OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: STEPHANIE NORDLINGER, Petitioner v.

KENNETH HAHN, IN HIS CAPACITY AS TAX

ASSESSOR FOR LOS ANGELES COUNTY, ET AL.

CASE NO: 90-1912

PLACE: Washington, D.C.

DATE: February 25, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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STEPHANIE NORDLINGER, :

Petitioner :

v. : No. 90-1912

KENNETH HAHN, IN HIS CAPACITY :

AS TAX ASSESSOR FOR LOS :

ANGELES COUNTY, ET AL. :

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Washington, D.C.

Tuesday, February 25, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

CARLYLE W. HALL, JR., ESQ., Los Angeles, California; on behalf of the Petitioner.

REX. E. LEE, ESQ., Provo, Utah; on behalf of the Respondents.

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PROCEEDINGS

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 90-1912, Stephanie Nordlinger against Kenneth Hahn.

Mr. Hall.

ORAL ARGUMENT OF CARLYLE W. HALL, JR.

ON BEHALF OF THE PETITIONER

MR. HALL: Thank you, Mr. Chief Justice, and may it please the Court:

The principal question presented by this case is whether California's welcome stranger method violates the equal protection clause by taxing newly purchased property at many times higher rates than property owned by long-time owners, without any possibility of seasonably attaining rough equality in tax treatment.

Just 3 years ago in the Allegheny decision, this Court unanimously concluded that there was no rational basis to justify welcome stranger assessment practices. The fact that California's welcome stranger system is formally embodied in the State law is not a valid distinction. We say it can't make a difference; the respondents say it must make a different.

For argument --

QUESTION: We did reserve that question in the

Allegheny case, did we not?

MR. HALL: Yes, you did. And for argument's sake let's assume that there might be a difference, and look to see whether there should be a difference, based on whether there are any practical differences in operation or in effects or in justifications.

In terms of the practical operations, the two welcome stranger systems function in an identical fashion. Basically, they both set up two groups of taxpayers. There is a favored group of taxpayers who are going to pay very low effective rates of tax, based on low assessed values. Then there's the disfavored group of taxpayers who are the new buyers, who are going to be coming in to the system with base -- with assessments based on high current market values, and therefore will be paying higher taxes and higher effective tax rates.

QUESTION: Of course, these are not static groups, are they? I mean --

MR. HALL: No, that's exactly.

QUESTION: -- today you may be a continuing resident, tomorrow decide to move. So it's not as though citizens are identified permanently in one or the other category.

MR. HALL: No, that is true, that citizens are not identified permanently. And indeed, in terms of their being static groups, one of the interesting and curious things about the welcome stranger phenomenon is that it links these two groups together by having the change of ownership provision give higher tax assessments to the new groups and the new buyers, the new owners, and having the flat cap of 2 percent on the assessments for the old buyers.

So the two groups are intimately linked together, and over time as the tax rates change, as the assessments go up for the new buyers and as new money comes into the system, the effective tax rates for the long-time group is going to get lower and lower and lower. So it's a dynamic system that over time inevitably results in a skewing of the system so that the effective tax rates of the low tax group get lower and lower and lower.

And the result of that is that you get these enormous disparities that you found in the Allegheny case, where you had 35 to 1 disparities that the Court characterized as gross disparities. And in California our court of appeal took judicial notice of the fact that our common gross disparities are of that same magnitude. And, indeed, the California Supreme Court just last month, although it didn't take this case up for review, did characterize those kinds of disparities and the way they come about as a wild-card system.

And that's easily seen if you just look at how it treats like taxpayers, like properties, in a different way. You could have identical houses next door to each other and they would be taxed dramatically differently, one tax --

QUESTION: Well, Mr. Hall, in West Virginia, I suppose the State law required that properties be put on the rolls at current value.

MR. HALL: No, Your Honor, that's -- the State law was a current market value system. But the State court said that that current market value system could be coordinated with a welcome stranger system, and that this welcome stranger system that was being practiced by the assessment --

QUESTION: But at least the State law in West Virginia said you will place properties on at market value.

MR. HALL: Yes.

QUESTION: And in California the constitution has been amended to provide something other than that.

MR. HALL: That's true.

QUESTION: Acquisition value.

MR. HALL: That's true, but --

QUESTION: And how do we normally measure an equal protection claim? What standard do we apply?

MR. HALL: When --

QUESTION: A rational basis test, normally?

