

UN-CONSTITUTIONALITY OF REAL PROPERTY TAXATION AND LOCATION INCENTIVES, AND SOME ASSOCIATED ECONOMIC EFFECTS

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Abstract

This article shows that the present regime of real property taxation and location incentives are inherently unconstitutional. The analysis in this article pertains to US state/local laws/regulations governing tax assessment, tax collection, tax foreclosures and incentives offered to firms to relocate to states (although much of it is applicable in most common law jurisdictions).

Keywords: Constitutional law; real property taxation; urban economics; location incentives; macro-economics

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Introduction

Real Property Taxation is a major element of municipal finance - most towns in the US generate more than 30% of their annual revenues from real property taxes. The purchase/sale of real property and the analysis/prediction of trends in real estate markets and housing markets are also affected by real property tax dynamics.

State governments in many developed countries routinely offer location incentives to coerce firms to relocate. These incentives are typically in the form of full or partial exemptions from real property taxes, Tax Credits, grants, Research & Development Tax Credits, Investment Tax Credits, Sales Tax abatements, etc.⁵⁸

The analysis in this article pertains to US state/local laws/regulations governing real property tax assessment, tax collection, tax foreclosures and location Incentives. US States generally have broad discretion in tax policy⁵⁹. Unfortunately, there has been relatively little legal research about the constitutionality⁶⁰ of real property taxation, and

⁵⁸ See: Enrich P (December 1996). Saving The States From Themselves: Commerce Clause Constraints On State Tax Incentives For Business. *Harvard Law Review*, 110(2):377-468.
See: Vanistendael F (1996). *Legal Framework For Taxation*. Chapter Two In Thuronyi V (ed.), "Tax Law Design And Drafting", Volume One, International Monetary Fund.
See: Hale D (1985). The Evolution Of The Real Property Tax: A Study Of The Relation Between Public Finance And Political Theory. *Journal of Politics*, 47(2):382-404.
See: Nechyba T (1997). Local Property And State Income Taxes: The Role Of Interjurisdictional Competition And Collusion. *Journal of Political Economy*, 105:351-384.
See: Hellerstein W (June 1996). Commerce Clause Restraints On State Tax Incentives. *The Region* (Federal Reserve Bank Of Minneapolis).
See: *Complete Auto Transit v. Brady*, 430 US 7274 (1977).
See: *Tyler Pipe Industries v. Department Of Revenue*, 438 US 232 (1987).
See: *Armco v. Hardesty*, 467 US 638 (1984).
See: *C&A Carbone v. Town Of Clarkstown*, 114 S.Ct. 1677 (1994).
See: *Fort Gratiot Sanitary Landfill Inc. v. Michigan Department Of Natural Resources*, 504 US 353 (1992).
See: *Nippert v. City of Richmond*, 327 US 416 (1946).
See: DeLysa B (1992). Becoming Competitive: How Policy Makers View Incentive-Based Development Policy. *Economic Development Quarterly*, 6:14-20.

See: Burstein M & Rolnick A (1994). Congress Should End The Economic War Among The States. *The Region*, (Federal Reserve Bank Of Minneapolis, Annual Report), 9(3):3-6.
See: Hellerstein W (1995). Commerce Clause Restraints On State Taxation After Jefferson Lines. *Tax Law Review*, 51:47-57.
See: Hellerstein W (1994). *West Lynn Creamery Inc. v. Healy* And The Constitutionality Of State Tax Incentives: A Preliminary Analysis. *State Tax Notes*, 7:1182-1190.
See: Zelinsky E (2002). Restoring Politics To The Commerce Clause: The Case For Abandoning The Dormant Commerce Clause Prohibition On Discriminatory Taxation. *Ohio Northern University Law Review*, 29:29-39.
See: Choper J & Yin T (1998). State Taxation And The Dormant Commerce Clause: The Object-Measure Approach. *The Supreme Court Review*, 1998:193-245.
⁵⁹ See: *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).
See: *Kahn v. Shevin*, 416 U.S. 351 (1974).
See: *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974).

⁶⁰ On constitutionality in general, see:
See: Alexander F. S. (2000). Constitutional Questions About Tax Lien Foreclosures. *Government Finance Review*, 16:27-32.
See: Alexander F (2000). Tax Liens, Tax Sales And Due Process. *Indiana Law Journal*, 75: 747-807.
See: Alexander F S (1995). Property Tax Foreclosure Reform: A Tale of Two Stories. *Georgia Bar Journal*, _____.
See: Levinson D. (2002). Framing Transactions In Constitutional Law. *Yale Law Journal*, 111:13111-1322.
See: Hirsch W (1994). An Economic Analysis Of The Constitutionality Of State Preference Laws. *International Review Of Law & Economics*, 14:299-306.
See: Cotlar A (Jan. 2003). Say Cheese: The Constitutionality Of State-Mandated Free Airtime On Public Broadcasting Stations. *Federal Communications Law Journal*, 56(1):55-70.
See: Nimmer M B (1958). The Constitutionality Of Official Censorship Of Motion Pictures. *University Of Chicago Law Review*, .

associated political economy issues.⁶¹ Constitutional law issues seem to be very much intertwined with

See: Dunbar W (Feb. 1901). The Constitutionality Of The US Inheritance Tax. *Quarterly Journal Of Economics*, 15(2):292-298.
See: Thomas S A (2003). Re-Examining The Constitutionality Of The Remittitur Under The Seventh Amendment. *Ohio State Law Journal*, _____.
See: Huhn W (2004). Assessing The Constitutionality Of Laws That Are Both Content-Based And Content Neutral: The Emerging Constitutional Calculus. *Indiana Law Journal*, 79:801-810.
See: White D B (1939). Unfair Competition: The Constitutionality Of California Unfair Practices Act. *California Law Review*, 27(4): 449-458.

⁶¹ **See:** Tate C (1990). The Constitutionality of State Attempts To Regulate Foreign Investment. *Yale Law Journal*, 99(8):2023-2042.
See: Wunderlich G (1997). Land Taxes In Agriculture: Preferential rate And Assessment Effects. *American Journal of Economics & Sociology*, 56(2): 215-228.
See: Houghton K & Hellerstein W (2000). State Taxation Of Electronic Commerce: Perspectives On Proposals For Change And Their Constitutionality. *Brigham Young University Law Review*, 1:9-24.
See: Hellerstein (1996)(*Supra*).
See: Alexander F S (2000). Tax Liens, Tax Sales And Due Process. *Indiana Law Journal*, 75:746-756.
See: Choper & Yin (1998)(*Supra*).

See: Chicoine D., Sonka S. & Doty R. (1982). The Effects of Farm Property Tax Relief Programs on Farm Financial Conditions, *Land Economics*, 56:516-523.

