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Constitutional Implications of Acquisition-Value Real Property Taxation: The Elusive Rational Basis

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INTRODUCTION

Acquisition-value real property taxation systems represent a departure from the traditional practice of taxing real property on its current fair market value. In contrast to traditional systems, which are still employed by the vast majority of states, under acquisition-value taxation a real estate owner's property tax liability is determined by the value of the property when the taxpayer acquired it. In periods of rising real estate prices, such a scheme compels later buyers to shoulder a higher annual tax liability than previous buyers. As a result, there can be great disparities in the tax liabilities of taxpayers owning identical property. These disparities have given rise to a variety of legal challenges. One such challenge asserts that acquisition-value taxation violates the Equal Protection Clause by giving, without sufficient rational basis, preferential treatment to certain taxpayers.

This Article explores the equal protection challenge. Part I describes the acquisition-value taxation systems adopted in California and Florida. Part II reviews the history of legal challenges to unequal property taxes prior to the United States Supreme Court's 1992 decision in *Nordlinger v. Hahn*,[1] which upheld California's system against an equal protection challenge.[2] Part III examines the merits of the equal protection question and critiques the Court's analysis of *Nordlinger* in light of its previous decision in

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1. 112 S. Ct. 2326 (1992).
2. *Id.* at 2331–36.

Allegheny Pittsburgh Coal Co. v. Webster County,[3] which invalidated a similar tax scheme effectuated by an individual assessor rather than a lawmaking body.[4] Part IV concludes that *Nordlinger* fits squarely within the "minimum scrutiny" tradition, but questions the appropriateness of applying that level of scrutiny to acquisition-value taxation. In the course of evaluating whether acquisition-value taxation satisfies the standards of equal protection, this Article will highlight the Court's inconsistent approach to property tax cases. While professing to have found an acceptable rationale for acquisition-value taxation, the Court has stumbled in its efforts to establish the requisite threshold of rationality for this kind of discriminatory taxation. The Court's uncertainty is particularly unfortunate in the context of an economic regulation which has profound social consequences and which promises to be difficult, if not impossible, to repeal.

I. BACKGROUND: PROPOSITION 13 AND ITS PROGENY

In 1978, the California electorate overwhelmingly approved Proposition 13, which amended the state's constitution to implement a novel scheme of real property taxation.[5] Under the new acquisition-value taxing system, all real property assessments were rolled back to their 1975–76 levels until the property changed ownership or underwent construction.[6] Annual assessment increases were limited to two percent (or the rate of inflation, if less),[7] but when a particular parcel was sold its assessment would increase to fair market value, and new construction (including improvements to existing structures) would be similarly valued.[8] The new valuation, in turn, would be subject to the same "freeze" until the property again changed hands or underwent further construction. This scheme was ostensibly intended to provide relief to cash-strapped taxpayers facing escalating property taxes.[9] Wags soon dubbed it

3. 488 U.S. 336 (1989).

4. *Id.* at 344–46.

5. DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 2 (1982). Even after its incorporation as article XIIIA of the California Constitution, the new property tax scheme continued to be known popularly as "Proposition 13," and it will be so referred to throughout this Article. It is also known as the Jarvis-Gann initiative. *Id.*

6. CAL. CONST. art. XIIIA, § 2(a) (amended 1992).

7. *Id.* § 2(b). The assessment may also be "reduced to reflect substantial damage, destruction or other factors causing a decline in value." *Id.* As originally enacted, Proposition 13 allowed an assessment to be reduced only to the extent of a reduction in "the consumer price index or comparable data for the area under taxing jurisdiction." *Id.*

8. *Id.* § 2(a).

9. *See infra* text accompanying notes 111–16 (discussing historical context of

the "welcome stranger" law, because in a period of rising land values it created great disparities in the tax burdens of comparable parcels and compelled new arrivals in the community to pay higher taxes than their longer-established neighbors.[10]

Not every transfer of title is a "change in ownership" under the California scheme. Although Proposition 13 as originally enacted applied to all transfers of title,[11] subsequent amendments carved out an array of exceptions. For example, transfers of property between spouses, whether or not for consideration, are not treated as changes in ownership.[12] Likewise, parents may transfer to a child their principal residence and up to one million dollars in other real property (measured by tax valuation, not fair market value), gratuitously or for value, without triggering a reassessment.[13] In some circumstances, the old tax valuation on one property can be transferred to a replacement property—for example, where the original property is substantially damaged or destroyed by a disaster,[14] or the owner is displaced by eminent domain proceedings.[15] Similar exemptions allow severely disabled persons and persons over the age of fifty-five who change their principal residence to carry over the assessment of the old residence to the new residence.[16] Other exemptions exist as well.[17]

Since Proposition 13 became law, other states have considered or adopted acquisition-value property taxation. In November of 1992, Florida adopted a constitutional amendment similar to Proposition 13, albeit narrower in scope.[18] The Michigan electorate re-

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Proposition 13 and intent of those who supported it).

10. *See* Nordlinger v. Lynch, 275 Cal. Rptr. 684, 686–87 (Ct. App. 1990), *aff'd sub nom.* Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

11. CAL. CONST. art. XIIIA, § 2(a) (amended 1992).

12. *Id.* § 2(g) (1978); Law of July 10, 1979, ch. 242, § 4, 1979 Cal. Stat. 505, 506 (codified as amended at CAL. REV. & TAX. CODE § 63 (West 1987)).

13. CAL. CONST. art. XIIIA, § 2(h) (amended 1992); Law of June 17, 1987, ch. 48, § 1, 1987 Cal. Stat. 121, 121 (codified as amended at CAL. REV. & TAX. CODE § 63.1(a)(1), (2) (West Supp. 1994)). One commentator refers to this exemption as "the modern equivalent of a hereditary royal grant." Richard Reeves, *The Tax Revolt That Wrecked California*, MONEY, Jan. 1994, at 90, 98.

14. CAL. CONST. art. XIIIA, § 2(e) (amended 1992); Law of Sept. 17, 1986, ch. 855, § 1, 1986 Cal. Stat. 2945, 2945 (codified at CAL. REV. & TAX. CODE § 69(a) (West 1987 & Supp. 1994)).

15. CAL. CONST. art. XIIIA, § 2(d) (amended 1992); Law of Sept. 28, 1982, ch. 1465, § 5.5, 1982 Cal. Stat. 5627, 5637 (codified as amended at CAL. REV. & TAX CODE § 68 (West 1987)).

16. CAL. CONST. art. XIIIA, § 2(a) (amended 1992); Law of July 23, 1987, ch. 186, § 1, 1987 Cal. Stat. 1142, 1142 (codified as amended at CAL. REV. & TAX CODE § 69.5(a) (West Supp. 1994)).

17. *See* CAL. REV. & TAX CODE §§ 62–69.5 (West 1987 & Supp. 1994).

18. The Florida "Homestead Value Limitation" (or the "Save Our Homes"

jected a similar scheme the same year.[19] Idaho adopted its own version of Proposition 13 in a 1978 initiative, but the Idaho legislature promptly amended it to delete the provision requiring an assessment increase in the event of a change of ownership.[20] As long as such tax relief schemes retain their political appeal, their constitutionality will remain a critical question.

As discussed in part II below, the predictable effect of Proposition 13 has been to create large disparities in the property tax liabilities incurred by owners of comparable properties. This is likely to be the ultimate effect of Florida's constitutional amendment as well, although that effect will not become apparent for some time. A classification scheme that assigns annual tax burdens according to a property's value when acquired or constructed upon rather than its current value appears to disadvantage new purchasers, and thus has an adverse impact on new arrivals in the state, first-time buyers, and persons whose circumstances require them to relocate within the state.

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amendment) passed by a margin of 54% to 46%. Dexter Filkins & Tim Nickens, *Will New Tax-cap Law Be Boon or Boondoggle?*, MIAMI HERALD, Nov. 5, 1992, at 1B. The Florida provision limits increases in the assessed value of homestead property (which is normally taxed at fair market value minus a $25,000 homestead exemption) to the lesser of three percent or the prior year's inflation rate. FLA. CONST. art. VII, §§ 4(c)1(A), (B), 6(a)–(c). Like Proposition 13, the Florida amendment provides for reassessment to full fair market value in the event of a change of ownership, and for an increase in the assessment to reflect any improvements to the property. *See id.* art. VII, § 4(c)3. Unlike Proposition 13, the Florida amendment applies only to homestead property—that is, the owner's permanent residence—and thus is inapplicable to "second" homes, rental property, and commercial property, which continue to be reassessed annually at full fair market value. *See id.* art. VII, § 4(c). Thus, increases in property taxes for businesses and landlords may have to be substantial in order to offset the lost revenues from homestead property. The Florida provision also differs from Proposition 13 in that it provides no exceptions for intrafamily transfers, involuntary conversions, sales by senior citizens, or other special cases. *See id.* art. VII, § 4(c)3; *supra* text accompanying notes 12–17 (discussing exceptions to Proposition 13).

19. Two versions of a voter initiative limiting annual homestead reassessments until property is sold appeared on the November 1992 ballot in Michigan. *See State Proposals, Gen. Election—Nov. 3, 1992*, MICH. DEP'T OF STATE, Sept. 1992. *See generally* Bill Kole, *Property Tax Plans OK'd for Ballot*, DETROIT FREE PRESS, Sept. 5, 1992, at 10A (discussing state proposal to limit annual increases in homestead property tax). Both failed: Proposal A (limiting annual property tax increases) by a vote of 61% to 39%, and Proposal C (the "Cut and Cap" plan, which would have limited annual property tax increases *and* reduced current rates) by a vote of 58% to 42%. *Property Tax—Relief Plans Rejected*, 1992 Daily Rep. for Executives (BNA) No. 216, at D61 (Nov. 6, 1992). However, Michigan Governor John Engler has pledged to seek similar reforms from the state legislature. Chris Christoff & Dawson Bell, *Now With House Edge, Lansing GOP Exults*, DETROIT FREE PRESS, Nov. 5, 1992, at 1A, 13A.

20. *See* Law of Mar. 9, 1979, ch. 18, § 1, 1979 Idaho Sess. Laws 23, 23 (codified as amended at IDAHO CODE § 63-923 (1989 & Supp. 1993)).

In one of the last opinions issued in its 1991–92 term, the United States Supreme Court, in an eight to one decision, upheld Proposition 13 against a "minimum scrutiny" challenge under the Equal Protection Clause.[21] This Article examines the constitutionality of an acquisition-value tax scheme under traditional equal protection jurisprudence as well as more recent developments in the doctrine. The Article focuses on California's scheme, although much of the analysis applies to the Florida approach as well. The analysis reveals that, while acquisition-value taxation may pass the minimal standard of rationality demanded of discriminatory economic regulations, the Supreme Court has applied this standard in an inconsistent manner that undermines its legitimacy. Additionally, this standard may be inappropriate in light of the political processes which gave rise to laws implementing acquisition-value taxation and which present serious obstacles to their repeal.

II. CASES CHALLENGING ACQUISITION-VALUE TAXATION

A. Amador: *The First Challenge*

Proposition 13 was challenged in state court even before substantial tax disparities materialized. In *Amador Valley Joint Union High School District v. Board of Equalization*,[22] a group of "governmental agencies and concerned citizens"[23] filed suit shortly after Proposition 13 was adopted. They argued that Proposition 13 would "result in invidious discrimination between owners of similarly situated property,"[24] creating tax disparities that would constitute "an arbitrary discrimination in violation of the federal equal protection clause."[25]

Although the California Supreme Court pronounced the equal protection claim "arguably . . . premature,"[26] it nonetheless decided to "treat the equal protection issue as constituting an attack upon the face of the article itself."[27] The court acknowledged a line of federal precedents, including the United States Supreme Court's decisions in *Cumberland Coal Co. v. Board of Revision*[28] and *Sioux*

21. Nordlinger v. Hahn, 112 S. Ct. 2326, 2331–36 (1992).
22. 583 P.2d 1281 (Cal. 1978).
23. *Id.* at 1283.
24. *Id.* at 1292.
25. *Id.*
26. *Id.*
27. *Id.*
28. 284 U.S. 23 (1931).

City Bridge Co. v. Dakota County,[29] which held that "intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners" violates equal protection principles.[30] The court found, however, that both cases were factually distinguishable because both had involved "constitutional or statutory provisions which *mandated* the taxation of property on a *current value* basis."[31] Proposition 13, in contrast, amended the California Constitution to *eliminate* current value taxation. In the view of the *Amador* court, the United States Supreme Court's equal protection tax cases did "not purport to confine the states to a current value system."[32] The California court therefore did not consider those cases relevant to its doctrinal analysis.

Turning to the doctrine, the *Amador* court acknowledged that equal protection principles require that "a tax classification or disparity of tax treatment [be] founded upon some reasonable distinction or rational basis."[33] However, the court found that it was "arguably reasonable" to base assessments on acquisition cost,[34] even suggesting that such a system might "operate on a fairer basis than a current value approach."[35] The court noted that the "'acquisition value' approach to taxation finds reasonable support in a theory that the annual taxes which a property owner must pay should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value."[36]

Since *Amador*, the California Supreme Court has refused to hear challenges to Proposition 13's constitutionality, even as greater disparities have emerged. As discussed in part II.C below,[37] three more cases challenging Proposition 13 have reached the California appellate courts, and each time the tax scheme has survived the equal protection challenge.[38] The California Supreme Court denied

29. 260 U.S. 441 (1923).

30. *Cumberland Coal*, 284 U.S. at 28; *Sioux City Bridge*, 260 U.S. at 445; *see Amador*, 583 P.2d at 1293.

31. *Amador*, 583 P.2d at 1293.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See infra* notes 69–86 and accompanying text.

38. The California courts have rejected challenges under the right to travel and the Commerce Clause as well. These issues are addressed in the second article of this series. *See* Mary LaFrance, *Constitutional Implications of Acquisition-Value Real Property Taxation: Assessing the Burdens on Travel and Commerce*, 1994 UTAH L. REV. (forthcoming Aug. 1994).

petitions for review in each of those cases,[39] perhaps as a result of populist political pressures.[40]

B. *Equal Protection and* Allegheny Pittsburgh: *The Minimum Scrutiny Standard*

Long before it heard a challenge to Proposition 13, the United States Supreme Court in *Cumberland Coal* and *Sioux City Bridge* found equal protection violations when property was intentionally undervalued in violation of state law.[41] Then, more than a decade after *Amador*, the United States Supreme Court heard yet another challenge to unequal property tax assessments in *Allegheny Pittsburgh Coal Co. v. County Commission*.[42] The inequities in *Allegheny Pittsburgh* were the result of the local assessor's enforcement methods rather than a state-wide mandate.[43]

Allegheny Pittsburgh bore a close resemblance to *Cumberland Coal* and *Sioux City Bridge* both in its facts and in its outcome. Nonetheless, the Supreme Court's decision in *Allegheny Pittsburgh* unleashed a flurry of challenges to Proposition 13.[44]

Each of the petitioners in *Allegheny Pittsburgh* had conveyed or

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39. Northwest Fin., Inc. v. Board of Equalization, 280 Cal. Rptr. 24 (Ct. App. 1991), *review denied*, No. S021146, 1991 Cal. LEXIS 3204 (Cal. July 11, 1991), *cert. denied*, 112 S. Ct. 3026 (1992); R.H. Macy & Co. v. Contra Costa County, 276 Cal. Rptr. 530 (Ct. App. 1990), *review denied*, No. S019216, 1991 Cal. LEXIS 943 (Cal. Feb. 28, 1991), *cert. granted*, 111 S. Ct. 2256, *cert. dismissed*, 111 S. Ct. 2923 (1991); Nordlinger v. Lynch, 275 Cal. Rptr. 684 (Ct. App. 1990), *review denied*, No. S019164, 1991 Cal. LEXIS 842 (Cal. Feb. 28, 1991), *aff'd sub nom.* Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

40. As R.H. Macy realized late in its challenge to the amendment, Proposition 13 is a political "hot potato." *See* Oswald Johnston & Kevin Roderick, *Macy's Abandons Plea to Overturn Prop. 13's Legality*, L.A. TIMES, June 8, 1991, at A1. California's Supreme Court justices are elected, CAL. CONST. art. VI, § 16(a), and are thus not immune from majority pressures. *See generally* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1579–84 (1990) (arguing elected judges cannot be trusted to protect minority interests). One commentator has pointed out that four of the California justices who voted with the majority in *Amador* "were facing a confirmation vote on the November 1978 ballot (only a few months away) as they considered their decision." John J. Curtis, *California's Proposition 13 v. Webster County, West Virginia: The Elephant Spooked by the Mouse*, 1 J. PROP. TAX'N 7, 25 (1988).

