

PROPOSITION 13 UNDER AN UPDATED EQUAL PROTECTION ANALYSIS: UNLUCKY AT LAST?

I. INTRODUCTION

In California, property tax revenues constitute the bulk of the state's revenue.¹ California's current tax scheme began in 1978 when voters approved the constitutional amendment popularly known as Proposition 13.² Many states employ a market value standard for computation

1. See Richard C. Reuben, *Prop. 13, at 10, Said to Have Met Its Primary Goals—But Initiative Wreaked Havoc on Budgets of County Governments—Still Controversial*, L.A. DAILY J., June 6, 1988, at 1. Proposition 13 dramatically reduced revenues compared to the state's previous market value system. A former chief consultant for the California Assembly Revenue and Taxation Committee, David Doerr estimates the revenue shortfall over the decade to be \$228 billion. *Id.*

2. CAL. CONST. art. 13A (Proposition 13) reads:

Section 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on . . . any indebtedness approved by the voters prior [to the time this action becomes effective].

Sec. 2. (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation. For purposes of this section, "newly constructed" does not include real property which is reconstructed after a disaster, as declared by the Governor, where the fair market value of such real property, as reconstructed, is comparable to its fair market value prior to the disaster. . . .

(b) The full cash value base may reflect from year to year the inflationary rate

of tax liability.³ Proposition 13, however, bases property assessments on the acquisition price together with annual adjustments capped at two percent.⁴

Since Proposition 13's enactment, inflation and appreciation have contributed to spiraling real estate prices.⁵ Many properties currently sell at two to three times their 1978 cost.⁶ Consequently, recent purchasers pay property taxes double or more than owners who acquired similarly situated properties only a few years ago.⁷ Under Proposition

not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction. . . .

Sec. 3. From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

Sec. 4. Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Sec. 5. This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

Sec. 6. If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

CAL. CONST. art. 13A.

3. See Walter Hellerstein & James H. Peters, *Recent Supreme Court Decisions Have Far-Reaching Implications*, 70 J. TAX'N 306, 309 (1989) (discussing the numerous taxing jurisdictions throughout the country using the ad valorem method). See also Kristine C. Karnezis, Annotation, *Sale Price of Real Property as Evidence in Determining Value for Tax Assessment Purposes*, 89 A.L.R. 3D 1126 (1979) (discussing property assessment issues in states utilizing market value).

4. See generally Alexander H. Pope & Charles R. Ajalat, *Proposition 13 Section 2(a): Base Years, Changes of Ownership and New Construction*, CAL. ST. B.J. 494 (Dec. 1979) (explaining in detail the history and future of Proposition 13).

5. One litigant in a case involving Proposition 13 alleges increases as high as 500 to one. *Nordlinger v. Lynch*, 275 Cal. Rptr. 684, 687-88 (1990), cert. granted, 112 S. Ct. 49 (1991). The property owner in *Nordlinger* alleged a differential of 500% which reflected the value increase since 1975. *Id.*

Rapidly rising property values spurred Californians to adopt Proposition 13. See George Lefcoe & Barney Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case*, 53 So. CAL. L. REV. 173, 174-76 (1979).

6. See, e.g., *Nordlinger*, 275 Cal. Rptr. 684 (1990). The *Nordlinger* taxpayer paid a tax "nearly five times that paid by . . . neighbors on their comparable properties." *Id.* at 1267.

7. Some people claim the tax differentials are even greater than the two to three

13, corporations, the wealthy, and long-term residents benefit at the expense of the poor, the frequently uprooted, and first-time homebuyers.⁸

All states' tax systems must conform to the fundamental protections guaranteed by the Fourteenth Amendment's Equal Protection Clause.⁹ States, however, have long enjoyed broad discretion to design tax systems without implicating equal protection concerns.¹⁰ In many cases, outright discrimination is constitutionally tolerated.¹¹ Despite strong challenges in California state courts, Proposition 13 has weathered several equal protection attacks.¹²

times that the property costs increased. See Hallye Jordan, *Hearing Examines Prop. 13 Cases*, L.A. DAILY J., Dec. 6, 1989, at 4 (stating that "new homeowners are paying up to 15 times more in property taxes than neighbors who have owned similar homes since before the initiative passed").

Critics cite inequities of otherwise similar properties that "have property tax bills that vary 300 or 400 percent, one [home] being owned by a longtime resident, the other by a newcomer." Dan Walters, *A Fascinating Scenario for Proposition 13*, L.A. DAILY J., April 12, 1988, at 4.

8. See Michael S. Strimling, *How Proposition 13 Distorts the Economy: Big Corporations Reap Windfalls: New Firms, Young Homeowners Suffer*, L.A. DAILY J., June 17, 1991, at 6. Strimling believes that the problem is exacerbated because Proposition 13 discourages transfer of property. *Id.*

Proposition 13 has been credited with opening the wave of tax reform in California. State Senator John Vasconcellos postulates that Californians have abandoned their enthusiasm for tax reform. See John Vasconcellos, *The Tax Revolt Is Dead*, CALIFORNIA REPUBLIC, March 26, 1991, at 26.

The resulting problems caused by Proposition 13 were accurately predicted long ago:

With the passage of time, unfortunately, inequities in assessment ratios in California are bound to increase, rather than diminish, under Proposition 13. This is because realty values will certainly continue to rise at more than the two percent maximum annual rate of increase that the law applies to valuations of those properties which do not experience a change of ownership (or new construction). Allen D. Manvel, *Assessment Uniformity — and Proposition 13*, 24 TAX NOTES 893, 895 (1984).

9. U.S. CONST. amend. XIV, § 1.

10. See *infra* notes 17-45 and accompanying text discussing the constitutionality of state tax systems under the Equal Protection Clause.

