Constitutional Implications of Acquisition-Value Real Property Taxation: Assessing the Burdens on Travel and Commerce

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This Article addresses constitutional issues raised by systems of real property taxation that base a property owner's tax assessment not on the current value of the property but on its value on the date the taxpayer acquired it. The first Article in this series described the operation of acquisition-value systems of real property taxation such as those adopted by California in 1978 and Florida in 1992, and evaluated the equal protection challenges to the California system (“Proposition 13”) which culminated in the United States Supreme Court's 1992 decision upholding Proposition 13 in Nordlinger v. Hahn. Although the Nordlinger majority determined that California's version of acquisition-value taxation satisfied the minimum scrutiny standard of equal protection review generally applied to schemes of taxation and economic regulation, that decision did not resolve all of the constitutional questions surrounding the tax disparities created by acquisition-value taxation. This Article therefore continues the analysis by evaluating acquisition-value...
taxation in light of two other constitutional doctrines. First, this Article examines the impact of these tax disparities on persons seeking to exercise their constitutional right to travel. Second, the Article addresses the burdens such tax systems impose on interstate commerce. If acquisition-value taxation indeed burdens travel or interstate commerce, its constitutionality should be evaluated under the stricter scrutiny that applies to interference with those protected interests.

When acquisition-value taxation is subjected to this greater degree of scrutiny, however, it becomes apparent that the appropriate standards of review are unclear and, at times, inconsistent. In the likely event of a future challenge to acquisition-value taxation under these doctrines, resolution of these issues would not only put to rest the question of whether such discriminatory systems of taxation can lawfully be implemented, but also would provide an opportunity for the United States Supreme Court to address the inadequacy of its doctrines in these areas.

I. RIGHT TO TRAVEL

Even if acquisition-value taxation bears a rational relationship to a legitimate state interest, as the Court determined in *Nordlinger v. Hahn*, such taxation may be subject to stricter scrutiny as a burden on the fundamental constitutional right to travel. As discussed below, the right to travel may be infringed by a tax classification which places an undue burden on interstate travel. The Supreme Court should recognize that a burden affecting both intrastate and interstate travel should be assessed under the same constitutional standard as a burden affecting only interstate travel. The critical question presented by acquisition-value taxation of real property, however, is whether the purchase of real property has a sufficient nexus to the exercise of the right to travel. If strict scrutiny applies, then the taxing scheme can withstand constitutional challenge only if it serves a compelling state interest and is narrowly tailored to minimize the burden on travel.

In *Nordlinger*, a Californian who purchased a Los Angeles home after renting an apartment for twenty-five years discovered that her real estate tax was nearly five times the tax owed by her neighbors who had owned comparable property for considerably longer. The Supreme Court declined to reach the question whether Proposition 13 violated the petitioner's constitutional right to travel, finding that

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the complaint d[id] not allege that petitioner herself has been impeded from traveling or from settling in California because, as has been noted, prior to purchasing her home, petitioner lived in an apartment in Los Angeles. . . . Petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf.  

As a threshold matter, it is not clear what the Court meant by this observation. Certainly, apartment dwellers in Los Angeles have the same constitutional rights as other United States citizens. Perhaps the Court intended to say that California residents have no constitutional right to travel within California. If that was the Court’s intent, then it failed to make its meaning plain. Indeed, the Court flatly states that anyone who is “impeded from traveling or from settling in” California would have standing to claim infringement of her constitutional right to travel. This approach would appear to protect even purely intrastate travel. Yet the petitioner in Nordlinger was in fact travelling within California at the time she encountered this state-created impediment, and still she was denied standing.  

Whatever its intent, the Court’s terse, one-paragraph disposition of the right-to-travel issue in Nordlinger is unhelpful. The Court instead could have addressed squarely such questions as whether obstacles to real estate purchases impede travel, and whether and to what extent a state can constitutionally burden intrastate travel. Because the Court was not presented with the question of whether plaintiffs who reside out of state at the time they attempt to buy California real estate can raise a right-to-travel claim when they are impeded by Proposition 13, this question re-

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6. Id. at 2332 (emphasis added).
7. Id.
8. Perhaps the Nordlinger Court found it significant that the petitioner was living in a rented apartment prior to purchasing a house. Thus, it was not her travel per se that was impeded, but her change of status from tenant to landowner. If the Court found critical the fact that the petitioner was not a landowner prior to the purchase—that is, if selling one residence and buying another would have established that the petitioner was traveling in California—then surely the Court would have mentioned that she rented, rather than owned, her previous residence.

If we assume, for argument’s sake, that the Court inadvertently omitted the fact that the petitioner was a renter-turned-owner, then the Court could have meant that the petitioner might have had standing to assert infringement of her right to travel if the change-of-ownership specter had discouraged her from selling one residential property and purchasing another. If, for some reason, the Court considers this pretravel status (as owner versus renter) to be relevant, then the Court has left open the possibility that another litigant—one who was already a California homeowner before buying new property—could properly claim infringement of her right to intrastate travel.
mains unanswered as well. In the interstices of these questions resides yet another issue: If the Court finds that interstate, but not intrastate, travel is protected, at what point will a recent arrival in a state be treated as having ceased her interstate travel status and instead become an intrastate traveler? The Court’s dismissive language in Nordlinger implies that the Court did not even find it relevant whether Nordlinger had been living in the state a few days or a few years. Yet, if interstate travel ceases once one enters or comes to rest within a state, then, as discussed below, much of what we have come to know as constitutionally protected interstate travel does not merit such protection at all.  

When an individual nonresident challenges the acquisition-value tax scheme of either California or Florida, the Supreme Court may at long last address the merits of the right-to-travel claim. In the interim, the Nordlinger Court could have performed a valuable service by squarely addressing the rights of the intrastate traveler who purchases land shortly—or not so shortly—after entering the state.  

9. See infra notes 33–54 and accompanying text.  
10. The plaintiffs in Northwest Financial and R.H. Macy resided outside of California at the time they experienced the adverse effects of the change-of-ownership rules. Northwest Fin., Inc. v. Board of Equalization, 280 Cal. Rptr. 24, 25 (Ct. App. 1991), cert. denied, 112 S. Ct. 3026 (1992); R.H. Macy & Co. v. Contra Costa County, 276 Cal. Rptr. 530, 532 (Ct. App. 1990), cert. granted, 500 U.S. 951, and cert. dismissed, 501 U.S. 1245 (1991). Because both plaintiffs were corporations, their standing to assert a right-to-travel claim would be doubtful. Corporations have been held not to have a right to travel under the Privileges and Immunities Clause of Article IV. See, e.g., Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177–78 (1868) (stating a foreign insurance company has no right to enter Virginia without state’s consent). Thus, a corporate right to travel would need to be derived from some other constitutional provision. See infra note 104 (discussing constitutional challenges involving corporations’ right to travel). In spite of this, the California Court of Appeal addressed the right-to-travel issue in both Northwest Financial and R.H. Macy, and rejected it on the merits, finding that the tax system did not classify citizens on the basis of residency and did not “significantly impede interstate mobility.” R.H. Macy, 276 Cal. Rptr. at 539–41; see Northwest Fin., 280 Cal. Rptr. at 28–29.

The California Supreme Court had previously rejected a right-to-travel challenge to Proposition 13 in Amador Valley Joint Union High School District v. Board of Equalization, 583 P.2d 1281 (Cal. 1978). There, the court found that Proposition 13 imposed no penalty on new owners. Its only support for that conclusion, however, was the bare assertion that the new tax scheme was “intended to benefit all property owners” regardless of their residency status or duration. Id. at 1295. The court ignored the possibility that an unintended penalty might exist. Amador suggests that a traditional fair-market-value property tax would itself impair the right to travel by deterring property purchases when valuations were rising. Id. at 1295–96. The court failed to acknowledge that the impact of such a tax is experienced equally at any given time by old and new residents, and by old and new property owners. If escalating taxes might deter new purchasers, they would also have an equal tendency to
A. The Standard for Assessing State-Imposed Penalties on Travel

1. Discriminatory Classifications

Although its scope and constitutional source remain in doubt,11 the existence of a constitutional right to travel is well settled.12 As the Court noted in United States v. Guest: “Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass these differences further. All have agreed that the right exists.”13

While the early right-to-travel cases generally involved direct restrictions on the freedom of persons to move from one state to another14 or to travel abroad,15 beginning in 1969 the Supreme Court found that the right to travel may be burdened where travel itself is unrestricted but where the traveler subsequently becomes the target of a discriminatory classification because of her status as a recent traveler.16 Such classifications, the Court determined, must be subjected to strict scrutiny under the Equal Protection Clause because they burden a fundamental right.17 Under this approach, the classification must be justified by a compelling state

eourage owners to liquidate, thus increasing the supply of available property and possibly exerting a downward pressure on prices. Indeed, this pressure to liquidate one’s property was apparently one of the prime motives for adopting Proposition 13. Thus, under a fair-market-value tax, new arrivals purchasing property would experience no special penalty in comparison to long-term owners.

11. On the scope and source of the right to travel, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-14 & n.10 (2d ed. 1988).
14. See, e.g., id. at 745 (discussing African Americans’ right to travel on highways).
interest\textsuperscript{18} and must be the least burdensome means to protect that interest.\textsuperscript{19}

2. \textit{Focusing on Effect}

Arguably, the acquisition-value tax systems of California and Florida do not reflect any motivation particularly hostile to travelers.\textsuperscript{20} Although the statutory exemptions of Proposition 13 are problematic,\textsuperscript{21} the broader concept of acquisition-value taxation treats all purchasers of property alike, without regard to their current residency or residency duration. While property acquisition frequently coincides with travel, one may acquire new property without changing one's place of residence or business, and one may change one's place of residence or business without acquiring new property.

In contexts not involving the right to travel, the Court has said that equal protection forbids only \textit{purposeful} discrimination.\textsuperscript{22} Thus, merely showing that a facially neutral classification has a disparate impact on a particular group within that classification will not establish an equal protection violation absent some showing of an intent to discriminate against that group.\textsuperscript{23} While that may be true in equal protection cases involving discrimination against members of a suspect class,\textsuperscript{24} the Equal Protection Clause should not be—and, indeed, has not been—construed to tolerate unwarranted burdens on fundamental rights simply because the burdens were unintentionally imposed. Thus, an incidental burden on the right to vote or speak, the right to exercise one's religion, or the right to associate with persons of one's choice, should not be subject

\begin{footnotes}
\footnotetext{18}{\textit{Dunn}, 405 U.S. at 335; \textit{Shapiro}, 394 U.S. at 634.}
\footnotetext{20}{However, there is reason to believe that at least some of the Californians who voted for Proposition 13 were concerned about the influx of foreign capital, if not foreign persons. See infra notes 256–59 and accompanying text (discussing effects of foreign capital on real estate prices and consequences of Proposition 13 on foreign investors).}
\footnotetext{21}{The California law contains numerous exemptions which allow property owners under certain circumstances to transfer their grandfathered assessments to others, or to carry over their old assessment to newly acquired property. See \textit{LaFrance}, supra note 1, at 819 & nn. 11–17.}
\footnotetext{23}{\textit{Seattle Sch. Dist.}, 458 U.S. at 484–85; \textit{Harris v. McRae}, 448 U.S. 297, 322 (1980); \textit{Feeney}, 442 U.S. at 272.}
\end{footnotes}
to mere rational basis scrutiny. As Professor Tribe points out:

Certainly the Court has never hesitated to condemn "neutral" laws that had an unacceptably adverse impact upon such rights as free speech, freedom of political association, or freedom of religion. Proof of impermissible motive should hardly be a necessary element of a prima facie case of unconstitutional vote dilution, since the denial of something to which a person has a substantive constitutional right is no less illegal just because it may have been unintentional.25

Thus, for example, no evidence of discriminatory intent was necessary to invalidate laws burdening free speech in Schneider v. State (Town of Irvington),26 political association in NAACP v. Button,27 or freedom of religion in Wisconsin v. Yoder.28 If a right to travel is indeed fundamental, to accord it dignity equal to that given to other fundamental rights, it should be protected against unjustified burdens, regardless of the motive behind such burdens.29

25. TRIBE, supra note 11, § 16-20, at 1507 (footnotes omitted).
26. 308 U.S. 147, 164 (1939). Motive, however, has been treated as relevant in determining whether a particular restriction on speech should be subject to close scrutiny or subject to a balancing analysis. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 808–08 (1985). See generally TRIBE, supra note 11, §§ 12-2 to -6 (discussing balancing test).

The irrelevance of motive in determining whether a fundamental right has been unconstitutionally burdened has been discussed by both Professor John Hart Ely
In terms of effect, the burden on travel imposed by acquisition-value taxation is quite different from that imposed by differences in state laws that simply make one state a more inviting place to live than another state for a particular citizen or class of citizens.\(^30\) For example, one state may offer lower taxes, better public services, or greater welfare benefits than another. Such differences, by themselves, offer identical benefits and burdens to new arrivals and to long-term residents. Different issues arise when such systems offer different benefits and burdens to persons based on when they established a particular nexus with the state—for example, the date they entered the state, or the date they became landowners in the state.

The burden of acquisition-value taxes also differs from that of simple bona fide residency requirements, which restrict certain public benefits to those who have established local residency. Residency requirements have been defended on the ground that the Constitution protects migration with intent to settle, but not mere locomotion.\(^31\) The Supreme Court embraced this “intent-to-settle”

and Justice Marshall in his Mobile dissent. See Mobile, 446 U.S. at 112–21 (Marshall, J., dissenting); John H. Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155, 1160–61 (1978). Even the Mobile plurality conceded that “a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional.” Mobile, 446 U.S. at 76 (plurality opinion) (emphasis added) (citing Shapiro, 394 U.S. at 634, 638; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17, 30–32 (1973)). Accordingly, the plurality implied that a burden on a fundamental right is subject to heightened scrutiny regardless of the lawmakers’ motivation. The conclusion that heightened scrutiny is always triggered by a burden on fundamental rights also follows from the Court’s recognition in Feeney of the clearly defined range of equal protection cases to which minimal scrutiny applies: “When some other independent right is not at stake and where there is no ‘reason to infer antipathy,’ it is presumed that ‘even improvident decisions will be rectified by the democratic process.’” Feeney, 442 U.S. at 272 (emphasis added) (citations omitted) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)). The Mobile plurality recognized this as well: “[W]here a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from ‘the settled mode of constitutional analysis of legislation . . . involving questions of economic and social policy.’” Mobile, 446 U.S. at 76 (plurality opinion) (alteration in original) (quoting Rodriguez, 411 U.S. at 33).

30. See, e.g., Dunn, 405 U.S. at 342 n.12 (noting state’s higher driving age requirement may deter travel but is not penalty imposed on the newcomer).

31. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257–62 & n.10 (1974); Cole v. Housing Auth., 435 F.2d 807, 811 (1st Cir. 1970). Examples include residency requirements for municipal employment. See Wright v. City of Jackson, 506 F.2d 900, 901–02 (5th Cir. 1975). See generally Stewart A. Baker, Note, A Strict Scrutiny of the Right to Travel, 22 UCLA L. Rev. 1129, 1139–40, 1148 n.103 (1975) (discussing how fundamental right to travel can be made more predictable and principled). This explanation of their constitutional validity seems to prove too much, however, because a law impeding mere passage through a state would go to the heart of federalism and one of the earliest asserted rationales for the right to travel: the right to travel to the seat of government to seek redress of grievances. Crandall v. Nevada,
version of the right to travel in Memorial Hospital v. Maricopa County, holding that strict scrutiny would apply to burdens on: “the right to migrate, ‘with intent to settle and abide’ or . . . ‘to migrate, resettle, find a new job, and start a new life.’ Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement.”

The classifications created by acquisition-value taxation bear little resemblance to bona fide residency classifications because the former does not place all residents into a single classification. Instead, these tax schemes bear a greater resemblance to durational residency classifications. In the earliest of the durational residency cases, the Supreme Court applied strict scrutiny to hold that a state could not impose a one-year residency requirement for receipt of welfare benefits or as a prerequisite for voting in state elections. The Court found it irrelevant both that the laws in question were not enacted for the purpose of burdening travel and that they might not in fact deter travel. Rather, the critical question was whether the law had the effect of discriminating against newcomers.

This approach to the right to travel was recognized in Shapiro v. Thompson, where the Supreme Court invalidated a one-year state residency requirement for receipt of state welfare benefits. Applying heightened scrutiny, the Court concluded that one of the state’s purposes—to deter indigents from entering the state—was constitutionally impermissible. Even when presented with constitutionally inoffensive justifications for the classification, the Shapiro Court noted that because the effect of the classification was “to penalize the exercise of the right” to travel, the law could be upheld only if it was “necessary to promote a compelling government interest.” Thus, Shapiro treated the deferral of welfare benefits as itself an unlawful burden on the right to travel, and subjected

73 U.S. (6 Wall.) 35, 44 (1867).
32. Maricopa County, 415 U.S. at 255 (footnote omitted) (citation omitted) (quoting Shapiro, 394 U.S. at 629, and federal courts interpreting Shapiro).
33. Shapiro, 394 U.S. at 633.
34. Dunn, 405 U.S. at 360.
35. Id. at 341 n.10 (quoting Shapiro, 394 U.S. at 643–44 (Stewart, J., concurring)).
36. Id. at 339.
37. Id. at 341 n.10.
39. Id. at 642.
40. Id. at 628–31.
41. Id. at 634.
that burden to stricter scrutiny than would be applied to a classification that was not based on a person's status as a recent traveler. The Court found so close a nexus between welfare benefits and freedom to migrate that denial of the former amounted to an impermissible burden on the latter.

The Shapiro Court declined to suggest what other interests might be so closely tied to travel that a burdening of such interests would trigger strict scrutiny:

We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel. 42

Notably, Shapiro was concerned not with travel in the sense of transient presence in the state, but in the narrower sense of travel with intent “to migrate, resettle, find a new job, and start a new life.”43 “Intent to settle and abide” is implicated in a traveler’s decision to purchase residential real estate in California, Florida or any other state. Intent to “find a new job, and start a new life” likewise is implicated in the purchase of business-related real estate.

Three years after Shapiro, the Court extended its analysis to require a “substantial and compelling reason for imposing duration-al residence requirements” as a prerequisite for voting.44 In Dunn v. Blumstein, the Court found that such state and county residency requirements not only infringed the fundamental right to vote, but independently infringed a second fundamental right—the right to travel.46 The Court found that a law denying recent arrivals in a state or county the right to vote “penalize[d] such travelers directly.”47 There was no evidence in Dunn of any intent to penalize travel. Relying on Shapiro, the Court nevertheless rejected the state’s argument that only an intent to deter travel or actual deterrence would implicate that fundamental right; instead, the Court found that a penalty effect was sufficient to implicate the right.48

42. Id. at 638 n.21.
43. Id. at 629. This was the type of travel which the Court in Maricopa County later described as travel “with intent to settle and abide,” adopting the phrasing of lower courts interpreting Shapiro. See supra note 32.
44. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).
45. Id. at 336.
46. Id. at 338.
47. Id.; see also id. at 341 (“Travel is permitted, but only at a price.”).
48. Id. at 339–42.
The state's asserted justification for the durational residency requirement was to prevent voting by uninformed persons and fraudulent voting by nonresidents, not to disenfranchise new arrivals. However, the Court found that the classification was both over- and underinclusive for these purposes.49 Thus, the classification was unlawful because it was not narrowly tailored to achieve the state's legitimate goals, and not because it was motivated by an unconstitutional goal.

In *Memorial Hospital v. Maricopa County*,50 the Court confirmed that a classification may unconstitutionally burden travel, even absent an intent to penalize travelers.51 In striking down a one-year county residency requirement for nonemergency indigent medical care, the Court in *Maricopa County* implied that under *Shapiro* the critical question is not the purposefulness of the burden but its severity: "The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State."52 In *Maricopa County*, the Court also implied that new arrivals should be entitled to receive vital benefits on equal terms with long-term residents:

> Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance.