41. *See supra* notes 28–30 and accompanying text (discussing *Cumberland Coal* and *Sioux City Bridge*).

42. 488 U.S. 336 (1989).

43. *Id.* at 338–40.

44. As discussed below, the Court's decision in *Allegheny Pittsburgh* may have attracted this special attention because, until that opinion was issued, both *Cumberland Coal* and *Sioux City Bridge* easily could have been dismissed as moribund since they were decided in the *Lochner* era of economic due process. *See infra* note 189 and accompanying text.

acquired real property in Webster County, West Virginia, during the years in controversy.[45] Each parcel was reassessed after the purchase. During the same period, the assessments of comparable, neighboring properties that had not recently been sold were considerably lower than the new assessments of the petitioners' property.[46] It was the assessor's practice to increase the valuation of a particular parcel to reflect its most recent selling price. In the case of parcels that had not recently changed hands, the assessor continued to assess the property based on the old selling price, making only minor adjustments, none of which reflected recent sales of comparable properties.[47]

Because the assessor used two different valuation methods, her assessments of the petitioners' parcels were dramatically higher than the assessments of comparable property in Webster County that had not recently been sold.[48] As a result, the petitioners' property taxes were commensurately greater than the taxes imposed on the owners of those comparable properties.[49] Even including the assessor's periodic minor adjustments in the assessments of land not recently conveyed, one petitioner was assessed and taxed 3400% more than the owners of comparable parcels; the disparities asserted by the other petitioners ranged from 700% to 3200%.[50]

State law clearly required full market valuations for each of the properties in question. The West Virginia Constitution specified that "taxation shall be equal and uniform throughout the State, and all property . . . shall be taxed in proportion to its value."[51] State law required property to be appraised for tax purposes annually at its current fair market value.[52] Applying these rules, the assessor had not *over*valued petitioners' property in an absolute sense.[53] Rather, the petitioners argued that the assessor's method *under*valued comparable properties that had not recently been sold, and that in light of such undervaluations the full-value appraisals of the petitioners' property violated the state constitution as well as the Equal Protection Clause of the Fourteenth Amendment.[54]

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45. *Allegheny Pittsburgh*, 488 U.S. at 339.
46. *Id.* at 338.
47. *Id.*
48. *Id.*
49. *Id.* at 340.
50. *See id.* at 341.
51. W. VA. CONST. art. X, § 1.
52. W. VA. CODE § 11-3-1 (1991).
53. If anything, the appraisals on which the assessments were based were probably too low. In a period of rising prices they had not been adjusted since the year of purchase.
54. *Allegheny Pittsburgh*, 488 U.S. at 342.

After conflicting decisions by the state courts,[55] the United States Supreme Court unanimously concluded that the assessment scheme violated the petitioners' federal equal protection rights.[56] The Court found it irrelevant that two different valuation *methods* were applied to property in the same class. Instead, the Court focused entirely on the *results* of the two-track method. Regardless of the methods employed, the Court held, "the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[57] Thus, the state's claim that it had a rational basis for its two-track system was apparently beside the point:

> The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, it does not require immediate general adjustment on the basis of the latest market developments.[58]

The assessment differentials at issue, the Court observed, were hardly "transitional," having persisted for "more than 10 years with little change."[59] Applying the constitutional test of "seasonable attainment of a rough equality" in tax burdens, the Court found that the assessor's periodic adjustments to property not recently conveyed were "too small to seasonably dissipate the remaining disparity."[60]

The *Allegheny Pittsburgh* Court analyzed the two-track assessment scheme as one that permitted gross disparities in the tax burdens imposed on a *single* class of property: "'[I]ntentional systematic undervaluation by state officials of other taxable property *in*

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55. The West Virginia Circuit Court found that the county's assessment method systematically and intentionally discriminated against the petitioners in violation of the state constitution and the Federal Equal Protection Clause. *Id.* at 339–40. The court ordered the county commission to reduce the petitioner's assessments to a level consistent with the assessments of comparable property. *Id.* The West Virginia Supreme Court of Appeals reversed, however, finding no systematic and intentional discrimination because the valuation of the petitioners' land conformed with state law. The court instructed the petitioners to seek reassessments of the comparable properties instead. *In re* 1975 Tax Assessments Against Oneida Coal Co., 360 S.E.2d 560, 564–65 (W. Va. 1987).

56. *Allegheny Pittsburgh*, 488 U.S. at 346.

57. *Id.* at 343.

58. *Id.* (citations omitted).

59. *Id.* at 344.

60. *Id.*

the same class contravenes the constitutional right of one taxed upon the full value of his property.'"[61] Imposition of unequal tax burdens on *different* classes of property or taxpayers, the Court noted, is permissible under traditional equal protection analysis only "'[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy.'"[62] The Court did not explain how it determined that the disparate treatment in this case involved a single class of property.

A footnote in *Allegheny Pittsburgh* added this pregnant aside:

> 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 has adopted a similar policy as Article XIIIA 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 or constructed upon, or in a limited manner for inflation . . . . 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.[63]

Despite this footnote, *Allegheny Pittsburgh* prompted commentators to predict that the Supreme Court would invalidate Proposition 13,[64] based largely on the Court's holding that equal protection requires "seasonable attainment of a rough equality" in tax bur-

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61. *Id.* at 345 (quoting Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352–53 (1918)) (alteration in original) (emphasis added).

62. *Id.* at 344 (quoting Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)) (alteration in original).

63. *Id.* at 344 n.4 (citation omitted). The numbering of this footnote ironically recalls the fertile footnote in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

64. *See* 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, 1190–95 (1989); William C. Peper, Note, *Proposition 13 Under an Updated Equal Protection Analysis: Unlucky at Last?*, 42 WASH. U. J. URB. & CONTEMP. L. 433, 447–50 (1992); Bruce Stephan, Comment, Allegheny Pittsburgh Coal v. Webster County*: Are Proposition 13's Days Numbered?*, 20 GOLDEN GATE U. L. REV. 289, 312–17 (1990); *see also* Curtis, *supra* note 40, at 27 (predicting, prior to *Allegheny Pittsburgh*, that Court might invalidate Proposition 13 on equal protection grounds). Other commentators viewed *Allegheny Pittsburgh* as an aberration. *See, e.g.*, William Cohen, *State Law in Equality Clothing: A Comment on* Allegheny Pittsburgh Coal Company v. County Commission, 38 UCLA L. REV. 87, 97–99 (1990) (criticizing *Allegheny Pittsburgh* and suggesting Proposition 13 should withstand minimal scrutiny in spite of that decision); John H. Ely, *Another Spin On* Allegheny Pittsburgh, 38 UCLA L. REV. 107, 108–11 (1990) (criticizing *Allegheny Pittsburgh*).

dens.[65] But attainment of such equality is only required as between *"similarly situated* property owners."[66] As discussed below, Proposition 13 was able to withstand equal protection scrutiny because the Court viewed it as treating persons who acquired property on different dates as falling into different classes of property owners—in other words, as not "similarly situated"—and viewed the state's differential treatment of these classes as a rational means to a legitimate end.[67]

Such an argument is not foreclosed by *Allegheny Pittsburgh.* Neither West Virginia nor the Court itself considered the possibility that the Webster County taxpayers could rationally be treated as members of different classes defined by acquisition dates.[68] Thus, the Court implicitly assumed that only one class of taxpayers was involved. As discussed below, by demonstrating that acquisition-value taxation draws rational distinctions between taxpayers who are not similarly situated, and that it does so in furtherance of legitimate goals, the defenders of Proposition 13 succeeded in persuading the Court that this type of unequal treatment satisfies the Equal Protection Clause's minimum "rationality" test.

C. The Allegheny Pittsburgh *Aftermath:* Nordlinger, R.H. Macy, *and* Northwest Financial

The petitioners' success in *Allegheny Pittsburgh* revived the hopes of those seeking to overturn Proposition 13. In short order, three suits were filed in the California state courts and moved quickly toward the United States Supreme Court. Not surprisingly, the California courts upheld Proposition 13 in each case.

The first case to reach the California appellate courts was *Nordlinger v. Lynch.*[69] The petitioner in *Nordlinger* purchased her first home in Los Angeles in 1988 after twenty-five years of living in rental housing.[70] The change of ownership caused only a modest increase in the annual property tax because the house had changed

65. *Allegheny Pittsburgh,* 488 U.S. at 343.

66. *Id.* (emphasis added).

67. *See Nordinger,* 112 S. Ct. at 2332–34.

68. *See* Brief of Respondent at 12–16, 29–34, Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989) (No. 87-1310) (defending methodology without suggesting that different dates of acquisition warranted different valuations).

69. 275 Cal. Rptr. 684 (Ct. App. 1990), *review denied,* No. S019164, 1991 Cal. LEXIS 842 (Cal. Feb. 28, 1991), *aff'd sub nom.* Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

70. *Nordlinger,* 275 Cal. Rptr. at 687.

hands two years earlier.[71] However, the tax disparity was far greater when the petitioner's property was compared to comparable neighboring properties that were still subject to their 1975 valuations; the petitioner was paying nearly five times the property tax owed by those neighbors.[72] Nordlinger's complaint alleged that these disparate tax burdens violated her right to equal protection.[73]

The second case appealed in California was *R.H. Macy & Co. v. Contra Costa County*,[74] a challenge by the owners of a Macy's department store in Contra Costa County.[75] Although the store had operated in the same location since 1967, in 1986 the petitioners underwent a corporate restructuring which, under California law, constituted a "change of ownership."[76] As a result, the store's valuation nearly tripled.[77] Two competing department stores occupying comparable property in the same shopping center had undergone no recent change of ownership and therefore retained their lower valuations.[78] Macy's property tax was greater than theirs by a ratio of 2.5 to 1, a difference that the petitioners alleged could affect their competitive position.[79] They argued that these disparate tax levies violated the reorganized company's rights of equal protection.[80]

A third case, *Northwest Financial, Inc. v. State Board of Equalization*,[81] involved a Nevada holding company, which purchased a house in San Diego in 1987 for $730,000. Before the purchase, the house was valued for property tax purposes at $175,839; after the sale, it was reappraised at the purchase price.[82] Over the next two years this reappraisal cost Northwest Financial an additional $8,897 in property taxes.[83]

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71. *See id.*

72. *Id.*

73. *Id.* at 689–90. Nordlinger also alleged that this disparate treatment impermissibly burdened "interstate and intrastate travel." *Id.* at 690. This argument os addressed in the second article of this series. *See* LaFrance, *supra* note 38.

74. 276 Cal. Rptr. 530 (Ct. App. 1990), *review denied*, No. S019216, 1991 Cal. LEXIS 943 (Cal. Feb. 28, 1991), *cert. granted*, 111 S. Ct. 2256, *cert. dismissed*, 111 S. Ct. 2923 (1991).

75. *Id.* at 532.

76. *Id.* at 532–33.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* The petitioners also claimed the tax levies placed impermissible burdens on interstate travel and interstate commerce. *Id.*; *see infra* note 86.

81. 280 Cal. Rptr. 24 (Ct. App. 1991), *review denied*, No. S021146, 1991 Cal. LEXIS 3204 (Cal. July 11, 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

82. *Id.* at 25 n.1.

83. Alan Abrahamson, *Buyers of La Jolla Home Go to Court in Attempt to Kill*

In upholding Proposition 13 against each of these three challenges, the California Court of Appeal concluded that nothing in *Amador* was inconsistent with the subsequent decision in *Allegheny Pittsburgh.* In the appellate court's view, *Allegheny Pittsburgh* merely held that a local tax assessor violated state law.[84] The California Supreme Court denied review in all three cases.[85]

As discussed in part III below, the United States Supreme Court may ultimately have reached a correct conclusion in *Nordlinger* when it determined that acquisition-value real property taxation withstands minimum scrutiny under the Equal Protection Clause, but that conclusion was dictated by the Court's extreme deference to state economic regulations. *Nordlinger* offers several important lessons unrelated to the merits of acquisition-value taxation. First, under true minimum scrutiny, even very bad tax policy may be "good enough for government work." Second, the Court has not yet defined minimum scrutiny at a consistent level, as evinced by the inconsistency between *Nordlinger* and *Allegheny Pittsburgh.* Finally, acquisition-value taxation may warrant a higher level of equal protection scrutiny because it has significant social consequences, it has been (in both California and Florida) adopted by initiative rather than by action of the legislature, and it is likely to be almost impossible to repeal.[86]

III. EQUAL PROTECTION: MINIMUM SCRUTINY

A. *The Equal Protection Standard*

Under traditional equal protection analysis, a state classification scheme that does not rely on suspect or "quasi-suspect" classifications and does not infringe upon fundamental rights conforms to equal protection principles if the scheme "'is neither capricious nor

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Proposition 13, L.A. TIMES (San Diego ed.), Mar. 15, 1991, at B8; Johnston & Roderick, *supra* note 40, at A27.

84. *See Nordlinger*, 275 Cal. Rptr. at 694–95.

85. *See* sources cited *supra* note 39 (providing subsequent history of three cases). Although the petitioners in R.H. Macy successfully petitioned the United States Supreme Court for review, they later withdrew their petition, apparently due to public relations concerns. *See* R.H. Macy & Co. v. Contra Costa County, *cert. granted*, 111 S. Ct. 2256, *and cert. dismissed*, 111 S. Ct. 2923 (1991); *Macy's Withdraws Challenge to California's Proposition 13*, 1991 DAILY TAX REP. (BNA) No. 112, at G2 (June 11, 1991).

86. The Court has yet to reach the right-to-travel and Commerce Clause issues raised by acquisition-value taxation. These should present a greater challenge. As discussed in the second article of this series, addressing these issues will require the Court to clarify certain troubling aspects of its travel and commerce jurisprudence. *See* LaFrance, *supra* note 38.

arbitrary, and rests upon some reasonable consideration of difference or policy.'"[87] The Court for several decades has not required a state decisionmaker to show which policies it actually considered in adopting the classification scheme; it is enough that some legitimate policy can be imagined which *could* have been advanced by the scheme.[88] In recent years, however, the Court has on occasion strayed from this extreme deference, while maintaining the pretense that it is applying the traditional "conceivable basis" doctrine.[89]

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87. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344 (1989) (quoting Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–41 (1985) (outlining equal protection analysis); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174–79 (1980) (finding no suspect classification and providing that inquiry is over if plausible reasons exist for Congress's action); City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976) (noting that when economic regulation is challenged, classification need only be rationally related to legitimate state interest); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (stating only invidious discrimination runs afoul of Equal Protection Clause).

88. *See, e.g., Fritz*, 449 U.S. at 179 (upholding railroad retirement scheme due to "plausible" congressional rationales regardless of whether Congress actually considered them); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (upholding state restrictions on opticians based on hypothetical legislative purposes); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423–25 (1952) (noting Court does not weigh wisdom of legislature); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (using hypothetical legislative ends to uphold restriction on vehicle advertising). Justice Marshall has observed:

> The extremes to which the Court has gone in dreaming up rational bases for state regulation . . . may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls.

Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting); *see* Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1129–30 & n.135 (1988) (contending that "rational basis" review applied in cases such as *Williamson v. Lee Optical* renders "courts little more than lunacy commissions"); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1696–98 (1984) ("The Supreme Court demands only the weakest link between a public value and the measure in question, and it is sometimes willing to hypothesize legitimate ends not realistically attributable to the enacting legislature.").

89. *See Cleburne Living Ctr.*, 473 U.S. at 440 (using minimum scrutiny standard, invalidating requirement that operators of home for mentally retarded obtain special use permit); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 616–24 (1985) (using minimum scrutiny standard, invalidating limitation on property tax exemption excluding Viet Nam veteran who established state residence after 1976); Plyler v. Doe, 457 U.S. 202, 216 (1982) (using minimum scrutiny standard, invalidating statute restricting enrollment of children, not legally admitted into United States, to public school access); Zobel v. Williams, 457 U.S. 55, 58–64 (1982) (invalidating, under minimum scrutiny standard, distribution plan which gave adult residents proceeds from state's mineral income).