11. Discrimination per se is not a violation of the Equal Protection Clause. See, e.g., *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 364 (1973) (upholding constitutionality of tax on corporate property even though private individuals paid no taxes). Rather, discrimination is constitutionally impermissible only if it is invidious in nature. *Id.* at 359. See *infra* notes 17-45 and accompanying text for a discussion of permissible classifications and applicable standards under the Equal Protection Clause.

12. Proposition 13's adoption surprised many individuals, including its sponsors, who for years had tried to get a tax initiative on the California ballot. See Lefcoe & Allison, *supra* note 5, at 174 (discussing a "volunteer army" who, on a budget of

Recently, however, the United States Supreme Court has sent signals indicating that state tax schemes may face higher scrutiny under an evolving equal protection analysis.¹³ Some observers believe Proposition 13's days are numbered.¹⁴ For California, invalidation of Proposition 13 would have devastating consequences.¹⁵ Meanwhile, legislators and planners have done little to prepare for an ominously probable event.¹⁶

\$28,000, obtained over 1.2 million signatures to get the initiative on the ballot). Legislators had proposed tax reform initiatives every other year from 1968 to 1978. *Id.* at 177. Lefcoe postulates several reasons for its eventual success in 1978. *Id.* at 174-78. Californians became aware of huge surpluses, runaway local government spending and bonding, while property taxes continued to skyrocket. *Id.* The governor, the legislature, and the local governments could not work out solutions to the problem. *Id.* at 176. Prior to the enactment of Proposition 13, California had the fourth highest property tax burden per capita trailing behind Alaska, Massachusetts, and New Jersey. *Id.* Some believe that voters did not truly understand what Proposition 13 would do. *Id.* at 175 n.9.

The only judicial voice of dissent against Proposition 13 has come from Chief Justice Rose Bird in a 1978 opinion. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1302 (Cal. 1978) (Bird, C.J., dissenting). See *infra* note 61 and accompanying text for an excerpt from Chief Justice Bird's opinion.

13. The Court granted certiorari in a recent case involving Proposition 13. *R.H. Macy Co. v. Contra Costa County*, 276 Cal. Rptr. 530 (1990), *cert. granted*, 111 S. Ct. 2256, *cert. dismissed*, 111 S. Ct. 2923 (1991). The petitioner voluntarily withdrew under heavy pressure from interest groups unhappy with Macy's stores' potential role in facilitating the demise of Proposition 13. See Richard C. Reuben, *Proposition 13 Up in Air After Macy's Retreat*, L.A. DAILY J., June 11, 1991, at 7. Customers threatened Macy's stores with a boycott. *Id.* The firm evidently chose to withdraw its petition rather than risk the loss of public good will. *Id.* Macy's appeal also generated enormous criticism from within the business community. See Michael S. Strimling, *How Proposition 13 Distorts the Economy: Big Corporations Reap Windfalls; New Firms, Young Homeowners Suffer*, L.A. DAILY J., June 17, 1991, at 6. Many believe that corporations have the most to lose should Proposition 13 land on the scrap heap. Strimling suggests that the success achieved by Apple Computer Company could not happen in today's tax climate. *Id.* He also argues that while corporations as a whole have benefited, out-of-state corporations in particular have reaped windfalls. *Id.*

Attorney Charles J. Ajalat, representing a litigant who had challenged Proposition 13 on constitutional grounds earlier this year, argues that the United States Supreme Court would be interested in the issue because it recently has "had a line of cases in which they took a broader view of the equal protection clause than they have historically." Halle Jordan, *Proposition 13 Cases Rejected*, L.A. DAILY J., March 1, 1991, at 3.

14. See, e.g., *Ready for the Post-Prop. 13 Era?*, L.A. DAILY J., May 14, 1991, at 6.

15. The tax collection process occurs on an ongoing basis. When Proposition 13 passed on June 4, 1978, government officials had to scramble to implement the new system. See Lefcoe & Allison, *supra* note 5, at 178.

16. In the last several months, attention has focused more intensely on alternatives as it appears more likely that the Supreme Court will rule on Proposition 13. *Nordlinger v. Lynch*, 275 Cal. Rptr. 684 (1990), *cert. granted*, 112 S. Ct. 49 (1991).

II. HISTORY

A. *Traditional Analysis Under the Equal Protection Clause*

State tax systems have always enjoyed a strong presumption of constitutionality.¹⁷ Only rarely has the Supreme Court invalidated a tax system under equal protection review.¹⁸ State tax schemes, like most economic legislation, receive a deferential review unless a fundamental interest has been implicated.¹⁹ Over the years, the Court has formulated three situations by which a state's property tax can constitutionally run aground against Fourteenth Amendment protections.

First, a state's choice of classifications requires application of a fairly lenient arbitrary and capricious standard.²⁰ States can and often do

One recent article outlines three proposals unveiled in June 1991, by a special senate commission. See Hallye Jordan, *Panel Offers Alterations to Prop. 13*, L.A. DAILY J., June 14, 1991, at 2. All three proposals rely on a return to a market-based system. *Id.* The first proposal suggests a phase-in from Proposition 13's dated purchase value system; the second an increase from \$7,000 to \$50,000 per year for the homeowner exemption; the third would create a split-roll tax between homeowners and commercial owners. *Id.*

California's lawmakers, constrained under the present system, would likely relish the opportunity to rework the tax scheme. See Richard C. Reuben, *Prop. 13 Up in Air After Macy's Retreat*, L.A. DAILY J., June 11, 1991, at 5. The state senate has done a study to determine "what life would be like if [Proposition 13] were struck." *Id.* Arthur Laffer, an economist, suggests elimination of the property tax altogether. See *Ready for the Post-Prop. 13 Era?*, L.A. DAILY J., May 14, 1991, at 6. Laffer proposes a flat income tax rate of 6.1% of income. *Id.* That proposal, one of a few publicly aired, garnered applause from the *Contra Costa Times*. *Id.*

17. See, e.g., *Allied Stores v. Bowers*, 358 U.S. 522, 529 (1959) (holding that state legislatures need not state an explicit purpose due to presumption that purposes of tax assessment are valid).

