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Allegheny Pittsburgh Coal v. Webster County: Are Proposition 13's Days Numbered?

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COMMENTS

ALLEGHENY PITTSBURGH COAL v. WEBSTER COUNTY: ARE PROPOSITION 13's DAYS NUMBERED?

I. INTRODUCTION

A taxation system[1] similar in practice to California's[2] was ruled unconstitutional by the United States Supreme Court in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia.*[3] As a result of this decision, the future of Proposition 13,[4] which has kept property taxes affordable for millions of Californians, is uncertain.

This Comment will first discuss Proposition 13 and the cases which have interpreted it. The *Allegheny* Court's decision will then be closely analyzed in an attempt to predict the outcome of a constitutional challenge to Proposition 13. Lastly, changes to Proposition 13 will be recommended that could equalize taxes for all property owners without destroying the tax protection sought by the voters when they enacted the initiative.

II. PROPOSITION 13

A. History and Purpose of Proposition 13

Before the enactment of Proposition 13, real property in California was annually re-appraised for taxation purposes at a percentage of the price it would sell for on the open market.[5]

1. W. Va. Const. art. X, § 1.
2. Cal. Const. art. XIIIA.
3. 109 S.Ct. 633 (1989).
4. Cal. Const. art. XIIIA.
5. "All property is taxable and shall be assessed at the same percentage of fair mar-

During the 1970's, property values sharply increased[6] and the taxing authorities increased real estate assessments to reflect the higher values.[7] The result was dramatic annual increases in property taxes throughout California.

On June 6, 1978, more than sixty-four percent of California's voters enacted California Constitution article XIIIA,[8] popularly known as Proposition 13. The Voters Pamphlet stated that Proposition 13 would limit property tax increases and cut government spending.[9]

Proposition 13, publicized as a "tax revolt,"[10] imposed severe limitations upon the assessment and taxing powers of state and local government. As a result of the initiative, property tax revenues immediately dropped $5.9 billion, a fifty-one percent decrease from the previous year.[11]

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ket value." CAL. CONST. art. XIII, § 1(a)

"Fair market value" is defined in the Revenue and Tax Code as follows:

> "'[F]air market value' means the amount of cash or its equivalent which property would bring if exposed for sale in the open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other and both with knowledge of all of the uses, and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions upon those uses and purposes." CAL. REV. & TAX CODE § 110(a) (West 1972 & Supp. 1990).

6. The assessed value of land and improvements reported by county assessors increased from $43,187 million in 1969-70 to $90,394 million in 1977-78. Cal. State Board of Equalization, Annual Report 1977-78, at page A-4, table 4.

7. State assessments increased from $2,880 million to $3,854 million in the same period. *Id.*

8. California Voters Pamphlet, June 6, 1978, Statement of Vote (compiled by Cal. Secretary of State, Primary Election).

9. California Voters Pamphlet, June 6, 1978 (compiled by Cal. Secretary of State) (comments by H. Jarvis, Chairman, United Org. of Taxpayers and P. Gann, President, Peoples Advocate). One of the initiative's co-authors, Howard Jarvis, stated that "[t]he objective. . .is to cut the cost of Government, and the only way left is to not give them the money in the first place." Fairbanks & Jarvis, *Behr Measures Pit Owners Against Renters -Both Intended to Slow Tax Rise*, L.A. Times, Apr. 23, 1978 § 2, pt. 2, col. 1.

10. G. KAUFMAN & K. ROSEN, *THE PROPERTY TAX REVOLT* (1981), T. SCHWADRON & P. RICHTER, *CALIFORNIA AND THE AMERICAN TAX REVOLT* (1984).

11. *See* CALIFORNIA LEGISLATIVE ANALYST, AN ANALYSIS OF THE EFFECT OF PROPOSITION 13 ON LOCAL GOVERNMENTS 3 (October 1979) (prepared by the California Legislative Analyst pursuant to Cal. S.B. No. 154, 1978 Cal. Stat. ch. 292 (1978) and Cal. S.B. 2212, 1978 Cal. Stat. ch. 332 (1978)) [hereinafter California Legislative Analyst].

B. Structure of Proposition 13

Proposition 13 limits taxation in three ways. First, taxes are limited to one percent of a property's "full cash value."[12] Second, the property's "full cash value" is fixed at its 1975 level, subject to an annual two percent inflationary increase.[13] Lastly, a two-thirds vote is required to raise any other taxes.[14]

1. *Percentage Limitation*

Section 1(a) of Proposition 13 limits the maximum amount of any ad valorem[15] tax to one percent of real property's "full cash value."[16] Prior to the initiative, ad valorem taxes averaged 2.7 percent of the full cash value of all taxable property in California.[17] Thus the one percent limit substantially lowered real property taxes in the year it was enacted.

Section 1(b) of Proposition 13 lists two exceptions to this one percent limitation: pre-approved indebtedness, and new bonded indebtedness approved by two-thirds of the voters.[18] The pre-approved indebtedness exception allows government to increase taxes in order to pay debts incurred before Proposition 13 was enacted. The other exception allows taxes to be increased if two thirds of the voters want to raise them.

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12. Cal. Const. art. XIIIA, § 1.

13. *Id.* § 2.

14. *Id.* §§ 3 & 4.

15. Ad valorem is "a tax levied on property. . .in proportion to its value, as determined by assessment or appraisal." Black's Law Dictionary 48 (5th ed. 1979).

16. "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." Cal. Const. art. XIIIA § 1(a) (1978, amended 1986). Full cash value is defined in § 2(a).

17. California Voters Pamphlet 56, n. 7, June 6, 1978 (compiled by Cal. Secretary of State) (comments by H. Jarvis, Chairman, United Org. of Taxpayers and P. Gann, President, Peoples Advocate).

18. "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 (1) any indebtedness approved by the voters prior to July 1, 1978, or (2) any bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition." Cal. Const. art. XIIIA § 1(b) (1978, amended 1986).

2. *Value Limitation*

Section 2(a) of Proposition 13 provides two alternative definitions of the term "full cash value" used in section 1.[19] Which definition applies depends on the acquisition date of the affected property. The full cash value of property acquired *before* March 1, 1975 is based on the county assessor's valuation as shown on the 1975-76 tax bill.[20] The full cash value of property acquired *after* March 1, 1975 is based on its appraised value when purchased, newly constructed, or when a change in ownership has occured.[21]

Section 2(b) of Proposition 13 allows an annual inflationary increase to the full cash value, up to a maximum of two percent.[22]

3. *"Super Majority" Vote Restriction*

Sections 3 and 4 of Proposition 13 require a two-thirds "super majority" vote in order to levy any new state or local tax increases.[23] The same sections also specifically forbid new ad valorem taxes on real property.[24] Before Proposition 13 was en-

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19. "Full cash value" is 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 occured after the 1975 assessment. CAL. CONST. art. XIIIA § 2(a) (1978, amended 1986).

20. *Id.*

21. A "change in ownership" includes the creation of a leasehold interest for a term of 35 years or more, CAL. REV. & TAX CODE § 61; and a corporate restructuring. Exceptions are granted for inter-family transfers, CAL CONST. art. XIIIA, § 2(g) and 2(h).

