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### Rationalizing Injustice: The Supreme Court and the Property Tax

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22 Hofstra L. Rev. 79 (1993)

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# RATIONALIZING INJUSTICE: THE SUPREME COURT AND THE PROPERTY TAX

John A. Miller\*

[T]he conduct of government is the testing ground of social ethics and civilized living.<sup>1</sup>

Don't tax you, don't tax me,  
Tax that fellow behind the tree.<sup>2</sup>

## CONTENTS

I.	INTRODUCTION . . . . .	80
II.	THREE ASPECTS OF THE QUESTION ADDRESSED . . . . .	83
	A. <i>The Property Tax in Theory and in Practice</i> . . . . .	83
	B. <i>Proposition 13</i> . . . . .	89
	C. <i>The Equal Protection Clause and the Rational Basis Test</i> . . . . .	98
	1. In General . . . . .	98
	2. Is There a Basis for "More Exacting Judicial Scrutiny"? . . . . .	101
	3. The <i>Allegheny</i> Decision . . . . .	106

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1. RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* at v (1959).

2. Attributed to Senator Russell Long. See, e.g., George F. Will, *Morality and the 'Martini Lunch'*, NEWSWEEK, Oct. 17, 1977, at 120.

III. THE CASE OF <i>NORDLINGER V. HAHN</i> . . . . .	109
A. <i>The Facts</i> . . . . .	109
B. <i>The Law According to the Majority</i> . . . . .	110
1. The Argument the Court Declined to Hear . . . . .	110
2. The Rational Basis Test . . . . .	111
3. The Court's Reasoning and a Brief Critique . . . . .	113
C. <i>Justice Thomas' Concurrence</i> . . . . .	121
D. <i>Justice Stevens' Dissent</i> . . . . .	122
IV. IS INJUSTICE RATIONAL? . . . . .	124
A. <i>How Do We Measure Tax Justice?</i> . . . . .	125
B. <i>Three Economic Bases for the Property Tax</i> . . . . .	127
C. <i>The Connection Between Equity and</i> <i>Accurate Assessments of Value</i> . . . . .	130
D. <i>Horizontal Equity as Moral Truth</i> . . . . .	132
V. TRANSLATING PROPOSITION 13 INTO COMPARABLE PRINCIPLES OF INCOME TAXATION AND CONSUMPTION TAXATION . . . . .	134
A. <i>Translating Proposition 13 into an</i> <i>Income Tax</i> . . . . .	134
B. <i>Translating Proposition 13 into a</i> <i>Consumption Tax</i> . . . . .	136
VI. A MESSAGE TO THE COURT AND TO CONSTITUTIONAL SCHOLARS . . . . .	137
VII. CONCLUSION . . . . .	141

#### I. INTRODUCTION

When the United States Supreme Court addresses a challenge to a state taxing scheme under the Equal Protection Clause, it is obliged to uphold the taxing scheme as long as the classifications employed within it have a rational basis. In deciding whether the classifications employed by the state are rational, what is the Court's obligation, if any, to take account of principles of tax theory? I won't leave you in suspense. The answer, apparently, is none. This answer is neither gratifying nor startling. A purpose of this Article is to offer an explanation to courts and to constitutional scholars why they should consider the normative standards of tax theory in reaching decisions about the constitutionality of taxation schemes. It also has a more

particular purpose—to offer a critical examination of the Supreme Court's recent decision concerning the California property tax scheme popularly known as Proposition 13. In the case referred to, *Nordlinger v. Hahn*,<sup>3</sup> constitutional rationality as found by the Court and tax rationality are widely divergent. Though I recognize that constitutional rationality and tax rationality are often concerned with different things,<sup>4</sup> I also believe that tax rationality should inform constitutional rationality. In appropriate cases, I will argue, tax rationality should even determine constitutional rationality. I believe that *Nordlinger v. Hahn* was such a case.

The provision of Proposition 13 in question in *Nordlinger* established that real property owners are taxed based on their acquisition costs (as opposed to the traditional base of fair market value).<sup>5</sup> Stephanie Nordlinger challenged that provision on the ground that it denied her the right to equal protection of the laws granted to her by the Fourteenth Amendment of the United States Constitution. The essential factual basis for her claim was that under Proposition 13 she was obliged to pay approximately five times as much in property taxes as similarly housed neighbors simply because she had acquired her home at a later date than her neighbors. By an eight to one vote, the Court concluded that the acquisition-cost assessment scheme of Proposition 13 has a rational basis and, thus, did not violate the Equal Protection Clause. It is argued here that the Court's decision is wrong. Indeed, it is my conviction that though *Nordlinger v. Hahn* may reflect much of today's conventional constitutional wisdom, it is an extraordinarily bad decision.

My thesis—that on occasion tax rationality should determine constitutional rationality—rests upon the recognition that just forms of taxation are a fundamental element of a just society. It also arises from a recognition that taxing schemes have central organizing princi-

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3. *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). Three recent publications addressing *Nordlinger* are Andrew S. Johnston, Case Comment, *Tax Law—Nordlinger v. Hahn: Constitutionality of "Welcome Stranger" Laws Under the Equal Protection Clause of the Fourteenth Amendment*, 23 MEM. ST. U. L. REV. 891 (1993); Samuel A. Mandarino, Note, *Nordlinger to Allegheny: "This Town Ain't Big Enough for the Both of Us"*, 1993 WIS. L. REV. 1195; and Michael D. Rawlins, Note, *Taxation, Equal Protection, and Inquiry into the Purpose of a Law: Nordlinger v. Hahn and Allegheny Pittsburgh Coal Co. v. County Commission*, 1993 B.Y.U. L. REV. 1001.

4. The central difference, perhaps, is that constitutional rationality analysis must concern itself with the harm the Court may do by upsetting the democratic processes by which laws are enacted. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 5-9 (1980).

5. CAL. CONST. art. XIII A, § 2 (West Supp. 1993).

ples. The elimination of one or more of these principles from a taxing scheme may render it so misshapen in form and so distorted in substance that allowing the tax to stand is unconscionable. The argument, then, is that the Supreme Court should follow tax rationality at least in those cases where tax theory tells us that a legislative classification scheme has violated the most fundamental principles of fair taxation.

I wish to be clear that I am not arguing that some theoretical flaw at the periphery of a tax should render it constitutionally infirm. It is beyond challenge that our taxing schemes, both state and federal, contain many vices when viewed from the tax theorist's perspective. Some of these perceived failings have enormous consequences.<sup>6</sup> Moreover, there is little unanimity on many aspects of tax theory.<sup>7</sup> But there are a few principles on which there is general agreement. Horizontal equity—the principle of treating like cases alike—in particular is widely regarded as a fundamental tax principle. The absolute elimination of horizontal equity prevents a tax—any tax—from being fair. I will argue that Proposition 13's disregard for horizontal equity is so pervasive and so deep that it should not be considered to have a rational basis.

Part II of this Article provides historical and descriptive backgrounds concerning the property tax, Proposition 13, and the Equal Protection Clause as it has been applied to state taxing schemes and conduct. This part includes a brief argument for more exacting judicial scrutiny than is typical in rational basis cases. Part III develops the facts presented by the case of *Nordlinger v. Hahn* and discusses

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6. For example, the home mortgage interest deduction provided in the federal income tax is often criticized as a housing subsidy for the middle and upper classes. See, e.g., *Hearings before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee*, 92d Cong., 1st Sess. 49-51 (1972); see also Allen D. Manvel, *Upside Down Housing 'Aid'?*, 53 TAX NOTES 743 (1991); Martin J. McMahon, Jr., *Individual Tax Reform for Fairness and Simplicity: Let Economic Growth Fend for Itself*, 50 WASH. & LEE L. REV. 459, 485-88 (1993).

7. For example, there is a longstanding and ongoing debate among tax theorists concerning the relative merits of income taxation versus consumption taxation. See, e.g., Joseph Bankman and Thomas Griffith, *Is the Debate Between an Income Tax and a Consumption Tax a Debate About Risk? Does it Matter?*, 47 TAX L. REV. 377 (1992); Michael J. Graetz, *Revisiting the Income Tax vs. Consumption Tax Debate*, 58 TAX NOTES 1437 (1992); Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145 (1992) (arguing for a middle path between those two forms of taxation). The literature on this question is legion. For further references see McCaffery, *supra*, at 1146 nn.2-3. For other topics of controversy in tax theory see STEPHEN G. UTZ, *TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES* (1993).

the three opinions filed by members of the Court; the majority opinion by Justice Blackmun, the concurring opinion by Justice Thomas, and the dissenting opinion by Justice Stevens. The main emphasis of this part is a critique of the rationalizations the majority offered for upholding Proposition 13. From these premises and with this background, part IV will critique the assessment scheme adopted in Proposition 13 from a tax theory perspective. It describes how Proposition 13 eliminates the central organizing principle of traditional property taxation. It shows that the elimination of this organizing principle takes away the chief equitable justification for the property tax. In a society that values fairness, it is argued, a taxing scheme that is based on unfairness is irrational. Part V will proceed to illustrate the irrationality of Proposition 13's assessment scheme by translating that scheme into comparable schemes of income taxation and consumption taxation. When viewed against the backdrop of more widely understood taxation systems, Proposition 13's startling irrationality will stand clear of the rubble produced by political warfare and constitutional theorizing. Part VI then addresses the connection between constitutional rationality and tax theory.

## II. THREE ASPECTS OF THE QUESTION ADDRESSED

### A. *The Property Tax in Theory and in Practice*

Though in some respects this Article may be seen as a defense of the traditional property tax, a fair presentation of the central issue obliges me to begin by painting a rather unflattering portrait of the tax I seek to defend.

The property tax is a tax of peculiar complexity, and it poses administrative and theoretical problems that differ from those of other taxes.<sup>8</sup> Though it is not as complex as an income tax, its limitations

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8. The property tax came into being in medieval Europe as a tax on land and the chattels used in agriculture. EDWIN R.A. SELIGMAN, *ESSAYS IN TAXATION* 11 (9th ed. 1921). In its earliest phase, value was placed on the property by reference to the land's productivity. *Id.* at 12. Later, valuation was measured by selling value. *Id.* In this country, the property tax rose to prominence in state and local taxation during the nineteenth century. JEROME R. HELLERSTEIN, *1 STATE TAXATION* § 1.2 (1983). Its importance at the state level has since declined, but it has continued as a chief provider of local tax revenues, especially for schools, throughout our history. *Id.* § 1.3; *see also* JEROME HELLERSTEIN & WALTER HELLERSTEIN, *STATE AND LOCAL TAXATION* 8 (5th ed. 1988) [hereinafter *STATE AND LOCAL TAXATION*]; DICK NETZER, *ECONOMICS OF THE PROPERTY TAX* 1 (1966). Though widely vilified for decades, it persists and, indeed, as far as real property taxation is concerned,

are even more stubbornly intransigent than those of the income tax. However, in outline it is simple to understand. Like most taxes, a property tax liability is arrived at by applying a rate to a base. The property tax rate is often stated as certain number of mills<sup>9</sup> or cents per hundred dollars of value. Traditionally, the base against which the rate is levied is the fair market value of the property subject to the tax.<sup>10</sup> Thus, for example, if there is a tax on real property imposed at the rate of twenty-five cents per one hundred dollars of value, then a home worth one hundred thousand dollars would generate a property tax liability of two hundred fifty dollars.<sup>11</sup>

It is useful to note at this early stage that since the tax rate is simply a mathematical multiplier with an inherently arbitrary aspect,<sup>12</sup> it is the tax base that serves as the tax's chief equitable component. For example, if our property tax rate was two hundred fifty dollars per item of property and our tax base was defined as brick houses with wooden shutters, our first question in considering the fairness of the tax would likely be whether the base was equitable. We would almost certainly ask such questions as why are brick homes without shutters favored over brick homes with shutters, and

shows no signs of fading away. NETZER, *supra*, at 1. The most prominent and outspoken of the early critics of the property tax was E.R.A. Seligman. As will be discussed, Seligman, in his influential treatise *Essays in Taxation*, railed against the property tax on both practical and theoretical grounds.

With the development of a mercantile economy and, later still, of an industrial economy, the property tax was largely supplanted by excise taxes. These taxes, levied upon the transfer of property or services, are what today we call consumption taxes. The twentieth century saw the rise of the income tax, first at the federal level and then at the state level. Nonetheless, in this country the property tax retains unusual prominence. Indeed this country is anomalous in its taxing scheme since both the property tax and the income tax are significantly more important here than they are in much of the rest of the world. See, e.g., Charles E. McLure, Jr., *Substituting Consumption-Based Direct Taxation for Income Taxes as the International Norm*, 45 NAT'L TAX J. 145 (1992); John A. Miller, *State Adoption of a Value Added Tax: A Desperate Act in Search of the Proper Occasion*, 71 NEB. L. REV. 192, 207 n.59 (1992) (describing the growing importance of the value added tax throughout the world); Peggy B. Musgrave, "Substituting Consumption-Based Direct Taxation for Income Taxes as the International Norm": A Comment, 45 NAT'L TAX J. 179 (1992).

9. A mill is one tenth of one cent. See BLACK'S LAW DICTIONARY 993 (6th ed. 1990).

10. Fair market value refers to the price a willing buyer would pay a willing seller if both were well-informed and neither were acting under a compulsion. See Treas. Reg. § 20.2031-1(b) (1958).

11.  $\$100,000 / \$100 = \$1,000$ ;  $\$1,000 \times \$0.25 = \$250$ .

12. The rate, of course, is not simply drawn from the air. Its selection will depend on political circumstances, revenue needs, ability to pay and other factors. But, it is arbitrary in the sense that it is inflexible and certain.

so on. Especially when we are dealing with a proportionate or flat rate tax such as the property tax, our eyes are irresistibly drawn to the base when we consider the fairness of the tax.

The property tax suffers from several theoretical difficulties. Moreover, a persistent problem with the property tax is that its administration does not always comport with its already flawed theory. For instance, a common phenomena in property tax assessment is the failure of assessments to keep pace with the appreciation of real property.<sup>13</sup> Over time assessors often fall into the practice of assessing property in a roughly uniform but fractional manner. Thus, real property may be assessed at forty percent, sixty percent, or eighty percent of its market value.<sup>14</sup> This failing, while significant, does not pose on its face major equity concerns because use of fractional assessments is not overtly aimed at shifting the property tax burden from one group to another.<sup>15</sup> Instead fractional assessment largely serves as a way of capping (in a proportionate manner) everyone's tax bills in an inflationary economy. Though the fractional assessment approach is illegal in those states where the law mandates assessment at fair market value, and though the practice has often received judicial condemnation,<sup>16</sup> it persists in many jurisdictions.<sup>17</sup>

There are other practical problems with the traditional property tax. First and foremost is the difficulty inherent in valuing property that has not recently been the subject of an arm's length sale.<sup>18</sup> Assessors have developed various techniques for valuing such property, but still the question of value is often problematic.<sup>19</sup> Another prob-

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13. See STATE AND LOCAL TAXATION, *supra* note 8, at 128-46.

14. Some states, such as California prior to Proposition 13, provide by law for fractional assessments. See George Lefcoe & Barney Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case*, 53 S. CAL. L. REV. 173, 198 (1979).

15. However, it has been argued that fractional assessments do in fact shift tax burdens because the tax system becomes secretive. This secretiveness, it is argued, can disguise errors arising from "political favoritism, incompetence, corruption, or other factors." DIANE B. PAUL, *THE POLITICS OF THE PROPERTY TAX* 4-5 (1975).

16. See, e.g., *Russman v. Lockett*, 391 S.W.2d 694 (Ky. 1965).

17. See, e.g., PAUL, *supra* note 15, at 4-7. In many jurisdictions the tax assessor is an elected official. In a rising market, the tax assessor who maintains assessments at fair market value is causing her constituents to owe more taxes with each reassessment. Naturally, such an assessor may have trouble getting reelected. There are a number of other explanations that have been offered as to why assessors frequently underassess property. See *id.* at 27-30.

18. See generally Jennifer J.S. Brooks & Ronald J. Schultz, *Market Theory: An Approach to Real Property Valuation for State and Local Tax Purposes*, 45 TAX LAW. 339 (1992).

19. I have elsewhere suggested that the problem of valuation is epistemological in origin. See John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplifica-*



lem, as was pointed out by Professor E.R.A. Seligman more than sixty years ago, is the difficulty of taxing some forms of property such as intangible property and other movable property because such property is hard to locate and is easily concealed.<sup>20</sup> But if personal property is excluded from the tax base, the tax may distort economic behavior and fall inequitably upon landowners.<sup>21</sup>

A further problem with the property tax, one which is central to its disfavor with taxpayers,<sup>22</sup> is its failure to necessarily coincide with the taxpayer's ability to pay in a liquidity sense.<sup>23</sup> One may be land-rich and cash-poor. But the property tax must be paid annually or semi-annually in cash. Thus, the land-rich, cash-poor taxpayer is certain to feel some pain in satisfying her property tax obligation. Naturally, this pain will intensify in an economy where land values are rising rapidly because, without other adjustments,<sup>24</sup> assessment

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*tion in the Law of Taxation*, 68 WASH. L. REV. 1, 57 (1993).

20. See SELIGMAN, *supra* note 8, at 19-61. A lengthy quotation from Seligman on the matter discussed in the text is found in STATE AND LOCAL TAXATION, *supra* note 8, at 116 (quoting the 10th edition).

21. Simply put, if the tax falls on real property but not on intangible property such as stocks and bonds, the tax provides an incentive to invest in intangibles rather than in land. Most tax theorists would agree that an ideal tax should be economically neutral so that the market for goods and services will operate most efficiently. For a discussion of neutrality principles, see McCaffery, *supra* note 7, at 1157.

22. "The property tax is certainly the most unpopular of all major taxes." PAUL, *supra* note 15, at 1. The dislike of the property tax is not limited to the average citizen. The property tax has been nearly universally criticized by scholars since the nineteenth century. See NETZER, *supra* note 8, at 3-8.

23. See SELIGMAN, *supra* note 8, at 56-61; George F. Break, *Adam Smith and the Property Tax: Some Neglected Advice*, at 2-3 (Lincoln Inst. Tax Pol'y, Tax Pol'y Roundtable, Prop. Tax Papers Series No. TPR-3, 1979). Professor Seligman was an advocate of taxation based on "the ability principle" and thus advocated retreat from property taxation in favor of income taxation and gratuitous transfer taxation. See Clarence Heer, *The Property Tax as a Measure of Ability*, in PROPERTY TAXES 155 (Tax Pol'y League ed., 1940). Just what is meant by ability to pay is not entirely clear. But certainly at its simplest level, ability to pay refers to liquidity. But it may also be taken to encompass principles of progressive income taxation and exemption for the poor. *Id.* at 159. The property tax has been described as a regressive tax. This is because it falls heavily on housing, and lower income people spend a greater portion of their total income on housing than higher income people. *Id.* at 162. But the economic incidence of the property tax is the subject of some controversy, especially with respect to the question of whether the property tax is shifted from landlords to renters. See PAUL, *supra* note 15, at 13-15. At least we can say in the case of owner occupied dwellings, that a traditional market value assessment property tax is proportionate to one's wealth as measured by the property subject to assessment (assuming no mortgage).

