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Taxation, Equal Protection, and Inquiry into the Purpose of a Law: *Nordlinger v. Hahn* and *Allegheny Pittsburgh Coal Co. v. County Commission*

I. INTRODUCTION

In 1978, California taxpayers passed Proposition 13, which overhauled the state's property tax laws, saved taxpayers seven billion dollars in tax assessments during the first year alone,[1] and required wide-scale fiscal restructuring of the state government.[2] Aside from dramatically lowering tax rates, Proposition 13 redefined the tax base by capping the assessed value of property at its acquisition value, with only minor adjustments thereafter.[3]

Because of California's highly inflationary real property market during the 1970s and 1980s, the assessed values of comparable properties quickly drifted apart. In California, the

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1. REPORT OF THE SEN. COMM'N ON PROPERTY TAX EQUITY AND REVENUE TO THE CAL. STATE SEN. 28 (1991).

2. Proposition 13 amended Article XIII of the California Constitution to read as follows (in relevant part):

> § 1. Maximum amount of ad valorem tax
> (a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property.
>
> § 2. Assessment of full cash value; Definitions
> (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation.

CAL. CONST. art. XIIIA.

Proposition 13 provided for two major exceptions to the reassessment plan. First, transfers of property from parents to their children did not merit a reassessment. *Id.* § 2(h). Second, homeowners over the age of 55 who sold their principal place of residence could purchase another residence of lesser or equal value and retain their original assessment value. *Id.* § 2(a).

3. This assessment provision was not applied retroactively; instead, properties already owned by a taxpayer were valued at their 1975-76 level. *Id.* § 2(a). This valuation method avoided huge disparities in the assessed values of comparable properties at the outset.

typical recent home buyer faces a much higher property tax than a neighbor who purchased a similar home years before at a lower price.[4] Proposition 13 provided no mechanism by which such disparate tax burdens would converge; in fact, it limited the annual increase in assessed values to only two percent.[5] The constitutionality of such unequal treatment of similarly situated tax payers was attacked the same year Proposition 13 was enacted. However, employing traditional Equal Protection Clause principles, the California Supreme Court held that unequal taxation of similar properties did not violate the Fourteenth Amendment if the taxation scheme rationally furthered a legitimate government interest.[6]

The California court's 1978 decision was not surprising given the deference the United States Supreme Court traditionally affords the states in creating their own taxation procedures.[7] However, in 1989, the United States Supreme Court in *Allegheny Pittsburgh Coal Co. v. County Commission*[8] invalidated a tax assessment scheme using rational basis scrutiny—something it had not done since 1933.[9] According to the unanimous opinion, when assessment strategies undergo constitutional review, the Equal Protection Clause requires the "seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[10] Since California's tax

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4. A Los Angeles County study that compared the prices of homes purchased in August 1989 with the assessed values of the previous owners revealed disparities as high as 17:1 in certain neighborhoods. Several neighborhoods had disparities ranging from 13:1 to 9:1. Petitioner's Brief on the Merits at A1, Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) (No. 90-1912).

5. CAL. CONST. art. XIIIA, § 2(b).

6. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1292-94 (Cal. 1978), *overruled on other grounds by* Los Angeles County Transp. Comm'n v. Richmond, 643 P.2d 941 (Cal. 1982). For another case attacking Proposition 13, see R.H. Macy & Co. v. Contra Costa County, 276 Cal. Rptr. 530 (Ct. App. 1990), *review denied*, 1991 Cal. LEXIS 943 (Cal. Feb. 28, 1991), *cert. granted*, 111 S. Ct. 2256, *and cert. dismissed*, 111 S. Ct. 2923 (1991).

7. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) ("States have large leeway in making classifications and drawing lines which in their judgement produce reasonable systems of taxation."); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 526 (1959) ("States have a very wide discretion in the laying of their taxes."); Madden v. Kentucky, 309 U.S. 83, 88 (1940) (stating that state tax schemes have a strong presumption of constitutionality).

8. 488 U.S. 336 (1989).

