

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>EUGENE B. BOWLER,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 90-300-B</b>
	)	
<b>JOHN MCKERNAN, et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS  
FOR JUDGMENT BASED ON A STIPULATED RECORD <sup>1</sup>**

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<sup>1</sup> Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

The plaintiff, Eugene Bowler, resides in Camden, Maine where he owns real property that is subject to municipal property taxation supporting, among other things, local schools. In this injunction and declaratory judgment action Bowler petitions the court to enjoin the defendants<sup>2</sup> from any further implementation of Maine's School Finance Act of 1985, 20-A M.R.S.A. ' ' 15601-21 ( "Act"), and from disbursing any funds to the several town and city schools and school districts using the formulae contained in the Act.<sup>3</sup> The plaintiff also seeks a declaration that the Act is unconstitutional. The parties have filed cross-motions for judgment based on a stipulated written record. This procedural device allows a court to resolve any lingering issues of material fact in reaching its decision on the merits. *Boston Five Cents Sav. Bank v. Secretary of Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985).

Under the Act the state subsidizes local school budgets according to the relative need of each school district. A school district's need for the subsidy is based, in part, on the "state valuation of the municipalities" in that district. *See, e.g.*, 20-A M.R.S.A. ' 15609(1)(A). In other words, the Maine legislature apparently assumed that those school districts with lower overall property values have greater need for the subsidy than school districts with higher overall property values.

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<sup>2</sup> The defendants are the governor of the state of Maine, the state's commissioner of education and its treasurer.

<sup>3</sup> The plaintiff makes specific reference to the formulae in sections 15609 and 15610 for computing the maximum local and state shares of the so-called foundation allocation.

State subsidies under the Act range from 5 percent to 98 percent of a local school district's total budget. The state's subsidy for the Camden school district -- Camden being a relatively affluent town according to the state's analysis -- was 7 percent of the district's budget for the 1990-91 school year.

Bowler argues that the "retained, reserved, residual and implied rights [of] the Sovereign People" include the right of "just and equitable taxation."<sup>4</sup> Petition for Preliminary Injunction & Declaratory Judgment. Bowler claims that the state's grant of greater subsidies to the districts with lower property values is not "just and equitable" and violates Article IV, section 4 and the Ninth and Tenth Amendments of the United States Constitution, as well as Article I, section 24 of the Maine Constitution. Bowler also challenges a municipality's use of property value as an indicia of a person's ability to pay local taxes.

### NINTH AMENDMENT

The plaintiff argues that the Act violates the Ninth Amendment.<sup>5</sup> The cases cited by him as support, *United States v. Choate*, 576 F.2d 165, 181 (9th Cir.), *cert. denied*, 439 U.S. 95 (1978), and *United States v. Cook*, 311 F. Supp. 618, 619-20 (W.D.Pa. 1970), are among a number of cases that reflect an essential teaching of *Griswold v. Connecticut*, 381 U.S. 479 (1965):

Rights [protected] under the Ninth Amendment are only those "so basic and fundamental and so deeply rooted in our society" to be truly "essential rights," and which nevertheless, cannot find direct support elsewhere in the Constitution.<sup>6</sup>

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<sup>4</sup> Bowler appears *pro se*, so the court reviews his pleadings according to "less stringent standards than formal pleadings drafted by lawyers." *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). The court's solicitude in this regard, however, is not alchemy and will not transmute a defective claim into a meritorious cause of action. *See, e.g., Posadas de Puerto Rico, Inc. v. Radin*, 856 F.2d 399, 401 (1st Cir. 1988) (*pro se* litigant, like any other, must plead specific facts when opposing motion for summary judgment).

<sup>5</sup> The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

<sup>6</sup> The Supreme Court did not rely solely on the Ninth Amendment in *Griswold v. Connecticut*. The plurality opinion of the Court held that a state statute that criminalized the use of contraceptives by married couples violated their right to privacy, a right older than the Bill of Rights and whose

*Choate*, 576 F.2d at 181 (quoting *Griswold*, 381 U.S. at 488-89, 491 (Goldberg, J., concurring)).

Whatever the present-day currency of Justice Goldberg's concurrence in *Griswold*, its principle is clearly inapplicable here. A state subsidy apportioned among school districts according to the districts' relative property values is not so invasive as to impinge on a municipal taxpayer's "essential rights."