See: Comment (1989). Liberalizing Kansas Real Property Tax Exemptions: The 1988 Legislation. *University of Kansas Law Review*, 37:597-619.

See: Collins R. (1988). Economic Union As A Constitutional Value, *New York University Law Review*, 63:43-47.

See: Hirsch W (1994). An Economic Analysis Of The Constitutionality Of State Preference Laws. *International Review Of Law & Economics*, 14:299-306.

See: Zelenak L (1999). Radical Tax Reform, The Constitution And The Conscientious Legislator. *Columbia Law Review*, 99(3):833-856.

See: Nakamura M (1990). Freedom Of Economic Activities And The Right To Property. *Law And Contemporary Problems*, 53(2):1-12.

See: Van Schalkwyk L (2004). Constitutionality And The Income Tax Act - Revisited. *Meditari Accountancy Research*, 12(2): 185-201.

See: Bryson P & Comia G (2003). Moral Hazard In property Tax Administration: A Comparative Analysis Of The Czech And Slovak Republics. *Comparative Economic Studies*, 45(1): 44-62.

See: Cypher M & Hansz A (December 2003). Does Assessed Value Influence Market Value Judgments? *Journal of Property Research*, 20(4): 305-318.

See: Sacher S (1993). Housing Demand And Property Tax Incidence In A Life Cycle Framework. *Public Finance Review*, 21(2): 235-259.

See: McCluskey W, Almey R & Rohlickova A (1998). The Development Of Property Taxation In The New Democracies Of Central And Eastern Europe. *Property Management*, 16(3): 145-159.

See: Adern W (2000). Managing And Reducing Corporate Real Estate Taxes. *Journal Of Corporate Real Estate Taxes*, 2(3): 221-29.

See: Enrich P (December 1996). Saving The States From Themselves: Commerce Clause Constraints On State Tax Incentives For Business. *Harvard Law Review*, 110(2):377-468.

See: Vanistendael F (1996). *Legal Framework For Taxation*. Chapter Two In Thuronyi V (ed.), "Tax Law Design And Drafting", Volume One, International Monetary Fund.

See: Hale D (1985). The Evolution Of The Real Property Tax: A Study Of The Relation Between Public Finance And Political Theory. *Journal of Politics*, 47(2):382-404.

economic issues pertaining to real property taxes and location incentives⁶². There have been some studies of the constitutionality of location incentives – these studies have provided mixed conclusions – in almost all cases, while the US Supreme Court cases effectively invalidated all location incentives, the authors proffered alternative basis for legality of

⁶² **See:** Tate (1990)(*supra*).

See: Hellerstein (June 1996). *Supra*.

See: Houghton K & Hellerstein W (2000). State Taxation Of Electronic Commerce: Perspectives On Proposals For Change And Their Constitutionality. *Brigham Young University Law Review*, . .

See: Byrne P (2006). Determinants Of Property Value Growth For Tax Increment Financing Districts. *Economic Development Quarterly*, 20(4): 317-329.

See: Gihring T (1999). Incentive Real Property Taxation: A Potential Tool For Urban Growth Management. *Journal of The American Planning Association*, 65(1): 62–79.

See: Hale D (1985). The Evolution Of The Real property tax: A Study Of The Relation Between Public Finance And Political Theory. *Journal of Politics*, 47(2):382-404.

See: Tushnet M (2003). The Issue Of State Action/Horizontal Effect In Comparative Constitutional Law. *International Journal Of Constitutional Law*, 1(1):79-98.

See: Banks J (1992). State Constitutional Analyses Of Public School Finance Reform Cases: Myth Or Methodology. *Vanderbilt Law Review*, 45:129-160.

See: Fischel W (April 2000). *Municipal Corporations, Homeowners And The benefit View of The Real property tax*. Conference On Real Property Taxation And Local Government Finance, Paradise Valley, Arizona, January 16-18, 2000.

See: Cornia G & Slade B (2005). Real Property Taxation Of Multifamily Housing: An Empirical Analysis Of Vertical And Horizontal Equity. *The Journal of Real Estate Research*, 27(1): 17-46.

See: Davig T (2004). Regime-Switching Debt And Taxation. *Journal Of Monetary Economics*, 51:837-859.

See: Gervais M (2003). Housing Taxation And Capital Accumulation. *Journal Of Monetary Economics*, 49(7):1461-1489.

See: McGuire R & Van Cott N (2003). A Supply And Demand Exposition Of A Constitutional Tax Loophole: The Case Of tariff Symmetry. *Constitutional Political Economy*, 14:39-45.

See: Poterba J. (1984). Tax Subsidies To Owner-Occupied Housing: An Asset Market Approach. *Quarterly Journal of Economics* (November), pp. 729-752.

See: Rubinfeld D. & Polinsky M. (April 1978). The Long-Run Effects Of A Residential Real Property Tax And Local Public Services. *Journal Of Urban Economics*, pp. 241-262.

See: Mikesell J (1980). Real Property Tax Re-Assessment Cycles: Significance For Uniformity And Effective Rates. *Public Finance Review*, 8(1):23-37.

See: Byrne P (2006). Determinants Of Property Value Growth For Tax Increment Financing Districts. *Economic Development Quarterly*, 20(4): 317-329.

See: Fischel W (April 2000). *Municipal Corporations, Homeowners And The benefit View of The Real property tax*. Conference On Real Property Taxation And Local Government Finance, Paradise Valley, Arizona, January 16-18, 2000.

See: Glaeser E (1996). The Incentive Effects Of Real Property Taxes On Local Governments. *Public Choice*, 89: 93-111.

See: Moomau P & Morton P (1992). Revealed Preferences For Real property taxes: An Empirical Study Of Perceived Tax Incidence. *Review Of Economics & Statistics*, 74:176-179.

See: Nechyba T (1997). Local Property And State Income Taxes: The Role Of Interjurisdictional Competition And Collusion. *Journal of Political Economy*, 105:351-384.

See: Einhorn R (2001). Species Of Property: The American Property-Tax Uniformity Clauses Re-Considered. *Journal of Economic History*, 61(4):974-984.

See: Vlassenko (2001)(*Supra*).

location incentives – but unfortunately, the reasons proffered often don't have any basis in fact or law.

Real Property Taxation As A Violation Of The Due Process Clause (Procedural and Substantial).

In most US jurisdictions/towns, real property taxation constitutes a violation of the Due Process Clause (Procedural and Substantial).⁶³ The state actions involved are the property appraisal, determination of applicable tax, billing, collection of taxes and processing of any tax liens⁶⁴.