Professor Tribe has described this "covert" use of heightened scrutiny as the Court's response to classifications that it "evidently regards as in some sense 'suspect'" but which it is "unwilling to label as such."[90] He has identified several types of "middle-tier" equal protection analyses.[91] For example, the Court in some cases has balanced the importance of the state's objectives against the burdens created by the classification. Under this approach, a consideration such as "administrative convenience" has very limited justificatory value.[92] Another similar approach demands a "close fit" between means and ends; the classification must be "sub-

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90. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 1445 (2d ed. 1988). Several Justices have urged the Court to disregard post hoc rationalizations, thus considering only evidence of actual legislative intent. *See* Bowen v. Owens, 476 U.S. 340, 350 (1986) (Marshall & Brennan, JJ., dissenting); Schweiker v. Wilson, 450 U.S. 221, 244 (1981) (Powell, Brennan, Marshall, and Stevens, JJ., dissenting); *Fritz*, 449 U.S. at 183–84 (Brennan & Marshall, JJ., dissenting); *cf.* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 681–82 & n.3 (1981) (Brennan & Marshall, JJ., concurring) (analyzing Commerce Clause).

The four dissenting Justices in *Schweiker* offered this explanation of the appropriate weight to be accorded to post-hoc rationales actually advanced by the government in litigation:

> Some of our cases suggest that the actual purpose of a statute is irrelevant . . . and that the statute must be upheld "if any state of facts reasonably may be conceived to justify" its discrimination. Although these cases preserve an important caution, they do not describe the importance of actual legislative purpose in our analysis. We recognize that a legislative body rarely acts with a single mind and that compromises blur purpose. Therefore, it is appropriate to accord some deference to the executive's view of legislative intent, as similarly we accord deference to the consistent construction of a statute by the administrative agency charged with its enforcement. Ascertainment of actual purpose to the extent feasible, however, remains an essential step in equal protection.

Schweiker, 450 U.S. at 244 n.6 (Powell, Brennan, Marshall, & Stevens, JJ., dissenting) (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)) (citations omitted). This approach implies that no weight at all should be given to hypothetical rationales not advanced by the government. *See generally* Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 282–85 (1990) (collecting cases); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21 (1972) (detecting emergence of a more demanding rational relationship test). Furthermore, when enough time has passed since legislative enactment as to make ascertainment of the actual effect of a law difficult, the legislature sitting at the later date should be deemed to intend that effect by its failure to amend or repeal the law. *Cf.* JOHN H. ELY, DEMOCRACY AND DISTRUST 125–31, 156 n.69 (1980) (discussing legislative processes and rational relationship test). Likewise, if a future effect is reasonably foreseeable at the time of enactment, the legislature ought to be deemed to have intended that effect. *See id.* at 125–31.

91. TRIBE, *supra* note 90, § 16-32, at 1602–10.

92. *Id.* § 16-32, at 1602–03 (citing Vlandis v. Kline, 412 U.S. 441, 458–59 (1973) (White, J., concurring)); *see* Plyler v. Doe, 457 U.S. 202, 221–25 (1982); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Reed v. Reed, 404 U.S. 71, 77 (1971).

stantially related" to the state's legitimate objectives.[93] The Court may also find that the state's objectives are themselves irrational or bear no rational relationship to the means employed by the state,[94] or it may require the classification to be treated as rebuttable.[95] At times, the Court has distinguished contemporaneous from post-hoc rationales. Thus, on some occasions it has refused to consider post-hoc rationales at all.[96] At other times, however, it has refused to consider rationales suggested by the legislative record but not contemporaneously urged by the state's representatives in the litigation.[97]

State property tax laws have generally enjoyed deferential

93. TRIBE, *supra* note 90, § 16-32, at 1603; *see* Caban v. Mohammed, 441 U.S. 380, 392–93 (1979); Trimble v. Gordon, 430 U.S. 762, 770–72 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.20, 116 n.48 (1976); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 n.13 (1974); *see also* Gunther, *supra* note 90, at 20–21.

94. *See, e.g.*, Williams v. Vermont, 472 U.S. 14, 22–27 (1975) (finding no legitimate purpose behind statute providing use-tax credit only to those who were residents at time they paid sales tax to another state); Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (finding deterrence of premarital sex cannot reasonably be regarded as purpose of law prohibiting distribution of contraceptives to unmarried people).

95. *See, e.g.*, *Craig*, 429 U.S. at 199 (discussing requirement that legislatures either realign laws in gender-neutral fashion, or adopt procedures to identify instances where sex-centered generalizations comport with fact). A number of commentators have observed or embraced the emergence of this more searching "rational basis" review. *See* Scott H. Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 57 S. CAL. L. REV. 689, 698–700 (1977); Glennon, *supra* note 90, at 281–83, 301; Gunther, *supra* note 90, at 18–24; James M. O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 48 (1979); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1067–74 (1979). In light of the highly deferential standard traditionally applied to state tax policy, the success of the challenge in *Allegheny Pittsburgh*, discussed *supra* part II.B, was surprising. As discussed in part III.D, however, a closer look at that opinion indicates that the Court did not perceive the state actions in question as emanating from policy decisions at all, but from errant actions by a state employee that were inconsistent with the policies adopted by the state. *See infra* notes 153–201 and accompanying text. Thus, *Allegheny Pittsburgh* apparently does not signal a heightening of rational basis scrutiny.

96. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727–30 (1982); Califano v. Goldfarb, 430 U.S. 199, 212–17 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Jimenez v. Weinberger, 417 U.S. 628, 634 (1974); Vlandis v. Kline, 412 U.S. 441, 449 (1973); James v. Strange, 407 U.S. 128, 141 (1972). Professor Tribe suggests this approach enhances political accountability: "[A] legislature or agency that cannot count on the post-hoc rationalizations of those charged with responsibility to enforce and defend its enactments or promulgations might be motivated to ventilate more fully the considerations underlying those enactments." TRIBE, *supra* note 90, § 16-32, at 1607; *see also* Glennan, *supra* note 90, at 282.

97. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640–44 (1974) (involving due process analysis); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (same). *See generally* TRIBE, *supra* note 90, § 16–32, at 1605–06.

treatment under equal protection review. The Court has observed that "[t]he latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy."[98] Rejecting an "iron rule of equality,"[99] the Court has declared itself willing to uphold any system of taxation that is supported by a rational basis, and is not "palpably arbitrary," even if it lacks "a precise, scientific uniformity."[100] Tax laws that intentionally and arbitrarily discriminate among taxpayers, however, have long been held to violate the requirements of equal protection.[101]

B. *Equal Protection Analysis of Voter Initiatives*

It seems logical that laws enacted by a state's electorate should be held to at least the same constitutional standards as laws enacted by the electorate's legislative representatives.[102] By omitting any mention of the process by which the laws originated, the Court's opinions assessing the constitutionality of laws which originated as initiatives or referenda implicitly support this view.[103] As discussed below, however, the Court has been somewhat more searching in its efforts to determine the purpose of a law when it is enacted by this large and disparate group of decisionmakers.

To ascertain the purposes of a voter initiative in the context of equal protection analysis, the Supreme Court has endorsed an approach which examines the "immediate objective" of the enactment,

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98. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

99. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526 (1959).

100. *Id.* at 527; *see also* Board of Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931) (reiterating doctrine that statutes may discriminate if not arbitrary or capricious); Ohio Oil Co. v. Conway, 281 U.S. 146, 159–60 (1930) (noting state may make classifications, but not in "palpably arbitrary" way); Joseph Tussman & Jacobus tenBroeck, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 368–70 (1949) (finding tax cases as broad area in which Court has "abandoned" use of Equal Protection Clause).

101. Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 28–29 (1931); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445–47 (1923).

102. *See* Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body enacted [the law in question], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."); *see also* Reitman v. Mulkey, 387 U.S. 369, 392 (1967) (Harlan, Black, Clark, & Stewart, JJ., dissenting) ("There is no question that the adoption of [a voter initiative] . . . constitute[s] 'state action' within the meaning of the Fourteenth Amendment.").

103. Eule, *supra* note 40, at 1505 & n.5 (listing cases where court does not note popular origin). Professor Eule, in fact, argues that initiatives and referenda should be scrutinized more closely than other legislation. *Id.* at 1507.

its "ultimate effect," and its "historical context and the conditions existing prior to its enactment."[104] Where a state court has identified these factors, the Supreme Court has given "careful consideration" to the state court's analysis, recognizing the deference owed to the state judiciary on matters of state law.[105] Context and ultimate effect are important because discriminatory motives can be camouflaged in the language of the initiative and in the proponents' pre-election propaganda.[106] Indeed, the "real" purpose of the proposal—meaning the purpose contemplated by its creators and key promoters—may be deliberately obscured by either proponents or opponents of the measure in an effort to deceive the voters.[107] More often, the arguments pro and con may simply overwhelm and confuse the public.[108] These factors, combined with the simple fact that each of the thousands or millions of voters casting ballots may have a slightly different individual understanding of the law's purpose, make it especially difficult to determine the "purpose" of an initiative or referendum.[109] Thus, any test of constitutionality which turns on the purpose of a law will be particularly difficult to apply to voter initiatives.[110]

Applying the Court's approach, the historical context of Proposition 13 must be examined. Prior to the passage of Proposition 13, property values in California rapidly outpaced inflation due to high demand.[111] Judging from pre-election publicity, the most obvious intent of those who voted in favor of Proposition 13 was to limit further increases in their property taxes,[112] which in 1978 were fifty-

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104. *Reitman*, 387 U.S. at 373–74.

105. *Id.*

106. *See* Derrick A. Bell Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 23–24 (1978).

107. *See* Eule, *supra* note 40, at 1517–18.

108. *See id.* at 1517, 1569–70.

109. *See id.* at 1561–63 ("The search for a bigoted decision-maker seems particularly elusive in the context of substitutive plebiscites. Public debate is minimal and voting is private. Furthermore, lower courts have barred inquiry into motivations of individual voters."); *see also* Edwards v. Aguillard, 482 U.S. 578, 595–96 (1987) (illustrating difficulty of ascribing single motive to large group); John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212–14 (1970) (discussing difficulty of ascertaining motivations of entire legislative assembly).

110. Derrick Bell, for example, has suggested that one reason for the voter approval of Proposition 13 was a belief that the proposal would reduce welfare entitlements. Bell, *supra* note 106, at 19 n.72; *see also* Eule, *supra* note 40, at 1558 (arguing courts should "take a harder look when constitutional challenges are mounted against laws enacted by substitutive plebiscite").

111. Respondent's Brief at 23, R.H. Macy & Co. v. Contra Costa County, 276 Cal. Rptr. 530 (Ct. App. 1990) (No. A049789); *see* Reeves, *supra* note 13, at 92 (observing that California real estate prices rose 70% from 1975 to 1978).

112. Respondent's Brief at 45, *R.H. Macy* (No. A049789); SEARS & CITRIN, *supra*

two percent above the national mean.[113] Average assessments in some parts of the state were increasing by as much as thirty percent per year.[114] At the same time, voters had become increasingly cynical about "big government."[115] Promoters of Proposition 13 urged that the new property tax limits would force the government to curb its spending.[116]

Thus, the "historical context" of acquisition-value taxation in California supports the inference that a major purpose for enacting Proposition 13 was to lower the taxes of long-term landowners and to require new buyers to bear a heavier burden in order to compensate the state for the lost revenues. The evidence since Proposition 13's enactment indicates that the "ultimate effect" of the tax scheme has been consistent with these purposes. However, this ultimate effect also suggests an intent to subsidize inefficient commercial enterprises without regard to the public benefit they provide, to diminish local property tax revenues by leaving a large portion of the state's real property wealth untaxed, and to discourage property transfers to or by anyone not covered by an exemption from the change-of-ownership rules.[117]

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note 5, at 30–31.

113. SEARS & CITRIN, *supra* note 5, at 21.

114. *Id.* at 22. Increases of 15%–25% were typical. Stephen J. DeCanio, *Proposition 13 and the Failure of Economic Politics*, 32 NAT'L TAX J. 55, 56 (June Supp. 1979). It has been reported, however, that some homeowners saw increases of 10% per month. Frank Lalli, *Editor's Notes*; *In Your Interest*; This Tax Revolt Turned Out to be Revolting, MONEY MAG., Aug. 1994, at 5.

115. SEARS & CITRIN, *supra* note 5, at 15, 23–24.

116. *Id.* at 27; *see also* George F. Break, *Interpreting Proposition 13: A Comment*, 32 NAT'L TAX J. 43, 43–44 (June Supp. 1979) (finding it impossible to determine which grievances motivated voters most: big government, high taxes in general, high property taxes, or existence of hefty state revenue surplus); William H. Oakland, *Proposition 13: Genesis and Consequences*, *in* THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, at 31, 33–44 (George G. Kaufman & Kenneth T. Rosen eds., 1981) [hereinafter PROPERTY TAX REVOLT] (finding growing state and local tax burden, massive shift of property taxes toward homeowners, and rapidly expanding state budget surplus contributed to emergence of Proposition 13).

117. *See* CALIFORNIA SENATE OFFICE OF RESEARCH CALIFORNIA'S TAX BURDEN: WHO PAYS? (pt. 1) 70 (Sept. 1990) [hereinafter SENATE OFFICE OF RESEARCH]; REPORT OF THE SENATE COMMISSION ON PROPERTY TAX EQUITY AND REVENUE TO THE CALIFORNIA STATE SENATE 40–50 (June 1991) [hereinafter COMMISSION REPORT]; SEARS & CITRIN, *supra* note 5, at 237; Richard Attiyeh & Robert F. Engle, *Testing Some Propositions About Proposition 13*, 32 NAT'L TAX J. 131, 140 (June Supp. 1979); Jennifer Foote, *Going Broke in California: A County on the Rocks*, NEWSWEEK, Feb. 22, 1988, at 29; Ralph Frammolino, *Bill Coming Due On Prop. 13 Tax Revolt*, L.A. TIMES, Sept. 8, 1992, at A3; Tim Nickens, *Cap on Assessments Heads Toward Ballot*, MIAMI HERALD, Aug. 1, 1992, at A1, A24; William Stombley, *Legislature Ponders Problems of Prop. 13*, L.A. TIMES, July 15, 1990, at A3; Susan Sward, *Counties Learn True Meaning of "Dire,"* S.F. CHRON., Mar. 15, 1993, at A1, A11.

The State of California, the courts, and interested commentators have suggested a number of policy considerations which, they argue, could provide a rational basis—an "immediate objective"—for acquisition-value property taxation. These arguments are discussed below. Of these considerations, only the reliance interests and liquidity problems of long-term owners were prominently mentioned in the publicity and public debate that preceded the enactment of Proposition 13.[118] The other arguments were not articulated until after Proposition 13 was challenged in court.

C. *Rationales for Acquisition-Value Taxation*

1. *Reliance Interests*

Defenders of acquisition-value property taxation have argued that this alternative to current-value taxation protects the reliance interests of purchasers by enabling them to avoid escalating property taxes which may make it difficult, if not impossible, to afford the annual carrying costs of their property.[119] The quintessential ex-

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118. *See* Marvin D. Field, *Voters Evenly Split on Prop. 13*, SACRAMENTO UNION, Apr. 12, 1978; C.B. Hagen, *When the Taxpayers Cried "Enough!"*, THE OREGONIAN, Aug. 6, 1978, at 5; Howard Jarvis et al., *Arguments in Favor of Proposition 13*, and *Rebuttal to Argument Against Proposition 13*, *in* TAX LIMITATION—INITIATIVE CONSTITUTIONAL AMENDMENT, OFFICIAL TITLE AND SUMMARY PREPARED BY THE ATTORNEY GENERAL 56, 58 (ballot pamphlet distributed before California's June 1978 primary election); *Sound and Fury Over Taxes*, TIME, June 19, 1978, at 12. Because no litigation has arisen yet from Florida's Save Our Homes amendment, it is difficult to determine what the State of Florida will identify as the rationale(s) for that amendment. The rationales articulated in the public debate, however, focus on cutting government spending and giving tax relief to long-term homeowners. *See* Nickens, *supra* note 117, at 1A, 24A; Tim Nickens, *Proposed Property Tax Curb Gains Spot on Nov. 3 Ballot*, MIAMI HERALD, Aug. 4, 1992, at 6B; Memorandum from Kenneth M. Wilkinson, President, Save Our Homes, Inc., to Save Our Homes Contributors & Supporters (Aug. 11, 1992) (on file with Author).