> . . . [T]he right of interstate travel must be seen as ensuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.53

The right to receive vital government benefits on equal terms is arguably absent in any property taxation scheme that compels new arrivals to pay higher taxes for the same privileges of property ownership and the same accompanying government services that are received by longer-term residents for a lower price.54

As discussed in Part II below, a law affecting interstate commerce may be an unconstitutional burden regardless of the intent of

49. *Id.* at 343–60.
51. *Id.* at 269.
52. *Id.* at 263; see also *id.* at 262–63 ("[W]e must . . . insure that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily burden constitutionally protected interests.").
53. *Id.* at 259–61 (emphasis added) (footnotes omitted).
the lawmakers who enact it.\textsuperscript{55} As a matter of policy, it would seem that the movement of persons should receive no less protection. To impose an intent requirement in travel cases without imposing one in commerce cases thus seems incongruous.\textsuperscript{56} Indeed, it has been persuasively argued that the interstate movement of persons should receive more protection than that of merchandise or services. Concurring in Edwards \textit{v.} California, Justice Douglas observed: "I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.\textsuperscript{57} Justice Jackson was equally concerned:

\begin{quote}
[The migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the Commerce Clause will result eventually either in distorting the Commerce Clause or in denaturing human rights.\textsuperscript{58}]
\end{quote}

Certainly, few would suggest that movement of persons should receive less protection than movement of property or services. This outcome could be avoided in either of two ways. First, Congress could exercise its Commerce Clause powers to allow states more latitude in erecting incidental barriers on interstate commerce. Although this is clearly within Congress's powers, it would represent a major shift in public policy. Alternatively, courts could recognize that the right to travel should be protected from unintentional burdens as well as purposeful ones. The latter result follows logically from the Court's treatment of unintentional burdens on other fundamental rights.

Thus, the travel cases indicate that the intent of a legislature (or electorate) that adopts acquisition-value tax laws should be irrelevant in determining whether such laws burden a fundamental right to travel.\textsuperscript{59} The question presented by such tax classifications

\textsuperscript{55} See infra part II.B.1.b.

\textsuperscript{56} Congress could, of course, choose to apply an "intent" standard in dormant Commerce Clause matters, by exercising its power under the Commerce Clause.

\textsuperscript{57} Edwards \textit{v.} California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); accord Katzenbach \textit{v.} McClung, 379 U.S. 294, 280 (1964) (Douglas, J., concurring) (suggesting Civil Rights Act of 1964 was predicated on Fourteenth Amendment as well as Commerce Clause).

\textsuperscript{58} Edwards, 314 U.S. at 182 (Jackson, J., concurring); see also Heart of Atlanta Motel \textit{v.} United States, 379 U.S. 241, 292-93 (1964) (Goldberg, J., concurring) (suggesting Civil Rights Act of 1964 could be predicated on Fourteenth Amendment as well as Commerce Clause).

\textsuperscript{59} Even if lawmakers' intent were treated as relevant to the right-to-travel question, one may argue that the burden placed on travel by acquisition-value taxa-
ought to be whether there is in fact a burden on constitutionally-protected travel and, if so, whether that burden is warranted by some compelling interest that cannot be adequately served by other less burdensome means.

B. Can a Burden on Property Ownership Be Equated with a Burden on Travel?

The courts have not recognized a fundamental right to purchase real estate. Thus, it is necessary to determine the extent to which the class of travelers—interstate or intrastate—coincides with the class of persons buying real property. This question really has two components. First, is the act of purchasing real estate too remote from the act of travelling for a burden on the former to be considered equivalent to a burden on the latter? Second, even if such a purchase has a sufficient nexus with travel, is the right to travel implicated only where the purchase is part of an overall plan to migrate across state lines?

1. The Nexus Between Travel and Real Estate Purchases

The California Court of Appeal, in *Northwest Financial, Inc. v. State Board of Equalization*, held that the ownership of property was “too tangential” to a person’s freedom of movement for a burden on property ownership to be considered a burden on migration. Is the ownership of real property indeed so remote from the act of travel that burdening ownership cannot, as a matter of law, be an unconstitutional burden on travel? Or is property ownership analogous to such “necessities of life” or “vital government benefits and privileges” as welfare benefits and nonemergency medical care?

The Court has made clear that the Constitution protects travelers against discrimination in many forms. A trilogy of Supreme Court cases in the mid-1980s applied equal protection analysis to invalidate state laws that imposed discriminatory burdens on per-

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60. 280 Cal. Rptr. 24 (Ct. App. 1991).
61. Id. at 30.
63. *Maricopa County*, 415 U.S. at 261.
64. *Shapiro*, 394 U.S. at 638.
sons based on when they had become, or had previously been, residents of the state. None of those burdens affected a fundamental right distinct from travel, such as the right to vote.

The first case, Zobel v. Williams,66 invoked the Equal Protection Clause to invalidate an Alaska statute that distributed a portion of the state’s mineral income to each of the state’s residents in proportion to the number of years that resident had lived in the state.67 Unlike a bona fide residency requirement, the Alaska payout scheme did not establish a durational threshold beyond which all residents were treated the same. Rather, it created “fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State.”

Any unequal distribution of benefits by a state, Zobel held, is subject to equal protection scrutiny.69 But the Court found it unnecessary to determine what level of scrutiny was triggered by these facts because it found that the classifications in question would not withstand even minimum scrutiny.70 Alaska’s asserted purposes for making these distinctions—providing a financial incentive to establish and maintain Alaska residency, encouraging prudent management of this portion of the state’s mineral income, and rewarding the contributions of its residents—were found to be constitutionally inadequate. The first two bore no rational relationship to the dividend distinctions, and the third was a “constitutionally unacceptable” apportionment of benefits which would permit a state “to divide citizens into expanding numbers of permanent classes,” a result which the Court, without further explanation, declared “clearly impermissible.”71 The majority referred to the right to travel only briefly in a footnote and identified it as “little more than a

67. Id. at 59. The majority distinguished cases involving state laws that imposed durational residency requirements in order to assure that all beneficiaries were bona fide residents. Id. at 58–59. The Court has upheld a one-year waiting period to obtain a divorce, Sosna v. Iowa, 419 U.S. 393, 410 (1975), and a waiting period to receive in-state tuition at a public college or university, Sturgis v. Washington, 414 U.S. 1057, 1057 (1973); Starns v. Maltersen, 401 U.S. 985, 985 (1971); cf. Vlandis v. Kline, 412 U.S. 441, 453–54 (1973) (striking down state law permanently denying in-state tuition to student entering from out of state). The Court invalidated waiting periods in Maricopa County, 415 U.S. at 269 (involving indigent nonemergency medical care), Dunn v. Blumstein, 405 U.S. 330, 380 (1972) (involving voting), and Shapiro, 394 U.S. at 641–42 (involving welfare benefits).
68. Zobel, 457 U.S. at 59.
69. Id. at 60.
70. Id. at 60–61, 65.
71. Id. at 64–65; see also Shapiro, 394 U.S. at 633 (“The Equal Protection Clause prohibits such an apportionment of state services.”).
particular application of equal protection analysis." The Court did, however, implicitly acknowledge that the right to travel was burdened by Alaska's dividend scheme: "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents."

Acquisition-value property taxation resembles the Zobel statute in one important respect: like the Alaska dividend scheme, it creates "distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents." Unlike the Alaska statute, however, acquisition-value taxation does not create classes that are directly tied to the duration of a landowner's residence in the taxing state. Rather, it creates classes based on the duration of a landowner's ownership of a particular piece of real estate within the state. These classes do not necessarily coincide with the length or even the fact of state residence. Nonresidents or newcomers who have owned a piece of land for a number of years can therefore fall into a more benefitted class than long-term state residents who have recently purchased new property. Thus, on its face, acquisition-value taxation burdens nonresidents, recent arrivals, and long-term residents equally.

A person who purchases property in a particular locale long before forming an intent to move there to reside or to operate a business, like the person who purchases property in an area and never moves there, would appear to represent an exception rather than the rule. Justice Stevens has written that "[w]e cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases." While these few recent arrivals and nonresidents will be included in the most benefitted classes, a far greater number are likely to be excluded. Thus, the change-of-ownership reassessment rules appear to have a disparate impact on nonresidents and newcomers whenever prices are increasing.

72. Zobel, 457 U.S. at 60 n.6.
73. Id.
74. Id.
75. Id.
76. On the other hand, because of the exemptions in Proposition 13, long-term California residents eligible to purchase exempt replacement property have the opportunity to remain in the more benefitted classes. Thus, the exemptions to the reassessment rules create a stronger correspondence between length of residency and reduced tax liability than would exist if the change-of-ownership rules applied to everyone. See LaFrance, supra note 1, at 819 & nn.11-17 (discussing exemptions).
Another difference between the classes created by acquisition-value taxation and those created by the Alaska dividend scheme is that the former are not fixed, permanent classes. Rather, they are a one-way ratchet—one can always move into a class less benefitted than the class in which one began by selling one property and buying a nonexempt replacement property, but one can rarely move into a more benefitted class.77

When Justice O'Connor argued in her Zobel concurrence that the Alaska scheme should be strictly scrutinized because it burdened the right to travel,78 she found it irrelevant "that some of the disfavored citizens already live in Alaska," because that did "not negate the fact that 'the citizen of State A who ventures into [Alaska] to establish a home labors under a continuous disability.'"79 Justice O'Connor thus rejected the argument "that Alaska's scheme d[id] not trigger the Privileges and Immunities Clause because it discriminate[d] among classes of residents, rather than between residents and nonresidents."80 She also implicitly rejected the suggestion that the scheme could not unconstitutionally burden travel unless it actually impeded migration:

The "burden" imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former State. The Clause addresses only differences in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens.81

Justice O'Connor's analysis can also be applied to acquisition-value taxation. The new buyer in an acquisition-value taxing state "labors under a continuous disability" in her effort to purchase a home or business property. The disability exists by comparison with longer-term landowners who have had the opportunity, whether or not they have chosen to take advantage of it, to retain their property and their grandfathered tax assessments. The new buyer who is a recent arrival, entering the region in the exercise of her right to

77. Such "upward mobility" might occur, but rarely. For example, suppose a recent house purchaser inherited (in an exempt transfer) a second house with a much lower, grandfathered assessment and then sold the recently purchased house. The taxpayer would thereby succeed in replacing a high assessment with a low one. This transaction can only occur where there are exceptions to the change-of-ownership rules, as there are in California.
78. Zobel, 457 U.S. at 73–74 (O'Connor, J., concurring). Justice O'Connor located the source of this right in the Privileges and Immunities Clause of Article IV. Id.
79. Id. at 75 (citation omitted) (O'Connor, J., concurring).
80. Id. (O'Connor, J., concurring).
81. Id. at 76 n.6 (O'Connor, J., concurring).
travel, is relatively disadvantaged in attempting to acquire and retain real property.

After Zobel, the two other decisions in the equal protection trilogy struck down state laws that created distinctions based not on duration of residency, but on a person’s residency status on a specific historical date. As in Zobel, the state-imposed burdens in each of these cases did not affect any fundamental rights independent of the right to travel.

In Hooper v. Bernalillo County Assessor, the Court examined a New Mexico law which gave a property tax exemption to honorably discharged veterans who had served at least ninety continuous days of active duty during the Vietnam War, but only if they had been New Mexico residents before May 8, 1976. Thus, like the statute in Zobel, the New Mexico statute created “fixed, permanent distinctions between ... classes of concededly bona fide residents’ based on when they arrived in the State.” When the statute was challenged on equal protection grounds by Vietnam veterans who became New Mexico residents after the critical date, the Court found it unnecessary to determine the proper level of scrutiny, because it found, as in Zobel, that the classification in question did not even withstand minimal scrutiny.

Thus, the Hooper Court did not decide whether the exemption scheme burdened the right to travel. However, its minimum scrutiny analysis suggests that the Court, in fact imposed a more demanding standard than true minimum scrutiny—something resembling the enhanced scrutiny that Professor Tribe describes as “covertly heightened” or “middle-tier” equal protection analysis. To ascertain the purposes of the legislation, the Court relied on the two justifications accepted by the New Mexico Court of Appeals in the decision below and asserted by the state in its amicus brief to the Court. These purposes were, first, to encourage veterans to settle in New Mexico, and second, to reward those who “picked up or laid down the burdens of war” as state citizens. The Court found that the first justification was not served by the statute, and indeed may have been frustrated by it, just as Alaska’s dividend scheme may

83. Id. at 614.
84. Id. at 617 (quoting Zobel, 457 U.S. at 59).
85. Id. at 618, 624.
88. Hooper, 472 U.S. at 618–19 (citation omitted).
have made potential immigrants feel unwelcome. As to the second rationale, the Court found that the residency distinction was “not rationally related to the state’s asserted legislative goal” because the statute required no “connection between the veteran’s prior residence and military service.” Thus, a “veteran who resided in New Mexico as an infant long ago” could qualify “regardless of where he resided before, during, or after military service.” Although for these reasons the Court found that the New Mexico law was both over- and underinclusive, the Court has on other occasions tolerated such “rough justice” within limits when applying the most deferential form of minimum scrutiny. In effect, the Hooper Court required a close fit between means and ends, an approach Professor Tribe has identified as one method of applying covertly heightened scrutiny.

The third case in the equal protection trilogy, Attorney General of New York v. Soto-Lopez, addressed the constitutionality of a state statute that offered a civil service employment preference only to veterans who were state residents at the time of their induction into the military. Like the classification scheme invalidated in Hooper, the residency-based distinction in Soto-Lopez was neither a durational residency requirement nor a bona fide residency requirement; it was based solely on residency on a particular historical date regardless of whether residency had been maintained continuously since that time. The state of New York sought to justify the classification by citing four goals: (1) encouraging New York residents to join the military; (2) compensating residents for their military service by helping them reestablish themselves upon returning to civilian life; (3) inducing veterans to return to New York after their service; and (4) employing those whose military experience placed them in a “uniquely valuable class of public servants.” The majority found that all four goals could have been served just as well if the state had offered a preference to all qualified veterans, regardless of their prior residency. Unlike the majority in Hooper,

89. Id. at 619–20.
90. Id. at 622.
91. Id.
92. See LaFrance, supra note 1, at 832–33 & n.100. See generally TRIBE, supra note 11, § 16-32 (discussing uses of intermediate forms of review).
93. TRIBE, supra note 11, § 16-32, at 1603; see also LaFrance, supra note 1, at 831–32 & nn.90–93.
95. Id. at 899 (plurality opinion).
96. Id. at 909 (plurality opinion).
97. Id. (plurality opinion).
98. Id. at 910 (plurality opinion).
however, a plurality of four justices in *Soto-Lopez* directly addressed the right-to-travel issue and held that the veterans’ preference scheme “operate[d] to penalize appellees for exercising their rights to migrate” and therefore should be subject to heightened scrutiny.\(^9\)

In light of these decisions, the *Northwest Financial* court’s refusal to recognize a close connection between a tax burden on real property and the ability of a nonresident to immigrate seems myopic.\(^1\) The *Zobel* Court held that recent travel status is an irrational basis for discriminatory distributions of excess state revenues, a benefit that, unlike health care or welfare payments, is neither a fundamental right nor an essential benefit.\(^2\) The *Soto-Lopez* plurality held that state hiring practices burdened the right to travel, even though government employment does not appear to be either a fundamental right or an essential benefit.\(^3\) Although *Hooper* cannot fairly be called a right-to-travel case, the level of scrutiny applied to the New Mexico law in *Hooper* was more than the usual minimum scrutiny. A property tax exemption such as the one invalidated in *Hooper* has the same effect as a reduced tax assessment: it results in a lower tax liability. If enhanced scrutiny is warranted by discriminatory tax exemptions, then surely it is warranted as well by discriminatory assessments.

Justice O’Connor’s concurrence in *Zobel* also suggests a link between travel and real property ownership. Justice O’Connor grounded her right-to-travel jurisprudence squarely in the Privileg-

\(^9\) *Id.* at 909 (plurality opinion).

\(^1\) As the plurality stated: “[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference.” *Id.* at 909–10 (plurality opinion) (quoting *Dunn*, 405 U.S. at 343) (alterations in original). The two concurring justices found that the New York preference scheme, like the tax exemption in *Hooper*, failed even to meet the test of minimum rationality. *Id.* at 913 (Burger, C.J., concurring); *id.* at 916 (White, J., concurring). The same three justices who dissented in *Hooper* dissented again in *Soto-Lopez*, finding that the burden imposed by the New York statute on the appellees’ right to travel was constitutionally insignificant. *Id.* at 921–23 (O’Connor, Rehnquist & Stevens, JJ., dissenting). The hypothetical justification on which the dissenters in *Hooper* so heavily relied—the state’s limited finances—would have been unavailing on these facts, since hiring one civil servant in preference to another of similar ability at the same salary is a zero-sum game.


es and Immunities Clause of Article IV:

Our opinions teach that Art. IV's Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." The Clause protects a nonresident who enters a State to work, to hunt commercial game, or to procure medical services. A fortiori, the Privileges and Immunities Clause should protect the "citizen of State A who ventures into State B" to settle there and establish a home.104

Justice O'Connor also relied on the Court's statement in Ward v. Maryland105 that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; [and] to take and hold real estate."106 This statement implies that real property ownership is not so tangential to the right to travel that it may be burdened without affecting that fundamental right.107 Even those cases that have construed the right to travel most narrowly have interpreted it as a right to settle or abide in a region,108 and such a long-term commitment has historically been associated with land ownership—or at least with ownership of the settler's own residence.

The Court's precedents thus support the conclusion that the

104. Zobel, 457 U.S. at 74 (citations omitted). The Supreme Court has held that the Privileges and Immunities Clause does not apply to corporations. See id. at 73 n.3 (O'Connor, J., concurring); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177–78 (1869); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586–87 (1839). Thus, the Clause would not support a right-to-travel claim by a corporate plaintiff like R.H. Macy. This would not, however, bar such a plaintiff from premising a right-to-travel challenge on another constitutional provision, such as the Commerce or Equal Protection Clauses. See Zobel, 457 U.S. at 73–74 & n.3 (O'Connor, J., concurring). The Supreme Court may be invited to revisit this question if and when it hears a corporate plaintiff's challenge to acquisition-value taxation.

105. 79 U.S. (12 Wall.) 418 (1871).


107. It follows that property ownership is no more "tangential" to the right to engage in interstate commerce unburdened by discriminatory or misapportioned state taxes. See infra part II. Indeed, the Court in Ward implied that the statute at issue violated not only the Privileges and Immunities Clause but the Commerce Clause as well. Ward, 79 U.S. (12 Wall.) at 428–29; see also id. at 432 (Bradley, J., concurring).

108. See, e.g., Shapiro, 394 U.S. at 629 (defining right to travel as right to "migrate, resettle, find[] a job"); Cole v. Housing Auth., 435 F.2d 807, 811 (1st Cir. 1970) ("The Court apparently uses 'travel' in the sense of migration with intent to settle and abide."); cf. Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) (discussing ordinance not aimed at transients and involving no fundamental right).
right to travel may be unconstitutionally burdened by state action that discriminates against travelers in the distribution of benefits that are not themselves fundamental rights. The list of benefits protected thus far includes welfare, medical care, and civil service jobs. This list may also include property tax exemptions and oil dividends, although the Zobel and Hooper decisions regarding these benefits nominally employed the rational basis standard of equal protection rather than a right-to-travel analysis. This analysis suggests, for example, that if a state imposed a durational residency prerequisite for the ownership of real property, such a requirement would be found to burden travel.