Another defect in the property tax is that it is difficult to collect in a timely fashion. See NETZER, *supra* note 8, at 6.

24. However, adjustments are quite possible. This point is discussed at several places later on in this Article. I mention it here because the ability to make adjustments to control

increases will augment tax bills just as effectively as rate increases. Over time persons of modest cash income may find themselves paying high property taxes simply because of their good fortune or their wisdom in the selection of a place to live.

The failure of the property tax to necessarily coincide with ability to pay is a clear structural weakness of the tax, and this weakness may well cause one to wonder why the property tax survives.<sup>25</sup> Certainly the public has voiced widespread dissatisfaction with the property tax for decades.<sup>26</sup> There is some authority, however, indicating that at least with respect to residential property there is a rough correlation between the value of one's property and one's ability to pay.<sup>27</sup> In other words, though the property tax does not necessarily correlate with ability to pay on a theoretical plane, it may well do so as a practical matter. Thus, the ability-to-pay objection to the property tax may not be as significant a failing of the tax as it at first appears.<sup>28</sup>

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the impact of inflation on homeowners living on modest fixed incomes was a crucial, though flawed, justification for Proposition 13's enactment.

25. This question was already being asked more than fifty years ago. See Leo D. Woodworth, *Importance of Property Tax in State and Local Tax Systems*, in PROPERTY TAXES 3, 7 (Tax Pol'y League ed., 1940) ("Why has it been continued while it became less and less a measure of ability to pay for the costs of government?"). Yet the fact remains that the property tax has been a relatively stable source of revenue in our society for hundreds of years. See PAUL, *supra* note 15, at 1.

26. See NETZER, *supra* note 8, at 1. Indeed, property tax rate limitation statutes and constitutional amendments were quite common in the 1930s. See Lawrence G. Holmes, *Over-All Tax Limitation*, in PROPERTY TAXES, 35, 37-43 (Tax Pol'y League ed., 1940) (nine states adopted rate limitation provisions).

27. See NETZER, *supra* note 8, at 29-30; see also George G. Kaufman, *Inflation, Proposition 13 Fever, and Suggested Relief*, in THE PROPERTY TAX REVOLT 215, 219 (George T. Kaufman & Kenneth T. Rosen eds., 1981) ("Contrary to public belief, recent evidence suggests that it is, at minimum, proportional if not progressive.").

28. Netzer notes, however, that viewed as an excise tax on consumption, i.e., as a tax on housing, the property tax "is higher in rate than any other generally used American consumption tax." NETZER, *supra* note 8, at 30 (writing in 1966).

Still another objection to the property tax is its treatment of debt. See SELIGMAN, *supra* note 8, at 29-30. Even though the property tax's traditional claim to being a just tax is based on its function as a tax on wealth, typically no allowance is made for mortgages on the assessed property. This is not to say that a tax can be viewed as just without considering the use to which the revenues are put. "In a democracy . . . the ultimate justification of all taxation is the general social welfare." Heer, *supra* note 23, at 157. But especially when the mortgage arises out of the acquisition of the property, it is clear that the property owner is taxed in part on the illusion of wealth rather than on wealth itself. For example, one who buys a home for one hundred and fifty thousand dollars by borrowing one hundred thousand dollars and by spending fifty thousand dollars of her own money is readily understood to have only fifty thousand dollars of equity in the home at the time of purchase. If we wish to tax the homeowner on her wealth, that is, on her net worth, our tax base should be fifty thousand rather than one hundred fifty thousand dollars. The fundamental equation of account-

If the question addressed in this Article was whether we should abandon the property tax, I could not vouch for the final answer. But

ing is:

$$\text{ASSETS} = \text{LIABILITIES} + \text{NET WORTH.}$$

When we wish to solve for net worth, we simply shift the elements of the equation like so:

$$\text{NET WORTH} = \text{ASSETS} - \text{LIABILITIES.}$$

This is the foundation of double-entry bookkeeping first described in writing in 1494 by Luca Pacioli, an Italian mathematician. See STANLEY SIEGEL & DAVID A. SIEGEL, ACCOUNTING AND FINANCIAL DISCLOSURE 14 (1983).

The way to arrive at what seems a fairer tax base would be to allow the property owner to deduct the mortgage amount from the assessed value of the home. But the apparent simplicity of this solution is illusory. This is because the problem of coverage and the problem of debt are interconnected, and can only be solved through a solution that is also interconnected. If we seek to solve the taxation of debt problem by allowing a deduction from fair market value for mortgages, we create an incentive to create false debts or to borrow against property when there is no independent economic motive for doing so. Thus, if the coverage of the tax extends only to real property, a debt deduction would create an incentive for taxpayers to borrow against their real property in order to invest in some form of tax-free property. The most theoretically sound solution would be to tax all forms of property at the same rate based on fair market value assessments (including the taxation of debt instruments in the hands of the lenders), and to allow a deduction for secured debts against the value of the property that secures them. In this way each taxpayer would be taxed on her net worth. The property tax would be a true wealth tax. This common sense view of property taxation is subject to challenge. Arguments can be made that different forms of wealth should be taxed at different rates. See, e.g., Simeon E. Leland, *Some Observations Concerning the Classified Property Tax*, in PROPERTY TAXES, 87-116 (Tax Pol'y League ed., 1940). I discount these arguments in part because I believe they rest on valuation complaints. It is also arguable that they simply raise the basic complaint about the property tax—that it fails to correspond to ability to pay.

The net worth solution has not been acceptable, probably because of the difficulty of locating and assessing all personal property, and because of the perceived liquidity problems posed by any property tax. As presently constituted, the property tax in most states is a tax on real property and on special categories of personal property such as automobiles and boats. It is easy to understand why these particular categories of personal property are taxed while other categories are not. Land is immovable, and boats and automobiles are licensed, and, consequently, are easily traced. A few states do levy a tax on intangible property. See John A. Miller, *American Bank & Trust Co. v. Dallas County: The Quiet Passing of the Separate Incidence Rule*, 41 TAX LAW. 831, 839 n.58 (1988). Generally, no deduction is allowed for debt associated with the property. Thus, as taxes on wealth, most property taxes are inherently flawed from a theoretical perspective both with respect to coverage and with respect to the nominal base.

Generally speaking, the property tax base has been eroding since World War I. See Ronald B. Welch, *The Property Tax Under Pressure: A Policymaker's Guide* (Lincoln Inst. Land Pol'y, Tax Pol'y Roundtable Prop. Tax Papers Series No. TPR-4, 1980). A tax on all property is sometimes referred to as a "general property tax." This is distinguished from the "classified property tax" which is levied upon relatively narrow classes of property, often at different rates. See Leland, *supra*, at 83.

The flawed treatment of debt may not be as much of a problem as it seems if instead of regarding the property tax as a tax on wealth, we regard it as a surrogate tax on income from property or consumption of property. These alternate conceptual bases for the property tax are addressed in part IV of this Article.

that is not the question. The question presented is whether the Supreme Court was correct in deciding that the Equal Protection Clause of the United States Constitution is not violated by Proposition 13's conversion of the California property tax system from a value based assessment system to an acquisition-cost based assessment system. That is a very different question altogether. As will be discussed, it is a question whose answer depends on the answer to another question: does an acquisition-cost property tax system have a rational basis? We can begin to answer that question by gaining an understanding of the changes wrought by Proposition 13.

### B. Proposition 13

Proposition 13 is the popular name for a statewide ballot initiative passed by the voters of the state of California in 1978.<sup>29</sup> Propo-

29. See CAL. CONST. art. XIII. Article XIII must be read in conjunction with Article XIII in order to be properly understood. Article XIII provides:

§ 1. Taxable property; percentage; full value

Sec. 1. Unless otherwise provided by this Constitution or the laws of the United States:

- (a) All property is taxable and shall be assessed at the same percentage of fair market value. When a value standard other than fair market value is prescribed by this Constitution or by statute authorized by this Constitution, the same percentage shall be applied to determine the assessed value. The value to which the percentage is applied, whether it be the fair market value or not, shall be known for property tax purposes as the full value.
- (b) All property so assessed shall be taxed in proportion to its full value.

CAL. CONST. art. XIII (West Supp. 1993).

Article XIII then provides:

§ 1. Ad valorem tax on real property; maximum amount; application

Section 1.

- (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax shall be collected by the counties and apportioned according to law to the districts within the counties.
- (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any of the following:
  - (1) Any indebtedness approved by the voters prior to July 1, 1978.
  - (2) Any bonded indebtedness, not subject to paragraph (3), for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the voters voting on the proposition.

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§ 2. Full cash value; reassessment; newly constructed property; seismic safety; value and location of replacement dwelling; full cash value base; change in ownership; family transfers

Sec. 2.

- (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation. For purposes of this section, "newly constructed" does not include real property which is reconstructed after a disaster, as declared by the Governor, where the fair market value of the real property, as reconstructed, is comparable to its fair market value prior to the disaster. Also, the term "newly constructed" shall not include the portion of reconstruction or improvement to a structure, constructed of unreinforced masonry bearing wall construction, necessary to comply with any local ordinance relating to seismic safety during the first 15 years following that reconstruction or improvement.

However, the Legislature may provide that under appropriate circumstances and pursuant to definitions and procedures established by the Legislature, any person over the age of 55 years who resides in property which is eligible for the homeowner's exemption under subdivision (k) of Section 3 of Article XIII and any implementing legislation may transfer the base year value of the property entitled to exemption, with the adjustments authorized by subdivision (b), to any replacement dwelling of equal or lesser value located within the same county and purchased or newly constructed by that person as his or her principal residence within two years of the sale of the original property. For purposes of this section, "any person over the age of 55 years" includes a married couple one member of which is over the age of 55 years. For purposes of this section, "replacement dwelling" means a building, structure, or other shelter constituting a place of abode, whether real property or personal property, and any land on which it may be situated. For purposes of this section, a two-dwelling unit shall be considered as two separate single-family dwellings. This paragraph shall apply to any replacement dwelling which was purchased or newly constructed on or after November 5, 1986.

In addition, the Legislature may authorize each county board of supervisors, after consultation with the local affected agencies within the county's boundaries, to adopt an ordinance making the provisions of this subdivision relating to transfer of base year value also applicable to situations in which the replacement dwellings are located in that county and the original properties are located in another county within this state. For purposes of this paragraph, "local affected agency" means any city, special district, school district, or community college district which receives an annual property tax revenue allocation. This paragraph shall apply to any replacement dwelling which was purchased or newly constructed on

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or after the date the county adopted the provisions of this subdivision relating to transfer of base year value, but shall not apply to any replacement dwelling which was purchased or newly constructed before November 9, 1988.

- (b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing a decline in value.
- (c) For purposes of subdivision (a), the Legislature may provide that the term "newly constructed" shall not include any of the following:
- (1) The construction or addition of any active solar energy system.
  - (2) The construction or installation of any fire sprinkler system, other fire extinguishing system, fire detection system, or fire-related egress improvement, as defined by the Legislature, which is constructed or installed after the effective date of this paragraph.
  - (3) The construction, installation, or modification on or after the effective date of this paragraph of any portion or structural component of a single or multiple family dwelling which is eligible for the homeowner's exemption if the construction, installation, or modification is for the purpose of making the dwelling more accessible to severely disabled person.
  - (4) The construction or installation of seismic retrofitting improvements or improvements utilizing earthquake hazard mitigation technologies, which are constructed or installed in existing buildings after the effective date of this paragraph. The Legislature shall define eligible improvements. This exclusion does not apply to seismic safety reconstruction or improvements which qualify for exclusion pursuant to the last sentence of the first paragraph of subdivision (a).
- (d) For purposes of this section, the term "change in ownership" shall not include the acquisition of real property as a replacement for comparable property if the person acquiring the real property has been displaced from the property replaced by eminent domain proceedings, by acquisition by a public entity, or governmental action which has resulted in a judgment of inverse condemnation. The real property acquired shall be deemed comparable to the property replaced if it is similar in size, utility, and function, or if it conforms to state regulations defined by the Legislature governing the relocation of persons displaced by governmental actions. The provisions of this subdivision shall be applied to any property acquired after March 1, 1975, but shall affect only those assessments of that property which occur after the provisions of this subdivision take effect.
- (e) Notwithstanding any other provision of this section, the Legislature shall provide that the base-year value of property which is

substantially damaged or destroyed by a disaster, as declared by the Governor, may be transferred to comparable property, within the same county, that is acquired or newly constructed as a replacement for the substantially damaged or destroyed property.

This subdivision shall apply to any comparable replacement property acquired or newly constructed on or after July 1, 1985, and to the determination of base-year values for the 1985-86 fiscal year and fiscal years thereafter.

- (f) For the purposes of subdivision (e):
- (1) Property is substantially damaged or destroyed if it sustains physical damage amounting to more than 50 percent of its value immediately before the disaster. Damage includes a diminution in the value of property as a result of restricted access caused by the disaster.
  - (2) Replacement property is comparable to the property substantially damaged or destroyed if it is similar in size, utility, and function to the property which it replaces, and if the fair market value of the acquired property is comparable to the fair market value of the replaced property prior to the disaster.
- (g) For purposes of subdivision (a), the terms "purchased" and "change in ownership" shall not include the purchase or transfer of real property between spouses since March 1, 1975, including, but not limited to, all of the following:
- (1) Transfers to a trustee for the beneficial use of a spouse, or the surviving spouse of a deceased transferor, or by a trustee of such a trust to the spouse of the trustor.
  - (2) Transfers to a spouse which take effect upon the death of a spouse.
  - (3) Transfers to a spouse or former spouse in connection with a property settlement agreement or decree of dissolution of a marriage or legal separation.
  - (4) The creation, transfer, or termination, solely between spouses, of any coowner's interest.
  - (5) The distribution of a legal entity's property to a spouse or former spouse in exchange for the interest of the spouse in the legal entity in connection with a property settlement agreement or a decree of dissolution of a marriage or legal separation.
- (h) For purposes of subdivision (a), the terms "purchased" and "change of ownership" shall not include the purchase or transfer of the principal residence of the transferor in the case of a purchase or transfer between parents and their children, as defined by the Legislature, and the purchase or transfer of the first \$1,000,000 of the full cash value of all other real property between parents and their children, as defined by the Legislature. This subdivision shall apply to both voluntary transfers and transfers resulting from a court order or judicial decree.
- (i) Unless specifically provided otherwise, amendments to this section adopted prior to November 1, 1988, shall be effective for changes in ownership which occur, and new construction which is

sition 13 was the product of what we would now call a taxpayer revolt.<sup>30</sup> It has been described as "a revolt of the haves" because its strongest support came from higher income white males.<sup>31</sup> It contained several property tax amendments to the state constitution, including rate limits and limits on assessment increases. But the key provision in Proposition 13, which was at issue in *Nordlinger*, concerned the assessment base for real property taxation. This portion of the initiative provided that real property should be assessed at "full cash value" ("FCV"), which was defined as "the assessed valuation as of the 1975-76 tax year or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment."<sup>32</sup> The consequence of this provision was that the assessed value of real property acquired before 1976 became fixed at 1975 assessed values. Property acquired after 1976 was assessed at its date of sale fair market value, that is, at its cost. Assessment increases for all property were thereafter limited to two percent per year. Since, over time, real property values tend to rise, comparably housed individuals were nearly certain to be taxed differently depending on when they purchased their homes with the most recent purchasers bearing a disproportionately large share of the total tax burden.<sup>33</sup> Thus, after the enactment of Proposition 13, a tiered scheme of property taxation was in place in California which systematically favored long term property owners over newer owners. This scheme is described as an acquisition-cost based property tax.

One can readily understand why the large majority of homeown-

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completed, after the effective date of the amendment. Unless specifically provided otherwise, amendments to this section adopted after November 1, 1988, shall be effective for changes in ownership which occur, and new construction which is completed, on or after the effective date of the amendment.

§ 3. Changes in state taxes; enactments to increase revenues; imposition

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

CAL. CONST. art. XIII A.

30. For a brief history of the "California Tax Revolt," see DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA*, 19-43 (1985).

31. *Id.* at 220.

32. CAL. CONST. art. XIII A, § 2(a). For the text of this provision see *supra* note 29.

33. As measured by the present value of their homes.



ers would have supported Proposition 13.<sup>34</sup> First, it dramatically lowered property taxes.<sup>35</sup> Second, it froze the tax rate and it largely froze assessments in order to prevent future increases in property taxes.<sup>36</sup> In addition, there was particular appeal to the baser instincts of voters because the provision contained within its terms the opportunity to minimize one's own taxes while also increasing the taxes borne by others.<sup>37</sup> As will be discussed later, these last two factors need not have been interrelated. That is, the tax freeze could have been implemented without discriminating against latecomers. This is an important point because the justifications offered for Proposition 13 rest primarily upon the freeze element, not the discrimination element.<sup>38</sup>

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34. A survey by the *Los Angeles Times* on election day showed that 81% of homeowners with no state or local worker in the home supported Proposition 13. 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* 1, 10 (George T. Kaufman & Kenneth T. Rosen eds., 1985). Proposition 13 was adopted by a margin of two-to-one. See Lefcoe & Allison, *supra* note 14, at 174. By its terms the provision cannot be amended with less than a two-thirds majority of all the members of both legislative houses. See CAL. CONST. art. XIII A, § 3. A voter initiative can also amend the provision. Thus, if it is ever to be voluntarily repealed, another powerful movement will have to be assembled. The difference—and this is a telling one—is that most of those persons voting for repeal would be voting against their economic self-interest. In its amicus brief, the League of Women Voters argued that "Proposition 13 reflects a breakdown of the political process that has resulted in an inequity that cannot be cured absent judicial intervention." Brief of The League of Women Voters of California as Amicus Curiae in Support of Petitioner at 37, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (No. 90-1912).

35. Initial estimates were that Proposition 13 would reduce local government revenues by \$7 billion in the 1978-79 fiscal year alone. William H. Oakland, *Proposition 13: Genesis and Consequences*, in *THE PROPERTY TAX REVOLT* 31, 44 (George G. Kaufman & Kenneth T. Rosen eds., 1981). Prior to Proposition 13 the statewide effective tax rate was running at about 2.5%. *Id.* at 31.

36. The tax freeze portion of Proposition 13 was not at issue in *Nordlinger*, nor is it a central issue in this Article. As will be discussed later, revenue capping could have been accomplished without the necessity of discriminating against latecomers.

37. The ability to achieve relative superiority over one's neighbors has been recognized as a powerful motivator. See Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 28-48 (1992).

Whether it is termed "status," "prestige," or "distinction," people sometimes seek—as an end in itself—relative position; they measure their income against the prevailing "standard of living" of their society or their peers, suffer indignity at failing to "keep up with the Joneses," and generally gain or lose satisfaction according to how well they do compared to others.

