Taxes and Takings in a Nutshell

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There is something wrong with the way we pay for our public schools – which we do in large part with property taxes – where we know there is a wide disparity between those who pay the taxes, and those who receive the benefits – which would be a violation of the takings clause – except for long standing Supreme Court rulings that say (in effect) that “taxes are not subject to the takings clause”. But that is a misreading of these cases, which contain within their rulings (upon closer scrutiny) both an implicit presumption that taxes are subject to the takings clause, and an explicit test for when the takings clause is violated.

The Rule and An Exception

The power of eminent domain (a/k/a the takings clause) says that “private property [shall not] be taken for public use, without just compensation.” ¹ But in the case of taxes, there has long been an exception to the takings clause that says (in effect) that “taxes are not subject to the takings clause.” ² Thus, we often hear that “taxpayers are guaranteed nothing in return for their taxes.” ³

Now, it appears that this taxing power exception was conceived to shield general revenue taxes (whose benefits are immeasurable) from constitutional attack for failure to provide the just compensation that is required by the takings clause (because the benefits are immeasurable) – by simply declaring (with little discussion) that “taxes are not subject to the takings clause”. But when we looked more closely at this taxing power exception, to see why taxes should not be subject to the takings clause, we discovered that –

1. Contrary to the exception, taxes are indeed subject to the takings clause, and

2. In one case (and one case only), there is a conclusive presumption that the takings clause is satisfied, without regard to distribution of the tax benefits – when the tax is a flat rate tax, based on ability to pay, with benefits that are immeasurable, and

3. In every other case, there is a rebuttable presumption that the takings clause is satisfied, and the benefits received for each tax must be examined for evidence of a “flagrant and palpable inequality between the burden imposed and the benefit received” – that violates the takings clause – and rebuts the rebuttable presumption.⁴

We now look at this rationale in depth, and at how it confirms our conclusion that the public school property tax (which is not based on ability to pay) is an unconstitutional taking of property from those taxpayers who are least able to pay the tax, in violation of the takings clause.

¹ U.S. Constitution, Amendment V.
³ David Morton, Manager of the Town of Casco, Maine, at a 2007 meeting at which several hundred residents were bitterly objecting to large increases in their property tax assessments.
⁴ Dane v. Jackson, 256 U.S. 589 (1921).
The Principle of Ability to Pay

The principle of ability to pay focuses on the overall capacity of taxpayers to pay their taxes with two equitable components – horizontal equity, that taxpayers of equal wealth should pay the same amount of taxes – and vertical equity, that taxpayers of greater wealth should pay a greater share of taxes than taxpayers of lesser wealth.\(^5\)

Taxes Based on Ability to Pay – and Implicit Compensation

Ability to pay has long been recognized as the basis for general revenue taxes whose benefits are immeasurable.\(^6\) The benefits are deemed immeasurable because they are difficult (and perhaps impossible) to measure and/or because the cost of the benefits (referred to as “public goods”) has been accepted as the responsibility of the community as a whole, and not of the individuals receiving the benefits.\(^7\) And when the benefits are immeasurable, it is logical that the taxes to pay for these benefits be spread among the taxpayers according to their ability to pay, with each taxpayer paying his fair share of the taxes.\(^8\) And because the benefits are immeasurable, it appears the taxing power exception was conceived to shield these taxes from constitutional attack, for failure to provide the just compensation required by the takings clause, because the benefits could not be measured.

The Supreme Court long ago described this situation as follows:

[I]t may plainly be derived from the cases cited that, since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer . . . in proportion to payment made, as will be returned to every

\(^5\) Economyprofessor.com/economictheories/ability-to-pay-principle.php
\(^6\) Edwin R.A. Seligman, Essays In Taxation (“Seligman Essays”), Professor of Political Economy and Finance, Columbia College (MacMillan & Co. 1895) 274-275, “The basis of taxation is the ability or faculty of the taxpayer; the basis of a fee is the special benefit accruing to the individual. . . . In the case of a fee, the benefit is measurable; in the case of a tax, the benefit is not susceptible of direct measurement. In the case of a fee, the particular advantage is the very reason of the payment; in the case of a tax, the particular advantage, if it exists at all, is simply an incidental result of the state action.”
\(^7\) The concept of “immeasurable benefits” includes benefits that are unevenly enjoyed by the members of a community, which may to some extent be measurable (as reflected in note 6 above), but are considered immeasurable (and not to be measured) because they are the responsibility of the community at large, and not of the individuals receiving the benefits. A notable example of these are public education benefits.
\(^8\) Seligman Essays 57, “Every civilized society professes to tax the individual according to his ability to pay . . . In the early stages of society property is indeed a rough test of ability. In modern societies, as we have seen, the basis of taxation has . . . shifted from product to income. . . . This is the reason for the failure of the property tax. . . . The property tax is unjust . . . because property is no longer a measure of ability.”
other individual . . . paying a given tax, it is not within either the disposition or power of this Court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures . . . and . . . a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation (emphasis supplied).  

This observation about proportional taxation was made almost a century ago, and has continued down through the years, to the present day. It dates back to the time when Thomas Cooley was writing about constitutional law, more than a century ago, and there was uncertainty about whether the constitutional limitations imposed on the power of eminent domain also applied to the power of taxation. And that uncertainty led to separation of the power of taxation from the power of eminent domain – and that separation led to separation of the just compensation requirement from the taxing power. These logical progressions were aided and abetted by the known difficulty of matching tax burdens with tax benefits, which has long been a force for insulating the power of taxation (essential for funding government) from the rigors of the takings clause.  

