

The Graduated Income Tax Amendment - A Shell Game?

By Kevin Martin



MISSION

Pioneer Institute develops and communicates dynamic ideas that advance prosperity and a vibrant civic life in Massachusetts and beyond.

Vision

Success for Pioneer is when the citizens of our state and nation prosper and our society thrives because we enjoy world-class options in education, healthcare, transportation and economic opportunity, and when our government is limited, accountable and transparent.

Values

Pioneer believes that America is at its best when our citizenry is well-educated, committed to liberty, personal responsibility, and free enterprise, and both willing and able to test their beliefs based on facts and the free exchange of ideas.



PIONEER OPPORTUNITY

This paper is a publication of Pioneer Opportunity, which seeks to keep Massachusetts competitive by promoting a healthy business climate, transparent regulation, small business creation in urban areas and sound environmental and development policy. Current initiatives promote market reforms to increase the supply of affordable housing, reduce the cost of doing business, and revitalize urban areas.



PIONEER EDUCATION

Pioneer Education seeks to increase the education options available to parents and students, drive system-wide reform, and ensure accountability in public education. The Center's work builds on Pioneer's legacy as a recognized leader in the charter public school movement, and as a champion of greater academic rigor in Massachusetts' elementary and secondary schools. Current initiatives promote choice and competition, school-based management, and enhanced academic performance in public schools.



PIONEER HEALTH

Pioneer Health seeks to refocus the Massachusetts conversation about health care costs away from government-imposed interventions, toward market-based reforms. Current initiatives include driving public discourse on Medicaid; presenting a strong consumer perspective as the state considers a dramatic overhaul of the health care payment process; and supporting thoughtful tort reforms.



PIONEER TRANSPORTATION

Pioneer Transportation seeks reforms that allow commuters to take full advantage of the coming mobility revolution—with access to a range of affordable and on-demand public and private transportation options, as well as transit-friendly real estate development.

THE MASSACHUSETTS CONSTITUTION HAS AUTHORIZED AN INCOME TAX SINCE 1915, and ever since that taxing authority has always been subject to one significant restraint: a prohibition on graduated tax rates. Put another way, our constitution requires a flat income tax. Currently, that flat income tax rate sits at 5 percent, a competitive rate that serves the Commonwealth well in its fight for good jobs against high tax jurisdictions such as New York, Connecticut, and California. Indeed, despite the Commonwealth's past reputation as "Taxachusetts," on five occasions voters have been asked to amend the constitution to eliminate the ban on graduated income taxes (in 1962, 1968, 1972, 1976, and 1994)—and they've rejected the pitch every time.¹

In the run-up to the 2018 election cycle, proponents of graduated income taxes thought they had found a solution to the unpopularity of their cause: assure voters that any money raised by a tax hike would be earmarked for two causes popular with the middle class, public education and transportation spending. Thus, in the graduated income tax or so-called "Fair Share Amendment," tax hike proponents engaged in logrolling, linking a 4 percent rate hike on incomes over \$1 million to a constitutional earmark of the money to just education and transportation spending. Specifically, the proposed graduated income tax ballot measure stated:

To provide the resources for quality public education and affordable public colleges and universities, and for the repair and maintenance of roads, bridges and public transportation, all revenues received in accordance with this paragraph shall be expended, subject to appropriation, only for these purposes. In addition to the taxes on income otherwise authorized under this Article, there shall be an additional tax of 4 percent on that portion of annual taxable income in excess of \$1,000,000 (one million dollars) reported on any return related to those taxes.²

That proposed ballot measure never made it before voters. In June 2018, in the landmark decision *Anderson v. Healey*, the Massachusetts Supreme Judicial Court ruled that the measure violated the state constitution's ban on citizen-initiated ballot questions that combine unrelated subject matters—in that case, a new graduated income tax and two disparate subjects of spending.