119. The California Supreme Court found this argument persuasive in *Amador*:

> This "acquisition value" approach to taxation finds reasonable support in a theory that the annual taxes which a property owner must pay should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value. Not only does an acquisition value system enable each property owner to estimate with some assurance his future tax liability, but also the system may operate on a fairer basis than a current value approach. For example, a taxpayer who acquired his property for $40,000 in 1975 henceforth will be assessed and taxed on the basis of that cost (assuming it represented the then fair market value). This result is fair and equitable in that his future taxes may be said reasonably to reflect the price he was originally willing and able to pay for his property . . . .

Amador Valley Joint Union High Sch. Dist. v. Board of Equalization, 583 P.2d 1281, 1293 (Cal. 1978). This argument was also raised by the taxing authorities in *Nordlinger* and *R.H. Macy*. *See Nordlinger*, 275 Cal. Rptr. at 689–90; Respondent's ample is the elderly or fixed-income homeowner who purchased a home at a relatively low price, has lived there many years, and will, in effect, be forced to sell that home when its subsequent price appreciation generates a tax bill which the homeowner's limited income cannot accommodate. This rationale was one of two which the *Nordlinger* Court found persuasive.

However, until Proposition 13 took effect, California's landowners had no reason to expect their property tax bills to remain constant or even predictable. It is certainly likely that some homeowners may have seen relatively little increase in their property values in their early years of ownership, but the law was clear that property taxes would fluctuate with property values. Real estate owners can reasonably expect that the value and related carrying costs of their property will increase whenever there is a "hot" real estate market. Thus, when Proposition 13 placed a constitutional ceiling on both the rate of tax and the rate at which assessments could increase, the new regime did not protect a reliance interest; rather, it created one. Therefore, a Proposition 13 rationality argument cannot be that it protects established reliance interests,[120] but that it *creates* a situation which allows buyers to rely on their first tax bill as an indicator of future tax bills. Under the change-of-ownership rules, moreover, the only persons whose reliance interests receive protection are those who already own real property (or are in a position to acquire grandfathered property under one of the exemptions). The price of giving predictability to those taxpayers is that new buyers must subsidize everyone who has bought before them at lower prices.

Predictability as a goal in itself, moreover, deserves little weight in the equal protection analysis. If property tax increases were manageable, then volatility would not cause hardship. The acquisition-value approach to property taxation uses predictability as a subterfuge for compulsory subsidies when, in fact, the underlying issue—ability to pay—does not turn on predictability at all.

Even if predictability were an adequate rationale for limiting tax rate increases, it would not justify the change of ownership rules. Predictability is achieved by limiting the tax increases on all

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Brief at 18, 25–26, R.H. Macy Co. v. Contra Costa County, 276 Cal. Rptr. 530 (Cal. 1990) (No. A049789).

120. By contrast, in City of New Orleans v. Dukes, 427 U.S. 297 (1976), the Court upheld a grandfather clause exempting from a new ban on pushcart food sales in the French Quarter only those vendors who had operated there continuously for at least eight years, finding that "[t]he city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre." *Id.* at 305.

property; favoritism is achieved by forcing only the newest buyers to bear the burden of compensating the state for revenues lost in the pursuit of predictability.[121]

In addition, whatever merit the "reliance" argument may have in the context of individual home ownership, it is difficult to see how the public interest is served by ensuring tax liabilities for existing owners in the competitive commercial marketplace. Such a scheme favors established businesses over new entrants. It also favors owners over renters, who, unless they secure a long-term lease, cannot be sure their rent will remain predictable from year to year. This argument applies to both nonresidential property and residential property purchased for rental or investment purposes. In addition, there is often extensive overlap between home ownership and investment-motivated ownership; many, if not most, people who choose to buy rather than rent a home do so with the idea that the home will appreciate in value. Nonresidential property simply presents a clearer example of a property investment that is not based on the expectation that land values will remain constant.

Acquisition-value taxation also does not protect the reliance interests of persons who rent rather than own their homes. Thus, reliance interests provide a weak argument in favor of acquisition-value taxation even in the context of home ownership.[122]

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121. *See* COMMISSION REPORT, *supra* note 117, at 3 (rejecting proposal to "achieve property tax equity by . . . extending the favored tax status of pre-1978 property owners to all property owners (or at least homeowners)"). Even in the appealing case of the low- or fixed-income homeowner, acquisition-value taxation is not the only means to protect reliance interests; several alternatives are discussed in the next section.

122. The State of California has undermined its own "reliance" argument, at least with respect to commercial property, in certain statements made by the state legislature in the course of enacting anti-rent control legislation.

Rent controls are relevant because they are usually adopted out of concerns similar to those which some defenders of Proposition 13 have articulated in support of acquisition-value property taxation: reliance interests, ability to pay, and possibly even neighborhood stability. At the same time California was defending Proposition 13 with respect to both residential and commercial property in the lower federal courts, the state was implementing new legislation prohibiting localities from imposing rent controls on commercial property. The legislature made the following explicit finding in the Costa-Keene-Seymour Commercial Property Investment Act of 1987:

> The Legislature finds that the price charged for commercial real property is a matter of statewide concern. Price controls on commercial rents discourage expansion of commercial development and entrepreneurial enterprise. These controls also discourage competition in the open market by giving artificial price benefits to one enterprise to the disadvantage of another. Because the impact of these controls goes beyond the local boundaries within which the controls are imposed, the adverse economic consequences become statewide.

Costa-Keene-Seymour Commercial Property Investment Act of 1987, ch. 824, § 2,

2. *Ability to Pay*

A second rationale for acquisition-value property taxation is the recognition that for most taxpayers real property tends to be a relatively non-liquid asset.[123] This rationale has been implicit in the California courts' defense of Proposition 13 based on reliance interests.[124] A taxpayer that holds significant wealth in the form of real property will find it difficult to pay an annual wealth tax unless the taxpayer also holds sufficient liquid assets.[125] Unless willing and able to make a hasty, and perhaps disadvantageous, sale of the non-liquid asset, the taxpayer may be forced to borrow funds to pay the tax, usually by refinancing the property, thus replacing the tax burden with a debt-service burden and almost certainly encumbering the property.[126] This option may not be available to all taxpayers, since lenders may be reluctant to lend to low-income persons regardless of their home equity.

Unquestionably, acquisition-value taxation makes it easier for some taxpayers to pay their property taxes. But the beneficiaries are not necessarily those with the least ability to pay. In some cases, those who benefit most are those with the greatest ability to pay higher taxes because of high incomes[127] and/or substantial wealth. After all, property tax relief is a greater benefit to those who own

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1987 Cal. Stat. 2557, 2557 (codified at CAL. CIV. CODE § 1954.25 (West Supp. 1994)).

It is strange that a state should consider the impact of commercial rent controls to be so adverse while at the same time arguing in court that the impact of commercial property tax controls is beneficial. Yet the lawmaking body behind the Costa-Keene-Seymour Act—the legislature—had no hand in the drafting of Proposition 13. This raises the question whether two different lawmaking bodies in the same jurisdiction can entertain inconsistent theories and still produce legislation "rational" enough to withstand an equal protection challenge.

123. Of course, a taxpayer who holds real property as stock-in-trade (for example, a developer or speculator) would have a weaker argument in this regard.

124. *See supra* notes 119–22 and accompanying text (discussing reliance interests).

125. *See generally* George Kaufman, *Inflation, Proposition 13 Fever, and Suggested Relief*, *in* PROPERTY TAX REVOLT, *supra* note 116, at 218 (stating that property taxes are more difficult to pay because not cash flow based).

126. Under a traditional system of current-value taxation, any increase in the tax valuation of a particular parcel simply reflects an increase in that property's market value. This represents an increase in the owner's equity. Real property owners can, and often do, tap into that equity by refinancing the property. The refinancing proceeds will finance the tax bill and service the debt for years to come. *See* DeCanio, *supra* note 114, at 56.

127. SENATE OFFICE OF RESEARCH, *supra* note 117, at 80, 93 (observing that, in the post-proposition 13 period, "studies suggest that homeowners with lower income may, in some cases, be paying more taxes than those with higher incomes," but reliable data is scarce).

more (or more valuable) property. Renters may receive little or no relief from escalating rents, which are set by market forces that may not be influenced by a specific landlord's assessment level. Taxpayers whose income or wealth has decreased since they acquired their real property receive no benefit even though they may have lost their previous ability to pay their tax.[128] Reliance on acquisition value as a surrogate for ability to pay thus creates a classification that is both under-and over-inclusive with respect to its asserted purposes.[129]

Even under a "worst case" scenario involving no tax relief—where a taxpayer must sell his or her house because the tax burden is too high—the taxpayer is no worse off than the non-home owner who cannot afford to buy a house in the first place. The acquisition-value system, however, offers a remedy to the first taxpayer and not to the second.

If a state wishes to make tax borrowing unnecessary, there are more narrowly tailored ways to address the liquidity problem. Many states offer tax relief to low- or fixed-income and elderly or disabled

128. State efforts to resolve particular problems by the use of classifications need not match means to ends with "mathematical nicety," Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), but classifications which are grossly over- or under-inclusive are too arbitrary to pass the rational basis test. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524, 528–31 (1974) (holding New York statute arbitrarily discriminated between categories of qualified voters); United States v. Robel, 389 U.S. 258, 265–66 (1967) (ruling statute contains fatal detail of overbreadth). *See generally* Tussman & tenBroek, *supra* note 100, at 348–51 (discussing over- and under-inclusive classifications under equal protection laws). The Supreme Court's level of deference nonetheless has remained high when legislation is only somewhat over- and/or under-inclusive. *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 108 (1979) (stating "perfection is by no means required"); New York Transit Auth. v. Beazer, 440 U.S. 568, 592–93 (1979) (upholding classification although it may have been broader than necessary); Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) ("The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all."); Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (recognizing that "constitutional demand is not a demand that a statute necessarily apply equally to all persons"); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (holding that Equal Protection Clause prohibits only "invidious" discrimination); Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931) (noting that "machinery of governmental" need not be perfect). *See generally* TRIBE, *supra* note 90, § 16-4 (noting approximation rather than mathematical precision is required).

129. Both California and Florida mitigate the under-inclusiveness of their property tax schemes by providing some tax relief to disabled, elderly, or low income taxpayers. *See* CAL. CONST. art. XIIIA, § 2(b); CAL. REV. & TAX CODE §§ 62–69.5 (West 1987 & Supp. 1994). Neither state, however, offers a more broad-based "hardship" relief scheme. Note that the effect of California's exemptions for inherited property and interspousal transfers is to presume conclusively that the recipients's ability to pay is identical to that of the transferor, which is not necessarily the case if ability to pay is best measured by purchase price.

homeowners to alleviate the hardship of escalating tax bills on a principal residence. These programs allow certain homeowners to defer their property taxes until death or the sale of their homes.[130] Other programs offer partial tax exemptions.[131] Tax relief of either type may be limited to low-income taxpayers and/or may be offered only to the disabled or to senior citizens.[132] Several states and the District of Columbia offer relief without regard to income.[133] Interestingly, both of the states currently using acquisition-value taxation already offer "homestead exemptions" which partially exempt homeowners from real property taxes regardless of need.[134] Increasing those existing exemptions would achieve much of what ac-

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130. Under a deferral approach, taxpayers can defer payment of some portion of their annual tax increase until their liquidity or cash flow improves. *See* George Kaufman, *Inflation, Proposition 13 Fever, and Suggested Relief, in* PROPERTY TAX REVOLT, *supra* note 116, at 219–20. Kaufman notes that the taxing jurisdiction can recoup the temporary loss of revenues resulting from the deferral by issuing tax-exempt bonds. *Id.* at 220. Alternatively, the state can require the taxpayer who defers to pay a market (or other) rate of interest to the state. In effect, the state can take the place of a commercial lender. For greater relief, lower-income taxpayers could pay a sliding-scale below-market interest rate on the deferral, or in extreme cases, no interest at all. In contrast, the revenue lost by freezing assessments is either never recouped at all or recouped only from more recent purchasers—who pay taxes based on appreciated values—by imposing a higher rate tax on everyone than would be necessary if all assessments were based on current market value. Furthermore, because the deferral mechanism can be reserved for hardship cases, it can be the exception rather than the rule. And the deferral can be kept small, by limiting it to the same or all of the amount by which the current year's tax bill exceeds the prior year's.

Security problems can arise under a tax deferral scheme just as they do in commercial lending; if the taxpayer has very little equity in the property, a tax lien offers the state little security in the event of default. Typically, states that offer tax deferral plans respond to this problem by limiting the amount of the deferral to the market value of the property less the amount of any liens against it. *See* Adrienne Blum, *You Could Get a Break on Property Taxes*, KIPLINGER'S PERS. FIN. MAG., Aug. 1992, at 83 (summarizing plans of various states).

131. *See, e.g.*, D.C. CODE ANN. § 47-863 (Supp. 1993) (offering 50% decrease).

132. *See* CAL. REV. & TAX CODE §§ 20581–20622 (West 1990); COLO. REV. STAT. § 39-3.5-102(1) (1982); FLA. STAT. ANN. § 197.252 (West Supp. 1993); GA. CODE ANN. § 48-5-72.1 (1991); ILL. ANN. STAT. ch. 67.5, paras. 452(a), 453 (Smith-Hurd 1989); MD. CODE ANN. TAX–PROP. § 9-104(i) (1986); N.H. REV. STAT. ANN. § 72:38-a(I) (1991); OR. REV. STAT. § 311.668 (1993); TENN. CODE ANN. §§ 7-64-201 to -202, 67-5-1807 (1989 & Supp. 1992); TEX. TAX CODE ANN. § 33.06 (West 1982 & Supp. 1992); VA. CODE ANN. § 58.1-3210 (Michie 1993); WASH. REV. CODE ANN. §§ 84.38.010, .030 (West 1991 & Supp. 1993); WIS. STAT. ANN. §§ 77.63 to .65 (West 1989); UTAH CODE ANN. § 59-2-1108 to -1109 (Supp. 1993).

133. *See* COLO. REV. STAT. § 39-3.5-102(1) (1982); D.C. CODE ANN. § 47-863 (Supp. 1993); GA. CODE ANN. § 48-5-72(a) (1991); TEX. TAX CODE ANN. § 33.06 (West 1982 & Supp. 1992).

134. FLA. CONST. art. VII, § 6 (1970); FLA. STAT. ANN. § 196.031 (West Supp. 1993); CAL. REV. & TAX CODE § 253.5 (West 1990).

quisition-value taxation was supposed to achieve without favoring earlier over later buyers.[135] Where an interest-bearing tax deferral plan is believed to provide insufficient taxpayer relief, states can avail themselves of other options. Such options include a non-interest-bearing deferral plan (or a plan providing for a sliding-scale interest rate tied to the taxpayer's income), a property tax rebate system tied to income, or, in cases of exceptional hardship, total forgiveness of tax liability. Any of these plans can be based on a finding of need, a determination that a state can simplify by allowing a taxpayer's need to be established conclusively by some measure of the taxpayer's income or wealth. Alternatively, or in addition, relief can be provided on a case-by-case basis, with the burden on the taxpayer to make a particularized showing of need. Such tax relief mechanisms would be especially appropriate for low-income taxpayers who may have difficulty refinancing their property.

Any of these alternatives addresses taxpayer liquidity problems in a more narrowly-tailored way than acquisition-value taxation, a tax forgiveness plan that operates without regard to need. At any rate, the worst-case scenario under a tax deferral or forgiveness scheme—a needy taxpayer's failure to pay the entire annual tax increase—is sounder than the everyday result under acquisition-value taxation, in which *all* real property owners are exempted from paying *any* tax increase over the assessment cap for as long as they own their property.[136] In implementing any of these tax relief schemes, a state can treat commercial and rental property less favorably than non-rental residential property if the state finds it appropriate to offer more tax relief to homeowners than to businesses.[137]

By ignoring need, acquisition-value taxation provides a windfall to wealthy taxpayers while shifting their share of the cost of state services to recent buyers, whose incomes in many cases may be lower than the incomes of the benefitted class. Irrational as this may be in the context of home ownership, it is even more bizarre as

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135. The California legislature in fact had considered increasing the state's homestead exemption if Proposition 13 were struck down by the Supreme Court. *See* COMMISSION REPORT, *supra* note 117, at 6.

