

## Note

### *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County:* **Equal Protection in Property Taxation, A New Challenge To Proposition 13?**

*In Allegheny Pittsburgh Coal Co. v. County Comm'n the United States Supreme Court held that it was an unconstitutional violation of equal protection for the assessor of Webster County to subject similarly situated properties to different tax burdens depending on when they were purchased. The Court stated it "need not" and did not decide whether the California system of property taxation under Article XIII A of the California Constitution, enacted as Proposition 13, would "stand on a different footing." The Court's collateral reference has inspired recent challenges to Proposition 13. This Note addresses the United States Supreme Court's equal protection analysis and its possible application to California's Article XIII A.*

#### I. INTRODUCTION

Eleven years after the voters of California passed Proposition 13,<sup>1</sup> the Tax Limitation Initiative, the United States Supreme Court may have rekindled the debate over its constitutionality in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*.<sup>2</sup>

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1. Proposition 13, the Tax Limitation Initiative, was adopted June 6, 1978. CAL. CONST. art. XIII A (1988).

2. 109 S. Ct. 633 (1989).

The Court held that the Webster County, West Virginia tax assessor violated the equal protection clause of the fourteenth amendment by valuing the petitioners' land on the basis of its recent purchase price while making only minor modifications in the assessed value of comparable property which had not been recently sold.<sup>3</sup> The Court found that the disparity in the allocation of the tax burdens arising from the "relative undervaluation of comparable property" was a denial of equal protection.<sup>4</sup>

In *Allegheny Pittsburgh*, the Court specifically referred to the California scheme of property taxation under article XIII A of the California Constitution, which was created by Proposition 13. The Court recognized that the provisions of Proposition 13 might result in the same kind of disparities condemned in *Allegheny Pittsburgh*; that is, similarly situated properties that bear different tax burdens depending on when they were purchased.<sup>5</sup> The Court laid the groundwork to distinguish the California system, stating that the seemingly "aberrational enforcement policy" at issue in the West Virginia case might "stand on a different footing if it were the law of a State, generally applied," as in California.<sup>6</sup> But the Court made no reference to *Amador Valley Joint Union High School District v. State Board of Equalization*<sup>7</sup> in which the California Supreme Court had addressed the equal protection issue in an early, and unsuccessful, challenge to the constitutionality of Proposition 13.

By suggesting that the constitutionality of the California system of property taxation might be questioned in the context of the *Allegheny Pittsburgh* case, the United States Supreme Court seems to have left the door open to an equal protection challenge to the Proposition 13 tax system. This Note addresses the United States Supreme Court's equal protection analysis and its possible application to California's article XIII A.

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3. *Id.* at 639.

4. *Id.*

5. *Id.* at 637, 639.

6. The entire footnote, the last of only four footnotes in the unanimous opinion, states:

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 XIII A of its Constitution, popularly known as "Proposition 13." Proposition 13 generally provides that property will be assessed at its 1975-1976 value, and reassessed only when transferred, constructed upon, or in a limited manner for inflation. The system is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

*Id.* at 638 n.4 (citation omitted).

7. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

## II. BACKGROUND

The principles of equal protection as they apply to real property taxation have been well established in a long line of cases. As early as 1917, the United States Supreme Court stated "it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the Constitutional right of one taxed upon the full value of his property."<sup>8</sup> In disputes over discrimination, the burden of proof is on the complaining party to prove the discrimination was intentional and systematic.<sup>9</sup>

Where the distinction in tax burdens is based on a state policy or state law, a "different footing" has always been recognized. "The States have a very wide discretion in the laying of their taxes."<sup>10</sup> The United States Supreme Court stated in a 1929 case:

The applicable principles are familiar. The States have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests.<sup>11</sup>

This principle has been repeated in numerous cases, many of which are cited with approval in *Allegheny Pittsburgh*. For example, in *Nashville Chattanooga & St. Louis Railway v. Browning*, the Court held that a state could distinguish railroad and utility property from other property and require the former to bear a higher tax burden than the latter.<sup>12</sup> The Court stated: "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others . . . are among the commonplaces of taxation and of constitutional law."<sup>13</sup>

The distinctions and classifications made by a state for taxation purposes must not violate the equal protection clause of the four-

8. *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352-53 (1918).

9. For a listing of relevant equal protection cases, see *Charleston Fed. Sav. & Loan Assoc. v. Alderson*, 324 U.S. 182, 190-91 (1945) (cited in *Allegheny Pittsburgh*, 109 S. Ct. at 637-38).

10. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1958) (cited in *Allegheny Pittsburgh*, 109 S. Ct. at 638).

11. *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930). The Court held there was no violation of equal protection where the state taxed different classes of oil on a separate basis.

12. 310 U.S. 362 (1940) (cited in *Allegheny Pittsburgh*, 109 S. Ct. at 639).

13. *Id.* at 368.

teenth amendment. "Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. . . . But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."<sup>14</sup>

The Court enunciated the standard of review as early as 1920: "If the selection or classification is neither capricious nor arbitrary, and rests upon some *reasonable consideration* of difference or policy, there is no denial of the equal protection of the law."<sup>15</sup> This standard or test merely states the question that must be addressed in each case: Does the state's system of taxation distinguish between properties on the basis of reasonable considerations of difference or policy, or does it capriciously or arbitrarily discriminate between comparable properties?

### III. CALIFORNIA: PROPOSITION 13

#### A. Amador Valley Joint Union High School District v. State Board of Equalization

In *Amador Valley Joint Union High School District v. State Board of Equalization*,<sup>16</sup> the California Supreme Court reviewed a seemingly comprehensive attack on Proposition 13, which had been incorporated into the California Constitution as article XIII A. Petitioners in *Amador Valley* raised two equal protection arguments in challenging Proposition 13. One equal protection argument raised in *Amador Valley* focused on the two-thirds voting requirement for "special taxes;" it is not relevant to this analysis.<sup>17</sup> But the primary

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14. *Allied Stores of Ohio*, 358 U.S. at 526; *accord* *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973) ("the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation").

15. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910) (emphasis added) (cited in *Allegheny Pittsburgh*, 109 S. Ct. at 638).

16. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

17. The petitioners in *Amador Valley* argued that the two-thirds voting requirement for enacting "special taxes" by local agencies (article XIII A, section 4) unduly discriminated in favor of those casting negative votes. The court disposed of this contention in summary fashion. It held that "[b]ecause persons who vote in favor of tax measures may not be deemed to represent a definite, identifiable class, equal protection principles do not forbid 'debas[ing]' their vote by requiring a two-thirds approval of such measures." *Id.* at 237, 583 P.2d at 1294-95, 149 Cal. Rptr. at 252-53.