Yet, Justice O'Connor has urged that "something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied." In her Soto-Lopez dissent, Justice O'Connor argued that the right to travel is burdened only where the classification in question involves access to some other fundamental right, a "significant activity," or "essential governmental services." The plurality in Soto-Lopez acknowledged that even temporary deprivations warranted scrutiny if they involved "very important benefits" or "life's necessities." Justice O'Connor inferred from this that the plurality would be willing to tolerate burdens that affected less important benefits. Both Justice O'Connor and the Soto-Lopez plurality, however, seemed willing to apply strict scrutiny to a burden that creates a permanent disability. While the Soto-Lopez plurality focused solely on the permanence and significance of the deprivation, Justice O'Connor was willing to apply strict scrutiny only where the disability turned the traveler into a "second-class citizen" or imposed a "direct restraint" on travel. Thus, where the traveler was treated "exactly the same as the vast majority" of state residents, and was simply denied preferential treatment available to a small group of eligibles, she would find the burden on travel to be minimal and strict scrutiny inappropriate.

109. The Zobel Court observed that apportionment of state services, or apportioned charges for those services, based on duration of residency would also violate the Equal Protection Clause. Zobel, 457 U.S. at 63 (citing Vlandis v. Kline, 412 U.S. 441, 449–50 & n.6 (1973)).
111. Id. (O'Connor, J., dissenting).
112. Id. at 907 (plurality opinion).
113. Id. at 921 (O'Connor, J., dissenting).
114. Id. at 909 (plurality opinion).
115. Id. at 922–23 (O'Connor, J., dissenting).
116. Id. at 921–22, 925 (O'Connor, J., dissenting).
Even applying Justice O'Connor's conservative approach, it seems clear that newcomers to acquisition-value states labor under a continuous disability with respect to property ownership. As long as land prices are generally rising, newcomers will be unable to acquire the benefits of real property ownership without incurring taxes at a higher effective rate than previous buyers. That disability places newcomers in a second-class status compared to the earlier arrivals who will generally constitute the majority of the taxpayers. The deprivation is permanent, and in a period of continually rising land prices the degree of deprivation increases for each new wave of immigrants. Thus, the disability is not temporary, and strict scrutiny may be triggered even if property ownership is not considered one of life's necessities. To permit a person to migrate and settle in a new area, but to use state tax laws to disable that person from purchasing real estate on the terms enjoyed by previous buyers, is to relegate that citizen to second-class status, thus penalizing immigration as in Zobel.\(^{117}\)

Acquisition-value taxation laws also bear some resemblance to antigrowth laws like the one at issue in \textit{Construction Industry Ass'n v. City of Petaluma}.\(^{118}\) In \textit{City of Petaluma}, the district court held that a local law limiting growth in the number of housing units within city limits violated the right to travel.\(^{119}\) The \textit{City of Petaluma} court saw a close connection between the act of travel and the availability of housing,\(^{120}\) and found the city's concerns over

\(^{117}\) It is true that the cost of state services associated with real estate acquisition—for example, a state documentary tax or title recording fee—may have increased since the previous buyers made their purchases. Passing on the cost increase to new buyers increases their state-imposed transaction costs relative to those paid by previous buyers. But a buyer that incurs state transactional taxes is paying for a state service, and is simply being asked to pay her own way. The cost of these services is analogous to a user fee, such as the cost of a subway token or a toll road; the user pays the cost of a state-provided service. If that cost increases, it is reasonable to pass the increase along to those who receive the service at the time of the cost increase and thereafter. While the actual dollar cost to the newcomer is greater than the dollar cost to the previous buyer, the newcomer is also receiving a service of greater value in current dollars. If the newcomer did not pay the higher cost, then the newcomer would be receiving a subsidy from the previous buyers. In contrast, the imposition of a higher property tax rate only on new buyers does not require all property owners to pay their own way. There appears to be no evidence that recent buyers, as a class, use more or different state or local services in a given year than do earlier buyers.

\(^{118}\) 375 F. Supp. 574 (N.D. Cal. 1974), rev'd on standing grounds, 522 F.2d 897, 903–05 (9th Cir. 1975), and cert. denied, 424 U.S. 934 (1976).


\(^{120}\) \textit{City of Petaluma}, 375 F. Supp. at 581.
water and sewage unpersuasive.\textsuperscript{121} However, concerns over health, safety, and related problems arising from population density or construction activity might, under some circumstances, provide the compelling state interest necessary to justify a barrier to entry such as a limit on housing growth. On those occasions, a less burdensome means of protecting that interest might be difficult to find. Acquisition-value taxation, in contrast, is based on a far less compelling interest—the desire to reduce the tax burden on long-term landowners. The state could accomplish this goal in a number of ways less burdensome to travelers. For example, the state could lower all assessments to the same base year, with scheduled annual increases, without regard to the most recent purchase price. Alternatively, the state could institute tax-forgiveness or deferral plans for hardship cases.\textsuperscript{122}

2. Which Buyers Are Protected Travelers?

Even if acquisition-value taxation generally imposes a heavier tax cost on new arrivals, this discriminatory treatment is not automatically significant enough to infringe the right to travel. Arguably, even a permanent disability may be too inconsequential to have constitutional significance. In Village of Belle Terre v. Boraas,\textsuperscript{123} for example, the Supreme Court rejected a right-to-travel challenge to a zoning ordinance that prohibited more than two unrelated people from sharing a household.\textsuperscript{124} The Court offered little explanation for its decision.\textsuperscript{125} Instead, it lumped all of the plaintiff’s constitutional claims together and disposed of them by stating that the ordinance was “not aimed at transients, . . . involves no procedural disparity, . . . [and] involves no ‘fundamental’ right guaranteed by the Constitution, such as voting; the right of association; the right of access to the courts; or any rights of privacy.”\textsuperscript{126} Accordingly, the Court applied minimum scrutiny.\textsuperscript{127} Although the Court’s concern regarding a law aimed at “transients” implies that the Court might have been willing to recognize a right

\begin{footnotes}
\footnote{121. Id. at 582–84.}
\footnote{122. For a detailed discussion of the asserted goals of acquisition-value taxation, and the alternative means to achieve these goals, see LaFrance, \textit{supra} note 1, at 836–42.}
\footnote{123. 416 U.S. 1 (1974).}
\footnote{124. Id. at 7.}
\footnote{125. The Court’s inattention to the travel-related arguments may have resulted in part from the fact that the petitioners also presented equal protection and right-of-privacy claims. Id.}
\footnote{126. Id. (citations omitted).}
\footnote{127. Id.}
\end{footnotes}
to travel not associated with an intent to settle, there is little in the way of right-to-travel jurisprudence that can be gleaned from this offhand dismissal of the issue.

Commenting on the travel aspect of *Belle Terre*, Professor Tribe has suggested that “the validity of such a law should be tested against its impact upon the rights of all persons subject to it, rather than against any incidental tendency to inhibit certain outsiders from moving in.” A local prohibition against cohabitation by unrelated persons would make a residential area unattractive to immigrants by making it equally unattractive to everyone. The long-term cohabitants of *Belle Terre* thus labored under the same disability as newly arrived cohabitants; they faced the same legal penalties for their choice of living arrangements. This is not true of annual tax assessments which are higher for new acquirers of property than for earlier buyers. Under such assessments, those who buy early and retain their property tend to benefit more than those who purchase property later.

Another notable distinction between the zoning law in *Belle Terre* and acquisition-value taxes is that the *Belle Terre* ordinance arguably encouraged as much travel as it discouraged. The decision to commence cohabitation requires that at least one person move their residence to a new location, and the zoning ordinance in *Belle Terre* was apparently designed to discourage such moves. It would be equally true, however, to say that the ordinance was designed to encourage at least one of the cohabitating parties to move out of the shared residence. In contrast, acquisition-value property taxation rarely, if ever, rewards travel.

The unfavorable consequences of acquisition-value taxation fall exclusively on “outsiders moving in,” to use Professor Tribe’s words,

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128. Tribe, supra note 11, § 15-14, at 1381 n.20; see also Memorial Hosp. v. Maricopa County, 415 U.S. 250, 285 (1974) (Rehnquist, J., dissenting) (“The Court should examine . . . whether the challenged law erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote.”).

129. If moving were the only way to lower one’s assessment, then travel would be stimulated whenever the market value of real estate declined. Thus, a “pure” acquisition-value system—meaning one in which assessments are always tied to acquisition values—might not burden travel as much as the California system, where real estate assessments can drop even without a change in ownership. Whether Florida’s system is “pure” in this sense remains uncertain until details of the law are fleshed out. At this time, it appears to be so. However, to the extent that rising land prices reflect increased demand for real estate in a particular region, even a “pure” acquisition-value system will discourage travel most when immigration pressures are the greatest. Thus, it would tend to burden immigration whenever the state’s population had the strongest motives to exclude newcomers.
if this category is defined to include all new purchasers—that is, if it includes intrastate and interstate travelers, new owner-occupants, and new purchasers of rental and other business properties. If any of these categories is determined to fall outside the protected traveler category, then acquisition-value taxation can be said to apply to persons other than protected travelers. In that case, one might argue that the burden on protected travelers, while permanent, is merely incidental, and thus not constitutionally significant under Professor Tribe’s interpretation of Belle Terre. This makes critical a determination whether all new property purchasers fall into the protected traveler class.

However, finding the right to travel implicated only where all of the burdened parties are travelers may set too high a standard. If most purchasers are in the class of protected travelers, it should not be necessary to find that all of them are in that class in order to establish that the burden on travel is more than incidental. As discussed in Part II, infra, the Supreme Court has held, in its Commerce Clause jurisprudence, that a law burdening interstate commerce is not rendered constitutionally acceptable merely because it also burdens some intrastate interests.\footnote{\textit{See} Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951); see also \textit{infra} notes 273–76 and accompanying text (discussing Dean Milk).} The Court applied a similar analysis under the Article IV Privileges and Immunities Clause in \textit{United Building \\& Construction Trades Council v. Mayor of Camden}.\footnote{465 U.S. 208 (1984).} In \textit{United Building}, the Court ruled that a municipal residency requirement for employees of city contractors could not be found to infringe the rights of nonresidents even though many state residents were burdened as well.\footnote{\textit{Id.} at 215–18.} The logic of this position should apply equally to travel jurisprudence.\footnote{Compare Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753, 763 n.7 (1993), where the majority asserted that this approach cannot be applied to the right to travel because such a right does not derive from the Commerce Clause. The fact that the rights asserted may originate in different parts of the Constitution, however, does not mean that similar analyses are never appropriate.} Thus, the proper inquiry should not be whether all persons burdened by the reassessment rules are penalized for engaging in constitutionally protected travel, but whether the rules have a disparate impact on such travelers.\footnote{134. For an extensive discussion of territorial discrimination, see Gerald L. Neuman, \textit{Territorial Discrimination, Equal Protection, and Self-Determination}, 135 U. Pa. L. Rev. 261 (1987).}
(a) Burdens That Affect All Travel

If we assume that certain burdens on purchasing real estate can penalize travel, is it relevant that acquisition-value taxation affects not only those who are seeking to buy property as part of an overall plan to travel interstate, but all travelers who seek to buy property? The question whether intrastate travelers have the same right as interstate travelers to be protected against burdens on travel is important to this analysis for two reasons. First, if intrastate travelers are not protected, then the tax burden might be found to have only an incidental impact on travel, and arguably could be upheld under Professor Tribe's analysis of Belle Terre. Second, if intrastate travel is not protected, then only an interstate traveler would have standing to raise a challenge based on the right to travel, as Nordlinger implied. As discussed below, the fact that acquisition-value taxation burdens both interstate and intrastate travelers should not lessen the standard of review, and should not serve as the basis for denying standing to intrastate travelers such as the plaintiff in Nordlinger. 135

Many of the Supreme Court's durational residency decisions have addressed burdens affecting intrastate travelers, and in these cases the Court has applied heightened scrutiny. In Maricopa County, for example, the state law at issue required one year's residence in a county as a prerequisite to receiving nonemergency medical care at the county's expense. 136 A state resident who had recently moved from one county to another within the state would have been just as disadvantaged as an immigrant from out of state. However, the majority declared that the plaintiff was in fact an interstate traveler because he had entered the state only one month before seeking medical care. 137 The Court observed that "[w]hat would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction." 138 The Court therefore found it unnecessary on the facts before it "to draw a constitutional distinction between interstate and intrastate travel." 139 Thus, the Court did not indicate how it would have decided the case had the plaintiff failed to meet the residency test simply

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135. 112 S. Ct. 2326, 2332 (1992); see supra notes 5–9 and accompanying text (discussing Nordlinger).
137. Id. Evidently, the Court believed that a person can be in a state for one month and still be in "travel" mode.
138. Id. at 256.
139. Id. at 255–56.
because he had moved from one Arizona county to another. This left open the possibility that the Court would deny standing to an intrastate traveler, as it later did in Nordlinger.

Standing considerations aside, when the Maricopa County Court invalidated the county residence requirement, it implicitly rejected the argument that a burden on all travel can never constitutionally burden interstate travel. The Court in Dunn v. Blumstein implicitly reached the same conclusion when it invalidated both state and county durational residency requirements for voting. Lower federal courts have followed suit. In Cole v. Housing Authority, for example, the First Circuit invalidated a city durational residency requirement for access to low-income housing, finding that it served no “compelling interest.” The Cole court believed this requirement would be invalid under Shapiro as applied to a recent arrival from out of state and concluded that it would be irrational to apply a different standard where the person had simply relocated within the state.

One year after the First Circuit decided Cole, the Second Circuit adopted its reasoning in King v. New Rochelle Municipal Housing Authority. The King court applied the “compelling interest” standard of review to strike down a city ordinance requiring five years’ residency in the city as a prerequisite to admission to public housing. The court found that “[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state.”

Shortly after King, in Wellford v. Battaglia, the Third Circuit affirmed a district court’s decision striking down a city’s five-year residency requirement for mayoral candidates under the “compelling interest” standard. Applying Dunn and King, the district court had found burdens imposed not only on the right to vote but also on the right to travel both within and between states.

140. 405 U.S. 330, 358–60 (1972).
141. 435 F.2d 807 (1st Cir. 1970).
142. Id. at 811–13.
143. Id. at 809–12.
144. See id. at 813.
146. Id.
147. Id.
148. 485 F.2d 1151 (3d Cir. 1973) (per curiam).
149. Id. at 1152.
After the Supreme Court decision in *Maricopa County*, the Fifth Circuit struck down a municipal curfew on minors in *Johnson v. City of Opelousas*, finding a violation of the right to intrastate travel. Notably, the plaintiffs in *Johnson* were all local residents who did not claim to be engaging in interstate travel when they violated the curfew. Nonetheless, even this seemingly purely intrastate burden could have had some effect on all travelers.

In sum, all of these lower court decisions could be interpreted to support heightened scrutiny only for those intrastate travel burdens that necessarily or demonstrably burden interstate travel as well. Indeed, it is difficult to imagine any intrastate travel restriction which would not also burden interstate travel. The *Maricopa County* Court considered the possibility that a state law could burden intrastate travelers while exempting interstate travelers, but even this type of law would require that the notion of "interstate" travel be defined, and that "new" arrivals be differentiated from "not so new" arrivals. This appears to be an inherent weakness of the argument that only interstate travel is constitutionally protected.

Nonetheless, in a recent decision, the Supreme Court appears to have retreated from the broad view of travel articulated in *Maricopa County*. In *Bray v. Alexandria Women's Health Clinic*, Justice Scalia, writing on behalf of a bare majority, implicitly rejected the notion that a burden on all travel is necessarily a burden on interstate travel: "[This] purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied discriminatorily against them." Without explicitly saying so, *Bray* appears to reject the existence of a right to intrastate travel, and in the process begs the question of whether and how intrastate and interstate travel can meaningfully be distinguished. The *Bray* majority did not explain how its holding could be reconciled with *Maricopa County* and *Dunn*.

Dissenting in *Bray*, Justice Stevens argued that the right to

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151. 658 F.2d 1065 (5th Cir. 1981).

152. *Id.* at 1072–73.

153. *See id.* at 1067. Apparently because the plaintiffs were minors, the Fifth Circuit required the state to show only a "significant" rather than a "compelling" state interest. *See id.* at 1073.


156. *Id.* at 763.
travel can be violated even by “conduct that even-handedly disrupts both local and interstate travel.” Justice Stevens noted that “[w]here the Court to hold otherwise, interference with the right to travel could occur only at state borders.” Relying on cases that found burdens on interstate commerce unlawful even where the burdens also affected local commerce, Justice Stevens observed that:

[T]oday no one could possibly question the power of Congress to [enact a civil rights statute that would] prohibit private blockades of streets and highways used by interstate travelers, even if the conspirators indiscriminately interdicted both local and out-of-state travelers. . . . The fact that an impermissible burden is most readily identified when it discriminates against nonresidents does not justify immunizing conduct that even-handedly disrupts both local and interstate travel.

Both the majority and the dissent in Bray framed the question as whether the activities in question—demonstrations which blocked access to abortion clinics—interfered with the right of interstate travel. Neither opinion addressed the question whether a separate right of intrastate travel exists which might be infringed by those same activities.

Were it not for the Bray decision, acquisition-value taxes could, under Maricopa County, squarely be placed in the category of burdens that affect interstate travel because such taxes affect both interstate and localized travel. If, however, the majority’s analysis in Bray is meant to replace the Maricopa County standard, a claim that acquisition-value taxation violates the right to travel between states will be more difficult to establish because it will require a determination whether acquisition-value taxation burdens interstate travel more than localized travel. Such a showing would require empirical data demonstrating that, of all new purchasers of real property in an acquisition-value state, more are recent arrivals in the state than are long-term residents. Before obtaining such

157. Id. at 795 (Stevens, J., dissenting).
158. Id. at 782 (Stevens, J., dissenting) (quoting National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1493 (E.D. Va. 1989)).
159. Id. at 795 (Stevens, J., dissenting) (citing Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)).
160. Bray, 113 S. Ct. at 795 (Stevens, J., dissenting). The dissent also cited Griffin v. Breckenridge, 403 U.S. 88, 101, 105–06 (1971), which held that 42 U.S.C. § 1985(3) applies to private conspiracies to deprive persons of their right of interstate travel. Bray, 113 S. Ct. at 795 (Stevens, J., dissenting). The dissent noted that “[t]he defendants in Griffin could not have refuted the claim that they interfered with the right to travel by demonstrating that they indiscriminately attacked local civil rights activists as well as nonresidents.” Id. (Stevens, J., dissenting).
data, however, it would be critical to determine when a person ceases to be a new arrival and becomes a long-term resident. The Court has yet to offer guidance on how such a fine distinction is to be drawn.