136. This distinguishes the "realization" principle employed in most federal and state income taxation schemes. The realization requirement in income tax law merely *postpones* a *one-time* tax until the taxpayer has disposed of the appreciated asset. Acquisition-value property taxation, however, *eliminates* the *annual* tax on the appreciation in a property's value, and does so each year as long as the owner retains the property.

137. Indeed, different assessment percentages and tax rates often apply to different classes of property. *See generally* Curtis, *supra* note 40, at 13–15 (surveying "reasonable" tax classifications).

applied to commercial, rental, or investment properties. These properties are acquired for their revenue-generating potential by purchasers who are or should be aware that the carrying costs of property (notably, taxes and insurance) tend to increase with the value of that property, that the value will tend to increase as the property's revenue-generating potential increases, and that their competitive position in a free market will not be bolstered by a state subsidy. Yet acquisition-value taxation creates such a subsidy, making it possible for one merchant to succeed while a neighboring merchant fails, even though there may be no difference in the efficiency of their operations.

The existence of more rational alternatives does not necessarily mean that the voters' choice is so capricious as to violate the Equal Protection Clause. A system of semi-frozen assessments might be cheaper and simpler to administer than the deferral mechanism discussed above. Such a scheme, however, entails a predictable revenue loss so large that it could outstrip any savings arising from the administrative simplicity of the freeze. Thus, the liquidity problem could provide a "rational basis" for acquisition-value taxation that would satisfy the "minimum scrutiny" standard, but only if the projected savings from administrative efficiency exceed the foreseeable revenue loss. Such a projection is unsupported by any evidence in the history of Proposition 13[138] or its Florida counterpart. Absent some support for the efficiency claim, then, the liquidity concern, while legitimate, offers weak support for adopting a plan of acquisition-value taxation when other approaches offer a significantly better "fit" between problem and solution. A deferral or rebate system for low-income taxpayers (leaving the refinancing option for others) offers a far superior solution.

Finally, as Justice Stevens pointed out in his *Nordlinger* dissent, acquisition-value taxation in California applies to *all* land, improved or not, vacant or occupied.[139] Surely the "ability to pay" rationale deserves less weight when the taxpayer does not even use the property for a residence or for an ongoing business. Such a taxpayer would experience relatively little hardship even if compelled by tax considerations to sell or borrow against this unused asset.

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138. California's property tax revenues decreased substantially after Proposition 13 was enacted, *see* COMMISSION REPORT, *supra* note 117, at 28–30, and there appears to be no evidence that Proposition 13 has led to decreased administrative costs.

139. Nordlinger v. Hahn, 112 S. Ct. 2326, 2346 (1992) (Stevens, J., dissenting).

3. *Neighborhood Stability*

In addition to reliance interests, the second rationale which persuaded the *Nordlinger* Court to uphold Proposition 13 was that the tax scheme advanced the state's "legitimate interest in local neighborhood preservation, continuity, and stability."[140] This rationale apparently was devised by the Court on its own initiative, since it was neither argued by the state nor suggested by any of the California courts.

It is certainly reasonable, as the Court implies, to believe that the large property tax increase which can accompany a change of ownership under an acquisition-value tax scheme discourages purchasers because they know they will be paying more than their fair share of the cost of state services. It discourages sellers who wish to purchase replacement property, such as a new principal residence, because they will lose their accustomed government subsidy and join the least-favored class of taxpayers when they buy the replacement property. As the price of land escalates and the differential between grandfathered assessments and recent reassessments becomes larger, the amount of the subsidy increases and therefore the disincentives to buy and sell become greater. Acquisition-value taxation thus discourages property transfers.[141]

In a residential setting, it is possible that this kind of stagnation has some favorable consequences. Neighbors who have known each other for long periods may take better care of their property or in other ways take a greater interest in the welfare of the community. However, residential neighborhoods can be quite "unstable" even without transfers of ownership. It is conventional wisdom that neighborhoods with a substantial number of renter-occupied properties are less "stable" in this sense than neighborhoods with more owners in residence. Acquisition-value taxation schemes, however, do not discourage rentals. Although an owner who vacates a property in order to rent it out feels the burden of the acquisition-value tax upon purchasing a replacement residence, once the owner accepts that initial burden, the grandfathered rental property can be rented to a different tenant every year, or every month, without triggering any further reassessment. Thus, landlords can raise their rents as market forces allow, driving out tenants unable to keep up with the increases.[142]

140. *Id.* at 2333; *see infra* note 161 and accompanying text.

141. As of January 1994, 82% of Los Angeles County's citizens aged 65 years or older, and 43% of the county's total population of homeowners, had not moved since 1978. Reeves, *supra* note 13, at 103.

142. In fact, contrary to predictions by some supporters of Proposition 13, land-

Discouraging sales of residential property may also lead to the inefficient allocation of a limited resource. "Empty nesters" or others with diminished needs will continue to occupy homes larger than they need in order to avoid the perversely higher tax bill that may accompany the purchase of a smaller home.[143] The resulting supply shortage means that growing families will have less access to larger properties. Moreover, even when a large enough property becomes available, the property tax liability incurred by the purchaser of that property will be greater than it would be if property tax burdens were allocated among all owners according to current values. The taxpayer with a growing family, who may face significant and increasing costs for child care and education, and who also may be a first-time home buyer, will be forced to subsidize taxpayers who may have little or no need, but who are entitled to receive the subsidy solely because they bought earlier.[144]

In addition, California's acquisition-value taxation system requires reassessment of any new construction. Thus, property owners have an incentive not to improve their grandfathered properties. If the "stability" goal of Proposition 13 was aimed at encouraging neighborhood upkeep, it may very well have the opposite effect.

Neighborhood "stability"—an appealing term[145]—also means that fewer new residents can enter a particular community. Thus, enclaves that have been homogeneous will tend to remain so. Persons who desire to leave areas that are unsafe or who need to change residences to take advantage of new job opportunities will

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lords did not pass their savings on to their tenants, and rents kept pace with inflation. SEARS & CITRIN, *supra* note 5, at 27, 125.

143. *See, e.g.*, Frederick Balderston et al., *Proposition 13, Property Transfers, and the Real Estate Markets*, *in* PROPERTY TAX REVOLT, *supra* note 116, at 78–80 (describing "lock-in" effect); Morris Newman, *Focus: Proposition 13: California's 'Tax Revolt' Faces Challenge*, N.Y. TIMES, July 7, 1991, at 3 (describing phenomenon of "empty nesters" holding onto homes and consuming more property than they need).

144. The California legislature's own research suggests that young families now bear a disproportionate share of the state's property taxes. COMMISSION REPORT, *supra* note 117, at 33. The "lock-in" effect, however, is not unique to acquisition-value taxation schemes. Rules allowing taxpayers to defer some or all of their property taxes until they sell their property can have a similar effect, as do the federal tax laws deferring recognition of unrealized gains, I.R.C. § 1001 (1988), and providing for a stepped-up basis at death, *id.* § 1014. The "lock-in" effect does not itself make acquisition-value taxation irrational. The important point is that this effect is not necessarily a desirable one from a public policy perspective, and thus it may not by itself provide a strong "rational basis" argument in favor of acquisition-value taxation.

145. Justice Stevens used the same concept to defend a zoning ordinance burdening households composed of unrelated persons in Moore v. City of E. Cleveland, 431 U.S. 494, 516 (1977) (Stevens, J., concurring).

find it increasingly difficult to relocate as the lock-in effect becomes greater over time.

Similar inefficiencies arise in the context of commercial property. A start-up business or a business trying to compete more effectively by moving to a new location will be discouraged by the burden of subsidizing established businesses. In some cases, the older business may use its property far less efficiently than the new arrival, but property will tend to remain in the hands of the inefficient user. Buyers will be discouraged by the looming reassessment and sellers will be discouraged from selling the underutilized property and buying replacement property.[146] Furthermore, these retained grandfathered properties are unlikely to be significantly improved by their owners because new construction triggers reassessment.

Finally, as applied to vacant or unimproved land, the "stability" argument rings especially hollow. Inadequately maintained land may have a negative impact on the surrounding area. Yet acquisition-value taxation makes it less likely that such property will be transferred to an owner who will enhance or maintain the property.

Stability thus seems to provide a very poor "rational basis" for acquisition-value taxation in the context of commercial or vacant property where barriers to entry are difficult to justify. In the context of residential property, imposing barriers to entry as a means of encouraging neighborhood stability, may not necessarily be sound public policy, but may justify the rational basis standard. As discussed in part V, however, it is less likely to satisfy the more stringent requirements of the "compelling interest" standard triggered by burdens on the right to travel and, indeed, it may be a constitutionally impermissible basis for state action.

4. *Stable Revenues*

Perhaps the most bizarre rationale advanced for acquisition-value property taxation is that it provides stable revenue to local governments.[147] Not surprisingly, the California courts have not relied on this rationale to uphold Proposition 13. Compared to cur-

146. Owners of depreciated commercial property will have to balance the benefit of grandfathered assessments against the opportunity cost of losing the increased depreciation deductions generated by replacing old property with new. In general, however, businesses in California have tended to stay put after Proposition 13, *see* John Jacobs, *Some Neighbors Pay Triple Taxes*, S.F. EXAMINER, Feb. 12, 1990, at A1, suggesting that the property tax savings outweigh the lost depreciation deductions. Indeed, commercial interests have consistently opposed any effort to repeal Proposition 13 with respect to commercial property. *Id.*

147. *See* Northwest Fin., Inc. v. Board of Equalization, 280 Cal. Rptr. 24, 28 n.6 (Ct. App. 1991) (noting but not endorsing this rationale).

rent-value taxation, the revenue stream produced by semi-frozen assessments is certainly less volatile, but only because it eliminates much of the upside potential. Proposition 13 permits a prompt decline in tax revenues if property values drop.[148] Yet, on the upside, revenues increase more slowly than they would under a current-value system. This is "stability" of a strange sort; revenues can go up only a small amount per year while they can go down quickly and indefinitely.

5. *The Sales Tax Analogy*

It is well settled that "[i]nequalities in state taxation [may] be constitutional so long as they 'rest upon some ground of difference having a fair and substantial relation to the object of legislation.'"[149] If the object of a property tax is to exact a tax from each taxpayer based on the amount of their wealth taking the form of a particular kind of property, then a property tax differential based on the historical fact of how much the taxpayer paid to obtain the property does not bear a "fair and substantial" relationship to that object. Thus, the state must establish that the differential has a "fair and substantial" relation to some other legitimate object. Various attempts to do so are catalogued above.

In *Amador*, the California Supreme Court tried to establish a fair and substantial relationship by comparing Proposition 13 to a sales tax, pointing out that two people purchasing the same item at different prices will pay different amounts of sales tax even though they have acquired the same good or service.[150] But a sales tax is a one-time tax, and it is a tax measured by spending,[151] that is, by the amount of consideration a consumer pays to obtain goods or

148. Assessments in California may drop across the board in periods of general deflation, and individual assessments may be reduced if the property's market value declines. CAL. CONST. art. XIIIA, § 2(b) (amended 1992). The constitutional language does not make clear whether this assessment reduction is permissive or mandatory. Florida's "Save Our Homes" amendment is ambiguous on the question of downward reassessments. *See* FLA. CONST. art. VII, §§ 4(c)(1), (5).

149. Amador Valley Joint Union High Sch. Dist. v. Board of Equalization, 149 Cal. Rptr. 239, 261 (1978) (Bird, C.J., concurring and dissenting) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); *see* Kahn v. Shevin, 416 U.S. 351, 355–56 (1974); Allied Stores v. Bowers, 358 U.S. 522, 526–27 (1959); Ohio Oil Co. v. Conway, 281 U.S. 146, 159–60 (1930).

150. *Amador*, 149 Cal. Rptr. at 252.

151. George G. Kaufman, *Inflation, Proposition 13 Fever, and Suggested Relief, in* PROPERTY TAX REVOLT, *supra* note 116, at 218. The recipients of grandfathered property under California's inheritance and interspousal transfer exemptions must pay annual property taxes at the transferor's assessment level even though they have "spent" nothing.

services in a particular transaction. When a buyer makes a particularly good or bad bargain, the purchase money paid to the seller may not equal the fair market value of the property received, but it still represents the amount actually spent by the buyer. Because both the money and the property change hands at the same time, the money also represents a reasonable proxy for the value of the consideration surrendered by the seller, but only *at the moment the exchange takes place.* It is unusual for property to sell for a price much different from its fair market value, and it is difficult as a practical matter to appraise every item of commerce each time it changes owners. Thus, for example, federal income tax law does not tax a buyer on the value of a bargain purchase for cash. If we make the reasonable assumption that most property changes hands for a price that approximates its value at the time of the transfer, it would be impractical and unproductive, for the sake of imposing a one-time transfer tax, to assess the fair market value of every item sold within a taxing jurisdiction.

In contrast, property taxes are recurring rather than one-time taxes. Even a few months after the sale takes place, the amount of consideration originally paid for a piece of property may cease to be a good proxy for fair market value, and after a few years there is likely to be very little connection between acquisition value and current fair market value. Thus, the consideration paid at the time of transfer, while a reasonable measure of spending, typically ceases to bear a "fair and substantial" relation to the wealth held by the taxpayer after the transfer. Imagine two taxpayers who purchase land at the same time, each paying $100,000 for the property. Years later, one piece of property is worth $80,000 and the other is worth $1 million. In both cases the original purchase price bears no relation whatsoever to the owner's wealth, much less a "fair and substantial" one. Thus, the California court's analogy is unpersuasive. A tax on spending should bear a fair and substantial relation to the amount spent; a tax on income, to the economic benefits received in excess of costs; and a tax on wealth, to the value of the wealth actually held by the taxpayer. In effect, acquisition-value taxation imposes a repetitive sales tax each year after the sale takes place. Since the purchase does not take place repeatedly, the repeated imposition of the tax bears no long-term relation to spending, just as it bears no long-term relation to wealth.[152]

152. Of course, any cost associated with real property acquisition that is imposed or increased by state action will tend to favor previous buyers over later ones. For example, any increase in the state documents tax means that new buyers face greater closing costs than previous buyers. The effect of such an increase would in some

D. Nordlinger v. Hahn: A llegheny Pittsburgh *Under Siege*

1. Majority Opinion

In *Nordlinger v. Hahn*,[153] the Supreme Court held, by a vote of eight to one, that Proposition 13 withstood minimum scrutiny under the Equal Protection Clause.[154] Justice Blackmun's majority opinion invoked the familiar refrain that equal protection review is "especially deferential in the context of classifications made by complex tax laws."[155] Justice Blackmun observed that the decision

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respects resemble the effects of acquisition-value taxation; it would disadvantage new buyers, and could therefore have a disproportionate impact on new arrivals in the state, or persons relocating within the state, relative to long-term residents. Yet it never has been suggested that this disproportionate impact would violate the Equal Protection Clause. How, if at all, does acquisition-value taxation differ from these other increases in the cost of acquiring property? In both cases, the impacted group is defined as all persons undertaking a transaction at a particular time. In the case of the documents tax, the increased cost results either from an increase in the cost of the benefits conferred by the state in connection with real estate transactions, or simply an increase in the state's need for revenue. The documents tax, like a sales tax, is imposed only once per transaction, and reflects the notion that the buyer is enjoying a state-provided benefit. It is appropriate to ask each buyer to pay the current cost of enjoying that privilege, even if that cost were lower in previous years, and even if that cost reflects factors other than the state's direct costs in providing the benefit. Conceivably, state-imposed transaction fees could rise to such levels that they might constitute a significant burden on travel or on the efforts of out-of-state businesses to establish a foothold in the state. In that case, the state's goals in establishing the fees would need to be examined and balanced against the burden on travelers and interstate commerce, according to the approach outlined in the second article in this series, *see* LaFrance, *supra* note 38.