Interestingly, the state court's treatment of this issue had been prescribed by decisions of the United States Supreme Court. The California Supreme Court had originally held a two-thirds requirement for approval of bonds violated federal equal protection principles. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970). However, the United States Supreme Court vacated that decision, *Mihaly v. Westbrook*, 403 U.S. 915 (1971), and remanded it for reconsideration in light of its holding in *Gordon v. Lance*, 403 U.S. 1 (1971). In *Gordon*, the United States Supreme Court upheld a 60% voting requirement primarily because it did not single out any "discrete and

equal protection argument in *Amador Valley* was the “rollback” of assessed valuation to “full cash value” would result in “invidious discrimination between owners of similarly situated property.”<sup>18</sup> This argument is at the crux of the issue later raised in *Allegheny Pittsburgh*.

Proposition 13 overturned the system of assessing real property at its current value, which tied assessment value to the property’s current fair market value. In its place, Proposition 13 required assessment of property taxes to be based on the “full cash value” of the property. The new assessment system included two important restrictions. First, the assessment restrictions of Proposition 13 limited the “full cash value” to the “appraised value of real property when purchased, newly constructed or a change in ownership has occurred . . . .”<sup>19</sup> Second, for owners who purchased their property before 1975, Proposition 13’s rollback provision limited “full cash value” to “the county assessor’s valuation . . . as shown on the 1975-76 tax bill.”<sup>20</sup>

When these provisions went into effect in 1978 they actually created two groups of property owners who gained comparative tax advantages that still exist today. The first group consists of pre-1975 owners whose property assessment was rolled back to the assessed value as of 1975. The second group consists of people who bought their property after 1975 but whose property appreciated due to inflation or minor improvements which did not trigger reassessment. As the California Assembly Revenue and Taxation Committee recognized in 1980: “The effect of the Section 2 assessment restrictions is to stabilize taxes for persons who *remain* in their homes, and allow increases to market value only for those acquiring or improving real property.”<sup>21</sup>

In *Amador Valley*, the California Supreme Court addressed both of these property tax classifications and found no violation of federal

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insular” minority for special treatment. *Gordon*, 403 U.S. at 7.

18. *Amador Valley*, 22 Cal. 3d at 232, 583 P.2d at 1292, 149 Cal. Rptr. at 250.

19. *Id.* at 232, 583 P.2d at 1292, 149 Cal. Rptr. at 249. The original proposition listed certain exceptions to this clause and later amendments have added to the list. The term “newly constructed” exempts construction following certain disasters, addition to solar energy systems or construction in order to comply with certain government-imposed safety standards. Additionally, there are numerous exceptions to the “change in ownership” provision primarily related to involuntary changes in ownership or intra-family transfers.

20. CAL. CONST. art. XIII A, § 2, sub. a (1988).

21. ASSEMBLY REVENUE AND TAX’N COMM., PROPOSITION 13 ASSESSMENT ISSUES, A BRIEFING BOOK FOR OVERSIGHT HEARINGS A-7 (Sept. 1980).

equal protection principles. Under the “full cash value” or “acquisition value”<sup>22</sup> system, each year those who have recently purchased real property may be required to pay higher taxes than owners of similarly situated property who purchased their property in previous years.<sup>23</sup> The California Supreme Court held that the more recent purchasers were not unduly discriminated against even though they would pay higher taxes than owners of similarly situated property. In fact, the court found that the acquisition value system could “operate on a fairer basis than a current value approach” because each property owner would be assessed and taxed on the same basis. That is, each piece of property would be assessed and taxed on the basis of the cost of the property, “assuming [the cost] represented the then fair market value.”<sup>24</sup>

The court also considered a group of property owners who were potentially *disadvantaged* by the rollback provisions: those whose true acquisition value was *lower* than the “full cash value” shown on the 1975-76 tax rolls. The court held that “[t]hese persons cannot complain of any unfair treatment in view of the substantial tax advantage gained by the rollback.”<sup>25</sup> Although the 1975 cutoff date might seem arbitrary, the court determined that the policies of administrative convenience and of ensuring adequate tax revenues were an adequate basis for it.<sup>26</sup>

The petitioners in *Amador Valley* relied on a number of cases in which “intentional, systematic *undervaluation* of property similarly situated with other property assessed at its full value” was held to

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22. “Full cash value” is the term used in the text of Proposition 13 but the California Supreme Court used the term “acquisition value.” *Amador Valley*, 22 Cal. 3d at 232, 583 P.2d at 1293, 149 Cal. Rptr. at 251. The term “acquisition value” may more accurately reflect Proposition 13’s system of property valuation because the term “full cash value” might be confused with the concept of “fair market value.” Therefore, the term acquisition value is used in the following discussion.

23. This is true assuming property values are increasing for all the similarly situated property and that the rate of increase is higher than the two percent inflationary allowance under the California Constitution. CAL. CONST. art. XIII A, § 2, sub. b (1988).

24. *Amador Valley*, 22 Cal. 3d at 235, 583 P.2d at 1293, 149 Cal. Rptr. at 251. The court ignored the cumulative effect. A simple example of the cumulative effect can be seen in the following hypothetical. Assume the properties at 100 Suburban Lane and 102 Suburban Lane are identical tract homes. When the homes were first purchased in 1975 they were both worth \$30,000; in April 1989, they are both for sale at \$170,000. *A*, the owner of 100 Suburban Road, purchased the home in 1975 and has not moved; she has paid \$300 in property tax each year for fourteen tax years since the passage of Proposition 13 (a total of \$4,200). The property next door at 102 Suburban Lane has had seven owners (who purchased the home every other year for \$20,000 above the price paid by the previous buyer). The seven owners of 102 Suburban Lane have paid a total of \$12,600, three times more tax than that paid by *A* for her similarly situated property at 100 Suburban Lane. But when *A* sells her home, she will recover the full current value of the property without ever compensating for the lower taxes she has paid.

25. *Id.* at 236, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

26. *Id.*

constitute an improper discrimination in violation of equal protection principles.<sup>27</sup> The court distinguished these cases because the successful challenges were brought against a background in which the state legislature had mandated a system of current valuation. The court noted that the passage of Proposition 13 by the voters of California changed the state's basis of valuation to that of "full cash value."<sup>28</sup> The court found there was nothing in either the California or federal constitution mandating the current value approach to real property valuation. For support, the court pointed out that the California Constitution "contemplates" the use of a value standard other than fair market value.<sup>29</sup> Additionally, it noted that the United States Supreme Court had previously held the states are "not limited to *ad valorem* taxation."<sup>30</sup> Finally, the California Supreme Court compared the acquisition value basis for real property taxation to the computation of sales tax; the court did not, however, address the question of whether different policies underlie property and sales taxes.<sup>31</sup> The court equated the two tax systems "whereby the taxes one pays are closely related to the acquisition value of the property."<sup>32</sup>

The California Supreme Court, in analyzing the equal protection challenge in *Amador Valley*, reached two essential conclusions, the

27. *Id.* at 234, 583 P.2d at 1293, 149 Cal. Rptr. at 251; *see, e.g.*, *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) (unequal assessment not in accordance with state statute); *Cumberland Coal Co. v. Greene County*, 284 U.S. 23, 28 (1931) (discrimination in state taxation of coal tracts); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923) (taxpayer who was discriminated against had a right to have his assessment reduced even though it was a departure from the requirement of the *ad valorem* taxation laws).