9. Robert J. Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 262 (1990). The 1933 case was Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

10. 488 U.S. at 343.

scheme resulted in highly disparate treatment,[11] it appeared that Proposition 13 would no longer pass constitutional muster.[12]

California's worries were quelled in June 1992 when the United States Supreme Court held that the State's property taxing scheme was constitutional. In *Nordlinger v. Hahn*,[13] the Court returned to a deferential treatment of state taxation schemes after its singular deviation in *Allegheny Pittsburgh*. Unfortunately, one state's victory "left . . . Equal Protection jurisprudence in disarray"[14] because the Court reached its decision without overruling *Allegheny Pittsburgh*;[15] rather, the Court labelled *Allegheny Pittsburgh* as a "rare case" in which rational basis scrutiny was not met.[16] The distinctions drawn between the two cases are troublesome.

This Note focuses on the differences in the legal reasoning employed in *Nordlinger* and *Allegheny Pittsburgh* in an effort to discern why the Court found that such similar taxing methods merited opposite constitutional results. Part II gives a brief background of the Equal Protection Clause and taxation, focusing on the anomalous *Allegheny Pittsburgh* decision. The facts and opinion of the recent *Nordlinger* decision are outlined in part III. Part IV argues that the *Nordlinger* Court's upholding of Proposition 13 comports with traditional rational basis scrutiny of taxation matters, but that the majority's assertion that *Allegheny Pittsburgh* and *Nordlinger* can be reconciled is problematic. The analysis shows that the Court has not firmly decided how to discern the purpose of a given taxing scheme. In Part V, this Note concludes that the analysis underlying *Allegheny Pittsburgh* should be discarded, and that courts should continue to afford great latitude to state taxation schemes if

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11. *See supra* note 4 and accompanying text.

12. Finding Proposition 13 unconstitutional could have been devastating to the already financially strapped state. If property taxes were rolled back to the 1975 levels, the state could have suffered as much as $10 billion per year in lost revenue while being wholly understaffed to perform the assessments required to implement market-value taxation. Brief of Amicus Curiae Cal. Assessors' Ass'n in Support of Neither Party at 5-6, Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) (No. 90-1912).

13. 112 S. Ct. 2326 (1992). Justice Blackmun wrote for the seven-justice majority. Justice Thomas concurred in the result but disagreed with the Court's interpretation of, and failure to reverse, *Allegheny Pittsburgh*. Justice Stevens dissented.

14. *Id.* at 2341 (Thomas, J., concurring in part).

15. *Id.* at 2334.

16. *Id.* at 2335.

the schemes are rationally related to any plausible and legitimate government purpose.[17]

II. BACKGROUND: THE EQUAL PROTECTION CLAUSE AND TAXATION

The Equal Protection Clause has been interpreted to demand that "all persons similarly circumstanced . . . be treated alike."[18] Nevertheless, to effect their legitimate ends, governments are permitted to define what constitutes similarly situated persons and to make appropriate classifications. These classifications are subject to varying degrees of scrutiny; those affecting fundamental rights are subject to the strictest scrutiny, while those based on social and economic needs are reviewed under a more deferential rational basis test.[19] Because they involve economic policy, taxing strategies devised by a state legislature or a state agent are traditionally afforded a great deal of deference.[20]

The Court's deviation in *Allegheny Pittsburgh* from its usual course was surprising, especially since no property tax scheme had been held to violate the Equal Protection Clause since 1931 and no taxation scheme had failed rational basis scrutiny since 1933.[21] In *Allegheny Pittsburgh*, the Webster County assessor valued properties according to the price at which they were purchased. Since subsequent modifications in assessed value were too small and too infrequent to keep up with rising real estate prices,[22] "gross disparities in the

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17. The author has limited this Note to a discussion of rational basis scrutiny. The Court found neither the tax scheme in *Allegheny Pittsburgh* nor that in *Nordlinger* worthy of heightened scrutiny. This Note does not delve into the policy aspects of market-value versus acquisition-value taxation.

18. Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). For an excellent discussion on the Equal Protection Clause, see City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-42 (1985).

19. *Cleburne*, 473 U.S. at 439.

20. *See* cases cited *supra* note 7.

21. *See* William Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 91 n.25 (1990). The cases were Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U.S. 23 (1931), and Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933). *Cumberland* was a case somewhat similar to *Allegheny Pittsburgh* in that it involved disparate assessments of coal-bearing properties, and the assessment scheme was contrary to state law.