But the related subject matter requirement does not apply to proposed constitutional amendments that originate in the Legislature. So almost as soon as the ink was dry on *Anderson*, supporters of the tax hike on Beacon Hill moved the graduated income tax into a legislatively-proposed constitutional amendment and set the stage for a renewed battle in 2022. Their expectation remains that voters, eager to support increased education and transportation spending, will vote for the tax increase.

That leads to a crucial question: if voters go for it, will the graduated income tax actually lead to increased education and transportation spending? Proponents of the tax hike certainly want voters to think that it will. Raise Up Massachusetts, the coalition of advocacy groups that originally developed the proposal, states unambiguously on its website that "The new revenue, approximately \$2 billion a year, would be spent on quality public education, affordable public colleges and universities, and the repair and maintenance of roads, bridges, and public transportation." It suggests that this "new revenue" will be used to "improve" schools and to "invest" in transportation.³

Maybe. Or maybe not. The fact is, the proposed constitutional amendment contains no assurance of new spending on education or transportation. To the contrary, it is entirely possible that even as tax revenues increase, education and transportation spending could stay the same, or even fall, without violating the amendment.

The critical point is this: on its face, the proposed amendment only requires that the specific revenue raised by the tax be earmarked to education and transportation. It says nothing about the total amount spent on those two causes. And money, of course, is fungible.

Some simple math shows the problem. The new tax, as of 2018, was expected to raise about \$2 billion each year. How much does the state government already spend on education and

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transportation? The fiscal year 2020 budget directed \$7.9 billion to the Executive Office of Education and \$573 million to the Department of Transportation.⁴ This is almost \$8.5 billion total, all funded from sources other than the graduated income tax.

If the constitutional amendment passes, the Legislature could play a shell game: dedicate the \$2 billion raised through the graduated income tax to those two line items, add \$6.5 billion in revenue from other sources—down from the \$8.5 billion previously being used—and leave total education and transportation spending exactly where they were. In the meantime, the Legislature will have freed up \$2 billion in revenue from other sources to spend on whatever it wants.

Is that really how it would work? Just ask Attorney General Maura Healey. In *Anderson v. Healey*, another problem with the proposed ballot measure was its dedication of the expected graduated income tax revenue to education and transportation spending; that sort of “specific appropriation,” cemented in the constitution, cannot be done in a citizen-initiated ballot measure. In addressing that second hurdle to the ballot measure, the Attorney General told the Supreme Judicial Court not to worry about it, because any earmarking could be rendered moot by precisely the sort of shell game described above:

The Legislature would retain ultimate discretion over spending choices for the additional reason that money is fungible. Because the proposed amendment does not require otherwise, the Legislature could choose to reduce funding in specified budget categories from other sources and replace it with the new surtax revenue. As long as the total spending in these combined categories did not fall below the revenue generated by the surtax in any particular year, the Legislature would be in compliance with the proposed amendment.⁵

The late Chief Justice Ralph Gants understood this too, asking the Attorney General’s counsel at oral argument whether she agreed that, if the graduated income tax amendment passed, it “may or may not result in any increase in education or transportation or education spending.” Counsel responded that the Chief Justice’s understanding was correct.⁶

Tax hike proponents on Beacon Hill also recognize that the graduated income tax measure contains no assurance of increased education and transportation spending. And they see no problem with it. During debates on the proposed ballot measure, an amendment was offered that would have required the new tax revenues to be spent incrementally on education and transportation, over and above what already is spent. That amendment was defeated, leaving legislative budget writers maximum discretion to engage in the shell game predicted in the Attorney General’s brief.

The record is clear. The graduated income tax amendment is being pitched to voters as a means of increasing education and transportation spending. But that is true only in the sense that every tax increase gives politicians more taxpayer money to spend on whatever they want. The graduated income tax proposal contains no assurances. As a practical matter, given existing spending levels, every dollar it generates could be siphoned off to some other purpose without violating the proposed constitutional amendment’s text. If the state constitution is going to be amended to allow a graduated income tax for the first time ever, the terms of the debate should be honest. Unfortunately, this proposal is anything but.