*Id.* at 3. "[T]he social science evidence suggests that people generally share a strong desire for social distinction, and in particular that people desire relatively high income and the goods associated with high income or status." *Id.* at 48. Obviously, one who pays less taxes will have relatively more income to spend than other people who are otherwise similarly situated in economic terms.

38. However, it is interesting to note that the ability of Proposition 13 to raise more

The package placed before the voters, however, contained both elements. Subsequent events reveal that Proposition 13 functioned effectively both as a tax freeze device for established homeowners and as a tax discrimination device with respect to latecomers. Over time as real property continued to appreciate, each new buyer bore a greater share of the tax burden than did her comparably housed neighbor who happened to have bought her home at an earlier point in time when values were lower.<sup>39</sup> Thus, those taxpayers who benefitted most from Proposition 13 benefitted in two ways (over and above the immediate tax cut). First, they were assured that their taxes would not increase precipitously. Second, they were assured that the government services they desired would still be available because others would not be taxed as lightly as themselves.<sup>40</sup>

This, then, was the cleverness of Proposition 13, a well calculated appeal to self-interest and to majoritarian rule. All those homeowners who voted for its enactment were voting in their own economic self-interest<sup>41</sup> and, in some respects, against the self-interest of per-

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revenue over time by taxing newcomers more heavily than established homeowners was offered as evidence of its rationality by at least one amicus in the case. See Brief of Howard Jarvis Taxpayers Association et al. as Amici Curiae in Support of Respondents at 10, *Nordlinger* (No. 90-1912) ("The reassessment upon change of ownership provision is an integral part of Article XIII A's operation which advances the policy of providing a stable revenue source for local governments."). This argument apparently accepts that discrimination can be justified on the principle that the money had to come from somewhere. "[I]f these were the only two provisions of Article XIII A [referring to the rate and assessment caps] local governments would have gone bankrupt long ago." *Id.* at 26. The Court's opinion in *Nordlinger* does not expressly accept the principle that discrimination can be justified by revenue needs, but it may well have been influenced by this argument since it did adopt a reliance interest argument that bears some similarity to the revenue argument. See *infra* part III.B.

39. A recent study showed, for example, that property in San Bernardino County that had been subject to sale in the 1990-91 assessment year bore on average 3.91 times the tax liability of property of equal value that had been held since 1978. See Terri A. Sexton et al., *Equity of an Acquisition-Value Property Tax: The Case of Proposition 13*, 15 ST. TAX NOTES 37, 38 (1992).

40. Sears & Citrin found that most voters supporting Proposition 13 held contradictory attitudes toward tax and spending reform. The taxpayers wanted tax relief without reduction in government services, that is, the taxpayers wanted "something for nothing." SEARS & CITRIN, *supra* note 30, at 70-71, 91-95. In the Supreme Court, Nordlinger argued that Proposition 13's enactment resulted from the "naked political calculation" of those persons who wanted to minimize their own taxes while keeping government services high. Petitioner's Brief on the Merits at 37, *Nordlinger* (No. 90-1912) (noting also that two-thirds of those voters who voted for Proposition 13 owned their own homes).

41. Most voters who were also homeowners anticipated that they would save money if Proposition 13 passed and thus, their support for Proposition 13 increased with the size of their anticipated tax reduction. Citrin & Levy, *supra* note 34, at 10-11. According to

sons, many of whom, such as young people and future residents, had no vote.<sup>42</sup> Moreover, the extent of this cleverness is further revealed when one considers how each succeeding wave of California home buyers was likely to feel compelled to accept its terms. Though the pre-1976 homeowners were the biggest beneficiaries of Proposition 13, those homeowners who followed them received a benefit as well because their assessments were frozen at their homes' respective fair market values as of their dates of purchase. The freeze mechanism of Proposition 13 was "a spoon full of sugar" to help the discrimination medicine go down. As long as home prices kept on rising and as long as the latecomer did not perceive the freeze effect as separate from the discrimination effect, she was likely to conclude that Proposition 13 was better than the apparent alternative of escalating market value assessments. And, of course, though the latecomers might look with envy at their neighbors who bought prior to 1976, they could also look at those who followed them and see that there was someone worse off than they. With the passage of time, each succeeding buyer had the satisfaction of seeing that someone else was receiving even worse treatment than she was. Only the most recent buyers had no one to feel superior to. However, even they could look forward to the day when the law would tax someone else more heavily than it taxed them. Yet the increased tax burden borne by new buyers may well have prevented many potential homeowners from ever buying in the first place. Actual new buyers who planned to own their homes for a prolonged period could reasonably expect that their relative share of the general tax burden would decline as more and more new buyers came along to shoulder a greater portion of the general tax burden.<sup>43</sup>

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Nordlinger's Supreme Court brief, two-thirds of those voters who voted for Proposition 13 were homeowners. See Petitioner's Brief on the Merits at 37, *Nordlinger* (No. 90-1912). There was a turnout of 69% of the registered voters in the vote on Proposition 13. Citrin & Levy, *supra* note 34, at 8. Sixty-six percent of the voting age population of California was registered to vote. *Id.* Surveys just before the election showed that 69% of all owners favored Proposition 13 while only 47% of renters favored it. *Id.* at 9.

42. The underrepresentation in the vote of those persons most harmed by Proposition 13 is one of its troubling aspects. Arguably, this is a defect of constitutional concern. See discussion *infra* part II.C.2.

43. It should be apparent that this view of Proposition 13 depends on the existence of a rising market. As long as real estate continues to appreciate, the scenario just described will hold true. For most of the period since the enactment of Proposition 13, there has been a rising real estate market in California. The long term trend of real estate generally is to appreciate. Of course much of this appreciation is a function of inflation. More recently, the real estate market in California has suffered some declines. See, e.g., Jim Carlton, *Southern California is Rattled as Prices of Homes Keep Falling*, WALL ST. J., Oct. 13, 1992, at A1.

For the initial beneficiaries of Proposition 13, this is in fact what happened. As the *Nordlinger* opinion noted, by 1989 those homeowners who had owned their homes since 1978 constituted forty-four percent of all homeowners but paid only twenty-five percent of all residential property taxes levied that year.<sup>44</sup> The opinion does not state what portion of all homes, *as measured by value*, were held by that forty-four percent. It is possible that the housing of long term owners is generally more valuable than that of short term owners. If so, the established homeowners are escaping more in taxes (measured by value) than the above numbers reveal.

The discriminatory aspects of Proposition 13 are readily observable in its main features, but are further emphasized by certain other subsidiary rules concerning transfers between related parties. These include a provision allowing children who buy their parents' home to retain their parents' assessment and a provision allowing children who inherit their parents' home or who receive their parents' home by gift to retain their parents' assessment.<sup>45</sup> Thus, Proposition 13 creates a hereditary right to a low property tax assessment for property passed from parent to child by sale, gift, devise, or inheritance. In addition, Proposition 13 provides similar advantages with respect to transfers between spouses.<sup>46</sup> It also allows for the retention of one's old assessment for new property acquired by persons over the age of fifty-five or for property acquired as a result of certain casualties and involuntary conversions with respect to one's old property.<sup>47</sup>

The discriminatory aspects of Proposition 13 are not limited to discrimination between residential homeowners. For example, over time homeowners as a class are likely to bear a greater share of the tax burden than owners of commercial property because homes sell

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However, Proposition 13 does not prohibit reduction in assessed values when the market value of property drops below its assessed value. *See* CAL. CONST. art. XIII A, § 2(b); *State Bd. of Equalization v. Supervisors of San Diego County*, 164 Cal. Rptr. 739 (Ct. App. 1980). Thus, Proposition 13 permits assessments to go down but not to go up except in small increments of two percent per year. It discriminates in a most complete fashion in favor of the established property owner over the newcomer. But it ensures that most of those injured by its terms will refrain from seeking to change back to a market value system because such a change would cause their assessments to go even higher. In any event, voter-inspired reversion to a value-based system is extremely unlikely because Proposition 13 also contained a supermajority requirement for its amendment. *See supra* note 29 and accompanying text.

44. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2329 (1992).

45. CAL. CONST. art. XIII A, § 2(h). For the text of this provision, see *supra* note 29.

46. *Id.* § 2(g). For the text of this provision see *supra* note 29.

47. *Id.* § 2(d)-(e). For the text of these provisions see *supra* note 29.

more often and because commercial property can be sold indirectly through sales of corporate stock.<sup>48</sup> Other discriminatory aspects of Proposition 13 have been described elsewhere,<sup>49</sup> and will not be addressed in this Article.

As I have just described, Proposition 13 institutionalized a taxing scheme built on "relative preferences"<sup>50</sup> among taxpayers. An economic hierarchy was created preferring one person relative to another by reference to the order in which they acquired their property, and a "first come, first served" system became the order of the day. As will be discussed, this form of taxation is directly contrary to traditional notions of tax equity. Indeed, it is a tax which treats traditional notions of equity with contempt.

### C. *The Equal Protection Clause and the Rational Basis Test*

#### 1. In General

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>51</sup> The clause "imposes a disability on state lawmaking; it is a test of invalidity."<sup>52</sup> Among all of the Fourteenth Amendment's process-oriented provisions, the Equal Pro-

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48. See Lefcoe & Allison, *supra* note 14, at 197.

49. See *id.* at 196-201.

50. Professor McAdams uses the phrase "relative preferences" as the title of his article detailing his belief in the importance for economic and social theory of the pursuit of relative position. McAdams, *supra* note 37, at 3.

51. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause and the rational basis test have been the subjects of a wealth of legal scholarship, including: Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049 (1979); Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward*, 38 STAN. L. REV. 1 (1985) [hereinafter Cohen, *A Comment on Metropolitan Life*]; William Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87 (1990) [hereinafter Cohen, *A Comment on Allegheny Pittsburgh*]; Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1 (1992); Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261 (1990); Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Joseph Tussman & Jacobus Tenbroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). For additional references, see Farrell, *supra*, at 2 n.1.

52. Michael Bayles, *Hart vs. Dworkin*, 10 LAW & PHIL. 349, 354 (1991).

tection Clause "by its explicit concern with equality among persons within a state's jurisdiction . . . constitutes the document's clearest, though not sole, recognition that technical access to the process may not always be sufficient to guarantee good-faith representation of all those putatively represented."<sup>53</sup>

Though the Equal Protection Clause could be read as a flat prohibition against discriminatory legislation, as construed by the Supreme Court, it does not forbid the use of classifications or other legislative schemes that differentiate between people or property.<sup>54</sup> In the tax context, "[t]he Equal Protection Clause 'applies only to taxation which in fact bears unequally on persons or property of the same class.'<sup>55</sup> Implicit in this language is the assumption that the classifications employed will not be arbitrary or unreasonable. Otherwise, classification schemes could be used by legislatures to discriminate between persons and properties that properly should be treated as members of the same class. This implicit assumption has been expressly stated as a requirement that the classification must "rationally further a legitimate state interest."<sup>56</sup> This is a lenient standard which simply requires that the classification scheme must be reasonable.<sup>57</sup>

Is the notion of rationality a determinate legal concept? I like to believe it is; maybe it's the romantic in me. Whether constitutional law and, indeed, whether law generally is little more than a swamp of indeterminacy has often been debated.<sup>58</sup> The generality of the lan-

53. ELY, *supra* note 4, at 98.

54. As Professor Ely has pointed out, a ban on all unequal treatment would hardly be feasible. Classification based on generalities is an unavoidable aspect of rulemaking. *See id.* at 30-31.

55. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343 (1989) (quoting *Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 190 (1945)).

56. *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2331-32 (1992).

57. Glennon, *supra* note 51, at 267; *see also* Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 93 ("The requirement that legislative classifications bear a rational relationship to an appropriate legislative purpose is easily met.").

58. *See* Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential For Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988); Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Steve Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549 (1988); Kent Greenawalt, *How Can Law Be Determinate?*, 38 UCLA L. REV. 1 (1990); Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15 (1990); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Robert J. Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, 60 FORDHAM L. REV. 595 (1992); David Millon, *Objectivity and De-*

guage employed in the Constitution and in the cases interpreting it lends itself to such a debate. Perhaps an indeterminist would contend that the rational basis test is nothing more than a coded reference to the power of the majority of the Supreme Court to do whatever it chooses for whatever reasons it chooses in any case where the rational basis test is deemed to apply. For reasons offered later on, I do not accede to this view of the rational basis test. I believe it can be a meaningful standard by which to gauge the soundness of state tax enactments. However, the rationality standard is significantly dependent upon context and upon the exercise of human judgment. It is a flexible standard that directs the Court to *do the right thing*.<sup>59</sup> The

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*mocracy*, 67 N.Y.U. L. REV. 1 (1992); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990). There is what amounts to a symposium on the topic of legal indeterminacy in a recent issue of the *Northwestern University Law Review*. See 85 NW. U. L. REV. 113, 113-89 (1990). An even more recent issue of the *Harvard Journal of Law and Public Policy* presented a collection of articles on the related topic of the relationship between rules and the rule of law. See 14 HARV. J.L. & PUB. POL'Y 615-852 (1991). There has been a great deal written on this topic, and I do not offer here a complete catalogue. The topic is a big one and its limits are ill-defined. Often the matter of legal indeterminacy is a beginning point for development of some other theme such as the belief that law is politics, that law is power or the negation of those views. For my views on legal indeterminacy in the context of tax law, see Miller, *supra* note 19.

59. This does not necessarily mean that the rational basis test is indeterminate. If we believe that the proper application of the rational basis test requires doing the right thing, then in a broad sense, the test is determinative of the outcome when we do the right thing. See Kress, *supra* note 58, at 320-22. I simply mean to say that the rational basis test would have permitted a finding for Ms. Nordlinger and against the constitutionality of Proposition 13 if this were the right thing to do. That this is so is readily demonstrable, I believe, by the cases discussed *infra* part II.C.3, *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Of course, in a sense, the law is always indeterminate when a case reaches the Supreme Court because the Court is not restrained in any formal sense from deciding the case in the manner it likes. The law depends upon the Justices' willingness to decide cases according to law. For present purposes, I assume that willingness.

I recognize that the short shrift I have thus far given to Equal Protection theorizing may grate on the nerves of constitutional scholars, just as the short shrift they give tax theory grates upon me. If any of them think I am wrong in saying that the rational basis test is flexible enough to have allowed the Court do the right thing in *Nordlinger*, I invite them to correct me. But when they do so, I ask that they take account of what it means to do the right thing from a tax theory perspective as part of considering what is the right thing from a constitutional law perspective. In other words, I ask them to actually attempt to comprehend the failings of Proposition 13 as a tax measure in considering what is the right thing. If they can do this and still conclude that the rational basis test bars the Court from overturning the measure, I will be greatly surprised. After all, the concept of rationality is inher-

real question then becomes "what is *the right thing?*"

In practice, the rational basis test has not operated as a major restraint on state and local taxation. On only a handful of occasions has it been used to invalidate classification schemes or practices.<sup>60</sup> Part of the leniency of the test is that the rationality of the classification is often considered independent of proof of actual legislative purpose.<sup>61</sup> In other words, the Court may simply think of a reason for the classification employed. If it is satisfied by that reason, it may uphold the classification based on that reason even though that reason was not expressly adopted by the legislature when it created the classification.<sup>62</sup> Another reason for the leniency of the test is that the Court recognizes that tax laws are complex creations with inherently political aspects. The legislature is seen as a more fit arena than the Court for the crafting of revenue raising measures.<sup>63</sup>

## 2. Is There a Basis for "More Exacting Judicial Scrutiny"?<sup>64</sup>

It might be argued that Proposition 13's unfairness is a substan-

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ently contextual.

60. See PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, § 3:1 (1981); see also Farrell, *supra* note 51, at 2; Glennon, *supra* note 51, at 287 ("The Court has been so deferential in rational basis review of state tax schemes that it has not found a violation of equal protection since 1933 [until *Allegheny*].").

61. This approach has been criticized. Gunther argued that only actual purposes should be considered. See Gunther, *supra* note 51, at 20-21.

62. Farrell, *supra* note 51, at 22-25 (noting, however, that on occasion the Court has looked for the "actual purpose of governmental action"). On the other hand, it is sometimes argued that legislative purpose is irrelevant. See *id.* at 20 (arguing that the Supreme Court does not take actual legislative intent into account). The view that legislative purpose is irrelevant is supportable on several grounds, including the lack of a legislative mind with which to form a purpose and the likely existence of multiple purposes. *Id.* at 9 n.36 (citing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930)). In the end, it seems to me that the main justification for this disregard of legislative intent is the argument that language has an objective meaning that does not depend on the motivation of its speaker for rational meaning. If this is so, then the language of a statute has an intrinsic meaning that is determinable from the language itself. To allow this meaning to be overturned by some assumed underlying purpose, renders the statute a virtual nullity. See generally Schauer, *supra* note 58, at 534.

63. Of course, Proposition 13 was crafted by neither the Court nor the California state legislature. For a discussion of whether judicial review should differ with respect to voter initiatives as compared to regular legislation, see Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990) (arguing that judicial review should be more stringent with respect to expressions of direct democracy).

64. As is discussed *infra* part III.B.1, Nordlinger, as a new homeowner, argued that there was a basis for strict scrutiny of Proposition 13 due to infringement of the right to travel. The basis for heightened scrutiny offered below is more diffuse and less doctrinally conventional.



tive matter that by itself cannot reach the level of a compelling constitutional concern.<sup>65</sup> In order to raise such a constitutional concern, the argument might be that, there must have been a flaw in either the *process* by which Proposition 13 came into being or in the *processes* created by Proposition 13.<sup>66</sup> These procedural flaws, if found, could justify a "more exacting judicial scrutiny" directed toward Proposition 13.<sup>67</sup> While I do not concede the need for more exacting scrutiny,

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65. As I have indicated, it is a common view that the rational basis test should be applied by the courts with much timidity. This is certainly a supportable idea. It is offered as a principled defence of the supremacy of the democratic process over the arguably more oligarchical judicial process. The logical progression for this view is the argument for the judicial renunciation of the rational basis test. Some commentators have done so. See ELY, *supra* note 4, at 110 n.10; Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 104-05; Linde, *supra* note 51, at 220-22. I will leave the question of renunciation to the constitutionalists. In this Article I have proceeded as though the rational basis test is a fact (though an ambiguous one) of the legal terrain. This view of the law was suggested to me by Professor Anthony D'Amato. See Letter from Anthony D'Amato, Professor, Northwestern University School of Law, to John A. Miller, Associate Professor, University of Idaho College of Law 1 (Feb. 3, 1993) (on file with author). For persons such as myself who are outsiders to constitutional theorizing, I believe the sensible thing to do is to take the rational basis test at face value and then to argue the merits of the individual case. If we do this, then we would say that when the democratic process brings forth a highly irrational product, the rational basis test says the Court should intervene on the side of reason—on the side of justice.