22. "The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year. . . ."; CAL. CONST. art. XIIIA, § 2(b) (1978, amended 1986).

23. "[A]ny changes in State taxes enacted for the purpose of increasing revenues. . .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. . . ." CAL. CONST. art. XIIIA § 3.

"Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district. . . ." CAL. CONST. art. XIIIA § 4.

24. "[N]o new [State] ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed." CAL. CONST. art. XIIIA, § 3.

"[A]d valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district [may not be imposed]." CAL. CONST. art. XIIIA, § 4.

acted, voter approval was not required to increase local taxes,[25] and a simple majority vote was sufficient to raise state taxes.[26] By creating a "super majority" voting requirement, the drafters of Proposition 13 hoped to limit state and local government's ability to compensate for the loss of real property-related revenues.[27]

C. Judicial Softening of Proposition 13

Despite the limitations imposed by Proposition 13, state and local governments found ways to maintain and even increase gross revenues.[28] This result has been attributed to the California courts' interpretation of the ambiguous[29] language of Proposition 13.[30]

1. *Laying The Groundwork: The* Amador *Decision*

Just months after Proposition 13 was enacted, various government agencies challenged the initiative on multiple constitutional grounds.[31] The California Supreme Court upheld Proposition 13 in *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, but did so in a fashion that allowed later cases to soften the initiative's effect.

The court in *Amador* stressed the limited nature of its inquiry, expressly reserving interpretation and application of particular provisions of the initiative for future litigation.[32] This ju-

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25. Cal. Const. art. XI § 5 (homerule taxing authority); Cal. Govn't Code § 37100.5 (West 1988); Cal. Rev. & Tax. Code §§ 7200-12 (West 1988); Cal. Govn't Code § 37101 (West 1988).

26. *Id.*

27. "[T]he initiative would restrict the ability of local governments to impose new taxes in order to replace the property tax revenue losses." California Voters Pamphlet 60, Jun. 6, 1978 (compiled by Cal. Secretary of State) (Analysis by Legislative Analyst).

28. State tax collections increased from $14.8 billion in 1977 to 35.6 billion in 1987-88, Economic Report of the Governor, State of California at A-44, Table 35 (1989).

29. The California Supreme Court termed the language of Proposition 13 "imprecise and ambiguous." *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 245, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 257 (1978).

30. Henke & Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Government Revenue Sources*, 22 U.S.F. L. Rev. 251 (1988).

31. *Amador*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239.

32. The court ". . .examine[d] only those principal, fundamental challenges to the validity of article XIII A as a whole. . . . 'Analysis of the problems which may arise

dicial sidestepping left the door open for later challenges. This Comment will briefly discuss the more significant decisions interpreting Proposition 13, in order to illustrate how California courts have softened the initiative's impact without eliminating it.

2. *Avoiding The One Percent Limitation*

a. Special Assessments

California courts have restricted the taxes to which the one percent limitation applies by distinguishing between "ad valorem taxes" and "special assessments."[33] Proposition 13 defines neither term, but expressly limits only "ad valorem taxes". California courts define special assessments as charges to pay for local improvements which specifically benefit the affected property, and define ad valorem taxes as "general" taxes designed to pay for general expenditures.[34] The courts have interpreted the reference to "special assessments" as exempting those charges from the one percent limitation.[35]

The rationale for permitting special assessments is that they allow local authorities flexibility in making improvements that owners are willing to pay for. Individual owners pay for the special benefit they receive.[36] Courts have characterized street improvements, lighting improvements, irrigation improvements,

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respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged.'" *Amador*, 22 Cal. 3d at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

33. "[A] special assessment was wholly different from an ad valorem tax, and therefore not within the one percent limitation." *City Council v. South*, 146 Cal. App. 3d 320, 329, 194 Cal. Rptr. 110, 116 (1983). The difference between "special assessments" and "ad valorem taxes" was analyzed in detail in *Solvang Mun. Improvement Dist. v. Board of Supervisors*, 112 Cal. App. 3d 545, 550-557 (1980), where the court concluded that "in spite of ambiguities encountered in practice, the basic distinction between general ad valorem taxation and special assessment to meet the cost of improvement remains reasonably clear." *Id* at 553-54.

34. *South*, 146 Cal. App. 3d at 328, 194 Cal. Rptr. at 116.

35. ". . . government entities which undertake local public improvements to benefit specified real property can finance such improvements by special assessments levied on the benefited property without regard to the 1 percent limitation on ad valorem real property taxes specified in section 1 of article XIIIA." *Solvang*, 112 Cal. App. 3d at 553-554.

36. "The general public should not be required to pay for special benefits for the few, and the few specially benefitted should not be subsidized by the general public." *South*, 146 Cal. App. 3d at 330, 194 Cal. Rptr. at 117.

sewer connections and drainage improvements as "special assessments," thereby allowing them to escape Proposition 13's one percent limitation.[37] By narrowly defining ad valorem taxes, courts have allowed California cities and utility districts to finance needed improvements by avoiding the one percent limitation.

b. Pre-Approved Indebtedness

Proposition 13 expressly provides for an "indebtedness" exception to the one percent limitation of section 1(a).[38] By broadly defining the term "indebtedness"[39] to include, *inter alia*, retirement pension plans[40], water district maintenance contracts[41], and a 1937 city charter provision requiring a tax for the support of the city's libraries[42], courts have found another way to uphold taxes in excess of the one percent limitation.

3. *Two-Thirds Vote Requirement*

"Super majority" voting requirements such as the two-third vote required by sections 3 and 4 of Proposition 13 have long

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37. A special assessment for maintaining landscaped median islands on public streets levied in proportion to the benefit received by the parcel was not subject to the one percent limitation, *South*, 146 Cal. App. 3d at 330, 194 Cal. Rptr. at 117.

A maintenance levy charged in proportion to the benefit received by each zone was not subject to the one percent limitation, *American River Flood Control Dist. v. Sayre*, 136 Cal. App. 3d 347, 186 Cal. Rptr. 202 (1982).

38. "The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on . . . any *indebtedness* approved by the voters prior to July 1, 1978. . ." CAL. CONST. art. XIIIA, § 1(b) (emphasis added).

39. "The critical consideration in determining whether a city has created an "indebtedness" under subdivision (b) is. . . whether the voters obligated themselves prior to 1978 to make expenditures in the future for a specified purpose." *Patton v. City of Alameda*, 40 Cal.3d 41, 46, 706 P.2d 1135, 1138, 219 Cal. Rptr. 1, 4 (1985).

40. *City of Watsonville v. Merrill*, 137 Cal. App. 3d 185, 186 Cal. Rptr. 857 (1982); *Valentine v. City of Oakland*, 148 Cal. App. 3d 139, 196 Cal. Rptr. 59 (1983); *Carman v. Alvord*, 31 Cal. 3d 318, 644 P.2d 192, 182 Cal. Rptr. 506 (1982) [all three cases held that a provision in the city's charter for pension plan contributions was "indebtedness" and thereby exempt from the one percent limitation of §1].