MR. HALL: Yes.

QUESTION: Yes.

MR. HALL: And that's what you applied in Allegheny.

QUESTION: And do you think that an argument can certainly be mounted that California's scheme is rationally related to the goal of preventing people on a fixed income from losing their homes?

MR. HALL: No, Your Honor. There is -- that is the problem with the California tax system. The -- there is no -- first of all, there is no goal of taxpayers not being taxed out of the their homes. That's not a criteria that's in the welcome stranger system. The taxpayers being taxed out of their home is being -- is addressed in California now as it was before Proposition 13 by the so-called circuit breaker legislation that provides tax relief to taxpayers who are in such financial distress that they might lose their home.

Proposition 13 does not touch on that issue. What Proposition 13 is about is -- and this is the respondents' description of it and I believe all the amici say the same thing, is giving tax relief to existing homeowners who were finding assessments rising and finding themselves taxed into financial distress because of the hyperinflation in the real estate market. And what they claim has happened is that now the tax -- taxes have fallen, and that now it's a better system and a better world. That's a --

QUESTION: And you say that that doesn't meet the rational basis test.

MR. HALL: I say that's not a valid description of the California welcome stranger system. The California welcome stranger system does not simply lower taxes for long-time owners. It intimately links the tax breaks to the long-time owners with the tax benefits -- I mean with the tax burdens on the new buyers, so that there is this correlation that is irrational. And it's that --

QUESTION: But why is it irrational? Why isn't it perfectly rational for California to say that whenever Proposition 13 was passed we had a lot of people who bought homes at much below their present assessed value. They'd anticipated a certain amount of real property tax, now they are paying three or four times as much real property tax.

MR. HALL: Yes, it's irrational for the same reason that the Court stated in Allegheny.

QUESTION: Well --

MR. HALL: You have to make a comparison of the groups of people who --

QUESTION: In Allegheny we had quite a different situation, Mr. Hall. It was almost impossible to say what rational justification for the West Virginia system was, since what the county assessor was doing was squarely contrary to State law.

MR. HALL: The West Virginia court did not find it so. The West -- and the West Virginia court said it was consistent with State law, and could be reconciled with State law.

QUESTION: Well, but I think if you'll read the opinion from this Court, the thrust of it was that there was no justification.

MR. HALL: That's exactly right. The Court could not find a justification in the equality principles that were established by the current market value system that the assessor claimed to meet, and also --

QUESTION: They were applied only in one county in West Virginia.

MR. HALL: Yes, that's true. And this particular assessor was instituting a discriminatory system. And that system was what was at issue in the Allegheny case. And you looked at the discriminatory system, you looked to see if it could be reconciled with equality principles of the current market value system or discriminatory principles of the welcome stranger system that was at issue, and you found that it didn't further either set of principles.

There was no rational relationship to either equality purposes or discriminatory purposes. And therefore you found it completely irrational, and it did not pass muster under the rational basis test. It's very unusual for the Court to find that, but this is a very unusual system. This is the system that the Professional Assessors' Association, which is the main professional group, condemns as the most patently inequitable tax assessment system that exists, that it's --

QUESTION: Would it be rational for a State to conclude, given the pattern of our economy in the last few generations, that there is a constant inflation, and that this means that the longer you've held your home, the more unrealized value you have in the home?

MR. HALL: No, that would be precisely --

QUESTION: Would that be rational?

MR. HALL: -- precisely what happens under the welcome stranger system.

QUESTION: Would it be rational for the State to make that judgment as an economic matter, that this is what happens: the longer you have your home, the more unrealized value you have in that home?

MR. HALL: Yes, that that -- it's a rational judgment and it's --

QUESTION: You say it is irrational?

MR. HALL: No, it is rational.

QUESTION: It is rational.

MR. HALL: Yes. But the welcome stranger system takes that premise, which is merely a description of the fact -- I mean, it is true that the longer you own your house in an inflationary economy, the lower your assessed value will be as compared to the market value. But that's not the issue. The issue is, the welcome stranger system links the property taxes so that one group is down here with low assessed values and low effective tax rates, and another group in the same house, it could be next door, is paying high effective tax rates and high taxes.

And there must be some description for the reason for the difference. Somewhere in the rational basis test you need to have someone identify a legitimate objective for why these taxpayers are paying more, should be subsidizing in a direct one-to-one relationship, dollar for dollar, the people who are getting subsidized.