Some constitutional experts will find my views strikingly naive. It is clear to me from conversations with a number of constitutional scholars that their views of the rational basis test are formed of impressions having little connection with the language employed by the Court to describe it. Equal Protection analysis is viewed by some of those scholars as shaped almost entirely by standard of review analysis, i.e., the process of choosing between strict scrutiny review, intermediate review, and rational basis review. From this perspective, once the standard of review is determined, the outcome in the case is largely determined. My chief complaint with this approach is that it results in relatively little individualized consideration of cases. Even the Supreme Court, I would argue, should define its primary role by reference to the goal of achieving justice in the case before it. The rule that arises from the case should be secondary. In my view, then, analytical constructs, like the standard of review mechanism described above, tend to reduce cases to mere abstractions and defeat the goal of individual justice.

My view of the rational basis test is pragmatic. Whether the Court affirms or reverses in a case involving the rational basis test, it is obliged to pass judgment. That judgment can be right or wrong, good or bad. The language employed to describe the rational basis test is flexible enough to permit the court to do the right thing. In the immediate context, the *Allegheny* case proves this. Given that freedom, the Court *should* do the right thing. Then the question becomes what is the right thing.

66. See, e.g., ELY, *supra* note 4, at 101 ("The American Constitution has thus by and large remained a constitution properly so called, concerned with constitutive questions. What has distinguished it, and indeed the United States itself, has been a process of government, not a governing ideology." (footnotes omitted)); see also Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291, 1296 (1986) (offering a critical view of process ideology).

67. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The cited

Proposition 13 does raise important process concerns that, at a minimum, justify what Gerald Gunther called rationality review with "bite."<sup>68</sup>

Two-thirds of those voters who voted for Proposition 13 in 1978 were existing homeowners.<sup>69</sup> Those California homeowners were voting their pocketbooks.<sup>70</sup> It is worth recalling that, first and foremost, Proposition 13 was billed as a tax cut of immense proportions.<sup>71</sup> A contemporaneous survey showed that most voters who were also homeowners anticipated they would save money if Proposition 13 passed, and that their support for Proposition 13 grew with the size of their anticipated tax reduction.<sup>72</sup> The fact that existing homeowners controlled the vote on a property tax measure is not by itself a ground for striking down such a measure if it passes or even a ground for strict scrutiny. But in Proposition 13's case, there are two particular reasons for concern.

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footnote, as every constitutional scholar knows, is "the most celebrated footnote in constitutional law." See Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 n.4 (1982) (collecting authorities analyzing the *Carolene Products* footnote). I make this reference to *Carolene Products* without any claim of exact usage. My intent is simply to signal the general direction of my comments. For those whose sense of completeness is violated by mere allusion, the text of the footnote is set out below.

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Carolene Products*, 304 U.S. at 152 n.4 (citations omitted).

68. See Gunther, *supra* note 51, at 18-22. Gunther favored a means-oriented rationality review that focused on actual as opposed to conjectural legislative purposes. *Id.* at 20-21. I believe that my analysis of *Nordlinger* fits the Gunther model.

69. See Petitioner's Brief on the Merits at 38, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (No. 90-1912).

70. See *supra* note 41.

71. It reduced property taxes by \$7 billion in its first year. See Steven T. Lawrence, *Solving the Proposition 13 Puzzle: From Amador to Nordlinger—Judicial Challenges and Alternatives*, 24 PAC. L.J. 1769, 1775 (1993).

72. Citrin & Levy, *supra* note 34, at 10-11.

First, in Proposition 13 the homeowner/voters were casting a tax burden upon future homeowners that they did not intend to share themselves.<sup>73</sup> When we vote for a traditional property tax levy, such as a local school bond issue, or a tax cut, this is not the case. We can reasonably say to latecomers who might complain about the levy, "You have to pay the tax, but so do I. In some respects at least, when I voted on that bond levy I was thinking of your interests as well as mine." We can argue, in short, that the newcomer's interests were represented in the election by the existing homeowners.<sup>74</sup> This is an illustration of the concept of "virtual representation."<sup>75</sup>

Virtual representation is not as readily observable when we levy a tax that discriminates in favor of current homeowners and against later home purchasers. Suppose, for example, that Proposition 13 had completely exempted current homeowners, but not future homeowners, from paying property taxes on their homes. Would we say that those homeowners have the same interest in voting for or against Proposition 13 as those subsequent purchasers? Of course not. One might argue that my analogy is too extreme to be meaningful. But consider that year after year the Stephanie Nordlingers of California will pay three, four, or five times as much in property taxes as their neighbors. In some cases they may pay ten or twenty times as much in property taxes as their comparably housed neighbors.<sup>76</sup> Those existing homeowners who voted in the 1978 initiative on Proposition 13 had a different stake in the outcome than did the latecomers. Virtual representation is not easily found in such a circumstance.

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73. Of course, many decisions taken today will affect future generations who have no say in the matter. The government's deficit spending is a classic example of this. The difference with Proposition 13 lies in the fact that the California homeowners/voters were conferring a benefit upon themselves that accrues simultaneously with the detriment to the non-voting latecomer.

74. This includes the seller's interest since the sale price may have been reduced by the tax increase. The seller may not bear the tax in the same way under Proposition 13 since it discourages sales of homes in many cases and thus may have shrunk the supply of available homes sufficient to counter the effect of the tax increase on market prices.

75. See ELY, *supra* note 4, at 82-83 (discussing the historical roots as well as the failings and strengths of the concept of "virtual representation"). This historical approach to constitutional analysis has particular relevance to what Professor Ely calls "distributions" (as opposed to "constitutional entitlements"). "The constitutionality of most distributions thus cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question . . ." *Id.* at 135-36. In this analysis, Professor Ely draws upon the work of Robert Nozick. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 153-55 (1974). For a criticism of the theory of virtual representation, see Brilmayer, *supra* note 66, at 1310-15.

76. See *infra* part IV.

Over time the group of latecomers will be largely composed of people who had no vote when Proposition 13 was passed because they were minors or non-residents or both at the time of the vote. Who was representing those latecomers' interests at the time Proposition 13 was being voted upon? How does a group that by definition has no present active coherence (future homeowners) at the time of the vote get adequately represented in an initiative that isolates them as the target of that initiative?<sup>77</sup>

The unrepresentativeness of the vote on Proposition 13 takes on an even more rancorous odor in light of the changes in the democratic process sought to be implemented by Proposition 13. By its terms Proposition 13 requires a two thirds majority of "all members elected to each of the two houses of the Legislature" for the enactment of "any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation."<sup>78</sup> This provision, read literally, would seem to prohibit the use of the very mechanism that brought Proposition 13 into existence, that is, the voter initiative,<sup>79</sup> for future changes in property taxation. However, the California Supreme Court has ruled that the statutory initiative process was not overturned by this language.<sup>80</sup> Still it is clear that the supermajority requirement of Proposition 13 was an effort to insulate it from future changes. The

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77. Arguably, the California resident parents of those latecomers who were minors when Proposition 13 was passed would have considered their children's interests. Those persons who were California renters who planned to buy sometime in the future or who were California homeowners who planned to move within California also would have had some interest in voting against Proposition 13. But these interests were more inchoate and contingent than the immediate prospect of a 60% tax cut for all current homeowners coupled with an immediate permanent tax freeze. The fact is that discrimination against a group that will only exist in the future is inherently easier than discrimination against a presently constituted body of people because none of the voters are presently standing in the shoes of the intended victim. Doubtless, some of the California homeowners who voted for Proposition 13 subsequently became its victims. But in the main, the voters could reasonably anticipate that someone else would get stuck with the big tax bill if Proposition 13 passed.

78. CAL. CONST. art. XIII, § 3. It also prohibits "[all] new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property." *Id.* For the full text of this provision, see *supra* note 29.

79. See CAL. CONST. art. IV, § 1. In California, an initiative passes with a simple majority. See *id.* art. XVIII, § 4.

80. *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360 (Cal. 1991). In that case, the petitioners offered proof that the sponsors of Proposition 13 subscribed to the interpretation of Proposition 13 that foreclosed future use of the initiative power to amend it. See *id.* at 1363 n.2. But, the court ruled that an after-the-fact statement of intent was not binding on its determination of "how the voters understood the ambiguous provisions." *Id.*

existing homeowners were not only conferring a benefit upon themselves and a detriment upon others not fully represented, they were attempting to change the rules of the game to ensure that the late-comers would not change the rules when they arrived. The current homeowners were drawing up the ladder.

Changes in the procedures of democracy may be effectuated in a facially neutral manner and yet still cause us to suspect them.<sup>81</sup> This is certainly true when changes in that process intended to harden the status quo are coupled with creation of a new status quo that discriminates, as Proposition 13 does, against a group not fully represented in the process. In such cases "more exacting judicial scrutiny" of the discriminatory classification scheme is justified.

### 3. The *Allegheny* Decision

Although the Supreme Court has invalidated state taxing schemes on equal protection grounds infrequently, two of those rare decisions have come within the last decade. In 1985, in *Metropolitan Life Insurance Co. v. Ward*,<sup>82</sup> the Court struck down an Alabama taxing scheme that taxed out-of-state insurance companies at a higher rate than in-state insurance companies. In 1989, in *Allegheny Pittsburgh Coal Co. v. County Commission*,<sup>83</sup> the Court ruled that the practice of a West Virginia property tax assessor of assessing coal mining property according to acquisition-cost violated the equal protection rights of those taxpayers who were recent purchasers of coal property.

Of the two cases, the *Allegheny* decision is particularly striking because of its close resemblance to *Nordlinger*.<sup>84</sup> In *Allegheny*, the Webster County assessor assessed recently acquired property at its sale price while only minimally increasing the assessments of long-held property. This resulted in great disparities in assessments between properties of similar value.<sup>85</sup> This scheme of assessment was used by the assessor despite the fact that West Virginia law required that property be assessed according to its fair market value.<sup>86</sup> In essence, the West Virginia assessor had established a de facto acquisition-cost assessment scheme in contravention of West Virginia law.

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81. See Brilmayer, *supra* note 66, at 1310-15.

82. 470 U.S. 869 (1985).

83. 488 U.S. 336 (1989).

84. As will be discussed *infra* parts III.C-D, Justice Thomas and Justice Stevens did not believe that *Allegheny* properly could be distinguished from *Nordlinger*.

85. *Allegheny*, 488 U.S. at 341.

86. See W. VA. CONST. art. X, § 1.

However, the West Virginia Supreme Court had refused to overturn the complaining taxpayers' assessments because those assessments were not incorrect.<sup>87</sup> The appropriate remedy, the court opined, was for the complainants to seek increased assessments for the undervalued properties.<sup>88</sup>

The U.S. Supreme Court reversed, stating that, "the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings. The relative undervaluation of comparable property in Webster County over time therefore denies the petitioners equal protection of the law."<sup>89</sup> However, in apparent anticipation of the obvious implications its decision might be seen to have for Proposition 13, the Court took special note of the Webster County assessor's divergence from the requirements of state law.<sup>90</sup> It implied that a single assessor was not free to create classifications no matter how reasonable or unreasonable those classifications might be. Instead the assessor was bound by the classification scheme adopted by the state's legislature. The Court left open the question of whether a legislatively adopted acquisition-cost assessment scheme would survive equal protection scrutiny.<sup>91</sup>

To a property tax aficionado, the *Allegheny* decision seems quite unremarkable. After all, it merely reaffirmed what had been widely understood as the fair and proper system for assessing property for taxation. However, some constitutional scholars found the decision unsettling. Professor Robert Glennon described the decision as having "ominous" implications.<sup>92</sup> Professor William Cohen described the outcome in *Allegheny* as "startling."<sup>93</sup> Both recognized that *Allegheny*

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87. *Allegheny*, 488 U.S. at 342; see *In re 1975 Tax Assessments Against Oneida Coal Co.*, 360 S.E.2d 560 (W. Va. 1987), *rev'd sub nom. Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989).

88. *In re 1975 Tax Assessments*, 360 S.E.2d at 565.

89. *Allegheny*, 488 U.S. at 346.

90. *Id.* at 345.

91. *Id.* at 344 n.4. The Court's effort to explain its decision in *Allegheny* in a way that distances that decision from Proposition 13 has been the object of commentary. See Glennon, *supra* note 51, at 293-302. The Court's subsequent effort in *Nordlinger* to distinguish its decision in *Allegheny* was a matter of some contention within the Court. Indeed, Justice Thomas' concurrence in *Nordlinger* is largely devoted to arguing that *Allegheny* is indistinguishable and thus should be overruled. See *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2336-41 (1992) (Thomas, J., concurring). Conversely, Justice Stevens' dissent argues that *Allegheny* requires the Court to invalidate Proposition 13. See *id.* at 2342-44 (Stevens, J., dissenting). Both the Thomas concurrence and the Stevens dissent are discussed *infra* parts III.C-D.

92. Glennon, *supra* note 51, at 262.

93. Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 89; see also John H.

held implications for the validity of Proposition 13.<sup>94</sup> Professor Cohen, especially, indicated a preference for not extending the Court's decision in *Allegheny* to invalidate Proposition 13.<sup>95</sup> The basis for this preference seems to be a conviction that the overturning of Proposition 13 by the Court would require that the members of the Court substitute their own views of fairness for that of the citizens of California. Thus, for example, in discussing Chief Justice Bird's dissent in the case in which the California Supreme Court upheld Proposition 13, Professor Cohen wrote that: "[h]er error was in insisting that the United States Constitution required her to trump the California Constitution with her own conceptions of fairness."<sup>96</sup> Though Professor Cohen recognized that "issues of fairness are crucial to equal protection analysis,"<sup>97</sup> he asserted that "[t]he central point of 'rational basis' scrutiny, however, is that debatable propositions about fairness are for legislatures."<sup>98</sup> Professor Cohen's error, I will argue *infra*, lies in perceiving the acquisition value assessment scheme as

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Ely, *Another Spin on Allegheny Pittsburgh*, 38 UCLA L. REV. 107 (1990); Barbara Paley, Note, *Federal Accountability for Local Tax Assessment Schemes—An Equal Protection Overlay: Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 43 TAX LAW. 457 (1990); John Vihta, Comment, *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia: The Supreme Court Gives "Welcome Stranger" Tax Assessments a Cold Reception*, 56 BROOK. L. REV. 1383 (1991).

94. Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 91, 97-99; Glennon, *supra* note 51, at 293.

95. Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 99.

96. *Id.*

97. *Id.* at 98.

98. *Id.* at 99. Professor Glennon's concern about the *Allegheny* decision is more frankly political. He fears the decision may portend an effort by the Court to stand as "wealth's bulwark against income redistribution." Glennon, *supra* note 51, at 275. Professor Glennon's concern, it seems to me, arises from too narrow a conception of how the *Allegheny* decision might be used by others. Equal protection analysis can cut in favor of the less wealthy as easily as for the wealthy. Indeed it seems to me that in the end it is the less wealthy who would benefit most from a rigorous enforcement of equal protection standards. For an illustration, see *Gillis v. Yount*, 748 S.W.2d 357 (Ky. 1988) (holding unconstitutional, under a state uniformity clause, a property tax statute that separately classified unmined coal from other real property in order to largely exempt it from taxation). The *Gillis* decision represented a significant victory for rural counties and school districts since unmined coal was a major portion of their property tax bases. Though Glennon is cognizant of the two edged aspect of *Allegheny*, he still asserts that "*Allegheny* surely serves conservative political ends." Glennon, *supra* note 51, at 276. In my view there is nothing inherently political in the principle established by *Allegheny* unless we view a requirement that like cases be treated alike as political dogma. However, his instinct that the courts are more likely to use the equal protection rationale in favor of conservative political ends is supported by the failure to overturn Proposition 13 in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). *Nordlinger* was clearly a victory for established wealth.

representing a supportable conception of fairness.<sup>99</sup> I will argue that there are recognized standards by which we gauge fairness in matters of taxation and that Proposition 13 does not meet those standards.

But, even if some relatively objective standards of fairness apply to Proposition 13, the application of those standards still requires judgments that are inherently contextual. In order to judge whether a rule is reasonable, we have to see the rule in operation.<sup>100</sup> We need to understand how important the rule is. Does it affect many people or only a few? Does it alter the entire legal system in which it is employed or only one small area of the system? To be rational, the classification must forward a public good that outweighs the harm it may cause those who are disadvantaged by the classification.<sup>101</sup> To judge this, one must see what the classification's effect is. This brings us to a more direct consideration of *Nordlinger v. Hahn*.

### III. THE CASE OF *NORDLINGER V. HAHN*

#### A. *The Facts*

Stephanie Nordlinger bought a home in November of 1988. It was a small home in a neighborhood of tract homes in the Baldwin Hills section of Los Angeles. She paid \$170,000 for the home which was assessed by the Los Angeles County Tax Assessor at \$170,100 and her first full year property tax bill was \$1,701.<sup>102</sup> It was undisputed that her property tax bill was roughly five times greater than the property tax bills received by those of her comparably housed neighbors who had owned their homes since 1975.<sup>103</sup> Nor was it

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99. I recognize that, in this postmodern era, it may seem absurd to contend that such things as generally accepted notions of fairness exist. Recent jurisprudential writing asserts the improbability of "value consensus." Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 375 (1992). Nonetheless, I will argue that value consensus does exist in the field of taxation sufficient to establish the unfairness of acquisition-cost assessment schemes.

100. Farrell, focusing on legislative purpose, approaches this issue in this fashion, "[t]he effects of a law are an important starting point in identifying its purpose." Farrell, *supra* note 51, at 33.

101. *Id.* at 45.

102. *Nordlinger*, 112 S. Ct. at 2330. Under Proposition 13, real property is assessed at the value of the property at the time it is acquired by the owner. *Id.* at 2329. Also, it will be recalled that Proposition 13 capped property tax rates. The maximum rate is one percent of assessed value. *Id.* Thus, one percent of \$170,100 is \$1,701.

103. *Id.* at 2330.



disputed that "[t]he general tax levied against her modest home is only a few dollars short of that paid by a pre-1976 owner of a \$2.1 million Malibu beachfront home."<sup>104</sup> Additional evidence was introduced at trial to show that other, even greater, tax burden disparities existed in other parts of Los Angeles with respect not only to owner occupied residential property but also with respect to apartment buildings and commercial and industrial income-producing properties.<sup>105</sup> In short, Proposition 13 had done just what it was designed to do, shift the tax burden to more recent buyers of property.

I am certain this short synopsis of the facts cannot do justice to Stephanie Nordlinger's story. Nor can it adequately picture the millions of other stories that have been played out under the rules set down by Proposition 13.<sup>106</sup> But I hope it will be enough to forward the reader's understanding of what follows.

### B. *The Law According to the Majority*

#### 1. The Argument the Court Declined to Hear

Stephanie Nordlinger argued that Proposition 13 should be subject to a higher level of scrutiny than is afforded by the rational basis test because it violated her constitutional right to travel.<sup>107</sup> This argument relied heavily on the Court's decision in *Zobel v. Williams*<sup>108</sup> where the Court struck down an Alaska oil revenue distribution scheme that based the amount of one's distribution on length of residency. However, the *Nordlinger* Court believed that the peti-

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104. *Id.*

105. *Id.* at n.2.