18. For recent examples, see *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343 (1989) (rejecting property tax as applied by county assessor); *Hooper v. Bernadillo County Assessor*, 472 U.S. 612, 619-20 (1985) (striking down a residence requirement for property tax exemption for veterans).

Prior to *Allegheny*, the Court had not invalidated a tax scheme specifically on equal protection grounds since 1933. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 534 (1933) (rejecting state tax favoring proprietors who own only one store).

19. The standard is also known as the "rational basis" approach. See Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 281-82 (1990). Even when rational basis scrutiny is appropriate, the intensity of the standard can vary depending on the justice. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 183-84 (1980) (Brennan, J., dissenting). See also Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 1-24 (1972) (examining equal protection methodologies and a proposal for a standard with more bite).

20. See *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910) ("If the selection

choose to divide property types into different classes and apply varying tax rates.²¹ The Clause permits resultant inequities where those divisions and burdens attain reasonableness.²² Typically, the state proffers a rational basis for the classification based on a policy or a difference between classifications.²³ For example, a state may distinguish property held by a corporation from property held by an individual and apply different tax rates.²⁴ Tax classifications supported by reasonable distinctions rarely fail to meet the generous arbitrary and capricious standard.²⁵

Second, the Fourteenth Amendment requires that states avoid intentional and systematic discrimination within a given classification.²⁶ Ongoing, inequitable taxation imposed discriminately within a classification raises the specter of an equal protection violation.²⁷ Not all discrepancies in tax treatment evoke equal protection problems.²⁸ Discrimination resulting from occasional errors or mistakes in judgment is constitutionally permissible.²⁹ Whether a claim survives depends on whether the state has attained some seasonable equality in the treatment of similarly situated taxpayers.³⁰

or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.”).

21. *See, e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (approving scheme under the Equal Protection Clause whereby corporate property was taxed, while private property was not taxed).

22. *Allied Stores v. Bowers*, 358 U.S. 522, 526-27 (1959) (allowing “the flexibility and variety that are appropriate to reasonable schemes of state taxation”).

23. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910) (holding that there is no denial of equal protection if the “classification is neither capricious nor arbitrary and rests upon some reasonable consideration of difference or policy”).

24. *Lehnhausen*, 410 U.S. at 365.

25. The tax scheme must fail the rationality test before being judged arbitrary and capricious. *See Ohio Oil Co. v. Conway*, 281 U.S. 146, 159-60 (1930) (holding that a scheme fails rationality test only if “palpably” arbitrary).

26. *Charleston Fed. Savings & Loan Ass’n v. Alderson*, 324 U.S. 182, 190-91 (1945). *See also Coulter v. Louisville & Nashville R.R.*, 196 U.S. 599, 607 (1905) (holding that before a federal court may enjoin a state tax on grounds of inequality of valuation, claimant must show that inequality is systematic and intentional).

27. *Allied Stores v. Bowers*, 358 U.S. 522, 526-27 (1959).

28. *See, e.g., Allegheny*, 488 U.S. 633 (1989).

29. *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353 (1918) (holding that a state must intentionally violate the essential principal of uniformity); *Coulter v. Louisville & Nashville R.R.*, 196 U.S. 599, 607 (1905) (holding that a claimant must make a showing that inequality was systematic and intentional).

30. 488 U.S. 336, 344 (1989); 358 U.S. 522, 526-27 (1959).

Finally, a state's tax scheme must avoid impermissible interference with the right to interstate travel. This Fourteenth Amendment stipulation applies to statutes that discriminate between in-state residents and non-residents.³¹ In the 1980's, the Court decided a trilogy of interstate right to travel cases. The Court found violations of the right to interstate travel in each case.³²

In *Zobel v. Williams*,³³ an Alaska statute required distribution of state oil proceeds to bona fide residents.³⁴ Distributions varied according to the citizen's length of residency since 1959.³⁵ The state argued that the plan encouraged migration to and settlement in the state.³⁶ The state also suggested that the plan rewarded Alaskans for past contributions.³⁷ The Court rejected each rationalization while purportedly relying on a minimal rationality standard.³⁸

Two subsequent decisions delivered the same result. In *Hooper v. Bernalillo County Assessor*,³⁹ a New Mexico statute granted a small property tax exemption to veterans who became residents prior to May 8, 1976.⁴⁰ Without attempting heightened scrutiny, the Court found the statute in conflict with the Equal Protection Clause.⁴¹

The Court's third decision, in *Attorney General v. Soto-Lopez*⁴² also found a state statute in violation of the right to travel. In *Soto-Lopez*, New York provided hiring preferences to veterans.⁴³ These benefits accrued only to veterans who had lived in New York prior to induction into the military.⁴⁴ The Court struck down the statute and observed that the right to travel protects residents of a particular state from ad-

31. See *infra* notes 32-45 and accompanying text for discussion of current right to travel issues.

32. See *Attorney General v. Soto-Lopez*, 476 U.S. 898 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982). See also *infra* notes 33-45 and accompanying text reviewing these cases.

33. 457 U.S. 55 (1982).

34. *Id.* at 57.

35. *Id.*

36. *Id.* at 61 & n.7.

37. 457 U.S. at 61 & n.7.

38. *Id.* at 62-63.

39. 472 U.S. 612 (1985).

40. *Id.* at 614 & n.2.

41. *Id.* at 621-23.

42. 476 U.S. 898 (1986).

43. *Id.* at 900 & n.1.