The process of setting real property taxes involves property appraisal by government appraisers, which is typically not subject to any appeal. In many cases, these appraisers are not MAIs, and their experience may be questionable. Typically, there are no state laws governing appraisal methods for such valuations – and various appraisal methods (income, sales, replacement cost, discounted cash flow, or liquidation value) may produce drastically different values. Several studies have shown that such property appraisals have significant information effects (perceptions of prices, investor psychology, reinforcement, anchoring effects, etc.) and create moral hazard problems.⁶⁵ Hence, such procedures are

grossly inadequate for protecting the rights of property owners and constitutes violations of both the procedural and substantive due process rights of property owners.

Real property taxation may also constitute violations of the substantive due process doctrine where: **1)** the real property tax rate differs substantially from those of similar towns in the same geographic area; or **2)** any changes to real property taxes are not preceded by public hearings; or **3)** the procedure for assessment of real property taxes and or any tax appeal, differs dramatically from those in neighboring towns; or **4)** tax assessments for different properties are not re-evaluated at the same time or in the same manner; or **5)** the real property tax rate differs drastically by property type; or **6)** municipalities use differential classifications of property which results in widely disparate tax levels for even similar properties⁶⁶.

Many issues pertaining to notice requirements in tax lien foreclosures are discussed in Alexander (2000)⁶⁷ - the notice provisions for tax lien foreclosure in many US jurisdictions are often

⁶³ See: Tate (1990). *Supra*.

See: Wunderlich G (1997). Land Taxes In Agriculture: Preferential Rate And Assessment Effects. *American Journal of Economics & Sociology*, 56(2): 215-228.

See: Houghton & Hellerstein (2000)(*Supra*).

See: Alexander (2000)(*Supra*).

See: Hale (1985)(*Supra*).

See: Glaeser (1996)(*Supra*).

See: Vlassenko (2001)(*Supra*).

See: Zelinsky (1998)(*Supra*).

⁶⁴ See: *Evans v. Newton*, ___ US ___ (1966).

See: *Evans v. Abney*, ___ US ___ (1970).

See: *Burton v. Wilmington*, ___ US ___ (1971).

See: *Moose Lodge v. Irvis*, ___ US ___ (1972).

See: *Edmonson v Leesville Concrete*, ___ US ___ (1991).

See: Tushnet M (2003). The Issue Of State Action/Horizontal Effect In Comparative Constitutional Law. *International J. Of Constitutional Law*, 1(1):79-98.

See: *Marsh v. Alabama*, ___ US ___ (1946).

See: *Screws v. US*, 325 US 91 (___).

See: Ellman S. (2001). Constitutional Confluence: American "State Action; Law And The Application Of South Africa's Socio Economic Rights Guarantees To Private Actors. *New York Law School Law Review*, 45: _____.

See: Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, Michigan Law Review, 102: 387-398 (2003).

See: Stephen Gardbaum, Where The (State) Action Is, *Int. J. Constitutional Law*, 4:760-779.

See: Currie D (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.

See: Goldberg J (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.

⁶⁵ See: Bryson P & Comia G (2003). Moral Hazard In Property Tax Administration: A Comparative Analysis Of The Czech And Slovak Republics. *Comparative Economic Studies*, 45(1): 44-62.

See: Cypher M & Hansz A (December 2003). Does Assessed Value Influence Market Value Judgments? *Journal of Property Research*, 20(4): 305-318.

See: Sacher S. (1993). Housing Demand And Property Tax Incidence In A Life Cycle Framework. *Public Finance Review*, 21(3): 235-259.

See: Wunderlich G (1997). Land Taxes In Agriculture: Preferential Rate And Assessment Effects. *American Journal of Economics & Sociology*, 56(2): 215-228.

See: McCluskey W, Almey R & Rohlickova A (1998). The Development Of Property Taxation In The New Democracies Of Central And Eastern Europe. *Property Management*, 16(3): 145-159.

See: Adern W (2000). Managing And Reducing Corporate Real Estate Taxes. *Journal Of Corporate Real Estate Taxes*, 2(3): 221-29.

See: Mikesell J (1980). Real Property Tax Re-Assessment Cycles: Significance For Uniformity And Effective Rates. *Public Finance Review*, 8(1):23-37.

See: Byrne P (2006). Determinants Of Property Value Growth For Tax Increment Financing Districts. *Economic Development Quarterly*, 20(4): 317-329.

See: Fischel W (April 2000). *Municipal Corporations, Homeowners And The benefit View of The Real property tax*. Conference On Real Property Taxation And Local Government Finance, Paradise Valley, Arizona, January 16-18, 2000.

See: Glaeser E (1996). The Incentive Effects Of Real Property Taxes On Local Governments. *Public Choice*, 89: 93-111.

See: Nechyba T (1997). Local Property And State Income Taxes: The Role Of Interjurisdictional Competition And Collusion. *Journal of Political Economy*, 105:351-384.

⁶⁶ See: Alexander (2000:754)(*supra*).

⁶⁷ See: Alexander (2000:751)(*supra*).

See: Tatarowicz P & Mims-Velarde R (1986). An Analytical Approach To State Tax Discrimination Under The Commerce Clause. *Vanderbilt Law Review*, 39:879-885.

See: Nicholson B & Mota S (2005). The Dormant Commerce Clause Rises Again: *Cuno v. Daimler Chrysler*. *Houston Business & Tax Law Journal*, 2005:321-330.

See: Zelenak L (1999). Radical Tax Reform, The Constitution And The Conscientious Legislator. *Columbia Law Review*, 99(3):833-856.

See: Nakamura M (1990). Freedom Of Economic Activities And The Right To Property. *Law And Contemporary Problems*, 53(2):1-12.

inadequate and violate the Due Process Clause of the US Constitution.

In some US jurisdictions, tax lien foreclosure processes don't involve any adversarial hearings.⁶⁸ This lack of a structured process for what is effectively a transfer of ownership, constitutes a violation of the procedural due process doctrine.⁶⁹ The government has an interest in using processes/procedures that are fair and efficient in order to maximize social welfare and reduce overall transaction costs. However, property owners also have legitimate property interests in a having hearing before deprivation of their property, and also have interests in fair and efficient procedures for transfers of assets and for adjudication of claims on their property – such property interests arise from state constitutional law, state laws, expectations and norms. The property owners' property interests far outweigh the state's interest in applying supposedly cost-effective procedures for tax lien foreclosures. The primary issues are that: a) the probability of unjust outcomes are very high under the present regime of tax lien foreclosures; b) the cost of correcting errors arising from application of deficient procedures, is very substantial; c) the collective information effects, economic effects and psychological effects on market participants is not justified by any cost savings achieved by the use of such unfair foreclosure procedures.

Real Property Taxation By US Municipalities Constitutes Violations of The Equal Protection Clause of The US Constitution.

The existing regimes of real property taxation constitutes violations of the Equal Protection doctrine because they unfairly discriminate between parties that have different types of ownership interest in the same property.⁷⁰ The state action involved is the discrimination by the government in the application of tax laws⁷¹.