28. CAL. CONST. art. XIII A, § 2 (1988).

29. *Amador Valley*, 22 Cal. 3d at 236, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

30. *Ohio Oil Co. v. Conway*, 261 U.S. 146, 159 (1930) (cited in *Amador Valley*, 22 Cal. 3d at 236, 583 P.2d at 1294, 149 Cal. Rptr. at 252).

31. *Amador Valley*, 22 Cal. 3d at 235-36, 583 P.2d at 1293-94, 149 Cal. Rptr. at 251-52. Even after Proposition 13, the assessed value of property is not necessarily equal to the purchase price. Sales taxes, on the other hand, are always applied to the actual price paid. In a California Senate Committee hearing which focused on the inequities caused by the Proposition 13 system of property taxation, the counsel for the State Board of Equalization stated:

The assessor now and always has used the fair market value standards which can be somewhat different from the purchase price. You can pay more for the property if you get favorable returns. You might find a distressed seller who a buyer could take advantage of and consequently he may get it at less than market value.

*Interim Hearing on Proposition 13, Senate Comm. on Revenue and Tax'n*, 1979-80 Sess. 11 (1980) (remarks of Mr. Larry Augusta, Tax Counsel, Board of Equalization).

32. *Amador Valley*, 22 Cal. 3d at 236, 583 P.2d at 1294, 149 Cal. Rptr. at 252.

second of which was wholly unsubstantiated. First, the court concluded that a rational relation to a valid state policy is a sufficient basis for discrimination to overcome an equal protection challenge. For this conclusion, the court relied on a long and consistent line of United States Supreme Court cases holding that each state has “a large leeway” in drawing up a system of taxation.<sup>33</sup> The principle that “[a] state tax law is not arbitrary although it “discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy” not in conflict with the Federal Constitution . . . ’ has weathered nearly a century of Supreme Court adjudication.”<sup>34</sup>

But the California Supreme Court did not have the same kind of support for its second conclusion that Proposition 13 bore a rational relation to a valid state policy. The court sidestepped the task of actually defining the applicable state policy to which Proposition 13 was directed. The court merely found the “acquisition value” approach might provide a fairer basis for assessment than a current value approach, but it did not substantiate its opinion. The disparate result in property taxes was found to be fair and equitable in that each owner’s taxes would reflect the price that he or she was originally willing to pay “rather than an inflated value fixed, after acquisition, in part on the basis of sales to third parties over which sales [the owner] can exercise no control.”<sup>35</sup> The California Supreme Court concluded its equal protection discussion by stating: “We cannot say that the acquisition value approach incorporated in article XIII A, by which a property owner’s tax liability bears a reasonable relation to his costs of acquisition, is wholly arbitrary or irrational. Accordingly, the measure under scrutiny herein meets the demands of equal protection principles.”<sup>36</sup>

### B. Amador Valley: *Dissenting Opinion*

Chief Justice Rose Bird filed a separate opinion, concurring in part but dissenting from the court’s equal protection analysis. Justice Bird raised the issue of whether it was enough for the court to simply assume a rational state policy justified the disparities created by Proposition 13. The Chief Justice concluded: “Under article XIII A property taxpayers are not treated equally, and those sections which

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33. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1972) (“the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation”). For a discussion of these principles of taxation and constitutional law, see *supra* notes 9-16 and accompanying text.

34. *Amador Valley*, 22 Cal. 3d at 234, 583 P.2d at 1292, 149 Cal. Rptr. at 250 (citing *Kahn v. Shevin*, 416 U.S. 351, 155-56 (1974)).

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

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



promote this disparity must fall.”<sup>37</sup>

In her dissent, Justice Bird pointed out that although any initiative passed by the people of the state must be given great deference, “even minimal scrutiny requires that [such initiatives must] be defensible in terms of a shared public good.”<sup>38</sup> She noted the absence of a documented state policy decision in favor of assessment based on full cash value. She argued that in this case, “[n]o one has yet established what benefits the general public derives from the systematic undervaluation of the property of pre-1975 purchasers, and this court should decline to hypothesize rationales.”<sup>39</sup>

The Chief Justice foresaw that the inequality caused by article XIII A of the California Constitution would be the systematic imposition of different assessments on properties of similar worth. Focusing on the cumulative effects of the disparate tax treatment, Chief Justice Bird hypothesized:

Initially, properties purchased in earlier years will be undervalued in comparison with other properties (though they may be identical in current fair market value) purchased, constructed, or transferred in later years. Then as the years go by, the skewed nature of the tax world created by Article XIII A will become even more pronounced as each successive generation of purchasers will have their property overvalued in comparison to their neighbors or predecessor owners.<sup>40</sup>

The Chief Justice argued that the analysis of the equal protection issue required more of “a serious and genuine judicial inquiry” than that given by the majority in this case. Justice Bird noted that judicial analysis was constrained by two extremes. At one extreme, the courts are compelled by the fourteenth amendment to overturn laws which deny equal protection, although the courts are reluctant to overturn laws solely on the grounds of denial of equal protection. At the other extreme, the fourteenth amendment requires the court to defer to the will of the people, expressed in the passage of Proposition 13 and its subsequent enactment as article XIII A of the California Constitution. Justice Bird argued that despite these recognized constraints, the court had a duty to assess the equal protection

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37. *Id.* at 249, 583 P.2d at 1303, 149 Cal. Rptr. at 260. The criticism seems well aimed. The majority opinion refers to no articulated social or economic policy supporting the passage of Proposition 13. Instead, the Court found the effects of the changes in the tax law whereby “an acquisition value basis [sic] predicated on the owner’s free and voluntary acts of purchase . . . is an arguably reasonable basis for assessment.” *Id.* at 235, 583 P.2d at 1293, 149 Cal. Rptr. at 251.

38. *Id.* at 250, 583 P.2d at 1303-04, 149 Cal. Rptr. at 261.

39. *Id.* at 251, 583 P.2d at 1304, 149 Cal. Rptr. at 262.

40. *Id.* at 252, 583 P.2d at 1305, 149 Cal. Rptr. at 262.

challenge, and had failed to do so.