22. On three separate occasions (in 1976, 1981, and 1983), a 10% adjustment was made to certain properties that had not been recently sold. Even these

assessed value of generally comparable property"[23] resulted. The assessor's taxing procedures were utilized despite a provision in the West Virginia Constitution that required "all property, both real and personal, [to] be taxed in proportion to its value."[24]

Though the effects of Webster County's assessment methods paralleled those of Proposition 13, the purpose behind the two schemes (as perceived by the Court) differed. In *Allegheny Pittsburgh*, Webster County argued that its assessment strategy was rationally related to its purpose of achieving current-market-value taxation.[25] Chief Justice Rehnquist would have found this assertion reasonable "[a]s long as general adjustments [were] accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders."[26] In such circumstances, the Equal Protection Clause would be fully satisfied even though properties were reassessed infrequently. While granting leeway to state actors to craft their own means of taxation, the Court pinned them down to rigid ends, stating that "[in] each case, the constitutional requirement is the *seasonable attainment of a rough equality* in tax treatment of similarly situated property owners."[27] Given the vast tax disparities of like properties in Webster County, the Court had little difficulty in finding that the assessor's practices failed to meet this requirement.

Despite the Court's traditional deference in taxation matters, the county assessor's scheme failed rational basis scrutiny because the classification of property owners by time of purchase did not "rest upon some reasonable consideration of difference or policy."[28] The Court then resurrected verbiage from a 1918 decision, stating that "[i]ntentional 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."[29]

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seemingly sizeable increases failed to keep up with the inflationary market in the region. *Allegheny Pittsburgh*, 488 U.S. at 338-39.

23. *Id.* at 338.

24. W. VA. CONST. art. X, § 1.

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

26. *Id.* (citing Allied Stores, Inc. v. Bowers, 358 U.S. 522, 526-27 (1959)).

27. *Id.* (emphasis added).

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

29. *Id.* at 345 (quoting Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352-353 (1918)).

Just in case the California legal community had failed to ponder whether the Court would head west to ravage Proposition 13, the Court tempted the state's imagination in a footnote:

> We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy as Article XIIIA of its Constitution, popularly known as "Proposition 13."[30]

This language sounded like a formal invitation to California taxpayers to test the validity of Proposition 13. Such a taxpayer presented herself soon after *Allegheny Pittsburgh* was published.

III. THE *NORDLINGER* COURT RETURNS TO TRADITIONAL EQUAL PROTECTION CLAUSE DEFERENCE

Petitioner Stephanie Nordlinger had recently purchased a modest home in Los Angeles County only to find she was paying nearly five times the property taxes of some of her long-established neighbors who lived in similar homes.[31] After the Los Angeles Superior Court dismissed her claims for a tax refund and for a declaration that Proposition 13 was unconstitutional, the California Court of Appeal affirmed the dismissal based on traditional notions of deference to state tax laws having a rational basis.[32] According to the Court of Appeal, *Allegheny Pittsburgh* did not invalidate acquisition-value tax schemes, but rather "arbitrary enforcement" of market-value taxation strategies.[33] The California Supreme Court denied review and the United States Supreme Court granted certiorari.

The majority in *Nordlinger* did very little to distinguish the practical effects of Proposition 13 from those produced by the Webster County scheme. Justice Blackmun began his opinion by noting how "staggering" the differences in assessed values of

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30. *Id.* at 344 n.4.

31. Petitioner's Brief on the Merits at 3, Nordlinger v. Hahn, 112 S. Ct. 2326 (1992) (No. 90-1912).

32. Nordlinger v. Lynch, 275 Cal. Rptr. 684 (Ct. App. 1990).

33. *Id.* at 686.

comparable properties had become;[34] moreover, he noted that such assessments were likely to diverge further over time.[35] In order to determine whether such unequal treatment was violative of the Equal Protection Clause, this standard was set forth:

> [T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. This standard is especially deferential in the context of classifications made by complex tax laws.[36]

Justice Blackmun presented two possible purposes for Proposition 13's unequal treatment of taxpayers. First, since moving from one home to another would likely increase an owner's property taxes, the acquisition-value tax system discourages rapid turnover of properties and preserves the integrity of neighborhoods. Second, the classification is rational because new home buyers and established residents have entirely different reliance interests. The person buying a new home can look at the property tax burden with open eyes and a keen understanding of the real property market. The established resident, on the other hand, has "vested expectations" in her property that are worthy of more protection than the "anticipatory expectations" of a new neighbor.[37] Her decision to buy cannot be avoided. Hence, the acquisition-value tax scheme prevents the elderly and those on a tight budget from being taxed out of their homes due to unrealized paper gains on their real property.