A property tax, of course, is not a payment for a one-time state benefit. It is a periodic payment for benefits provided on a continuing basis, imposed on the owner of property throughout the period of ownership. Subsequent increases in the cost of state services, or other revenue needs, are allocated to all owners according to their share of real property wealth. Property tax increases are both foreseeable (if the taxpayer monitors the property's value and any changes in the tax rates) *and* to some extent avoidable. Therefore, when a taxpayer discovers that property taxes are going up, because either rates or valuations have increased, the taxpayer can sell the current property and move to a less expensive one, thereby avoiding the increased burden, at least after the first year of its imposition.

Thus, imposing a property tax increase on all property owners prospectively reflects the same pay-your-own-way rationale as imposing the documents tax increase on all real property buyers prospectively. To subdivide the affected group into long-term versus short-term owners is inconsistent with the pay-as-you-go rationale. Consequently, the classification scheme created by acquisition-value taxation requires some other rationale to withstand constitutional scrutiny.

153. 112 S. Ct. 2326 (1992).

154. *Id.* at 2336.

155. *Id.* at 2332 (citing Williams v. Vermont, 472 U.S. 14, 22 (1985); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973)).

whether differential tax treatment "rationally furthers a legitimate state interest" turns on three determinations: (1) that there is a "plausible policy reason for the classification";[156] (2) that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker";[157] and (3) that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."[158] The Court's reference to legislative facts on which the classification is *apparently* based suggests that the Court would not be free to consider rationales having no basis whatsoever in the legislative record, something it has done freely in the past.[159] In any event, Justice Blackmun seemed to disavow this inference when he notes that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate" the purpose of its classification.[160]

The *Nordlinger* Court found that California had two reasonable policy bases for the different tax assessments: (1) "neighborhood preservation, continuity, and stability," and (2) protection of the "reliance interest" of homeowners who had purchased property when land values were lower.[161] The Court's discussion of reliance interests, like the discussion in *Amador*, implicitly encompasses the "ability to pay" rationale. Although, as noted earlier, the merits of these goals are debatable, and California might have achieved them

156. *Id.* (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174, 179 (1980)).

157. *Id.* (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)).

158. *Id.* (citing Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 446 (1985)).

159. *See supra* note 88 and accompanying text (discussing "considerable basis" standard of review).

160. *Nordlinger*, 112 S. Ct. at 2334 (citing *Fritz*, 449 U.S. at 179; McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969)).

161. *Nordlinger*, 112 S. Ct. at 2333. With respect to neighborhood stability, the Court observed: "The State . . . legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, 'mom-and-pop' businesses by newer chain operations." *Id.*

As noted by Justice Stevens in his dissent, the majority's defense of the "reliance interest" rationale employs some loaded language: "[T]he existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities." *Id.* at 2343 (Stevens, J., dissenting). Many would envy the plight of one "saddled with" an investment yielding the kind of return on investment which California property owners enjoyed in the decades preceding Proposition 13's enactment.

by less discriminatory means, in light of the highly deferential standard of review the Court applies to economic regulations the Court's decision was consistent with its past practices.

This holding, however, appeared to be quite inconsistent with the Court's holding in *Allegheny Pittsburgh*. The Court attempted to distinguish the West Virginia case as follows:

> [A]n obvious and critical factual difference between this case and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme. In the first place, Webster County argued that "its assessment scheme is rationally related to its purpose of assessing properties *at true current value*." Moreover, the West Virginia "Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value," and the Court found "no suggestion" that "the State may have adopted a different system in practice from that specified by statute."[162]

Thus, *Nordlinger* implies, the Webster County tax assessor, and the state of West Virginia, in effect denied any intention to pursue either the "neighborhood stability" or "reliance interest" goals which the Court might otherwise have been willing to hypothesize—with little or no evidentiary foundation—on the assessor's behalf.

The *Nordlinger* Court described *Allegheny Pittsburgh* as "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme."[163] This rather odd statement implies that most litigated cases—or perhaps most instances, whether or not litigated—of unequal property assessments present facts from which it is plausible to infer that the purpose of the inequality is to achieve neighborhood stability and/or to protect reliance interests. There seems to be no support for this improbable claim.[164] Indeed, enactment of Proposition 13 was clearly a break

162. *Id.* at 2334 (quoting *Allegheny Pittsburgh*, 488 U.S. at 343 n.6, 345) (alteration in original) (citations omitted).

163. *Id.* at 2335. Indeed, the *Nordlinger* opinion notes, even if the Webster County tax assessor had asserted these "acquisition-value policies," this "assertion would have been nonsensical given its inherent inconsistency with the county's principal argument that it was in fact trying to promote current-value taxation." *Id.* at 2334 n.6; *see also* Allied Stores v. Bowers, 358 U.S. 522, 530 (1959) (holding that where state statute specifically declares its purpose, other purposes need not be considered in assessing statute's rationality).

164. In fact, the opposite appears to be true. *See, e.g.*, Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 25–28 (1931) (presenting facts showing inequity from an overly simplistic property valuation system); Sioux City Bridge Co. v. Dakota

with tradition.[165] The Court's observation, if taken literally, is simply untrue. Read more forgivingly, the Court's statement suggests that *Allegheny Pittsburgh* was an unusual equal protection case, rather than an unusual assessment case. Does this mean that the case was unusual because the West Virginia legislature manifested an intent that was inconsistent with the two "plausible" rationales the Court itself envisioned three years *later*? Surely this cannot explain *Allegheny Pittsburgh*.

In *Nordlinger*, as in most equal protection cases, the Court took a liberal approach to hypothesizing legislative rationales that were not contemporaneously articulated by the lawmakers. Yet it declined to do so in *Allegheny Pittsburgh*, even though during the litigation Webster County voiced the plausible rationale of administrative efficiency.[166] The difference, according to the Court, is that the state legislature in *Allegheny Pittsburgh* had already articulated a goal that was inconsistent with the results achieved by the Webster County assessor's unequal valuations. Small and/or transitory inequities might have passed the test in *Allegheny Pittsburgh*; the assessor's valuations violated the Equal Protection Clause not because of the assessor's decision to take valuation shortcuts *per se*, but because those shortcuts failed (in the Court's judgment) to advance the law's stated goal. In other words, the shortcuts failed to provide sufficiently close approximations of current market values. The Court itself made the judgment as to how close was close enough.[167] By declining to consider alternative rationales such as administrative convenience, the *Allegheny Pittsburgh* Court implied that once a lawmaker articulates a rationale, no other rationales should be considered in evaluating an equal protection claim. Yet this approach would give lawmakers an incentive to "keep their options open" by not articulating any purpose at all when enacting

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County, 260 U.S. 441, 447 (1923) (noting inequities often result from "mere errors of judgment" on part of officials); Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352–53 (1918) (presenting facts demonstrating inequity resulted from honest mistake by officials).

165. The Court itself refers to Proposition 13 as "California's grand experiment." *Nordlinger*, 112 S. Ct. at 2336.

166. *See* Brief of Respondent at 22, 32, Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989) (No. 87-1303). The *Nordlinger* opinion acknowledges that Webster County raised this argument. *Nordlinger*, 112 S. Ct. at 2334 n.6.

167. The *Allegheny Pittsburgh* Court's description of the Webster county assessor's actions as an "aberrational enforcement policy" has been criticized on the ground that any apparent inconsistency between the assessor's methods and the dictates of West Virginia law was eradicated when the assessor's judgment was upheld by the County Commission, a state circuit court, and finally the West Virginia Supreme Court of Appeals. *See* Glennon, *supra* note 90, at 269.

legislation. A policy that encourages official silence with respect to legislative intent offers little public benefit and suggests that *Allegheny Pittsburgh* was a case of covertly heightened scrutiny—a departure from the Court's traditional willingness to consider post hoc rationales when applying minimum scrutiny.[168]

In the case of Proposition 13, if the pre-adoption publicity and the historical setting of the initiative may be taken as indicators of voter intent,[169] the California electorate *en masse* articulated a goal of acquisition-value assessment. Apart from the question of exemptions, the petitioner in *Nordlinger* did not contend that this articulated goal was frustrated or ignored in practice. The issue in *Nordlinger* was the rationality of the goal itself, rather than the rationality of the method by which the goal was implemented.

Arguably, the exemptions from the change-of-ownership rules undermine the superficial credibility of California's asserted purpose in creating the general rule. According to the *Nordlinger* majority, the exemption for replacement property acquired by persons aged fifty-five or older withstands minimum scrutiny because "[t]he people of California reasonably could have concluded that older persons in general should not be discouraged from moving to a residence more suitable to their changing family size or income."[170] If that is so, then surely those same "people of California" would reasonably have concluded that the identical logic applies to all homeowners, regardless of age. However, the Court ignored this inconsistency. It also found a rational basis for the exemption for children who acquire property from their parents, because "the people of California reasonably could have concluded that the interests of family and neighborhood continuity and stability are furthered by and warrant an exemption for transfers between parents and children."[171] Underlying the "people's" conclusion is the unarticulated assumption that a person who inherits property at virtually no cost will take better care of that property, retain it longer, and perhaps show more interest in the community's welfare, than someone who makes a substantial investment to acquire the property. Such an assumption is counterintuitive.[172]

In *Allegheny Pittsburgh*, the assessor's departures from the articulated goal of current value assessment were found to be con-

168. *See supra* notes 88–97 and accompanying text.

169. *See supra* notes 104–117 and accompanying text (applying Supreme Court's approach to determining purposes of voter initiatives).

170. *Nordlinger*, 112 S. Ct. at 2335.

171. *Id.*

172. The petitioner did not raise, and the Court did not address, the other statutory exemptions.

stitutionally defective because they frustrated that goal. In *Nordlinger*, by contrast, the state's exemptions from the articulated goal of acquisition-value taxation were found to be constitutionally sound even though they too frustrated that goal. The difference lies in the *Nordlinger* Court's conclusion, arrived at with minimal analysis, that the departures themselves had a rational policy basis. The Court itself supplied that policy basis, just as it has in so many other minimum scrutiny cases.

This leaves open the question of why the *Allegheny Pittsburgh* majority made no effort to determine whether the assessor might have had a sound policy basis—such as administrative efficiency—for departing from the current value assessment scheme. Instead of asking whether and why a rational assessor might depart from the current-value tax scheme, the *Allegheny Pittsburgh* Court focused solely on the *magnitude* of the assessor's departure:

> The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied . . . . The county's adjustments to the assessments of property not recently sold are too small to seasonably dissipate the remaining disparity between these assessments and the assessments based on a recent purchase price.[173]

This suggests that equal protection analysis should focus on the size of the assessment disparities alone. From that perspective, the administrative feasibility of alternative methods is simply irrelevant. Suppose, however, that a county experiencing budget problems could not devote sufficient resources to enable the tax assessor's office to reassess property on any basis more costly than acquisition price and/or general periodic adjustment. Under the reasoning of *Allegheny Pittsburgh*, if the disparity became too large these reassessments would be unconstitutional in spite of the mitigating circumstances. Such a result would be an anomalous throwback to the *Lochner* era of more demanding equal protection scrutiny.[174]

173. *Allegheny Pittsburgh*, 488 U.S. at 343–44.

174. *See infra* note 189 (discussing economic due process analysis in waning days of *Lochner* era). Even in the *Lochner* period, the Court considered feasibility as a mitigating circumstance in at least one case involving unequal assessments. *See* Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 353 (1918) (finding that "no adequate time remained for detailed consideration nor was there sufficient evidence before the Board to justify immediate and general revaluations"). In that case, unlike *Allegheny Pittsburgh* or *Nordlinger*, the inequities were remedied the next tax year. *Id.*; *see*

Alternatively, some notion of administrative feasibility may be implicit in the *Allegheny Pittsburgh* majority's requirement that the adjustments be large enough "to seasonably dissipate the . . . disparity,"[175] or in the even vaguer mandate that the adjustments produce "the seasonable attainment of a rough equality in tax treatment."[176] Perhaps the *Allegheny Pittsburgh* Court intended to say that some allowance could be made for the cost of reappraisals. If so, the Court buried this balancing test virtually out of sight. To balance administrative feasibility against equality of tax burdens could be exceedingly difficult, especially when state budgets are tight. If the Court nonetheless believes that striking this balance is a matter of constitutional concern, then it would be appropriate for the Court to provide a clearer statement to that effect.

The *Nordlinger* majority did not attempt to distinguish *Cumberland Coal Co. v. Board of Revision,*[177] or *Sioux City Bridge Co. v. Dakota County,*[178] the two *Lochner*-era decisions involving facts similar to *Allegheny Pittsburgh.* Both decisions stated that the intentional use of nonuniform property valuations violates the Equal Protection Clause. Neither case involved "aberrational enforcement." The *Cumberland Coal* defendants were required to assess all coal lands based on actual value, but in determining actual value they appraised all "coal within the same township at the same value an acre notwithstanding differences in actual or market value due to distances from transportation facilities and to other factors"[179]—differences which in several cases were substantial.[180] Citing a long list of precedents,[181] the Court observed: "It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one

also Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 29 (1931) (where inequities not remedied in the next year, Court struck down discriminatory reassessments without expressly considering feasibility rationale). The *Cumberland Coal* Court noted: "[W]here it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Id.*

175. *Allegheny Pittsburgh,* 488 U.S. at 349.

176. *Id.* at 343.

177. 284 U.S. 23 (1931).

178. 260 U.S. 441 (1923). In his *Nordlinger* concurrence, Justice Thomas stated that the Court in *Sioux City Bridge* "rejected" the petitioner's equal protection challenge. *Nordlinger,* 112 S. Ct. at 2339 (Thomas, J., concurring). In fact, the Court simply remanded the case for a determination of whether intentional discrimination had occurred. *Sioux City Bridge Co.,* 260 U.S. at 447.

179. *Cumberland Coal,* 284 U.S. at 26.

180. *Id.* at 27.

181. *Id.* at 29.

taxed upon the full value of his property."[182] In *Cumberland Coal* the Court did not discuss whether this unconstitutional undervaluation resulted from "aberrational enforcement"[183] as in *Allegheny Pittsburgh*, or from "the law of a State, generally applied,"[184] as in the Proposition 13 cases. Unlike the assessor's "aberrational" method in *Allegheny Pittsburgh*, the assessment scheme in *Cumberland Coal* had been "adopted by the Commissioners of the County sitting as a Board of Appeal for the Revision and Equalization of Assessments."[185] The adoption of the plan was "deliberate . . . systematic, and intentional."[186] This suggests an analogy to state-wide policies such as Proposition 13. Indeed, in addressing the equal protection challenge to nonuniform tax assessments in *Sioux City Bridge*, the Court held that "intentional and arbitrary discrimination" violates equal protection "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[187] Thus, the actions of the administrative actors in *Cumberland Coal* and *Allegheny Pittsburgh* should be subject to the same constitutional standards as the actions of legislators or of voters participating directly in the lawmaking process.[188] Yet *Cumberland Coal* struck down the commissioners' scheme without even inquiring whether it had a rational basis. If the Cumberland County commissioners were vested with authority to set appraisal policy, then *Cumberland Coal* cannot be meaningfully distinguished from *Nordlinger*. The different outcomes may simply reflect the post-*Lochner* era sea-change in the Court's approach to reviewing economic regulation by the states.[189] Alternatively, the different outcomes may reflect the decision of the commissioners in *Cumberland*

182. *Id.* at 28.

183. *Allegheny Pittsburgh*, 488 U.S. at 344 n.4.

184. *Id.*

185. *Cumberland Coal*, 284 U.S. at 24.

186. *Id.* at 25.

187. *Sioux City Bridge*, 260 U.S. at 445 (quoting *Sunday Lake Iron*, 247 U.S. at 352–53).

188. The *Nordlinger* majority acknowledged this, stating: "In finding *Allegheny Pittsburgh* distinguishable, we do not suggest that the protections of the Equal Protection Clause are any less when the classification is drawn by legislative mandate, as in this case, than by administrative action as in *Allegheny Pittsburgh*." *Nordlinger*, 112 S. Ct. at 2335 n.8.

189. Although, strictly speaking, these were equal protection rather than due process cases, both *Cumberland Coal* and *Sioux City Bridge* were decided in the waning days of economic due process under Lochner v. New York, 198 U.S. 45 (1905), which held that a state law regulating work hours in private enterprise unconstitutionally infringed upon economic liberty. *Id.* at 64. Economic due process gave way to the deferential "rational basis" scrutiny of economic regulations in Nebbia v. New York, 291 U.S. 502, 539 (1934).