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– Attorney General’s office

Endnotes

- 1 Ballotpedia, “Massachusetts Graduated Income Tax, Question 1 (1962),” December 23, 2013, [https://ballotpedia.org/Massachusetts_Graduated_Income_Tax,_Question_1_\(1962\)](https://ballotpedia.org/Massachusetts_Graduated_Income_Tax,_Question_1_(1962))
Ballotpedia, “Massachusetts Graduated Income Tax, Question 2 (1968),” December 23, 2013, [https://ballotpedia.org/Massachusetts_Graduated_Income_Tax,_Question_2_\(1968\)](https://ballotpedia.org/Massachusetts_Graduated_Income_Tax,_Question_2_(1968))
Ballotpedia, “Massachusetts Graduated Income Tax Based on Federal Income Tax, Question 6 (1972),” December 23, 2013, [https://ballotpedia.org/Massachusetts_Graduated_Income_Tax_Based_on_Federal_Income_Tax,_Question_6_\(1972\)](https://ballotpedia.org/Massachusetts_Graduated_Income_Tax_Based_on_Federal_Income_Tax,_Question_6_(1972))
Ballotpedia, “Massachusetts Graduated Income Tax, Question 2 (1976),” December 23, 2013, [https://ballotpedia.org/Massachusetts_Graduated_Income_Tax,_Question_2_\(1976\)](https://ballotpedia.org/Massachusetts_Graduated_Income_Tax,_Question_2_(1976))
Ballotpedia, “Massachusetts Graduated Income Tax Amendment, Question 6 (1994),” [https://ballotpedia.org/Massachusetts_Graduated_Income_Tax_Amendment,_Question_6_\(1994\)](https://ballotpedia.org/Massachusetts_Graduated_Income_Tax_Amendment,_Question_6_(1994))
- 2 Joseph Bishop-Henchman, “Massachusetts May Set Its Income Tax Rate In The Constitution. How Unusual Is That?” Tax Foundation, February 2, 2016, <https://taxfoundation.org/massachusetts-may-set-its-income-tax-rate-constitution-how-unusual/>
- 3 Raise Up Massachusetts, “Fair Share Amendment,” <https://www.raiseupma.org/fair-share-amendment-2022/>
- 4 Massachusetts Executive Office of Administration and Finance, “FY2020 Budget Summary,” Commonwealth of Massachusetts, July 31, 2019, <https://budget.digital.mass.gov/summary/fy20/enacted>
- 5 Brief of the Attorney General, in *Anderson v. Healey*, 579 Mass. 780 (2018), available at http://masscases.com/briefs/sjc/479/479mass780/SJC-12422_03_Appellee_Attorney_General_Brief.pdf
- 6 Massachusetts Supreme Judicial Court, “SJC 12422,” Commonwealth of Massachusetts, December 9, 2020, <https://www.youtube.com/watch?v=O8bFdcNvQKQ&feature=youtu.be>

About the Author

Kevin Martin is a partner and co-chair of the Appellate Litigation group at Goodwin Procter LLP in Boston, Massachusetts, where he has practiced since 2001. He was counsel for the plaintiffs in *Anderson v. Healey*, the 2018 decision in which the Supreme Judicial Court excluded the graduated income tax from that year's ballot. Prior to joining Goodwin, Kevin clerked for Justice Antonin Scalia on the United States Supreme Court (2000–2001), and Judge Laurence Silberman on the U.S. Court of Appeals for the District of Columbia Circuit (1999–2000). From 2010–2011, he served as Deputy Independent Counsel representing the SJC in an investigation into corruption in the Massachusetts Probation Department. He currently is the Vice Chair of the board of directors of the New England Legal Foundation. Kevin graduated from Columbia Law School in 1999, and Georgetown University's School of Foreign Service in 1996.

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