The Cole, King, Wellford, and Johnson courts recognized not only that a burden affecting all travelers was subject to scrutiny under the right to travel, but also that an intrastate traveler should have standing to raise the constitutional challenge on behalf of all travelers. The Nordlinger Court, in contrast, implicitly rejected this concept of standing.\(^{161}\) This conflict raises a thorny issue: If intrastate travelers lack standing to sue, then how does a court, presented with a recent immigrant to a state, determine when interstate travel ends and intrastate travel begins? In other words, if intrastate travelers such as Nordlinger do not have standing to challenge acquisition-value taxation, then who does? Only those travelers who have not yet obtained any form of lodging within the state? Surely one night in a hotel would not strip a person of “traveler” status. Would one month in a furnished apartment do so? One year? Or does interstate travel cease as soon as the traveler forms a subjective intent to remain in the state? If so, how long must they intend to remain? In Maricopa County, the Court evidently believed that a person could still be an interstate traveler even after being in the state for one month.\(^{162}\)

In applying constitutional scrutiny to Proposition 13, one could argue that to be considered an interstate traveler, an individual must be purchasing her first California property. Although the Nordlinger Court did not address the point, this may have been the plaintiff’s situation as a long-term renter. A new arrival who takes several years to purchase property would still be disadvantaged by not being eligible for the rollback years predating her arrival in the state. Perhaps the Nordlinger Court’s unstated rationale for denying standing was that the plaintiff had apparently resided in California before 1978, the year Proposition 13 took effect.\(^{163}\) Certainly, any person arriving in a state after the effective date of acquisition-value taxation ought to have standing to claim a burden on the right to interstate travel, regardless of how the Court resolves the intrastate travel question. Otherwise the question of who is an

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161. See LaFrance, supra note 1, at 868–69.
162. See supra notes 136–39 and accompanying text (discussing Maricopa County).
163. See Nordlinger v. Lynch, 275 Cal. Rptr. 684, 687 (Ct. App. 1990), aff’d sub nom. Nordlinger v. Hahn, 112 S. Ct. 2326 (1992). However, because the Supreme Court’s opinion never mentioned this fact, this rationale is unlikely.
interstate traveler simply becomes a question of how recent one’s travel must be for a burden imposed on changing residences or business locations to constitute a burden on interstate travel. The Supreme Court, however, has done little to resolve the interrelated questions regarding the scope of the right to travel and the standing of intrastate travelers to invoke this right.

(b) The Rights of Intrastate Travelers

The alternative, of course, is to recognize that the Constitution also protects purely intrastate travel, but the Court has shown no interest in venturing this far. Indeed, the Court’s decisions offer no consistent interpretation either of the purpose of the right to travel or its constitutional source, two threshold inquiries that could help flesh out the scope of the right.

Most early authorities supporting a right to travel tie that right specifically to interstate travel or its equivalent. Several of the original colonies recognized a right to enter and leave a colony freely. Article IV of the Articles of Confederation recognized a right of “free ingress and egress to and from any other state” and guaranteed “the free inhabitants of each of these states . . . the privileges and immunities of free citizens in the several states.” This “privileges and immunities” language resurfaced in Article IV of the Constitution and was evidently derived from the Articles of Confederation passage. Early case law basing the right to travel on the Article IV Privileges and Immunities Clause referred specifically to the right of a citizen of one state to enter and leave that or other states. Even when the Court has expressed alternative views and outright uncertainty as to the origins of the right to travel—questioning whether it might also be traced to the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth

164. ZECHARIAH CHAFFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 177 (1956).
165. ARTICLES OF CONFED. art. IV, reprinted in CHAFFEE, supra note 164, at 184–85.
166. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
Amendment,\textsuperscript{170} or the Due Process Clause of the Fifth Amendment\textsuperscript{171}—the Court has generally referred to the right as one of "interstate" travel.\textsuperscript{172} Not until Maricopa County did the Court even recognize the question of whether intrastate and interstate travel were constitutionally distinguishable.\textsuperscript{173}

Lacking guidance from the Supreme Court, the lower federal courts are in some disarray as to whether there exists a right to intrastate travel. As noted earlier, four circuits have recognized a right to travel intrastate,\textsuperscript{174} but each of those cases involved burdens that arguably affected interstate travel as well. Federal courts that have expressly refused to recognize a right of intrastate travel have done so in the narrow context of bona fide residency requirements for public employment; they have not addressed more burdensome constraints such as durational residency requirements.\textsuperscript{175}

\begin{footnotes}
\item[170] See, e.g., Edwards, 314 U.S. at 178 (Douglas, J., concurring) (arguing that right to travel derives from Fourteenth Amendment's Privileges and Immunities Clause); id. at 182-84 (Jackson, J., concurring) (same); Twining v. New Jersey, 211 U.S. 78, 97 (1908) (same).
\item[171] See Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964) (describing right to travel as a "liberty" protected by Due Process Clause); Kent v. Dulles, 357 U.S. 116, 125 (1958) (same). Zechariah Chafee commented: "[T]he Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires?"
\item[173] Maricopa County, 415 U.S. at 255-56.
\item[174] See supra notes 141-53 and accompanying text (discussing First, Second, Third, and Fifth Circuits' recognition of right to intrastate travel).
\end{footnotes}
As discussed below, in *Lutz v. City of York*,\(^{176}\) which was decided between the Supreme Court’s *Maricopa County* and *Bray* decisions, the Third Circuit upheld a right-to-travel claim asserted by intrastate travelers, even though the ordinance in question had very little effect on interstate travelers.\(^{177}\) The *Lutz* court expressly recognized a constitutional right to travel intrastate, and grounded this right in the substantive due process guarantee of the Fourteenth Amendment.\(^{178}\)

*Lutz* involved a city ordinance which outlawed “cruising,” or “unnecessary repetitive driving.”\(^{179}\) The purpose of the law, according to the legislative findings, was “to reduce the dangerous traffic congestion, as well as the excessive noise and pollution resulting from such unnecessary repetitive driving, and to insure sufficient access for emergency vehicles.”\(^{180}\) Thus, by its own terms, the statute implicated purely intrastate travel, with the possible exception of the occasional interstate traveler who temporarily became enamored of the city’s streets. Rejecting the plaintiff’s argument that the cruising ordinance violated his right to travel, the district court analyzed the statute under a rational basis standard of review.\(^{181}\) The district court held that “the freedom to cruise throughout downtown York rose ‘only’ to the level of a ‘liberty interest’ (as opposed to a ‘fundamental right’).”\(^{182}\)

On appeal, the Third Circuit Court of Appeals reversed, noting its agreement with *King*.\(^{183}\) The Third Circuit acknowledged, however, that if the right to travel derived solely from principles of federalism, “it might be entirely ‘meaningful’ to suppose that the right is not implicated by reasonable restrictions on localized intrastate movement.”\(^{184}\) Determining which restrictions are reasonable and which intrastate movement is localized would be difficult tasks. A “cruising” ordinance might represent one of the better cases for finding a restriction reasonable and the burdened movement localized. However, any movement that was more purposeful—or at least not purposely repetitive—would present a difficult question, since it

\(^{176}\) 899 F.2d 255 (3d Cir. 1990).
\(^{177}\) See id. at 268.
\(^{178}\) Id. at 256.
\(^{179}\) Id. at 257.
\(^{180}\) Id. (quoting York, Pa., Ordinance 6, § 2 (Apr. 19, 1988)).
\(^{182}\) Id.
\(^{183}\) Id. at 261.
\(^{184}\) Id. at 261–62.
would be much harder to establish that the localized movement was unconnected to interstate travel.

In *Lutz*, the Third Circuit avoided this reductive dilemma. While recognizing that the right to travel could, to differing degrees, be derived from each of several constitutional sources, the court chose to ground the right not in principles of federalism, but in the due process guarantee of the Fourteenth Amendment. The court traced this approach to *Williams v. Fears*, in which the Supreme Court found that “the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . . secured by the Fourteenth Amendment.” Of course, the *Fears* Court then went on to add: “And so as to the right to contract.” Noting the apparent demise of economic substantive due process, the Third Circuit conceded that the precedential value of *Fears* with respect to travel was “uncertain.”

The *Lutz* court therefore undertook an independent inquiry into whether the right to travel within a state falls within the scope of rights attributed to substantive due process in its most conservative construction: those rights which are “‘implicit in the concept of ordered liberty’” or “‘deeply rooted in this Nation’s history and tradition.’” Mindful of the Supreme Court’s aversion to identifying new substantive due process rights, the Third Circuit applied a standard which, in its view, represented “[t]he narrowest conception of substantive due process articulated in recent years.” The court cited Justice Scalia’s plurality opinion from *Michael H. v. Gerald D.*, for the proposition that substantive due process protects only those unenumerated rights “so rooted in

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185. *Id.* at 262–66.
186. 179 U.S. 270 (1900).
187. *Id.* at 274.
188. *Id.*
190. *Lutz*, 899 F.2d at 266.
191. *Id.* at 267 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).
192. *Id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).
193. *Id.* The Third Circuit acknowledged that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).
194. *Id.*
the traditions and conscience of our people as to be ranked as funda-
mental.”196

Justice Scalia, in a footnote endorsed only by Chief Justice
Rehnquist, had argued in Michael H. that these traditions should
be identified at the most specific level possible.197 Although the Third
Circuit in Lutz did not embrace Justice Scalia’s narrow view,198
the court nonetheless opted to test the right of intrastate travel
against this most conservative view of substantive due process: “[I]
if a fundamental right of intrastate travel can be recognized under a
view of substantive due process expressly rejected by a majority of
the Court as unduly narrow, then clearly we will not have overex-
tended the doctrine by so doing.”199

Accordingly, the Third Circuit hypothesized a regime under
which a state “could constitutionally prohibit all freedom of move-
ment that does not involve interstate migration, interstate com-
merce, business between a citizen and the federal government, and
 presumably travel incident to otherwise protected activity.”200
This would allow a state to prohibit a person from taking a Sunday
afternoon sightseeing drive through her own neighborhood as long
as the restriction had a legitimate state purpose.201 Troubled by
the notion that minimum scrutiny would apply to such a law, the
Third Circuit drew the “unquestionably ad hoc” conclusion that “the
right to move freely about one’s neighborhood or town, even by
automobile, is indeed ‘implicit in the concept of ordered liberty’ and
‘deeply rooted in the Nation’s history.”202 The court stopped short,
however, of requiring the state to show a “compelling interest”

196. Michael H., 491 U.S. at 122 (plurality opinion) (quoting Snyder v. Massachu-
setts, 291 U.S. 97, 105 (1934)).

197. See id. at 127 n.6 (plurality opinion). Thus, for example, while a tradition of
respecting marital privacy has enjoyed “deeply rooted acceptance in our Nation’s
history,” Lutz, 899 F.2d at 268, Justice Scalia’s view of substantive due process
would freeze the right of sexual privacy at this level of specificity until the Court
decides that homosexuality has found “deeply rooted acceptance,” see id.

198. See Lutz, 899 F.2d at 268.

199. Id.

200. Id. This list encompasses those forms of travel which would, at least argu-
ably, be constitutionally protected even if travel were not recognized as a funda-
mental right under substantive due process.

201. Id.

202. Id. The court drew indirect support for its conclusion from two cases invali-
dating loitering statutes on vagueness grounds. Id. at 260 n.8 (discussing Kolender
right to freedom of movement” threatened by antiloitering statute) and Papachristou
v. City of Jacksonville, 405 U.S. 156, 164 (1972) (noting that Thoreau and Whitman,
among others, extolled virtues of “wandering or strolling” as “part of the amenities of
life as we have known them”)).
served by the anticruising statute. Instead, by analogy to "time, place, and manner" restrictions on speech, the Third Circuit held that intermediate scrutiny was appropriate.203

Although not explicitly discussed by the Third Circuit in its bold endorsement of a fundamental right to travel intrastate, such a right appears closely linked to the fundamental rights of speech and association. Traveling within one's home state, or within a state where one is a visitor, is an essential part of gathering and sharing information, seeking and capitalizing on business opportunities, and choosing and interacting with a circle of associates. Although the Supreme Court has recognized the connection between travel and speech, it has done so only when scrutinizing restrictions that expressly conditioned foreign travel on abandonment of First Amendment Rights.204 It has not recognized travel as an essential part of exercising those rights.

C. Travel: Conclusions

The critical question in evaluating whether acquisition-value real property taxation unconstitutionally burdens the right to travel is the extent to which the class of land purchasers intersects the class of persons exercising their constitutional right to travel. First, the nexus between land purchases and travel must be examined. Most persons buying land for residential or business purposes are undertaking a relocation that constitutes travel.205 That travel may be interstate or intrastate. If intrastate travelers are not constitutionally protected, and the tax burden on interstate travelers is no greater than the burden on other buyers, then the burden on travel might be deemed merely incidental under Bray and under Professor Tribe's analysis of Belle Terre.206 However, if most purchasers are considered protected travelers because they will occupy the newly purchased land for residential or business purposes, then the burden falls exclusively (or nearly so) on travelers. The Su-

203. That is, the ordinance would be upheld if "narrowly tailored to serve significant government interests." Id. at 269.
205. Even if buyers who do not occupy their property at all are treated as nontravelers, this group may represent such a small portion of buyers that it should not alter the analysis. See Caban v. Mohammed, 441 U.S. 380, 411–12 (1979) (Stevens, J., dissenting) ("We cannot test the conformance of rules to the principal of equality simply by reference to exceptional cases.").
206. See supra note 128 and accompanying text (discussing Tribe's analysis of right to travel).
The Supreme Court could therefore find that the vast majority of persons acquiring new real property are engaged in travel.

The burden on subsequent buyers of real property can be viewed as a burden on constitutionally protected travel, without regard to the place the travel originated, for three reasons. First, an intrastate right to travel may be recognized, as in Lutz. Although the Bray decision suggests that the right of interstate travel is implicated only where a burden affects interstate travelers more than other persons, the majority in that case never addressed the possibility of a separate right to travel intrastate. Second, the burden imposed by acquisition-value taxation can be viewed as a burden on all travelers, so that protected travel is implicated even if the Constitution does not protect purely intrastate travel. Bray's suggestion that the Constitution is not offended by discrimination that affects both classes of travelers evenhandedly is difficult to square with Maricopa County and Dunn. Finally, any suggestion that only interstate travelers are constitutionally protected assumes that a line can be drawn to determine when interstate travel ends and localized travel begins. In the case of acquisition-value taxes, this would be extremely difficult, as the Nordlinger case illustrates.

If the right to travel is implicated, then the state's justifications for acquisition-value taxes must be subjected to strict scrutiny. Under strict scrutiny, the various arguments advanced in defense of acquisition-value taxation do not rise to the level of a compelling interest. Rather, these are concerns that can be adequately addressed by means less burdensome for travelers. Notably, one rational basis asserted in support of acquisition-value taxation has been the promotion of neighborhood stability. This goal is achieved largely by impeding the right to travel of persons wishing to move to a new neighborhood. By freezing ownership—and thus, to some extent, residence and business locale—acquisition-value taxation acts as a neighborhood barrier, effectively erecting a "No Trespassing" sign directed toward the aspiring home buyer or new business

207. Cf. Katzenbach v. McClung, 379 U.S. 294, 298–305 (1964) (upholding Title VII of Civil Rights Act of 1964 as exercise of Congress's authority to regulate interstate commerce, even though activities were overwhelmingly intrastate).

208. Lutz arguably would support application of "intermediate" scrutiny if the burden affects only, or predominantly, intrastate travelers, although the burden of the anticruising ordinance in that case was a less significant one than discriminatory taxation. Cf. Johnson v. City of Opelousas, 658 F.2d 1065, 1073 (5th Cir. 1981) (applying intermediate scrutiny because burden fell only on minors).

209. See LaFrance, supra note 1, at 836–48 (describing rationales advanced in support of acquisition-value taxation).

210. See id. at 844–46.
operator. Besides the cost of acquiring property, in a period of rising assessments new owners must pay extra taxes to subsidize, among others, wealthier residents who bought property before them. The constitutionality of this burden on migration should not depend on whether the migrants begin their move within or outside the state.

II. COMMERCE CLAUSE

To the extent that the class of new purchasers corresponds to new entrants in the marketplace, acquisition-value taxation systems warrant scrutiny under the dormant Commerce Clause because, in a period of rising land prices, they disadvantage new arrivals and offer a competitive advantage to established business interests. A Commerce Clause challenge seems inevitable for California’s Proposition 13, which applies to all types of real property. A similar challenge also seems possible, though somewhat less likely, for the scheme adopted in Florida, which applies only to owner-occupied residential property. As discussed below, the Commerce Clause may present a strong constitutional basis for invalidating acquisition-value taxation. Surprisingly, it has been overlooked by most plaintiffs.

Of the four cases challenging Proposition 13 in the California and federal courts, only R.H. Macy & Co. v. Contra Costa County addressed the Commerce Clause question. However, the California Court of Appeal rejected the Commerce Clause challenge, observing that: “Article XIII A does not restrict interstate commerce because it taxes only real property within the state. It is widely recognized that . . . ‘A tax on property or upon a taxable event in the state, apart from operation, does not interfere [with interstate commerce.]’ After the California Supreme Court refused to review R.H. Macy, R.H. Macy withdrew its petition for certiorari after the United States Supreme Court granted certiorari.

In Nordlinger v. Lynch and Northwest Financial v. State Board of Equalization, the interstate commerce issue was sim-

211. The “dormant” or “negative” Commerce Clause limits the power of states to impose burdens on interstate commerce even in the absence of a conflicting federal statute. See Hughes v. Oklahoma, 441 U.S. 322, 326 & n.2 (1979).
213. Id. at 541 (quoting Southern Pac. Co. v. Gallagher, 306 U.S. 167, 178 (1939)).
215. See id. at 829 n.85, 869 n.229.
ply never raised. The plaintiff in *Nordlinger* was a California resident at the time of her real estate purchase, and her arguments tacitly assumed that even under a broad definition of "commerce" a state's obstruction of its own resident's effort to purchase a home in the state did not involve any burden on interstate commerce. In *Northwest Financial*, the plaintiff unfortunately did not raise a Commerce Clause argument even though it was an out-of-state corporation purchasing residential property in California for investment. As discussed below, however, *Northwest Financial*, and perhaps *Nordlinger* as well, could have legitimately raised Commerce Clause arguments. Future plaintiffs are likely to raise the issue, compelling the Supreme Court to examine closely the inadequacies of its current approach to Commerce Clause analysis of state taxation schemes.

A. Commerce Clause Standards: Tax Laws Compared with Economic Regulations

The Supreme Court has often articulated its general approach to dormant Commerce Clause analysis of state economic regulations. The Court routinely invalidates laws amounting to simple economic protectionism without balancing the local benefits against the burden on interstate commerce.

218. *Nordlinger*, 275 Cal. Rptr. at 690 n.5; see infra part II.B.3 (discussing commercial versus residential property).


220. Protectionism consists of providing a "direct commercial advantage to local business." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959). In such cases, the Court has applied a "virtually per se rule of invalidity," Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2015 n.6 (1992) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)), to "not only . . . laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade." Id. (emphasis added) (quoting Maine v. Taylor, 477 U.S. 131, 148 n.19 (1986)); see also id. at 2014 ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) (recognizing that if state's purpose is protectionist, then state is not entitled to balancing approach between local benefits and burdens on interstate commerce); Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 406-07 (1984) (explaining that Court need not examine magnitude of burden on commerce once discrimination is found); Maryland v. Louisiana, 451 U.S. 725, 759-60 (1981) (same); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (same); Lewis v. BT Inv. Mgrs., Inc., 447 U.S. 27, 36-37 (1980) (same). In *Chemical Waste*, the Court struck down an Alabama law which imposed higher fees for the private disposal of hazardous wastes imported from outside the state than for disposal of such material generated in Alabama. *Chemical Waste*, 112 S. Ct. at 2014. The Court found "no room . . . to say that the Act presents 'effects
The Court applies a lower level of scrutiny to state economic regulations lacking a protectionist purpose. Such laws are subjected to a balancing-of-interests analysis. If a state law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," the Court will uphold it "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Thus, even a

upon interstate commerce that are only incidental." *Id.* at 2014 n.5 (quoting *City of Philadelphia*, 437 U.S. at 624).