## TENTH AMENDMENT

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penumbras emanate from the First, Third, Fourth, Fifth and Ninth Amendments. 381 U.S. at 484-86. The Court declined to rest exclusively on the Ninth Amendment as the foundation for the right of privacy. In any event, Ninth Amendment jurisprudence appears thus far at least to be limited to "matters involving families and procreational activities." *Choate*, 576 F.2d at 181. No court has relied on the Ninth Amendment to declare a tax statute unconstitutional.

Bowler also claims that the Act violates the Tenth Amendment.<sup>7</sup> Indulging the most liberal reading of his complaint and memoranda, *see Haines v. Kerner*, 404 U.S. 519 (1972), I fail to see any federalism issue that would link the Tenth Amendment to this case. The case the plaintiff cites, *United States v. Darby*, 312 U.S. 100 (1941), deals with the Tenth Amendment only as it applies to the relationship between federal and state government. *Id.* at 123-25.

The Tenth Amendment also reserves power to the people. The Maine Constitution, art. VIII, pt. 1, ' 1, authorizes and, indeed, directs the state to require its municipalities to support and maintain public schools at their own expense. It follows that the people of Maine impliedly authorized the towns to raise school revenue through property taxes, which precludes a Tenth Amendment claim of the sort advanced by Bowler here.

#### ARTICLE IV, SECTION 4

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<sup>7</sup> The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by to the States, are reserved to the States respectively, or to the people."

The plaintiff asserts for the first time in his Addendum to Motion for Judgment ("Plaintiff's Addendum") that the Act is unconstitutional under Article IV, section 4.<sup>8</sup> The defendants argue that Bowler should not be allowed to raise this claim at such a late stage in the proceeding. Because Bowler is a *pro se* plaintiff, I will address his claim.

Bowler claims that the Guarantee Clause of Article IV, section 4 "insures only the People are sovereign and protects their liberties and may well be the keystone and lodestar clause of the Organic Act." Plaintiff's Addendum at 1.

This being a claim based on the Guarantee Clause of Article IV, section 4, it presents a political question and is therefore nonjusticiable. *See, e.g., Baker v. Carr*, 369 U.S. 186, 217-18 (1962).

#### MAINE CONSTITUTION, ARTICLE I, SECTION 24

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<sup>8</sup> Article IV, section 4, popularly referred to as the Guarantee Clause, reads:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Bowler asserts for the first time in his Motion for Judgment that the Act violates Article VIII, section 24 of the Maine Constitution.<sup>9</sup> I will entertain this argument as well.

As discussed above, the people of Maine have authorized municipalities to raise school revenue. *See* Me. Const. art. VIII, pt. 1, ' 1. The people of Maine cannot be said to have retained under Article I, section 24 of the Maine Constitution what they have given up under Article VIII, part 1, section 1.

### **PROPERTY TAXES IN GENERAL**

I recognize but will not rule on Bowler's general challenge regarding the practice of taxing citizens according to the value of real property they own in the municipality.

General challenges to statutes or ordinances, absent allegations that they violate some constitutional constraint, often present nonjusticiable political questions.

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one issue.

*Baker*, 369 U.S. at 217; *see also United States v. Munoz-Flores*, 110 S. Ct. 1964, 1968 (1990).

Without constitutional support, Bowler's claim presents a nonjusticiable political question, since, first, municipalities in Maine have the power to tax to raise school revenue, *see Baker*, 369 U.S.

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<sup>9</sup> Article I, section 24 of the Maine Constitution reads: "The enumeration of certain rights shall not impair nor deny others retained by the people." *Cf.* U.S. Const. amend. IX.

at 217; Me. Const. art. VIII, pt. 1, ' 1, second, there are no ` `judicially discoverable and manageable standards for resolving" Bowler's claim that property values are not the proper indicia of a person's ability to pay taxes, *Baker*, 369 U.S. at 217, and, third, the court's undertaking independent resolution of this claim would express ` `lack of the respect due coordinate branches of government," *id.*

### CONCLUSION

For the foregoing reasons, I **GRANT** the defendants' motion, and **DENY** the plaintiff's motion, for judgment based on a stipulated written record.

Dated at Portland, Maine this 14th day of February, 1992.

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David M. Cohen  
United States Magistrate Judge