106. I suspect that a fascinating article could be written about Proposition 13 utilizing a legal storytelling approach. However, this is not that article. Legal storytelling addresses the law from the perspective of individual narratives. From this perspective, each case is viewed as important not for the rule that arises from it but because some person's life is bound up in that case and its outcome. Moreover, legal storytelling need not be concerned with "formal" cases at all. Legal storytelling is a form of "rebellion against abstraction." Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (part of a legal storytelling symposium contained in pages 2073 through 2494 of volume 87). The rise of legal storytelling has recently been chronicled. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (arguing that while narratives can be useful in legal scholarship, legal storytelling should also contain a significant analytical component). For a response to Farber & Sherry, see Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

107. Petitioner's Brief on the Merits at 39-49, *Nordlinger* (No. 90-1912).

108. 457 U.S. 55 (1982).

tioner lacked standing to raise the right to travel issue because she had been a Los Angeles resident prior to the acquisition of her current home.<sup>109</sup> My reason for mentioning the right to travel issue here is to alert the reader to the possibility that the issue will be revived. The Court's ruling on standing invites a further test of Proposition 13 by a home buyer who has recently moved to California from another state.

In rejecting Nordlinger's only argument for heightened scrutiny, the Court laid the groundwork for using a low intensity rational basis review. It did not address, nor was it asked to address, the procedural and representation arguments for rationality review with "bite" set out earlier in this Article.<sup>110</sup>

## 2. The Rational Basis Test

In describing the rational basis test in *Nordlinger*, Justice Blackmun, writing for the majority,<sup>111</sup> set out the standard of review in this fashion:

The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.<sup>112</sup>

To this general standard, the opinion then adds the gloss that "[t]his standard is especially deferential in the context of classifications made by complex tax laws. '[I]n structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.[']'"<sup>113</sup>

The opinion further suggests that the case simply raises an ordinary classification question involving new owners and old owners.

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109. *Nordlinger*, 112 S. Ct. at 2332.

110. *See supra* part II.C.2.

111. The majority included all of the Justices except Justice Stevens. Justice Thomas concurred in part and concurred in the judgment. Justice Stevens' vigorous dissent is discussed *infra* part III.D.

112. *Nordlinger*, 112 S. Ct. at 2332 (citations omitted).

113. *Id.* (citations omitted).

This approach is interesting because typically questions of classification in the context of property taxation relate to classification based on the nature of the underlying property rather than on the nature of its owner. Thus, for instance, legislatures commonly distinguish between real property and personal property for property tax purposes. Typically, all residential real property is deemed to belong to the same class. By looking to the owners as the subjects of classification in *Nordlinger*, the Court is shifting attention away from the fact that properties within the same class, for example, nearly identical residential properties resting side by side, are being treated differently from one another. In addition, the opinion assumes that there is a classification scheme at work here that divides people into two classes; new owners and old owners. In reality, however, Proposition 13 divides people into a myriad of classes. Every homeowner is in the same class with those other homeowners who paid the same amount for their homes, whatever those homes may be worth now.<sup>114</sup> Thus, Stephanie Nordlinger is in the same class with the owner of the Malibu mansion because her original cost was the same. The Court's treatment of the classification scheme as creating two classes is but one example of the artful way in which Justice Blackmun's opinion seeks to fit the case into standard equal protection analysis while also downplaying the discriminatory aspect of Proposition 13.

After framing the issue as a standard classification matter, Justice Blackmun points out that:

As between newer and older owners, Article XIII A does not discriminate with respect to either the tax rate or the annual rate of adjustment in assessments. Newer and older owners alike benefit in both the short and long run from the protections of a 1% tax rate ceiling and no more than a 2% increase in assessment value per year.<sup>115</sup>

The importance of this feature of Proposition 13 to Justice Blackmun and the other members of the majority is that it shows the general benevolence of Proposition 13 as it helps everyone. Only in one respect is the law discriminatory. "New owners and old owners are treated differently with respect to one factor only—the basis on which

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114. Another way to look at Proposition 13 is that it creates a new class of taxpayers every day, i.e., each buyer is in a class with all other same-day buyers. The problem of isolating a coherent classification scheme in Proposition 13 was pointed out to the Court in the Petitioner's reply brief. See Reply Brief of Petitioner at 5-7, *Nordlinger* (No. 90-1912).

115. *Nordlinger*, 112 S. Ct. at 2332.

their property is initially assessed.”<sup>116</sup>

Justice Blackmun seems to be implying that the amount of discrimination involved is small because it involves only one factor. But, of course, the factor involved is a vital factor in determining the amount of one's tax liability—the tax base. Using different tax bases for similarly situated taxpayers is as effective in altering the balance in their respective tax liabilities as using different rates. The legal and effective rate of tax paid by Ms. Nordlinger was one percent. The legal rate paid by the owner of the \$2.1 million dollar Malibu mansion referred to earlier was also one percent, but the effective rate, as measured by fair market value, was less than one tenth of one percent.

### 3. The Court's Reasoning and a Brief Critique

Now we have arrived at the crux of the matter. The taxing scheme contains one clearly discriminatory element, the initial tax base. Does that discriminatory element have a rational basis? The Court thought it did on two grounds. The Court's first rationale stated:

[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability. The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, 'mom-and-pop' businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the Article XIII A assessment scheme rationally furthers this interest.<sup>117</sup>

There is a legitimate aspect to this rationale, but the legitimate aspect of the rationale does not justify the discriminatory aspect of Proposition 13. As already mentioned, one of the infirmities of the property tax is its failure to necessarily coincide with the taxpayer's ability to pay. In extreme cases precipitous rises in property taxes may force some taxpayers to sell their property in order to pay the taxes on the property. But this unhappy eventuality is largely avoidable without any discrimination against newer owners by capping the revenue raising capacity of the property tax. One such system employs a "compensating tax rate" which declines as assessments in-

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116. *Id.* at 2332-33.

117. *Id.* at 2333 (citations omitted).

crease so that, in the aggregate, taxes do not increase beyond a specified percent per year.<sup>118</sup> This system has been employed in Kentucky for many years.<sup>119</sup> A less theoretically sound approach would be to freeze all assessments.<sup>120</sup> For example, in the context of Proposition 13, property sold after 1976 could have been allowed to keep its 1976 assessment. Even a home built after 1976 could have been assessed at the value it would have had if it had existed in 1976.<sup>121</sup> However, the compensating tax rate is a much superior approach

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118. This can be readily illustrated: Suppose that last year the property tax rate was one percent and aggregate assessments totalled \$100 billion. Thus, last year's revenue yield was \$1 billion (.01 x 100,000,000,000 = 1,000,000,000). If aggregate assessments for the current year equal \$110 billion, the compensating tax rate necessary to maintain a revenue freeze would be slightly more than nine-tenths of one percent (.0090909 x 110,000,000,000 = 1,000,000,000).

This sort of revenue freeze will not freeze every individual's tax liability because some properties will outperform the market and some properties will appreciate less rapidly than the market as a whole. But all property owners are insulated from tax increases arising solely from generalized inflation. Even the person who owns a home that outperforms the market is not likely to face a tax increase sufficient to endanger his or her economic well-being. Indeed, that person is probably more than compensated for any tax increase by the increased economic benefit of owning such valuable property.

The compensating tax rate in the property tax context is comparable to the approach taken in the federal income tax of indexing tax brackets for inflation. *See* I.R.C. § 1(f) (West Supp. 1993). Although I believe that Ms. Nordlinger's case was presented reasonably forcefully, I was struck by the failure of any of the seventeen briefs filed by the parties and amici to mention the availability of a compensating tax rate as a nondiscriminatory mechanism to control tax increases fueled by inflation. It is possible that the Court would have been less lenient in its view of Proposition 13 if it had been better informed on the availability of non-discriminatory tax freezes to the people of California.

119. *See* KY. REV. STAT. ANN. § 132.010(6) (Michie/Bobbs-Merrill 1991). Utah has a similar system. *See* UTAH CODE ANN. §§ 59-2-918 to -924 (1992). For a brief description of Utah's system, see Gary R. Thorup, *Nordlinger and Friends, Issues and Acquisitions*, 3 ST. TAX NOTES 864, 865 (1992).

120. Nordlinger's brief makes this argument. *See* Petitioner's Brief on the Merits at 36, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (No. 90-1912). However, as the Governor's amicus brief points out, such a system would create its own inequities. *See* Brief of Governor Pete Wilson et al. as Amici Curiae in Support of Respondents at 23, *Nordlinger* (No. 90-1912). This would occur because, over time, as properties appreciated at different rates, horizontal equity would dissipate. However, to the extent that inflation was generalized, a general assessment freeze would maintain rough equality while insulating homeowners from tax increases.

121. This would involve sort of a reverse appraisal. For instance, the appraiser would have to take a home built in 1980 and answer the question: what would this house have been appraised at in 1976? Clearly, this involves a legal fiction, i.e., the pretense that a home built in 1980 was actually in existence in 1976. But legal fictions are commonplace in tax law, and are legitimate means of making the law function fairly. *See generally* John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. COLO. L. REV. 1 (1993).

because of its ability to maintain assessment equality as values change at different rates while also capping individual tax liabilities to the extent of inflation.

The simple fact is that the Court could not justify the discriminatory aspect of Proposition 13 by merely contending that the state has a legitimate interest in preventing people from being forced to move by higher property taxes fueled by inflation. To justify the discriminatory aspect of Proposition 13 the Court was forced to contend that the state has a legitimate interest in using the property tax to *actively discourage* people from moving. This, it seems to me, is plainly wrong. What reason does the state have for wanting to force people to stay in their homes when they genuinely wish to leave? More likely, the state has an interest in enhancing the mobility of people who wish or need to move. Indeed in the income tax law, the federal government, California and most other states have explicitly agreed to ease the tax burden of moving by allowing gain non-recognition on the sales of homes and by making moving expenses deductible.<sup>122</sup> As a simple matter of reason, it is socially desirable to allow people the freedom to move in order to be closer to their jobs or in order to obtain better jobs. But Proposition 13 establishes a disincentive to move because when the taxpayer buys a new home, the old low assessment is replaced by a new high assessment even if the new home is worth no more than the old home. The Court's justification for this disincentive seems pathetically thin once it is divorced from its reliance on the freeze component of Proposition 13.

The Court, again displaying an artful use of language, describes Proposition 13 as "permitting older owners to pay *progressively less* in taxes than new owners."<sup>123</sup> This use of the concept of progressivity is ironic when one considers the fact that Proposition 13 is likely to render the property tax an extremely regressive tax.<sup>124</sup>

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122. See I.R.C. §§ 217, 1034 (1988); CAL. REV. & TAX. CODE §§ 18031, 18044 (West 1983); James Charles Smith & Walter Hellerstein, *State Taxation of Federally Deferred Income: The Interstate Dimension*, 44 TAX. L. REV. 349, 349 (1989). Smith & Hellerstein write:

Most states that impose income taxes conform their levies to the federal model. Consequently, when income is realized but not recognized at the federal level—for example, when a taxpayer reinvests the gain from the sale of her former residence in a new residence . . . —states typically follow the federal rule in deferring recognition of that income.

*Id.* (footnotes omitted).

123. *Nordlinger*, 112 S. Ct. at 2333 (emphasis added).

124. The terms progressive and regressive have several meanings depending on the con-

This regressivity was illustrated by the fact that Stephanie Nordlinger was paying as much in property taxes on her small tract home as the owner of a Malibu mansion was paying on his home.<sup>125</sup> Is that rational?

As already noted the chief analytic failure of the Court's opinion is its effort to justify the discriminatory component of Proposition 13 by reference to benefits arising from its tax freeze component without recognizing that the two components are severable. But the Court's justification of Proposition 13 is also flawed by a certain tunnel vision. That is, it focuses on protection of a small segment of the real property owning population, lower-income families and "mom-and-pop" businesses as justification for a property tax system that is designed chiefly to benefit the middle and upper classes.<sup>126</sup> Can we really argue with conviction that every millionaire homeowner residing in the state of California in 1978 was entitled to a permanent tax advantage over subsequent home buyers in order to protect lower income families from gentrification of their neighborhoods? Ultimately

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text in which they are employed. In its usual sense, a progressive tax is one in which the rate of tax climbs as the tax base increases. The primary tax where this concept is utilized is the income tax. See Mark S. Stein, *Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of The Uneasy Case*, 12 N. ILL. U. L. REV. 373, 373-74 (1992). The current federal income tax employs five rates for individuals: 15%, 28%, 31%, 36% and 39.6%. For married taxpayers filing jointly, these rates kick in at taxable income levels of \$1,000, \$32,450, \$78,400, \$140,000, and \$250,000 respectively. See I.R.C. § 1(a) (West Supp. 1993). Other provisions may slightly alter the effects of section 1(a). See I.R.C. § 1(f), (h) (West Supp. 1993). Thus, a progressive income tax levies a higher rate of tax at higher income levels. Property taxes and consumption taxes are more typically "flat" or proportional taxes because only one rate is applied to the entire tax base. However, both property taxes and consumption taxes can be rendered at least somewhat progressive by means of exemptions and exclusions.

125. It will be recalled that Ms. Nordlinger paid \$1,701 in taxes, representing one percent of her home's \$170,100 assessed value. The Malibu mansion owner also paid \$1,700 in property taxes, but on a home worth \$2.1 million. *Nordlinger*, 112 S. Ct. at 2330. The effective tax rate for the mansion owner was less than one tenth of one percent. *Id.*

Even this example may understate the regressiveness inherent in Proposition 13 because it does not consider the role of debt in assessing taxes. If Ms. Nordlinger's home was subject to a large mortgage while the Malibu mansion was owned free and clear, the regressiveness of the property tax as a tax on wealth is intensified. As a matter of logic, the longer a home has been owned by the same person, the greater the likelihood that it will not be subject to a mortgage or that the mortgage balance will be relatively small. As any homeowner knows, typically mortgages run for terms of either 15 years or 30 years. Proposition 13 was enacted approximately 15 years ago. Of course, the failure of the property tax to function fairly as a tax on wealth is not entirely the fault of Proposition 13. See *supra* part II.A.2. But that failing is magnified by Proposition 13.

126. As discussed later, Justice Stevens made this point in his dissent. See *infra* part III.D.

the Court's reasoning rings false. It is an argument made up for lack of anything better to say. It is a rationalization. The State has no legitimate interest in making its citizens prisoners in their own homes.

The Court's second rationalization in support of the discriminatory element of Proposition 13 is significantly more doubtful than the first. Justice Blackmun wrote:

Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to "lock in" to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.<sup>127</sup>

Note that in its second rationale the Court has again raised the ability to pay issue already acknowledged as a problem with all property taxes. Allow me to repeat that the ability to pay problem can be solved with a compensating tax rate that declines as assessments increase. There is no need to discriminate between newer and older buyers in order to solve the ability to pay problem.<sup>128</sup> But what else

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127. *Nordlinger*, 112 S. Ct. at 2333.

128. *Nordlinger* argued that Proposition 13 has no significant connection to ability to pay because what one can pay for a home at one point in time has no necessary relation with one's income level at a later time. See Petitioner's Brief on the Merits at 32, *Nordlinger* (No. 90-1912).

Rather than being based on ability to pay, by its design Article XIII A systematically *ignores* that critical factor. Long-time owners of the most luxurious mansions in the wealthiest neighborhoods have become so advantaged by Article XIII A that they now pay lower taxes than recent buyers of humble bungalows in the poorest parts of Los Angeles County.

*Id.* at 24.



is the Court saying? In part it seems to be contending that a taxpayer has a "reliance interest" in the property tax system that entitles her to expect that her taxes will not increase. I confess I have never heard of such a reliance interest before. Moreover, the Court's contention that such a reliance interest exists seems to contradict reality. Do those persons first employed in 1987 have a right to insist that their income can never be taxed at a higher marginal rate than twenty-eight per cent, the top marginal rate for that year? Of course not. A taxpayer has no right to insist that the taxing scheme in effect on his date of birth or on some other date is the only one that may apply to him throughout his life. Tax laws change; sometimes the changes are even retroactive. The mere fact of change in the law by itself never entitles the taxpayer to object to the law.

It is important to recognize that multiple tax bases like those employed by Proposition 13 are no different in effect than multiple tax rates. Suppose that California had enacted a property tax rate scheme that utilized market value assessments but provided that rates would increase by one per cent each year but only for buyers during the year in question. Thus, for example, in 1978 the tax rate might have been one percent, but for those persons who purchased their homes in 1979 the rate would be two percent. Those persons who purchased their homes in 1980 would pay at a rate of three percent. This could go on year after year. The effects of such a system would resemble the effects of Proposition 13 with the difference being that the newcomers pay more in taxes than their comparably housed neighbors because of differences in rates rather than because of differences in bases. In short, the discriminatory approach is more forthright, but there is no logical difference in the outcome or in the justifications that might be offered for the outcome. Just like the *Nordlinger* majority, we might justify such a scheme on the basis of reliance interest analysis. The people who bought in 1978 relied on having a one percent tax rate. Those persons who bought in 1990 knew in advance that they would pay a twelve percent property tax. They could judge whether or not they could afford it.

But is such reasoning satisfactory? To me it rings hollow and cold. It is the reasoning of the smug, the self-satisfied, the well off.<sup>129</sup> We can understand this better if we reduce the level of ab-

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129. In this sense it is typical of some so-called "neutral" jurisprudence, that is, it is laden with hidden bias favoring the established over the disadvantaged. For a recent interesting treatment of this problem see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality*

straction by considering who is hurt by such a scheme. The short answer is that those persons who do not currently own homes (but who hope to) are those most harmed by such a system. Included in this group are young people, people in transition, the working poor,<sup>130</sup> and, perhaps, racial minorities. I include racial minorities as probable victims of Proposition 13 because historically people of color have had less success than their white economic counterparts in obtaining the financing necessary to purchase homes.<sup>131</sup> But there is some evidence that this form of discrimination is declining.<sup>132</sup> Thus, if blacks in California ultimately succeed in becoming homeowners in a percentage equalling the white percentage of home ownership, it will be in spite of Proposition 13. Moreover, black homeowners will bear a comparatively greater tax burden than their white counterparts who were able to purchase homes earlier because they did not have to overcome the barrier of racial discrimination.<sup>133</sup>

Just as it is worthwhile to consider who is harmed by Proposition 13 it is worthwhile to consider who is helped by it. The answer, of course, is the existing homeowners.<sup>134</sup> This group is certain to include nearly all wealthy and upper middle class persons of a mature age.<sup>135</sup> It will also include a large portion of the mature middle

and *Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993).

130. The Court grudgingly grants this point late in its opinion but then excuses itself from intervening by reference to the need to allow the democratic process to run its course:

Petitioner and *amici* argue with some appeal that Article XIII A frustrates the "American Dream" of home ownership for many younger and poorer California families. . . .

Time and again, however, this Court has made clear in the rational basis context that the "Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."

*Nordlinger*, 112 S. Ct. at 2335-36 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

131. For an enlightening description of the difficulties blacks have traditionally faced in obtaining mortgages see Paulette Thomas, *Blacks Can Face a Host of Trying Conditions in Getting Mortgages*, WALL ST. J., Nov. 30, 1992, at A1, A8-A9.