I am aware that during the past 40 years, since the end of the *Lochner* era, courts have not used the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought. I fully agree that in regard to matters of economics and tax policy, courts must defer to the will of the people unless the challenged enactment lacks a rational basis. However, the rational basis test was never meant to authorize judicial tolerance of unconstitutional classifications.<sup>41</sup>

Chief Justice Bird concluded: "If a serious and genuine judicial inquiry is made of the classifications under section 2(a) [of article XIII A], it is clear that they violate the equal protection clause of the Constitution by treating identical or similarly situated property taxpayers in an unfair and unequal way."<sup>42</sup>

#### IV. ALLEGHENY PITTSBURGH COAL CO. v. COUNTY COMMISSION<sup>43</sup>

##### A. Facts of the Case

The Webster County, West Virginia assessment procedure was based on the acquisition value of the real property, a practice which would be consistent with California's real property taxation system after Proposition 13. This practice resulted in gross disparities between the taxes paid by the petitioners and taxes paid by owners of similarly situated property who had luckily purchased their land in earlier years.<sup>44</sup>

Between the years 1975 and 1986, the county tax assessor for Webster County fixed the assessed value of property at the declared consideration at which the property was last sold. The tax assessments were then based upon roughly fifty percent of the assessed value. Only minor adjustments were made in the assessments of properties that had not recently sold.<sup>45</sup> The actual result was that the assessments of recently purchased properties were made at roughly current value; the assessments of properties which had not recently

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41. *Id.* at 255-56, 583 P.2d at 1307, 149 Cal. Rptr. at 264-65 (citations omitted).

42. *Id.* at 256, 583 P.2d at 1307-08, 149 Cal. Rptr. at 265.

43. *Allegheny Pittsburgh Coal Co. v. Webster County*, 109 S. Ct. 633 (1989). This case represented a consideration of cases that were appealed to the West Virginia Supreme Court as *In Re 1975 Tax Assessments against Oneida Coal Co.*, 360 S.E. 2d 560, *rev'd*, *Allegheny Pittsburgh Coal Co. v. County Comm'r*, 109 S. Ct. 633 (1989).

44. For example, the Court found that for the years 1976 through 1982, *Allegheny Pittsburgh Coal Co.* was assessed and taxed at approximately thirty-five times the rate applied to owners of comparable properties. Similarly, after purchasing its land, *Kentucky Energy Corp.* was assessed and taxed at approximately thirty-three times the rate of similar parcels. From 1981 through 1985, the county assessed and taxed the *Shamrock-Oneida* property at roughly eight to twenty times that of comparable neighboring coal tracts. *Allegheny Pittsburgh*, 109 S. Ct. at 637.

45. They amounted to a maximum of 10% increases in 1976, 1981, and 1983. *Id.* at 635.

been purchased were based on much older, and lower, acquisition prices.

The Allegheny Pittsburgh Coal Company (Allegheny) appealed the tax assessment of its coal tract, which it had purchased in 1974. In 1982 Allegheny sold the land to the East Kentucky Energy Corporation (Kentucky Energy), which also appealed the decisions of the county tax assessor.<sup>46</sup> These cases were consolidated with other cases involving Oneida Coal Company and Shamrock Coal Company, which had participated in similar transactions in Webster County.<sup>47</sup>

On appeal from the West Virginia Circuit Court, the Supreme Court of Appeals of West Virginia had found that "assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of . . . property."<sup>48</sup> The court also held that if the petitioners felt that other properties were relatively undervalued, their only remedy was to "seek to have the assessments of other taxpayers raised to market value."<sup>49</sup>

The United States Supreme Court granted certiorari on two grounds: (1) to decide whether the tax assessments denied petitioners equal protection of the law; and (2) if there was a violation of equal protection, to decide "whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others."<sup>50</sup>

### B. The Court's Opinion

Chief Justice Rehnquist delivered the unanimous opinion. The Court held that "the relative undervaluation of comparable property in Webster County over time" denied petitioner equal protection of the law. Further, a "taxpayer in this situation cannot be remitted by the State to the remedy of seeking to have assessments of the under-

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46. In 1974, Allegheny Pittsburgh Coal Co. purchased its property for a stated value somewhat in excess of \$24 million and was assessed at roughly half this figure. In 1982, Kentucky Energy purchased the land for nearly \$30 million, and the property was thereafter assessed at just below \$15 million. *Id.*

47. *In re 1975 Tax Assessments against Oneida Coal Co.*, 360 S.E.2d 560, 564 (1987), *rev'd*, 109 S. Ct. 633 (1989).

48. *Oneida Coal Co.*, 360 S.E.2d at 564.

49. *Id.* at 565 (quoting *Killen v. Logan Co. Comm'n*, 295 S.E.2d 689, 709 (1982)).

50. *Allegheny Pittsburgh*, 109 S. Ct. 637.

valued property raised.”<sup>51</sup>

The Court began its discussion by focusing on the comparative nature of an equal protection challenge. The Court agreed with the Supreme Court of Appeals of West Virginia that petitioners could not complain of an equal protection violation *merely* because the assessment of their land was based on its purchase price. However, the Court stated that the “complaint is a comparative one.”<sup>52</sup> The Court assumed that the price paid by petitioners in a *recent* arm’s length transaction was a reasonable basis for determining the current value of that land as well as the current value of neighboring comparable properties which had not been recently sold. Given this rough estimate or basis for current value, the Court’s comparison of tax assessments showed that the petitioners’ property was assessed at fifty percent of its estimated current value. However, the neighboring comparable property was assessed at only a minor fraction of its current value because the assessment value was based on grossly outdated purchase price information.<sup>53</sup> The equal protection violation arose because of the gross disparities in taxation between the property which had been recently purchased and that which had not been recently purchased.

The Court next addressed the state’s argument that the assessment scheme could be saved because of the periodic adjustments based on “the general change in area property values” in lieu of individual reassessments.<sup>54</sup> The Court disagreed. It stated that the constitutional adequacy of the general adjustment must be tested both in terms of the time element and the disparities within the same class of taxpayers.

On the question of time, the Court stated that to satisfy the equal protection clause, general adjustments must be “accurate enough over a short period of time to equalize the difference in proportion between the assessments of a class of property holders.”<sup>55</sup> The Court found that the problems in Webster County were not merely due to transitional delay. In addition, the taxation disparities could not be adequately resolved by the adjustments periodically made to the assessments of land which had not been recently purchased. Petition-

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51. *Id.* at 639.

52. *Id.* at 637.

53. The Court explained the assessment method as follows:

Between 1975 and 1986, the tax assessor for Webster County, West Virginia, fixed yearly assessments for property within the County at 50% of appraised value. She fixed the appraised value at the declared consideration at which the property was last sold. Some adjustments were made in the assessments of properties that had not recently been sold, although they amounted to, at most, 10% increases in 1976, 1981, and 1983 respectively.

*Id.* at 635.