Having easily found a plausible purpose for Proposition 13, and thus having met traditional rational basis scrutiny, the Court confronted the more difficult task of distinguishing the *Allegheny Pittsburgh* decision. The Court performed this task all too simply by noting that "an obvious and critical factual

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34. *Nordlinger*, 112 S. Ct. at 2329; *see supra* note 4 and accompanying text.

35. *Nordlinger*, 112 S. Ct. at 2329. The petitioner's suggestion that unequal taxation for similarly situated owners might merit heightened scrutiny—because it infringes one's fundamental right to travel—was dismissed summarily for lack of standing. *Id.* at 2332.

36. *Id.* (citations omitted).

37. *Id.* at 2333.

difference between this case and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme."[38] In essence, *Nordlinger* stated that the Equal Protection Clause was violated in *Allegheny Pittsburgh* because the county stated one purpose and then acted in a way not rationally related to that purpose. The Court confidently wrapped up its review of *Allegheny Pittsburgh* as follows:

> [It] was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, Article XIIIA was enacted precisely to achieve the benefits of an acquisition-value system. *Allegheny Pittsburgh* is not controlling here.[39]

The asserted purpose of the two schemes, rather than their substance or implementation, was the critical difference. Thus, the Court appears to say that virtually identical plans can have differing constitutional results if they have different stated goals.

IV. *NORDLINGER* AND *ALLEGHENY PITTSBURGH* CANNOT BE RECONCILED

The *Nordlinger* decision is questionable in at least two ways. First, it denied the effect of the distinction alluded to in *Allegheny Pittsburgh* between codified state taxing schemes and those which are merely the practice of state agents. Second, the Court inconsistently applied rational basis scrutiny, demanding that a classification be rationally related to an *articulated* purpose in *Allegheny Pittsburgh*, but using a looser standard for discerning purpose in *Nordlinger*.

A. Is a Codified Scheme Inherently More Constitutional than an Aberrant Administrative Practice?

The *Nordlinger* Court suggested that "the protections of the Equal Protection Clause are [not] any less when the classification is drawn by legislative mandate . . . than by adminis-

38. *Id.* at 2334.
39. *Id.* at 2335 (footnote omitted).

trative action as in *Allegheny Pittsburgh.*"[40] The Court further clarified that its holding does not "suggest that the Equal Protection Clause constrains administrators, as in *Allegheny Pittsburgh*, from violating state law requiring uniformity of taxation of property."[41] However, the conflicting results in *Nordlinger* and *Allegheny Pittsburgh* may suggest otherwise.

The Court is justifiably uneasy about lending credence to a constitutional distinction between codified schemes and aberrant administrative practices. The Equal Protection Clause has never been an adequate tool by which the Court can police state administrators. A state agent's misapplication of state law does not trigger, by itself, an Equal Protection Clause violation.[42] Furthermore, the United States Supreme Court must accept the state high court's construction of its own constitution.[43] Since the West Virginia Supreme Court of Appeals found that the actions of the Webster County assessor did not violate the state's constitution,[44] the Webster County tax scheme could not be construed as a misapplication of state law.

While the *Nordlinger* Court correctly stated the law, its reasoning about the non-effect of codification is troublesome. Only three years earlier in *Allegheny Pittsburgh*, the unanimous Court seemed particularly bothered that the assessments in Webster County were imposed differently than in other parts of the state. The Court remarked, "We are not advised of any West Virginia statute or practice which authorizes individual counties of the State to fashion their own substantive assessment policies independently of state statute."[45] One must question why the taxing scheme was labelled an "aberrational enforcement policy" if the Court were not comparing it to something it deemed normal—namely the method approved by the state constitution. The *Allegheny Pittsburgh* decision was

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40. *Id.* at 2335 n.8.