Today, when we consider all that has changed, and all that has been written since the time of Judge Cooley, we can only imagine how things might have turned out differently if Judge Cooley, at the time, had been able to read and appreciate Richard Epstein’s *Takings (Private Property and the Power of Eminent Domain)* – where we believe he would have found and welcomed the insights of Epstein into why taxes are takings (and should be treated as such), and would not have taken the position he did – that they are mutually exclusive – which has been a persistent contributor to a century of confusion about taxes and takings. According to Epstein, “Cooley’s implicit account is that a tax as a general levy is not a wrongful taking.”  

And so we have the taxing power exception with its pervasive coverage of taxes, producing a result we believe is correct, but for the wrong reason. We believe that (contrary to current authority) most taxes are valid, not because they are not subject to the takings clause, but because they satisfy the takings clause with the measurable (*explicit*) and immeasurable (emphasis supplied). 

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9 Dane v. Jackson, id., note 4, 598-599.  
12 RAE Takings 283-284; Jacobs, id., note 9, 107.  
13 RAE Takings 284.
(implicit) compensation that is received for the taxes. And the fact that some benefits are immeasurable does not mean there are no benefits, only that they cannot be measured.

Judge Cooley’s “implicit account” was correct – “a tax as a general levy is not a wrongful taking” because the takings clause is satisfied by the implicit compensation that is received by the taxpayers.

**Taxes Based on Ability to Pay – and Proportionate Impacts**

The formula for general revenue taxes that are based on ability pay is found in the definition of the ability to pay principle – that “taxpayers of equal wealth should pay the same amount of taxes, and taxpayers of greater wealth should pay a greater share of taxes than taxpayers of lesser wealth.” 14 The first half of this definition (horizontal equity) is clear enough. The second half (vertical equity) needs some clarification – as to how (like the first half) it is satisfied by (and requires) a flat rate tax.

Over time the general revenue tax that is based on ability to pay has evolved from a tax on real property – to a tax on income 15 – and it now should further evolve, either by remedial adjustment of the income tax (if possible), or by return to the property tax, now on all of the property (all of the “wealth”) of a taxpayer, not just his real property.

It may be possible to make adjustments in the calculation of taxable income (like those used in calculating “alternative minimum taxable income”) that will produce a correlation between taxable income and total wealth that is close enough (to 1.0) for the income tax (like a wealth tax) to be conclusively presumed to satisfy the takings clause. We believe it is reasonable to assume that such a process can be established, but that is a project beyond the scope of this paper, and if this solution should prove elusive, then the income tax will be only rebuttably presumed to satisfy the takings clause – and subject to testing for satisfaction of the takings clause, in the way we discuss further on.

If appropriate adjustment of the income tax cannot be achieved, then a tax on total wealth (rather than income) may be the only way to assure the proportionality between the burdens and benefits of a tax that is needed to satisfy the takings clause. A tax on wealth may be more difficult to administer than a tax on income (or a tax on real property), but it may be the price we must pay for a constitutional tax that will always satisfy the takings clause. A flat rate tax on total wealth, with immeasurable benefits, is the only tax that we can now conclusively presume (without looking at the benefits) will satisfy the takings clause.

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14 Id., note 5.
15 Id., note 8.
When a tax is a flat rate tax based upon ability to pay (whether on income or wealth), with benefits that are immeasurable, the tax produces proportionate impacts across taxpayers, with no transfers of wealth between taxpayers, because each taxpayer pays the same proportion of his wealth into the tax collection, and receives in return a share of the implicit compensation produced by the taxes that is proportionate to his share of the total wealth of all taxpayers.

**The Principle of Proration**

This is the principle of *proration* that says that the burdens and benefits of each group enterprise are pro-rated among the members of the enterprise, whether public or private, in proportion to their investments in the enterprise. ¹⁶ A familiar application of this principle is found in a private partnership, where gains in the value of partnership property are allocated among the members of the partnership, in proportion to their investments in the partnership.

And a less familiar application is found in a public community, where gains in value from social governance (a “social surplus”) are allocated among the members of the community in proportion to their total wealth (their “private holdings”). ¹⁷ This application is more difficult to visualize, because a social surplus is more difficult to visualize, but we can see how the principle does work to produce proportionality between the burdens and benefits of a tax, and how this proportionality prevents transfers of wealth between taxpayers that would violate the takings clause. ¹⁸

The comparable proportionality between the burdens and benefits of all taxpayers follows automatically when the tax is a flat rate tax – but not when the tax is a progressive rate tax. When a tax is a progressive rate tax, the wealthier taxpayers pay a greater share of their wealth into the tax collection than taxpayers of lesser wealth and, when this is so, it is mathematically impossible for the proportionality between the burdens and benefits of the tax to automatically be the same for all taxpayers. When a tax is a progressive rate tax (and the benefits are immeasurable), there


¹⁷ RAE Takings 3-6 (“A Tale of Two Pies”), 163. The two (John) Lockean pies pictured on page 4 of RAE Takings show, pictorially, how the gains from social governance are allocated among the members of a community in proportion to the relative size of each member’s preexisting share of the total value of the community.