132. *Id.* at A9.

133. It is worth noting that while 66% percent of whites surveyed favored Proposition 13 at the time of its enactment, only 18% of blacks were in favor of it. Citrin & Levy, *supra* note 34, at 9. Clearly, most blacks perceived Proposition 13 to be against their self-interest.

134. Not only do these homeowners pay property taxes at lower effective rates, it has been argued that Proposition 13 also enhanced the value of their homes. See Sexton et al., *supra* note 39, at 96.

135. It is worth noting that Sears & Citrin found that the strongest supporters of Proposition 13 were "white, middle-aged, higher-income men, especially those from Southern California." SEARS & CITRIN, *supra* note 30, at 220.

class.<sup>136</sup> As mentioned earlier Proposition 13 was a "revolt of the haves."<sup>137</sup> Moreover, it is worthy of our understanding to see that among the class of existing homeowners, Proposition 13 discriminates more heavily in favor of those who grow wealthier fastest. Two simple examples will illustrate this point.

First, suppose two California taxpayers, Ron Reaganomics and Sylvia Smalltown, purchase homes for the same amount in the same year. Ron pays \$1 million and Sylvia pays \$1 million. In their first year of ownership they each pay property tax in California at legal and effective tax rates of one percent. Ron, thus, pays ten thousand dollars in property tax and Sylvia pays ten thousand dollars in property tax. Suppose that five years later Ron's home has tripled in value while Sylvia's home has doubled in value. From a market value perspective, Ron's home, still assessed at acquisition cost, is underassessed by \$2 million while Sylvia's home is underassessed by \$1 million. Ron has \$1 million more of wealth escaping taxation as compared to Sylvia. Thus, even as between persons nominally of the same class, Proposition 13 discriminates in favor of the wealthier person.

In our second illustration, let's assume that Ron buys a home for \$1 million and Sylvia buys a home for one hundred thousand dollars. Even if we assume that both homes appreciate at the same rate, Ron will derive more benefit from Proposition 13 than will Sylvia. For example, if both of their homes double in value, Sylvia will have one hundred thousand dollars of wealth escaping taxation while Ron will have \$1 million of wealth escaping taxation. From a market value perspective, Ron has nine hundred thousand dollars more wealth escaping taxation than does Sylvia.

The conclusion is nearly inescapable that Proposition 13 has a disparate impact based on age, mobility,<sup>138</sup> social class and probably

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136. The Court grants this assertion but then offers the defense that this in itself is not grounds for overturning Proposition 13. The Court states:

Certainly, California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary democratic processes may be unlikely to prompt its reconsideration or repeal. Yet many wise and well-intentioned laws suffer from the same malady. Article XIII A is not palpably arbitrary, and we must decline petitioner's request to upset the will of the people of California.

Nordlinger v. Hahn, 112 S. Ct. 2326, 2336 (1992) (citations omitted).

137. SEARS & CINTRIN, *supra* note 30, at 220.

138. Sexton notes that persons who move frequently are hurt most by Proposition 13. Sexton et al., *supra* note 39, at 96.

on race as well. The class-based discrimination is particularly prominent because of the existence of the rules allowing parents to pass their low property tax assessments along with the family residence on to their children. Moreover, it stands to reason that the offspring of the wealthy will be able to buy homes at younger ages than the offspring of the poor because of parental gifts and loans and because of the other economic and educational advantages that flow from an affluent upbringing. Proposition 13 is a taxing scheme that will always favor, as a class, wealthier individuals over the less wealthy. Can the neighborhood stability and reliance interest analysis of Justice Blackmun really justify such discrimination? I do not believe that it can, but I will save the rest of my argument until the other opinions of the Court have been described.

### C. Justice Thomas' Concurrence

Justice Thomas agreed with the majority's conclusion that Proposition 13 was rationally based but argued that this result could not be squared with the Court's decision in *Allegheny*.<sup>139</sup> In his view *Allegheny* should be overruled.<sup>140</sup> He reasoned that the major distinction between *Nordlinger* and *Allegheny* was that California's acquisition value assessment scheme was based on state law while the West Virginia assessor's acquisition value assessment scheme conflicted with state law.<sup>141</sup> This distinction, he argued, could not justify different outcomes in the two cases because a violation of state law does not establish a violation of the Equal Protection Clause.<sup>142</sup> On this last point Justice Thomas echoed the views of several expert commentators.<sup>143</sup>

Though the view proffered by Justice Thomas may have some merit, for present purposes it is only necessary to recognize that Justice Thomas' opinion adds nothing to the debate concerning the rationality of an acquisition-cost assessment scheme.<sup>144</sup> His focus

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139. *Nordlinger*, 112 S. Ct. at 2336 (Thomas, J., concurring).

140. *See id.* at 2341.

141. *Id.* at 2339-40.

142. *Id.* at 2340 (citing *Snowden v. Hughes*, 321 U.S. 1, 64 (1944)).

143. *Id.* at 2340-41. Justice Thomas cites Professors Glennon, Cohen, and Ely on this point. *See* Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 93-94; Ely, *supra* note 93, at 108-09; Glennon, *supra* note 51, at 268-69.

144. One might be tempted to chastise Justice Thomas for his insensitivity to the class and race discrimination issues inherent in Proposition 13. After all, he is a man of color who grew up in poverty. Some might well contend that he has a special obligation to serve the

was on another aspect of the case, and it will not be pursued here any further.

#### D. Justice Stevens' Dissent

Justice Stevens began his dissent by taking note of the phenomenal appreciation in California real estate during the 1970s and 1980s and by describing the phenomenal disparities in tax liabilities this appreciation has wrought in conjunction with Proposition 13.<sup>145</sup> Properties appreciated tenfold in value in a decade.<sup>146</sup> Consequently, some persons pay ten times as much in property taxes as comparably housed neighbors because of different purchase dates. In Stephanie Nordlinger's case, she paid almost five times as much in property taxes as her tract home neighbors.<sup>147</sup> The early purchasers of California real estate are referred to by Justice Stevens as "the Squires" as a way of emphasizing their preferential status under Proposition 13.<sup>148</sup> This medieval sobriquet is particularly appropriate because of the rules allowing the transfer of the low property tax assessment from parent to child for generation after generation.

Like Justice Thomas, Justice Stevens found *Nordlinger* indistinguishable from *Allegheny*.<sup>149</sup> But unlike Justice Thomas, he concluded from this that Proposition 13 could not withstand Equal Protection analysis. In fact, in Justice Stevens' view "[i]f anything, the inequality created by Proposition 13 is constitutionally more problematic because it is the product of state-wide policy rather than the result of an individual assessor's mal-administration."<sup>150</sup>

Justice Stevens took the view that Proposition 13 was "palpably

interests of the poor and of racial minorities. See, e.g., A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992). However, it is my conviction that Justice Thomas's obligation to the poor and oppressed is no greater or less than that of any other Supreme Court Justice. That is not to say that his obligation is a small one. But, in my view, placing a greater burden on Justice Thomas in such matters is a way of excusing the lack of empathy of the other Justices. We should not excuse or forgive an upper class, white male Supreme Court Justice for his insensitivity to the interests of those who differ from him in race or social class. His insensitivity is a failing, not simply a biologic or social fact. If Justice Thomas has displayed an insensitivity to the plight of the poor and oppressed, so has Justice Blackmun.

145. *Nordlinger*, 112 S. Ct. at 2341 (Stevens, J., dissenting).

146. *Id.*

147. *Id.* In 1989, while Nordlinger's neighbors paid an average of less than \$400 in taxes, Nordlinger paid \$1,700. *Id.*

148. *Id.*

149. *Id.* at 2343.

150. *Id.*

arbitrary” since acquisition value classification rests on nothing more than a number that may now have no relevance to any reasonable scheme of taxation.<sup>151</sup> He wrote:

Under Proposition 13, a majestic estate purchased for \$150,000 in 1975 (and now worth more than \$2 million) is placed in the same tax class as a humble cottage purchased today for \$150,000. The only feature those two properties have in common is that somewhere, sometime a sale contract for each was executed that contained the price “\$150,000.”<sup>152</sup>

He argued that a classification scheme must have a rational basis independent of merely advancing the interests of a favored class of persons. Quoting *Williams v. Vermont*,<sup>153</sup> he wrote “[t]he classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps.”<sup>154</sup> He then argued that the reasons offered by the majority for acquisition value classification were too far removed from those whom the majority claimed it was intended to benefit. “Proposition 13 sweeps too broadly and operates too indiscriminately to ‘rationally further’ the State’s interest in neighborhood preservation.”<sup>155</sup> The fact that some persons within the favored group might need protection from tax increases simply could not justify a “state-wide, across-the-board tax windfall for *all* property owners and their descendants.”<sup>156</sup>

Justice Stevens flatly denied the majority’s argument that earlier landowners had a reliance interest in lower assessments. In fact, he asserted that prior to the enactment of Proposition 13 many purchasers must have hoped that their property would appreciate in value even though they knew that their assessments would rise accordingly.<sup>157</sup> He noted that, in a sense, Proposition 13 created a reliance interest in a fixed and low assessment. But, he argued, this could not justify its enactment since it “simply restates the effects of Proposition 13.”<sup>158</sup> As for the point made by the majority that later purchasers know in advance that they will bear a greater tax burden than earlier purchasers, Justice Stevens asserted that this “does not answer

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151. *Id.* at 2344.

152. *Id.*

153. 472 U.S. 14, 27 (1985) (citing *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966)).

154. *Nordlinger*, 112 S. Ct. at 2344.

155. *Id.* at 2345.

156. *Id.*

157. *Id.* at 2346.

158. *Id.* at 2347.

the critical question: Is it reasonable and constitutional to tax early purchasers less than late purchasers when at the time of taxation their properties are comparable?"<sup>159</sup> In his own view:

[I]t is irrational to treat similarly situated persons differently on the basis of the date they joined the class of property owners. Until today, I would have thought this proposition far from controversial. . . . Similarly situated neighbors have an equal right to share in the benefits of local government. It would obviously be unconstitutional to provide one with more or better fire or police protection than the other; it is just as plainly unconstitutional to require one to pay five times as much in property taxes as the other for the same government services.<sup>160</sup>

Unlike the rather mechanical opinions of Justice Blackmun and Justice Thomas, Justice Stevens focuses his arguments upon the concept of fairness. He asks: how can we justify such strikingly unequal treatment of similarly situated persons?; how can we justify such favored treatment for people based on a number that appeared in a contract more than fifteen years ago? Stevens' questions go unanswered by the majority because there is no truly persuasive answer.<sup>161</sup> In the end we are left with Professor Cohen's assertion that debatable questions of fairness should be left to the legislature rather than to the courts, and that the unfairness of Proposition 13 is a debatable matter.<sup>162</sup> To his credit, Professor Cohen sees Proposition 13 as creating "considerable unfairness."<sup>163</sup> But, apparently, he sees his own judgment in the matter as an insufficient basis for belief in the unconstitutionality of Proposition 13.<sup>164</sup> It is time to consider whether Professor Cohen's modesty is well founded.

#### IV. IS INJUSTICE RATIONAL?

"The duty to pay taxes, or the power to tax, is among the most tangible of all links between subject and sovereign, or citizen and society."<sup>165</sup> Considering the importance that this "most tangible of all links" has for both the citizen and for society, it should surprise

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159. *Id.*

160. *Id.* at 2347-48.

161. *See id.* at 2347.

162. Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 98-99.

163. *Id.* at 99.

164. *Id.* at 97-99.

165. MUSGRAVE, *supra* note 1, at 61.

no one to learn that all modern taxing schemes, including the property tax, have some moral or ethical basis. It is only natural that when people are forced to part with their hard earned wealth through the payment of taxes that they should want to know that their fellow citizens are bearing their fair share of the total burden. In this country, "[t]he struggle to overcome arbitrariness in taxation was one of the early objectives of constitutional government."<sup>166</sup> Arbitrariness can only be overcome by finding measures for individual tax liability that are widely regarded as fair.

#### A. *How Do We Measure Tax Justice?*

"Perhaps the most widely accepted principle of equity in taxation is that people in equal positions should be treated equally."<sup>167</sup> In the argot of tax people, this is what is called "horizontal equity."<sup>168</sup> It

166. *Id.*

167. *Id.* at 160; see also HENRY C. SIMONS, FEDERAL TAX REFORM 8 (1950); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 79 (1977); Joseph E. Stiglitz, *Utilitarianism and Horizontal Equity: The Case For Random Taxation*, 18 J. PUB. ECON. 1, 1-2 (1982). More than two hundred years ago Adam Smith put it this way: "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 777 (Edwin Cannan ed., 1937). There are subtleties in Smith's view of horizontal equity such as his apparent endorsement of an income tax as the fairest tax. But I will not explore these issues here because this Article assumes the existence of a property tax system. The issue is not whether a property tax is the most rational tax we could have, but rather what is a rational property tax? One answer to this question is that in our society a rational property tax must provide equal treatment to persons in like circumstances.

Of course the principle of treating like cases alike has a long history outside of and prior to its development in the law of taxation. See, e.g., David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 441-447 (1993). "The equality ideal has been a profoundly important ethic in moral and political philosophy throughout the ages. It was perhaps the central ethic in Aristotle's theory of corrective justice." *Id.* at 441 n.41; see also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 575 (1983) ("No value is more thoroughly entrenched in Western culture than is the notion of equality.").

168. Another way of stating this principle is "[p]olicies that redistribute should levy identical taxes or provide identical transfers to all units with the same level of well-being." Robert Plotnick, *A Comparison of Measures of Horizontal Inequity*, in HORIZONTAL EQUITY, UNCERTAINTY, AND ECONOMIC WELL-BEING 239, 239 (Martin David & Timothy Smeeding eds., 1985). In the discussion that follows I make no attempt to describe the different nuances that have been ascribed to the term "horizontal equity." The economics literature, in particular, is laden with intricate descriptions of how we might seek to define and measure horizontal equity. See, e.g., A.B. Atkinson, *Horizontal Equity and the Distribution of the Tax Burden*, in THE ECONOMICS OF TAXATION 3 (Henry J. Aaron & Michael J. Boskin eds., 1980). There are also different ethical bases on which to justify horizontal equity as a tax



has been said that "[e]quity in this primary sense must, in an advanced nation, predominate over, if not wholly override, all other objectives."<sup>169</sup> A dozen years ago Princeton economist Joseph Stiglitz wrote, "so basic is the notion of horizontal equity that it is incorporated in the Constitution of the United States in the '[E]qual [P]rotection [C]ause."<sup>170</sup> Former Harvard economist Richard Musgrave has made a similar allusion.<sup>171</sup> In the present context, this assumed connection between horizontal equity and equal protection takes on an irony that neither Stiglitz nor Musgrave could have intended. As will be described more fully, the essence of Proposition 13 was the abandonment of horizontal equity in property taxation, and, the essence of the Supreme Court's decision in *Nordlinger*<sup>172</sup> was to hold that the Equal Protection Clause sanctions that abandonment.

A corollary principle to the principle of treating like cases alike is the principle that people in different positions should be treated differently.<sup>173</sup> In tax jargon this second principle of tax justice is known as "vertical equity." To give the terms horizontal equity and vertical equity concrete meaning requires "an objective index of equality."<sup>174</sup> Since equality in the taxation context is fundamentally an economic concept, the accepted indices of equality are economic in nature. Depending on the form of tax in question, the possible indices of equality may be income, consumption or wealth. In the property tax context the generally accepted index is wealth. As will be discussed *infra*, other views of the property tax are possible. However, the traditional view is that horizontal equity is present in the property tax if persons with property of equal value pay equal taxes. Vertical equity is at least partially satisfied when owners of property of greater value pay more in taxes than the owners of property of lesser value.

In the context of the *Nordlinger* case, the denigration of horizon-

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principle. *Id.* Economists also debate whether it is an independent principle or whether it derives from other concepts such as vertical equity. *Id.* at 13; see also MUSGRAVE, *supra* note 1, at 160. Although I focus my attention on horizontal equity, I might have easily focused on vertical equity. For most purposes they are but two sides of the same coin. See *id.*

169. SIMONS, *supra* note 167, at 11.

170. Stiglitz, *supra* note 167, at 1.

171. Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113, 113 (1990).

172. *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992).

173. MUSGRAVE, *supra* note 1, at 160; SIMONS, *supra* note 167, at 8.

174. MUSGRAVE, *supra* note 1, at 161.

tal equity implicit in Proposition 13 is embodied in the fact that Ms. Nordlinger was obliged to pay five times as much in property taxes as her similarly housed neighbors.<sup>175</sup> The denial of vertical equity is similarly evidenced by the fact that Ms. Nordlinger was obliged to pay the same amount of property taxes as the owner of a Malibu mansion.<sup>176</sup> However, vertical equity is usually thought to include an element of progressiveness.<sup>177</sup> The traditional property tax makes little attempt to be progressive, "that is, the tax as a percentage of the incomes of those who bear the ultimate burden" does not rise as income rises.<sup>178</sup> Instead, it is structured as a proportionate or "flat" tax, and its actual incidence is quite regressive in that effective rates decline significantly in relation to income.<sup>179</sup> In the end, whatever tax justice that can be found in the property tax depends primarily on the existence of horizontal equity, but this implies the presence of some degree of vertical equity as well.

### B. Three Economic Bases for the Property Tax

The property tax has been regarded as "having the virtues of being the simplest and most visible of the inherently just taxes."<sup>180</sup> This is an exaggeration,<sup>181</sup> but the "inherent justice" of the tax, to the extent it exists, arises out of the three possible economic bases mentioned above. Thus, we may conceive of the tax as being fair because ideally its burden falls in proportion to one's wealth as measured by the fair market value of one's property.<sup>182</sup> A second basis for considering the property tax a just tax is that it may also be

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175. *Nordlinger*, 112 S. Ct. at 2330.

176. *Id.*

177. See SIMONS, *supra* note 167, at 8.

178. NETZER, *supra* note 8, at 5.

179. Netzer concluded that ultimately the property tax on housing was "markedly regressive when compared to money income before taxes." *Id.* at 46. He offers analysis from 1960 income tax returns to show that the property taxes as a percentage of income declined from about six percent to about two percent as annual income rose from less than two thousand dollars to over fifteen thousand dollars. *Id.* at 50.

180. Robert C. Denne, *Introduction to ANALYZING ASSESSMENT EQUITY 21* (Int'l Ass'n of Assessing Officers ed., 1977).

181. As discussed *supra* part II.A, the property tax is flawed in both theory and practice. The narrowness of the modern property tax base, focusing, as it does, on real property, renders it significantly less fair than a broader based tax.