41. *Id.*; *see id.* at 2343 (Stevens, J., dissenting) ("Webster County's scheme was constitutionally invalid not because it was a departure from state law, but because it involved the relative 'systematic undervaluation . . . [of] property in the same class.' ") (quoting *Allegheny Pittsburgh*, 488 U.S. at 345).

42. Snowden v. Hughes, 321 U.S. 1, 7 (1944).

43. *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 376 n.7 (1979); Ward v. Illinois, 431 U.S. 767, 772 (1977); City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 674 n.9 (1976).

44. *In re* 1975 Tax Assessments Against Oneida Coal Co., 360 S.E.2d 560, 564 (W. Va. 1987), *rev'd sub nom.* Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989).

45. *Allegheny Pittsburgh*, 488 U.S. at 345.

arguably influenced by the Court's skeptical view of atypical assessment policies.[46]

B. Actual Purpose or Any Plausible Purpose: What Does the Equal Protection Clause Require?

Whether or not one assumes the Court viewed *Allegheny Pittsburgh*'s "aberrational" scheme with such disregard as to skew the outcome of the case, the Court's inflexible determination of the *purpose* of the county's taxing practice most likely forced the strange outcome in that case. If the Equal Protection Clause demands that a discriminatory classification be rationally related to a legitimate state purpose, an inquiry into the purpose of an administrative practice or legislative act cannot be avoided unless any plausible government intention will suffice.[47]

1. How purpose is discerned: three possibilities

The Supreme Court case of *United States Railroad Retirement Board v. Fritz*[48] is particularly enlightening in the area of purpose and rational basis scrutiny. It outlines three of the more prominent views on this question.

The first view, espoused by Justice Brennan, is that a statute or administrative practice must be rationally related to the actual, stated purpose of the law maker.[49] According to Justice Brennan, such purpose can often be discerned by perusing legislative history.[50] Under this approach, a judicially-imagined purpose would never be sufficient to meet the requirements of rational basis scrutiny if another purpose had been articulated by the law maker, as in *Allegheny Pittsburgh*. This view results in the least deferential rational basis scruti-

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46. *See Nordlinger*, 112 S. Ct. at 2336 (Thomas, J., concurring in part); Glennon, *supra* note 9, at 268.

47. For a discussion on legitimacy of purposes, see Melanie E. Meyers, Note, *Impermissible Purposes and The Equal Protection Clause*, 86 COLUM. L. REV. 1184 (1986).

48. 449 U.S. 166 (1980) (Equal Protection Clause challenge to the Railroad Retirement Act of 1974).

49. *See Id.* at 184 (Brennan, J., dissenting); Johnson v. Robison, 415 U.S. 361, 374-75 (1974); Reed v. Reed, 404 U.S. 71, 75-76 (1970); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). For cases implementing Justice Brennan's view, see Zobel v. Williams, 457 U.S. 55, 61-63 (1982); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 535 (1973).

50. *See Fritz*, 449 U.S. at 185-87 (Brennan, J., dissenting) (pointing to legislative reports as the proper means of discerning purpose).

ny. Moreover, this approach is arguably impossible to apply when the law maker is the voting public; such was the case with Proposition 13, which was passed by initiative.

A second view, or middle ground, finds support from Justice Stevens in his concurring opinion in *Fritz*.[51] In addition to an actual, articulated purpose of a legislature, the Court may also look to legitimate, unstated purposes that the legislature may have considered.[52] This approach is effective when the actual purpose of a statute is ambiguous.

A third, and most deferential, view has been espoused by Justice Rehnquist. This approach asserts than any legitimate and plausible purpose which is rationally effected by a given classification is sufficient to make that classification a constitutional one, regardless of whether the legislature articulated or even considered the purpose.[53] In areas of Equal Protection Clause jurisprudence where special deference is expected, and especially in taxation cases where a presumption of constitutionality exists, Justice Rehnquist's approach seems the most appropriate way to effect such license.[54]

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51. *See Fritz*, 449 U.S. at 180-81 (Stevens, J., concurring).