¹⁸ RAE Takings 163, “For example, if each person received an equal portion of the general gain, there would be an incentive for persons with smaller shares to force matters into the public area, where they would be relative gainers. Keeping the gains prorata minimizes the possibilities of strategic gamesmanship.”
necessarily will be disproportionality between the burdens and benefits of the tax (by operation of the principle of proration), and when it is “flagrant and palpable” (we soon will see) there is violation of the takings clause.

The proponents of the flat tax have long touted the superior merits of the flat tax, and now that we see how a flat rate tax can produce automatic proportionality between the burdens and benefits of a tax, the merits of the flat tax are more apparent than ever. When a tax is a flat rate tax based on ability to pay, with benefits that are immeasurable, each taxpayer pays the same proportion of his wealth into the tax collection, and receives in return a share of the benefits that are produced by the tax (the social surplus) that is proportionate to his share of the total wealth (private holdings) of all taxpayers. And when this is the case, the tax satisfies both halves of the ability to pay principle – that taxpayers of equal wealth pay the same amount of taxes, and taxpayers of greater wealth pay a greater share of taxes than taxpayers of lesser wealth.

Once again, when tax benefits are deemed immeasurable, we do not measure the benefits because they are difficult (and perhaps impossible) to measure, and because they are accepted as the responsibility of the community as a whole, and not of the individuals receiving the benefits. 19 The net benefits (if any) of a flat rate tax are a social surplus within the community that is allocated among the members of the community, by the principle of proration, in proportion to their private holdings, producing automatic proportionality between the burdens and benefits of the tax and (consequently) no transfers of wealth between taxpayers that would violate the takings clause.

**Taxes Not Based on Ability to Pay – and Disproportionate Impacts**

Next we look at taxes that are not based on ability to pay, and here we find we do need to examine the benefits that are received for a tax to determine the proportionality between the burdens and benefits. When a tax is not based on ability to pay, the horizontal and vertical equities of the ability to pay principle are not present, and the impact of the tax upon each taxpayer is different than the impact of the tax upon every other taxpayer. The impacts are disproportionate. And when tax impacts are disproportionate, there can be proportionality between the burdens and benefits only if we can see (or believe) that the benefits are received by the taxpayers roughly in proportion to the taxes they pay (e.g. the police and fire protection benefits (but not the public education benefits) that are paid for by property taxes). And the only way to see if there is this proportionality between the burdens and benefits is by examining the benefits.

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19 Id., notes 6 and 7.
A tax that is not based on ability to pay must be based upon some subject or object for which the tax is assessed, and that subject or object will be the benefit that is received for the tax. Most of these taxes are sales, or consumption, or excise taxes that are exchanged for some kind of explicit compensation in the form of goods, or services, or privileges. They are voluntarily paid by taxpayers, to obtain the measurable benefits they receive in return, and the amounts of taxes they pay are determined by the amounts of benefits they receive. These are not the involuntary takings of property contemplated by the takings clause, and they are not likely to draw a takings clause challenge. And, should that happen, the takings clause should be satisfied by the proportionate compensation that is received by the taxpayers. These taxes are constitutional not because of the taxing power exception, but because of the takings clause, and because the takings clause is satisfied.

We have now looked at the two kinds of taxes described by Professor Seligman in his Essays on Taxation, the general revenue taxes based on ability to pay that he refers to as “taxes”, and the taxes exchanged for some special benefit that he refers to as “fees”, and we have found proportionality between the burdens and benefits of both kinds of taxes, which implies some kind of interactive relationship between taxes and the takings clause – which we need to pursue.

So what is the relationship between taxes and the takings clause? Is it right that taxes are not subject to the takings clause – and the just compensation requirement of the takings clause? To the contrary, we believe that taxes are subject to the takings clause, and that they need to satisfy the takings clause – and that usually they do.

And we will show how the takings clause is satisfied when there is an acceptable degree of proportionality between the burdens and benefits of a tax – and how this proportionality for each kind of tax depends on the measurability of its benefits – with taxes based on ability to pay depending on immeasurable benefits – and taxes not based on ability to pay depending on measurable benefits, in each case to establish the proportionality between the burdens and benefits that is required by the takings clause.

II

Takings by Eminent Domain – and Disproportionate Impacts

First, we return to the power of eminent domain, and note that a taking by eminent domain results in “disproportionate impacts” among the members of a community, with a transfer of

\[20\] Seligman Essays 275.

\[21\] Id., note 6.

\[22\] Id., note 6.
wealth moving from the member whose property is taken – to the members who benefit from the new public property. 23 And the eminent domain clause (the takings clause) requires that just compensation be given to the member whose property is taken – by the members who benefit from the new public property.

Now, we know there are a number of cases that over the years have accepted as settled authority that “taxes are not subject to the takings clause.” 24 But we submit that these cases are misreadings of the Supreme Court cases that are the source of that conclusion, and that those high court rulings (upon closer examination) literally support precisely the opposite conclusion – that taxes are subject to the takings clause.

