



# Michigan's Constitutional Tax Limits:

*How the "Headlee" Amendment, "Proposal A," and Other Provisions Protect Michigan's Taxpayers*

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## Chapter 1

### The Tax Limitations of the Michigan Constitution

Michigan's 1963 Constitution, like those that preceded it, is founded on both state and local tax limitations. Since the ratification of this Constitution a third of a century ago, the voters have added to those limitations by amending their Constitution with two major tax limitation amendments: the 1978 "Headlee" amendment, and 1994's "Proposal A." In addition, other amendments have modified some tax limitation provisions, although none with the major changes wrought by these two amendments.

This monograph, now completely revised, summarizes the tax limitation provisions, with special attention on "Headlee" and "Proposal A." New in this 5th edition is a review of the new Proposal A provisions, and a short discussion of the tax limitations woven into the fabric of the 1963 Constitution.

#### A. Tax Limitations in the 1963 Constitution

Article IX of the Constitution, the finance article, contains the main limits on local and state government taxation. These include:

- Limits on *property tax rates* in section 6.
- Limits on the *property tax base* in sections 3 through 6
- Limits on the *total tax collected* in sections 25 through 33 (the Headlee amendments of 1978)
- *Voter approval requirements* in sections 6 and 25 through 33.
- Limits on the *sales tax rate and base*. This section limited the state sales tax to 4%, although this limit was increased to 6% by Proposal A in 1994.<sup>1</sup>
- Requirements that all local taxes be *authorized by the state legislature and subjected to a limit*.
- Limitations on *property tax rates on individual parcels*, by Proposal A of 1994.

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1. The original section limited the state sales tax to 4%, allowing a lower rate. Prop A required an additional 2% sales tax rate. Arguably, the state now has a minimum sales tax rate of 2% and a maximum of 6%.

- The establishment and limitation of a *state property tax*, and the exemption from it for “homesteads,” added by Proposal A of 1994.
- The requirement that all new local taxes be approved by the voters, in sections 25 and 31.
- The requirement that any increases in school operating property taxes receive a 3/4 vote in the legislature.

## **Chapter 2**

### **The Headlee Amendment**

The tax limitation amendment to the Michigan Constitution, commonly known as the “Headlee” amendment, protects Michigan taxpayers against excessive state and local taxation in a variety of ways. The amendment, adopted by Michigan voters as Proposal E on November 7, 1978, was described on the ballot as follows:

#### **PROPOSAL FOR TAX LIMITATION.**

#### **THE PROPOSED AMENDMENT WOULD:**

1. Limit all state taxes and revenues, excepting federal aid, to its current proportion of total state personal income and to provide for exception for a declared emergency.
2. Prohibit local government from adding new or increasing existing taxes without voter approval.
3. Prohibit the state from adopting new or expanding present local programs without full state funding.
4. Prohibit the state from reducing existing level of aid to local governments, taken as a group.
5. Require voter approval of certain bonded indebtedness.

Should this amendment be adopted?

## Chapter 3

### The Headlee Amendment: Section by Section Analysis

#### A. Section 25: Purpose of the Amendment

“Headlee” amended Article IX, section 6 of the 1963 Constitution of Michigan, and added sections 26 through 34. The first two sentences of section 25 clearly establish the purpose of the amendment:

Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government.

#### B. Sections 26 through 28: Limiting State Taxation

Section 26 limits the total amount of taxes which may be imposed on the taxpayers by the State legislature. The section begins:

There is hereby established a limit on the total amount of taxes which may be imposed by the legislature in any fiscal year on the taxpayers of this state. The limit shall not be changed without approval of the majority of the qualified electors voting thereon,...

The limit is based on the share of Personal Income taken by the State in fiscal year 1979: approximately 9.49%. Section 26 provides that whenever total state revenues exceed this maximum share of the citizens income by 1% or more, it must be refunded to the Income and Single Business taxpayers. Smaller excesses must be deposited in the Budget Stabilization Fund.

This limit does not apply to principal and interest payments on state general obligation bonds, which must be approved by the electors. Since government debt is the same as deferred taxes, this allows the citizens to directly approve any future taxes required by bonds.<sup>2</sup>

Section 27 establishes strict conditions for the declaration of an emergency, during which the limit can be exceeded. Before any “emergency” expenditures can be made, the governor must request the legislature to make such a declaration, and the legislature must concur with a 2/3 majority in each house.

Section 28 prohibits the state from making expenditures in excess of the limit.

For further information, see the discussion of “compliance and implementation.”

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2. The requirement for voter approval of state general obligation bonds was already in the Michigan Constitution when the Headlee amendment passed. The Headlee amendment extended this same principle to local government bonds as well. See discussion under Section 6.

### **C. Section 29: Mandating State Funding of State-Required Local Programs**

Section 29 of the Constitution prohibits the state from reducing the state-financed share of funding for existing local programs required by state law, and requires that new local programs required by state law be funded by the state:

The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the Legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs....

This section guarantees that new state-mandated functions of local government, like Special Education, receive state funding. It also prevents the state from reducing its commitment to state-required programs existing before the Headlee amendment was ratified.

Programs protected under section 29 include “categorical” aid for special education, special education transportation, school lunch and supplemental milk, and drivers' education.<sup>3</sup>

For further information, see the discussion of compliance and implementation.