The Court applies this same analysis in determining whether a state-imposed tax constitutes protectionism. Thus, even a tax which is facially neutral but which has a significant discriminatory effect on out-of-state interests may constitute the kind of economic protectionism that warrants greater scrutiny than state tax laws placing purely incidental burdens on interstate commerce. See, e.g., *Chemical Waste*, 112 S. Ct. at 2015 n.6 (holding state user fee may be unconstitutional because it has discriminatory effect); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (noting that tax discriminates if it gives direct commercial advantage to local business); see also *West Point Wholesale*, 354 U.S. at 390–92 (prohibiting license fee for delivery into Opelika of wholesale groceries from warehouses outside city); Nippert v. Richmond, 327 U.S. 416, 417–31 (1946) (holding tax on both in-state and out-of-state businesses selling through drummers violated Commerce Clause because out-of-state interests were more likely to depend on this method of solicitation); Best & Co. v. Maxwell, 311 U.S. 454, 455–57 (1940) (striking down tax on use of hotel rooms by itinerant salesmen: "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497–98 (1887) (holding tax on solicitation of orders for goods for subsequent delivery had greater impact on out-of-state businesses than on local businesses, which were less likely to solicit orders in that manner). Use taxes on imported goods are upheld when they compensate for a foreign state's failure to collect a sales tax on the item in question. *See Henryford v. Silas Mason Co.*, 300 U.S. 577, 583–86 (1937). However, these taxes are not upheld in the absence of such a compensatory tax on locally purchased goods. *See Halliburton Oil Well*, 373 U.S. at 71–72. *See generally TRIBE, supra* note 11, § 6-17, at 457–60 (discussing concept of cumulative burdens on interstate commerce).

221. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); see also *Chemical Waste*, 112 S. Ct. at 2014 n.5 (explaining that regulation imposing incidental interstate burden must pass inquiry balancing that burden against local benefits); *Bacchus Imports*, 468 U.S. at 270 (same); *Clover Leaf Creamery*, 449 U.S. at 471 (same); *City of Philadelphia*, 437 U.S. at 624 (same).
law that discriminates to some extent against interstate commerce may be upheld if it serves a legitimate non-protectionist purpose that outweighs the resulting burden on interstate commerce.\textsuperscript{222} The Court's balancing approach has considered "the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities."\textsuperscript{223} This standard of review is significantly more stringent than the rational basis test used in basic equal protection analysis.\textsuperscript{224} The balancing approach to dormant Commerce Clause analysis is often summarized by saying that the state must use the least discriminatory means available to achieve its legitimate purpose.\textsuperscript{225}

Professors James C. Smith and Walter Hellerstein have urged that a state tax law burdening interstate commerce should be held to the same standard as state economic regulations.\textsuperscript{226} That is, if the tax law is non-protectionist, it should be scrutinized under the balancing-of-interests analysis described above. However, in the context of state tax laws affecting interstate commerce, even absent a protectionist purpose, the Court often ignores the more flexible balancing approach. Instead, the Court's analysis tends to focus solely on whether the tax has a discriminatory impact on interstate commerce.

\textsuperscript{222} See New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988) (recognizing that some laws appearing to be protectionist may, on closer analysis, be constitutionally acceptable); see also Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186–87 (1950) (recognizing legitimate local interest in preventing waste of state's natural gas reserves). But see Regan, supra note 220, at 1206–87 (arguing that, in practice, Supreme Court virtually always focuses on protectionist purpose even when purporting to balance interests).

\textsuperscript{223} Pike, 397 U.S. at 142.

\textsuperscript{224} See, e.g., James C. Smith & Walter Hellerstein, State Taxation of Federally Deferred Income: The Interstate Dimension, 44 Tax L. Rev. 349, 394–95 (1989) ("[A] state taxing measure that discriminates against interstate commerce is not rendered constitutionally tolerable merely because a state can advance a rational basis for the discrimination." (citation omitted)). The level of scrutiny applied to non-protectionist measures is illustrated by Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).


\textsuperscript{226} Smith & Hellerstein, supra note 224, at 395; see Walter Hellerstein, Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination, 39 TAX LAW. 405, 461 (1986); Walter Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources, 1979 SUP. CR. REV. 51, 69–71 [hereinafter Hellerstein, Hughes v. Oklahoma]. But see Regan, supra note 220, at 1186–87 (arguing that fair apportionment test suffices without balancing).
commerce. If it does, the tax is invalidated. In effect, a protectionist purpose is virtually presumed when the state's discriminatory treatment consists of tax disparities rather than other forms of economic regulation.

Where a state tax law has a disproportionate impact on interstate commerce, the burden falls on the state to rebut the inference of protectionism by offering a justification for the differential treatment. For example, the state can show that the interstate activity received special benefits from, or generated special costs or problems for, the taxing state. Thus, a state may require interstate business to "pay its way," but cannot place interstate commerce at a disadvantage with respect to its local competitors.

When the Court does consider a state's asserted purposes for imposing a tax which discriminates against interstate commerce, it subjects those justifications to "the strictest scrutiny." Professor Tribe has suggested that one reason courts have not been more

227. See, e.g., Chemical Waste, 112 S. Ct. at 2014 (collecting cases) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."). Professor Hellerstein has noted that a state tax that "by its terms or operation imposes greater burdens on out-of-state goods, activities, or enterprises than on competing in-state goods, activities, or enterprises will be struck down as discriminatory under the Commerce Clause." Walter Hellerstein, State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication, 41 TAX LAW. 37, 60 (1987) (hereinafter Hellerstein, State Taxation); see Smith & Hellerstein, supra note 224, at 394–95 ("[O]nce the United States Supreme Court determines that a state tax has a discriminatory impact on interstate commerce, it routinely strikes down the levy without 'balancing' the discriminatory burden against competing state interests."). See generally Hellerstein, Hughes v. Oklahoma, supra note 226, at 63–71.

228. The Supreme Court has occasionally employed a balancing approach in tax cases. See, e.g., New Energy, 486 U.S. at 278–80 (finding state's asserted interests "amount to no more than implausible speculation"). It has not, however, explained why so few tax cases warrant the balancing approach.

229. See, e.g., City of Philadelphia, 437 U.S. at 626–27 (explaining that state's legitimate purpose "may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently"); see also Westinghouse, 466 U.S. at 404–05 (rejecting state's justification for discrimination against interstate commerce); Boston Stock Exch., 429 U.S. at 336 (same); Hale v. Bimco Trading, Inc., 306 U.S. 375, 380 (1939) (same). See generally Tribe, supra note 11, § 6-17, at 454 (discussing how states may "justify the differential").


231. See Ferdinand P. Schoettle, Commerce Clause Challenges to State Taxes, 75 MINN. L. REV. 907, 910–14, 932 (1991) (arguing that in Commerce Clause cases Court should inquire only whether state law disadvantages interstate businesses).

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generous in considering asserted state interests in tax cases is that the primary interest the state is protecting—raising revenues—is the same in each case. 233 He points out, however, that the reason for imposing a particular tax is distinct from the reason for imposing taxes in general. 234 Tax laws often have purposes other than, or in addition to, revenue generation. 235 This is illustrated by the Supreme Court’s “drummer” cases, where it struck down discriminatory state taxes imposed on itinerant merchants. 236 For this reason, state taxes should be held to the same standards as other forms of state economic regulation under the Commerce Clause. That is, a court should consider the state’s legitimate goals in imposing a tax, not just the effects of the tax, and should weigh the burden of the tax against its local benefits. 237

Some tax laws have no revenue enhancement purpose at all. Proposition 13, for example, was not designed to raise revenues. Indeed, it was designed for the opposite purpose—to deprive the state of funds in order to reduce government spending and protect what long-term landowners perceived as their economic interests. 238

If California and Florida had merely wanted to reduce the tax burden on landowners, they could have accomplished this goal by lowering everyone’s taxes pro rata or by offering deferral or forgiveness programs to taxpayers experiencing specific hardship. However, the voters in those states were evidently unwilling to freeze all real property assessments because such a freeze would have decimated the tax rolls. They also chose not to limit the relief to hardship cases. Instead, the voters tried to obtain the benefits of a freeze

233. TRIBE, supra note 11, § 6-15, at 441.
234. Id. § 6-16, at 446; see, e.g., Freeman v. Hewit, 329 U.S. 249, 253 (1946) (“[R]evenue serves as well no matter what its source.”).
235. For example, a nonrevenue purpose underlay New York’s 1968 decision to impose a heavier transfer tax on securities transactions occurring partly out of state than on those taking place entirely in New York. Striking down this law as discriminatory in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), the Court found that the state’s purpose was to make its securities markets more competitive with out-of-state markets without losing tax revenues. Id. at 325.
236. See, e.g., Nippert v. Richmond, 327 U.S. 416, 434–35 (1946) (invalidating license fee for “drummers” as unconstitutional regulation of interstate commerce); Best & Co. v. Maxwell, 311 U.S. 454, 455–57 (1940) (invalidating tax on hotel rooms used by itinerant salesmen); Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 493–94 (1887) (similar to Nippert).
237. Contra Regan, supra note 220, at 1186–87 (finding balancing unnecessary and suggesting that absent protectionist purpose, effects analysis alone is sufficient to protect interstate commerce).
238. For a discussion of the public debate which led to Proposition 13’s adoption, see LaFrance, supra note 1, at 834–35 & nn.111–16.
for all current owners while mitigating the revenue loss by shifting a greater tax burden to new buyers. This shifting of burdens to benefit one class of citizens more than others involves allocation decisions similar to those which characterize state economic regulations of the non-tax variety. The mere fact that the state employs a tax as the regulatory mechanism should not disguise the tax's character as a scheme of economic regulation.\textsuperscript{239}

The validity of treating tax laws like any other scheme of economic regulation can be demonstrated with an example. Consider a hypothetical law under which a state adopts a state-wide system of residential and commercial rent controls to accomplish objectives similar to those claimed for Proposition 13—controlling the carrying cost of property occupied by persons or businesses whose incomes do not keep pace with increasing property values. As a non-tax scheme of economic regulation, such rent controls would be subject to a Commerce Clause analysis inquiring, first, whether the law effectuated a protectionist goal and, if not, whether the local benefits of the law outweighed the incidental burden on interstate commerce.\textsuperscript{240} Because the benefits and burdens of acquisition-value tax schemes are similar to those that would arise under this hypothetical rent control scheme, the same balancing approach seems

\textsuperscript{239} See Tribe, supra note 11, § 6-16, at 445 & n.2 (arguing that taxes serving regulatory purposes require same analysis as other forms of regulation); Regan, supra note 220, at 1244 (“Regulatory programs may even include decisions exactly analogous to choosing a tax rate, such as setting a minimum price.”). Some regulatory taxes have already been subject to the regulatory type of Commerce Clause analysis. See supra notes 228, 236.

\textsuperscript{240} See supra notes 221–25 and accompanying text (discussing balancing analysis of non-tax regulations). But see Earl M. Maltz, How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence, 50 Geo. Wash. L. Rev. 47, 58–64 (1981) (questioning basis for balancing approach). Constitutional challenges to state or local rent controls have been few and unsuccessful. The only challenge heard by the Supreme Court, Pennell v. City of San Jose, 485 U.S. 1 (1988), alleged infringement of the landlord's constitutional rights under the Takings Clause and the Equal Protection Clause, id. at 4–5. No challenge from a prospective tenant's point of view has ever reached the Supreme Court. If it did, however, the prospective tenant could raise arguments similar to those raised by the taxpayers in the Proposition 13 cases. Likewise, if Proposition 13 is held unconstitutional, depending on the Court's rationale, such a decision could generate tenant challenges to state and local residential and commercial rent controls. See infra notes 360–61 and accompanying text (discussing arguments against rent controls under Commerce Clause).

For other landlord challenges to the constitutionality of residential rent controls, see Bowles v. Willingham, 321 U.S. 503, 505–10 (1944) (challenging federal rent controls); Eisen v. Eastman, 421 F.2d 560, 561–62 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970) (challenging New York City rent controls); Wilson v. Brown, 137 F.2d 348, 349–50 (Emer. Ct. App. 1943) (similar); and City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 802 (Fla. 1972) (challenging city rent regulations).
appropriate.

Thus, a Commerce Clause analysis of acquisition-value taxation should begin by inquiring whether the tax scheme is protectionist either in purpose or effect—that is, whether it gives a direct commercial advantage to local interests. If the scheme is not protectionist, the inquiry should move to whether the incidental burden on interstate commerce is outweighed by the local benefits of the tax scheme. In conducting this "balancing" test, the Court should consider the legitimacy of the state’s asserted objectives, including, but not limited to, revenue generation. Finally, if the Court is satisfied that any of those objectives are legitimate, it should consider whether the state could accomplish those legitimate objectives by less discriminatory means.

The discussion that follows first assumes that real property taxes can burden interstate commerce, and examines acquisition-value taxation under both the balancing approach and the "impact only" approach typically reserved for tax laws, in order to determine whether the two approaches lead to different results. The analysis then examines the underlying assumption to determine whether and how such taxes can burden interstate commerce.

B. Application of Commerce Clause Analysis to Acquisition-Value Property Taxation

1. Commerce Clause Analysis Employing Standards Applied to Economic Regulations

(a) Is There a Protectionist Purpose?

Perhaps the most difficult aspect of scrutinizing acquisition-value tax schemes under the Commerce Clause is determining whether they can fairly be characterized as having a protectionist purpose. In contemporary Commerce Clause jurisprudence, the line between protectionist and incidental effects is ill-defined, but is critical to determining whether the state regulation is per se invalid or whether a balancing of interests is warranted.\footnote{241} There is no persuasive evidence that the acquisition-value tax schemes adopted in California and Florida were designed for the purpose of disadvantaging only those new real estate buyers that resided out-of-state or had recently immigrated from outside the state.\footnote{242} Florida’s law, for example, creates a favored group con-

\footnote{241. See, e.g., HARTMAN, supra note 220, § 2:19, at 122–23 (1981) ("[O]nce the question goes beyond the tax that is patently discriminatory on its face, much room for controversy about hidden discrimination exists.").}

\footnote{242. But see infra notes 257–58 and accompanying text (noting Californians’ frus-
sisting of long-term homesteaders who benefit from an annual cap on property tax increases until they buy new property. However, Florida's law also creates two disadvantaged groups. Of these, the group bearing the lesser burden includes all new buyers of homestead property, because their future taxes will be determined by the property's value at the time of purchase. The most burdened group consists of all owners of nonhomestead property, whose property will be taxed on its current fair market value.

In California, by contrast, it appears that the property tax freeze was originally designed to disadvantage all new real estate buyers. As amended by subsequent initiatives, however, California’s law now disadvantages all new buyers except those entitled to statutory exemptions. Generally speaking, exemptions are available only for certain persons who either (1) buy real estate to replace grandfathered real estate, or (2) receive California real estate from a spouse or parent. Although California’s exemptions may not create a broad-reaching pattern, the exemptions, especially for intrafamily transfers, lend credence to the notion that Californians have chosen to “take care of their own” at the expense of later arrivals. In Kassel v. Consolidated Freightways Corp., a plurality of the Court held that a pattern of exemptions benefitting in-state interests suggests that a facially neutral law discriminates against interstate commerce.

R.H. Macy & Co. v. Contra Costa County illustrates the manner in which Proposition 13 may create a competitive advantage for those businesses that have owned their income-producing properties in California for longer periods of time. R.H. Macy underwent a corporate reorganization, only to discover that the corporation’s new identity was viewed under Proposition 13 as a

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243. Florida law defines homestead property as the owner’s primary residence. See LaFrance, supra note 1, at 819 n.18.

244. Of course, this distribution of the benefits and burdens of the tax scheme could change if Florida follows California’s lead by creating exceptions to its reassessment rules.

245. The exemptions from the California change-of-ownership rules include interspousal and parent-child transfers; replacement of damaged, destroyed, or condemned property; and purchases of replacement property by the elderly and disabled. See LaFrance, supra note 1, at 819 nn.12–17.

247. Id. at 675–79 (plurality opinion).
249. See id. at 541.
change of ownership triggering reassessment of its California real property. As a result, the corporation found itself paying substantially higher taxes than its competitors owning comparable property. 250

In a period of rising land values, acquisition-value taxation ensures that established businesses owning real property will receive, through the vehicle of the tax disparity, indirect government subsidies financed by revenues derived from businesses and homeowners that purchase property after they do. 251 Because the most recent buyer is placed at the greatest competitive disadvantage, an out-of-state business seeking to establish a place of business in a state with acquisition-value taxation does not have the opportunity to be in any of the most favored classes of property-owning businesses.

Although some out-of-state interests can conduct business in a state without buying real estate there, for others land ownership may be important to maintaining a competitive position. In such cases, any law that burdens land acquisition will tend to impede that competitive effort. Of course, some of the burdens of acquisition-value taxation will fall on purely intrastate enterprises which purchase new property in the state. Accordingly, the interstate interests competitively disadvantaged by the tax structure will be joined in the relatively disfavored camp by newly created intrastate businesses, by businesses that have recently moved or expanded from one in-state location to another, and by businesses that have previously rented rather than owned property in the state. Not all of the most disfavored businesses, therefore, will be recent entrants to the state’s marketplace. However, recent arrivals will tend to be overrepresented in the most burdened groups because so few will own in-state property compared to their established competitors. 252 Additionally, the new arrivals will be completely excluded from the

250. Id. at 532–33.

251. It is an odd quirk of Commerce Clause doctrine that “[d]irect subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause while] discriminatory taxation of out-of-state manufacturers does,” even though the economic effects may be similar. New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988).

252. Studies indicate that commercial property changes ownership far less often than residential property. See California Sch. Bds. Ass'n, Proposition 13: An Analysis of Its Fiscal and Governance Impact 10 (1990); Thomas J. Rhoads, Current Developments in Post-Proposition 13 California: Using a Sale and Lease-Back to Avoid Property Taxes, 64 Appraisal J. 463–64 (1986); John Jacobs, Some Neighbors Pay Triple Levies, S.F. Examiner, Feb. 12, 1990, at A1. In most cases, a business just entering a new market would have a greater need to acquire new property than a business that already owns property in that market.
most favored group—the earliest buyers—for as long as that group exists.\(^{253}\)

The arrival of new competitors to the economic marketplace would normally be expected to increase the demand for, and value of, real property suitable for use in the relevant business or for employee residences. Acquisition-value taxation purposely insulates the current owners of the state’s commercial and residential properties from the tax impact of this price appreciation.

In a different context, the Supreme Court has struck down state legislation that attempts to shelter a state’s population from perceived negative aspects of an open national economy. In two decisions prohibiting states from burdening the importation of wastes for disposal in private facilities, the Supreme Court has invalidated “parochial legislation” whereby “a presumably legitimate goal,” such as limiting the amount of waste materials disposed of within a state’s borders, is “sought to be achieved by the illegitimate means of isolating the State from the national economy.”\(^{254}\)

Just as the Court’s decisions acknowledge the reality of the national economy as one where wastes are being generated, so should the national economy be recognized as one where land values sometimes appreciate rapidly due to generalized inflation and/or particularized demand. Thus, if acquisition-value taxation is seen as parochial legislation designed to shield a state’s landowners from the influence of a national economy, then such taxation regimes are too protectionist to withstand Commerce Clause scrutiny.\(^{255}\)

Given that California’s real estate prices rose higher and faster than those of other states in the years preceding adoption of Proposition 13,\(^{256}\) one might argue that the new law responded to

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253. The earliest buyers are those who enjoyed the full rollback to 1975–76 valuations. That group will shrink over the years. It will not soon disappear, however, due to the exemptions which allow carryover valuations of certain intrafamily transfers, principal residences exchanged by elderly or disabled persons, and involuntary conversions.


255. Such a protectionist purpose could be found both in a scheme such as Proposition 13, which applies to all kinds of real property, and in a scheme like Florida’s, which applies only to owner-occupied residential property.