182. As early as the seventeenth century it was argued that one's obligation to pay taxes should be measured by one's wealth. See MUSGRAVE, *supra* note 1, at 66. "[I]t is generally allowed by all that men should contribute to the public charge but according to the share and interest they have in the public peace; that is, according to their estates and riches." *Id.*

viewed as an indirect tax falling in proportion to one's income from property. A final basis for considering the property tax a just tax is that it may be seen as an excise tax in proportion to one's consumption of property. The view of the property tax as a tax on wealth is the traditional understanding of its nature. That is why the term "*ad valorem* tax" is often used as a synonym for "property tax." *Ad valorem* means "according to value."<sup>183</sup> The views of the property tax as a form of income tax or as a tax on consumption are less obvious and require some explanation.

The idea of the property tax as an indirect tax upon income from property rests upon the view that one who owns property has income equal to the fair rental value of the property. Of course, if the property is not rented to a third party, this income is not reflected by an actual receipt of money or property. Instead, it arises from the absence of an expenditure for rent by the owner. An owner who occupies her property has income from the use of property because she is not required to pay rent. This is analogous to the employee whose employer provides him with housing without charging any rent. The employee is viewed as having compensation income equal to the fair rental value of the housing provided.<sup>184</sup> By the same logic, one who owns her own home may be seen as having "imputed" income equal to the fair rental value of the home because she rented her home to herself rather than to someone else.<sup>185</sup> Normally, imputed income is not directly taxed as income.<sup>186</sup> But the property tax can be seen as an indirect tax upon both imputed and actual income

183. BLACK'S LAW DICTIONARY 51 (6th ed. 1990).

184. See, e.g., *Dean v. Commissioner*, 187 F.2d 1019 (3d Cir. 1951). But cf. I.R.C. § 119(a) (1988) (creating a narrow exception for housing provided for the convenience of the employer).

185. For more detailed discussions of imputed income, see MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS ¶ 1.03 (6th ed. 1991); JOSEPH M. DODGE, THE LOGIC OF TAX 151-52, 225-27, 312-15, 327 (1989); WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 124-33 (8th ed. 1990). An important early work in this area is Donald B. Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514 (1943). Marsh begins his article with this definition:

Imputed income may be defined provisionally as a flow of satisfactions from durable goods owned and used by the taxpayer, or from goods and services arising out of the personal exertions of the taxpayer on his own behalf.

. . . .

Imputed income is . . . a species of the genus *income in kind*, and its distinguishing characteristic is that it arises outside the ordinary processes of the market.

*Id.*

186. See KLEIN ET AL., *supra* note 185, at 124-33.

from property.

The property tax is only an indirect tax on income because the traditional property tax base is the sale value of the property rather than the annual rental value of the property. But, in general, we can say that there is a rational relationship between the fair market value and the fair rental value of property.<sup>187</sup> Indeed, the primary method for valuing income-producing real estate is to multiply net income by a capitalization rate.<sup>188</sup> Another income-based approach to valuation of commercial property is to discount the property's anticipated future income to its present value.<sup>189</sup> Under both forms of valuation, the greater the income a piece of property will produce, the greater its fair market value. In short, value is proportionate to income. These valuation approaches could be applied to residential property, but their applications are not necessary because typically one can arrive at an estimate of a home's value by direct comparisons to sales prices of similar homes in the same neighborhood. The point is that the rental value of property and its sale value have a reasonably well-defined proportionate connection.<sup>190</sup> Thus, a property tax measured by reference to sale value can be seen as a surrogate mechanism for taxing both actual or imputed income from the property.

The view of the property tax as a tax on consumption has a similar logic. The owner of property has the use of that property.<sup>191</sup> The use of property is a form of consumption. The value of that consumption, like the income from the property, is measured by the fair rental value of the property. As discussed above, there is a proportionate economic connection between fair rental value and fair market value. Thus, the property tax can be viewed as a surrogate mechanism for taxing consumption.

One of the benefits of viewing the property tax either as an indirect tax on income from property or as a tax on consumption is

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187. "A tax on capital is the same as a tax on capital income, if it applies to income-earning assets only, and if such assets are valued by capitalizing the income stream." MUSGRAVE, *supra* note 1, at 325.

188. See Leon W. Ellwood, *Appraisal for Mortgage Loan Purposes*, in ENCYCLOPEDIA OF REAL ESTATE APPRAISING 1095 (3d ed. 1978), reprinted in MICHAEL T. MADISON & ROBERT M. ZINMAN, MODERN REAL ESTATE FINANCING: A TRANSACTIONAL APPROACH 383, 383-84 (1991).

189. See Charles C. Wetterer, *What is "Value?"*, 3 REAL EST. FIN. 77, 78 (1976), reprinted in MADISON & ZINMAN, *supra* note 188, at 387.

190. The rule of thumb is that property is worth about ten times its annual rental value. Allen D. Manvel, *Upside-Down Housing 'Aid'?*, 53 TAX NOTES 743, 744-45 (1991).

191. This is so even if the owner chooses to rent the property to another.

that it reveals the fallacy of one of the criticisms leveled against the market value assessment scheme, that is, that it taxes unrealized or paper gains.<sup>192</sup> When we see that one who owns a home has income relative to one who rents an identical home, we also see that as home values rise (and rents rise with them), the homeowner enjoys a comparable rise in income and consumption. In short, as the cost of renting increases, the economic benefit of home ownership increases also.<sup>193</sup> This benefit is realized immediately not merely on sale of the residence.

### C. *The Connection Between Equity and Accurate Assessments of Value*

Whether we regard the property tax as a tax on wealth, income or consumption, the horizontal equity of the property tax depends upon accurate assessments of the value of the property subject to the tax. As a tax on wealth, the property tax will fail to fall equally on persons of equal wealth unless property is assessed according to its value. If assessments are unequal, the tax stops being *ad valorem*, and the tax stops being "just."<sup>194</sup> As a surrogate tax on income or consumption, horizontal equity is also lost when assessments are not based on accurate appraisals of fair market value because a distortion of value leads to a distortion of income or of consumption. No matter what the economic basis of the property tax, assessing some property at its fair market value while assessing similar property at less than

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192. This was a recurring argument made by the respondents and their *amici* in *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992). See Brief of Respondents at 17-21, *Nordlinger* (No. 90-1912); Brief of the United Justice Foundation and James V. Lacy as Amici Curiae in Support of Respondents at 11-14, *Nordlinger* (No. 90-1912); Brief of the Washington Legal Foundation et al. as Amici Curiae in Support of Respondents at 11, *Nordlinger* (No. 90-1912). Another related economic argument offered in defense of the acquisition cost assessment scheme is the contention that it drives down the prices of homes so that the seller ultimately bears some of the burden imposed by Proposition 13. Brief of Respondents at 25-26, *Nordlinger* (No. 90-1912). This argument overlooks the fact that Proposition 13 probably boosts prices by reducing the number of homes on the market. Moreover, any assumed reduction in prices brought about by Proposition 13 would not be shared by sellers on the basis of the difference between assessed value and fair market value. Thus, sellers who benefited most from Proposition 13 would not suffer any more a reduction in selling price than short-term owners who sell their homes. For more on this last point, see Reply Brief of Petitioner at 15-16 n.10, *Nordlinger* (No. 90-1912).

193. "The market value or selling price of a dwelling depends on the net value of the services generated by the dwelling. The principal benefit of home ownership is that it allows the household to avoid paying rent." Sexton et al., *supra* note 39, at 94.

194. See ANALYZING ASSESSMENT EQUITY, *supra* note 180, at 103 (comment by Henry J. Aaron).

its fair market value will render the tax horizontally inequitable.<sup>195</sup> This is precisely what Proposition 13 did; it eliminated horizontal equity, in its traditional sense, as an organizing principle of the property tax.

In saying that Proposition 13 eliminates horizontal equity from the property tax system, I am aware that one could argue that Proposition 13 simply creates a new form of horizontal equity. One could argue that Proposition 13's objective measure of equality is the date of acquisition value.<sup>196</sup> In other words, two properties acquired on the same date are treated in the same fashion since presumably both properties were purchased for their fair market values. However, this measure of horizontal equity is inadequate to satisfy most reasonable conceptions of fairness because it is inherently arbitrary. The property classes it establishes are too narrow because acquisition cost is a number that declines in meaning over time. Thus, two properties of equal value on their dates of acquisition may vary greatly in value on the date of taxation. Two properties of vastly different acquisition cost may be of equal value on the date of taxation. What sense does it make to use these historical numbers to tax current wealth, income, or consumption? It makes no sense from an economic equality perspective.

With the passage of time the connection between the original acquisition cost of property and its current fair market value disintegrates. This is so because the value of property is affected by many factors. Those factors include demographic changes in the surrounding neighborhood, the rate of inflation, the strength of the local economy, the amount of money and effort the owner has expended to maintain the property, and so on. The acquisition cost of a particular piece of property may be no more indicative of its current value than a num-

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195. This vulnerability of the property tax to manipulation by under or over assessment is addressed by the constitutions of nearly all states through provisions requiring that all property be assessed equally according to its just value. HELLERSTEIN, *supra* note 8, § 2.1; *see also* Glennon, *supra* note 51, at 264 n.8 (1990) (citing thirty-nine state constitutional provisions mandating equal and uniform taxation and taxation according to value). Indeed, California has such a provision in its constitution. But Proposition 13 twisted the meaning of that provision by redefining "just value" to mean acquisition cost rather than fair market value. *See supra* note 29.

196. In a sense this argument derives from the more fundamental argument that the term "equality" is devoid of substantive meaning. For a significant defense of this idea see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For responses, see Chemerinsky, *supra* note 167; Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

ber drawn from a hat except that it is likely to be lower than current value. A property tax assessment system based on acquisition cost, thus, tends to randomize the tax burden borne by property owners, but in a manner that favors long-term owners over short-term owners. Since the tax burden one bears has no rational connection to an equalizing base, the tax becomes an arbitrary mechanism for extracting revenue from the populace. Such a tax lacks normative legitimacy because it has no claim to being fair. Thus, we must reject the argument that Proposition 13 creates a new form of horizontal equity.<sup>197</sup> Instead, we must recognize that the acquisition-cost assessment scheme rejects horizontal equity as an organizing principle of the property tax. If horizontal equity is the single most important value of modern taxation, can its elimination be rational? I think not. One way to demonstrate this is to translate the acquisition-cost assessment scheme into similar principles of income and consumption taxation as is done in part V of this Article.

#### *D. Horizontal Equity as Moral Truth*

In our society a rational property tax must be founded on fairness. I believe that this principle holds true for any tax that reaches a significant portion of the population. The reasons supporting this principle are simple and, mostly, obvious. Our ideal conception of ourselves and of our society is that of a nation of free women and men living together in equality. Of course, we recognize that our ideal is not always mirrored in actual circumstances. But we write our laws and enforce them with the goal of equality before us. We may disagree on what precisely is meant by "equality," but we do not disagree that it is a proper goal and standard. When our taxing system rejects the standard of equality, the public is encouraged to view the tax system as a jumble of rules to be manipulated rather than as a rational tool for maintaining the government. When the government is seen as not being evenhanded in its levies, it is difficult, if not impossible, to justify a demand that the citizenry should gracefully accede to the government's need for revenue. "[W]e cannot wisely or reasonably promote enterprise, thrift, or industry by tax measures

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197. In its amicus brief, the International Order of Assessing Officers noted that, based on the 1980 census, just three years after the enactment of Proposition 13, California had gone from sixth to thirty-third among the states in assessment uniformity. See Brief of International Order of Assessing Officers as Amicus Curiae in Support of Petitioner at 12, *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (No. 90-1912).

which systematically repudiate justice among persons.”<sup>198</sup>

There is an inescapably moralistic aspect to this argument. The principle of horizontal equity may be seen as an attempt to state an objective moral truth.<sup>199</sup> Whether objective moral truth exists is, of course, subject to debate.<sup>200</sup> If it does, the principle that like cases should be treated alike seems an appropriate candidate for such status. After all, treating like cases alike is an implicit element in our conception of the rule of law. It is an aspect of the categorical imperative.<sup>201</sup> It is a variation of the Golden Rule.<sup>202</sup> Even if there are no objective moral truths in an absolute sense, the nearly universal acceptance of the principle of treating like cases alike should weigh heavily with anyone attempting to design a taxation scheme. The superiority of the principle of treating like cases alike does not depend upon proof that it is an objective truth existing like a law of nature, outside of human control. Instead, its superiority is established by our belief in it. As a community we have accepted the principle, and by our belief, we have made it true.

Failure to conform our taxing scheme to this principle calls into question either the principle or the taxing scheme. In considering whether we want to call into question the principle of taxing equals equally, we must consider where disavowal of the principle leads. One possible, even likely, outcome is that we could end up with a taxing scheme that legitimizes what have been called “naked preferences.”<sup>203</sup> “When a naked preference is at work, one group or per-

198. SIMONS, *supra* note 167, at 11 (specifically defending the principle of horizontal equity).

199. Economists in particular have often addressed the principles of horizontal equity and vertical equity as representations of objective truth. See Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989); Musgrave, *supra* note 171, at 114-17.

200. See, e.g., Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Jeremy Waldron, *On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality*, 80 CAL. L. REV. 1361 (1992) (book review).

201. “There is . . . only one categorical imperative. It is: Act only according to that maxim by which you can at the same time will that it should become a universal law.” IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 39 (Lewis W. Beck trans., 1959) (1785).

202. The Golden Rule is commonly stated as: “Do as you would be done by.” Or, conversely, as: “what you do not want [done to] yourself, don't inflict on another.” CONFUCIUS, *CONFUCIAN ANALECTS* bk. 15, § 23 (Ezra Pound trans., Peter Owen Ltd. 1956). It has also been stated by Aristotle as: we should behave to our friends “[a]s we should wish them to behave to us,” DIOGENES LAERTIUS, *LIVES OF EMINENT PHILOSOPHERS* bk. V, § 21 (R.D. Hicks trans., Harvard University Press 1950), and in the Bible as: “Therefore whatever you want others to do for you, do so for them.” *Matthew* 7:12.

203. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV.



son is treated differently from another solely because of a raw exercise of political power; no broader or more general justification exists."<sup>204</sup> I believe that Proposition 13 is an example of naked preferences at work. If there are any readers who are in doubt about this, perhaps placing the acquisition cost rule of Proposition 13 into other taxing schemes will make this point more believable.

## V. TRANSLATING PROPOSITION 13 INTO COMPARABLE PRINCIPLES OF INCOME TAXATION AND CONSUMPTION TAXATION

### A. *Translating Proposition 13 into an Income Tax*

Imagine an income tax where one's taxable income was determined by reference to one's income in the year that one acquired a given job. We might call this an acquisition-income system. As long as the taxpayer was employed by the same employer, her taxable income could not increase even if the taxpayer's actual income increased. Thus, for example, if Jill, a longtime executive for a large corporation, began her career by earning twenty-five thousand dollars annually and ten years later was earning seventy-five thousand dollars, she would pay the same amount of income taxes in each of the ten years of her employment. Suppose Jill had a next door neighbor, Jack, who had just moved to town and who started a new job earning seventy-five thousand dollars annually. While Jill was earning seventy-five thousand dollars and paying income taxes computed on a salary of twenty-five thousand dollars, Jack would be earning seventy-five thousand and paying income taxes computed on a salary of seventy-five thousand dollars. Thus, even if the system employed a flat or proportionate rate income tax, Jack would pay three times as much tax as Jill. Is this difference in treatment between Jill and Jack rational?<sup>205</sup>

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1689, 1689 (1984).

204. *Id.* at 1693.

205. I recognize that my basic analogy might be imperfect. In particular, one might contend that Jill is less deserving of protection than the long-term owner of California property because she has the cash to pay higher taxes. But, it is important to remember that the mere fact that one's home was worth much less when one bought it than it does currently cannot establish that one lacks the cash to pay property taxes derived from a fair market value assessment. Indeed, there is evidence that there is a correlation between market value and ability to pay. *See supra* part II.A. If the acquisition-cost assessment scheme is a valid measure of ability to pay, why does Proposition 13 use fair market value as the assessment base when value declines below acquisition-cost? *See* CAL. CONST. art. XIII, § 2(b); State Bd. of

If we were members of the present Supreme Court, we might argue in support of the acquisition-income system that it fosters stability in employment by penalizing those persons who change jobs. The size of the penalty would certainly be significant enough to deter many job changes. Suppose, for example, the tax rate was a flat thirty percent. Jill would pay \$7,500 in taxes under the acquisition-income scheme.<sup>206</sup> In order for Jill to change jobs with any significant increase in her after tax income, Jill's new job would have to pay roughly one hundred thousand dollars annually.<sup>207</sup> In short, she has to increase her salary by almost twenty-five thousand dollars just to break even because of the tax increase she will suffer if she changes jobs. Unless Jill is an extraordinary individual it seems unlikely that she will find many employers willing to hire her away from her present employer with a salary offer that she will find enticing. It seems quite reasonable to assume that the acquisition-income scheme will rationally further the goal of fostering stable employment by discouraging people, such as Jill, from changing jobs.

Does Jill's new neighbor, Jack, have just cause for complaint because of Jill's lower income tax bill? The present Supreme Court might answer that he does not. After all, Jack knew what he was getting into when he accepted his new job. The Court might state that Jill pays less taxes than Jack because she is different from him. This difference is that Jack has chosen to go against the governmental policy of maintaining stability in employment. Of course, from Jack's narrow perspective the acquisition income scheme is patently unfair since he pays three times as much in taxes as Jill, despite the fact that she earns just as much as him. Because of their disparate tax treatment, Jack's after tax income is fifteen thousand dollars less than Jill's.<sup>208</sup> Of course, the Court might state that the difference arises from Jack's exercise of his free choice to place himself in a different class from Jill.

The Court might also point out that there is a silver lining to

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Equalization v. Board of Supervisors, 164 Cal. Rptr. 739 (Ct. App. 1980).

206. In order to calculate Jill's taxes under the acquisition-income scheme, multiply Jill's initial salary level by the thirty percent flat tax:  $\$25,000 \times .30 = \$7,500$ .

207. Jill's present after tax income is \$67,500 ( $\$75,000 - \$7,500 = \$67,500$ ). If her salary were \$100,000 in a new job, her after tax income would be \$70,000 ( $\$100,000 \times .30 = \$30,000$ ;  $\$100,000 - \$30,000 = \$70,000$ ). Thus, Jill would only have a net gain of \$2,500 as a result of a \$25,000 increase in her salary.

208. Jack pays \$22,500 in income tax ( $\$75,000 \times .30 = \$22,500$ ) while Jill pays only \$7,500 in income tax on the same amount of income. Thus, the difference in taxes paid by Jack and Jill is \$15,000 ( $\$22,500 - \$7,500 = \$15,000$ ).

Jack's dark cloud. If he stays with his job through a series of raises, his effective tax rate will decline because of the acquisition-income system. Thus, over time Jack will be relatively advantaged over other taxpayers whose earnings equal his but, whose present income is closer to their acquisition-income than his. If Jill's income growth keeps pace with Jack's, she will always have a significant tax advantage over him. But, in time, Jack may have a similar advantage over other taxpayers.