**A Taking of Taxes – is a Taking of Property**

We begin with the fact that a taking of money by taxation is a taking of property, because money is property – intangible property – and a taking of someone’s intangible property is as much a taking of his property, as a taking of his real property by eminent domain. 25

When a person’s real property is taken by eminent domain as the site for a new school, that person is entitled to just compensation for his property. And when a person’s intangible property is taken by taxation to build the new school, and then to operate the new school, why should this person not be treated the same as the person whose real property was taken for the school? 26

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23 RAE Takings 204-209.
24 See, e.g., *Empress Casino v. Giannoulis*, 231 Ill. 2d 62 (2008), 77: “It is well settled that the takings clauses of the federal and state constitutions apply only to the state’s exercise of eminent domain and not to the state’s power of taxation.”
26 RAE Takings 99-100, “With a tax, the government takes property in the narrowest sense of the term, ending up with ownership and possession of that which was once in private hands. Anyone who wants to deny the conclusion need only consider the consequences of not paying taxes. Liens are attached to one’s land or bank accounts, which are then taken and sold to satisfy the tax obligation. To be sure, there cannot be, either as a matter of general political theory or of constitutional law, any simple equation between taxation and government theft. Yet the analysis does establish that taxation is prima facie a taking of private property. The legitimacy of taxation does not flow from any artificial narrowing of the phrase “taking of private property,” but rather, from the justifications available for all other forms of taking: police power, consent, and compensation, typically either implicit or in kind. What cannot be said is that taxes are simply outside the scope of the eminent domain clause because they are not takings at all, when their effectiveness precisely depends upon coercive power clothed in official garb.”
The public school property tax is a taking of money from real property owners, based not upon their ability to pay, but upon the value of their property, while promising nothing in return. It takes a percentage of the value of each piece of property, year after year, without regard to the owner’s ability to pay, in ever-increasing amounts that are ever more difficult to pay, by many owners who receive nothing in return for their taxes.

Today many senior citizens living on fixed incomes have a difficult time paying their ever-increasing property taxes, and a common suggestion they receive is to “take out a reverse mortgage” to help with the payment of their taxes. If and when they follow this advice, they are funding the payment of their taxes with an unwanted transfer of the home they live in – as the steady growth of their reverse mortgage debt slowly consumes the equity in their home – in a “death by a thousand cuts”.

Taking of Taxes – and Just Compensation

Now, if a taking of money by taxation is a taking of property, then there should be just compensation for the person whose money is taken by taxes, just like there is just compensation for the person whose real property is taken by eminent domain – and, if this is not the case, then there should be a good reason why it is not the case. And the “good reason why it is not the case” should be something more than simply proclaiming that “taxes are not subject to the takings clause.”

Thus far we have seen that, when a tax is a flat rate tax, based on ability to pay, with benefits that are immeasurable, we do not need to look for the just compensation that is required by the takings clause, because it is supplied automatically (with mathematical precision) by the principle of proration. And that, in every other case, we do need to look for the just compensation that is required by the takings clause – provided we can first show why this examination should not be precluded by the taxing power exception that says that “taxes are not subject to the takings clause.” To do this, we need to take a closer look at the taxing power exception.

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RAE Takings 285, “All the elements found in the analysis of takings reemerge in the taxation context: takings, justification (in the control of crime or civil delinquency), public use, and implicit compensation.”

RAE Simple Rules 137.

27 RAE Takings 99-100.
III

More on the Taxing Power Exception

The taxing power exception has been stated in such near-absolute terms for so long that it has become accepted that taxes are not subject to the takings clause.\textsuperscript{28} It is derived from some strong judicial pronouncements, including the following by the U.S. Supreme Court:

Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. . . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.\textsuperscript{29}

But we are perplexed by the difficulty of applying the taxing power exception as presented in Magnano. How can taxes not be subject to the takings clause, except in circumstances when they are subject to the takings clause? What is the rational basis for a tax not being subject to the takings clause under most circumstances, but subject to the takings clause under some circumstances? These difficult questions only strengthen (illogically) the claim that taxes are not subject to the takings clause.

And we see the confusing authorities more and more as the product of the faulty historical development of the taxing power exception, into its near-absolute position that taxes are not subject to the takings clause, and as one more example of the maxim that hard cases make bad law. In this case a practical solution was found for the difficult job of reconciling taxes with the takings clause, but at a cost of resting upon a principle (that taxes are not subject to the takings clause) that is simply wrong.

\textsuperscript{28} RAE Takings 283, “The proposition that all taxes are subject to scrutiny under the eminent domain clause receives not a whisper of current support. The taxing power is placed in one compartment; the takings power in another. The first power is wholly untouched by the limitations imposed upon the other. A confiscatory tax approaching 100 percent will be attacked in vain as arbitrary, but the attack is in the garb of substantive due process, not eminent domain.”

\textsuperscript{29} Magnano, id., note 2, at page 44.
And the matter is worsened by the constitutional reference to the due process clause, rather than the takings clause, as we see in Magnano, and in the following statements:

A governmental requirement that one pay tax deprives the payer of property, and such a deprivation mandates compliance with the Due Process Clause of the United States Constitution.

A tax will ordinarily be held to violate the guarantee of due process only where it proposes, or clearly results in, such a flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation (emphasis supplied).  

The practical effect of this reference is to divert attention away from the rigors of the takings clause (i.e. just compensation), and on to the more complex and controversial doctrine of substantive due process, which has been referred to by a respected jurist as an “oxymoron”.  

But consider the wording of the taxing power exception (now in terms of due process) and how it contains an implicit presumption that the due process clause is satisfied, along with a demanding test for what is needed to rebut the presumption, i.e. “a flagrant and palpable inequality between the burden imposed and the benefit received” for the tax. In these terms the exception reflects a logical bias in favor of valid taxes, and implicit support for the proposition that taxes are subject to the takings clause – from this rule that is virtually the same as the takings clause, altered only by the added emphasis that is given to the disparity between burdens and benefits (it must be “flagrant and palpable”) that is needed to defeat a tax.