44. *Id.*

verse and differential treatment, compared to other residents of that state, based solely on the timing of their negotiation.⁴⁵

B. Proposition 13

Proposition 13 revolutionized modern tax reform and created national headlines when it secured ballot space in California's 1978 election.⁴⁶ Disenchanted with runaway tax assessments tied to skyrocketing property values, voters overwhelmingly approved the constitutional amendment.⁴⁷ Proposition 13 freezes assessment values at 1975 prices but allows 2% maximum annual adjustments.⁴⁸ Reappraisal occurs only when property changes hands.⁴⁹ In the first year alone, Proposition 13 saved taxpayers (and cost the state treasury) five billion dollars.⁵⁰ Despite the big taxpayer savings, Proposition 13 soon came under legal attack.

45. *Id.* at 904.

46. See *supra* notes 5-7 and accompanying text describing the circumstances that spawned Proposition 13.

47. Voters approved the measure by a margin of two-to-one. See Lefcoe & Allison, *supra* note 5, at 174.

48. See *supra* note 2 for text of Proposition 13.

49. See *supra* note 2 for text of Proposition 13. Reappraisal occurs when property has been purchased, newly constructed, or there has been a change in ownership. CAL. CONST. art. 13A § 2(a).

Proposition 13 left open many questions subsequently decided by the California courts. In *Amador Valley Joint Union High School District v. State Bd. of Equalization*, 583 P.2d 1281, 1294 (Cal. 1978) (en banc), the California Supreme Court upheld the measure's validity against federal equal protection challenges. See *infra* notes 51-61 and accompanying text for a discussion of the *Amador Valley* case. Other decisions construing language in Proposition 13 include *San Francisco v. Farrell*, 648 P.2d 935, 940 (Cal. 1982) (stating that special taxes mean taxes levied for a specific purpose rather than taxes used for general governmental purposes); *Carman v. Alvord*, 644 P.2d 192, 196-97 (Cal. 1982) (observing that the public employee retirement fund liability is a debt for purposes of Proposition 13); *Los Angeles County Transp. Comm'n v. Richmond*, 643 P.2d 941, 947 (Cal. 1982) (noting that two-thirds vote requirement for additional tax increases does not apply to a vote on a sales tax increase); *County of Fresno v. Malmstrom*, 156 Cal. Rptr. 777, 781 (1979) (stating that one percent maximum tax limitation on ad valorem taxes does not apply to special assessments, which therefore are outside Proposition 13's limits).

50. See Lefcoe & Allison, *supra* note 5, at 178. The overall savings over the first ten years approach \$230 billion. See Richard C. Reuben, *Prop. 13, at 10, Said to Have Met Its Primary Goals—But Initiative Wreaked Havoc on Budgets of County Governments—Still Controversial*, L.A. DAILY J., June 6, 1988, at 1. But see Lewis K. Uhler, *The Tax Revolt is Alive and Well*, CALIFORNIA REPUBLIC, March 26, 1991, at 27. According to the article, California has several options available to limit its need for additional funds. *Id.* The author estimates that the state can raise \$4 to \$5 billion. *Id.* at 28.

C. *Amador Valley Joint Union High School District v. State Board of Education*

Immediately after enactment, Proposition 13 faced legal opposition on federal and state constitutional claims.⁵¹ In *Amador Valley Joint Union High School District v. State Board of Education*,⁵² the California high court upheld Proposition 13's validity against a federal equal protection charge.⁵³

The *Amador Valley* petitioners included the school district, the County of Alameda, and the City and County of San Francisco.⁵⁴ Seeking a declaratory judgment, they contended that the 1975 rollback provisions would result in invidious discrimination between owners of similarly situated property.⁵⁵ They further argued that Proposition 13 had not established classifications.⁵⁶ The petitioners believed that the lack of classifications caused the tax scheme to fall below equal protection standards.⁵⁷ The California court, however, considered the system in a different light.⁵⁸ The court avoided deciding whether the scheme involved classifications and instead found any speculative disparities in tax treatment the result of the owner's choice to purchase on a given date.⁵⁹ Thus, the court concluded that because tax rates based on acquisition value withstood a rational basis review, Proposition 13 survived equal protection attack.⁶⁰ Chief Justice Rose Bird dissented. She did not accept the majority's rational basis approach which, in ef-

51. Proposition 13 was passed in June 1978. The California Supreme Court rendered an opinion by September 22, 1978. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281 (1978) (en banc).

52. 583 P.2d 1281 (Cal. 1978) (en banc).

53. *Id.* at 1302. The California court addressed several other issues the petitioners raised. These challenges involved state constitutional law. The California court rejected these attacks, holding (1) the voter initiative was not a constitutional revision; (2) matters encompassed by the initiative sufficiently met the state's requirement that initiatives only embrace a "single-subject;" and (3) the special requirement of a two-thirds vote to approve local taxation was not constitutionally infirm. *Id.* at 1283-95.

54. *Id.* at 1283. The court noted the abundance of support for petitioners. Among them were several governmental agencies and concerned citizens. *Id.*

55. *Id.* at 1292.

56. 583 P.2d at 1292.

57. *Id.* at 1293.

58. *Id.* The court conveniently equated tax classifications with tax disparities. *Id.*

59. *Id.*

60. 583 P.2d at 1294. The court stated that later purchasers would be assessed "in precisely the same manner as those who purchased in 1975" which justified a rational

fect, favored one class of owners over another.⁶¹

D. *Allegheny Pittsburgh Coal Co. v. County Commission*

In 1989 the United States Supreme Court cast new doubt on Proposition 13's constitutionality with a decision involving a West Virginia tax scheme.⁶² Two coal companies in *Allegheny Pittsburgh Coal Co. v. County Commission*⁶³ alleged an equal protection violation over gross disparities between taxes assessed on their recently purchased properties and those assessed on nearby property not recently transferred.⁶⁴ West Virginia's constitution does not provide for separate classifications of corporately owned land.⁶⁵ The state required uniform taxation of all real estate in proportion to value.⁶⁶ The county assessor, however, followed an ad hoc procedure which allowed huge disparities to develop in tax assessment of comparable property.⁶⁷

The county assessed property on the basis of deed consideration.⁶⁸

basis standard because the acquisition price reflected the owner's "voluntary acts of purchase." *Id.* at 1293.