### **D. Section 30: Mandating Minimum Local Share of State Revenues**

Section 30 mandates that the portion of State spending paid to all Local units of government not fall below a minimum limit.

The proportion of total state spending paid to all units of local government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79.

The limit is based on the share allocated in fiscal year 1979: approximately 41.6% of state spending. However, since the reallocation of mental health spending from state to local authorities, the state agreed in a consent judgement to recalculate the minimum share.<sup>4</sup> It did so, and the minimum state share is now over 48%.<sup>5</sup>

For further information, see the discussion on compliance and implementation.

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3. Programs protected by the Headlee amendment are immune from executive order reductions. See State of Michigan, Court of Appeals, *Durant v Michigan Dept. of Education*, No. 9 1271, Opinion of Judges Danhof, Gillis, and MacKenzie, IV, Nov. 5, 1990, 186 Mich App 83.
  4. *Oakland County v. State of Michigan*, Mich App \_\_; see also *Report of the Blue Ribbon Commission on the Headlee Amendment*, "Section 30" and the Appendix, which reprints the consent agreement.
  5. *Recalculation*.... Michigan Department of Management and Budget,\_\_\_\_\_.

### **E. Working Together to Prevent “Tax Shifts”**

Section 25 stated that one purpose of the amendment was to protect local governments and their taxpayers from tax shifts by the state government. The following sections establish a cascading structure of protections:

- The overall limit (section 26) prevents the state from taking an excessive amount of taxation without voter approval. This limit alone, however, does not prevent the State from either walking away from local government commitments, or mandating programs that must be paid for by local taxes. Thus, the amendment includes two additional sections to prevent such hidden tax increases.
- The local share minimum (section 30) prevents the state from reducing its overall commitment to local governments.
- The program mandate (section 29) prevents the state from taking money from one State-required program to fund another.

Taken together, these three sections limit the state government from taking too much taxpayer money or shifting the burden of state-required programs onto local taxpayers.

### **II Section 31: Requiring Voter Approval for Local Tax Increases.**

Section 31 requires voter approval of any new or increased local tax, and contains a special limit on property tax increases caused by assessment growth. The section begins:

Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon...

Furthermore, the section requires that increases in local property taxes, caused by higher property values, be limited to that accounted for by inflation plus new construction. Any increases in the assessed valuation of property (which would cause a tax increase at the previous millage rate) above the inflation rate, except that caused by new construction, must be returned to the taxpayers in the form of a lower millage rate. This reduction in the maximum authorized millage rate, which allows only the increase in tax revenue caused by inflation and new construction, is commonly known as a “Headlee rollback.”<sup>6</sup>

The Headlee amendment here provides a fair balance between the needs of local governments and school districts, and those of the taxpayers. It grants a cost-of-living increase for government, by allowing the tax base to expand at the same rate as the CPI. Furthermore, it allows any new construction, such as that from new homes or businesses, to be brought into the tax base without limitation. Only tax increases above the sum of inflation and new construction are limited, unless the voters approve such an increase. Even though such elections are commonly known as Headlee “overrides,” they do not override the

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6. Local governments may levy a lower rate than the "maximum authorized" rate permitted by law or charter. In this case, the rollback still applies against the maximum authorized rate, not the levied rate. This maintains the purpose of the Headlee amendment: voter control over taxes. Because the maximum authorized rate is the rate approved by the voters, it is the rate that must be rolled back. Any increases above that rate require, in turn, new voter authorization.

amendment. As with the state revenue limit in section 26, local governments are allowed to exceed their limits if the voters approve. Here, as elsewhere, the intent is not to abolish government, but to make it live within limits established by the voters.

For further information, see the discussions of millage limits, compliance and implementation of section 3.1, and the “Truth in Taxation” law.

### **A. Headlee 'Rollbacks' and Local School Finances**

Whenever the Headlee limitation requires a “rollback” of the millage rate, the new lower rate applies to a larger tax base. Thus, the amendment allows an increase in tax revenue (equal to the rate of inflation plus new construction) even when it requires a rollback of the millage rate.

Despite occasional claims to the contrary, the amendment *never* cuts local tax revenue to local schools—it always allows the cost-of-living and the new-construction *increases* to pass undisturbed. The Headlee limitation is, after all, *a limit on an increase*.

On the other hand, *state* aid to “in-formula” school districts often decreases when millage rates go down or property values increase, but this is purely the result of the legislated school aid formula. State reductions in “categorical” aid, also called “recapture,” are similarly the result of state legislative actions, and not the result of the Headlee amendment.<sup>7</sup>

When evaluating local school finances, it is absolutely vital to understand the difference between the Constitutional limit on *local* tax increases, and the changes in *State* school aid. The Headlee amendment *limits* local property tax *increases*, while State school aid can rise or fall.

While changes in state aid may force retrenchment in some school districts, the only “cuts” in these cases come from Lansing—not from local taxpayers or their Constitution!

### **B. Section 32: Enforcing the Amendment**

To make sure the state government follows the amendment, section 32 gives any taxpayer standing in the court of appeals to enforce its provisions. Furthermore, winning taxpayers must be reimbursed for their expenses incurred in sustaining the suit.

For further information, see the discussion of compliance and implementation, Sections 33 and 34: Definitions and Legislative Implementation.

Section 33 establishes definitions for sections 25 through 32. The legislature is directed to implement the amendment in section 34.