256. For example, one source indicates that between 1975 and 1976, the median home price in California increased more than 37%, compared with 8.24% nationwide. Jayne Jannuzzi, California Demand for Housing, MORTGAGE FIN. REV. (1st Quarter 1977). During the first quarter of 1977, California home prices increased another 14.5%, versus 6.12% nationwide. Id. According to U.S. census data, for the entire period between 1970 and 1980, California home values increased 83.6%, compared to 39.4% nationwide. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1990 HOUSING
a purely local problem and therefore was not protectionist. However, the local problem was largely created by an influx of out-of-state capital. According to one author, the major groups of land speculators considered responsible for the rapid rise in California land values preceding the enactment of Proposition 13 included wealthy out-of-state retirees, large corporations and investors both within and outside the state, wealthy rock stars, and “most disquieting” of all, “foreign buyers—wealthy Arabs and Iranians with millions of ready ‘petrodollars,’ Japanese concerns, and European and Latin American investors.” The significance of the international and out-of-state component was described as follows:

After passage of Proposition 13, the state fiscal analyst revealed that of the yearly $7 billion cut in property taxes, only $2 billion would favor California homeowners and commercial property. A whopping $3 billion would go to out-of-state corporations and foreign investors who own large amounts of land in California.

If this estimate was accurate, then interstate commerce arguably benefitted from Proposition 13. However, those benefits were restricted to interstate businesses that had already established themselves in the state by buying land. Future entrants would be burdened by the higher taxes that would follow as prices increased. Thus, the more significant lesson to be derived from this data is that California’s hot real estate market of the 1970s reflected the influence of burgeoning national and global economies. Proposition 13 was arguably a protectionist effort by the state to insulate its economy from those inflationary influences, and perhaps to insulate its citizens from an influx of foreign capital and foreign neighbors.

If acquisition-value tax laws have a protectionist purpose, they cannot withstand Commerce Clause scrutiny. The evidence of their protectionist purpose, however, is not conclusive, in part because both the California and Florida laws were enacted by the voters


257. Id.


rather than the legislature, making it difficult to ascertain the actual purpose of the legislation.\textsuperscript{260} The electorate may well have sought the protectionist goal of discouraging outsiders from entering their markets and thereby inflating land prices. However, the motive voiced most prominently in the public debate was a desire to protect the current landowners from the tax effect of those price increases—but only until those landowners bought new, nonexempt property.\textsuperscript{261} Specifically, acquisition-value taxation has been said to further several objectives: (1) allowing taxpayers to predict their future property tax liability, (2) alleviating the hardship on taxpayers whose income does not keep pace with their increasing taxes, (3) fostering neighborhood stability (by discouraging frequent ownership changes), and (4) ensuring stable revenues.\textsuperscript{262} These objectives have a protectionist ring to them. However, the protected parties are the earlier buyers of real property located in the state, and the disadvantaged parties are the later buyers, without regard to their connection with interstate commerce. The voters who enacted these laws were no doubt aware that some in-state commerce interests could also be impeded by the change-of-ownership rules. This awareness militates against the conclusion that the voters' intent was to give an advantage to in-state businesses.

In terms of effect, acquisition-value taxation does not fit the paradigm of a protectionist economic regulation because the discrimination inherent in this tax scheme does not disadvantage interstate commerce per se. It only burdens efforts by out-of-state businesses to expand into the taxing state by purchasing real property there. It does not place any burden on out-of-state businesses which offer goods or services within the state without acquiring land there. In effect, the more purely out-of-state the business is, the less likely it is to feel the burden. The penalty is felt only by those businesses which cannot compete optimally in the state without moving some portion of their operations to a fixed location within the state. Although this class is likely to be considerably smaller than the class of interstate businesses generally, it is not a negligible group, since it would include all providers of goods and services

\textsuperscript{260} For this reason, Professor Eule has urged closer scrutiny of the purposes underlying voter initiatives than the scrutiny given to legislative enactments. Julian N. Eule, \textit{Judicial Review of Direct Democracy}, 99 \textit{Yale L.J.} 1503, 1507, 1519–20, 1558–60, 1569–70 (1990); see also Derrick A. Bell, Jr., \textit{The Referendum: Democracy's Barrier to Racial Equality}, 54 \textit{Wash. L. Rev.} 1, 23–28 (1978) (arguing for increased constitutional scrutiny of referenda which implicate racial equality).

\textsuperscript{261} See LaFrance, \textit{supra} note 1, at 834–35 & nn.112–17.

\textsuperscript{262} For a detailed discussion of these objectives, see LaFrance, \textit{supra} note 1, at 836–47.
except those that can conduct their trade entirely by mail, telephone, cable, computer or similar modes of communication, or through agents who lack a fixed place of business.

(b) Is There an Excessive Burden on Commerce?

If a law is not patently protectionist in purpose or effect, then under the Court's precedents addressing schemes of economic regulation, the Commerce Clause analysis must focus on whether the law has a discriminatory effect that outweighs its legitimate nonprotectionist purposes. Although acquisition-value taxation may burden new entrants into a state's markets more than it burdens established competitors, this disparate impact is not by itself dispositive of the Commerce Clause issue. Laws that have a disparate impact on out-of-state businesses are not always found to be unlawfully discriminatory. An extreme example is Exxon Corp. v. Governor of Maryland,263 in which the Supreme Court upheld a Maryland law prohibiting petroleum producers and refiners from operating retail services within the state.264 The Court found that the statute placed "no barriers whatsoever" on competition in local markets by "interstate independent dealers" which did not also own production or refining facilities.265 The Exxon Court held that the disparate burden on some interstate competitors, the nonindependents, did not, by itself, establish a Commerce Clause violation.266 However, there were no refiner-producers in Maryland.267 Accordingly, the Court's observation that within the burdened class of businesses—the refiner-producers—the law did not discriminate between local and out-of-state interests268 was accu-

264. Id. at 134.
265. Id. at 126.
266. Id. The Court observed:
    If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland . . .

Id. at 126 n.16 (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)).
267. Id. at 123.
268. Id. at 126; cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473–74 (1981) (upholding ban on sale of milk in plastic containers because no evidence demonstrated that out-of-state interests would be more burdened than local interests). In contrast, in Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980), the Court struck down a Florida statute prohibiting out-of-state banks, bank holding companies, and trust companies from owning or controlling investment advisory services in the
rate simply because the burdened class included only out-of-state interests. The prohibited form of business happened to be a form that no in-state business had yet adopted.

Unlike the classification scheme in Exxon, the classification scheme used in acquisition-value taxation does not create a burdened class consisting solely of out-of-state interests. Thus, the California classification seems less discriminatory than the Maryland classification upheld by the Court in Exxon. Nevertheless, out-of-state interests newly entering the California markets are far more likely to fall into the burdened classes than into the favored classes, and this is not likely to be true of their competitors already doing business in the state. Exxon suggests that the critical question is the impact of the discrimination on the marketplace for goods and services: Does the law give a greater market share to intrastate interests?

This market-share analysis also may explain the results in cases where the Court has struck down a facially neutral tax or economic regulation on the ground that it has a discriminatory effect on interstate commerce. For example, the cases striking down fees on drummers involved facially neutral laws which appeared to draw distinctions based on the manner of soliciting business rather than the interstate character of the business, yet the laws were found to discriminate unlawfully against out-of-state businesses. Similarly, in Dean Milk Co. v. City of Madison, the Court held that the Commerce Clause did not permit a municipality to ban the sale within its borders of milk labeled as pasteurized that had been

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state. Id. at 39–44. The state argued that the statute did not prevent all out-of-state investment enterprises from entering local markets because “[i]nvestment enterprises that are not bank holding companies, banks, or trust companies either may own investment subsidiaries in Florida or may enter the state investment market directly by obtaining a license to do business.” Id. at 40. However, the Court found that the statute “[b]oth on its face and in actual effect” treated out-of-state bank holding companies, banks, and trust companies less favorably than their Florida competitors. Id. at 42. The Lewis Court distinguished Exxon because there the Maryland classification was based on business structure rather than on base of operations. Id. That distinction is unpersuasive for the same reason Exxon itself is unpersuasive: the favored class under the Maryland law had no out-of-state members. Id. at 43.

269. Exxon, 437 U.S. at 134.

270. Without extensive empirical data, it is impossible to say whether out-of-state interests and newcomers constitute a majority of the most burdened group at any given time.

271. See supra note 266.


pasteurized and bottled more than five miles away. The Court found it "immaterial that Wisconsin milk from outside the Madison area [was] subjected to the same proscription as that moving in interstate commerce" because the ordinance was "an economic barrier protecting a major local industry against competition from without the State." Therefore, the ordinance could not be upheld "if reasonable nondiscriminatory alternatives" were available to achieve the law's purported goal of protecting public health. The Dean Milk Court invoked its much earlier decision, Brimmer v. Rebman, which struck down a Virginia statute prohibiting the local sale of meat slaughtered one hundred miles or more from the place of sale unless the meat was inspected by a city or county official at a substantial cost to the seller. The Brimmer Court found it irrelevant that the law applied equally to "the citizens of all the States including Virginia," and cited its decision in Minnesota v. Barber, which held that interstate commerce was impermissibly burdened by a Minnesota law requiring the sale of any meat within the state to be preceded by an inspection of the animal by a local official no more than twenty-four hours before it was slaughtered. The Barber Court declared:

[A] statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.

In each of these cases, the discriminatory effect of the facially neutral law would reduce the ability of out-of-state businesses to bring their goods and services into the state's markets.

274. Id. at 350–57.
275. Id. at 354 n.4.
276. Id. at 354.
277. 138 U.S. 78 (1891).
278. Id. at 79–84.
279. Id. at 82–83.
280. 136 U.S. 313 (1890).
281. Id. at 328–30.
282. Id. at 326. The Court added: "The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States." Id.
283. In contrast, the Court rejected a Commerce Clause challenge based on disparate impact in Commonwealth Edison v. Montana, 453 U.S. 609, 618 (1981), where Montana imposed a severance tax on coal which was shipped largely to out-of-state consumers. Such a tax would seem unlikely to change the mix of interstate and intrastate goods in the state's markets. In two early cases involving state laws that imposed higher per-store license
If the market-share approach represents the proper inquiry, then regardless of whether *Exxon* was correct in concluding that in-state businesses would not enjoy a larger share of the market as a result of the law at issue in that case, it seems clear that California’s tax laws give established owners of real property a powerful incentive to hold onto their goods—their grandfathered property—rather than sell their old goods and buy new goods—nonexempt replacement property. Newcomers facing this locked-up market for real property will either be discouraged from entering the market or, like R.H. Macy, will enter the market and face a competitive disadvantage due to their higher tax costs. Real property will therefore be less available to new arrivals in the state, and those new arrivals will be less able to market their goods and services there. Thus, by favoring long-established property owners, Proposition 13 imposes a discriminatory tax on many, if not most, businesses expanding into the California marketplace, which may place those businesses at a competitive disadvantage. 284

(c) *Is the Discriminatory Burden “Cured?”—The Question of Adequate Representation of Out-of-State Interests in the Political Process*

Where a burden affects some intrastate interests as well as interstate commerce, the Supreme Court has often considered the possibility that out-of-state interests were adequately represented in the political process that gave rise to the burdensome regulation. In effect, the Court has treated the burdened in-state interests as proxies for the burdened out-of-state interests, 285 reasoning that

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284. Although renting would be an option, it would not insulate the business from the disparate tax burdens, which might be reflected in higher rents if the landlord chose to “pocket” the difference. In addition, compelling new arrivals to rent rather than own their property is a burden in itself.

such representation is a "powerful safeguard against legislative abuse." In contrast, the Court is more likely to invalidate a state regulation affecting solely out-of-state interests because the burdened parties lack any effective representation. Thus, this proxy analysis, like the market-share analysis of Exxon, is a means of distinguishing which types of disparate impact on interstate commerce merit special scrutiny.

Arguably, the interests of future purchasers of residential property in California and Florida were adequately represented in the political process that produced acquisition-value taxation laws. The electorate in each case included significant numbers of renters or persons who already owned real property but anticipated buying additional nonexempt property in the future. However, even though some of those eligible to vote owned no real property in the state, it is reasonable to presume that a much larger proportion of unrepresented people—that is, everyone ineligible to vote in that state who might someday wish to buy land there—owned no real property in the state. Thus, the nonowner portion of the electorate, together with those landowners in the electorate who realized that they might someday buy additional nonexempt property in the state, bore the burden of serving as proxies for virtually all out-of-state persons who later might be affected adversely by the amendment. Such representation hardly seems adequate to soften the effect of the discrimination.


286. Clover Leaf Creamery, 449 U.S. at 473 n.17; see also Barnwell, 303 U.S. at 184 n.2, 187 (upholding state law banning oversized trucks from state highways because in-state shippers used such trucks as well); cf. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (holding more stringent review than minimum scrutiny may be appropriate where political processes have been impaired). See generally JOHN H. ELY, DEMOCRACY AND DISTRUST 73–104 (1980) (discussing judicial role in scrutinizing inadequate representation in political processes); TRIBE, supra note 11, § 6–5, at 410–12 (same).

287. See, e.g., Kassel, 450 U.S. at 670–71 (plurality opinion) (concluding truck length limitations unconstitutionally burden interstate commerce); Rice, 434 U.S. at 440–43 (same). But see Exxon Corp. v. Governor of Md., 437 U.S. 117, 127–29 (1978) (upholding state regulation burdening only interstate companies).

288. A poll conducted in California shortly before the June 1978 election indicated that persons occupying rental housing supported Proposition 13 substantially less than homeowners. DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 117–22 (1982). While a majority of low income voters favored the amendment, their margin of support was smaller than that of higher-income voters. Id.; Jack Citrin & Frank Levy, From 13 to 4 and Beyond: The Political Meaning of the Ongoing Tax Revolt in California, in THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, at 1, 8–10 (George C. Kaufman & Kenneth T. Rosen eds., 1981).
In the case of commercial property, the argument of inadequate representation is even stronger. People who do not own their homes frequently aspire to do so in the future. In contrast, because ownership of commercial property is less common than home ownership, there will be fewer proxies to begin with. Because commercial property changes hands less often than residential property, voters who owned commercial real estate in 1978 had more reason to favor Proposition 13 than voters who owned residential property. The many nonowners of commercial real estate in the electorate would also be poor proxies since they would not routinely aspire to acquire such property. Thus, state residents would have been especially poor electoral proxies for out-of-state business interests.

If there was an initial electoral underrepresentation of out-of-staters, this may have been cured to some degree by the failure of the electorate in later years to repeal the initiative as more voters experienced its burdensome effect. Out-of-state interests such as the reorganized R.H. Macy Company arguably have better proxies in California now than they did in 1978. At that time, few voters may have seen themselves as probable losers in the skewed tax scheme, and for those who did anticipate buying property, the speculative impact of the tax scheme on their future tax burdens might have been heavily discounted. By 1994, however, more California voters, like the plaintiff in Nordlinger, have experienced the burdens of the scheme. Thus, a California company seeking to acquire new real estate today will be just as seriously disadvantaged in that endeavor as was R.H. Macy.

This "cure," however, is incomplete. Unless the proportion of nonowners in the electorate increases dramatically, the electorate will always contain a large number of voters who reasonably believe that they stand to lose a tremendous benefit if the tax subsidy is repealed. Even though more voters experience the ill effects of acquisition-value taxation as time passes, those grandfathered into the advantaged classes enjoy a greater benefit with each year as

289. See supra note 252 (citing demographic studies showing commercial property changes ownership less often than residential property).

290. This argument already applies to Proposition 13, although it seems premature as applied to Florida's law.

291. Indeed, the anticipated favorable consequence of Proposition 13—predictable, slowly increasing property taxes—would have weighed against the anticipated negative consequence of being forced to subsidize previous buyers. Renters as a group voted approximately 47% in favor of the measure. Citrin & Levy, supra note 288, at 8–9. However, one study showed a relatively low level of support for Proposition 13 from young, high income renters—presumably a class likely to purchase a home in the near future. Sears & Citrin, supra note 288, at 122–23.
long as land values trend higher. The land-owning Californians of 1978 who enacted the rollback to 1975–76 assessment levels would be unlikely in 1994 to vote themselves an assessment increase covering nearly twenty years of price appreciation. Those who bought land early in the post-1976 period would be almost as loathe to surrender their substantial benefits. Even as the group consisting of the earliest buyers dwindles over time, the next batch of buyers will take their place as the most privileged group. Unless all real property becomes concentrated in the hands of a small number of voters, there will always be substantial support for retaining the subsidies. Thus, aspiring landowners seeking to repeal Proposition 13 will find it hard to overcome entrenched reliance interests.292

It might be more politically feasible to retain the annual cap on reassessments but prospectively repeal the rule requiring reassessment upon a change of ownership. Recent buyers, however, might object to this approach, reasoning that in a period of rising prices they would be caught in the middle; they would still have higher assessments than previous buyers, but they would not have lower assessments than later buyers. Moreover, the prospect of imposing such tight constraints on the state’s property tax base might be even more troubling than the status quo for voters already experiencing California’s fiscal hardships. The desire to tax “the other guy” is a powerful motivator.

In addition, while California landowners seeking to buy additional, nonexempt real property today might resent the impact of Proposition 13, such buyers have the option of retaining their old property. This option is simply unavailable to new buyers. Furthermore, voters who can take advantage of exemptions, such as those available for certain intrafamily transfers, have even less motivation to change the law.

All of these factors will make it difficult to repeal acquisition-value taxation. The California Senate Commission that issued a 1991 report on alternatives to Proposition 13 began its report with a

292. The Senate Commission on Property Tax Equity and Revenue’s 1991 report to the California Senate acknowledged the continuing voter support for Proposition 13. SENATE COMM’N ON PROPERTY TAX EQUITY AND REVENUE, REPORT TO THE CALIFORNIA STATE SENATE OF 1991, at i, 2 (1991). This support should continue at least until property values have stagnated or declined long enough to diminish most of the benefits enjoyed by long-term owners. Even then, the prospect of future benefits for current owners should make repeal difficult, because it was this prospect that motivated passage of Proposition 13 in the first place. After all, if no voters are experiencing the benefits then none would be experiencing the burdens either. Few voters will perceive themselves as “victims” of the tax disparities when those disparities are temporarily diminished.
virtual apology for even considering a change:

A full thirteen years after its passage, the Commission recognizes the intense public sentiment which continues to surround Proposition 13. One of the most frequently heard refrains from Commission observers was an amazement that the Senate, a body of elected officials, would even put a study of Proposition 13 on the public agenda. . . . The Commission appreciates the political inertia which the current provisions of Article XIII-A intrinsically create in the body politic.293

As this quote suggests, even as the electorate comes to include more persons who have been burdened by acquisition-value taxation, any increase in their sympathy for unrepresented future buyers is likely to be tempered by self-interest, making them inadequate proxies for persons outside the electorate.

Furthermore, the Supreme Court has long recognized that the mere existence of a proxy does not guarantee adequate representation for out-of-state interests in the political process. This is evident from Dean Milk, Brimmer, and the drummer cases, all of which involved disparate impact analysis. The Court has voiced a particular concern that adequate representation is not possible whenever a state law burdens out-of-state interests more than local interests.294 The Court has also declined to conduct a proxy analysis in a number of cases striking down protectionist state laws even though the state's own retail merchants may have been disadvantaged by the law's effort to protect the state's wholesalers. In Baldwin v. G.A.F. Seelig, Inc.,295 for example, the Court struck down a New York law that barred in-state resale of milk purchased below the state's legally mandated minimum wholesale price.296 This prohibition hampered New York retailers who wished to buy milk at lower prices from out-of-state suppliers. Although those retailers could have served as proxies for the out-of-state suppliers, because the retailers would have had an interest in reducing their inventory costs, the Court did not explore that argument. In its failure to consider the proxy analysis, Baldwin is not an isolated case.297

293. Id. at 1, 2. California's Senate has been aware of the ill effects of Proposition 13 for some time, but has indicated that it will pursue alternatives to acquisition-value taxation only if the Supreme Court invalidates Proposition 13. See id. at 2.