54. *Id.* at 637-38.

55. *Id.* at 638.

ers' property had been assessed and taxed at roughly eight to thirty-five times the rate applied to comparable neighboring property over a ten-year period. The Court found that the periodic, general adjustments to the assessed value of the similarly situated property were too small to "seasonably dissipate the remaining disparity".<sup>56</sup> The Court noted that in the case of the Allegheny-Kentucky Energy property, "the County's adjustment policy would have required more than 500 years to equalize the assessments" with those of similarly situated properties.<sup>57</sup>

On the issue of disparities within the same class of taxpayers, the Court stated that no matter what the adjustment scheme, "the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."<sup>58</sup> This analysis focused on what could be the pivotal issue in testing the constitutionality of California's Proposition 13: the state's power to define classes of property owners to which it can assign different tax burdens.

The Court started this discussion from a position of deference to the states. "The States, of course, have broad powers to impose and collect taxes."<sup>59</sup> Furthermore, a state "may divide and assign to each class a different tax burden as long as those divisions and burdens are reasonable."<sup>60</sup> For support, the Court cited cases holding that it was no violation of the equal protection clause to distinguish, for specific tax purposes, between corporations and individuals<sup>61</sup> and between residents and nonresidents.<sup>62</sup> The Court reiterated that there is no violation of equal protection of the law "[i]f 'the selection or

56. *Id.*

57. *Id.* All of the property analyzed in the case was assessed at its original purchase price, although across the board adjustments were made to the assessments of property which had not recently been purchased. Then, the same tax rate was applied to 50% of the assessed value. Apparently, the gross disparities in property tax treatment arose because the assessed values were based on the original purchase price of property; for property which had not been recently purchased, the assessed value fell far behind the market price. The increase in the assessed values of property which had not been recently purchased, even with the periodic adjustments, did not keep pace with the assessed values of the comparable property owned by the petitioners, for which the assessed value was based on much more recent market prices.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (Illinois *ad valorem* tax on personalty of corporations).

62. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959) (exemption from taxation of merchandise belonging to nonresident stored held in storage warehouse within state).

classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy . . . .”<sup>63</sup>

Nevertheless, the Court found that the practice in Webster County was not based upon the kinds of distinctions which had passed constitutional muster in the earlier cases cited by the Court. Well-accepted principles support the states in applying different tax burdens to corporations than to individuals<sup>64</sup> or to distinguish between certain types of businesses.<sup>65</sup> But no such distinctions could be made between the petitioners’ property and comparable coal tracts. The Court found that the constitution and laws of West Virginia provided that all property of the kind held by petitioners “shall be taxed at a rate uniform throughout the state according to its estimated market value.”<sup>66</sup>

Had West Virginia adopted a different policy, the system might be valid “so long as the implicit policy is applied even-handedly to all similarly situated property within the state.”<sup>67</sup> Here, however, the Court found that the Webster County assessor had, “apparently on her own initiative,” applied the tax laws of West Virginia in a manner contrary to the West Virginia Constitution and the guidelines published by the West Virginia Tax Commission.<sup>68</sup>

## V. ANALYSIS

### A. *The Supreme Court’s Reference to California’s Proposition*

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In footnote four of the *Allegheny Pittsburgh* opinion, the United States Supreme Court refers to the property taxation system in California. The Court states that “[w]e 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 . . . .”<sup>69</sup> The Court noted that California had adopted a similar policy through the initiative process which enacted article XIII A

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63. *Allegheny Pittsburgh*, 109 S. Ct. at 638 (citing *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910) (license tax on residents)).

64. *See supra* notes 10-14, 60-63 and accompanying text.

65. *See, e.g., Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 368 (1940) (states may classify property for taxation and tax some at higher rates than others “and in making all these differentiations may treat railroads and other utilities with that separateness *which their distinctive characteristics and functions in society make appropriate*”) (emphasis added); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (discretion to tax resident and nonresident corporations); *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910) (license tax not discriminatory). *See supra* notes 10-14, 60-63 and accompanying text.

66. *Allegheny Pittsburgh*, 109 S. Ct. at 638.

67. *Id.* at 638-39.

68. *Id.* at 639.

69. *Id.* at 638 n.4.

of the California Constitution. The Court simply noted the California system was "grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized gains in the value of the property."<sup>70</sup> The Court did not give any references to support this presumed policy.

Why did the Court devote a footnote in the *Allegheny Pittsburgh* opinion to the California system of property assessment and taxation? The simplest explanation is the Supreme Court simply wanted to avoid re-opening the door to litigation on the equal protection aspects of California's tax system. If this was the Court's purpose, the footnote reference was meant to limit the Court's decision to the facts of *Allegheny Pittsburgh* and the methodology used by Webster County in assessing property values in the absence of a rational state policy supporting differential tax treatment. This interpretation seems to be supported by the court's emphasis that there was no state policy at issue in this case. Instead, the constitution and laws of West Virginia "provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the state according to its estimated market value."<sup>71</sup>

Nevertheless, the Court could have limited its opinion to the facts of the case without ever implicating the California system. The distinctions between the apparently "aberrational enforcement policy"<sup>72</sup> of the Webster County tax assessor and California's popularly elected statewide taxation system are obvious without the Court's disclaimer. The Court, in fact, seemed to protest too much. The immediate response to the *Allegheny Pittsburgh* case was that the Court "appeared to invite challenges to a provision of California's Proposition 13 allowing for disparate taxation of properties of equal value."<sup>73</sup>

The reason for the Court's reference to California's system of property taxation cannot be found on the face of the *Allegheny Pittsburgh* opinion, nor in the briefs of the petitioner or the respondent. But the amici curiae briefs submitted to the Court provide an explanation: four amici curiae briefs were submitted and each one specifically addressed the constitutionality of the California assess-

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70. *Id.*

71. *Id.* at 638.

72. *Id.* at 638 n.4.

73. *Different Value for Property of Equal Worth—Proposition 13's "Irrational Tax World"*, L.A. Times, Jan. 20, 1989, at B6, col. 1(S.D. ed.); see also *Tax Revolt 1990: Hello Guidlock*, L.A. Times, Mar. 6, 1990, at A1, col. 1(S.D. ed.).

ment system.<sup>74</sup>

The two amici curiae briefs submitted in support of the petitioners in the case argued that the California system resulted in inequities in the assessment of property tax. The International Association of Assessing Officers (IAAO) equated California's property taxation system with a legalized "welcome stranger" assessment, which refers to the practice of reassessing properties that happened to have been sold while not reassessing similar or surrounding properties.<sup>75</sup> Furthermore, the IAAO argued that the California Supreme Court erred in its ruling in *Amador Valley*: "[T]he court (wrongly, we think) hypothesized a 'rational basis' (namely, that certainty about one's future property tax burdens overrode traditional notions of equity, ability to pay or benefits received)."<sup>76</sup>

The National Taxpayers Union (NTU) also criticized the California system of property taxation in its amicus curiae brief which it submitted in support of the petitioners in the *Allegheny Pittsburgh* case. The NTU emphasized that article XIII A of the California Constitution provides two kinds of property tax provisions. The NTU noted that it reaffirmed "the importance of the tax limitations contained in Proposition 13, and particularly the two percent ceiling on increases in assessments."<sup>77</sup> It argued, however, that the California system of assessing property is discriminatory.<sup>78</sup> The NTU disagreed with the California Supreme Court's holding in *Amador Valley*.