### **C. Section 6: Requiring Voter Approval of Local Government Bonds**

The amendments to section 6 plugged a gaping loophole in the 1963 Constitution: the ability of local governments to borrow money, and then levy taxes to pay the debt regardless of any tax limitation. The “Headlee” amendment repeated the efforts of Michigan citizens in 1932, who amended the 1908 Constitution to require voter approval of any tax levied above a minimum limit.

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7. In fact, reductions in state funding for state-mandated programs are unconstitutional because of the protections afforded by section 29 of the amendment. See the discussion on compliance.

Section 6 requires that General Obligation (G.O.) bonds bearing the “full faith and credit” of the people be approved by the voters.<sup>8</sup> This matches the requirement in Article IX section 15 that State G.O. bonds be approved by the voters.

Thus, under section 3 1 of the Headlee amendment, taxes for current operations of local government are under direct voter control. Under section 6, taxes for debt that are the general obligation of the taxpayers are also placed under direct voter control.

#### **D. Millage Limits**

Article IX, section 6 of the 1963 Michigan Constitution contains the limitation on the total amount of property taxes that can be levied by local governments.<sup>9</sup> These limits preceded the Headlee amendment of 1978, and form the framework for the amendment to section 6 and additions of sections 25 and 3 1. As sections 26, 29 and 30 work together to protect local governments and their taxpayers from the state, so do sections 6 and 3 1 work together to protect taxpayers from local governments:

- Section 6 limits the total number of mills that can be levied by counties, townships, and school districts to no more than 50 mills, with voter approval required for millage totaling more than 15. Millage for charter authorities, such as cities, which are approved by separate voter action, are excluded from the 50-mill limit.<sup>10</sup>
- Voter-approved millage rates must be reduced if assessments on existing property grow faster than the rate of inflation, as required by section 31.
- General obligation debt millage is excluded from the section 6 millage limits and the section 31 rollback requirements, but the Headlee amendment to section 6 requires voter approval for such millage.
- Any other new local taxes must be approved by the voters, as required by section 31.

For further information, see the discussion on compliance and implementation.

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8. See Michigan Attorney General's Opinion number 5417, December 1987 for an interesting discussion, including historical notes. Certain bonds not carrying the full faith and credit of the people, such as "revenue bonds" supported by the revenue of a publicly-financed project and without a general claim on the taxpayers, do not require a vote under Article IX section 6.

9. The Constitution, in Article VII sections 2, 1 1, 14, 21, and 22, subject the powers of counties, townships, cities and villages to tax and incur debt to limitations contained in the Constitution, general law, and charters.

10. For general and historical discussion, see *Local Property Tax Limitations in Michigan*, publication 295 (September 1989), and *The 50-mill Limit: An Update*, publication 1013 (November 1992), both published by the Citizens Research Council of Michigan.

## Chapter 4

### Implementation and Compliance: The Headlee Amendment. I

#### Sections 26-28: The Revenue Limit.

Statutory implementation of the revenue limit is in sections 350a through 350e of the Management and Budget Act, at MCL 1 8. 1350a and following.

The legislature did not properly implement section 26 until the passage of 1988 PA 504, which required the Department of Management and Budget to first publish an official calculation of the limit by June 30, 1989. DMB calculated the limit at 9.49% of Michigan Personal Income and is now required to publish an annual compliance report.

The revenue limit was almost certainly violated in fiscal year 1985, before the State was required by Statute to annually review its compliance with the limit. Various independent agencies estimated the excess at around \$150 million.<sup>11</sup> The DMB redetermination of the limit, made over a decade after passage of the amendment, concluded that the state stayed in compliance in fiscal 1985 by \$6.1 million dollars, or about 1/100 of 1% of personal income.<sup>12</sup> Given the passage of time, and the retroactive certification, there is no chance for any refund for 1985. However, the proper mechanism is now in place for future enforcement.

By fiscal 1990, the state had built up a cushion above the limit of about \$1.9 billion. Thus, the revenue limit has the current effect of preventing only a major state tax increase. Because of the way the limit is calculated, it can become unusually “tight” or “loose” in years following economic peaks and troughs.<sup>13</sup>

#### II Section 29: The Program Mandate.

Statutory implementation of section 29 is in 1979 PA 101, at MCL 21.23 1 through 2 1.244.

Section 29, the mandate for local program aid, has been violated in intent. The state share of local school funding has fallen significantly since 1979. Where the state paid 45% of K-12 education costs in 1979, it paid only 39% in 1987, after falling to 33% in 1982.<sup>14</sup> This shortfall has clearly pressured local property taxes higher.

School boards have fought to enforce their collective rights under the Headlee amendment, but have been only partially successful. The State argued, in *Durant v State Board of Education* and *Waterford v State Board of Education*, that only a few educational programs, such as Special Education and Drivers Education, are actually “required” by state law and entitled to protection under section 29 of the Headlee Amendment. The State Supreme Court

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11. See, for example, the *1988 Statistical Report*, pp. 13, published by the Senate Fiscal Agency. The SFA calculated a 9.99% limit, and an excess of \$149 million in fiscal 1985. See also *The Michigan Tax Limitation Amendment, Current Status and Issues*, October 1981, Citizens Research Council of Michigan, which warns of the problem; and *The State Constitutional Revenue Limit: Has It Been Exceeded?* February, 1986, Public Sector Consultants, Inc. which concludes that the limit was exceeded.