An often overlooked aspect of *Amador Valley* concerned the political sentiment that must have affected the California Supreme Court. Voters elect California's supreme court justices; four on the *Amador Valley* court faced election in November 1978. See Lefcoe & Allison, *supra* note 5, at 174. The court rendered its decision in September, 1978. All four justices were confirmed. *Id.* However, Chief Justice Rose Bird, the lone dissenter, gained re-election with 52.5% of the vote, representing the closest vote in the history of confirmation elections. *Id.*

61. *Id.* at 1303-04. Chief Justice Bird added:

As judges we must be devoted to the preservation of the great constitutional principles which history had bequeathed to us. In article XIII A, one of those principles has been violated — the equal protection clause. No one mindful of this nation's colonial history can seriously question the right of the people to act to redress tax grievances. However, our citizens also have a right to be treated equally before the law. The right to equality of taxation is as basic to our democracy as is the right to representation in matters of taxation. Under article XIII A property taxpayers are not treated equally and those sections which promote this disparity must fall.

Id. at 1303 (Bird, C. J., dissenting).

62. West Virginia's supreme court held, by a three-to-two margin, that the scheme had not violated the constitution. *In re 1975 Tax Assessments Against Oneida Coal Co.*, 360 S.E.2d 560 (W. Va. 1987), *rev'd sub nom.* *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989).

63. 488 U.S. 336 (1989).

64. *Id.* at 339-40.

65. *Id.* at 344-45.

66. *Id.* at 338.

67. 488 U.S. at 338-39.

68. *Id.* at 340.

Consequently, property that infrequently changed hands remained on the tax rolls at low values.⁶⁹ Although the infrequently transferred property was subject to adjustments, the assessor had managed only three ten percent increases in the prior fifteen years.⁷⁰ Market values for all property had leaped in value during that same period.⁷¹

The Webster County officials mustered an extremely weak response.⁷² The Supreme Court unanimously held that the county's system violated the Equal Protection Clause.⁷³ Because the state elucidated no clear classification and seasonable attainment of inequities had not occurred, the Court judged the disparate tax burdens on the basis of intentional and systematic discrimination.⁷⁴ Noting that tax rate differentials were not likely to converge and that discrepancies in tax assessments were as high as thirty-five to one, the Court had no trouble concluding that the scheme fell below the standard.⁷⁵ In its last footnote, the Court explicitly referred to Proposition 13 but added that it did not, nor did it have to, decide that measure's validity with its *Allegheny* ruling.⁷⁶

69. *Id.*

70. *Id.* at 338.

71. 488 U.S. at 338.

72. One commentator goes as far as saying "[i]f the battle between the competing lawyers in *Allegheny* had been a prize fight, the referee would have stopped it." Glennon, *supra* note 19, at 272-73 (1990). Professor Glennon summed up his assessment of the tax assessor's counsel: "*Allegheny* unfortunately illustrates the dilemma that arises when the government attorney lacks persuasive powers. The failure of counsel for the County to assert any plausible reason for the Assessor's action resulted in the practice being found unconstitutional." *Id.* at 301.

73. 488 U.S. at 342-43.

74. *Id.*

75. *Id.* at 344-46.

76. *Id.* at 344-45 n.4. That footnote reads:

We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California had adopted a similar policy as Article XIII A of its Constitution, popularly known as 'Proposition 13.' Proposition 13 generally provides that property will be assessed at its 1975-1976 value, and reassessed only when transferred, constructed upon, or, in a limited manner for inflation. Cal. Const., Art. XIII A, § 2 (limiting inflation adjustments to 2% per year.) [sic] The system is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

Id.

III. RECENT DEVELOPMENT

Allegheny quickly generated new litigation and discussion over Proposition 13's viability. Prior to *Allegheny*, Proposition 13 appeared to have become impervious to any federal incongruities.⁷⁷ Observers of *Allegheny* accurately predicted the result but in *Allegheny*'s aftermath few commentators have taken note of its potential impact on Proposition 13.⁷⁸ Even more astonishing is the lack of responsible planning by California politicians and citizens for alternative tax systems.⁷⁹

A. *R.H. Macy Co. v. Contra Costa County*

In March of 1989 in *R.H. Macy Co. v. Contra Costa County*,⁸⁰ a national department store raised equal protection allegations involving Macy's property tax reassessment under Proposition 13. Macy's owned a portion of a shopping center in Contra Costa County.⁸¹ Because the company underwent a corporate restructuring, the title change triggered reassessment required by Proposition 13.⁸² Macy's argued that *Allegheny* applied to Proposition 13 and required a "reasonable attainment of rough equality."⁸³ According to Macy's, that goal had not and could not be met under Proposition 13. The California court rejected this challenge. The court noted that the Supreme

77. Until the *Allegheny* decision, *Amador Valley* effectively barred any subsequent challenges to Proposition 13 based on the Equal Protection Clause. See *supra* notes 51-61 and accompanying text for a discussion of the *Amador Valley* case.

In addition, federal law has helped shield Proposition 13 from challenges in federal court. 18 U.S.C. § 1341 (1988) (not allowing federal jurisdiction over a challenge to a state tax scheme unless the litigant has exhausted all state appeals).

78. At least two law review commentaries have undertaken an evaluation of *Allegheny*'s potential effects on Proposition 13. See Glennon, *supra* note 19, at 290-306 (focusing analysis on *Allegheny*, devoting last part of article to effects on Proposition 13); Marian A. Harvey, Note, *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County: Equal Protection in Property Taxation, A New Challenge To Proposition 13?*, 26 SAN DIEGO L. REV. 1173 (1989) (comparing West Virginia's scheme to Proposition 13).