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74. Brief Amicus Curiae of the Internat'l Assoc. of Assessing Officers in Support of Petitioners, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303 and 87-1310); Brief Amicus Curiae of the National Taxpayers Union in Support of Petitioners, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310); Brief of Amici Curiae, Pacific Legal Foundation, Paul Gann, and California Tax Reduction Movement in Support of Respondent, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310); Brief of the Nat'l Ass'n of Counties, Council of State Governments, U.S. Conference of Mayors, Nat'l Conference of State Legislatures, National League of Cities, Nat'l Governors' Ass'n, and Int'l City Management Ass'n as Amici Curiae in Support of Respondent, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310).

75. The brief of the International Association of Assessing Officers notes that the "welcome stranger" assessment is also referred to as "sales chasing" and "shotgunning." Brief Amicus Curiae of the Int'l Ass'n of Assessing Officers in Support of Petitioners at 6-7, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310).

76. See *id.* at 8-9. The IAAO also supplied data on the inequities arising in California under the article XIII A property taxation system. Specifically, the IAAO reported the findings of an unpublished paper that "the estimated 1988 effective tax rate for residential properties in California that have not been sold since Proposition 13 was enacted in 1978 is less than 0.3 percent, whereas the effective tax rate for recently sold properties is 1.0 percent." *Id.* at 9 (citing Break, Proposition 13's Tenth Birthday: Occasion for Celebration or Lament? 14-21 (unpublished paper presented at Lincoln Institute of Land Policy's Tax Policy Roundtable, Apr. 28-30, 1988, Coronado, Cal.)).

77. Brief Amicus Curiae of the National Taxpayers Union in Support of Petitioners at 13, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310).

78. The National Taxpayers Union raised the question of whether provisions of section 2 of article XIII A of the California Constitution can be severed from the rest of the provisions enacted by Proposition 13 (such as the one percent limitation on tax rates and the two percent inflation cap). See *id.* This issue is beyond the scope of this Note.



The California court's analysis . . . rests on vague expectations about predictable rates of taxation. While sudden increases in tax bills are a concern shared by the National Taxpayers Union, they are not a justification for forcing some people to bear a disproportionately large share of the costs of government. The concern is more appropriately addressed by limiting taxes for all citizens.<sup>79</sup>

The NTU noted the major impact of the decision in *Allegheny Pittsburgh* “[might] not be felt in West Virginia, where the legislature has already mandated that new assessments bring all property valuations up to date.”<sup>80</sup> Therefore, the NTU believed it was justified in extrapolating beyond the issues of the case at hand. It concluded that “holding the ‘welcome stranger’ assessment method unconstitutional would further the goals of reasonable and equitable taxation. The problem of excessive increases in property taxation can be controlled without resorting to discriminatory taxation.”<sup>81</sup>

Two amici curiae briefs arguing in support of Proposition 13's assessment method were submitted in support of the respondents in *Allegheny Pittsburgh*. One of these was sponsored, in part, by Paul Gann, co-author of California's Proposition 13.<sup>82</sup> It is clear the brief was submitted to defend California's system of property taxation. The introductory statement of “Interest of Amici” concludes: “Amici's participation in this case stems from their support for California's Proposition 13. Amici support the discretion of the states to determine tax policy independently. This discretion must include the ability to adopt a property tax assessment system such as that contained in Proposition 13.”<sup>83</sup> This brief described California's policy basis for the difference in assessments.

California has adopted a system that limits the year by year tax increases on property. This state policy prevents a property owner from being confronted with rapidly increasing property taxes as a result of an increase in market value that is of no benefit to the property owner until time of sale. California declines to tax the potential gain that might result if property were sold.<sup>84</sup>

Unfortunately, the brief does not cite any references that might articulate this refusal to tax “the potential gain” as the official or unofficial state policy. Other descriptions of this policy in the brief pro-

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79. *Id.* at 11.

80. *Id.* at 13.

81. *Id.*

82. Brief of Amici Curiae, Pacific Legal Foundation, Paul Gann, and California Tax Reduction Movement in Support of Respondent, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310).

83. *See id.* at 3.

84. *Id.* at 10 (citations omitted).

vide citations to the majority opinion in *Amador Valley*; these citations lead only to the unsupported statements of the California Supreme Court regarding the presumed state policy.<sup>85</sup>

The other amicus curiae brief submitted in support of the respondents was sponsored by a coalition of associations of municipal and state government officials. It described the California system of property taxation as “another good example of the constitutional flexibility that state and local governments have exercised in the area of valuation of property for tax purposes.”<sup>86</sup>

### B. *Proposition 13 after Allegheny Pittsburgh*

In *Allegheny Pittsburgh*, the United States Supreme Court emphasized the comparative nature of an equal protection violation. In that case, the petitioners paid taxes based upon fifty percent of the current market value of their land, as determined by the recent purchase price, while owners of similarly situated property paid taxes on only a fraction of the current market value. Similarly, under article XIII A of the California Constitution, one person may be assessed at one percent of current market value and another at a fraction of the current market value.

Based on the arguments made in the amici curiae briefs submitted in *Allegheny Pittsburgh v. Webster County*, it is clear the Supreme Court did not initiate a new dispute over the constitutionality of California’s system of property taxation—that dispute has been brewing since Proposition 13 was introduced. There are three closely interrelated reasons why section 2 of article XIII A of the California Constitution, containing the assessment provisions, might be subject to future attack in the courts.

#### 1. *State Policy*

Only if California has officially or unofficially adopted a reasonable policy which would justify the property tax disparities caused by Proposition 13 can the assessment provisions of section 2, article XIII A of the California Constitution survive an attack on equal pro-

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85. For example, the authors of the brief argued that the California “system results from a decision that property taxes should be firmly grounded in the original cost of the property, and should not tax unrealized paper gains in the value of the property.” *Id.* at 9. To support this statement, the brief cites *Amador Valley v. Board of Equalization*, 22 Cal. 3d 208, 235, 583 P.2d 1281, 1293, 149 Cal. Rptr. 239, 251 (1978). For a description of the Court’s discussion of policy that can be found on this page of the majority opinion, see *supra* notes 35-36, 39 and accompanying text.