The disparity is described as an “inequality between the burden imposed and the benefit received” for a tax. But received by whom? Is it an “inequality” between the burden imposed and the benefit received by a single taxpayer, or an “inequality” between the burdens imposed and benefits received by the several taxpayers relative to each other? Since the takings clause is satisfied when there is comparable proportionality between the burdens imposed and benefits received by all taxpayers, this “inequality” must mean disproportionality between the burdens imposed and benefits received by the several taxpayers relative to each other. When there is comparable proportionality with respect to all taxpayers, there are no transfers of wealth between

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31 Id., note 27.
taxpayers – and no violation of the takings clause. When there is not comparable proportionality with respect to all taxpayers, there are transfers of wealth between taxpayers – and (if it is flagrant and palpable) there is violation of the takings clause.

So we start with a taxing power exception that says that a tax will satisfy the takings clause unless there is a flagrant and palpable inequality between the burdens and benefits of the tax. Then we note that, when a tax is a flat rate tax, based on ability to pay, with benefits that are immeasurable, there can never ever be a flagrant and palpable inequality between the burdens and benefits of the tax, because there is automatic proportionality between the burdens and benefits, produced by the principle of ability to pay and the principle of proration, that satisfies the takings clause.

And then we note that the automatic proportionality of the burdens and benefits of these taxes is the single instance when there is automatic proportionality between the burdens and benefits of a tax. While in every other case, there is not automatic proportionality, and we must examine the benefits that are received in each case, for evidence of a flagrant and palpable inequality between the burdens and benefits that violates the due process clause – or (more explicitly) the takings clause.

So we must examine every tax for evidence of a flagrant and palpable inequality, with one exception – for a flat rate tax, based on ability to pay, with benefits that are immeasurable, which satisfies the takings clause with the automatic proportionality of its burdens and benefits.

And now, lo and behold, we find that the automatic satisfaction of the takings clause by these taxes makes it unnecessary to apply the taxing power exception (as now construed) to the one kind of tax that (we submit) the taxing power exception was conceived to protect and (coincidentally) the one kind of tax to which the taxing power exception may logically (though unnecessarily) be applied.

We have thus found that the taxing power exception (as now construed) need not be applied to the one kind of tax it was conceived to protect, and should not be applied to any other tax, which is a twofold finding that confirms the opposite of the taxing power exception – that taxes are subject to the takings clause.

Finally, we note that when the taxing power exception (as now construed) is extended from taxes that are based on ability to pay – to taxes that are not based on ability to pay, the impact of the taxing power exception is extended from the protection of taxes that satisfy the takings clause (rightful validation) – to the protection of taxes that violate the takings clause.
(wrongful validation). But this cannot happen if we accept that taxes are subject to the takings clause, and that the taxing power exception was conceived to apply – not to all taxes – but only to general revenue taxes whose benefits are immeasurable.

And so we conclude that the taxing power exception was poorly conceived a long time ago to solve the difficult problem of reconciling taxes with the takings clause – that the taxing power exception is inherently self-contradictory as to whether taxes are subject to the takings clause – and that the most rational reading of the confusing authorities is that taxes are subject to the takings clause, albeit in a way that is tailored to the known difficulty of matching tax burdens with tax benefits in a complex society.

Now this is our challenge: Do we continue to accept the current view that taxes are not subject to the takings clause – or do we acknowledge that taxes are subject to the takings clause in accordance with the reasoning in this paper. A closer look at the public school property tax will show, by plausible example, why it is important that we accept and acknowledge that taxes are subject to the takings clause.

IV

The Public School Property Tax

In the beginning school property taxes were based on ability to pay, but they are no longer based on ability to pay – and for a long time they have not been based on ability to pay. The following is from a “Homeowner’s Guide to Property Tax in Maine”, published in 2004 by the Maine Municipal Association:

Property taxes have been with us since colonial times when a person’s wealth could be measured in the amount of property a person owned. Although it is our oldest form of taxation in Maine, the property tax still remains widely misunderstood. As the fundamental structure of our economic system has evolved from an agricultural economy to a manufacturing economy to a services-based economy, the patterns of ownership have changed and the property tax has become quite regressive because it is no longer necessarily based on a person’s wealth or ability to pay (emphasis supplied).

The school property tax system now rests upon two assumptions that at one time were true, but are no longer true, to wit: (1) that the tax is based upon ability to pay, and (2) that the tax benefits are apportioned among taxpayers in proportion to the taxes they pay. The undoing of these assumptions parallels the evolution of the school property tax (as noted above) from a
tax that was originally based on ability to pay – into a tax that is no longer based on ability to pay. In the process the benefits of these taxes necessarily evolved from benefits that did not need to be examined, because the burdens and benefits were automatically proportional – into benefits that are no longer automatically proportional, and must now be examined for evidence of the proportionality between the burdens and benefits that is required by the takings clause.

First, no one today can seriously argue that public school taxes are based on ability to pay, since this would require that the ratio between the value of each piece of property and the net worth of its owner be the same in every case – which could never be true.