79. California's senate has commissioned one study to the impact if the legislature repealed Proposition 13. See Richard C. Reuben, *Proposition 13 Up in Air After Macy's Retreat*, L.A. DAILY J., June 11, 1991, at 7.

80. 276 Cal. Rptr. 530 (Cal. Ct. App. 1990).

81. *Id.* at 532-33. Macy's apparently owned the portion used by its store within the shopping mall. *Id.* The property had been controlled through subsidiaries, Concord Properties Corp. and Macy's of California, Inc. *Id.* at 532.

82. *Id.* at 533.

83. *Id.* (quoting *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343 (1989)).

Court explicitly refused to rule on the constitutionality of Proposition 13.⁸⁴ The California court also distinguished *Allegheny* on the basis of *Allegheny's* extreme disparities in tax assessments.⁸⁵ For further emphasis, the *Macy* court cited the different standards of value used under West Virginia's tax scheme and Proposition 13.⁸⁶

The *Macy* court refused to decide whether Proposition 13 implicitly or explicitly designated classifications.⁸⁷ Instead, the court, relying on *Amador Valley*, found that any inequities which may have resulted from the classification were an inevitable result of the rational scheme furthered by legitimate state objectives.⁸⁸

The California Supreme Court refused *Macy's* appeal.⁸⁹ Having exhausted state court remedies, *Macy's* filed a petition for a writ of certiorari with the United States Supreme Court in early 1990.⁹⁰ The Court granted the writ and both parties filed briefs and prepared for oral arguments in mid-June of 1990. Shortly before oral arguments, *Macy's* succumbed to angry supporters of Proposition 13 and withdrew its petition.⁹¹

B. *Nordlinger v. Lynch*

Another Proposition 13 challenge came before a California appellate court. *Nordlinger v. Lynch* involved a homeowner who raised her own *Allegheny* challenges.⁹²

In *Nordlinger*, an attorney purchased a California home on November 1, 1988 for \$170,000.⁹³ Her subsequent tax bill showed adjustment

84. 276 Cal. Rptr. 530, 538 (Cal. Ct. App. 1990).

85. *Id.* at 539. *Macy's* also raised a challenge based on the right to interstate travel. *Id.* at 540. The court rejected that claim. *Id.* at 541.

86. *Id.* at 537-38.

87. *Id.* at 538.

88. 276 Cal. Rptr. 530, 539 (Cal. Ct. App. 1990).

89. 1991 Cal. LEXIS 943 (Cal. 1991). See Hallye Jordan, *Prop. 13 Cases Rejected*, L.A. DAILY J., March 1, 1991, at 3. *Macy's* attorney, Charles R. Ajalat, predicted that the United States Supreme Court would hear the case because "[t]hat's where the action has been anyway." *Id.*

90. *R. H. Macy & Co. v. Contra Costa County*, 276 Cal. Rptr. 530 (Cal. Ct. App. 1990), *cert. granted*, 111 S. Ct. 2256, *cert. dismissed*, 111 S. Ct. 2923 (1991).

91. The public's reaction indicated the emotional volatility involved with Proposition 13. See Richard C. Reuben, *Prop. 13 Up in Air After Macy's Retreat*, L.A. DAILY J., June 11, 1991, at 7 (discussing the reasons *Macy's* withdrew its petition).

92. 275 Cal. Rptr. 684 (Cal. Ct. App. 1990), *cert. granted*, 112 S. Ct. 49 (1991).

93. *Id.* at 687. *Nordlinger* recently took her case to the press:

reflecting the new purchase price. Ms. Nordlinger then learned that two neighbors with nearly identical properties paid taxes on assessed values of \$35,850 and \$36,107.⁹⁴ Although all three properties appeared to be similar, Nordlinger received a tax bill five times higher than her neighbors.⁹⁵

The lower court ruled that *Amador Valley* controlled despite *Allegheny* and sustained a demurrer.⁹⁶ The California Court of Appeal for the Second District affirmed.⁹⁷ Rather than rely on *Allegheny* to strike down Proposition 13, the court of appeals closely followed the *Amador Valley* analysis.⁹⁸ According to the *Nordlinger* court, a system based on acquisition cost bears a reasonable relationship to valid state goals

A Los Angeles homeowner angry her property taxes are up to five times what her neighbors pay hopes the U. S. Supreme Court . . . will agree to consider her challenge to California's landmark Proposition 13.

Attorney Stephanie Nordlinger's case challenges the 1978 initiative's provision that provides for tax reassessment at current market value when a home is purchased or new construction occurs. She is also challenging the 2 percent annual limit on increases in a property's assessed value under current ownership. Those portions of the tax reform initiative are referred to as the 'welcome stranger' provisions.

"I filed [my lawsuit] because it's unfair for me to pay five times as much taxes as my neighbors," Nordlinger said.

Nordlinger . . . paid \$170,000 for her house in . . . November 1988. Her property taxes for 1989 were \$1,700, while many of her neighbors who had lived there longer only paid \$350, she said.

"It's a denial of equal protection of the laws," she said. "I get the same services as everyone else. Why should I pay five times more taxes than everyone else?"

Lauren Blau, *Lawyer's Challenge of Prop. 13 Is Awaiting Decision by Justices*, L.A. DAILY J., Oct. 7, 1991, at 1.