86. Brief of the Nat’l Ass’n of Counties, Council of State Governments, U.S. Conference of Mayors, Nat’l Conference of State Legislatures, Nat’l League of Cities, Nat’l Governors’ Ass’n, and Int’l City Management Ass’n as Amici Curiae in Support of Respondent at 10, *Allegheny Pittsburgh*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310).

tection grounds. Thus, the pivotal issue is: Is there such a policy?

The honest answer may be that there is *no* answer. Proposition 13 was approved by a large margin of the voters of California,<sup>87</sup> but there may have been as many rationales behind the affirmative votes as there were voters. A review of reports of some of the legislative hearings after the passage of Proposition 13 indicated that the legislature was not absolutely sure of the policy behind the initiative.

The underlying concerns have been identified in a number of ways. Certainly, it was clear "the voters were concerned about the high level of taxes."<sup>88</sup> The legislature seemed to operate under the presumption that the policy underlying Proposition 13 had more to do with the tax revolt against big government than preventing taxation of unrealized gains in property value. In 1978, the Senate Committee on Revenue and Taxation stated an intent to act to "implement the people's wishes for responsible but prudent levels of government as indicated by the passage [of Proposition 13]."<sup>89</sup> That concern was echoed in later legislative hearings. In 1987, the Joint Legislative Budget Committee hearing found "the public perception of government size and trustworthiness [had] improved dramatically since 1978."<sup>90</sup>

Stability in property tax burdens was another rationale articulated in support of Proposition 13.

The effect of the Section 2 assessment restrictions is to stabilize taxes for persons who *remain* in their homes, and allow increases to market value only for those acquiring or improving real property.

Howard Jarvis himself has consistently maintained that such a result was intentional, not accidental. Earlier . . . he was quoted to the effect that he put that provision in so people buying new homes would know *exactly* what tax burdens they faced, as the tax would stay the same (except for the 2 percent increases) as long as they didn't move. An *existing* owner would have the stability of the 1975 level value.<sup>91</sup>

In *Allegheny Pittsburgh*, the United States Supreme Court attributed an economic rationale to Proposition 13: preventing the taxation

87. "Proposition 13 was approved by an overwhelming 65% of the voters. . . ." JOINT LEGISLATIVE BUDGET COMM., PROPOSITION 13, TEN YEARS LATER, A REPORT ON THE CALIFORNIA LEGISLATURE, JOINT LEGISLATIVE BUDGET COMMITTEE'S HEARING OF SEPTEMBER 30, 1987 pt. 1, at 3 (Nov. 11, 1987).

88. *Id.*

89. *Joint Interim Hearings, Proposition 13 State and Local Fiscal Outlook, Senate Comm. on Revenue and Tax'n*, Sess. 1 (1978) (remarks of Sen. John W. Holmdahl).

90. JOINT LEGISLATIVE BUDGET COMM., *supra* note 87, at pt. 1, at 3.

91. ASSEMBLY REVENUE AND TAX'N COMM., *supra* note 21, at A-7. Howard Jarvis was co-author of Proposition 13 (with Paul Gann).

of unrealized gains.<sup>92</sup> The exact origins of this economic rationale are unclear. In 1980, however, the Assembly Revenue and Taxation Committee was told:

Another rationale in defense of the "acquisition value" approach was supplied by economist Neil H. Jacoby, who as a member of the Commission on Government Reform (Post Commission) appointed by Governor Brown in the wake of Prop. 13, stated in the "Supplementary Views" section of the Commission's final report: "[T]his feature of Proposition 13 ("unequal treatment") is no different in principle from the situation where one taxpayer has a *realized capital gain* on which he is taxed, while another taxpayer owning identical property has an unrealized capital gain on which he is not taxed. . . . [D]ifferences in the assessed values of identical properties arising from transfers of ownership at different dates will *disappear* as inflation is slowed and ultimately stopped—which is U.S. national policy today."<sup>93</sup>

The amicus curiae brief sponsored in part by Paul Gann and submitted in support of the respondents in *Allegheny Pittsburgh* reiterated this economic rationale.<sup>94</sup>

The fact that article XIII A was created by the initiative process, thus making the process of determining the state policy behind its provisions something of a guessing game, may explain the California Supreme Court's treatment of the equal protection challenge in *Amador Valley*. In particular, it might explain the Court's acceptance of the assessment of property owners on the "acquisition value basis predicated on the owner's free and voluntary acts of purchase" as "an arguably reasonable basis for assessment."<sup>95</sup>

## 2. Constitutionality of Tax Classification

Second, Proposition 13 might be ripe for attack in the courts is that the United States Supreme Court's holding in *Allegheny Pittsburgh* throws doubt on the types of classification used in California. It has already been established in a long line of cases that certain kinds of classification made by states for taxation purposes are presumptively valid. An example of an acceptable classification is the "class" of commercial real property as distinguished from the "class" of residential real property.<sup>96</sup> Nevertheless, these cases do not necessarily support distinctions between similarly situated property *within* those classes. In California, under article XIII A, acceptable classes of real property (e.g., commercial versus residential) are *subdivided* by date of purchase (or by dates of later major improve-

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92. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S. Ct. 633, 638 n.4 (1989).

93. ASSEMBLY REVENUE AND TAX'N COMM., *supra* note 21, at A-14.

94. *See supra* notes 82-85 and accompanying text.

95. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 235, 583 P.2d 1281, 1293, 149 Cal. Rptr. 239, 251 (1978).

96. *See supra* notes 10-14, 60-63 and accompanying text.

ments). There are no Supreme Court cases upholding these kinds of subclassifications.

In *Allegheny Pittsburgh*, the "class" of property owned by coal mining corporations was subdivided and discriminations were made between corporations owning similar property; the discrimination was based upon the date of purchase of the property. In California, the "class" of mining land owned by corporations is similarly subdivided for purposes of allocating the tax burden by length of ownership. Likewise, in California, the "class" of residential real property is subdivided between homeowners who recently purchased and those who reap the comparative benefits of a lower tax burden because of a longer period of ownership.

In *Allegheny Pittsburgh*, the Supreme Court reiterated that the States have power to distinguish between different classes of taxpayers. Nevertheless, the Court emphasized that the State's policy must be "applied evenhandedly to all similarly situated property within the state."<sup>97</sup> 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."<sup>98</sup>

In *Allegheny Pittsburgh*, the Court decided that distinctions made between similarly situated property on the basis of length of ownership did not fairly or evenhandedly apply the state's tax policy. Thus, the analysis returns to the pivotal issue of the existence and definition of the state's tax policy and whether it justifies disparate tax treatment within otherwise acceptable "classes" of real property.