Exhibit A (page 19) shows the disproportionate impacts that can occur in a school tax system, and how a tax imposed only upon real property (a small component of total wealth (2-18%)) and not upon intangible property (the largest component of total wealth (about 82%)) falls most heavily upon those less wealthy taxpayers whose homes constitute a large part of their total wealth.

Exhibit B (page 20) shows the difference in tax impacts, in tax dollars, between (1) a 2% tax on real estate, and (2) a 10% tax on income (or a backup 1% tax on total wealth) – depending on the income (or wealth) of the taxpayer. We assume (as we earlier assumed) that the income tax can be made adequately comparable to a tax on total wealth, and we therefore (for ease of presentation) hereafter refer to both taxes collectively as the “income tax”. And it is this income tax, not the real estate tax, that is based on “ability to pay”, and the diagonal line tracking the income tax that represents the equitable allocation of this tax burden. And once we accept that the income tax represents the equitable allocation of these taxes, we must then agree that the taxpayers who are paying more than 10% of their income in real estate taxes – are paying the taxes being saved by the taxpayers who are paying less than 10% of their income in real estate taxes.

In Exhibit B we can see, in graphic form, how wealth is transferred from the less wealthy to the more wealthy members of a community, as the real estate taxes paid by the less wealthy members, of more than 10% of their income (lower left triangle) become the tax savings of the more wealthy members, of the amounts by which their real estate taxes are less than 10% of their income (upper right triangle).

34 The line representing the 10% income tax and the 1% wealth tax would follow the same path (be the same line), provided the figure for taxable income can be adjusted in a way that brings close correlation between taxable income and total wealth.
Exhibit C (page 21) shows the difference in tax impacts between the two taxes, in the percentages of income that are taken by each tax, and how the higher percentages of income taken by the real estate tax from less wealthy taxpayers (to the left of the crossing lines) are transferred (as tax savings) to the more wealthy taxpayers, by the lower percentages of income that are taken from them (to the right of the crossing lines).

Exhibit D (page 22) is a U.S. Census Bureau graph showing a range of percentages of property taxes as a percentage of income, and the percentage of U.S. households within each percentage of income bracket. These are the flesh and blood taxpayers who populate the graphs in Exhibits B and C – and are living proof of the wide disparity in the levels of income that are received by the payers of real property taxes.

In the case of Taxpayers A and B portrayed in these exhibits, we see how $2,000 of B’s wealth is transferred (each year) to A, who has three times as much wealth (and three times as much income) as B. As time goes on, this transfer of wealth accumulates and grows, year after year, to the ever-increasing advantage of more wealthy taxpayers and ever-increasing disadvantage of less wealthy taxpayers. We can think of no justification for a tax that results in an unrelenting (and uncompensated) transfer of wealth from the less wealthy to the more wealthy members of a community.

In 1987 the Maine legislature passed a property tax “circuit breaker” program, to provide relief for low-income taxpayers (with a current limitation of $1,600 per annum, which is at once both minimal and inadequate). In its foundational “statement of fact”, the legislature said, in part:

> The property tax is generally considered to be a regressive tax. Such a tax consumes a larger proportion of the income of low-income persons than it does of higher income persons. This bill relieves the regressivity of the tax by providing a credit or payment which is inversely proportional to a household’s income. 35

Now, there is nothing unique about a regressive tax – the sales tax is a regressive tax. What is unique is a regressive tax for which the taxpayer receives nothing in return.

And now because the public school tax is no longer based on ability to pay, we must examine the benefits that are received for these taxes, to see if there is a “flagrant and palpable inequality” between the burdens and benefits that violates the takings clause. This is especially appropriate in the case of public school taxes, where we know there is little, if any, relationship between the persons who are paying the taxes, and the persons who are receiving the benefits.

In this discussion we have highlighted taxpayers who receive nothing in return for the school taxes they pay, because they represent the most dramatic example of the disproportionality between the burdens and benefits of these taxes. But there is virtually no proportionality at any level between the burdens and benefits of these taxes, and there has never been any intention that there be any proportionality at any level between the burdens and benefits of these taxes, which is a reality that is widely acknowledged and accepted, and should readily establish the “flagrant and palpable inequality” between the burdens and benefits that is needed to invalidate this tax.

Returning to Exhibit B, we see the two lines that represent the separate pathways of (1) the tax on income (based on ability to pay) and (2) the tax on real estate (not based on ability to pay), and we can visualize how, for proportionality between the burdens and benefits of each kind of tax, there must be a line representing the benefits received for each tax (at each point along the pathway of the tax) that is collinear with the pathway of the tax.

In the case of the tax on income, the collinear line will be established automatically (with mathematical precision) by operation of the principle of proration. In the case of the tax on real estate, the line must be established (if at all) by examining the benefits that are actually received for the tax. But the benefits that are actually received for these taxes are so diverse – it is virtually impossible to establish any kind of a line to represent the chaotic diversity of these benefits. And this inability to establish any kind of a benefit line is compelling evidence of the “flagrant and palpable inequality” between the burdens and benefits of these taxes.

The Public School Property Tax – and Due Process of Law

The public school property tax is –

- a discriminatory tax
- on a small share of total wealth (real property)
- to pay a large share of the enormous cost of public education
- continually shifting to higher value properties
- without consideration of ability to pay
- returning little or nothing to many taxpayers
- who eventually lose their properties, when taxed beyond their ability to pay.
Does this tax not produce “such a flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation”? Each one of the above factors by itself is a serious defect – put them all together in a single tax system, and we have a completely dysfunctional system that should no longer exist.