12. See *Determination of the State Revenue Limit Established in Article IX, Section 26 of the Michigan Constitution*, June 1989, Department of Management and Budget; and editions of the *Statistical Yearbook* for 1989 and later, which adopt the new definition, Senate Fiscal Agency, Lansing Michigan.

agreed in December 1985, concluding that the Constitution (which requires in Article VII section 2 free public education) is not “state law” for the purpose of section 29.

However, the Supreme Court remanded a portion of the case to the Appeals Court for fact finding. That court concluded that the state was violating the constitution:

As the testimony unfolded at trial, it became immediately apparent to the undersigned that from time to time following the passage of the Headlee amendment to the present date, the Department of Education has engaged in a plan or scheme to circumvent the effect of the Headlee amendment.<sup>15</sup>

The Appeals court took over a year to review this report from Judge George Denewith. Finally, on November 5, 1990, they issued their decision, which only partially accepted Judge Denewith's report. The court remanded the case back to Judge Denewith to determine if the state had underfunded certain programs, and if so, to determine the amount of the under funding. Ironically and tragically, Judge Denewith died the same day.

A related case, *Schmidt v Department of Education*, involves 57 school districts that sued in September 1990, seeking to prevent the State from “recapturing” categorical aid to out-of-formula school districts.

The Appeals Court dismissed the suit, claiming that the plaintiffs had failed to state a proper cause of action under the Headlee Amendment. On appeal, the Supreme Court ruled that reducing the state-financed portion of each local unit's mandated services violated the Headlee amendment.<sup>16</sup>

A further controversy over a state law creating “tax base sharing” among school districts resulted in a circuit court decision prohibiting the state from reducing its payments for state-mandated school programs.<sup>17</sup>

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13. Because the limit for each fiscal year cannot be calculated with personal income data for the same year (the data not reported until well after the close of the year), the limit is calculated based on past data. The limit for each fiscal year is the ratio of state taxes in fiscal year 1978-79 divided by personal income in calendar year 1977, (now calculated as 9.49%), multiplied by the personal income from the *prior* calendar year or the average personal income for the past three years. This builds in a lag that can be troublesome when the economy turns from recession to recovery, or vice versa. In fact, the limit was set at exactly such a time, since 1979 was a peak economic year, and the large tax revenue from that year was divided into the personal income data from 1977 (a slower-economy year) to establish the initial ratio at an unusually high level. For a critical discussion, see Edward Gramlich and Gary Woodard, "The Role of Tax Limitation Referenda in State Fiscal Policy," in *Michigan's Fiscal and Economic Structure*, Harvey Brazer, ed., Ann Arbor, University of Michigan, 1982. Calculated on an almost-contemporaneous basis (fiscal year state taxes over personal income for the calendar year ending in the fiscal year), and using US Bureau of the Census definitions, state taxes peaked at 6.5% of Michigan personal income in 1978-79. This ratio dropped to 6.2% in the recession year of 1980-81, and zoomed to 7.2% in 1983-84 when the economy was rapidly growing and the state income tax was increased. By 1990-91, the ratio returned to 6.7%. See *Statistical Yearbook*, Senate Fiscal Agency, Lansing Michigan, 1992.

The local government claims review board, set up by the implementing Statute at MCL 21.240 to review local government grievances under this section, apparently never met during the first 19 years of the amendment.<sup>18</sup>

### **III Section 30: The Minimum Local Share.**

Statutory implementation of the minimum local share requirement is in sections 349, 350 and 388 of the Management and Budget Act, MCL 18. 1349 and following.

Section 30, the local share minimum, was violated in the 1980's by the State's practice of shifting the funding of State-mandated Mental Health programs from State to Local categories. The State gave the local governments funding to cover the expense, then included the amount in the minimum share calculation as State funding. This left other local programs at risk of losing State funds.

Oakland County challenged this practice in Circuit Court, which ruled that the State was violating the Constitution:

The Court finds that the state may not... attribute to local units of government (e.g. Oakland County) that portion of state spending for county mental health services because of a county's refusal to accept responsibility via shared or full management contracts. To do so would violate Article 9, section 30 of the 1963 Constitution. The Legislature cannot repeal a constitutional mandate of the people.<sup>19</sup>

The State appealed to the Court of Appeals, which affirmed the lower court's opinion in July 1989.<sup>20</sup> Before the Supreme Court issued its decision, Governor John Engler and the Oakland County Board of Commissioners agreed on June 13, 1991 to a settlement of the case, which affirmed the decision of the Appeals Court. Under the settlement, the State agreed to stop counting state expenditures to local governments operating state-required

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14. See, for example, the *1988 Statistical Report*, pp. 80-81, published by the Senate Fiscal Agency; base data are from Bulletin 1011, Michigan Department of Education.
  15. State of Michigan, Court of Appeals, *Durant vs. State of Michigan*, No. 91271 (former COA nos. 51431 and 63901), report of Honorable. George R. Denewith, 20 September 1989. Citations for the case include 129 Mich App 517, 424 Mich 364, and 186 Mich App 83.
  16. State of Michigan, Supreme Court, *Schmidt v Department of Education*, No. 90858, 29 September 1992, Mich. The case was remanded for further determination of the required state-share ratios. The court also ruled in this case that FICA (Social Security) taxes paid by local school districts were not a state-mandated activity.
  17. State of Michigan, Circuit Court for the County of Macomb, *Macomb County Taxpayers Association et al vs. L'Anse Creuse Public Schools et al*, No. 91-5119-CZ. The "tax base sharing" law required, under penalty of losing all state aid, school districts to "share" their local property tax revenue with a state-designated agent, for redistribution to other districts. Although the state argued that school districts weren't actually required to make the payments, the tax base sharing law raised questions about the state's compliance with sections 26, 29, and 31 of the Headlee amendment.
  18. Testimony on this point was unclear at the Headlee Blue Ribbon Commission; DMB staff indicated that the Board had an initial organizational meeting sometime after the adoption of the amendment, and then had adjourned for almost two decades. The Board, however, did continue to exist on paper, and individuals were periodically appointed to fill positions on it.

