id.} art. XI, § 3.
  \item \textsuperscript{122} State \textit{ex rel.} Bowman v. Barczak, 34 Wis. 2d 57, 148 N.W.2d 683 (1967).
  \item \textsuperscript{123} Wis. Const. art. IV, § 1.
  \item \textsuperscript{124} Chicago & Northwestern Ry. Co. v. State, 128 Wis. 553, 629, 108 N.W. 557, 576 (1906).
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{Id.} at 631, 108 N.W. at 576.
  \item \textsuperscript{127} State \textit{ex rel.} Carey v. Ballard, 158 Wis. 251, 148 N.W. 1090 (1914).
\end{itemize}
branch of government either directly or through the officers of a political subdivision." At this point, it seemed that non-governmental officials could not impose a tax, but could only perform ministerial duties necessary for its imposition.

The next time the court considered the issue of the status necessary to impose taxes, it found an unusual way to validate the property taxes imposed by the Metropolitan Sewerage Commission of Milwaukee. The sewerage commissioners had authority to tell the county board the amount of revenue the commission needed. The board was then required to issue bonds in an amount necessary to provide the needed revenue and to impose a tax to retire the bonds. It appeared that the commission, through its agent, the county, imposed the tax. It certainly determined the amount of revenue needed, which was not a mere ministerial duty. The court, rather than simply holding that the commission was a governmental body, unnecessarily adopted the reasoning of the court in the previous case and held that "[t]he taxing power of the state is exerted through the Metropolitan Sewerage Commission and the various governing bodies and officers of the various municipalities." The argument is sophistry because the state merely authorized the imposition of the tax, and the sewerage district, by means of the county, actually imposed the tax.

In a subsequent case, the court returned to the ministerial duties argument. That case involved the Green Bay Sewerage District, which, unlike the Milwaukee district, had the authority to impose a tax itself rather than the mere authority to require a county to impose a tax. The court improbably found that the district's determination of its revenue needs and its other actions were ministerial and that the tax was actually imposed not by the district, but by the legislature. A few years later the court reached the same result for the same reasons. Finally, the court validated a tax imposed by a vocational, technical, and adult education district, holding that the legislature had delegated its

128. Id. at 258, 148 N.W. at 1092.
129. Thielen v. Metropolitan Sewerage Comm'n, 178 Wis. 34, 189 N.W. 484 (1922).
130. Id. at 54, 189 N.W. at 492.
132. Id. at 202, 246 N.W. at 509.
133. Id. at 203, 246 N.W. at 509.
134. State ex rel. Milwaukee Sewerage Comm'n v. Board of Supervisors, 220 Wis. 670, 675, 265 N.W. 848, 850 (1936).
taxing authority to the district and that such a delegation was constitutional.135

In addition to granting taxing authority, the section of the constitution containing the uniformity clause limits taxing authority.136 The most significant limit is the requirement of uniformity, which has been elaborated on in more than 125 appellate cases and applies only to the property tax. A recent article exhaustively covers that subject.137

This section of the state constitution also requires that the exemptions for taxes on incomes, privileges, and occupations be "reasonable." The reasonableness requirement was litigated in a case involving the Housing Finance Authority. The court found that an income tax exemption for the earnings from the authority's notes and bonds was reasonable, defined as having "a reasonable relation to a legitimate end of governmental action."138 The reasonableness requirement has probably been litigated so rarely because reasonableness is far from a demanding standard.

Oddly enough, the meaning of "income" in that section of the constitution has frequently been litigated in cases in which taxpayers have argued that the income tax was improperly applied to them. They argued that "income" is a limiting term. In most cases the subject was earnings on intangible property. The usual argument was that part of the earnings were a return of capital, not "income." The first two cases involved earnings on bonds. In each case, the court held that "income" meant the "fruits of property and labor."139 The next three cases on this issue involved dividends. In each of the three the court defined "income" as "profit or gain."140 The taxpayers lost all of the cases because the court defined income so broadly. In the next case, however, the court cited the "profit or gain" definition and held that revenue from the sale of tobacco was not entirely profit or gain because the seller should be allowed to deduct the cost of producing the tobacco when computing the

136. Wis. Const. art. VIII, § 1.
139. State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Comm'n, 161 Wis. 111, 116, 152 N.W. 848, 850 (1915); Van Dyke v. City of Milwaukee, 159 Wis. 460, 464, 146 N.W. 812, 814 (1915).
140. State ex rel. Moon v. Nygaard, 170 Wis. 415, 418, 175 N.W. 810, 811 (1920); State ex rel. Wisconsin Trust Co. v. Widule, 164 Wis. 56, 61, 159 N.W. 630, 632 (1916); State ex rel. Bundy v. Nygaard, 163 Wis. 307, 310, 158 N.W. 87, 88 (1916).
tax on that revenue.\textsuperscript{141} In another dividends case, the court ignored the earlier, more precise definition of "income" and announced that it would give the term a meaning liberal enough to include dividends.\textsuperscript{142} In five later cases, which involved potential earnings on secured contracts,\textsuperscript{143} a loss on stock,\textsuperscript{144} a gain on stock,\textsuperscript{145} a gain on the transfer of real estate in a divorce,\textsuperscript{146} and a gain on a stock option,\textsuperscript{147} the court went back to the "profit or gain" definition. In short, although it has been established that the income tax may be imposed only on "income," the prevailing definition of "income" is so broad that the standard is easily met.

V. CONCLUSION

The points about taxing authority and its limits presented above are the major ones that legislators and local officials who wish to create or modify a tax need to consider. Some of them are far from obvious and can be found only by carefully examining Wisconsin case law. Their importance bears reiteration. To venture beyond one's taxing authority is to court disaster.

\textsuperscript{142} State ex rel. Dulaney v. Nygaard, 174 Wis. 597, 608, 183 N.W. 884, 887-88 (1921).
\textsuperscript{143} State ex rel. Waldheim v. Wisconsin Tax Comm'n, 187 Wis. 539, 544, 204 N.W. 481, 482 (1925).
\textsuperscript{144} Falk v. Wisconsin Tax Comm'n, 201 Wis. 292, 294, 230 N.W. 64, 64 (1930).
\textsuperscript{145} Appeal of Siesel, 217 Wis. 661, 665, 259 N.W. 839, 841 (1935).
\textsuperscript{146} Department of Taxation v. Siegman, 24 Wis. 2d 92, 96, 128 N.W.2d 658, 661 (1964).
\textsuperscript{147} Uecke v. Department of Taxation, 36 Wis. 2d 530, 535, 153 N.W.2d 614, 617 (1967).