V

The Taxing Power – and the Takings Clause

Over time the protection of the takings clause has been diluted and disabled and, in the area of taxation, almost entirely banished from consideration. We believe it is the pervasive coverage of the taxing power exception that is responsible for this dysfunctional condition, and that the constitutional protection of the takings clause – so critical to the institution of private property – is far too important to be so lightly and incorrectly discarded.

The taxing power exception is stated in terms of due process, but it is a paraphrase of the takings clause, and it is time we accept this fact, and the fact that taxes are subject to the takings clause. If we do not do so, we will have accepted a truly Orwellian victory for the taxing authorities, who will have succeeded in removing the protection of the takings clause, simply by removing all reference to the takings clause from the controlling authorities.

But such a victory is averted when we acknowledge that taxes are indeed subject to the takings clause, and that (even after we have accepted this fact) there will still be very few taxes that violate the takings clause, because most taxes (as noted earlier) satisfy the takings clause with the explicit and implicit compensation that is received for the taxes. The takings clause will be violated only when there is a flagrant and palpable inequality between the burdens and benefits of a tax – and the only way to discover this inequality (with the one exception) is by examining the benefits.

Returning full circle to our opening statement, we can now see why it is only when a tax is a flat rate tax, based on ability to pay, with benefits that are immeasurable, that we do not need to examine the benefits that are received for the tax, because there is automatic proportionality between the burdens and benefits that satisfies the takings clause. And why, in every other case, we do need to examine the benefits that are received, for evidence of the proportionality between the burdens and benefits that is required by the takings clause.
And we can see how these conclusions derive from an orderly relationship between the taxing power and the takings clause, wherein all taxes are subject to the takings clause – with a flat rate tax, based on ability to pay, and benefits that are immeasurable, **conclusively** presumed to satisfy the takings clause – and every other tax **rebuttable** presumed to satisfy the takings clause – until rebutted by “a flagrant and palpable inequality between the burden imposed and benefit received” that violates the takings clause.

**Final Thoughts**

In conclusion, we submit that the public school property tax is a powerful example of the wrong that can result when the taxing power exception is applied (as it is now applied) to a tax that is not based on ability to pay – that contrary to the taxing power exception (as it is now construed) taxes are subject to the takings clause – and that, when we apply the literal (Supreme Court) terms of the taxing power exception to the public school property tax, we find that there is a flagrant and palpable inequality between the burdens and benefits of these taxes that is a verifiable violation of the takings clause of the Constitution.

And we close with the thought that this unconstitutional tax can be corrected quite easily, by shifting the responsibility for the property tax share of public school funding, from a tax that is now based solely on the real estate that is owned by a taxpayer – to a tax that is based (1) on the taxable income of the taxpayer (as appropriately adjusted, if possible), otherwise (2) on the total wealth of the taxpayer.
Exhibit A

The School Property Tax
and
Disproportionate Impacts

<table>
<thead>
<tr>
<th></th>
<th>Taxpayer A</th>
<th>Taxpayer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home</td>
<td>250,000</td>
<td>250,000</td>
</tr>
<tr>
<td>Mortgage</td>
<td>0</td>
<td>(200,000)</td>
</tr>
<tr>
<td>Bank Account</td>
<td>650,000</td>
<td>250,000</td>
</tr>
<tr>
<td>Total Wealth</td>
<td>900,000</td>
<td>300,000</td>
</tr>
<tr>
<td>Income</td>
<td>90,000</td>
<td>30,000</td>
</tr>
<tr>
<td>2% Real Estate Tax</td>
<td>5,000</td>
<td>5,000</td>
</tr>
<tr>
<td>10% Income Tax (or 1% wealth tax)</td>
<td>9,000</td>
<td>3,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Proration of tax benefits</th>
<th>Taxpayer A</th>
<th>Taxpayer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>by actual benefits received ¹</td>
<td>26,000</td>
<td>0</td>
</tr>
<tr>
<td>Proration of tax benefits by principle of proration ²</td>
<td>9,000</td>
<td>3,000</td>
</tr>
</tbody>
</table>

¹ This shows allocation of the tax benefits according to the actual benefits received. Since the real estate tax is not based on ability to pay, we must examine the benefits that are received to determine whether there is proportionality between the burdens and benefits. A has two children in the school system (at an annual cost of $13,000 per student) and B has no children in the school system. Here we see the substantial transfer of wealth under the real estate tax, from B (a person of lesser wealth) to A (a person of greater wealth).

² This shows allocation of the tax benefits according to the principle of proration, in proportion to the income of A and B (provided taxable income can be adjusted to be in close correlation with total wealth), otherwise in proportion to the total wealth (“private holdings”) of A and B. Here we see the automatic proportionality between the burdens and benefits under an income tax (or a wealth tax) when the tax is based on ability to pay, and the benefits are immeasurable.
Exhibit B

School Property Tax Regression
Real Estate Tax vs. Income (Wealth) Tax

Tax Dollars

Income (Wealth)
Exhibit C

School Property Tax Regression
Real Estate Tax vs. Income (Wealth) Tax
Percentage of Income (Wealth)
Exhibit D

School Property Tax Regression

Percentage of Income

FIGURE 1.2
Property Tax as a Percent of Income (2006)

Summary

Why do we have the Taxing Power Exception?