### 3. Actual Disparate Treatment

Third, as Chief Justice Bird predicted in *Amador Valley v. Board of Equalization*, the passage of time may have made the "skewed nature of the tax world created by Article XIII A" more pronounced.<sup>99</sup> Because of the exaggerated disparities, a sympathetic Supreme Court might be compelled to consider whether article XIII A denies equal protection to similarly situated property owners.

The California Supreme Court decided *Amador Valley* in a vacuum. The petitioners were "various governmental agencies and concerned citizens" who challenged the constitutional validity of Pro-

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97. *Allegheny Pittsburgh*, 109 S. Ct. at 639.

98. *Id.*

99. *Amador Valley*, 22 Cal. 3d at 252, 583 P.2d at 1305, 149 Cal. Rptr. at 262.

position 13 immediately upon its adoption by the initiative process.<sup>100</sup> The court noted there were inherent dangers in the arguably premature equal protection challenge, and that the court “could decline to consider the issue in the abstract and instead await its resolution within the framework of an actual controversy wherein the disparity is pivotal.”<sup>101</sup> But, because it decided that leaving the equal protection question unresolved would create too much uncertainty and confusion throughout the state, the court opted to “treat the equal protection issue as constituting an attack upon the face of the article itself.”<sup>102</sup>

The problems of deciding the issue of equal protection in the abstract are apparent even within *Amador Valley*: the majority opinion and the dissenting opinion focused on two different hypotheticals.<sup>103</sup> Only Chief Justice Bird, in her dissent, noted that as time passes, the disparity in tax treatment of similarly situated owners would become more and more pronounced.<sup>104</sup> And neither the majority nor the dissenting opinion hints at the possible ultimate range of disparity. The potential for exaggerated disparities is perhaps best reflected by the facts in the *Allegheny Pittsburgh* case.

Eleven years after the passage of Proposition 13, the contours of the abstract concerns of the petitioners in *Amador Valley* have been filled in with facts which reflect significant disparities between the property tax burdens placed on owners of otherwise similar properties—disparities which are tied to the date of purchase of the property, not to differences in the actual value of the property.<sup>105</sup>

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100. *Id.* at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

101. *Id.* at 233, 583 P.2d at 1292, 149 Cal. Rptr. at 250.

102. *Id.*

103. The majority opinion considered two independent pieces of property, one purchased in 1975 for \$40,000 and the other purchased in 1977 for \$80,000; the court found the resulting difference in taxes was fair because each owner was assessed and taxed at “the price he was willing and able to pay for that property.” *Id.* at 235, 583 P.2d at 1293, 149 Cal Rptr. at 251. In the dissent, Judge Bird considered a different hypothetical highlighting the disparity between two identical pieces of property:

Consider these facts. 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 XIII A 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.

*Id.* at 249, 583 P.2d at 1303, 149 Cal. Rptr. at 260-61.

104. *See supra* note 40 and accompanying text.

105. Actually, two kinds of disparities have been identified.

There are two fundamental inequities frequently attributed to the acquisition value approach. The first is the system unavoidably results in differing values for otherwise similar properties. . . . The second inequity cited is that the ac-

Whether or not the cold, hard facts of the disparate property tax burdens placed upon actual owners would convince the California Supreme Court to reconsider its "abstract" equal protection analysis cannot be answered here.

### C. Equal Protection Remedies

An additional facet of Proposition 13 that may have been inadequately addressed in *Amador Valley* because of the abstract nature of the equal protection issue is that the California Supreme Court looked at only one side of the issue: the comparative *benefits* given to long-term property owners.<sup>106</sup> The court ignored the responsibility of the state to remedy the higher taxes paid by the more recent purchaser.

In *Allegheny Pittsburgh v. Webster County*, the United States Supreme Court held the equal protection remedy can and must work either way. The state may not impose the burden of equalization of tax treatment on the disadvantaged taxpayer. A property owner who has been denied equal protection "may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised."<sup>107</sup> In other words, the state may be required to reduce the assessed value of newly purchased property and taxes of the newer owners to make the tax burdens comparable with the lower valued property of long-term owners, if it cannot increase the assessment value of the undervalued properties.

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quisition value approach results in a greater shift in tax burden from commercial properties to residential properties than did the prior fair market value system.

ASSEMBLY REVENUE AND TAX'N COMM., *supra* note 21, at A-7. Discussion of the latter inequity is beyond the scope of this Note.

The National Taxpayers Union (NTU) analyzed the disparity in tax burdens by reviewing the data on the "coefficient of dispersion," which is a "generally accepted standard of assessment uniformity." It is "average absolute deviation of a group of assessment ratios, taken around the median ratio and expressed as a percentage of that measure." Brief Amicus Curiae of the Int'l Ass'n of Assessing Officers in Support of Petitioners at 10, *Allegheny Pittsburgh Coal Co. v. Webster County*, 109 S. Ct. 633 (1989) (Nos. 87-1303, 87-1310). The NTU found that "[i]n 1976, California ranked sixth among states nationwide in terms of this measure of assessment uniformity, but in 1981, California ranked thirty-third." *Id.* at 11.

106. *Amador Valley*, 22 Cal. 3d at 234, 583 P.2d at 1293, 149 Cal. Rptr. at 251.

107. *Allegheny Pittsburgh*, 109 S. Ct. at 639. The Court also cited *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1945); *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 445-47 (1923); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931); and *Cumberland Coal Co. v. Greene County*, 284 U.S. 23, 28-29 (1931).

## VI. CONCLUSION

The constitutionality of Proposition 13 seemed conclusively settled by the California Supreme Court in *Amador Valley v. Board of Equalization* until the United States Supreme Court decided *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*. Despite the existence of unanswered questions which the Supreme Court has apparently revived in *Allegheny Pittsburgh*, the principles laid down in the line of cases cited by the California Supreme Court in *Amador Valley* in support of article XIII A remain intact after *Allegheny Pittsburgh*.<sup>108</sup> Additionally, as Justice Bird pointed out, short of reviving the *Lochner* era, the courts will be reluctant to overturn state laws even though they appear to be “unwise, improvident, or out of harmony with a particular school of thought” on the sole basis of denial of equal protection if the state has based the challenged law on a reasonable state policy.<sup>109</sup>

The difficulty here is in defining the policy behind a popularly approved initiative. Both the California Supreme Court and the United States Supreme Court have accepted the existence of such a policy, although neither has provided any support for the assumption. The difficulty of proving the rationale in favor of Proposition 13 could be seen as an invitation to challenge its validity.

MARIAN ADAMS HARVEY

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108. See *supra* notes 8-15, 60-63 and accompanying text.

109. *Amador Valley Joint Union High School District v. State Bd. of Equalization*, 22 Cal. 3d 208, 255-56, 583 P.2d 1281, 1307, 149 Cal. Rptr. 239, 264-65 (1978).