41. *Metropolitan Water Dist. v. Dorff*, 138 Cal. App. 3d 388, 188 Cal. Rptr. 169 (1982); *Goodman v. County of Riverside*, 140 Cal. App. 3d 900, 190 Cal. Rptr. 7 (1983) [both cases held that when voters approved water districts they approved an "indebtedness," allowing the issuance of general obligation bonds or an increase in local taxes exempt from §1].

42. *Patton v. City of Alameda*, 40 Cal.3d 41, 706 P.2d 1135, 219 Cal. Rptr. 1 (1985).

been disfavored in California.[43] Indeed, in 1970, the California Supreme Court held that a two-thirds voter approval requirement was an unconstitutional violation of equal protection.[44] Although the United States Supreme Court rejected this position and allowed a super majority voting requirement where no "discrete and insular" majority has been singled out for special treatment[45], the California Supreme Court continues to insist that super majority requirements be strictly construed and that ambiguities be resolved in favor of a simple majority.[46] Thus, many decisions interpreting Proposition 13 have permitted the adoption of new taxes by a simple majority vote.[47]

Another method the courts have used to avoid the super majority vote requirement is to narrowly define the terms used in the initiative. Proposition 13 requires a two-thirds vote for "special taxes" imposed by cities, counties and "special districts,"[48] but fails to define the terms "special taxes" and "special districts." California courts, however, have defined these terms so as to avoid the two-third voting requirement. "Special districts" are defined as *only* those districts which can levy taxes on real property.[49] "Special taxes" are defined as *only* those taxes levied for a special purpose.[50] In other words, the restric-

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43. Henke & Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Govn't Revenue Sources*, 22 U.S.F. L. REV. 251 (1988), at 271.

44. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970) rev'd, 403 U.S. 915 (1971) (remanded for reconsideration in light of *Gordon v. Lance*, 403 U.S. 1 (1970)), *cert. denied*, 403 U.S. 922 (1971).

45. *Gordon v. Lance*, 403 U.S. 1, 5 (1970).

46. "In view of the fundamentally undemocratic nature of the requirement for an extraordinary majority. . .the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting. . .a majority, rather than a two-thirds vote." *Los Angeles County Transp. Comm'n. v. Richmond*, 31 Cal.3d 197, 205, 643 P.2d 941, 945, 182 Cal. Rptr. 324, 328 (1982).

47. *See, e.g., Huntington Park Redevelopment Agency v. Martin*, 38 Cal. 3d 100, 105; 695 P.2d 220, 222; 211 Cal. Rptr. 133, 135 (1985) [upholding special district tax without two-thirds voter approval]; *City and County of San Francisco v. Farrell*, 32 Cal. 3d 47, 52; 648 P.2d 935, 937-8; 184 Cal. Rptr. 713, 715-16 (1982) [the language of section 4 must be strictly construed. . .so as to limit the measures to which the two-thirds requirement applies]; *Richmond*, 31 Cal. 3d at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330 (1982) [upholding transportation district sales tax even though only 54 percent of the voters approved it]; *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685, 691 (1981) [upholding school facilities fees without voter approval].

48. CAL. CONST. art. XIIIA, § 4.

49. *Richmond*, 31 Cal. 3d at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

50. *Farrell*, 32 Cal.3d 47, 648 P.2d 935; 184 Cal. Rptr. 713 (1982) [a two-thirds vote is not required for taxes that go into a general fund]

tions of Proposition 13's super majority requirement can be "readily and completely avoided by the simple creation of a district which is geographically precisely coterminous to a county, but which lacks its real property taxing power."[51]

4. *Summary*

The decisions interpreting Proposition 13 have helped state and local governments maintain their revenue base, despite the initiative. In the words of one commentator, "California courts have construed the taxing restrictions of Proposition 13 narrowly, allowing local governments room to develop nonproperty tax revenue sources to replace revenue losses caused by proposition 13."[52] As a result of narrow judicial interpretation of the initiative, the drastic reductions in critical services feared by Proposition 13's opponents[53] have not occured.

On the other hand, despite these judicially created "loopholes" the average property owner in California still pays substantially less in property taxes than he or she would pay in the absence of Proposition 13.[54] Thus, it appears that both the spirit of the initiative, and essential government services, have been maintained by delicate judicial balancing of the opposing interests.

III. ANALYSIS OF THE CONSTITUTIONAL CHALLENGE

A. The Equal Protection Constitutional Argument

Amador Valley Joint Union High School v. State Board of Equalization[55] was the first case to address an equal protection challenge to Proposition 13. Although a majority of the Califor-

51. *Richmond*, 31 Cal. 3d at 213, 643 P.2d at 950, 182 Cal. Rptr. at 333.

52. Henke & Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Government Revenue Sources*, 22 U.S.F. L. REV. 251, 253-54 (1988).

53. California Voters Pamphlet 58-59, Jun. 6, 1978 (compiled by Cal. Secretary of State) (comments by H. Jarvis, Chairman, United Org. of Taxpayers and P. Gann, President, Peoples Advocate).

54. The statewide average tax rate on real and tangible personal property dropped from $11.19 per $100 assessed valuation in 1976-77 to $1.083 per $100 assessed value in 1986-87 as a result of Proposition 13. Cal. State Board of Equalization, Annual Reports 1977-78 and 1987-88, at page A-4, table 4.

55. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

nia Supreme Court in *Amador* held that equal protection had not been violated, Justice Bird's dissent pointed out many of the same inequities that would later trouble the United States Supreme Court in *Allegheny*. Noting that §2(a)'s definition of "full cash value" effectively divides the property tax-paying public into two classes (pre- and post-1975 purchasers)[56] Justice Bird argued that Proposition 13 creates an environment where two substantially identical homes, sitting side by side and receiving identical government services, are assessed and taxed at different levels depending on their date of acquisition.[57] Because of rapid inflation in home prices over the past decade,[58] §2(a) creates a wide disparity in tax treatment for similar properties.[59] This disparity, the *Amador* dissent argues, violates Equal Protection requirements.

Most of the equal protection challenges to property taxation systems have failed[60] because of the heavy burden imposed on

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56. *Amador*, 22 Cal. 3d at 250, 583 P.2d at 1303, 149 Cal. Rptr. at 261.

57. Justice Bird used the following hypothetical to illustrate her point:

> "John and Mary Smith live next door to Tom and Sue Jones. Their houses and lots are identical with current market values of $80,000. The Smiths bought their home in January of 1975 when the market value was $40,000. The Joneses bought their home in 1977 when the market value was $60,000. In 1977, both homes were assessed at $60,000, and both couples paid the same amount of property tax. However, under article XIIIA in 1978, the Joneses will pay 150 percent of the taxes that the Smiths will pay. Should a third couple buy the Smiths' home in 1978, that couple would pay twice the taxes that the Smiths would have paid for the *same* home had they not sold it."

Amador, 22 Cal.3d at 249, 149 Cal. Rptr. 260-61.

58. The assessed value of land and improvements reported by county assessors increased from 95,453 million dollars in 1978-79 to 1,151,588 in 1988-89. *Cal. State Board of Equalization, Annual Report* 1987-88 at page A-4, Table 4.