Coal to take the extreme position of denying that they had intentionally discriminated at all rather than the more moderate position of defending their discrimination as rational.[190]

The commissioners in *Cumberland Coal* offered no rationale at all for departing from a fair market value standard. Yet the *Cumberland Coal* opinion does not even identify the standard of review being applied; it implies that equal protection requires current fair market value appraisals of all property if *any* comparable property is so appraised.[191] Such a substantive standard would be irreconcilable with the *Nordlinger* holding and, in addition, would represent a higher level of scrutiny than is applied even to classifications involving fundamental constitutional rights or "suspect classes." Such a heightened level of scrutiny would be particularly perverse applied to tax or economic regulations, and would signal a surprising revitalization of economic due process.[192]

Thus, the actions of the tax authorities in *Cumberland Coal, Sioux City Bridge*, *Allegheny Pittsburgh* and *Nordlinger* were all intentional. Additionally, according to the Court in *Sioux City Bridge*, the intentional actions of administrative authorities are to be held to the same standard as the actions of legislative bodies. The post-*Lochner* relaxation of equal protection scrutiny has not rendered this rule obsolete. The *Nordlinger* Court's attempt to distinguish *Allegheny Pittsburgh* is therefore unpersuasive for two reasons: (1) the Webster county assessor may have had a rational basis for the assessment disparities, and (2) a policy that would violate equal protection standards when deliberately implemented

190. *See* Brief for Respondent at 12–14, *Cumberland Coal* (No. 87-1303).

191. *See* Glennon, *supra* note 90, at 289. The same inference can be drawn from the language of *Sunday Lake Iron*, which also involved an equal protection challenge to nonuniform tax assessments of comparable properties: "[I]t must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352–53 (1918). There, as in *Cumberland Coal*, the Court treated the property in question as belonging to the same class; the taxing authority never argued that it should be treated otherwise. Brief for Defendant in Error at 27–28, *Sunday Lake Iron Co.* (No. 38).

192. Some recent cases suggest that a revitalization of economic due process may be underway, although none of the cases have involved an equal protection analysis. *See* United States v. Carlton, 62 U.S.L.W. 4472, 4477 (June 13, 1994) (Scalia, J., concurring) (calling failure to accord substantive due process protection to economic rights "inexplicable"); TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2719 (1993) (upholding punitive damages award because it was not so "grossly excessive" as to violate due process); Pacific Mut. Ins. Co. v. Haslip, 499 U.S. 1, 16 (1991) (upholding punitive damages award but noting that such awards, if excessive, could violate substantive due process).

by administrative actors also violates those standards when deliberately enacted by a lawmaking body.

2. *Concurrence*

In contrast to the majority's effort to preserve *Allegheny Pittsburgh* by distinguishing it as a case of aberrant enforcement, Justice Thomas's separate concurrence in *Nordlinger* launches a broad attack on that precedent. In Justice Thomas's view, the majority's attempt to distinguish *Allegheny Pittsburgh* amounts to a declaration that a state agent's failure to adhere to state law is *per se* an equal protection violation because it is inconsistent with whatever rational policy underlies the state law[193]—a holding which would be inconsistent with precedents predating *Allegheny Pittsburgh*.[194] That holding, however, is expressly disclaimed by the *Nordlinger* majority.[195] Justice Thomas argues that the same policy considerations the majority finds adequate to support California's decision to assess property at its acquisition price could also support the Webster County tax assessor's decision to do the same. Thus, he concludes, the *Allegheny Pittsburgh* Court should not have treated the assessor's actions as an equal protection violation.[196] As discussed below, this position is untenable.

Under the approach adopted by the *Nordlinger* majority, in order to determine whether a state action passes the minimum rationality test, a court may hypothesize policies or purposes which "may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker."[197] As noted

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193. *Nordlinger*, 112 S. Ct. at 2341 (Thomas, J., concurring).

194. Justice Thomas reiterated the following quote from a 1944 decision:

> "Not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another . . . . [W]here the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws."

Nordlinger, 112 S. Ct. at 2340 (Thomas, J., concurring) (quoting Snowden v. Hughes, 321 U.S. 1, 8 (1944) (alteration in original)); *see also* Nashville, Chattanooga St. Louis Ry. Co. v. Browning, 310 U.S. 362, 368–70 (1940) (holding practice of taxing railroads and other utilities unequally was "law" of state for purposes of equal protection, even though state constitution mandated uniformity of taxation).

195. *Nordlinger*, 112 S. Ct. at 2335 n.8. ("Nor do we suggest that the Equal Protection Clause constrains administrators, as in *Allegheny Pittsburgh*, from violating state law requiring uniformity of taxation of property.") (citing *Snowden*, 321 U.S. at 8–11; *Browning*, 310 U.S. at 368–70; Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 27–28 (1924)).

196. *Id.* at 2338 (Thomas, J., concurring).

197. *Id.* at 2334 (quoting Allied Stores Inc. v. Bowers, 358 U.S. 522, 528–29

earlier, the only two policies the *Nordlinger* Court hypothesized to uphold Proposition 13 were (1) a concern for neighborhood stability; and (2) the protection of property owners' reliance interests. Justice Thomas's argument, then, is simply a statement that the Webster County tax assessor "may reasonably" or "may conceivably" have underassessed property for one or both of these reasons.

Of course, virtually any motivation is "conceivable," depending on the idiosyncracies of the tax assessor. In spite of the majority's imprecise phrasing, the critical question in *Nordlinger* was whether the assessor could "reasonably" be thought to have had such purposes in mind. For this inquiry, the nature of the state actor seems critical. The answer will depend on whether the state agent is one in whom substantial discretion is vested, or one who performs a more ministerial role. The Webster County tax assessor may have had some discretion in how she exercised her judgment about relative market values or comparability of properties, but it seems unreasonable to believe that the West Virginia legislature vested in her the discretion to decide whether and how to promote neighborhood stability and to identify and protect landowners' reliance interests. In the case of industrial property, the first of these asserted goals is spurious, and the second is of doubtful merit.[198] Even assuming, *arguendo*, that these two goals would be rational considerations for a legislature or other policymaking body charged with determining how industrial land should be valued, absent some unusual delegation of authority by the West Virginia legislature it is bizarre to suggest, as does Justice Thomas, that such policies could reasonably be considered by a ministerial agent such as the Webster County tax assessor.[199]

(1959)).

198. "Neighborhood stability" does not seem a particularly rational goal when the "neighborhood" in question consists of coal mines, and the "reliance interests" argument is especially dubious as applied to commercial property. A coal-mining company, like any commercial enterprise, likely would anticipate that any real property it purchases will increase in value as neighboring land appreciates, and that such an increase in value will cause the carrying costs of the property, especially taxes, to increase accordingly. *See supra* part notes 119–46 and accompanying text.

199. In fact, a review of the relevant West Virginia law indicates no such delegation of authority. The Webster County tax assessor would have been acting well beyond the scope of her authority if she deliberately had assessed property at less than current fair market value in order to address the policy concerns Justice Thomas believes it would have been "reasonable" for her to consider. Her role, under state law, was strictly ministerial. *See, e.g., In re* National Bank of W. Va., 73 S.E.2d 655, 660–61 (W. Va. 1952) (holding West Virginia law gives assessor ministerial rather than judicial role and requires assessor to carry out constitutional mandate of equality and uniformity in taxation); Backus v. Abbot, 69 S.E.2d 48, 52 (W. Va. 1952) (same); Halloran v. Rocke, 113 S.E. 647, 648–50 (W. Va. 1922) (same). The

In sum, Justice Thomas's attack on *Allegheny Pittsburgh* is unpersuasive because it suggests, with perverse circularity, that the West Virginia assessor's valuations satisfied equal protection requirements because her "rational basis" could have been an intention to violate state law and, thus, to violate those same equal protection requirements. Thus, *Allegheny Pittsburgh* is not wrong for any of the reasons suggested by Justice Thomas. It may, however, be wrong for other reasons.

A tax assessor is typically vested with discretion to use her best judgment regarding property values; this is certainly true under West Virginia law.[200] Thus, an assessor might reasonably take administrative convenience or feasibility into consideration in exercising that discretion. Given limited time and resources, the Webster County assessor might reasonably have decided that general adjustments in valuations would have to suffice between changes of ownership. Yet the *Allegheny Pittsburgh* opinion does not even consider feasibility or convenience as a possible rationale for the differential assessments, even though, as noted earlier, these arguments were raised by Webster County.[201]

West Virginia Constitution and Code both require the assessor to assess property at a uniform percentage of its true and actual value. W. VA. CONST. art. X, § 1; W. VA. CODE §§ 11-3-1, 11-4-8 (1992); *see also In re* Assessment of Shares of Stock of Kanawha Valley Bank, 109 S.E.2d 649, 670–71 (W. Va. 1959) (holding state constitution forbids unequal assessments). The West Virginia Code defined "true and actual value" as "the price for which such property would sell if voluntarily offered for sale." W. VA. CODE § 11-3-1 (1992). Indeed, the Webster County Commission itself argued in its brief to the Supreme Court that an assessor's failure to adhere to this statutory mandate "would be an arbitrary and capricious act of the assessor." Brief of Respondent at 27, Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989) (No. 87-1303). Furthermore, the County argued, "[t]here is no statutory list of any other evidence or criteria which should be given priority by assessors in the exercise of their professional discretion." *Id.* at 28. Thus, for the assessor to have embarked on a crusade to promote neighborhood stability or reliance interests in the Webster County coal fields would have been *ultra vires* in the extreme, and in clear violation of state law. *See In re* U.S. Steel Corp., 268 S.E.2d 128, 132 (W. Va. 1980) (holding intentional discrimination against taxpayer by knowingly applying tax formula different from formula applied to other taxpayers in similar circumstances is violation of state law). Such an intentional violation would also have violated the Equal Protection Clause. *See supra* notes 177–92 and accompanying text (discussing Supreme Court cases holding that intentional use of nonuniform property valuation violates Equal Protection Clause).

200. *See, e.g.*, Kline v. McCloud, 326 S.E.2d 715, 718 (W. Va. 1984) (noting assessors have discretion to search out information to determine true and actual value); *Backus*, 69 S.E.2d at 53 (holding assessors may exercise judgment in discharging duties).

201. *See supra* note 166 and accompanying text (discussing Webster County's argument). The Court has considered feasibility in at least one of its previous cases addressing nonuniform assessments. Sunday Lake Iron v. Wakefield, 247 U.S. 350,

Perhaps *Nordlinger* and *Allegheny Pittsburgh* can be reconciled through recognition that neither of the rationales actually *considered* by the *Nordlinger* Court—neighborhood stability and reliance interests—could conceivably have motivated the Webster County assessor. However, this still leaves open the argument that *Allegheny Pittsburgh* was wrongly decided, not for the reasons suggested by Justice Thomas, but because the Court failed to consider the plausible rationale of administrative feasibility.

E. *Alternative Rationales for Upholding Acquisition-Value Taxation Schemes*

In light of the preceding analysis, it is tempting to ask whether administrative feasibility alone would have been a sufficient rationale to uphold Proposition 13 under the minimum scrutiny analysis. Since the scheme originated by voter initiative, and since the public record indicates that the arguments voiced in favor of that initiative prior to its adoption focused entirely on tax reduction and not on administrative efficiency,[202] the idea that California voters in fact acted out of concern for overburdened assessors is implausible.

Another rationale, however, might be considered. In responding to equal protection challenges to Proposition 13, the state of California has argued that the tax disparities are based on legitimate policy goals. The state has focused its entire argument on defending the tax disparities; it has made virtually no effort to prove that the disparities are illusory.[203] Thus, all of the litigation addressing the

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353 (1918).

202. *See supra* notes 111–16 and accompanying text (reviewing historical context in which Proposition 13 was passed).

203. A passage in the state's *Nordlinger* brief mentions the general notion that taxes are capitalized into real estate prices, but the state offers no data suggesting that the burden of the reassessment falls on someone other than the buyer. In fact, the state argues that in a *buyer's* market the burden would fall on the *seller*. Brief of Respondent at 25–26, Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) (No. 90-1912). This argument does not support the state's litigation position, for several reasons.

First, in a prolonged buyers market, prices would drop and many of the tax disparities would shrink or disappear, so that there would be little or no "burden" to be allocated between buyer and seller, since under California law property tax assessments would drop during a period of decreasing land values, even without a change of ownership.

Second, the state's own logic suggests that in a *seller's* market the burden of higher taxes from reassessment will fall on the *buyer*. And California was a strong seller's market in the decades preceding Proposition 13's adoption; indeed, this was the historical context which, the State argued, created the demand for property tax relief. *Id.* at 25. California continued to be a seller's market until the late 1980s.

Finally, even if the state's claims about the buyer's market were true, this would suggest that Proposition 13 burdens buyers most when demand is highest and constitutionality of acquisition-value taxation has proceeded, and been decided, on the tacit assumption that new buyers are in fact disadvantaged by the tax disparities. The public debate and the legal and economic literature concerning Proposition 13 also assume, without discussion, that the disparities are real.[204] Even the California legislature, in a recent report critical of acquisition-value taxation, found "substantial inequities for property taxpayers" and concluded that "over time the property tax assessment system does not self-correct or equalize the tax burden among taxpayers in any orderly, systematic way. In fact disparities have widened over time and will continue to widen so long as property values rise faster than the two percent annual reappraisal cap."[205]

There is, however, at least a theoretical basis for denying that new buyers are disadvantaged by the higher tax assessments. Specifically, the marketplace in an acquisition-value state might discount real estate prices to reflect some or all of the increased tax burden triggered by the sale and accompanying reassessment. Thus, property for sale now in California arguably may command a lower price than it would command if the change of ownership did not trigger a reassessment. If so, then the burden of the subsidy would be shared by buyer and seller. Is it reasonable to conclude, then, that new buyers of nonexempt property in California are receiving a benefit in the form of a lower purchase price that substantially offsets the detriment of being forced to subsidize the cost of state services to those who bought before them?

It is well settled that property tax burdens are one of many factors that influence real estate prices.[206] The exact relationship between property taxes and land prices has been the subject of extensive study and debate, yet it remains unresolved and rather controversial.[207] Many variables in addition to property taxes in-

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burdens buyers least when demand is lowest. Surely the constitutionality of a tax classification cannot vary from year to year depending on whether it is imposed during a buyer's market or a seller's market.

204. *See, e.g.*, COMMISSION REPORT, *supra* note 117, at 3–5, 58–60, 72–74, 93; Balderston et al., *Proposition 13, Property Transfers, and the Real Estate Markets, in* PROPERTY TAX REVOLT, *supra* note 116, at 77–90 (discussing effects of reassessment on sale of owner occupied housing); Curtis, *supra* note 40, at 28–29 (discussing Proposition 13 and *Allegheny Pittsburgh*).

205. COMMISSION REPORT, *supra* note 117, at 1; *see also id.* at 9–10 (discussing "inequity" of taxing inherited property less than purchased property).

206. *See, e.g.*, FREDERIC H. FINNIS, AN INTRODUCTION TO REAL PROPERTY TAXATION 46–47 (1972) ("[T]ax on land . . . cannot be passed on to the tenant, but has to be capitalized and absorbed by the owner.").