⁶⁸ See: Alexander (2000)(*supra*).

⁶⁹ See: *Fuentes v. Shevin*, 407 US 67 (1972).

See: *Sniadach v. Family Finance Corp.*, 395 US 337 (1969).

See: *US v. James Daniel Good Real Property*, 510 US 43 (1993).

See: *Matthews v. Eldridge*, 424 US 319 (1976).

⁷⁰ See: *FCC v. Beach Communications Inc.*, 508 US 307 (1993)(legislative classifications within the context of governmental purposes).

See: *McGowan v. Maryland*, 366 US 420 (1961).

See: *Williamson v. Lee Optical Co.*, 348 US 483 (1955)(economic regulation).

See: *Dandridge v. Williams*, 397 US 471 (1970)(allocation of state resources).

See: *Plyer v. Doe*, 457 US 202 (1982).

See: *Newport New Shipbuilding & Dry Dock Co. v. EEOC*, 462 US 669 (1983).

⁷¹ See: *Evans v. Newton* (1966)(*Supra*).

See: *Evans v. Abney* (1970)(*Supra*).

See: *Burton v. Wilmington* (1971)(*Supra*).

See: *Moose Lodge v. Irvis* (1972)(*Supra*).

Real property taxation is usually administered at the municipal/local level; although most of the governing laws are promulgated at the state level. However, the real property taxation systems in the US are based on fee-simple ownership of property – the laws assume that there is only one type of ownership interest. That is, the real property taxes are billed to the fee-simple owner(s) of the property, who retains final responsibility for payment of such taxes. This tax system was reasonable several hundred years ago, when there were no sophisticated financial instruments; but in the current environment where there are many financial instruments (leases, contracts, derivatives/options, participations) which essentially bestows all benefits/risks of ownership to parties other than the fee-simple owner, this tax system results in a drastically different economic reality than was intended by real property tax laws.

For purposes of equal protection analysis, there is a necessary classification between the fee-simple owner of the property, and all other parties that own other types of interests in the property. This classification is relevant and advances legitimate government interests, because most regulation is based on this classification, and there is a need to define the absolute owner of the property in the normal course of events.

A property owner that is overtaxed or taxed inappropriately has certain statutory legal remedies. Hence, with the advent of these new financial instruments, entities/persons who have substantial interests in property (but are not fee-simple owners) are not afforded the same level of legal protection as the fee-simple owner, even where both parties have the same economic magnitude of property interests. Furthermore, the tradeoff between the level of legal protection and the magnitude of the property interest/right is not symmetrical or constant. ie. $\partial y/\partial x \neq 1$; $\partial^2 y/\partial x^2 < 1$; where y = the magnitude of protection provided by laws, and x = the magnitude of the property interest in the asset.

Most Real Property Tax laws in the US are typically 'proportional' - the magnitude of real property taxes was intended to vary with the assessed value and market value of the subject property. This proportionality rule is a form of protection for property owners, which can be traced back in English jurisprudence and tax law drafting for several hundred years⁷². With the advent of new financial

See: *Edmonson v Leesville Concrete* (1991)(*Supra*).

See: Tushnet M (2003). The Issue Of State Action/Horizontal Effect In Comparative Constitutional Law. *International J. Of Constitutional Law*, 1(1):79-98.

See: *Marsh v. Alabama* (1946)(*Supra*).

See: *Screws v. US* (____)(*Supra*).

See: Ellman (2001)(*Supra*).

See: Gardbaum S (2003). The "Horizontal Effect" of Constitutional Rights. *Michigan Law Review*, 102: 387-398.

See: Gardbaum S. (2006). Where The (State) Action Is. *International Journal of Constitutional Law*, 4(4):760-779.

⁷² See: Vlassenko (2001)(*supra*).

instruments, real property taxation is no longer proportional. Hence property owners who don't have the knowledge/opportunity/sophistication to enter into value enhancing contracts, will effectively lose the equal protection afforded by proportionality – this consequence of the existing real property tax regime constitutes a violation of the Equal Protection Clause of the US Constitution.

The process of setting and collecting real property taxes maybe deemed violations of the Equal Protection clause of the US constitution, where: 1) such processes differ from generally accepted standards in similar towns in the same state, 2) the protections (provided to property-owners and the public) in such processes are insufficient within the context of state/federal statutes and common laws, 3) the processes conflict with existing laws.

Real Property Taxation And Tax-Based Location-Incentives Constitute Violations Of The *Interstate Commerce Clause*.

The state action involved are as follows: a) real property taxation processes, and b) the granting of location incentives to companies.⁷³ Real property taxation by US municipalities and the provision of tax-based Location-Incentives by states/municipalities constitute violations of the Interstate Commerce Clause of the US Constitution for several reasons⁷⁴.

Firstly, ownership/control, financing and sale/purchase of real property often involves interstate commerce; and hence, given the *Commerce Clause*, one possible theory is that real property-taxation laws should be promulgated by the US Congress and not

states/municipalities⁷⁵ because: **a)** uniformity of real property taxation drastically reduces transaction costs and also reduces divergencies in property valuation (all of which increase social welfare); **b)** real property taxation is a major source of funds for towns/states. However, the real property tax is a direct tax, and under Article One of the US Constitution, direct taxes must be levied by the rule of apportionment, which effectively precludes levy of any federal real property tax.⁷⁶

More importantly, real property taxes unduly burdens interstate commerce and interstate relationships. Since real property tax laws which are enacted at the state level (assessment, collections, enforcement, etc.) vary dramatically among states and even within states, and because the real property tax laws can be complicated, the existence and application of real property taxes increases transaction costs in interstate transactions. In interstate transactions, a) more effort is required (compared to intra-state transactions) to decipher basis of tax assessment, real property taxes due in the future and procedures/laws for tax liens; b) there are higher monitoring costs – to ensure compliance and if necessary, appeals; c) some lenders charge higher transaction fees and interest rates for out-of-state real property transactions and such higher fees are based on real property tax differentials. Real property taxes affect acquisitions/sales of property – any delinquencies creates automatic liens that cloud title. Hence, real property taxes places greater burdens on out-of-state goods/activities/enterprises than on competing in-state goods/activities/enterprises, and is a violation of the Commerce Clause.

Furthermore state real property tax incentives and location-incentives clearly violate the Commerce Clause of the US Constitution.⁷⁷ Such incentives are

See: Vanistendael F (1996). *Legal Framework For Taxation*. Chapter Two In Thuronyi V (ed.), "Tax Law Design And Drafting", Volume One, International Monetary Fund.

⁷³ See: *Evans v. Newton* (1966)(*Supra*).

See: *Evans v. Abney* (1970)(*Supra*).

See: *Burton v. Wilmington* (1971)(*Supra*).

See: *Moose Lodge v. Irisv* (1972)(*Supra*).