59. The owner of a property acquired in 1975 for $30,000 will pay approximately $385 in taxes during 1989 (1% of $30,000 plus 2% increase per year allowed by § 2(b)). The same property in 1989 will cost approximately $300,000; and the new owner's property tax liability will be approximately $3,000 per year (1% of purchase price), almost seven times higher than taxes for a property acquired in 1975.

60. *Louisville Trust Co. v. Stone*, 107 F. 305 (6th Cir. 1901) [court would not enjoin state's assessment of challenger's property at full cash value, even though other property was assessed at only seventy percent of full cash value]. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959) [tax on resident corporation's stored merchandise, while nonresident corporation was exempt, did not violate equal protection]; *Kahn v. Shevin*, 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed.2d 189 (1974) [tax exemption granted to widows but denied to widowers did not violate equal protection].

the challenger of an economic regulation.[61] There have been successful challenges; however,[62] which are useful in predicting the outcome of an attack on Proposition 13.

B. THE *Amador* DECISION

As stated above, the constitutionality of Proposition 13 was first addressed by the California Supreme Court in the *Amador* case.[63] Various government agencies challenged the three-month-old initiative on seven separate constitutional grounds.[64] The court specifically considered and rejected each argument, including one based on the California Constitution's equal protection clause. In reaching its decision, the *Amador* court noted that it had a "solemn duty to jealously guard the initiative power" as "one of the most precious rights of our democratic process."[65] It accordingly resolved all doubts in favor of the initiative.

The *Amador* court used mere "rational basis" scrutiny in its constitutional analysis, and gave as its justification:

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61. "[S]tates have broad powers to impose and collect taxes. A state may divide different kinds of property into classes and assign to each class a different tax burden." *Allegheny*, 109 S.Ct. at 638.

62. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; 40 S. Ct. 560; 649 L.Ed 989, 991 (1920) [charging different taxes for nonresident and resident corporations constitutes arbitrary discrimination violative of the fourteenth amendment].

63. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

64. The *Amador* court concluded that Proposition 13 ". . .survives each of the serious and substantial constitutional attacks. . . ." *Id.* at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241. The *Amador* court resolved each of the constitutional attacks by holding that Proposition 13:
(1)is an amendment to the state Constitution (which may be accomplished by initiative), rather than a revision (which requires a constitutional convention or legislative action), *id.* at 221, 583 P.2d at 1284-85, 149 Cal. Rptr. at 242-43.
(2)does not violate the single-subject requirement of the initiative process, *id.* at 229-30, 583 P.2d at 1289-90, 149 Cal. Rptr. at 247-48;
(3)does not violate equal protection requirements, *id.* at 233, 583 P.2d at 1292, 149 Cal. Rptr. at 250;
(4)does not deny the right to travel, *id.* at 237-38, 583 P.2d at 1295, 149 Cal. Rptr. at 253;
(5)does not impair municipalities' contractual rights, *id.* at 238-42, 583 P.2d at 1295, 149 Cal. Rptr. at 253-55;
(6)does not violate the title and ballot summary requirements for initiatives required by the California Constitution, *id.* at 242-44, 583 P.2d at 1298, 149 Cal. Rptr. at 256-57; and
(7)is not so vague as to be void and inoperable, since it could be judicially interpreted, *id.* at 244-47, 583 P.2d at 1299, 149 Cal. Rptr. at 257-59.

65. *Amador*, 22 Cal.3d at 248, 583 P.2d at 1302, 149 Cal. Rptr. at 259.

> "We have long held that 'where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. [S]o long as a system of taxation is supported by a rational basis, and is not palpably arbitrary, it will be upheld despite the absence of a precise scientific uniformity. . . ."[66]

The *Amador* court noted that under Proposition 13, taxes for the two classes, pre- and post-1975 purchasers, are based on each buyer's free and voluntary act of purchase.[67] Concluding that any tax inequalities created by Proposition 13 bear a rational relationship to purchase price and thus are not wholly arbitrary or irrational, the court upheld Proposition 13.[68]

The court found further support for its decision to uphold Proposition 13 in the theory underlying sales tax systems.[69] Sales tax on personal property is based on the purchase price of the good. Since the tax can vary substantially for identical items depending on the price paid, the *Amador* court felt this was analagous to the method of assessment created by Proposition 13.

As a result of the *Amador* decision, Proposition 13's constitutionality went without serious challenge until more than ten years later, when the United States Supreme Court issued its decision in *Allegheny*. Since *Allegheny*, three cases have challenged Proposition 13 on equal protection grounds.[70]

These three equal protection challenges to Proposition 13 brought within a year of *Allegheny* demonstrate its significance

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66. *Id.* at 233-34, 583 P.2d at 1292, 149 Cal. Rptr. at 250-51, citing *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

67. *Id.* at 235, 583 P.2d at 1293, 149 Cal. Rptr. at 251.

68. *Id.* at 237, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

69. *Id.* at 235-36, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

70. *Northwest Financial Inc. v. Board of Equalization and County of San Diego*, Cal. Super. Ct., San Diego County, No. 611092, filed 4/12/89; *Nordlinger v. Lynch*, Cal. Super. Ct., Los Angeles County, No. C-738781, filed 9/28/89; and *R.H. Macy & Co., Inc. v. Contra Costa County*, Cal. Super. Ct., Contra Costa County, No. C 89-04568. Although the Superior Court upheld Proposition 13 in the two cases that have had hearings as of March 6, 1990, these decisions are expected to be challenged on appeal.

to the future of taxes in California. These cases are now making their way through the courts. Any one of them could result in drastic changes or an invalidation of the initiative. Careful analysis of the *Allegheny* decision would be helpful in predicting the ultimate outcome of these challenges.

C. THE *Allegheny* DECISION

The United States Supreme Court held in the *Allegheny* case[71] that a tax system which created "dramatic differences in valuation"[72] for comparable property was unconstitutional because it denied recent purchasers equal protection of the law.[73]

In *Allegheny*, the taxing authority of West Virginia had been assessing real property on the basis of its recent purchase price, while making only minor modifications in the assessments of land which had not been recently sold.[74] The *Allegheny* Court found the practice unconstitutional, noting that "the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[75]

The *Allegheny* Court claims to have used "rational basis" scrutiny to overturn Webster County's taxation system. Well-settled principles of constitutional law dictate that this minimal scrutiny be applied to economic regulations.[76]

Since any conceivable reason for upholding the legislation is generally sufficient to meet the rational basis test,[77] virtually every challenge to a taxation system should fail. Despite this, the Court in *Allegheny* overturned the Webster County assessment practices. This is consistent with a modern trend favoring

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71. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 109 S. Ct. 633 (1989).

72. The *Allegheny* plaintiffs were taxed at 8 - 35 times the rate applied to owners of comparable properties, *Allegheny*, 109 S.Ct. at 637.

73. *Id.* at 635.

74. Assessed values of property that had not been recently conveyed were increased ten percent in the years 1976, 1982, and 1984, *In re 1975 Tax Assessments Against Oneida Coal Co.*, 360 S.E.2d 560 (1987).

75. *Allegheny*, 109 S. Ct. at 638.