94. 275 Cal. Rptr. at 687. According to the complaint, the two other homes contained more square footage. *Id.* The first home sits on a lot 900 square feet larger; that home is assessed at \$35,820. *Id.* The second comparable property has both a larger lot (by 1,040 square feet) and greater living space (by 44 square feet). *Id.* Nordlinger alleged that her fair assessed value should be \$30,000. *Id.*

95. *Id.* The prior owners of the Nordlinger property paid \$121,500 for it in 1986. *Id.* In 1989, shortly after the November 1988 sale, Nordlinger received a supplemental tax bill reflecting the reassessment triggered by the change in ownership. *Id.*

96. *Id.* at 688. The lower court dismissed both of Nordlinger's causes of action. *Id.* The first cause of action sought declaratory judgment declaring article XIII A unconstitutional as applied to similarly situated property owners. *Id.* In her second cause of action, Nordlinger sought a tax refund of \$898 in property taxes for the year 1988-89. *Id.* The figure did not amount to a proportional reduction because the previous owner paid or had already been liable for a portion of the 1988-89 tax bill. *Id.*

97. *Id.* at 698.

98. 275 Cal. Rptr. at 692. The court would not abandon loyalty to *Amador Valley* unless the Supreme Court's "decision in *Allegheny* is directly on point." *Id.* at 693.

and therefore withstands an application of the arbitrary and capricious standard.⁹⁹ The court distinguished *Allegheny* by emphasizing that West Virginia's valuation system differed from Proposition 13.¹⁰⁰ California's Supreme Court denied further review.¹⁰¹

On October 7, 1991, the United States Supreme Court granted Nordlinger's petition for a writ of certiorari.¹⁰² The petitioner's first question presented will place Proposition 13's constitutionality squarely before the Court.¹⁰³

IV. EVALUATION

The Supreme Court's current direction in applying equal protection to state tax issues has now reached a crossroads. *Allegheny* represents the first use of equal protection to invalidate a state tax system since 1931.¹⁰⁴ In the future, the Court might distinguish this as an unusual factual situation which required judicial intervention.¹⁰⁵ Most importantly, *Allegheny* signifies an aggressive use of equal protection as applied to state tax systems.¹⁰⁶

99. *Id.* at 694-95.

100. *Id.*

101. The California Supreme Court denied review on February 28, 1991. See Richard C. Reuben, *Battle Over Prop. 13 Heats Up — Again*, L.A. DAILY J., March 28, 1991, at 4.

102. See Richard C. Reuben, *High Court to Hear Prop. 13 Challenge — Supreme Court Has Chance to Expand Economic Rights*, L.A. DAILY J., Oct. 8, 1991, at 1.

103. Nordlinger presented two questions to the Court:

(1) Does California's ad valorem property tax system as modified by Proposition 13's welcome stranger provision violate equal protection clause by taxing newly purchased property 10, 12, 15, 17, and even 583 times higher than like property owned by long-time owners, with no possibility of ever seasonably attaining rough equality in tax treatment?

(2) Does the harshly disproportionate tax burden Proposition 13 imposes on recent migrants and other newcomers impede right to travel without compelling state purpose?

Nordlinger v. Lynch, 275 Cal. Rptr. 684 (Cal. Ct. App. 1990), *cert. granted sub nom. Nordlinger v. Hahn*, 112 S. Ct. 49 (1991).

104. See *Cumberland Coal Co. v. Bd. of Revision*, 284 U.S. 23, 28-30 (1931) (invalidating a Pennsylvania tax assessment plan on equal protection grounds).

105. The disparities were truly staggering. Differentials exceeded 3500%, and based on the periodic adjustments applied to other properties, 500 years would pass before the assessor had bridged the gap. *Allegheny*, 488 U.S. 336, 341-42 (1989). The Court's analysis virtually ignored serious consideration of the tax authority's proffered justifications. *Id.* at 344-46.

106. See Hallye Jordan, *Prop. 13 Cases Rejected*, L.A. DAILY J., March 1, 1991, at

The trilogy of cases starting with *Zobel v. Williams*¹⁰⁷ portend trouble for Proposition 13. California courts have relied heavily on the 1978 decision in *Amador Valley* to uphold Proposition 13's validity.¹⁰⁸ Since *Amador Valley*, the right to travel analysis may have matured into a more potent danger to Proposition 13.¹⁰⁹ For example, in *Hooper*, the Court struck down a statute that involved a modest financial benefit designed to reduce veteran's property taxes.¹¹⁰ Moreover, statutes struck in *Zobel*, *Hooper*, and *Soto-Lopez* used arbitrary cut-off dates quite similar to the 1975 date found in Proposition 13.¹¹¹

The Court's language in *Zobel* extends beyond the Alaska statute under consideration. Dictum in *Zobel* arguably questions Proposition 13's constitutionality. The majority opinion lashed out against *Zobel*-like statutes and rhetorically asked: "Could states impose different taxes based on length of residence?"¹¹² Justice Brennan, in a concurring opinion, echoed similar warnings, specifically noting that the Court, by adopting the Equal Protection Clause, has implicitly rejected state schemes with classifications based on length of residence.¹¹³

V. CONCLUSION

Equal protection presumes some benchmark for comparison. Before a court may find unconstitutional discrimination, the fact finder must place comparative values on the properties.¹¹⁴ Few would question the

3 (stating that attorney for Macy's believes the Court will invalidate Proposition 13 if given the opportunity).

107. 457 U.S. 55 (1982). For a discussion of the three cases, see *supra* notes 33-45 and accompanying text.

108. See, e.g., *Nordlinger*, 275 Cal. Rptr. 684 (Cal. Ct. App. 1990), *cert. granted*, 112 S. Ct. 49 (1991); *Macy*, 276 Cal. Rptr. 530 (Cal. Ct. App. 1990).

109. See *supra* notes 31-45 and accompanying text regarding right to travel decisions. Professor Glennon believes that rather than invalidating Proposition 13 under general equal protection analysis, the Court may hold the measure violative of the Clause's right to interstate travel. See Glennon, *supra* note 20, at 294-97 (1990).