mental health programs as “local” expenditures under section 30, and to review future laws to determine if they have the effect of shifting a tax burden onto local governments. Under the settlement, the state was given until fiscal year 1992-93 to begin complying with the section 30 requirement. The settlement forces the state to allocate over \$400 million a year in additional funds to local governments.<sup>21</sup>

**Section 31: Voter Control of Local Taxes A Property Taxes and Assessment Increases.**

The best-known aspect of the “Headlee” amendment is its limit on property tax increases caused by assessment growth. Michigan’s property taxes are among the highest in the country, and voter frustration with them leads to ongoing involvement with the Headlee amendment.<sup>22</sup>

Statutory implementation of the limit on tax increases caused by assessment growth is in the General Property Tax Act at MCL 211.34d.

The related “Truth in Taxation” law, MCL 21 1.24e, requires public officials to vote on increased property tax revenue, and is discussed below under Section 6.<sup>23</sup>

Section 3 1, which limits tax increases caused by assessment growth on existing property to no more than the rate of inflation, has been undermined by the implementing legislation. The legislature wrote into law a formula that reduced the maximum authorized millage rate when assessments on existing property grew faster than inflation. This reduction is commonly called a “Headlee rollback.” However, the same statutory formula also allows maximum authorized rates to increase without a vote of the people in some instances.<sup>24</sup> These “rollups” are clearly contrary to the amendment, which establishes tax limits that can only be increased with the consent of the electorate.

This circumvention was further exposed by Macomb County prosecuting attorney Carl Marlinga, in an opinion requested by the Macomb County Commissioner Mike Sessa. Marlinga concluded:

The Statute in question MCLA 21 1.34d is unconstitutional because the mechanisms created by the statue can. cause an increase in the tax rate in successive years without a vote of the people contrary to Article 9, sections 25 and 31 of the Michigan Constitution of 1963.<sup>25</sup>

The practice survived a circuit court test in Macomb County in 1992, with the court ruling:

19. State of Michigan, Circuit Court for the *County of Oakland, County of Oakiand v State of Michigan*, No. 85-305141-CZ, opinion of Honorable James S. Thorburn, 4 November 1987.
20. unpublished 1988 Senate Fiscal Agency memorandum, based on DMB reports, indicated the reclassification of over \$400 million in annual mental health expenditures would be partially offset by a then-current-law surplus of \$100 to \$150 million, so the net effect on local governments of the *Oakland County* settlement would be on the order of \$250 million annually.
21. State of Michigan, Court of Appeals, *County of Oakiand v State of Michigan*, No. 104795, opinion of Honorable John H. Gillis and Richard A. Griffin, 5 July 1989; 443 NW2d 805, 178 Mich App. 48. Further citations include appeal granted in part 453 NW2d 256, 434 Mich 900; appeal dismissed and remanded 471 NW2d 619.

[T]he Court holds defendant may raise its maximum allowable millage levy pursuant to the implementing legislation without voter approval and without violating the Headlee amendment provided the maximum allowable millage levy does not exceed the maximum authorized millage rate.<sup>26</sup>

The ruling here reveals exactly the logic used to justify the "roll up": a "maximum" rate can be "maximized" just a little more, as long as it doesn't exceed the "maximum" rate!

The Macomb County "rollup" case has been appealed.

## **V Voter Control of Local Taxes.**

There is no statutory implementation language for the requirements in sections 25 and 31 that local governments submit any new tax to the voters for approval.

The Headlee amendment requirement that voters approve any local tax increase survives a change in legal status approved by the board of a local unit of government. If the board of a general law township votes to become a charter township, it cannot raise its millage rate above that permitted previously by the voters.<sup>27</sup>

Detroit circumvented section 3 1 by creatively redefining a "new" tax. A utility users tax was permitted under a statute pre-dating Headlee, but this Statute expired. The state legislature in 1990 passed a law "reviving" the tax, and Detroit claimed that the new utility tax was not "new" under the Headlee amendment, and therefore did not require a vote of the people.<sup>28</sup> Taxpayers United for the Michigan Constitution sued the City of Detroit. The original Court of Appeals order dismissing the suit was vacated by the Supreme Court on March 29, 1991, and the case was remanded to the Appeals Court. The Appeals Court ruled against the plaintiffs on October 20, 1992, and denied a rehearing on February 8, 1993.<sup>29</sup> An application for leave to appeal to the Supreme Court was filed on March 1, 1993.