76. *See* GUNTHER, CONSTITUTIONAL LAW, 11 ed., pages 593-596.

77. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530 (1959).

a more penetrating "rational basis" review.[78]

A number of issues are relevant in determining how much "bite"[79] the scrutiny used by the court actually has. Why did the *Allegheny* Court even reach the *federal* constitutional issue when it could have overruled the assessment method by looking exclusively to the state constitution? Did the challengers really have the burden of proof? If the Constitution requires the "seasonable attainment" of a "rough equality" in tax treatment,[80] how are these terms defined by the Court?

a. Did the Court use a More Penetrating Rational Basis Scrutiny?"

Traditionally, the United States Supreme Court has given great deference to legislative classifications which infringe on purely economic rights, requiring only that there be a "rational basis" underlying the classification.[81] Under "rational basis" scrutiny, *any* conceivable argument to uphold a classification would be sufficient to meet the demands of equal protection.[82] Since it eliminates the need for proving legislative intent, a rational basis test simplifies the government's burden in defending against an equal protection attack.

Claiming to use the rational basis test, the *Allegheny* Court rejected Webster County's arguments,[83] even though they

78. "In the early and mid-1980's; the Burger Court was sometimes less willing to apply the conceivable basis test. . . . While invoking the "rational basis" standard, the Court's inquiry sometimes took on a new, more penetrating character." TRIBE, AMERICAN CONSTITUTIONAL LAW, 2nd Ed., 1444 (1988). The Supreme Court has recently used rational basis review to strike down economic legislation, *Zobel v. Williams*, 457 U.S. 55 (1982), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

79. A noted commentator has argued for "a new bite for the old equal protection," Gunther, *Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

80. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 109 S.Ct. 633, 638. (1989).

81. TRIBE, AMERICAN CONSTITUTIONAL LAW, 2d Ed, §16-2, 1439-40 (1988).

82. "Here the discrimination against residents is not invidious nor palpably arbitrary because. . .it rests. . .upon a state of facts that *reasonably can be conceived* to constitute a distinction. . .which the state is prohibited from seperately classifying." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530 (1959) (emphasis added).

83. The County argued that its assessment scheme was rationally related to its purpose of assessing properties at true current value. It noted that the purchase price of property was exceedingly accurate information about its market value. *Allegheny*, 109 S. Ct. at 637.

presented a "conceivable" justification for the taxation method. In reality the Allegheny Court articulated a more stringent and result-oriented test: "the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[84] If the language of *Allegheny* is to be taken literally, a tax plan that does not achieve equality in a "seasonable" time is unconstitutional. This demanding standard establishes a level of scrutiny far above the traditional "rational basis" test, despite the Court's characterization to the contrary. I would therefore conclude that the *Allegheny* court reviewed Webster County's taxation method using what has been called "rational basis with bite."[85]

b. Discussion of the Federal Violations

The *Allegheny* Court could have rested its decision on its holding that the Webster County taxation scheme violated the state constitution's requirement for uniform taxation throughout the state.[86] Instead, Chief Justice Rehnquist, writing for a unanimous court, discussed how the assessment method violated the Federal Constitution.[87] By doing so, the Court left the door open for subsequent constitutional challenges to Proposition 13. Any attempt at determining why the Court did this would be speculative, but it may be significant that they did so.

c. Burden of proof

After *Allegheny*, the constitutionality of an assessment method is determined by comparing tax bills. Once the plaintiff establishes that taxes for property in the same class have been unequal for an unseasonable time, the burden shifts to the taxing authority to prove the plan is constitutional.

This placement of the burden of proof is a significant change from the analysis used by the *Amador* court when it up-

84. *Allegheny*, 109 S.Ct. at 638, *citing Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527, 79 S. Ct. 437, 440-441 (1959).

85. *See supra*, note 79.

86. "The West Virginia Constitution guarantees to its citizens that, with certain exceptions, 'taxation shall be equal and uniform throughout the State. . . .'" *Allegheny*, 109 S. Ct. 635, *citing* W. VA. CONST. art. X, § 1.

87. *Allegheny*, 109 S. Ct. at 637.

held Proposition 13. There the California Supreme Court showed great deference to the people's use of the initiative power, resolving all doubts in favor of Proposition 13.[88] If a more searching rational basis scrutiny is indeed now being used to review economic regulations, Proposition 13 might very well be found unconstitutional.

d. Other Issues

A number of issues remain unresolved under the *Allegheny* test. First, the Court does not explain how long "seasonable" is. In *Allegheny*, the assessment inequities they held unconstitutional had lasted for ten years. Since Proposition 13 has been creating assessment disparities for a longer time, and has no mechanism for equalizing taxes over time, it appears to violate the *Allegheny* Court's interpretation of "seasonable."

The second issue is how much of a difference in taxes does "rough equality" allow? The *Allegheny* Court rejected a scheme where the difference was 8 - 35 times higher.[89] The inequities in California may not be as dramatic, but their impact is still significant.[90] The California courts must determine whether a "rough equality" would allow one owner to pay over three times as much as his similarly situated neighbor.

Another issue that should be considered is how "similarly situated" is defined. Classifications based on a reasonable difference between the two groups are allowable. The *Allegheny* Court approvingly cited as examples the differences between corporations and individuals, or different trades and professions. However, these examples are quite different from a classification based on the date of a property's purchase. California courts must determine whether neighbors who purchase their homes at different times are "similarly-situated."

If the California courts follow the Allegheny test, the propo-

88. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1302, 149 Cal. Rptr. 239, 259 (1978).

89. *Allegheny*, 109 S.Ct. at 638.

90. A statistical study was recently made in Contra Costa County to determine the magnitude of the inequities. The average ratio of disparities in the county for the 1975 base year properties was 3.2:1 in 1987.

nents of Proposition 13 will have a heavy burden to overcome. This is a complete reversal of the burden of proof in Amador, where all presumptions *favored* the initiative. As a result Proposition 13 is unlikely to survive a constitutional attack without a revision to the section which creates the inequities.

D. THE *Krugman* DECISION

In *Krugman v. Board of Assessors*,[91] a pre-*Allegheny* New York Supreme Court case, a homeowner sought a declaratory judgment invalidating the assessment practices of the Village of Atlantic Beach, New York. Like the taxing schemes at issue in *Allegheny* and *Amador*, Atlantic Beach was assessing real property upon transfer, while making only minor value increases in property that had not recently been sold. The New York Appellate Division vacated the assessment, holding that "the selective reassessment of real property upon a transfer thereof violates the equal protection clauses of the Federal and State Constitution."[92] Atlantic Beach filed an appeal but abandoned it after *Allegheny*.[93] The Village has since refunded the taxes to the *Krugman* homeowners with interest.[94]

The *Krugman* court noted that disparate tax treatment based on a property's acquisition date "permits property owners who have been longstanding recipients of public amenities to bear the least amount of their cost."[95] According to the *Krugman* court:

> "It would appear that the sole purpose of the different classes is to serve administrative convenience by relieving the village of the burden of conducting a total annual review of the tax roll and instead permitting a piecemeal approach to reassessment. This approach lacks any rational basis in law and results in invidious discrimina-

91. 533 N.Y.S.2d 495 (1988).