207. The scholarship on this question is remarkable not only in its magnitude but in its inconclusiveness. *See, e.g.*, Albert M. Church, *Capitalization of the Effective*

fluence land prices: interest rates, the supply of property available for sale, the number of interested buyers, the relative financial status of buyers and sellers, the characteristics of the particular parcel at issue, the quality of local public services, and overall economic conditions, both local and national. It is impossible to hold all of these variables constant throughout a reasonable testing period, and some, such as public services, may be inextricably connected with tax rates.[208] It is therefore difficult, if not impossible, to iso-

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Property Tax Rate on Single Family Residences, 27 NAT'L TAX J. 113, 113 (1974) ("These studies possess inherent limitations which more rigorous methodology and empirical estimates can overcome."); Dennis Epple et al., *A Search for Testable Implications of the Tiebout Hypothesis*, 86 J. POL. ECON. 405, 406 (1978) (disputing hypothesis that governmental tax and spending levels significantly affect housing prices); Bruce W. Hamilton, *The Effects of Property Taxes and Local Public Spending on Property Values: A Theoretical Comment*, 84 J. POL. ECON. 647, 649–50 (1976) (criticizing Oates's theory of correlation between fiscal variables and property values); Larry J. Kimbell et al., *A Framework for Investigating the Tax Incidence Effects of Proposition 13*, 32 NAT'L TAX J. 313, 315 (June Supp. 1979) (discussing possible effects of Proposition 13 on taxation and land values); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957, 957, 967–68 (1969) (stating evidence supports Tiebout hypothesis); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: A Reply and Yet Further Results*, 81 J. POL. ECON. 1004, 1004–08 (1973) (replying to criticisms); Henry O. Pollakowski, *The Effects of Property Taxes and Local Public Spending on Property Values: A Comment and Further Results*, 81 J. POL. ECON. 994, 1001 (1973) (criticizing Oates's theory and suggesting further research be done); Larry L. Orr, *The Incidence of Differential Property Taxes on Urban Housing*, 21 NAT'L TAX J. 253, 253–54, 262 (1968) (stating owners, not occupants, bear burden of property taxes); Kenneth T. Rosen, *The Impact of Proposition 13 on House Prices in Northern California: A Test of the Interjurisdictional Capitalization Hypothesis*, 90 J. POL. ECON. 191, 200 (1982) (discussing effect of property tax change in housing prices); R. Stafford Smith, *Property Tax Capitalization in San Francisco*, 23 NAT'L TAX J. 177, 178 (1970) (stating conclusions of few existing studies have not been in complete agreement); Dennis De Tray & Judith Fernandez, *Distributional Impacts of the Property Tax Revolt*, 39 NAT'L TAX J. 435, 436–39 (1986) (stating evidence suggests property tax differentials are capitalized into local property values); John H. Wicks et al., *A Note on Capitalization of Property Tax Changes*, 21 NAT'L TAX J. 263, 263 (1968) ("While capitalization of property taxes is a common assumption, there is a dearth of empirical verification."); F.O. Woodward & Ronald W. Brady, *Inductive Evidence of Tax Capitalization*, 18 NAT'L TAX J. 193, 193 (1965) (suggesting no verification exists for entrenched theory of public finance and tax capitalization). *See generally* DICK NETZER, ECONOMICS OF THE PROPERTY TAX (1966); G.S. Goldstein & M.V. Pauly, *The Effect of Revenue and Tax Limitation on Property Values*, 32 NAT'L TAX J. 97, 103 (June Supp. 1979) (stating tax limitations do affect net rents, especially in the short run).

208. Most tax capitalization studies assume that higher taxes are correlated with higher public expenditures. The evidence tends to support that correlation, especially in the post-Proposition 13 period in California, which has been marked by a notable decline in essential public services. *See* Reeves, *supra* note 13, at 92. This assumption should be discarded in evaluating the incidence of acquisition-value taxation,

late the effect of differential tax rates alone.

Even if it is assumed that buyers are, as a general rule, inclined to pay less for property burdened by high taxes than for comparable property burdened by low taxes, there is no evidence that the Proposition 13 subsidization scheme—considered in isolation, without regard to the state's economic conditions or other factors affecting land values—has in fact depressed California land prices.[209] Any tendency for the reassessment rules to depress prices may be countered by the inclination of landowners to hold on to their grandfathered property, reducing the supply of real property on the market. This, of course, would increase the price of available property. Indeed, the owners who are willing to sell their land and lose their grandfathered tax assessment will in many cases need to buy nonexempt replacement property, and they will therefore want to sell their grandfathered land at a price high enough to compensate them for the higher taxes they will have to pay on their replacement property.[210] In addition, upward price pressure might also result from the buyers' knowledge that property purchased now will be grandfathered at its current assessment even if the prices of neighboring parcels skyrocket.[211]

Thus, considered in isolation, acquisition-value taxation could be expected to create upward price pressures offsetting, to an uncertain degree, any downward price pressures it created.[212] To the extent that the opposing effects neutralize one another, market prices will simply be the result of the same forces that affect the real estate market in the absence of discriminatory taxation. In that

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which requires taxpayers to pay different levels of tax to receive the same level of state benefits.

209. Numerous factors have been cited as causes of the real estate slump which has plagued California since the 1990s. *See, e.g.*, Laura Evenson, *L.A. Area's Real Estate Takes Dive*, S.F. CHRON., Dec. 2, 1992, at A-8; Stephanie Simon, *Ventura County News Roundup: Thousand Oaks; Median Price of Housing Falls 17%*, L.A. TIMES, Apr. 8, 1993, at B-3.

210. Alternatively, when the owners later sell that replacement property, they may try to recoup the higher tax burden they suffered during their ownership years by demanding a higher selling price.

211. In the California scheme, the presence of exempt buyers and sellers in the market adds another complicating factor. Exempt buyers can push market prices up because they can afford to bid higher; exempt sellers can keep market prices down because their selling price need not compensate them for a higher tax burden on their replacement property. A homestead exemption such as Florida's would create similar effects.

212. In fact, during the public debates preceding the 1978 election, supporters of Proposition 13 argued that it would actually increase property values. Robert H. Edelstein, *The Impact of Proposition 13 Property Tax Reductions: A Theoretical Note*, *in* PROPERTY TAX REVOLT, *supra* note 116, at 207.

case, the burden of higher taxes on later buyers would seem to be quite real.

Although there have been many theoretical studies of tax capitalization,[213] there is no statistical evidence to shed light on the merits of this theory as applied to acquisition-value taxation. The number of variables that have influenced California real estate prices in recent decades is so large that making an accurate assessment of the impact of a single factor may be impossible. The problem is compounded by the fact that grandfathered and nongrandfathered property are not competing goods. Unless the buyer can invoke a statutory exception, only nongrandfathered property is for sale. Thus, it is difficult, if not impossible, to make direct comparisons of what otherwise identical grandfathered and nongrandfathered property would sell for.[214]

Unless and until the extent of acquisition-value property tax capitalization can be more persuasively established,[215] it will be difficult to determine the net economic effect on the new buyer of incurring a higher tax burden than previous buyers of comparable property.

What is clear, however, is that during periods of rising prices the later buyer bears an increased tax *cost*,[216] regardless of the ultimate *incidence* of that cost.[217] The imposition of the tax cost represents action by the state. Any price discounting which may offset

213. *See supra* note 207 (discussing literature on tax capitalization).

214. Since some California buyers are eligible for exemptions from reassessment, a study of purchase prices paid by exempt buyers versus nonexempt buyers for comparable property might be revealing. However, in light of the difficulty of determining which transactions involved exempt buyers, and the many variables that would influence the price paid, it seems unlikely that such a study could produce meaningful results.

215. One scholar has concluded that "[t]he overall impacts of Proposition 13 on property values and incidence of tax reductions are far from clear and are likely to require a deep understanding of general equilibrium economics." Robert H. Edelstein, *The Impact of Proposition 13 Property Tax Reductions: A Theoretical Note*, *in* PROPERTY TAX REVOLT, *supra* note 116, at 208.

216. If acquisition-value taxation were to operate in its "pure" form, then during periods of decreasing land prices, later buyers would enjoy lower tax assessments than previous buyers. In that case, the property owners bearing the higher tax burden could, with little difficulty, arrange for their property to undergo a "change of ownership," or new construction, within the meaning of the statute, and thereby garner a lower assessment. In any event, California's system is not "pure," and makes such formalistic arrangements unnecessary, since under Proposition 13 assessments may decrease without a change in ownership or new construction.

217. *Cf.* Ferdinand P. Schoettle, *Commerce Clause Challenges to State Taxes*, 75 MINN. L. REV. 907, 932 n.109 (1991) (proposing Commerce Clause analysis of state taxes based on their impact on marginal tax costs, but disregarding questions of tax incidence due to their inherent complexity).

that cost represents a response of the real estate marketplace. If the state action is viewed separately from the market's response, then even a fully discounted tax differential may present an equal protection question. The issue thus becomes whether an equal protection violation may be "cured" by subsequent neutralizing actions of the private sector. If the *Nordlinger* Court had undertaken a more intellectually rigorous review of Proposition 13, it could have explored this intriguing question.

In light of the Supreme Court's traditional willingness in "minimum scrutiny" equal protection cases to hypothesize rationales that lawmakers might have entertained, regardless of whether they in fact entertained those rationales, perhaps the Supreme Court could have upheld Proposition 13 on the ground that the voters could reasonably have believed that, under this capitalization theory, newcomers would not be disadvantaged by being compelled to pay higher taxes than previous buyers. However, there is no evidence that the voters ever entertained such a thought; indeed, what evidence there is suggests that the voters believed Proposition 13 would ultimately *increase* real estate values.[218]

Both the capitalization and administrative feasibility arguments offer logically appealing rationales for upholding acquisition-value taxation.[219] Both, however, would test the Supreme Court's willingness to supply a legislative rationale that was neither advanced in the litigation nor evident in the record.[220]

IV. IS STRICTER SCRUTINY WARRANTED?

Although the uneasy coexistence of *Nordlinger* and *Allegheny Pittsburgh* reveal the inconsistency of the Court's interpretations of minimum scrutiny, *Nordlinger* fits squarely within the most deferential tradition. Perhaps, however, the inequities created by acquisition-value taxation deserve a more searching standard of review,

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218. *See supra* note 212 (noting supporters believed Proposition 13 would increase property values).

219. The capitalization argument also would be a way of distinguishing cases involving aberrant enforcement (as in *Allegheny Pittsburgh*) from cases involving a uniform policy of acquisition-value taxation (as in *Nordlinger*). Market discounting is far more likely when increases are foreseeable.

220. The capitalization argument also would test the Court's willingness to uphold a state law that is based on a premise that has not been empirically proven, and may indeed be unprovable. The Court previously has been willing to uphold legislation based on a plausible but unproven premise. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58–63 (1973) (upholding state legislation premised on unproven theory that "exposure to obscene material adversely affects men and women or their society").

such as those catalogued by Professor Tribe.[221] Perhaps greater scrutiny is warranted by the fact that, both in California and Florida, acquisition-value taxation was adopted by a voter initiative, so that the actual "rationale" is difficult to discern.[222]

Heightened scrutiny may also be warranted by this tax scheme's tendency, once enacted, to become so entrenched that it is nearly immune from repeal. Such appears to be the case in California. It is widely agreed that repeal of Proposition 13 is extremely unlikely, because so many voters would experience significant property tax increases if tax valuations returned to the fair market value standard.[223] The fact that both California and Florida have embedded the new tax schemes in their state constitutions further decreases the likelihood of repeal.

These concerns probably warrant scrutiny no higher than the covertly heightened scrutiny which Professor Tribe has identified under numerous guises. In contrast, in other situations where state or local political processes have been impaired by state action, the Supreme Court has applied strict scrutiny to invalidate prohibitions on fair housing laws and involuntary busing of schoolchildren.[224] Each of these cases, however, invalidated a law which impeded the political process in a way that burdened the interests of a racial minority. This raises the question whether a person's status as a new buyer of real estate should place her in the same kind of protected class as religion, race, or national origin, at least where the majority of voters place a special burden on the person because of her new buyer status. If it could be demonstrated that new-buyer status is closely linked with a traditionally protected trait such as race, then stricter scrutiny would appear tenable. At this juncture,

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221. *See supra* notes 89–97 and accompanying text (discussing what Tribe calls "covertly" heightened scrutiny).

222. Professor Eule, as noted earlier, has advocated greater scrutiny of voter initiatives. *See* Eule, *supra* note 40, at 1579–84.

223. *See, e.g.*, COMMISSION REPORT, *supra* note 117, at i, 2 (noting citizens had expressed "amazement" that state senate would even consider making changes to Proposition 13); *see also* Reeves, *supra* note 13, at 103 (" 'It's a totem, like no other totem, kept in place by those who vote and those who benefit: white people over 35, the relatively affluent.' " (quoting Peter Schrag, a California newspaper editor)); Lalli, *supra* note 11, at 5 (panelists at recent UCLA conference concluded that proposition 13 is unrepeatable).

224. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 487 (1982) (invalidating state law prohibiting school authorities from implementing involuntary busing of school children without court order); Hunter v. Erickson, 393 U.S. 385, 393 (1969) (invalidating city regulations, adopted by voter initiative, prohibiting fair housing ordinances unless approved by a majority of voters); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (invalidating California constitutional provision prohibiting fair housing laws).

however, no such connections have been clearly demonstrated,[225] and the Court has shown itself reluctant to expand the list of protected classes.[226]

Another problem is that, unlike the laws struck down in the busing and fair housing cases, the change-of-ownership rules do not directly impede a political process. The impediment created by acquisition-value taxation is more attenuated; it simply requires amendment of the state constitution in order to effect a repeal, and it makes such voter action unlikely because it benefits one class of voters to such a great degree that the burdened voters will almost always be outnumbered.[227]

The class of new (and aspiring) buyers, however, may be closely linked to a different sort of protected group that is not defined by religion, race, or national origin: the group of persons exercising their constitutional right to travel or to engage in interstate commerce free of unreasonable burdens. Acquisition-value taxation schemes may inhibit travel by burdening new arrivals with higher

225. However, as noted earlier, Derrick Bell has suggested that many of those who voted for Proposition 13 did so to reduce welfare entitlements, *see* Bell, *supra* note 106, at 19 n.72, which may suggest some racial overtones. Additional support for this view comes from journalist Richard Reeves, who notes in a recent article that the generation who voted for Proposition 13 (known as the "Seventy-Eighters"), as well as "their children and often their grandchildren, were educated in good schools, which were backed by the wealth of California property, [but] voted to trade lower property taxes for themselves in exchange for diminished education spending for other people's children—many of them, it happens, black and Hispanic kids." Reeves, *supra* note 13, at 99–100.

226. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973) (holding "poor" persons are not a suspect class such that state discrimination invokes strict scrutiny).

227. *See* Reeves, *supra* note 13, at 100 (" 'The most insidious thing Prop. 13 did was to reinforce the haves against the have-nots of California. It severed the tie between most of the people and the few who govern. There is nothing people can do to improve their children's schools.' " (quoting Richard Zeiger, editor of the California Journal)). Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 17 VA. L. REV. 1413, 1415 (1991) (under access-based model of political legitimacy, "white majority rule in its self-interest is legitimate so long as some black representatives are there when the majority acts"); *id.* at 1479 (legitimacy of majority rule rests on assumption of "fluid majority, i.e., that members of a minority can join majority in future). A different component of Proposition 13 (absent from Florida's law) does create a more direct obstruction of the political process. The terms of the original provision require a two-thirds vote of the legislature to impose any new state taxes, CAL. CONST. art. XIIIA, § 3 (amended 1992), and a subsequent amendment requires a two-thirds super majority of voters to approve new local taxes or bond issues, *id.* art. XIIIA (amended 1992). Increases in real property taxes are prohibited altogether. *Id.* art. XIIIA, §§ 3–4 (amended 1992). Thus, the voting process is stacked against any changes to the state's tax structures which would remedy the hardship on the disadvantaged class of citizens.

taxes than established homeowners, and may inhibit competition by compelling new arrivals in the state's commercial markets to subsidize their entrenched competitors. Although the right-to-travel argument received some attention in the California courts,[228] it was dismissed cursorily by the *Nordlinger* Court on standing grounds. And while the Commerce Clause issue was addressed by the California appellate court, it never reached the United States Supreme Court.[229]

Both the right-to-travel and Commerce Clause standards require a state to show more than a "rational basis" for laws which burden protected activities, even in the context of economic regulations where the standard of equal protection review is normally deferential. Therefore, these arguments present a far greater challenge to acquisition-value taxation than the "minimum scrutiny" approach applied in *Nordlinger*. The second article in this two-part series will address the merits of these challenges.

228. *See R.H. Macy*, 276 Cal. Rptr. at 533; *Nordlinger*, 275 Cal Rptr. at 689; *Amador*, 583 P.2d at 1294.

229. The Commerce Clause issue was raised in *R.H. Macy*, which was not heard by the Supreme Court because the petitioners withdrew their certiorari petition after it had been granted. *See supra* note 85 (noting petition for certiorari withdrawn due to public relations concerns).