1. There is inherent conflict between the taking clause that says that “private property [shall not] be taken for public use, without just compensation”, and the taxing power exception that says that “taxes are not subject to the takings clause.”

2. And we ultimately resolve this conflict by showing why (upon closer analysis) the taxing power exception (as it is now construed) need not be applied to the one kind of tax it was conceived to protect – and should not be applied to any other tax.

3. First, we recognize that taxes must be either (a) based on ability to pay, or (b) not based on ability to pay.

4. And that tax benefits must be either (a) measurable or (b) immeasurable.

5. And then we find that ability to pay has long been recognized as the basis for general revenue taxes whose benefits are immeasurable.

6. And we presume the taxing power exception was conceived to protect these taxes from constitutional attack, for failure to provide the just compensation required by the takings clause, because the benefits could not be measured.

But do we need the Taxing Power Exception?

7. We then note that the taxing power exception presumes that a tax satisfies the takings clause, unless there is a flagrant and palpable inequality between the burdens and benefits of the tax that violates the takings clause. (Dane v. Walker, 256 U.S. 589 (1921).

8. And then that, when a tax is a flat rate tax based on ability to pay, with benefits that are immeasurable, there cannot ever be a flagrant and palpable inequality between the burdens and benefits of the tax, because there is automatic proportionality between the burdens and benefits, produced (with mathematical precision) by the principle of ability to pay and the principle of proration, that satisfies the takings clause.
9. And that, in every other case, there is not automatic proportionality between the burdens and benefits of the tax, and we must examine the benefits that are received, for evidence of the proportionality between the burdens and benefits that is required by the takings clause.

10. So we must examine every tax for proportionality between its burdens and benefits, with one exception – for a flat rate tax, based on ability to pay, with benefits that are immeasurable, which satisfies the takings clause with the automatic proportionality of its burdens and benefits.

11. And then we see that the automatic proportionality between the burdens and benefits of these taxes makes it unnecessary to apply the taxing power exception – to the one kind of tax the taxing power exception was conceived to protect, which means that the taxing power exception was conceived to solve a problem – that turns out not to have been a problem after all.

12. And so we have found that the taxing power exception need not be applied to the one kind of tax it was conceived to protect – and should not be applied to any other tax, which is a twofold finding that confirms the opposite of the taxing power exception – that taxes are subject to the takings clause.

So, we do not need the Taxing Power Exception, because taxes are subject to the Takings Clause, and there is no logical reason why this should be any other way.

13. And when we accept and acknowledge that taxes are subject to the takings clause, and understand the way in which they satisfy the takings clause, we will have eliminated any need for the taxing power exception, and all of the confusion it has caused over a very long period of time.

14. Now, we acknowledge that in this discussion we arrive at a final resting point that is similar to the one that is found in the current authority on this matter (that most taxes do not violate the takings clause) – but (significantly) we differ in a meaningful way from the current authority in the way that we arrive at this point.
15. The current authority says – that taxes are *almost never subject* to the takings clause.

And that a tax *is only subject* to the takings clause – when it fails to satisfy the constitutional requirement of *due process of law* (whatever that means).

Which is a test that is perplexing and seemingly unworkable, and has resulted in general acceptance of the idea that taxes are *not* subject to the takings clause.

16. While we say (to the contrary) – that taxes *are subject* to the takings clause and that taxes *almost always satisfy* the takings clause.

And that a tax *only fails to satisfy* the takings clause – when there is a *flagrant and palpable inequality* between the burdens and benefits of the tax.

Which is a test that follows the wording and spirit of the Supreme Court rulings, and honors the importance of the constitutional protection of the takings clause, with a workable process for testing the constitutionality of a tax such as the one we test in this paper – the public school property tax.

17. And when it comes time to apply this test to the income tax, we believe we will find that a *progressive rate* income tax (in all likelihood) violates the takings clause, and that a *flat rate* income tax (almost certainly) does not.
We have known from the start that this argument would have to be virtually irrefutable, or it would go nowhere. And on reading it over, we believe it is sound – but is it irrefutable? The best way to find if it is refutable is to put it out there – and let the refuting begin.

In the meantime, let us assume, to wrap things up, that the argument is sound, and then try to understand the common reaction we receive – a kind of passive acceptance of the status quo, because the public school funding system has been in place for such a long time, and the changes wrought by this argument are just too difficult to contemplate.

We think this reaction does stem from the difficult consequences that are produced by an argument that is difficult to comprehend. And we admit the argument is difficult to comprehend, because it combines the complex subject of public school funding with the complex doctrine of due process of law. And we agree the consequences will be difficult, but they will be resolved – they will have to be resolved if the argument is successful.

Today no one can seriously argue that public school property taxes are based on ability to pay, or that there is not a flagrant and palpable inequality between the burdens and benefits of these taxes. And when these truths are acknowledged, and our reasoning is accepted, we will have confirmation that the public school property tax is a taking of property from those taxpayers who are least able to pay this tax, in violation of the takings clause of the Constitution.

Now the reader must decide whether our argument is persuasive. If his reaction is positive, the next question for him, and for the rest of us, is whether there is anything we can do about it – is it possible, considering the current state of our politics and public opinion, and our state and federal judiciaries, to make a successful argument that the public school property tax is unconstitutional?

We hope the answer is yes, and that others will agree, and join with us in the effort that is necessary to fix this broken system.

George Hefferan
Casco, Maine
March 2014