110. In *Hooper*, the state provided a property tax exemption for \$2,000 of property value. *Hooper*, 472 U.S. at 615.

111. *Zobel* had a cutoff date in 1959; *Hooper*, in 1976; and *Soto-Lopez*, at time of induction. Proposition 13 establishes a cutoff date in 1975-76 as the starting point for valuation of continuously owned real estate. For text of Proposition 13, see *supra* note 2 and accompanying text.

112. *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (footnote omitted).

113. *Id.* at 71.

114. *Id.* The problem of value cropped up in *Allegheny* even at the Supreme Court's level of review. *Allegheny*, 488 U.S. 338-39. The County argued that values of

market value of widely traded stock. Real estate, in contrast, presents the assessor with a complicated determination.¹¹⁵ Until a property has sold, appraisers rarely agree on the fair market value of the real estate parcel.¹¹⁶ Consequently, in tax systems based on market value, variances as much as ten to twenty percent are tolerated.¹¹⁷

Proposition 13, once thought a panacea for California's tax evils, now represents a warped and unfair tax policy.¹¹⁸ The vital element of the scheme remains its reliance on acquisition value as a justifiable basis for its tax policy. The justification, however, has never had a basis in equal protection analysis and doubtfully survives constitutional re-

comparative properties had not been definitively determined. *Id.* The Court, of course, had to accept the factual findings by the trial court. *Id.* The County may have misdirected its theory of the case and instead might have argued rational bases for its system. See Glennon, *supra* note 19, at 272-75 (postulating that inadequate counsel, including preoccupation with factual disputes, may have contributed to the result).

115. See, e.g., Allen D. Manvel, *Assessment Uniformity—And Proposition 13*, TAX NOTES 893, 895 (1984) (explaining assessment level variations); Krishne C. Karnezis, Annotation, *Sale Price of Real Property as Evidence in Determining Value for Tax Assessment Purposes*, 89 A.L.R. 3d 1126, 1131-35 (1979) (discussing difficulties with appraisal values and issues that arise in that context).

See also Note, *Inequality in Property Tax Assessments: New Cures for Old Ill*, 75 HARV. L. REV. 1374, 1375-76 (1964) (documenting historic problems associated with appraisal judgments and recourse for the taxpayer).

116. Market price alone may not establish fair market value. See, e.g., *Geipel v. Milwaukee*, 229 N.W. 2d 585, 589 (Wis. 1975) (sale price of 60 acres with residence constitutes best evidence of property's value for taxation purposes); *In re Park Avenue Corp. v. Tax Comm'n*, 191 N.Y.S.2d 893, 895 (App. Div. 1959) (sale price best evidence for property tax valuation purposes); *Thaw v. Fairfield*, 43 A.2d 65, 67 (Conn. 1945) (sale price of house on acreage properly considered as a factor, but not conclusive evidence). In some instances, courts have disregarded sale price altogether. See, e.g., *Davidson v. Lansing*, 97 N.W. 2d 592, 593, 356 Mich. 697, 700 (1959) (holding that sale price of real estate is not controlling in assessing taxes); *Spear v. Bath*, 130 A. 507, 509 (Me. 1925) (holding auction price is not a true criteria of the assessed valuation on which to base taxes).

States assessing market value have grappled with other problems, such as assessors applying ad hoc rates that leave property owners burdened, but not to the extent that litigation would be worth the gain. See Irving I. Lesnick, *Does Full Value Mean Full Value? Prospects for Assessment Reform in New York in Light of the Experiences of Other States With Hellerstein's Progenitors*, 5 HOFSTRA L. REV. 235, 255 (1977). See also Note, *The Road to Uniformity in Real Estate Taxation: Valuation and Appeal*, 124 U. PA. L. REV. 1418 (1976) (coining the term "welcome stranger" taxation).

117. See Manvel, *supra* note 115, at 894 (noting that California had one of the best assessment records prior to Proposition 13).

118. See *supra* note 8 and accompanying text for discussion of the winners and the losers under Proposition 13.

quirements today.¹¹⁹

Acquisition price does not, on paper, directly lead to inequity. At the time of purchase, the price paid nearly always reflects the best estimate of a property's true value.¹²⁰ That figure, however, loses touch with updated market value as market values become volatile over time.¹²¹ When property is ultimately sold, the purchase price bears little relevance to market value.¹²²

California leaders recognize that a tax system purporting to fairly allocate the assessments according to such a system makes a mockery of fairness and equal treatment.¹²³ The tax system when enacted provided a temporary stay for the ills that previous tax policy had not cured. The Supreme Court may ultimately do to Proposition 13 what California's leaders and courts have been politically constrained from attempting.¹²⁴ Even if the Court upholds Proposition 13 under the recent challenges, responsible leaders and citizens should propose a rational revision to the existing system.

*William C. Peper**

119. The Supreme Court apparently assumes that fairness presumptively depends on fair market value basis as established by the fact-finder. See *Allegheny*, 488 U.S. at 344-45 n.4 (referencing inapplicability of the decision to Proposition 13, the Court highlighted the differing valuation theories).

120. In general, real estate appraisers define market value as "[t]he most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale" Fannie Mae Form 1004B (July 1986).

121. *Nordlinger* represents a fine example of market value volatility. The plaintiff in *Nordlinger* paid taxes on \$170,000 assessed value, while her neighbors, with equivalent or better properties, paid taxes on assessed values under \$37,000. *Nordlinger*, 275 Cal. Rptr. at 687.

122. *Id.*

123. See, e.g., John Vasconcellos, *The Tax Revolt Is Dead*, CALIFORNIA REPUBLIC, March 26, 1991, at 26, written by a California state senator). See also Richard C. Reuben, *Primary Goals*, *supra* note 1. Local governments, feeling the pinch, have attempted to exert pressure on state legislators. *Id.*

124. Proposition 13 requires a two-thirds majority to amend or revise it. See *supra* note 2 for text of Proposition 13.

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