See: *Edmonson v Leesville Concrete* (1991)(*Supra*).

See: Tushnet M (2003). The Issue Of State Action/Horizontal Effect In Comparative Constitutional Law. *International J. Of Constitutional Law*, 1(1):79-98.

See: *Marsh v. Alabama* (1946)(*Supra*).

See: *Screws v. US* (____)(*Supra*).

See: Ellman (2001)(*Supra*).

See: Gardbaum (2003)(*Supra*).

See: Currie (1986)(*Supra*).

See: Goldberg (2005)(*Supra*).

⁷⁴ See: *Western & Southern Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 667 (1981)(reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose).

See: *Jones v. Flowers*, 04-1447, (US Supreme Court, 4/26/06)(sufficiency of notice for tax sale).

See: *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)(When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute without further inquiry).

⁷⁵ See: Einhorn R (2001). Species Of Property: The American Property-Tax Uniformity Clauses Re-Considered. *Journal of Economic History*, 61(4):974-984.

See: Alexander (2000)(*Supra*).

See: Smith M (1986). State Discrimination Against Interstate Commerce. *California Law Review*, 74(4): 1203-1257.

See: Byrne (2006)(*Supra*).

See: Mikesell (1980)(*Supra*).

⁷⁶ See: Hellerstein (1996)(*Supra*).

⁷⁷ See: Frickey P (June 1996). The Congressional Process And The Constitutionality Of Federal Legislation To End The Economic War Among The States. *The Region – Federal Reserve Bank Of Minneapolis*, pp. 58-59.

See: Mazerov M (June 30, 2005). *Should Congress Authorize State To Continue Giving Tax Breaks To Businesses ?* Working Paper, Center On Budget And Policy Priorities, Washington, DC.

See: Hellerstein W & Coenen D (1996). Commerce Clause Restraints On State Business Development Incentives. *Cornell Law Review*, 81:789-799.

See: Tatarowicz P & Mims-Velarde R (1986). An Analytical Approach To State Tax Discrimination Under The Commerce Clause. *Vanderbilt Law Review*, 39: 879-929.

See: McCarthy L. (2007). The Commerce Clause As A Constraint On Wasteful Business Incentives: Road Block Or Bump In The Road In The 'Race To The Bottom' ? *Tijdschrift voor Economische en Sociale Geografie*, 98(4): 482-492.

typically in the form of exemptions from payment of real property taxes for a pre-specified period of time, Incentive Tax Credits, Research & Development Tax Credits, etc.. Hellerstein (1996)⁷⁸, Enrich (December 1996) and Choper & Yin (1998)⁷⁹ provide succinct analysis of some of the issues. The key cases are *New Energy Co. v. Limbach*⁸⁰; *Oregon Waste Systems v. Department of Environmental Quality*⁸¹; *Boston Stock Exchange v. State Tax Commission*⁸²; *Bacchus Imports v. Dias*⁸³. These key cases must be construed and interpreted liberally, and their common holding is that state tax-based incentives are unconstitutional. Such interpretation of US Supreme Court case law is justified because: **a)** the interpretation is in line with the legislative intent of the Commerce Clause (and the passage of time, or changes in the structure of the US economy, or changes in business norms have not rendered such legislative intent moot or inapplicable or irrelevant); **b)** the economic realities of such transactions are in line with the outcomes of such liberal interpretations of US Supreme court case law – the real property tax incentives create very strong economic incentives for state/municipal governments to discriminate in favor of in-state commerce and in-state entities; **c)** the *dormant Commerce Clause* policy is not applicable because the issue involves substantial discrimination with significant economic

impact, **d)** the tax incentives implicate the coercive powers of the state.

Hellerstein (1996)⁸⁴ attempts to make a distinction between real property tax incentives that are reductions of existing tax liability, and on the other hand, real property tax incentives that are exemptions from, or reductions of additional tax liability to which the tax payer would be subjected, only if the tax payer were to engage in the targeted activity. This distinction has no basis in fact or law, and both circumstances are economically similar.

Provision Of Location Incentives By US States And Municipalities Constitutes Violations Of The Equal Protection Clause Of The US Constitution

The existing regimes of location incentives constitutes violations of the Equal Protection doctrine because such incentives unfairly discriminate between in-state entities and similarly situated out-of-state entities.⁸⁵ The state action involved is the actual granting of location incentives to out-of-state companies⁸⁶. In the US, Location Incentives are typically granted by US state governments and or state legislatures, and are sometimes implemented at the municipal/local level.⁸⁷ Location incentives typically arise from temporary or permanent differentials in state taxation of corporate entities and their transactions - different

See: Hickman K (2006). *DaimlerChrysler Corp. v. Cuno* And The Constitutionality Of State Tax Incentives For Economic Development. *The Journal Of The Federalist Society's Practice Groups*, 7(1):4-8.

See: Shaviro D (1992). An Economic And Political Look At Federalism In Taxation. *Michigan Law Review*, 90(5):895-991.

See: Michael J (1985). The Constitutionality Of Minnesota's Business Tax Credits After *Westinghouse Electric Corp.* *Journal Of State Taxation*, 4:1-10.

See: Hirsch W (1994). An Economic Analysis Of The Constitutionality Of State Preference Laws. *International Review Of Law & Economics*, 14:299-306.

⁷⁸ **See:** Hellerstein (1996)(*Supra*).

⁷⁹ **See:** Choper J & Yin T (1998). State Taxation And The Dormant Commerce Clause: The Object-Measure Approach. *Supreme Court Review*, 1998:193-245.

See: Enrich P (December 1996). Saving The States From Themselves: Commerce Clause Constraints On State Tax Incentives For Business. *Harvard Law Review*, 110(2):377-468.

See: Smith (1986)(*Supra*).

See: Zelinsky E (1998). Are Tax "Benefits" Constitutionally Equivalent To Direct Expenditures ?. *Harvard Law Review*, 112(2): 379-389.

See: *New Energy Co. v. Limbach*, 486 US 269 (1988);

See: *Oregon Waste Systems v. Department of Environmental Quality*, 114 SCt 1345 (1994).

See: *Boston Stock Exchange v. State Tax Commission*, 429 US 318 (1977).

See: *Bacchus Imports v. Dias*, 468 US 263 (1984).

See: *Freeman v. Hewitt*, 329 US 249 (1946).

⁸⁰ *New Energy Co. v. Limbach*, 486 US 269 (1988).

⁸¹ *Oregon Waste Systems v. Department of Environmental Quality*, 114 SCt 1345 (1994).

⁸² *Boston Stock Exchange v. State Tax Commission*, 429 US 318 (1977).

⁸³ *Bacchus Imports v. Dias*, 468 US 263 (1984).

⁸⁴ **See:** Hellerstein (1996)(*Supra*).