52. Justice Stevens contrasts his view with that of Justice Brennan in *Fritz*.

> I do not . . . share Justice Brennan's conclusion that every statutory classification must further an objective that can be confidently identified as the "actual purpose" of the legislature. Actual purpose is sometimes unknown. Moreover, undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State. I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute *or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature.*

Id. (Stevens, J., concurring) (emphasis added) (footnote omitted).

53. In *Fritz*, Justice Rehnquist said, "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *Id.* at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)). For support of this view, see McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.") (citations omitted); Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528-30 (1959) (requiring "any state of facts" conceivable to sustain a rational basis of a classification); Madden v. Kentucky, 309 U.S. 83, 88 (1940) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

54. Compare this approach with Justice Brennan's dissent in *Fritz*: "[T]he rational-basis standard 'is not a toothless one,' and will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by

2. *How the* Nordlinger *Court arrived at purpose*

In *Nordlinger*, once it was decided that rational basis scrutiny was merited, the opinion quickly turned to identifying the rational effects of California's classification, naming neighborhood preservation and respect for reliance interests as reasons for passing Proposition 13. Said Justice Blackmun, "Article XIIIA was enacted precisely to achieve the benefits of an acquisition-value system."[55] Unfortunately, the goal of an initiative such as Proposition 13 cannot be determined with precision. As one commentator remarked shortly after the initiative's passage, "I don't think anyone really understands the implications of Proposition 13. I don't think we understand why it passed or what the results are going to be."[56] Unlike most statutory laws, initiatives have no legislative hearings from which to discern the purpose because the citizenry, with its inherent diversity of reasoning, acts as the lawmaker.

The forefront of the debate between proponents and opponents of Proposition 13 did not center on the benefits and liabilities of market-value or acquisition-value taxation. Voters had numerous reasons for overhauling the state's tax structure; but, according to one public opinion poll, the most common "purposes" of Proposition 13 were (1) to reduce excessive taxes, and (2) to cut government costs, waste, and inefficiency.[57] Voters wishing to cut their property taxes had reason to vote for

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Government attorneys." 449 U.S. at 184 (Brennan, J., dissenting) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)). In *Fritz*, Justice Rehnquist applied a deferential standard, searching beyond the "actual purpose" of the legislation to find other legitimate purposes effected by its terms. In his dissent Justice Brennan stated, "I suggest that the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review." *Id.* at 183.

55. 112 S. Ct. at 2335.

56. Thomas Fletcher, *Anticipation and Uncertainty*, *in* PROPOSITION 13 AND ITS CONSEQUENCES FOR PUBLIC MANAGEMENT 49, 49 (Selma J. Mushkin ed., 1979).

57. *See* Mervin Field, *Sending a Message: Californians Strike Back*, PUB. OPINION, July-Aug. 1978, at 3, 5 (reporting the results of a public opinion poll taken weeks after the passing of Proposition 13). Opponents of Proposition 13 did not focus their attention on the inequities of disparate tax burdens for similarly situated property owners, as Ms. Nordlinger complained about. Instead, Proposition 13 was seen as a measure which would bankrupt the state government. *See, e.g.*, ALVIN RABUSHKA & PAULINE RYAN, THE TAX REVOLT (1982); DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA (1985); PROPOSITION 13 AND ITS CONSEQUENCES FOR PUBLIC MANAGEMENT (Selma J. Mushkin ed., 1979).

Proposition 13 regardless of whether market-value or acquisition-value assessing resulted. The tax *rate* would have dropped dramatically either way.

Contrary to Justice Blackmun's claim, the *Nordlinger* Court could not have determined an "actual purpose" because no single purpose existed. Rather, the Court selected from among the numerous rational effects of the "tax revolt."