294. Kassel, 450 U.S. at 675–76.
296. Id. at 526–28.
Whether the Court will continue to apply the proxy analysis to Commerce Clause cases, and how far the Court is willing to look for intrastate surrogates, is uncertain. It has been suggested that consumers within the state may be adequate proxies for out-of-state vendors whenever discriminatory economic regulations have an inflationary effect on consumer prices. In theory, the higher cost of goods and services resulting from protectionist legislation would eventually drive voters to repeal the protectionist policies. Thus, normal political processes would ensure the failure of protectionist laws, and it would not be necessary for courts to intervene. However, acceptance of this version of the proxy argument would mark a significant change in Commerce Clause doctrine, because some of the most protectionist state legislation results in higher costs to consumers, and yet this is the type of legislation the Court has always been least hesitant to invalidate. Such a broad construction of the proxy approach would thus depart dramatically from the Court’s settled approach to determining whether a state law violates the Commerce Clause.

Notably, the Court has never applied this proxy analysis in the right-to-travel context, even where a burden on interstate travel also affects some state residents. Burdens on travel, by their very nature, affect parties who were unrepresented in the political pro-

298. See, e.g., Exxon, 437 U.S. at 127–28 (viewing proxy argument as version of national-market economic analysis of in-state/out-of-state discrimination); id. at 151 (Blackmun, J., dissenting) (accepting proxy argument only where there are adequate representatives); see also Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125, 137–39 (discussing discriminatory effects of “technically nondiscriminatory” ordinances which increase prices).

299. For example, in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the Court struck down protectionist legislation imposing a 20% excise tax on wholesale liquor while exempting certain liquor manufactured in Hawaii, even though the state contended that the economic burden of the tax was passed on to consumers in the state, id. at 276–77. Similar cost-shifting could be expected to occur as a result of other anticompetitive measures taken by a state. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 140–46 (1970) (invalidating state law requiring all cantaloupes grown in Arizona for sale to be packed in Arizona); Toomer v. Witsell, 334 U.S. 385, 403–07 (1948) (striking down state law requiring owners of shrimp boats licensed to fish in South Carolina waters to unload and pack shrimp in South Carolina).

300. See Tribe, supra note 11, § 6-5, at 412–13 (noting in-state interests almost always experience some burden as a result of governmental discrimination against interstate commerce; otherwise, the commerce would not be interstate in the first place); see also Regan, supra note 220, at 1160–67 (rejecting a “Carolene Products” approach to the dormant Commerce Clause); id. at 1230 (“A state could not conserve gas by closing gas stations to all blacks and to whites with odd numbered license plates.”).
cess which imposed the burden. If state residents also feel the burden, should the Court find that the interstate traveler is represented by an adequate electoral proxy? In Maricopa County, for example, state residents who relocated within the state could arguably have served as electoral surrogates for the plaintiff.\textsuperscript{301} The failure of the proxy analysis to make inroads in the travel context seems appropriate, however. If the right to travel is truly fundamental, then it should not be waivable by the actions of legal representatives.\textsuperscript{302} The dormant Commerce Clause, in contrast, is concerned not with fundamental rights of individuals but with federal supremacy and the well-being of the national economy. Thus, in cases where the burden on commerce is incidental rather than protectionist, the proxy analysis may be appropriate.

\textit{(d) Availability of Less Discriminatory Alternatives to Achieve State’s Legitimate Goals}

If acquisition-value taxation discriminates against interstate interests but lacks a protectionist purpose, it can withstand Commerce Clause scrutiny only if the burden imposed on commerce is the least discriminatory means to achieve the state’s legitimate nonprotectionist goals. The purposes asserted for acquisition-value taxation generally focus on discouraging property transfers and reducing taxpayer hardship during periods of increasing land values.\textsuperscript{303} However, states can achieve these objectives by adopting methods that place less of a burden on interstate commerce. For example, although acquisition-value taxation may serve a legitimate purpose by assisting landowners who lack sufficient cash to meet their real property tax obligations without extreme hardship,\textsuperscript{304} this goal could be achieved through tax deferral and forgiveness programs which either postpone tax liabilities or forgive them in the case of hardship, or through a reduction in all assessments without

\textsuperscript{301} In United Building & Construction Trades Council v. Mayor of Camden, 465 U.S. 208 (1984), the Court held that the Privileges and Immunities Clause required a city to show a substantial reason justifying a municipal residency requirement for employees of city contractors, even though state citizens were burdened just as much as out-of-staters. \textit{Id.} at 217–18 ("We conclude that Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged.").

\textsuperscript{302} Similarly, adequate representation does not validate restrictions on voting rights or on the freedoms of speech, religion, and association.

\textsuperscript{303} See supra note 261–62 and accompanying text (listing several objectives of acquisition-value taxation).

\textsuperscript{304} See LaFrance, supra note 1, at 839–40 & nn.125–29.
regard to date of purchase. These options would squarely address the hardship issue without being overinclusive and without operating to the disadvantage of new arrivals in the marketplace.

Thus, applying a traditional "balancing" analysis, the acquisition-value taxing state has not chosen the least discriminatory means to achieve its legitimate goals. Although the burden on interstate commerce may be incidental rather than purposeful, and may be shared by some intrastate businesses as well, if the discriminatory effect proves to be significant, then the state adopting acquisition-value taxation nonetheless may be found to have placed an undue burden on interstate commerce.

2. The Complete Auto Transit Analysis

The previous discussion examined acquisition-value property taxation under the balancing-of-interests approach traditionally applied in Commerce Clause analysis of state economic regulations. As noted earlier, the Court has often employed a somewhat different approach in analyzing state taxation schemes, focusing solely on their impact on interstate commerce without regard for the local benefits they confer. As previously discussed, this approach seems inappropriate for the many tax schemes which, like acquisition-value taxation, are designed chiefly for purposes other than raising revenue.

It would not be surprising, however, if the Court were to analyze acquisition-value taxation under the narrower "impact only" approach which it reserves for tax cases. Accordingly, this section of the Article focuses solely on the impact analysis. Because this analysis does not involve a balancing of interests, the state's concerns, such as taxpayer hardship, become irrelevant. When that objective is ignored, acquisition-value taxation is even more vulnerable to invalidation because the measure of the tax imposed bears no relationship to the level of services provided by the state to the taxpayer.

Although the impact approach to dormant Commerce Clause doctrine as applied to state and local taxes has had a tumultuous history, it has now come to rest, at least temporarily, under the rubric which the Court articulated in Complete Auto Transit, Inc. v.

305. Id. at 840–42 & nn.130–37.
306. See supra notes 227–37 and accompanying text.
307. For a thorough treatment of the evolution of dormant Commerce Clause analysis as applied to state and local taxation, see Hellerstein, State Taxation, supra note 227, at 37, 38–54. See also HARTMAN, supra note 220, §§ 2:9–2:20 (giving overview of relationship between states' taxing power and Commerce Clause).
In that case, the Court overruled the formalistic precedents which had flatly prohibited states from taxing any activity that is part of interstate commerce. Such a prohibition, the Court observed, unfairly "relieve[d] those engaged in interstate commerce from their just share of [the] state tax burden." Instead, Complete Auto Transit held that state taxes would pass muster under the Commerce Clause if they satisfied a four-part test designed solely to assess the economic effect of the tax. Under that test, a state tax does not violate the Commerce Clause if it (1) is applied to an activity that has a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state.

(a) The Nondiscrimination Requirement

The Complete Auto Transit test incorporates the traditional Commerce Clause standard prohibiting a state tax from discriminating against interstate commerce. Thus, a court may still conclude that a state tax imposes an unlawful burden on interstate commerce even if the tax does not facially discriminate against interstate interests. In applying Complete Auto Transit, the Court has expressly recognized that "[a]n apparently neutral 'guise of taxation which produces the excluding or discriminatory effect'" is unlawful unless there are no administratively feasible alternatives or the added burden is necessary to ensure that interstate commerce pays its own way.

As discussed earlier, while an acquisition-value tax scheme does not treat all interstate actors worse than all intrastate actors,
it appears to have a disparate impact on interstate actors. What is significant about the Complete Auto Transit analysis, however, is that under this approach even a nondiscriminatory tax may be an unlawful burden on interstate commerce. If acquisition-value taxation fails the substantial nexus, fair apportionment, or fairly-related tests, as discussed in detail below, then it violates the Commerce Clause.

(b) The "Substantial Nexus" and "Fair Apportionment" Requirements

The "substantial nexus" and "fair apportionment" requirements of the Complete Auto Transit test attempt to limit the burden of state taxation to an amount commensurate with the extent of the taxpayer's presence in the state. Without such a limit, states could tax persons or property having little or no connection to the state and thus lacking a significant voice in the public debate concerning a proposed tax. The nexus and apportionment requirements are, at least in part, the Court's response to the problem of inadequate proxies—"the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state."317 This suggests that the existence of a proxy for the interstate actor is only part of the analysis under Complete Auto Transit; even a business represented by proxy may be able to show that a particular tax does not satisfy the other three requirements.

There is no doubt that acquisition-value real property taxes satisfy the substantial nexus test, since ownership of real property within a state creates a substantial nexus.318 The apportionment rule also appears satisfied if that rule means only that the taxing state "does not undertake to tax any interstate activities carried on outside the state's borders."319 Acquisition-value taxation does not

317. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 46 n.2 (1940); see Tribe, supra note 11, § 6-16 (discussing additional cases); cf. Carolene Prods., 304 U.S. at 153 n.4 (holding that discrimination against discrete and insular minorities may require more searching judicial inquiry).


319. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 96–97 (1948) (Rutledge, J.,
tax any of the taxpayer's out-of-state property.\textsuperscript{320}

One test of fair apportionment on which the Court sometimes relies is the internal consistency test.\textsuperscript{321} Under this test, a state law affecting commerce runs afoul of the dormant Commerce Clause if enactment of similar laws by other states would subject an interstate business to multiple taxation arising from the same property, activity, or receipts.\textsuperscript{322} A mere risk of multiple taxation is sufficient to find misapportionment; multiple taxation need not actually concurring), quoted with approval in Complete Auto Transit, 430 U.S. at 282.

320. Although greater formalism prevailed under early Supreme Court precedents than under more recent Commerce Clause jurisprudence, even the early cases recognized that a property tax must be fairly apportioned to pass Commerce Clause scrutiny. See Hellerstein, State Taxation, supra note 227, at 37, 41 & nn.82–85 (collecting early cases in which property taxes survived Commerce Clause scrutiny as long as property was not in interstate transit and value was fairly apportioned). Case law holding that apportionment was required by the Due Process Clause seemed to find this requirement satisfied as long as the property or activity being taxed was located within the taxing jurisdiction. See Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174–75 (1949); Union Tank Line Co. v. Wright, 249 U.S. 275, 281–86 (1919). These cases upheld ad valorem property taxes against Commerce Clause challenges. See Hellerstein, State Taxation, supra note 227, at 48–52; see, e.g., Postal Tel. Cable Co. v. Adams, 155 U.S. 688, 698 (1895) (holding ad valorem tax “becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business”). Because such a tax by tradition has been based on the fair market value of property, it appears to present no apportionment problem as long as the property is located within the taxing jurisdiction. This would not be true of property taxes that are measured by a yardstick other than current value.

321. Historically, the internal consistency doctrine seems to have arisen out of the discrimination inquiry, although Professor Hellerstein aptly describes the connection as “attenuated.” Hellerstein, State Taxation, supra note 227, at 64; see International Harvester Co. v. Department of Treasury, 322 U.S. 340, 358 (1944) (Rutledge, J., concurring). But see Tribe, supra note 11, § 6-18, at 469 & n.1 (“[R]ecent cases . . . often treat multiple taxation as a matter of discrimination against interstate commerce.”).


take place. If states other than California and Florida were to adopt acquisition-value real property taxation, however, no multiple taxation would occur. Thus, the internal consistency test appears to be satisfied.

(c) The Requirement That the Tax Be “Fairly Related” to the Services Provided

The Complete Auto Transit test also inquires whether the tax in question is “fairly related to the services provided by the state.” In the case of general revenue taxes, the Court has declined to treat this test as a specific inquiry into the costs actually incurred by the taxing state in connection with the taxpayer’s activities in the state, or the value of the state-provided benefits actually received by the taxpayer. Instead, the Court has required only “that the measure of the tax . . . be reasonably related to the extent of the contact [with the state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of the state tax burden.” In other words, the amount of the tax must be “tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes.” These fruits of civilization include “police


325. Commonwealth Edison v. Montana, 453 U.S. 609, 621-29 (1981). It has been suggested, as a criticism of this interpretation, that any ad valorem tax on property would satisfy this test even if the tax were so high that it far exceeded the value of the services provided by the state to the interstate actor. Compare id. at 645-51 (Blackmun, J., dissenting) (criticizing majority opinion upholding state’s severance tax on coal shipped out of state, with tax cost passed to out-of-state purchasers) with Maryland v. Louisiana, 451 U.S. 725, 753-60 (1981) (striking down Louisiana’s “first use” tax on natural gas because in-state consumers received special tax breaks unavailable to out-of-state consumers).


327. Id. (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 446 (1940)). The Court also said:

[W]hen the measure of a tax is reasonably related to the taxpayer’s activities or presence in the State—from which it derives some benefit such as the substantial privilege of mining coal—the taxpayer will realize, in proper proportion to the taxes it pays, “[t]he only benefit to which the taxpayer is constitutionally entitled . . . that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.”

Id. at 629 (alterations in original) (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1937)).
and fire protection, . . . the benefits of a trained work force and the advantages of a civilized society.\textsuperscript{328}

The Court has distinguished cases involving general revenue taxes from those involving “user” fees or other taxes “designed and defended by the State for the use of state-owned or state-provided transportation or other facilities and services.”\textsuperscript{329} Thus, in the case of a general revenue tax such as a property tax, the relevant inquiry is not the level of services actually received by the taxpayer but the taxpayer’s “fair share” of the state’s revenue needs in light of the benefits that taxpayer derives from its activities in the state.\textsuperscript{330}

By precluding a specific inquiry into the benefits received by a new landowner entering the state’s marketplace, this approach to the “fairly related” standard would appear to make it irrelevant that the newcomer does not receive a higher level of services than the established landowner paying lower taxes on similar property. However, what is relevant is that the new arrival will pay higher taxes than the established competitor who may be deriving equal commercial benefits from its activities in the state. Thus, while it might be futile for the newly arrived business to argue that it does not receive greater police or fire protection than its established competitors, it could reasonably complain that the earnings it derives from its newly acquired property are subject to a greater tax burden than equivalent earnings by its better-established competitors.\textsuperscript{331}

\begin{flushleft}
\textsuperscript{329} Commonwealth Edison, 453 U.S. at 621.
\textsuperscript{330} See id. at 616, 623–24 (collecting Supreme Court cases holding that interstate commerce must pay “its own way” and “its fair share of the cost of state government”); Northwestern States Portland Cement v. Minnesota, 358 U.S. 450, 461–62 (1959) (stating interstate commerce should pay “its fair share of the costs . . . in return for the benefits it derives from within the state”). The “fairly related” requirement seems to embody a “balancing” test distantly related to that employed in scrutinizing nonprotectionist state laws other than tax laws. See, e.g., Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 747–48 (1978).
\textsuperscript{331} In striking down a state law imposing a flat tax on all vehicles using a state’s highways regardless of the extent of that use, the Court in Scheiner observed that
\begin{quote}
although out-of-state carriers obtain a privilege to use Pennsylvania’s highways that is nominally equivalent to that which local carriers receive, imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.
\end{quote}
\textit{Scheiner}, 483 U.S. at 296; see also Hellerstein, \textit{State Taxation}, supra note 227, at 61–62 (discussing “fairly related” test). This is the converse of imposing a higher tax on interstate commerce for the same level of state privileges.
\end{flushleft}
Of course, some intrastate businesses are burdened by the same tax disparities, and some interstate businesses are spared these disparities (or even fall into the more advantaged groups). This raises the question whether a tax that violates the "fairly related" test for all taxpayers can withstand Commerce Clause scrutiny. If it cannot, then Complete Auto Transit provides a second, independent basis for finding that acquisition-value taxation violates the Commerce Clause, even absent a protectionist purpose or a discriminatory effect that is unwarranted by the state's legitimate objectives.

3. Taxes on Commercial and Residential Real Property as a Burden on Commerce

The California Court of Appeal erred in R.H. Macy when it concluded that a tax on real property could not burden interstate commerce. However, although real property does not itself move across state lines, it does not follow that a burden on owning real property cannot also burden interstate commerce. It is well recognized that taxes on property which is a vehicle or instrumentality of interstate commerce are subject to Commerce Clause scrutiny, as are many burdens on seemingly local activities. What makes real property taxes different from taxes on goods, services, or instrumentalities that cross state lines is that the substantial nexus and apportionment prongs of the Complete Auto Transit test will always be satisfied provided that the property is located within the taxing jurisdiction.

When, in R.H. Macy, the California Court of Appeal held that "Article XIII A does not restrict interstate commerce because it taxes only real property within the state," it took a position which would insulate entire categories of property and transaction taxes from Commerce Clause scrutiny. However, regardless of whether a particular real estate transaction takes place solely within one state, it defies logic to suggest that a state law hindering recent immigrants or out-of-state interests from holding property on the same "pay-your-own-way" terms enjoyed by earlier immigrants does not burden interstate commerce. The constitutional issue is whether that burden is excessive.

333. See, e.g., Commonwealth Edison, 453 U.S. at 616.
335. Of course, many state-imposed costs of acquiring property tend to increase
The R.H. Macy court based its conclusion on the Supreme Court's statement in *Southern Pacific Co. v. Gallagher* that "[a] tax on property or upon a taxable event in the state, apart from operation, does not interfere [with interstate commerce]." But such a sweeping generalization is inconsistent with the Court's construction of the Commerce Clause in other cases. The Supreme Court has repeatedly held that no state "may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business," and that the Commerce Clause requires "substantially even-handed treatment" of domestic and out-of-state interests. Purely intrastate activities which affect interstate commerce are clearly within the domain of the Commerce Clause. Surely, if a state imposed its real property tax at higher rates on businesses incorporated out of state than on domestic corporations, or achieved the same result by using higher assessments, such a tax would merit Commerce Clause scrutiny.

over time. Such costs as state documents taxes, however, are one-time service charges rather than recurring costs such as annual property taxes. To require new buyers to pay the current cost of doing business reflects a pay-your-own-way standard that satisfies the "fairly related" prong of *Complete Auto Transit*.


339. *See Commonwealth Edison*, 453 U.S. at 615 ("The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity.").

340. Cases involving discrimination based on corporate residency have traditionally been evaluated under equal protection principles. *See generally* Hellerstein, *State Taxation*, supra note 227, at 53–54 (discussing use of Equal Protection Clause in state tax cases). For example, in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), Ohio imposed an ad valorem tax on receivables of nonresident corporations that arose from their business activities within the state, but imposed no such tax on similar assets owned by resident corporations. *Id.* at 562–70. The Supreme Court found that this practice denied equal protection to nonresident corporations: "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis." *Id.* at 571–72.

The *Wheeling Steel* majority ignored the petitioners' Commerce Clause argument altogether, and the dissent mentioned it only long enough to dismiss it without explanation: "The restrictions on state power which are contained in the Commerce Clause and which may prevent the states from burdening interstate commerce or discriminating against it rise from a different source and are not relevant here." *Id.* at 581 n.5 (citations omitted) (Douglas, J., dissenting). Nowhere did the Court suggest that the discriminatory tax was unsupported by any rational policy. Apparently
Thus far, the litigation over acquisition-value taxation has addressed the Commerce Clause issue only in the context of commercial property. However, the analysis can be applied to residential property as well. Both Florida's and California's tax schemes are aimed at insulating certain landowners from the tax consequences of inflation caused by an influx of capital.\textsuperscript{341} To the extent that this has the effect of discouraging capital flows from out of state, it can be seen as a burden on interstate commerce.