⁸⁵ **See:** *FCC v. Beach Communications Inc.*, 508 US 307 (1993)(legislative classifications within the context of governmental purposes).

See: *McGowan v. Maryland*, 366 US 420 (1961).

See: *Williamson v. Lee Optical Co.*, 348 US 483 (1955)(economic regulation).

See: *Dandridge v. Williams*, 397 US 471 (1970)(allocation of state resources).

See: *Plyer v. Doe*, 457 US 202 (1982).

See: *Newport New Shipbuilding & Dry Dock Co. v. EEOC*, 462 US 669 (1983).

⁸⁶ **See:** *Evans v. Newton* (1966)(*Supra*).

See: *Evans v. Abney* (____)(*Supra*).

See: *Burton v. Wilmington* (1971)(*Supra*).

See: *Moose Lodge v. Irvis* (1972)(*Supra*).

See: *Edmonson v. Leesville Concrete* (1991)(*Supra*).

See: Tushnet M (2003). The Issue Of State Action/Horizontal Effect In Comparative Constitutional Law. *International J. Of Constitutional Law*, 1(1):79-98.

See: *Marsh v. Alabama* (1946)(*Supra*).

See: *Screws v. US* (____)(*Supra*).

See: Ellman (2001)(*Supra*).

See: Gardbaum (2003)(*Supra*).

See: Gardbaum (2006)(*Supra*).

See: Currie D (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.

See: Goldberg J (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.

⁸⁷ **See:** Enrich (December 1996; Notes 47 & 48)(*supra*).

See: Smith M (1986). State Discrimination Against Interstate Commerce. *California Law Review*, 74(4): 1203-1257.

US states have different laws pertaining to real property transactions, corporations and taxation.⁸⁸

For purposes of equal protection analysis, there is a necessary classification between in-state and out-of-state entities. This classification advances legitimate government interests, partly because most applicable government regulations are based on this classification. The state governments have significant interests in attracting out-of-state companies and business to their jurisdiction – in order to create jobs, stimulate their economies and earn tax revenues. However, there are certain economic and social problems inherent in attracting out-of-state companies to relocate⁸⁹: a) in-coming companies sometimes displace workers employed by in-state companies – by automation, greater efficiency, economies of scale, outsourcing and or reorganizations; b) the tax revenues earned from in-coming companies are sometimes much less than the tax incentives provided to them by the state government; c) in-coming companies sometimes consume more resources than the state can affordably provide – more energy requirements, more housing requirements – and this may lead to temporary or permanent increases in prices of basic goods and services; d) the cash lost by the state government (by granting location incentives) has an opportunity cost – provision of services to state residents. Hence, the resident's property interests in fair and reasonable municipal budgeting and the state's provision of adequate services far outweighs the state's interests in attracting new business.

Furthermore, the exemptions and subsidies granted to incoming companies are a form of 'protection' that is not available to in-state companies. Incoming companies: a) can increase labor costs for in-state companies; b) under-bid in-state companies to obtain projects; c) increase the effective income tax rates of in-state companies – where anticipated incremental tax revenues are deemed low; d) increase operating costs of in-state companies – by increasing demand for utilities, housing, healthcare, real estate, e) drastically reduce profits of in-state companies by lowering prices by automation, outsourcing, etc.. Hence, the in-state companies have significant property interests in elimination of location incentives and such property interests arise from expectations

and norms. The in-state companies' property interests in elimination of, and non-issuance of location incentives far outweighs the state government's interests in attracting companies to the state.

The Real Property Tax Constitutes A Violation Of The 'Right-To-Contract' Clause Of The US Constitution

Under most US state/municipal laws, real property tax liability cannot be assigned or transferred in any way – the property owner retains final liability for payment of the real property tax. This is in contrast to other forms of tax which can be assigned – a) liability for corporate income tax can be contractually assigned; b) liability for capital gains tax can be contractually assigned or transferred; and c) liability for sales tax can be contractually assigned. It can be reasonably inferred from the wording of the real property tax laws in most states, that the legislative intent is to preclude transferability of the real property taxes.

As with other types of taxes in most commercial transactions, the potential transferability of real property taxes can be a critical element of financial instruments and transactions.

For purposes of constitutional analysis, the 'state action' involved is the statutory prohibition that limits the rights of interest-holders and or the fee-simple owner to enter into contracts pertaining to transfer/deferral/sale of property tax liability⁹⁰; and such restrictions arise because:

1) Real property taxes are intertwined with the property Title – payment or non-payment of real property taxes affects clarity of Title that will be transferred upon sale, mortgage or transfer of interests in the property; and

2) The probability of contracting about the property is a direct function of the following factors: a) the frequency of property tax assessment, b) the type/nature of property tax assessment, c) the identity of tax assessor, d) the absolute and relative magnitude of the property tax assessment; and

3) The magnitude of the property owner's right to contract about the property varies drastically and is

⁸⁸ See: Enrich (December 1996; Notes 44, 45, 46)(*Supra*).

Compare: *R J Reynolds Tobacco v. City Of New York Dept. Of Finance*, 643 NYS2d 865 (supreme Court, 1995)(declaring Sections 11-602.8(b)(11) and 11-602.8(j) of the New York City Administrative Code un-constitutional).

Compare: *Beatrice Cheese Inc. v. Wisconsin Department of Revenues*, 1993 WL 57202 (Wisconsin Tax Appeal Commission, February 24, 1993)(declaring Wisconsin Statute 71.04 (15)(b) un-constitutional).

⁸⁹ See: Zelinsky (1998)(*Supra*).

See: Moomau & Morton (1992)(*Supra*).

See: Nechyba (1997)(*Supra*).

See: Hellerstein (1995)(*Supra*).

See: Hellerstein (1994)(*Supra*).

⁹⁰ See: *Evans v. Newton* (1966)(*Supra*).

See: *Evans v. Abney* (1970)(*Supra*).

See: *Burton v. Wilmington* (1971)(*Supra*).

See: *Moose Lodge v. Irvis* (1972)(*Supra*).

See: *Edmonson v Leesville Concrete* (1991)(*Supra*).

See: *Tushnet* (2003)(*Supra*).

See: *Marsh v. Alabama* (1946)(*Supra*).

See: *Screws v. US* (*Supra*).

See: *Ellman* (2001)(*Supra*).

See: *Gardbaum* (2003)(*Supra*).

See: *Gardbaum* (2006)(*Supra*).

See: *Currie D* (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.

See: *Goldberg J* (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.

a direct function of the following factors: a) the frequency of tax assessment, b) type/nature of tax assessment, c) existence of tax liens; and d) the absolute and relative magnitude of the property tax assessment. In an ideal world, the property owner's right to contract about the property and or real property tax liability, should be completely independent of the real property tax system/regime and the real property tax assessment processes.