In order to continue the parallel with the acquisition-cost assessment scheme adopted by Proposition 13, it would be necessary to add a corollary principle to the acquisition-income tax. A provision would need to be made for the child of an employee to succeed to her parent's acquisition-income base in the event the child took over the parent's job. Obviously, this rule would favor persons owning their own businesses since they have greater control than most people over who will succeed them. But, nominally, anyone who succeeds to their parents' employment could take advantage of this tax break. Such a rule seems highly conducive to maintaining strong family ties between parents and children. A government policy which rationally furthers the goal of stronger families should be able to withstand equal protection challenge, should it not?

### *B. Translating Proposition 13 into a Consumption Tax*

Imagine a taxing scheme where taxpayers paid sales taxes on specific goods based on the prices in effect when they first purchased that particular item. As long as a taxpayer remained loyal to a particular brand, her sale taxes on purchases of that item could not increase even though the prices for that item might go up. Thus, if a taxpayer bought her first car, a Ford, for ten thousand dollars, the sales tax on all future Ford purchases by that taxpayer would be computed on a sale price of ten thousand dollars. We might call this an acquisition-cost sales tax.

Suppose under this system of taxation, Jack was a longtime buyer of Oldsmobiles. Suppose Jack's first Oldsmobile cost him five thousand dollars. Suppose further, that in the current year Jill, who had never owned an Oldsmobile, and Jack both buy new Oldsmobiles costing twenty-five thousand dollars each. Under an acquisition-cost sales tax, Jack will pay sales tax computed on a five thousand dollar purchase price, and Jill will pay sales tax computed on a twenty-five thousand dollar purchase price. Thus, Jill will pay five times as much sales tax on her purchase as Jack paid on his purchase. Is this dispa-

rate treatment violative of the Equal Protection Clause?

The majority of the present Supreme Court might justify the acquisition-cost sales tax as a rational, if indirect, means of protecting jobs. Since people who change brands will be penalized as compared to those people who remain loyal to the same brands,<sup>209</sup> taxpayers have an economic incentive to stay loyal. This loyalty should serve to insulate established domestic businesses from market erosion by foreign competitors. This, in turn, should protect the jobs of those people employed by the established domestic employers. The Court might also point out that Jill has chosen to place herself in a different class from Jack by changing automobile brands. Thus, if she pays more tax than Jack, it is because she has made a deliberate choice to pay more tax.

As in the case of the acquisition-cost income tax, a final bit of gloss is needed here to fully maintain the parallel with Proposition 13. That is, a taxpayer's children would be entitled to take the taxpayer's sales tax base as their own if they remained loyal to the brand choices of their parents. Assume that Bob bought his first Oldsmobile for five thousand dollars. If Bob's daughter also buys Oldsmobiles, she would acquire Bob's five thousand dollar sales tax base for her automobile purchases. This brand loyalty passed down from parent to child will obviously work to preserve the market share of existing businesses, and thereby preserve the jobs of the workers employed by those businesses. From that perspective, the acquisition-cost sales tax is rational, is it not?

## VI. A MESSAGE TO THE COURT AND TO CONSTITUTIONAL SCHOLARS

It appears that at least some (and perhaps most) respected constitutional scholars agree with the outcome in *Nordlinger*,<sup>210</sup> and indeed, are likely to applaud it.<sup>211</sup> This recognition cannot help but give a disagreeing but prudent person pause to ponder. Perhaps I am mistaken in thinking that *Nordlinger* is a bad decision. Perhaps tax theory has no place in constitutional discourse, even when that discourse is deciding the fate of one of our tax systems. Yet, I await

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209. I am assuming that prices for most commodities will rise over time.

210. *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992).

211. Professors Cohen, Ely, and Glennon all seem to be in this camp (although Glennon and Ely are less explicit than Cohen). See Cohen, *A Comment on Allegheny Pittsburgh*, *supra* note 51, at 98-99; Ely, *supra* note 93, at 108 n.6; Glennon, *supra* note 51, at 293-307.

further persuasion.

I have argued that whether we regard the property tax as a tax on wealth, income, or consumption it still depends on the use of fair market value assessments to maintain horizontal equity.<sup>212</sup> The constitutional scholar might reply that the people of California have exercised their sovereign right to create a new tax based on acquisition-cost rather than wealth, income, or consumption. Are they not free to create a new tax? My response is that the rejection of horizontal equity is not rational in a society that has deliberately adopted equality as a chief normative value. "But what is equality?" the constitutional scholar might ask. "Is not the facial neutrality of an acquisition-cost assessment scheme a form of equality?" My reply is two-fold. First, the apparent neutrality of Proposition 13 actually institutionalizes the advantages of wealth and property. In this sense it is not neutral at all. Second, in matters of taxation, equality is treating like economic cases alike.

This second assertion may be seen as begging the question because there are a variety of criteria that might be employed to establish economic likeness. Proposition 13 uses acquisition value as the criteria for determining likeness. Is that criteria so inferior to wealth, income, or consumption? My answer is yes because, over time, acquisition value is dramatically more arbitrary as a measure of tax liability. It has no economic claim to normative fairness. Over time it has little or no rational connection with the taxpayer's ability to pay. It is a number that with each passing year is less and less rationally related to the tax liabilities of persons situated in similar economic circumstances. In short, if we want our property tax system to be fair, it is irrational to choose an acquisition-cost assessment base.

I am certain there are a great many people who see the property tax as just an irritating jumble of rules. Seen from the outside, most tax schemes look this way. To such persons, Proposition 13 may appear as a mere technical change in the property tax. Along similar lines, some might say that the property tax is such a bad tax that one more bad rule grafted on to it should not rise to the level of a constitutional error.<sup>213</sup> Seeing the failure of these arguments lies in seeing

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212. I do not contend that fair market value is the only rational tax base one could adopt for the property tax. I believe that fair rental value, for example, would be a thoroughly rational basis for assessment of real property. Any standard that embraces a reasonable degree of horizontal equity may be a rational base.

213. This was a recurring argument of the respondents and their amici in *Nordlinger*. See, e.g., Brief of Respondents at 9-12, *Nordlinger* (No. 90-1912); Brief of the State of Cali-

that whatever rationality the property tax may enjoy is embodied in the principle of equalized assessments. This is because the rational justification of any tax has a moral aspect. The principle of taxing economic equals equally is the moral justification for the property tax. Take away this principle and the property tax is rendered a tax without any moral sense. It becomes the tax that fell from the sky. This is true without regard to whether we conceive of the property tax as a tax on wealth, as a tax on income, or as a tax on consumption. In all three cases our reason for choosing to have a property tax causes us to establish tax liabilities by reference to current value. This is because fair market value is our direct measuring rod for wealth, and serves as an indirect measure of income or of consumption. The fair market value assessment system permits us to treat economic equals equally by giving us a rational and objective basis for measuring equality.

The acquisition-cost system, in contrast, renders the tax an arbitrary event in which equally situated taxpayers are treated unequally. This tax says to taxpayers "You pay X dollars and you pay Y dollars. Don't ask why. There is no why. There is only the rule that you pay X dollars and you pay Y dollars." Such a system has no basis for commanding our respect except by the exercise of raw power. Those persons lucky enough to pay relatively low taxes under such a system may be inclined to accept it. But they will do so with a wink or a sneer. Those persons compelled to pay a disproportionately large share of the overall tax burden will see themselves as oppressed. Perhaps if such a system were entirely random, we could somehow accept it. But when this arbitrary system is rigged to primarily benefit established wealth, the additional unfairness makes it intolerable.

Proposition 13 robbed the property tax of its moral foundation. One does not need to be a tax expert or even a lawyer to see that much. This being so, how do we explain the Court's indifference to the moral vacuum left by Proposition 13? Perhaps the Court is offering a crude reflection of the antifoundationalist themes of modern legal scholarship. If so, it is a perverse view of those theories. The anti-foundationalists have told us that there are no objective moral

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fornia as Amicus Curiae in Support of Respondents at 17, *Nordlinger* (No. 90-1912). In *supra* part II.A, I have attempted to be frank in describing the shortcomings of the traditional property tax.

truths that transcend our own social conditions.<sup>214</sup> According to this view our moral beliefs merely reflect who we are and the society that formed us. Thus, one under the sway of this philosophy might reason that no person's view of fairness is entitled to more weight than another's. All morality becomes relative. In the case before us the Court might reason that the majority of California homeowners are entitled to have their view of property tax fairness take precedence over the Court's own view because neither view has any transcendent claim to rightness. The error in this approach, however, is in taking the antifoundationalist notion of ungrounded morality as a means to escape responsibility rather than as a statement of the truth that we are all responsible. Whatever the source of our beliefs, we cannot escape the act of judgment because even our omissions and our withholdings of judgment are in themselves judgments with moral dimensions and human consequences.<sup>215</sup>

When we defer to the moral judgments of others we may be exercising moral tolerance or moral cowardice. Recognizing the difference is a matter for profound introspection. It is also a matter where it is important to understand that there is a humanistic objectivity still available to aid us in our moral deliberations. This objectivity is found in the distilled wisdom of our greatest philosophers, judges, scholars, teachers, and leaders. It is found in the commonalities coursing through our sense of what is fair and just. This humanistic objectivity, though contextual, secular and ungrounded, still commands our respect because it offers ideals that have stood the test of time. Thus, one may justifiably argue that even in a world where absolute moral objectivity is thought impossible, a court confronted with a palpable injustice which it is empowered to correct that does nothing has engaged in an act of moral cowardice.

Whatever its motivation in *Nordlinger*, it is my conviction that the Supreme Court failed California and it failed the country when it upheld the acquisition-cost property tax assessment system as rational-

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214. As Thomas Morawetz writes:

A pervasive theme of recent legal theory is profound skepticism about the possibility of consensus in social values and goals. Accompanying such skepticism is multifaceted doubt about objectivity, rationality, and the possibility of social progress. Skeptical theorists reject the idea of shared intellectual foundations and therefore are generally called antifoundationalists.

Morawetz, *supra* note 99, at 374 (citation omitted).

215. See Martha Nussbaum, "Only Grey Matter"? Richard Posner's Cost-Benefit Analysis of Sex, 59 U. CHI. L. REV. 1689, 1708-09 (1992). There are various other attacks on moral relativism that I do not raise here. See Waldron, *supra* note 200, at 1371-81.

ly based. However, it may well have the chance to reconsider its position since the case may come before it again. The right to travel issue that the Court declined to decide in *Nordlinger* could yet serve as the basis for overturning Proposition 13.<sup>216</sup> But with its decision in *Nordlinger*, the Court has backed itself into a corner. Whether it will be willing to reconsider its position in *Nordlinger* and take a different approach remains to be seen.

## VII. CONCLUSION

A clear goal of the acquisition-cost assessment scheme was to shift the property tax burden from one group, most of whom had the opportunity to vote for Proposition 13, to another group, many of whom had no vote, on the arbitrary basis of "I was here first." This is the sort of exercise of naked preference that the Equal Protection Clause was enacted to prevent.<sup>217</sup> In saying this, I recognize that even a tax system that is sound in its fundamental principles will produce some unfairness in practice. This has always been true of the property tax. However, a tax system that is corrupt in its basic theory assures pervasive unfairness. This is a significant difference. Proposition 13's absolute disregard for horizontal equity assures a pervasive unfairness that is not balanced by any unique merits. It has two ostensible virtues; it provides certainty, and it freezes the tax liabilities of homeowners on modest fixed incomes. But neither of those virtues depends upon the law's discriminatory aspect. Those goals could largely have been achieved by enactment of a compensating tax rate that declined as assessments increased. In short, both of its supposed virtues are achievable without abandoning horizontal equity. Thus, to give up horizontal equity to achieve them is not rational. Indeed it is quite irrational since horizontal equity is a fundamental principle of just taxation. In our society a rational tax is not unjust.<sup>218</sup>

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216. Some commentators see a further challenge to Proposition 13 as fairly likely. See, e.g., Carol Douglas, *Panels Consider Future of California's Proposition 13*, 57 TAX NOTES 309 (1992).

217. See Sunstein, *supra* note 203, at 1692, 1697, 1710-14.

218. Of course, one can argue that a rational taxing scheme need not be fair. But is there really anyone who holds this point of view? I doubt it. I doubt that anyone, including Justice Blackmun, really believes that a pervasively unfair tax system is rational. Deliberative discourse with such people, if they exist, concerning the proper form for a property tax may be useless. That is, if we cannot agree that fairness should be central to any rational taxing scheme, we may be too far apart to communicate in a meaningful fashion. Probably nothing in this Article could reach the person who believes that a tax need not be fair in order to be rational. The person at whom this Article is directed is one who accepts fairness as an im-



Whether Proposition 13 is simply an aberration or whether it represents the wave of the future in property taxation remains to be seen. In part, the answer will turn on whether the voting public continues to have a moral commitment to the concept of equal taxation embodied in the fair market value assessment. But the recent enactment of a law resembling Proposition 13 by referendum in Florida does not bode well.<sup>219</sup> It is a simple fact that established homeowners (who also compose a large portion of currently registered voters) have a clear economic incentive to favor the acquisition-cost assessment scheme. By freezing their own assessments while allowing comparably housed latecomers (who may not be current voters in the state) to be assessed at higher values, voters can reduce their own future tax liabilities while also continuing to receive government services that a revenue freeze might make unaffordable. In short, they can minimize their taxes while passing on the costs of government to others. It is not pretty. It is not fair. But it is appealing in a base sort of way. Do the voters possess the "public virtue" to withstand the temptation?<sup>220</sup> Perhaps not. It is easy to rationalize that the latecom-

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plicit element of a rational property tax, but who also believes that fairness has an indefinite meaning in the context of the property tax. I have attempted to persuade that person that fairness is not an utterly indeterminate concept in the property tax context.

219. FLA. CONST. art. VII, § 4(c); see William D. Townsend, *Voters Impose Property Tax Limit for Homeowners*, 92 ST. TAX NOTES 262 (1992). According to the State's Attorney General this provision went into effect in Florida on January 5, 1993. 1992 FLA. ATT'Y GEN. ANN. REP. 92-90.

220. The question is of longstanding duration. See, e.g., Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 352-53 (1992). "An important weakness of republican government widely perceived by American Revolutionaries was the difficulty of inculcating and maintaining the transfer of loyalty to community or nation implied by classical notions of public virtue." *Id.* at 352. Professor Carrington offers a fascinating description of a solution proposed by many eminent persons of the post-revolutionary period to the problem of maintaining a government that was both just and republican. That solution was a system of moral education for the nation's future leaders, i.e., for its lawyers.

George Wythe [the nation's first law professor] and his followers were consciously engaged in moral education: they sought to prepare young men (and, at Oberlin, perhaps a woman or two) for public life in a democracy. They taught law as an act of patriotism. What they sought was to inculcate standards of public conduct appropriate to popular self-government subject to constitutional constraints.

*Id.* at 340. One cannot help but note that a law teacher who pursued such a course of instruction today would likely be charged with preaching political correctness. However, this approach to law teaching continues to have some adherents. See, e.g., Michael I. Swygert, *Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803 (1989). *But cf.* Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71 (1991). For a reply to Professor Modjeska see Peter F. Lake, *Make Lawyers, Not Lethal Sheep*, 42 J. LEGAL EDUC. 271 (1992).

ers know what they are getting into. Can we really expect the voters to care about the latecomers who can never buy a home because of the disproportionate tax burden they are being asked to bear? How will the electorate react to the likelihood that the latecomers are drawn disproportionately from among racial minorities, from among the young, and from the upwardly mobile poor? Time will tell.

Some readers might consider my discontent with the Court's decision in *Nordlinger* as merely a reflection of postmodern angst.<sup>221</sup> However, I would suggest that it is the Supreme Court that has been infected by a perverse form of postmodernism. By failing to confront the values inherent in taxation, its judgment has foundered under the weight of a moral relativism which argues that no person's sense of rightness is entitled to more weight than any other person's. Once shorn of a sense of objective principle, changes in a taxing scheme take on the appearance of mere rule changes without moral dimension. One can argue that "our ideals of justice in taxation change with the alteration in social conditions."<sup>222</sup> But the principle that equals should be taxed equally has an immediate and visceral appeal that should make us reluctant to pronounce it a mere passing fancy. It is a principle that underlies all of our current forms of taxation. Its abandonment represents a more radical change in "our ideals of justice" than any other change in taxation we have witnessed in this century.<sup>223</sup>

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221. See J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1967 (1992) "Postmodern legal culture is the rout of progressive forces, the increasing insularity, self-absorption, and fragmentation of progressive academic writing, and the increasing irrelevance of that writing to the positive law of the U.S. Constitution." *Id.* at 1967. Elsewhere in the same piece, Professor Balkin writes, "[w]e thus witness the creation of a 'shadow constitution' by progressive scholars, in which they declaim what the Constitution really means in the face of the increasing likelihood that it will never mean that in practice." *Id.* at 1986. Although I find other aspects of Professor Balkin's essay quite engaging (though not relevant here), I believe his implicit criticism of "progressive scholars" is short-sighted. History is not like a baseball game with a beginning and an end. Who is to say whether the "shadow constitution" of today will not be the "living constitution" a century from now. I should add that perhaps I am reading a more critical edge into Professor Balkin's words than was intended. In the end his own conclusion is that "Knowledge is Material." *Id.* at 1990. Such a view seems to transcend a requirement of immediate relevance.

222. SELIGMAN, *supra* note 8, at 1. "Not only the actual forms of taxation, but the theories of taxation as well, vary with the economic basis of society . . . Like all the facts of social life, taxation itself is only an historical category." *Id.*

223. I recognize this is a rather sweeping generalization. In this century, we have seen the enactment of both the income tax and the social security tax. We have also seen the widespread growth of broad based sales taxation. The reason I consider this change more fundamental than those is that the income tax, the sales tax, and the social security tax all

In *Nordlinger*, the Court has rationalized a readily observable injustice. It has sanctified a form of institutionalized oppression of one group by another group on grounds that reflect a mistaken unconcern for tax theory and a misguidedly muted conscience. The present Supreme Court has chosen to stunt its own powers of perception and reason in the name of judicial deference. It has shown itself willing to countenance flagrant inequality in the name of non-intrusiveness. This approach is problematic in areas such as taxation where the established majority may have a clear economic incentive to discriminate against latecomers. The political process does not always work in the defense of minority interests, especially those minorities that will have only a future existence. Traditionally, defense of minority rights to equal treatment has been the role of the judiciary.<sup>224</sup> By abandoning this role in *Nordlinger*, the Supreme Court has created a void in the legal framework of our society. With no one to fill the role of fair arbiter in matters of discriminatory taxation schemes, the states are left to sink or swim upon a stormy sea ruled by passion, prejudice, and self-interest.

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embrace the principle of horizontal equity. In that sense they are continuations of orthodox tax theory. As I have tried to show, the acquisition-cost assessment scheme is a radical departure from orthodox tax theory.

224. See Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164-65 (1977). In fairness, one should note that Professor Sandalow was skeptical of the virtues of this tradition. See *id.* at 1172-75. But it did receive his qualified endorsement. *Id.* at 1183-90 (arguing for a historical/process oriented system of judicial review).