3. *The problematic arrival at purpose in* Allegheny Pittsburgh

In contrast to *Nordlinger*, the *Allegheny Pittsburgh* Court would accept no other purpose than that stated by the Assessor—to tax properties based on their current market value. Having narrowed the field of legitimate purposes to one, the Court asked if the taxing scheme was rationally related to achieving market-value taxation. Predictably, the Court found that the assessment scheme was a plainly irrational means to accomplish the stated end because the county's occasional upward adjustments to property values would require nearly five hundred years to bring assessed value and market value in line.[58] Such analysis clashed with traditionally deferential property tax adjudication and produced a result that had not been witnessed for several decades.[59]

Given the appropriate deference to the states in fashioning their own tax schemes, the Court has customarily been more than willing to exercise judicial imagination to arrive at a plausible purpose.[60] In *Allied Stores, Inc. v. Bowers*, the Court stated that "a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."[61] In outlining the Equal Protection Clause in *Nordlinger*, Justice Blackmun merely requires a "*plausible* policy reason for the classification."[62] The *Allegheny Pittsburgh* decision itself stated that only " 'some reasonable consideration of difference or policy' " was required.[63] Never-

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58. *Allegheny Pittsburgh*, 488 U.S. at 341-42.

59. *See supra* note 21 and accompanying text.

60. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (exploring reasons why the legislature might have passed a statute).

61. 358 U.S. 522, 528-29 (1959).

62. *Nordlinger*, 112 S. Ct. at 2332 (emphasis added).

63. 488 U.S. at 344 (quoting Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910)).

theless, the *Allegheny Pittsburgh* Court was unwilling to stretch its judicial imagination past the purpose offered by the County's counsel.

A number of plausible reasons exist for assessing properties based on acquisition value in Webster County, just as they exist in Los Angeles County. The expense of assessing coal bearing lands, which involves extensive core drilling and sampling, was a substantial economic barrier to assessing the values of land in Webster County.[64] The value of a parcel could be more easily determined by reference to a purchase price. Furthermore, neighborhood preservation and protection of reliance interests are as important in Webster County as in California. Had the Supreme Court followed traditional rational basis scrutiny and applied its reasonable imagination to discern a plausible policy reason, the county's property tax program would have been equally as constitutional as California's.

Perhaps poor advocacy in *Allegheny Pittsburgh* caused the Court to rule the way it did.[65] If no purpose need be articulated,[66] only a "plausible" purpose need exist to uphold a classification. Counsel for Webster County would have been better off letting the Court search for that "plausible" purpose rather than articulating a goal that the assessor's actions could not possibly accomplish.

The pragmatic reasons for determining purpose through judicial imagination in rational basis scrutiny are compelling.[67] A room full of legislators can hardly be expected to

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64. *See* Glennon, *supra* note 9, at 271 n.55.

65. *Id.* at 272-75.

66. "To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 112 S. Ct. at 2334.

67. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983) ("[I]nquiry into legislative motive is often an unsatisfactory venture."). *Cf.* Gerald Gunther, *Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Professor Gunther asserts that judicial imagination of legislative purpose results in essentially no scrutiny at all and believes that purpose should be based in actuality.

> Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonable-

articulate one collective purpose for a statute, nor can a county commission, and certainly not a body of voters passing an initiative such as Proposition 13. Indeed, few lawmakers would assert that one "actual" purpose was behind their plan. If, however, a law maker were able to purport just one goal, should a court assume the stated goal is not collateral to other ambitions legislators or state actors may be pursuing?

Ascertaining the "actual" purpose, if it exists, is a difficult feat in itself. Should judges peruse reports of legislative hearings, review minutes of county meetings, or poll voters to ascertain actual purpose or should they accept that purpose enunciated by a clever counsel? Arguably, by exercising judicial imagination while looking at the plain effects of a scheme, a court is more likely to discern the primary goal of a statute or administrative procedure.

Practically indistinguishable governmental practices become subject to miscellaneous rules and standards if a court is bent on ascertaining the "actual" purpose of each practice. The *Allegheny Pittsburgh* Court maintained that the Constitution requires "the seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[68] But the majority in *Nordlinger* required no such equality, apparently limiting this requirement's application to governments that articulate a specific purpose—that of creating current-market-value taxation. That the Court in *Allegheny Pittsburgh* intended no such limitation seems clear from its manifesto: "[I]ntentional 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."[69] The *Allegheny Pittsburgh* opinion gave every indication that the gross disparity in tax liability was unconstitutionally discriminatory regardless of the system of taxation an assessor utilized.