Making Real Property Tax Liens Superior To Prior Mortgages And Loans, Regardless Of Timing Of Non-Payment (Super-Priority Status), Constitutes A Violation Of The Substantive Due Process Clause And The Interstate Commerce Clause

The super-priority status of property tax liens constitutes a violation of the *Due Process Clause* and the *Interstate Commerce Clause* for several reasons.

In most US states, the super-priority status of property tax liens is granted by statutes⁹¹, and in other cases, the super-priority status is granted by case law⁹² - but such case law is also void and unconstitutional as violations of the interstate clause. Where the super-priority status is granted by statutes, such statutes are unconstitutional because they impose substantial burdens on interstate commerce. Mortgagors or mortgagees who are out-of-state will incur disproportionately larger transaction costs, risk and monitoring costs (compared to in-state mortgagees or mortgagors), if the property tax lien has super-priority status. The incremental transaction costs include costs of due diligence costs, legal fees, transportation fees, etc..

The super-priority status of property tax liens constitutes a violation of the *Substantive Due Process Clause* because it is not based on economic reality, it reduces overall social welfare, and increases transaction costs. The super-priority status of real-property tax liens is valid regardless of the size and timing/commencement of the real property tax lien. The real property tax lien is typically based on borrower/Mortgagor's fee-simple interest. Under present US laws, the Mortgagee's interest in the real property is the most senior non-governmental interest in the property. The Mortgagee is the effective owner of the property even if the outstanding mortgage balance is One US Dollar. Hence, the super-priority status of property tax liens completely disregards the Mortgagee and clouds the Mortgagee's participation in, and interest in the property regardless of whether or not the Mortgagee can pay dollar amount of the property tax lien. Consider the following example: the Mortgagee has a \$100,000 first mortgage; the mortgagor's equity interest in the property is \$10,000; the property has a market-value of \$110,000 and a

liquidation/auction value of \$70,000; and the unpaid property tax is \$10. In most US (and common-law) jurisdictions, the Ten Dollar property tax liability will create an automatic property tax lien that is sufficient to foreclose the property, regardless of whether or not the Mortgagee can pay the property tax and avoid the additional costs inherent in a foreclosure auction. A more efficient tax regime/rule will grant the Mortgagee a right-of-first-refusal for payment of property-tax liens in order to retain its interest in the property and eliminate economic, social and psychological costs and losses associated with foreclosure and auctions. In the event of a tax foreclosure, the Mortgagee will incur the risk of losing substantial amounts of money. Hence, the super-priority status of property tax liens deprives the Mortgagee of Due Process rights.

The super-priority status of property-tax liens also contravenes several major tax law principles such as proportionality, equity and non-retroactiveness⁹³:

- a) Proportionality - the super priority status does not change with the magnitude of the real property tax lien, such that a Ten Dollar tax lien has the same foreclosure impact as a Five Hundred Thousand Dollar tax lien on the same property.
- b) Equity - The super-priority status does not provide for a grace period before the lien status becomes effective.
- c) Non-Retroactiveness - the super-priority status effectively makes any outstanding real property tax retroactive in time and senior to any mortgage - in commercial law and property law, priority is typically based on timing of filing/notice.

Real Property Taxation Constitutes Violations Of The Takings Clause

For purposes of constitutional analysis, the 'state action' involved is either the imposition of the real property tax, or statutory limitation on the property owner's remedies or right of appeal⁹⁴. Standard tests

⁹³ See: Vanistendael F (1996). *Legal Framework For Taxation*. Chapter Two in Thuronyi V (ed.), "Tax Law Design And Drafting", Volume One, International Monetary Fund.

⁹⁴ See: *Evans v. Newton* (1966)(Supra).
See: *Evans v. Abney* (1970)(Supra).
See: *Burton v. Wilmington* (1971)(Supra).
See: *Moose Lodge v. Irvis* (1972)(Supra).
See: *Edmonson v Leesville Concrete*, ___ US ___ (1991).
See: Tushnet (2003)(Supra).
See: *Marsh v. Alabama* (1946)(Supra).
See: *Screws v. US* (___)(Supra).
See: Ellman (2001)(Supra).
See: Gardbaum (2003)(Supra).
See: Currie D (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.
See: Goldberg J (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.
See: Gardbaum S. (____). Where The (State) Action Is, *International Journal of Constitutional Law*, 4:760-779.

⁹¹ See: Alexander (2000; Note 129)(Supra).

⁹² See: Alexander (2000; Note 130)(Supra).

for takings cases include: **a)** the reduction-of-value test (ability to profit before and after takings, is evaluated and there must be impairment); **b)** the cause-of-harm test (show that one person's use causes harm to another's property, and there is state action); **c)** the government-invasion theory (show that government takes possession of property); **d)** the noxious-use test.

In some US jurisdictions, real property taxation can be deemed a violation of the Takings Clause of the US Constitution where:

a) The tax assessed is excessive by historical standards, by comparison to similar towns/properties, etc.. The 'public use' requirement is satisfied because any benefits (fulfillment of municipal needs, excess tax revenues, etc.) are used by the local government public purposes.

b) The property owner does not have any right of appeal to complain about the assessed real property tax. The 'public use' requirement is satisfied because any benefits (fulfillment of municipal needs, excess tax revenues, etc.) are used by the local government presumably for public purposes.

c) The assessment of real property taxes is based not entirely on property values, but on local municipal needs. The 'public use' requirement is satisfied because any benefits (fulfillment of municipal needs, excess tax revenues, etc.) are used by the local government for public purposes.

d) The real property tax is not proportional to the property value;

e) The government does not assess the value of the property regularly;⁹⁵

f) The government's assessed value is substantially higher than market value of the property.

Under the accepted interpretation of the US Constitution, government regulation of private property constitutes a 'taking' if: 1) it does not substantially advance a legitimate state interest, and 2) the regulation is not imposed with adequate compensation for the property owners for any resulting economic losses.

The Takings elements are as follows:

a) The property owners has constitutionally guaranteed property interests in fair tax assessment and tax enforcement processes. These property interests arises from state contract laws, state property laws, and state constitutional laws, norms and expectations.

b) The losses to the property owners constitute an economic loss to the landlord and thus a 'taking'. These losses include: **a)** differences between market value and assessed value, **b)** losses arising from delays in re-assessment of the property, **c)** losses from application of a tax rate that is based not on property values but on the economic needs of the municipality. The monetary amount involved (loss incurred by property owners) is transferred to "public use" in various forms: **i)** funding of schools, and for other municipal expenditures; **ii)** a "market value effect" in

which higher assessed taxes slows the rate and magnitude of increases in property values. The said taking can be construed as being for 'public use' because the property taken is for 'public' use – the general public benefits from over-taxation. The 'public' includes not only all people and households that qualify for rent control and rent stabilization, but also all renters and homeowners who are affected by changes in municipal services.

c) The property owner is not compensated for said taking where the landlord does not receive any special benefit and or compensation such as tax credits (ie. the federal low income housing tax credits), housing vouchers (eg. Section 8 vouchers) or tax abatements.

d) The government has some interest in collecting taxes to finance municipal services, and 'takings' advance the government interests to some extent – but facilitation of such benefits and interests is limited by the number of property units and the fairness of the real property tax processes. However, the government has many other ways to solve the real property tax problem. The real property tax taking is a government intervention that has substantial economic multiplier effects that may even affect neighboring towns. There is substantial evidence that home-equity accounts for 65-80% of the net worth of 60-80% of US households. Hence, the government's interest in imposing and collecting taxes is far outweighed by the collective property interests of the town's property-owners in fair tax assessment and tax collection procedures.