### **A. Taxes That Are Not Taxes**

A frustrating trend for taxpayers in recent years has been the proliferation of new local taxes which, to avoid the voter-approval requirement of section 3 1, local units of government

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22. The Advisory Commission on Intergovernmental Relations (ACIR) in Washington DC publishes an annual review of states' "tax capacity" (tax base) and "tax effort" (tax burden). *Measuring State Fiscal Capacity*, 1987 edition (based on 1985 data) indicates that, while Michigan's tax capacity was 6% below the national average, its tax effort was 20% above the national average--fifth highest in the nation. See Nick Khouri's analysis in *Notes on the Economy and the State Budget*, no. 48 (February 1988), published by the Senate Fiscal Agency.

U.S. Census Bureau data from Fiscal Year 1984 show that Michigan's property tax burden was 5.2% of Personal Income--50% higher than the national average, and sixth highest in the nation.

ACIR and HUD data on 1987 effective property tax rates on homes with FHA-insured mortgages show that Michigan's effective tax rate is 2. 1%, fourth highest in the nation, and almost double the national average of 1. 15%. See Khoun and Addonizio, *An Analysis of HJR I*, August 1989, Senate Fiscal Agency, pps. 20ff. Census Bureau data for fiscal year 1987-88 show Michigan's State & Local tax burden the 13th highest in the county, (50 states and the District of Columbia), 6.3% above the national average. Property taxes were the 10th highest in the county, 33% above the national average. See US Census, *State Government Finances*, GF-88-5, table 32.

have labeled “fees” or “charges” or “assessments.” The Section 26 state tax limit relies on a clear and broad definition of state revenues in Section 33, but the amendment contains no definition of “tax” for local units of government. Of course, taxes have been levied by governments since antiquity, and there is no shortage of statute and case law on the subject. However, this has not prevented some units of local government from levying “fees” that are, in all respects but name, taxes.

The most noteworthy example is the use of recycling “fees” to finance new waste disposal services. In many communities, recently-enacted local ordinances require citizens to pay “fees” to a recycling authority, to finance a disposal service. These “fees” are levied on all property within a class (usually residential), regardless of whether the owner or occupant of the property actually uses the service. The “fees” then become a tax lien on the property, and if unpaid, are certified onto the property tax roll for collection in the same manner and at the same time as general property taxes.<sup>30</sup>

There are two major differences between a “fee” and a “tax”: First, fee revenue must be placed in a special fund, which can only be used for the purpose for which the fee was charged. Most or all recycling “fees” meet this test. Secondly, a “fee” must be a voluntary payment made only by those individuals who choose to use the service for which the “fee” is charged. The “fees” in question fail this test, since they are mandatory charges on property, made without regard to usage of the service. In some instances, the ordinances require all individuals to turn over their garbage, neatly sorted, to only the municipally contracted trash hauler, and even provide for inspection of garbage by municipal employees and the imposition of fines and other penalties for noncompliance.<sup>31</sup>

Such government charges are quite different from those made for entry into a public park, the purchase of a lottery ticket, or measured service charge from a municipal utility—all of which are true user fees. They are close, if not indistinguishable, from property taxes.

The Attorney General has demurred on repeated requests for an opinion on this issue, most recently responding that “Research has not disclosed any controlling case law on the question...”<sup>32</sup> However, the Court of Appeals in an earlier East Lansing case, and the Attorney General in an earlier opinion, both provided a good framework for deciding this question in a manner consistent with the plain meaning of the Constitution.<sup>33</sup>

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23. Both these statutes contain extremely complicated formulas, which create considerable confusion for citizens and public officials alike. Two short guides intended for public officials, are *Determining the proper amount of taxes to levy under the Headlee amendment and state law*, by George Stevenson and Richard Walawender, Miller Canfield Paddock and Stone, Detroit, in *Public Corporation Law Quarterly*, 1989 No. 1; and *Headlee Amendment*, by Pearl Holferty, Plante & Moran, Southfield, 1987. The Department of Treasury also distributes an annual statement including the allowed inflation rate for Headlee amendment calculations. Note that these publications describe compliance with the statutory implementation of section 3 1, which allows under certain circumstances an unconstitutional increase in millage rates, as discussed below.

24. The formula is in MCL 211.34(d)7. This confusing section establishes “millage reduction fractions” (MRFs) to reduce millage rates when assessment growth exceeds inflation. However, the formula allows assessment growth that does not exceed inflation to create a MRF higher than 1, thus actually increasing millage rates without a vote of the people.

25. Memorandum to Macomb County Board of Commissioners from Prosecuting Attorney Carl Marlinga, 14 January 1991, page 8.

Without legislation prohibiting “taxes” levied under other guises, this issue will almost certainly end up in litigation.

### **B. Section 32: Enforcing the Amendment**

The legislature implemented section 32 by adding section 308a to the Revised Judicature Act at MCL 600.308a, in 1980. It allowed taxpayers to sue in either the Circuit Court or the Court of Appeals under the Headlee amendment, and established a one-year statute of limitations for taxpayers challenging government actions under the Headlee amendment. In practice, the Court of Appeals normally refers a Headlee case to a Circuit Court. Unfortunately, this has helped established a pattern of delay in the most important cases, since the Circuit Court decisions going against the state are then appealed.

Section 32 of the amendment states that taxpayers have standing to challenge the government in the Court of Appeals to enforce compliance, and that winning plaintiffs shall have their expenses paid by the government. The "costs" that must be reimbursed to successful plaintiffs was obviously intended to include reasonable attorney fees. The State argued in the *Durant* case against including attorney fees as a component of costs. The Appeals Court, following Judge Denewith, concluded in 1990 that such fees must be reimbursed to winning plaintiffs.