Specifically, imposing disproportionate tax burdens on newly acquired residential property can affect interstate commerce in at least four ways which are discussed in greater detail below: (1) the burden can create a competitive disadvantage for real estate investors just entering the state's real estate markets; (2) the burden may discourage persons from immigrating to the state and participating in its economy; (3) the burden may reduce the salary expenses of established businesses with long-term employees relative to new market participants; and (4) any significant burden on new property acquisitions will tend to impede the flow of capital into the taxing jurisdiction.

(a) Investors

Residential property is frequently purchased as an investment. Imposing lower property taxes on long-term holdings of residential property than on newer acquisitions burdens new investors by raising one of their carrying costs relative to the carrying costs of earlier purchasers. Although in \textit{R.H. Macy} the difference in tax burdens

\textsuperscript{341} Confining the inflationary effects of this influx of capital was apparently one goal of Proposition 13. \textit{See supra} notes 257–58 and accompanying text (discussing public's resentment of wealthy land speculators as influence on Proposition 13's passage).
between competing businesses was a ratio of only 2.5 to one, disparities of as much as twenty-two to one between other taxpayers existed at the time R.H. Macy filed its petition. The differential may have increased since then. Except in the case of the unusually prescient or lucky out-of-state investor who purchased California real estate before 1976, out-of-state or newly immigrated investors can now own California real estate only if they are willing to fall into one of the less-favored taxpayer categories. In contrast, in-state investors will fall into that category only if and when they choose to increase their real property holdings or replace older investments with new ones. Therefore, both commercial and residential property owners in California can enjoy increasing land values at no cost by retaining their existing holdings, while new arrivals can never come aboard on equal terms.

One context in which tax disparities between residential properties clearly affect commercial activities is that of residential rental property. The competitive disadvantage created by acquisition-value taxation clearly burdens commerce when it affects prospective residential landlords. A heavier tax burden increases carrying costs so that landlords offering identical rents will receive different net profits depending on their date of purchase. Although some differential would result simply from their different purchase prices, acquisition-value taxation creates a separate differential through direct state intervention. An out-of-state party seeking to enter the California rental market would have difficulty overcoming the grandfathered competition.


343. Justice Stevens' dissent in Nordlinger pointed to known disparities of 17 to 1 for homeowners, and to estimated disparities as high as 500 to 1 for vacant land. Nordlinger v. Hahn, 112 S. Ct. 2326, 2341–42 (1992) (Stevens, J., dissenting).

344. If the replacement property fits into one of the exempt categories, the earlier purchaser's favorable tax treatment carries over to the replacement property as well.

345. Because Florida's law benefits only the owners of homestead property, it would not offer established landlords an advantage over newcomers. Thus, the disparate burden on out-of-state real estate investors is a problem only under California's across-the-board approach.
(b) Persons as Commerce

The Court has acknowledged that "it is settled beyond question that the transportation of persons is 'commerce.'"\textsuperscript{346} The buyer of residential property for owner occupancy contributes to the economy of the new state of residence. As an employer, the buyer brings employment opportunities; as an employee, the buyer adds to the state's labor force; as a merchant or entrepreneur, the buyer brings goods, services, or business opportunities; as a consumer, the buyer brings added demand for goods and services.

The Supreme Court repeatedly has held that the transportation of persons across state lines is commerce within the meaning of the Commerce Clause,\textsuperscript{347} and has also declared it to be "immaterial whether or not the transportation is commercial in character."\textsuperscript{348} State action obstructing such movement may be found to exceed the state's police powers and unconstitutionally impede interstate commerce.\textsuperscript{349} If the movement of persons across state lines is commerce, then it cannot be true, as the California Court of Appeal asserted in \textit{R.H. Macy}, that Proposition 13 "does not restrict commerce" because interstate commerce includes only "the flow of goods and services between and among the several states."\textsuperscript{350}

(c) Employee Relocation

California's and Florida's burdening of new residential investors also has the potential to discourage out-of-state businesses from entering the state if the move involves relocating employees. While any high level of real estate taxation would present an obstacle to

\textsuperscript{346} Edwards v. California, 314 U.S. 160, 172 n.1 (1941) (citing numerous precedents); accord United States v. Guest, 383 U.S. 745, 758–59 (1966) (stating "the federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities" and citing additional cases).


\textsuperscript{348} Edwards, 314 U.S. at 172 n.1; see Caminetti, 242 U.S. at 491. It should also be immaterial whether the transportation in question is provided by the traveler or by a second party. Granted, a two-party transaction seems to fit the notion of commerce better than a self-provided service. But if gratuitous transportation, as in Edwards, is commerce, then surely a self-provided service can be commerce as well.

\textsuperscript{349} Edwards, 314 U.S. at 173.

\textsuperscript{350} R.H. Macy, 276 Cal. Rptr. at 541.
employee relocation, that obstacle would be faced to an equal extent by domestic enterprises, since they would experience the same pressures to pay salaries sufficient to cover the carrying costs of their employees' home ownership. A state law that creates a significant differential between the tax burdens imposed on old and new acquirers of residential property potentially burdens the enterprise whose employees have recently entered the state's residential real estate market more than it burdens established enterprises, many of whose employees already own homes within the state. Thus, a Utah business relocating to California after a period of rising land prices must either pay salaries high enough to cover the tax costs arising from new purchases of nongrandfathered property by its relocated key employees, or it must replace those key employees with California residents who may accept lower salaries because their property tax assessments are grandfathered at lower levels. In the first case, the newly arrived business faces higher salary costs than its established domestic competitors. In the second case, it may lose the expertise of experienced employees. In either case, the new arrival is competitively disadvantaged.

(d) Flow of Capital

Even where no commercial activity is directly discouraged, a burden on new acquisitions of residential real property may have an impact on interstate commerce. Whether residential property is purchased for rental or owner-occupancy,\(^{351}\) one "interstate commerce" aspect of this transaction is the flow of capital. Viewed one way, the capital flow is from buyer to seller, and thus the buyer's and seller's states are the only two states involved. Viewed differently, however, the buyer has shifted an investment from one asset to another, and thus the flow of capital is from the locus of the prior investment to the locus of the newly purchased real property.\(^{352}\) Although different pairs of states may be involved depending on which of these two perspectives one adopts, from either perspective capital has moved in interstate commerce, and a state law which discourages the capital flow should be scrutinized under the Commerce Clause.

\(^{351}\) Land speculation is not considered in this discussion because in-state investors will, if they buy and sell frequently, experience largely the same increase in their tax assessments as out-of-state speculators.

\(^{352}\) *Cf.* Chemical Waste Management, Inc. v. Hunt., 112 S. Ct. 2009, 2012 n.3 (1992) (noting that transportation of hazardous wastes can be viewed as either a flow of goods (the waste) or of services (the transportation service)).
As early as 1824, in *Gibbons v. Ogden*, the Supreme Court recognized that commerce, in the constitutional sense, includes not only the buying and selling of commodities, but also the much broader area of "commercial intercourse." Since that decision, the Court has continued to recognize a broad concept of commerce. For example, in *McLain v. Real Estate Board*, the


354. Id. at 189–93. Still later, the Court recognized that there exists in interstate commerce a "national market" for corporate control and charters in which corporations themselves are traded as commodities and states compete for the opportunity to incorporate new enterprises. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93–94 (1987); Louis K. Liggett Co. v. Lee, 288 U.S. 517, 557–64 (1933) (Brandeis, J., dissenting); see also Michael H. Abbey, Note, *State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause as a Bulwark of National Free Trade*, 75 Va. L. Rev. 845, 863 n.92–93 (1989). In an earlier decision, *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), the Court held that a state law regulating takeover offers for target companies with some nexus to the state violated the Commerce Clause because it directly regulated transactions which take place outside the state, id. at 640–43. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court struck down a Florida statute prohibiting certain out-of-state entities from owning in-state investment advisory services, id. at 44. The Court acknowledged that banking was a legitimate area of local concern, but noted that the Commerce Clause authorizes Congress to legislate—and Congress does indeed legislate—in the areas of banking and investment advisory services and that "the same interstate attributes that establish Congress' power to regulate commerce also support constitutional limitations on the powers of the States." Id. at 38–39 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622–23 (1978)); see, e.g., Investment Advisers Act of 1940, ch. 686, § 201, 54 Stat. 789, 847 (1940) (codified at 15 U.S.C. § 80b-1 (1988)) (noting effect of investment advisory activities on interstate commerce).

355. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Court applied a Commerce Clause analysis to a New York law imposing a greater tax on securities transactions involving out-of-state sales than on transactions occurring entirely within the state, id. at 333–36. In contrast, *Justice Holmes in New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907), observed that the Commerce Clause was inapplicable to a securities transaction that took place wholly within the state, id. at 160–63.

In several recent pronouncements on the scope of interstate commerce, the Supreme Court has reaffirmed this broad interpretation, concluding that even hazardous waste—"inherently a liability rather than a thing of value—constitutes interstate commerce when it crosses state lines:

> Whether the business arrangements between out-of-state generators of hazardous waste and the Alabama operator of hazardous waste landfill are viewed as "sales" of hazardous waste or "purchases" of transportation and disposal services, "the commercial transactions unquestionably have an interstate character. The Commerce Clause thus imposes some constraints on [Alabama's] ability to regulate these transactions."


In *Chemical Waste*, the Court reiterated its statement from *City of Philadel-
Court held the Sherman Act applicable to price-fixing activities of real estate brokers. The *McLain* Court observed:

[An appreciable amount of [interstate] commerce is involved in the financing of residential property . . . and in the insuring of titles to such property. . . . The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multi-state lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by interstate corporations. . . .

. . . [I]t may be possible for petitioners to establish that, apart from the commerce in title insurance and real estate financing, an appreciable amount of interstate commerce is involved with the local residential real estate market arising out of the interstate movement of people, or otherwise.]

In discussing state taxation of federally tax-deferred income from sales and replacement purchases of personal residences, Pro-

*phia* that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 2012 n.3 (quoting *City of Philadelphia*, 437 U.S. at 622). Federal regulation of the banking and securities industries is predicated on the notion that such capital flows constitute commerce under the Constitution. *See*, e.g., Securities Act of 1933, 15 U.S.C. § 77c(a)(11) (1988) (exempting securities offered and sold intrastate). It is plain that the nineteenth-century Supreme Court's narrow definition of commerce as excluding sales of such valuable intangibles as insurance policies, *see* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868), no longer reflects the realities of our economy. *See also* McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (1988) (delegating insurance regulation and taxation to states, but maintaining applicability of federal antitrust laws to insurance industry); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539–53 (1944) (holding interstate insurance transactions and other transactions involving intangibles are clearly within Congress's regulatory power under the Commerce Clause); *id.* at 549–50 ("[T]ransactions . . . may be commerce though . . . they do not . . . concern the flow of anything more tangible than electrons and information.").


357. *Id.* at 245 (emphasis added). Of course, even intrastate real estate transactions can involve mortgage financing that moves in interstate commerce. This interstate connection might be too attenuated to have constitutional significance, however, because any state law that discourages real estate transactions—for example, an increase in documents taxes—would impede this capital flow, even if it reflects a pay-your-own-way pricing structure. If a balancing-of-interests analysis were applied, the state's interest in making buyers and sellers pay their fair share of taxes would almost certainly outweigh the attenuated burden on interstate commerce.
fessors Smith and Hellerstein have voiced a similar perspective:

Commerce Clause arguments ... might be raised in the context of principal residence replacements. The arguments, however, are somewhat weaker in that context because the investments, by definition, involve personal rather than business property. Nevertheless, a case can be made that limiting the tax advantages associated with interstate principal residence replacements could certainly have a dampening effect on both interstate labor mobility and the secondary mortgage market, and hence on the national common market. Moreover, Congress has apparently recognized that changes in principal residences are often motivated by business considerations. 358

If, as these scholars suggest, a state income tax increasing the cost of interstate home replacement implicates the Commerce Clause, then a state property tax that has the same effect should receive similar scrutiny.

(e) Summary: Commercial Versus Residential Property

Thus, in light of the various capital and labor flows affected by sales of residential property, the role of residential property as an article of commerce, and the strong connection between residential real estate prices and the cost of relocating a business across state lines, any analysis of acquisition-value taxation under the Commerce Clause should consider both commercial and residential property.

C. Commerce Clause: Summary

Examining acquisition-value property taxation under the dormant Commerce Clause is complicated by the disparity between the Court's approaches to evaluating state economic regulations and state taxes. While there is slight evidence that Proposition 13 was enacted for a protectionist purpose, the burdened class clearly includes local as well as out-of-state interests, which suggests that the protectionism is not targeted directly at political boundaries. Rather, it is aimed at protecting established owners against new or relocating owners, regardless of their geographic origins.

Under the balancing approach commonly used for state economic regulations, the burden on interstate commerce may be excessive because the state can pursue its legitimate goal of avoiding taxpayer hardship by employing means that impose a lesser burden on

358. Smith & Hellerstein, supra note 224, at 395 n.180 (emphasis added) (discussing I.R.C. § 217, which permits taxpayer deduction for certain moving expenses associated with commencement of work).
interstate commerce. Thus, under the balancing approach, the Court could invalidate acquisition-value taxation without even determining whether it has a protectionist purpose. Under Dean Milk, Brimmer, and the drummer cases, the fact that a law may burden some in-state interests should not insulate that burden from Commerce Clause scrutiny. The critical question would be the relative weight given to the burden on commerce and the local benefits achieved. In this balancing of interests, it would also be relevant to consider the fact that the burdened class of out-of-state businesses consists only of those businesses seeking to acquire property in, or relocate workers to, the taxing state, and excludes remote businesses such as mail-order operations.

Using the proxy approach that the Court has employed in some Commerce Clause cases, out-of-state interests may be represented to some degree by members of the electorate who vote in favor of acquisition-value tax laws—even though they may feel the burden of those laws in the future. Nevertheless, this representation seems inadequate, especially with respect to commercial property.

Alternatively, under the impact-only approach of Complete Auto Transit, which largely disregards interest balancing, acquisition-value taxation is constitutionally suspect because the tax burden it imposes is not fairly related to the services provided to the taxpayer, even if the tax is not clearly protectionist in its goals or unduly burdensome in its effects.

Regardless of how the Court ultimately answers the Commerce Clause question, acquisition-value taxation offers the Court an opportunity to revisit and refine its approach to evaluating state and local taxation under the Commerce Clause. In particular, the Court should clarify the role of the interest-balancing analysis in tax cases, the scope of the proxy device, the meaning of the “fairly related” prong of the Complete Auto Transit test, and the significance of a disparate impact on new arrivals in the state.

III. CONCLUSIONS AND SOME OBSERVATIONS ON RENT CONTROL AND GROWTH MANAGEMENT

Although the Nordlinger decision fits squarely within the equal protection tradition in its deference to state economic regulations, acquisition-value taxation should face greater challenges from claims asserting burdens on interstate commerce or the right to travel. The Nordlinger Court unfortunately side-stepped a long overdue opportunity to clarify the status of intrastate travelers who are burdened by a law that also affects interstate travelers. Even if the Court can justify different levels of constitutional protection for two classes of travelers, it will still have to determine how to distin-
guish them. Moreover, an interstate traveler burdened by the compulsory subsidy of acquisition-value taxation will be able to avoid the standing question entirely and compel the Court to determine whether a burden on real estate acquisitions also constitutes a burden on travel and, if so, whether the state's justifications for the tax scheme satisfy the compelling interest standard.

_Nordlinger_ did not give the Court an opportunity to address the burden imposed on interstate commerce. Because acquisition-value taxation operates much like a scheme of economic regulation, the Court should weigh the local benefits against the burden on commerce. It might conclude that the weak rationales offered in defense of the scheme do not outweigh its burdensome effects. If the Court follows the _Complete Auto Transit_ approach, it could invalidate acquisition-value taxation without any balancing of interests. Thus, a challenge to acquisition-value taxation could be the catalyst for reconciling these two approaches to Commerce Clause scrutiny of state taxes.

Whatever the Court's resolution of the travel and commerce questions in the acquisition-value taxation context, similar questions are likely to arise outside the tax context. Thus, the Court's resolution of these questions could have far-reaching implications. For example, as noted earlier, acquisition-value property taxation resembles rent control in its economic effects. Both are state-imposed regulatory schemes which artificially depress the carrying cost of property for certain occupants. Many rent control schemes have provisions analogous to the change-in-ownership rules of Proposition 13, allowing larger rent increases to be imposed on new tenants than on long-term tenants. Thus, new tenants subsidize established tenants by providing a greater share of the landlord's profit.

The Supreme Court's decision in _Nordlinger_ was anticipated to some extent four years earlier when the Court rejected a basic equal protection challenge to rent controls in _Pennell v. City of San Jose_. Although the challenge in _Pennell_ was not premised on the infringement of the fundamental right to travel or on an unconstitutional burdening of interstate commerce, such challenges may arise in the future. Where a particular system of rent controls imposes higher rents on new tenants than on established tenants, the argument can be made that burdening recent arrivals as a class in

359. See _supra_ note 240 and accompanying text.
360. _See, e.g._, D.C. CODE ANN. § 45-2523(a) (1990) (permitting 12% annual increase over rent-controlled level after tenant vacates).
order to benefit longer-term occupants as a class penalizes the later
arrivals and thus burdens the exercise of their right to travel. In
the case of rent controls that apply to commercial property, any
disparate impact on interstate businesses could provide the basis for
a challenge under the Commerce Clause. If the Court recognizes
that interstate commerce is affected by any state action that im-
pedes the ability of people to relocate from one state to another,
then a system of purely residential rent controls could be subject to
a Commerce Clause challenge as well. Thus, the Court's future
resolution of the right-to-travel and interstate commerce questions
left open in Nordlinger could have a significant impact on the abili-
ty of state or local governments to impose rent controls. 362

More broadly, it would seem that any regulatory scheme de-
dsigned to benefit current residents of a region at the expense of
future immigrants may raise concerns under the right to travel and
the Commerce Clause. 363 In particular, the Court's analysis of
these constitutional questions in the context of real estate taxes
could have implications for many growth management plans under-
taken by state and local authorities, as illustrated by the district
court's analysis of the travel issue in City of Petaluma. 364 With a
myriad of social, educational, economic, safety, health, and environ-
mental interests to consider, state and local governments in high-
growth regions will continue to feel pressure to resort to exclusionary schemes. Their responses may trigger intense scrutiny
under any constitutional provision designed to guarantee equal
treatment absent compelling state interests. Ultimately, the legiti-
macy and importance of the state interest must be the test. In the
context of real property taxation, the goals of providing tax savings
and neighborhood stability for current residents, at the expense of

362. A "tax capitalization" or "discounting" argument might be made, contending
that the burden of acquisition-value taxes on later purchasers is wholly or partly
illusory because it is factored into the property's market value. See LaFrance, supra
note 1, at 862–65 & nn.206–13. Whatever the merit of this argument in the context of
property taxes, it would be inapplicable to rent controls since the new tenants are
unlikely to receive any market benefit to offset their higher rent.

363. These concerns also apply to systems designed to benefit residents at the
expense of transients. See, e.g., County Bd. v. Richards, 434 U.S. 5, 5–8 (1977) (per
curiam) (upholding zoning ordinance that distinguishes residents and nonresidents for
parking purposes because it rationally promotes ordinance's legitimate objectives);
year residency precondition for receipt of medical care at county expense); Shapiro v.
Thompson, 394 U.S. 618, 629–31 (1969) (finding deterring migration of indigents into
state insufficient justification for classification, overruled on other grounds by

364. See supra notes 118–22 and accompanying text (discussing City of
Petaluma).
newcomers, seem to present state interests of relatively minor significance. Other state interests may prove more compelling, however, and may justify exclusionary schemes which the economic self-interest of landowners is inadequate to support.