Although there have been several important US Supreme court decisions on Takings, none of the cases directly addresses the real property tax issue⁹⁶. In *Kelo v. City Of New London*⁹⁷, the US Supreme Court effectively reversed much of the existing Takings case law and ruled that eminent domain can be used to obtain property for what can reasonably be deemed 'private' use – this ruling effectively eliminates the 'public use' requirement in eminent domain and Takings cases. Furthermore, the issue of definition of "public use" and "private use" within the context of Takings remains somewhat un-resolved.

⁹⁶ See: *Agins v. City Of Tiburon*, 447 US 255 (1980); *Monterrey v. Del Monte Dunes At Monterrey*, 526 US 687 (1999); *Lawton v. Steele*, 152 US 133 (1894); *Dolan v. City Of Tigard*, 512 US 374 (1994); *Nollan v. California Coastal Commission*, 483 US 825 (1987); *Kaiser Aetna v. United States*, 444 US 164 (1979); *Nectow v. Cambridge*, 277 US 183 (1928); *Penn Central Transportation v. New York City*, 438 US 104 (1978); *Rowan v. Post office Department*, 397 US 728 (1970); *Williamson County Regional Planning Commission v. Hamilton Bank Of Jefferson City*, 473 US 172 (1985); *Palazzolo v. Rhode Island*, 533 US 606 (2001); *Armstrong v. United States*, 364 US 40 (1960); *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982); *Andrus v. Allard*, 444 US 51 (1979); *First English Evangelical Lutheran Church Of Glendale v. County of Los Angeles*, 482 US 304 (1987); *SWIDA v. National City Environmental*, 768 N.E.2d 1 (Sup. Ct., Ill., 2002).

⁹⁷ *Kelo v. City Of New London*, ___ US ___ (2005); *Lingle v. Chevron*, 544 US ___ (2005); *SWIDA v. National City Environmental*, 768 N.E.2d 1 (Sup. Ct., Illinois, 2002)

⁹⁵ See: Mikesell (1980)(*Supra*).

Some courts have held that the Takings clause is most naturally construed to authorize takings for public use only if the public or government actually uses the taken property. Furthermore, any interpretation of “public use” and “private use” in Takings cases must recognize that most Takings cases are adjudicated by state courts, and state court judges are not as independent as federal judges, because in some jurisdiction, state judges are elected, and they are often are influenced by elected government officials who typically like re-development projects. The language of the Takings Clause, the reasonably inferable legislative intent of the Takings Clause, and the historical application of the Takings Clause by most US courts, and the nature of judges in takings cases supports this point of view.

In *Lingle v. Chevron USA*, 544 US ____ (2005), the US Supreme Court:

1) Determined that the ‘substantially advances’ formula that was previously applied in Takings cases is actually a Due Process question that should not be considered in Takings decisions.

2) Defined four classes of takings claims which are as follows: **a)** A physical taking; **b)** a Lucas-type total regulatory taking; **c)** a Penn-Central taking; **d)** a land-use exaction violating the *Nollan* and *Dolan* standards.

The Takings implicit in real property taxes don’t conform to any of the above-mentioned types of takings because: **a)** there is no physical occupation, **b)** there is no total regulatory taking, **c)** there are no exactions that violate the *Nollan* and *Dolan* standards, **d)** there is no Penn Central type taking. However, Bell & Parchomovsky (2001a,b)^{98, 99} provide a different set of definitions for Takings and Givings.

The net effects of *Kelo v. City of New London* and *Lingle v. Chevron* are as follows: **a)** reduction of property rights of, and constitutional protections for property owners, **b)** reduction of property values, **c)** greater importance of specific appraisal techniques in Takings cases – in such instances, appraisals are more likely to be based on replacement costs which most accurately reflects the economic occurrence/displacement implicit in Takings, **d)** elimination of the “substantially advances” requirement from Takings cases, thereby increasing transaction costs and litigation costs, and also increasing the burden-of- proof on home-owners in Takings cases. Prior to these two cases and during 1995-2003, Takings case law (from federal and state courts) provided some support and basis for rapid increases in prices of real property; and there were no evident trends in federal and state court rulings towards the results in *Kelo* and *Lingle*.

Conclusion

The major implication of the foregoing analysis is that real property taxation and location incentives in the US (and in most countries) are inherently unconstitutional. This has significant ramifications for municipal finance, local government budgets and state governments. These issues have not been sufficiently addressed in the existing literature.

⁹⁸ See: Bell A & Parchomovsky G (2001a). Takings Re-Assessed. *Virginia Law Review*, 87:277-287.

See: Bell A & Parchomovsky G (2001b). Givings. *Yale Law Journal*, 111:547-557.

See: Bell A & Parchomovsky G (2005). A Theory Of Property. *Cornell Law Review*, 90:531-541.

⁹⁹ See: Bardsley N & Sausgruber R (2005). Conformity And Reciprocity In Public Goods Provision. *Journal Of Economic Psychology*, 26:664-681.

See: Bell & Parchomovsky (2001a)(*Supra*).

See: Bell & Parchomovsky (2001b)(*Supra*).

See: Bell & Parchomovsky (2005)(*Supra*).

See: Garvill J, Garling T & Lindberg E & Montgomery H (1992). Economic And Non-Economic Motives For Residential Preferences And Choice. *Journal Of Economic Psychology*, 13(1): 39-59.

See: Glaeser E & Gyourko J (2005). Why Is Manhattan So Expensive ? Regulation And The Rise In House Prices. *Journal Of Law & Economics*,

See: Hellerstein (June 1996)(*Supra*).

See: Merrill T & Smith H (2000a). Optimal Standardization In The Law Of Property: The Numerus Clausus Principle. *Yale law Journal*, 111(1): 1-70.

See: Merrill T & Smith H (2000b). The Property/Contract Interface. *Columbia Law Review*, 101(4): 773-852.

See: Merrill T & Smith H (2001). What Happened To Property In Law And Economics ? *Yale Law Journal*, 111(2):357-398.