92. *Krugman*, 533 N.Y.S.2d at 497.

93. Appeal dismissed in *Krugman v. Board of Assessors of The Village of Atlantic Beach*, 73 N.Y.2d 872, 537 N.Y.S.2d 498, 534 N.E.2d 336 (1989).

94. Mr. Krugman obtained a refund of $1,640.09 for overpaid taxes and interest. The Village also refunded $13,138.50 to six other homeowners represented by Krugman's attorney. Shaman, *Courts Addressing Assessments Inequities*, N.Y. Times, Feb. 26, 1989.

95. *Krugman*, 533 N.Y.S.2d at 501.

> tion between owners of similarly situated property. Thus, the respondents' method of reassessment violates the equal protection clause of. . .the United States Constitution."[96]

A recent *New York Times* article speculated that the *Krugman* and *Allegheny* decisions could mean the rollback of assessments for hundreds of new property owners in New York, and higher assessments for longtime residents,[97] as local government tries to equalize the taxes.

The *Krugman* decision is significant since it adds to the weight of authority against a Proposition 13-style tax scheme. The analysis used in Krugman closely parallels that used by the Supreme Court in *Allegheny* three months later. The taxation system used in New York closely parallels the California system established by Proposition 13. Since both these cases dealt with almost identical factual situations, the fact that *Krugman* overturned the taxation system using a less stringent test than the *Allegheny* court highlights the fact that the *Allegheny* Court went further than was necessary to overturn the taxation method they were reviewing. It is conceivable that the Court was laying the groundwork for a challenge to Proposition 13. Certainly the precedent established by *Allegheny* creates a difficult burden for the California taxing authority to overcome.

E. Harmonizing the Decisions

The assessment methods sucessfully challenged in *Allegheny* and *Krugman* are virtually identical to the method established by Proposition 13, which *Amador* held to be constitutional. The *Allegheny* Court expressly noted that Proposition 13 was similar to the scheme it was striking down, but declined to determine if such a method would survive an equal protection attack if it were the general law of the state, as it is in California.[98] All three systems assessed recently transferred real prop-

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96. *Id.*

97. Shaman, *Courts Addressing Assessment Inequities*, N.Y. Times, Feb. 26, 1989.

98. "We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy as Article XIIIA of its Constitution. . . .The system is

erty at substantially higher rates than properties not recently sold, thereby creating a wide discrepancy in taxes. Both the *Krugman* and *Allegheny* courts held that this violated the equal protection clause of the federal constitution. The California Supreme Court in *Amador* looked at the same basic assessment method and only found it constitutional after weighing the scales very heavily in favor of the tax scheme. In order to predict the outcome of a challenge to Proposition 13 after *Allegheny*, it is necessary to harmonize these contradictory results.

The Supreme Court itself suggests one possible way to harmonize the *Allegheny* decision with Proposition 13.[99] California's method of assessment has been specifically established as a state law, while the *Krugman* and *Allegheny* assessors were violating the New York[100] and West Virginia[101] constitutions, respectively. It seems doubtful that this distinction is sufficient to save Proposition 13; however, since the Supreme Court also stated in the same opinion that this method of assessment violated the *federal* constitution.[102] Thus even if the assessment method does not violate *state* law, a challenger to Proposition 13 can argue that under *Allegheny* it violates the *federal* constitution.

A better explanation for the different holdings is the apparently differing levels of scrutiny applied by the courts reviewing the taxation methods. The *Amador* court upheld Proposition 13 by noting that it was the court's "solemn duty to jealously guard the initiative power as being one of the most precious rights of our democratic process."[103] The court also stated that "if doubts reasonably can be resolved in favor of the use of the initiative, we should so resolve them."[104] Plainly the burden in *Amador*

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grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of property. "*Allegheny*, 109 S. Ct. at 638, note 4.

99. *Id.*

100. "The legislature shall provide for the. . . equalization of assessments for purposes of taxation," N.Y. CONST. art. XVI, § 2.

101. ". . .[T]axation shall be equal and uniform throughout the state," W. VA CONST. art. X, § 1.

102. *Allegheny*, 109 S.Ct. 633, 637. (1989). (emphasis added).

103. *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 248, *citing Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591. (1976)

104. *Id.*

was on the challengers to the taxation scheme. The *Amador* court itself made it clear that a close question was being decided when it admitted that it was reserving judgment on some "unresolved uncertainties"[105] and that it was presenting "an arguably reasonable basis for assessment."[106] This language is consistent with a more traditional rational basis scrutiny level, which only requires a "conceivable" reason to uphold the challenged classification.

In sharp contrast is the test stated in *Allegheny*: "In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[107] Under this standard the challenger still has the initial burden of establishing inequality, but this can be met quite easily by putting the public tax roll into evidence. The burden then shifts to the taxing authority to establish that the challenged tax method will seasonably correct these inequities. If it does not, it fails the *Allegheny* test and thus violates the equal protection mandate. The test as articulated does not allow the taxing authority to justify the inequality. Once it has been established that similarly situated property is being taxed unequally, the disparity must be corrected. This is clearly tougher than the traditional rational basis scrutiny used by the *Amador* court.

If the different results reached by the decisions are caused by a modern, more searching level of review, then a challenge to Proposition 13 should succeed under the new standard. What becomes the deciding issue is where the court focuses its attention. If the challenger must prove that *no* rational basis for the assessment method exists, Proposition 13 should be found constitutional as it was in *Amador*. If instead the government is required to show that taxes are roughly equal, Proposition 13 must be held unconstitutional under the *Allegheny* test.

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105. *Amador*, 22 Cal. 3d at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

106. *Amador*, 22 Cal. 3d at 235; 583 P.2d at 1293, 149 Cal. Rptr. at 251 (emphasis added).

107. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 109 S. Ct. at 638.

IV. ARGUMENTS FOR & AGAINST PROPOSITION 13

An analysis of the arguments for and against Proposition 13 provides insight into the possible outcome of a constitutional challenge to the initiative. There are persuasive arguments on both sides of the issue. It is important to note; however, that a balancing of interests is not part of traditional rational basis analysis. The arguments in favor of Proposition 13 merely point out that it would be difficult to assert that *no* rational basis for the initiative exists. There are certainly some conceivable reasons to uphold Proposition 13. Thus under an *Amador* -type analysis the taxation system could be upheld.

A. ARGUMENTS IN FAVOR OF UPHOLDING PROPOSITION 13

1. *Predictability*

One argument in favor of Proposition 13's validity was analyzed in *Amador* and acknowledged by the United States Supreme Court in *Allegheny*.[108] Under the "acquisition value" approach[109] to taxation established by Proposition 13, taxes bear a "rational relationship" to the price a buyer is willing and able to pay for property.[110] Because of Proposition 13, property owners can estimate their future tax liability with some assurance. The *Allegheny* Court noted that Proposition 13 is grounded in the belief that owners should not be taxed on unrealized paper gains in the value of their property.[111]

Although Proposition 13 admittedly creates inequities, the initiative has accomplished its purpose of providing real property tax relief. Initially it lowered taxes for all homeowners from an effective rate of 2.7 percent to 1.1 percent. Proposition 13 then kept taxes affordable despite rapid appreciation in real property in the last decade.[112] The benefits of Proposition 13 can

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108. *Allegheny*, 109 S. Ct. at 638, n. 4.