[We] find that §32, by defining standing, sets forth a rule by which the rights guaranteed in the other provisions of the Headlee Amendment may be enjoyed and protected...Section 32 is self-executing....

and,

[We] conclude that, in ratifying the Headlee amendment, “the great mass of people themselves” intended the term “cost” to include reasonable attorney fees.<sup>34</sup>

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26. State of Michigan, Circuit Court for the County of Macomb, *Macomb County Taxpayers Association et al vs. Utica Community School District*, No. 91-3755-CZ, opinion of Judge Peter J. Maceroni, 29 June 1992. The court here relied falsely on *Fahnenstiel v Saginaw*, 142 Mich App 46, 368 NW2d 893 (1985) in dismissing the complaints of the taxpayers that the "rollup" of their millage rate violated the constitution. The issue in *Fahnenstiel* was whether Saginaw's reduction and subsequent increase in its tax rate under its charter violated Section 3 1, and the Appeals Court relied on *Bailey v Muskegon County* to determine what taxes were authorized when the Headlee amendment was passed. The "rollup" provision at MCL 211.34d was not even addressed.

27. Opinion of the Attorney General, 1989 No. 6588.

This same principle was also tested in Cascade Township, with the Township agreeing to respect the voters' rights under the Headlee Amendment. On the other hand, if the voters approve a change in legal status that carries with it a new, higher taxing authority, the maximum authorized rate under the Headlee amendment would increase accordingly. See *Smith v Scio Township* (1988) 173 Mich. App. 381.

28. The original or "old" Utility Users Tax was 1970 PA 198, at MCL 141.801; it contained a sunset date of June 1972. The legislature made several subsequent changes, including the extension of the sunset date. The "new" Utility Users Tax was 1990 PA 100, was made to apply retroactively to 1988, and contained no sunset date.

29. *Taxpayers United for the Michigan Constitution, et al v. City of Detroit*, SC No. 89945 on prior appeal, 437 Mich 829 (1991); COA Nos. 130128, 139330, Mich App Oct. 92; rehearing denied Feb. 1993.

The court also upheld the one-year Statute of limitations. In recent settlements, attorney fees were awarded successful plaintiffs.<sup>35</sup>

## **VI Section 6: Voter Approval of Local Debt.**

Section 6, which requires voter approval of bonded indebtedness, has been violated by court-ordered “judgment bonds” to pay for local government debts.<sup>36</sup>

Another circumvention of this requirement is the use of “limited” tax obligation bonds. These bonds purport to escape the voter approval requirement, because they have the backing of the taxpayers only up to the voted millage limits, rather than the unlimited millage that can be levied to pay for a voter-approved bond. Since these bonds create future tax obligations much the same as voter-approved G.O. bonds, there is no justification for a bypass of the voters. In personal terms, they are the equivalent of being a co-signer on a friend's car loan, without having signed the loan.<sup>37</sup>

The most notorious example is the 1989 Troy School Board case, where the voters twice turned down bond financing of a new high school. The school board, on its own, then sold “limited” tax obligation bonds to fund the construction. Legal challenges were dismissed on technicalities, but the citizens successfully recalled the board members who supported the bond sale.<sup>38</sup>

These “limited” obligation bonds may ultimately be subject to voter refusal to pay taxes for their repayment, since they had no voice in the initial borrowing. For example, should a school finance reform law be enacted, which replaced local property tax revenue with a state grant for operations, additional voter-approved taxes would be necessary to repay “limited” obligation bonds. Taxpayers would indeed be reluctant to approve such new taxes to repay borrowings they had no chance to approve.<sup>39</sup>

## **VII Millage Limits.**

Statutory implementation of constitutional millage limits is in the Property Tax Limitation Act, MCL 211.201 and following.

Michigan's constitutional property tax limits have a tortured history of legislative and judicial weakening that goes at least as far back as the 1932 voter-initiated tax limitation

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30. Examples include the cities of Farmington, Farmington Hills, Lansing, and Wixom and the township and village of Milford. Initial attempts to impose a recycling tax have been reconsidered or abandoned in Bloomfield Township, Oxford, Shelby Township, and Novi. controversies over proposed recycling taxes exist in Rochester Hills, Redford and other communities.

For editorial comment, see "Farmington Trashes Taxpayers," 25 September 1991, "The Oakland Trash Revolt," 3 November 1991, and "When a Tax Is Not a Tax," June 6, 1992, all in *The Detroit News*, and "User's fee' a loser," 27 January 1993, *The Spinal Column*.

31. Although beyond the scope of this pamphlet, for a government to require that citizens turn over all their garbage, sorted into categories, to government inspectors raises serious civil liberties questions.

32. Letter to Senator David Honigman from Chief Assistant Attorney General Stanley Steinbom, 18 February 1993. Although reported as supporting the legality of mandatory "fees," an earlier letter from Attorney General Frank Kelley to Senator Gilbert DiNello (dated 11 May 1992) actually only addressed the first difference cited above between a "tax" and a "fee."

amendment to the 1908 Constitution.<sup>40</sup>

**A. “Truth in Taxation”**

The “Truth in Taxation” law, 1982 PA 5, at MCL 21 1.24e, requires local governments to take certain public steps before increasing in local tax revenue beyond that allowed by new construction. This act guarantees that local taxpayers will have access to information on their property taxes, gives them the opportunity to present testimony to their public officials on property taxes, and requires public officials to vote for any increase in taxes beyond that allowed by new construction.