As it stands today, a law maker questioning whether an anticipated practice will pass rational basis scrutiny is left with little guidance. Rather than reviewing the results of similar

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ness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing.

Id. at 21.

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

69. *Id.* at 345 (quoting Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352-353 (1918)).

schemes in other jurisdictions, the law maker might question whether a court will find an articulated purpose of the practice hidden in legislative histories or in minutes of county assessor meetings. On the other hand, the law maker should also query whether the court will summarily concoct a purpose as the Supreme Court did with Proposition 13.

C. Other Factors That May Have Influenced the Decision

Legal scholars might justifiably view an inquiry into the purpose of a statute or scheme with a degree of cynicism, considering the anything but uniform way it has been handled.[70] The application of purpose is often outcome determinative; hence, it often appears that the desired outcome determines how purpose is to be discerned.

There are several possible factors unrelated to the purpose of the taxation strategies in *Nordlinger* and *Allegheny Pittsburgh* that may have influenced the Court's decisions. First, codified schemes have an aura of rationality and respectability that is not found in those schemes designed by a county assessor and which conflict with the state's constitution. Second, a scheme passed with an overwhelming approval of the voters of the most populous state in the Union is more difficult to overturn than that designed by an assessor of a small, rural county. Proposition 13 is a direct product of the democratic process Americans hold close to their hearts.

Another possible reason for the Court's decision, from a political perspective, is the difference in the practical effect of overturning the California Constitution versus the acts of the Webster County assessor. The Court may have been hesitant to render a decision that might have bankrupted a large and powerful state.[71] In *Allegheny Pittsburgh*, however, the decision against the small, rural county went largely unnoticed outside the affected geographic and legal perimeter.

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70. Justice Rehnquist has noted the Court's haphazard treatment in this area. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980) ("Despite the narrowness of the issue, this Court in earlier cases has not been altogether consistent in its pronouncements in this area."); Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) ("[T]he Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principal.").

71. *See supra* note 12 and accompanying text.

V. CONCLUSION

The Court's decision in *Allegheny Pittsburgh* left Equal Protection Clause jurisprudence, as it pertains to taxation, in a state of disarray. The decision not only overturned a property tax scheme for the first time in almost fifty years, but also imposed a stringent "rough equality" requirement upon property tax assessments. *Nordlinger v. Hahn* gave the Court an opportunity to either affirm the *Allegheny Pittsburgh* changes or return to taxation schemes the traditional deference they had once enjoyed.

The *Nordlinger* Court applied traditional rational basis scrutiny to California's taxation plan; but, in order to do so without reversing *Allegheny Pittsburgh*, the Court made *Allegheny Pittsburgh*'s constitutional requirement of "rough equality" in taxation contingent upon the "actual purpose" of the taxation strategy employed.[72] As a result, the stated purpose of a legislative or administrative action now appears to be more determinative of whether rational basis scrutiny is met than the host of factors normally inquired into.[73]

In effect, using "actual purpose" in rational basis scrutiny creates multiple standards that depend on the courts' ability to discern the underlying purpose of a government action. The *Allegheny Pittsburgh* Court could easily discern an actual, stated purpose since the law maker was an individual, the county assessor, who stated the goal of her actions. The result of narrowing in on that purpose to the exclusion of other plausible purposes was anything but deferential rational basis scrutiny. In contrast, the *Nordlinger* Court claimed to have found the precise purpose of Proposition 13 where no single purpose

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72. It appears Justice Thomas, in his concurring opinion, was correct in stating, "*Allegheny Pittsburgh* appears to have survived today's decision. I wonder, though, about its legacy." *Nordlinger*, 112 S. Ct. at 2341 (Thomas, J., concurring).

73. Justice Stevens once outlined a number of factors which should typically be considered.

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453 (1985) (Stevens, J., concurring in part) (footnotes omitted).

existed. In actuality, the Court had a cornucopia of plausible purposes from which it could, and did, select—some happened to match the consequences of the initiative. The result was traditional deferential rational basis scrutiny. After *Nordlinger*, counsel for the government would be wise to avoid alleging that an actual, primary purpose exists; the Court may be more likely to exercise judicial imagination and find a legitimate purpose effected by the scheme.

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