109. *Amador*, 22 Cal.3d at 235; 583 P.2d at 1293, 149 Cal. Rptr. at 251.

110. "This 'acquisition value' approach to taxation finds reasonable support in a theory that the annual taxes which a property owner must pay should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value, *id.* at 235, 583 P.2d at 1293, 149 Cal. Rptr. at 251.

111. *Allegheny*, 109 S.Ct. 633, 638, n. 4.

112. In the last decade the aggregate assessed value of all land in California increased from $95,453 million dollars in 1978-79 to $1,151,588 million dollars in 1988-89.

best be seen by comparing taxes in California to other jurisdictions lacking similar protection. Many other states are only now considering legislation similar to Proposition 13. In the New York/ New Jersey metropolitan area, sudden, dramatic increases in tax assessments[113] have property owners in active revolt.[114]

2. *Proposition 13 Spreads the Tax Burden*

Another argument in support of Proposition 13 is that the initiative spreads the overall tax burden more equitably than do systems without property tax limitations. Under Proposition 13, local governments cannot collect needed revenues by raising property taxes, so they must obtain funding from other sources. The cost of services, borne disproportionately by homeowners in the absence of Proposition 13-type legislation, is now spread over a larger group of all wage earners, renters, and owners of property. A broader tax base in turn allows for a lower tax per person.

3. *Will of the People*

Proposition 13 is also supported by the argument that the initiative is "the will of the people." It was enacted by an overwhelming majority of the voters.[115] Presumably, these voters were aware that unequal tax treatment would result, since the ballot arguments clearly stated that "two identical properties with the same market value could have different assessed values for tax purposes if one of them has been sold since March 1,

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CAL. STATE BOARD OF EQUALIZATION, ANNUAL REPORT 1987-88 at page A-4, Table 4.

113. Westchester County, NY predicted a 9% increase in 1989, New York Times, Dec. 25, 1988, §XXII, 1:5; Nassau County, NY predicted a 12% increase in 1989, New York Times, Nov. 15, 1988, §II, 2:4; Suffolk County, NY proposed a 15% increase in 1989, New York Times, Oct. 9, 1988, §XXI, 1:4; New York City co-op and condominium owners faced 20% increases in taxes in 1989, N.Y. Times, March 4, 1989, §I, 29:2. These statistics emphasis the benefits of Proposition 13's limitations on taxes.

114. On March 14, 1989 in Hauppauge, NY more than 700 residents, irate over rising taxes, packed the Suffolk County legislative chambers to demand a rollback of property tax increases. One local politician noted "I knew they would be angry, but there was almost a sense of violence out there tonight." Homeowners complained that their children had to move out of state in order to be able to afford a home. Speakers at the hearing stated " We fear being unable to live here, we fear being unable to pay our bills. . . You must heed the growing tide, the tide of a tax revolt." Schmitt, *Suffolk Property Owners Demand Tax Reductions*, N.Y. Times, March 14, 1989, §II, 2:4.

115. *See supra*, note 8 and accompanying text.

1975,"[116] and "[h]omeowners living in identical side-by-side houses will pay vastly different property tax bills."[117]

Continuing voter support for Proposition 13 is evidenced by subsequent tax-related initiative measures. In 1986, the California voters enacted Proposition 62, which requires a two-thirds vote of the local governing body to impose a general fund tax.[118] A recently proposed initiative which would have raised Proposition 13's one percent limitation to 2.2 percent for commercial properties failed to get the number of signatures required to put it on the ballot.

B. Arguments Against Proposition 13

There are a number of arguments that could be advanced to overrule Proposition 13. Again, it must be noted that these will not be considered by a court using the *traditional* rational basis test, since *any* reason in favor of the law will be sufficient to meet that standard. If, instead, a more searching test is used because of *Allegheny*, the court may balance the equities by weighing the arguments on both sides of the issues. If this occurs arguments against the initiative might carry significant weight in the court's decision.

1. *Inherent Unfairness*

Opponents of Proposition 13 argue that there is no reason why long time owners should pay lower taxes than recent purchasers. The court in *Krugman* noted that the practice of assessing only newly transferred properties at market value has the effect of permitting property owners who have been longstanding recipients of public amenities to bear the least amount of their cost.[119] This is true of the system established by Proposition 13 as well.

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116. California Voters Pamphlet, 59, June 6, 1978, Journal Ballot Proposition Analysis, note 3, (Analysis by Legislative Analyst).

117. *Id.*, Arguments Against Proposition 13.

118. Cal. Initiative Proposition No.62 (Nov 4, 1986), codified at Cal. Gov't Code § 53720-30 (West 1983 & Supp 1990).

119. *Krugman*, 533 N.Y.S.2d at 501.

2. *The Plight of the First-Time Homebuyer*

The difficulties facing home buyers in 1990 are much greater than they were in 1976. The price of property in most California cities has risen faster than salaries, putting the purchase of a home beyond the means of most potential first-time home buyers.[120] Proposition 13 exacerbates the problem by imposing a disproportionate share of California's tax burden on recent purchasers. The initiative could put the purchase of a home further out of reach for many first time homebuyers because their taxes must subsidize their neighbors. Justice Bird, in her *Amador* dissent, recognized this problem twelve years ago: "the higher mortgage payments that new homeowners pay as compared to earlier purchasers forewarns us against any cavalier assumption that later purchasers are able to bear heavier taxes."[121]

The value of these opposing arguments in allowing one to predict the outcome of a constitutional challenge is minimal however, since a balancing test allows each judge considerable discretion in determining which way the scales tip. They are presented in this note to allow the reader to begin considering the issues as a first step towards drawing their own conclusions.

V. CONCLUSIONS AND RECOMMENDATIONS

1. *Introduction*

The justifications for Proposition 13 referred to in *Amador* and *Allegheny* are commendable. The two interests advanced, enabling property owners to accurately estimate their future tax liabilities and preventing the taxation of unrealized paper gains in property values, seem to establish rational state interests which should be sufficient to uphold the initiative. This should not end the constitutional inquiry; however, since the equal protection test has both a "means" and "ends" branch. Where less

120. The assessed value of property has increased from $95,543 million dollars in 1979 to $1,151,588 million dollars in 1989; more than a thousand percent increase. Cal. State Board of Equalization, Annual Report 1988-89, at page A-4, table 4.
Salaries have not kept pace with this rapid appreciation.

121. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 255, 583 P.2d 1281, 1306-1307, 149 Cal. Rptr. 239, 264 (1978).

restrictive ways to accomplish these goals exist, the use of a more searching rational basis test might find the initiative unconstitutional.