Under Truth in Taxation, local governments must reduce their millage rates to that which would allow them the same revenue as the previous year's millage rate on the previous year's assessments, plus any revenue from new construction. If they wish to receive higher property tax revenue they must take the following steps:

1. Publish a notice, headed “notice of a public hearing on increasing property taxes,” not less than 6 days before the hearing, showing the time, date, and place of the hearing;
2. Include in the notice a statement indicating the proposed additional millage rate that corresponds to the increased revenue to the local unit of government, and the percentage increase it would represent;
3. Receive testimony and discuss the proposed levy of additional millage; and
4. Adopt by separate resolution or ordinance the additional millage rate.

The Statute specifically states that no action of the governing body can increase millage rates beyond that allowed by section 3 1 of the Headlee amendment, as implemented by the

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33. Letter from Patrick Anderson to Stanley Steinborn, 23 July 1992. *In Iriquois Properties v East Lansing*, 160 Mich App 544, 408 NW2d 495, 1ev den 429 Mich 884 (1987), the court held that a true user fee for trash hauling in which property owners who did not choose to use the service were not required to pay the fee) was not a tax. Furthermore, the court added that taxes levied to pay for such a service must be approved by the voters or would be struck down as unconstitutional.

In 1980 OAG 506, the Attorney General concluded that a city could finance an ambulance service either through "fees for services" or through voter-approved taxes, adding that such taxes must be approved by the voters even if they were called "special assessments" in the enabling statute.

34. State of Michigan, Court of Appeals, *Durant v Michigan Dept. of Education*, No. 91271, Opinion of Judges Danhof, Gillis, and MacKenzie, 1B and VI A, Nov. 5, 1990; 463 NW2d 461, 186 Mich App 83. The appeals court ordered that, on remand, the trier of fact “determine an appropriate award of costs to include reasonable attorney fees should he determine that defendants underfunded plaintiff district in violation of §29.”

35. In the settlement to the *Oakland County* case, the state agreed to pay \$50,000 in attorney fees. In the Macomb County tax base sharing case, the plaintiffs attorney was ordered to present a bill for services.

36. This practice is covered in detail *Are Judgement Levies, Judgement Bonds, and Other Taxes Authorized Without Limits Permitted Under the Michigan Constitution?*, (report number 284, May 1987) published by Citizens Research Council of Michigan.

legislature.<sup>41</sup>

### **B. “Headlee” and “Truth in Taxation” Limits Compared**

“Truth in Taxation” creates a stricter limit than section 31 of the “Headlee” amendment, since it only allows new construction to increase tax revenues, and applies to the levied rate even if the levied rate was less than the rate authorized by the voters. “Headlee” allows an inflation increase plus new construction, and applies to the rate authorized by the voters. However, “Truth in Taxation” only requires a public hearing and a vote of the board to increase taxes above the limit. “Headlee” requires a vote of the people.

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#### About the Author

Patrick L. Anderson is President of Anderson Economic Group, a consulting firm in Lansing, Michigan. Before founding his firm, Mr. Anderson served as a deputy budget director for the State of Michigan, and as Chief of Staff for the Michigan Department of State. In the private sector, he was a colleague of Richard Headlee's serving as an officer of Alexander Hamilton Life Insurance Company for six years during Mr. Headlee's tenure as President of that firm. In 1987, Headlee and Anderson founded Taxpayers United for the Michigan Constitution, a nonprofit corporation dedicated to instructing the citizens and policy makers of the state on the tax limitations of the Michigan Constitution. Earlier editions of this work were published by that organization.

Anderson's writings on economic and tax policy have been published in newspapers including the Wall Street Journal, Detroit News, Detroit Free Press, and Cram's Detroit Business; monographs of his have been published by the Heartland Institute of Chicago, the Mackinac Center for Public Policy in Michigan, and the Economic Enterprise Foundation of Detroit. He is currently an adjunct fellow for the Hudson Institute in Indiana.

Patrick Anderson received a Master's Degree in Public Policy, and Bachelor's degree in Political Science, both from the University of Michigan.

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37. The defense of "limited" tax obligation bonds rests on the claim that the taxpayers are liable for only a limited amount. In the personal example of being forced to pay off another person's car loan, you would also be liable for only a "limited" amount. The real question is whether you consented to the liability; individuals consent by signing a loan document, taxpayers by voting.

38. *Taxpayers United for the Michigan Constitution v Troy School District*, Court of Appeals No. 89-1 15 1 193-CZ, Oakland County Circuit Court No. 89 368120 CZ. Related editorials include "The Sack of Troy," The Detroit News 19 February 1989, and "Grab for Voter Dollars Unconscionable in Troy," The Oakland Press, 20 February 1989.

39. See Karen Pierog, "Legislation Seen Hurting Schools' Ability to Issue Limited Tax Bonds in Michigan," The Bond Buyer, 24 February 1993.

40. *Local Property Tax Limitations in Michigan* contains an extensive history.

41. Both "Headlee" and "Truth in Taxation" exclude millage for voter-approved bonds. "Truth in Taxation" also excludes millage for a "building and site fund," which is a potential area of abuse.