2. *Recommendations*

The inequities of Proposition 13 could be eliminated without affecting voter expectations. The protections afforded by the one percent limit of Section 1 and by the two-thirds voting requirements of Sections 3 and 4 could still stand,[122] government spending could still be restricted, and all arguments in favor of the initiative could still be met without imposing disproportionate tax burdens, simply by modifying the language of Section 2 which creates the different classes of taxpayers.

a. Raise All Assessments to 1990 Levels

One way to equalize taxes would be to define full cash value as current market value. Local government could reassess property and raise taxes annually. Neighboring property owners would then pay taxes based on the property's value, not its date of acquisition. It should be noted that raising assessments is not a remedy which can be forced on an aggrieved taxpayer. It has long been held, and was reasserted by the Court in *Allegheny*[123] that "the constitutional requirement. . . is not satisfied if a state. . . imposes on [the taxpayer] the burden of seeking an upward revision of the taxes of other members of the class."[124] One problem with this approach is that government revenue would substantially increase as a result, thereby thwarting the intention of the voters in enacting Proposition 13.

Reassessing all property at 1990 market values could also prompt an increase in foreclosures. Most home owners borrow to their credit limit, hoping to take advantage of continued equity growth. In addition, financing homes with variable rate mortgages has become a growing trend. Monthly payments under this

122. Proposition 13 allows for the severance of any unconstitutional section without affecting the whole, Cal. Const. art. XIIIA, § 6.

123. *Allegheny*, 109 S. Ct. 639.

124. *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-57 (1923), *Hillsborough Township v. Cromwell*, 326 U.S. 620 (1946).

form of financing increase as interest rates go up. A tax increase of even a few hundred dollars a month could cause borrowers using variable rate financing to go into default, especially if interest rates had increased as well.

Higher taxes would also lower the price of homes. Buyers must consider the total monthly cost of financing, insurance, *and* taxes when budgeting a purchase price. Higher taxes would make less money available for mortgage payments, would lower the demand for homes, and would thereby lower home prices. Lower home prices could in turn stagnate the home building market, cause a state-wide recession. As worker/homeowners began losing their jobs, still more foreclosures could result.

A number of solutions could alleviate these problems. The tax increases could be phased in over a period of from five to ten years. Special provisions, like tax exemptions or government subsidies, could be made for elderly and low-income homeowners so that these particularly susceptible classes of homeowners would not be forced out of their homes. A tax "payment cap," which places a ceiling on a homeowner's yearly payments, could also help to avert foreclosures. Any accrued but unpaid taxes under such a scheme would not be due until the affected property was sold or transferred.

b. Lower All Assessments to 1976 Levels

A second alternative, assessing all property at 1976 levels, could have a disastrous effect on governmental financing. When Proposition 13 was enacted in 1978, municipalities had to find creative ways around the initiative in order to make up for an estimated $6 billion in lost revenues. Subsequent initiatives have since closed many of these loopholes, making it difficult for state and local government to replace the losses.

The cost of providing government services has continued to increase since 1976. By reassessing property at 1976 levels, a taxpayer who benefits from an unnaturally low 1976 tax rate would nonetheless continue to expect 1990 services. The expectation is unrealistic in light of modern costs.

c. Base All Assessments on a Median Value

A third option would be to equalize assessments by fixing them at some median date so that pre-1975 residents would pay a little more and recent purchasers would pay a little less than they currently pay under Proposition 13. If the volume of home sales has been consistent over the past decade, a date midway between the 1976 and 1989 assessments would be the logical choice. All property bought before 1976 would accordingly be assessed at its 1983 value, and then adjusted to 1990 values using the inflation factor of Section 2(b).

With appreciation in home values running at up to thirty percent, Section 2(b)'s two percent annual inflation adjustment will have to be increased under this option. Statistical studies would be necessary to determine a percentage that could maintain the requisite "rough equality" over time. One solution would be to provide for a five year adjustment period, since predicting the rate of future appreciation is difficult. Basing the amount of the annual increase on an objective factor, in a manner similar to variable rate mortgage payments, offers another possible solution.

By adjusting all assessments to a median value, government revenues could be maintained at their present levels, while taxes could be equalized for similiarly situated owners. Homeowners would still be able to accurately predict their future tax liabilities because the base assessment would remain fixed, and the inflation factor would allow maximum increases which are set in advance. New buyers would take their seller's tax base, thereby avoiding the constitutional problem of the present system.

d. Charge a Transfer Tax upon Sale

Another solution, charging a transfer tax based on a property's sale price, would allow long-time homeowners to pay their proportionate share of the state's tax burden, but only upon realization of their property's appreciated value.

Because of the problems associated with trying to determine a transfer tax that would equalize all taxes, this solution would be difficult to implement. A payment cap would accomplish the

same goal of delaying payment until sale, but would assure equality in asessments.

e. Increase the Assessments and Lower the Rate

Since two of the purposes of Proposition 13 were to cut government spending and to provide "effective property tax relief", another, and arguably the best, solution to Proposition 13's constitutional weaknesses would be to equalize assessments at market value but cut the tax rate to keep revenues constant.

To illustrate, when the assessment on a home bought for $50,000 is increased to its market value of $200,000, the tax rate could be cut from one percent of the property's appraised value currently required under Proposition 13 to a lower percentage. While some taxpayers would, under such a scheme, face a tax increase, the magnitude of any such increase would be much less than if the percentage were not lowered.

The tax rate can be made variable, adjusting every year to maintain government revenues at present rates. An inflation factor can be incorporated to allow reasonable increases in revenues as required to maintain the same level of services. This solution would retain the spirit of the initiative while avoiding severe burdens on any class of property owners.

3. *Conclusions*

The large variety of recommendations above illustrate that there are less restrictive means to accomplish Proposition 13's goals. Whether these will be looked at by a court depends in large part on the level of scrutiny above. In light of the inequities created by the present system, and the wide variety of alternative methods to accomplish the same goals, the balance should be considered by a court.

While Proposition 13 has accomplished its purpose of lowering taxes for property owners, it has done so at the expense of the recent home buyer. The yearly two percent increase allowed by Section 2(b) has been unable to keep pace with rapidly rising property appreciation in California during the past decade, thereby widening the gap between the amount of taxes paid by

pre- and post-1975 property purchasers.

The disparity created by assessing property based on its acquisition date unfairly allocates the tax burden between these two classes of homeowners because it forces recent property owners to pay more for government services than do neighbors who have enjoyed these services for a longer period of time. Under Proposition 13 as it exists today, it is impossible to "seasonably" achieve a "rough equality" in tax treatment in California. Therefore, if the strict standard of the *Allegheny* decision is applied to Proposition 13, the initiative would be found unconstitutional.

If this occurs it does not mean that all control on state and local property taxes in California will be eliminated. Proposition 13 provides a mechanism for removing unconstitutional portions of the initiative without voiding the whole. Since the constitutional infirmiry would be limited to section 2, the rest of Proposition 13 could be preserved. Section 2 can be revised in a number of ways to equalize taxes for similarly situtated owners, while still maintaining government revenues.

Thus, in conclusion, only section 2 of Proposition 13 should be modified to remove the constitutional infirmiry. The initiative has succeeded in providing real property tax relief, and government services have not collapsed as a result. Since the benefits of Proposition 13 can be maintained, and the inequities cured, by a minor modification, either the legislature or the judiciary should act to correct the current imbalance in taxes.

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