QUESTION: Because they have less unrealized value.

MR. HALL: But again, that's simply a description of what is the system. The question is, if they have less unrealized value, what does that mean in practical terms. What it means is these -- the people who are getting hurt the most under this system are the ones who are hurt the most because of this volatile inflationary market. The very real estate market that Proposition 13 was put in to deal with is the market that the people who get the high taxes are the biggest victims of. They're the ones who pay these absurd mortgages --

QUESTION: Mr. Hall, what is the practical effect of Proposition 13? Has it deadened the real estate market in California?

MR. HALL: I think there are different opinions of what it's done to the real estate market in California.

QUESTION: And where did your client live before she bought her home?

MR. HALL: She lived in Los Angeles as a renter and could not afford to buy a home.

QUESTION: Well, she knew what she was getting into.

MR. HALL: She did, unfortunately, realize that she was going to have to pay more taxes. She eas -- she knew she was, first of all, going to have to stretch and pay a very high mortgage rate for a very modest house. And that's this -- that's the reality in Los Angeles, and I'm sure the Court is aware of that. And you can see that just from our -- the pictures in our brief of the tiny Venice bungalow that has a $300,000 assessed value on it because that's the current market value. So --

QUESTION: I suppose there's no chance of having Proposition 13 repealed by the electorate, is there?

MR. HALL: Unfortunately, the court of appeal in our case commented on exactly the problem of the very, very high vested interest that you get from all the people who are benefitting from the system on the benefit side, with these huge tax breaks that they're getting that are directly pulled from the people who are being burdened.

And if I could just get to that relationship between the people who are benefitted and the people who are burdened. The rational basis test says there has to be a rational relationship.

QUESTION: Well, there is a rational relationship, Mr. Hall. It seems to me you're insisting that it not only be rational but be perfect. In response to the question of whether it didn't assure that people would not be taxed out of their homes so that they could no longer, you know, pay the taxes and therefore have to move, you said well there are other ways of taking care of that. Well, there are indeed, but we've never insisted that in any public policy field the State has to choose the most precise way of solving the problem.

MR. HALL: No, that's certainly the case, but you --

QUESTION: This is not -- it's not very precise, but you must admit it solves that problem. And it seems to be the main problem at which it's been addressed, that people can't keep up with constantly increasing taxes on unrealized gains in their home. And therefore, to solve that problem we have this new tax system. It's rough and ready, it's not perfect, but close enough for government work.

QUESTION: It largely depends --

(Laughter.)

MR. HALL: It largely depends on how you define the problem. If you define the problem let's give low taxes increasingly to people who are existing owners. It does a fine job of that. That is the system, but if you define the problem as saying why is there this relationship that's a topsy-turvy relationship, that's the irrationality. It's not simply that a State or some body somewhere has said it's a good idea to have high taxes on some people and low taxes on other people.

The taxes are linked in a very odd way, and the burdened class is the class that's stretched right now for their -- to pay these mortgage payments. They have little equity. And the --

QUESTION: Your client -- you say your client really had to stretch to buy this house.

MR. HALL: Absolutely, absolutely.

QUESTION: But she knows she won't be stretched any further, doesn't she? She knows that next year it's not going to be anything more than 2 percent worse, and the next year after that no more than 2 percent worse. Isn't that some advantage to the people of California?

MR. HALL: She knows that, but she also knows that in the meantime she is paying enormous subsidies to people in an unfair way, because she is in a little modest house and she is paying the same taxes that a taxpayer in Malibu on the ocean in a fabulous lot is paying. There is no fairness in that.

QUESTION: What she is getting in exchange for that is the assurance that that little house, however much it cost her, is going to be hers and she is going to be able to afford it as long as she has her current level of income, and the people of California say that's a good trade. We're willing to have the one for the other. She may disagree with it, but why is that an irrational deal to make?

MR. HALL: Well, if you -- if -- first of all, because she has been picked out as a person who is in no better shape to bear these burdens than the people who are getting the benefits. And who are getting the benefits? Let's look at that side. The people who are getting the benefit, the biggest benefit, the people with the lowest effective tax rate, are the people who are just like Stephanie Nordlinger, but they are living next door to her and they bought at $15,000 or $25,000, and they have had huge appreciation in value in the meantime. So they have very low effective tax rates and huge appreciation in value. And if you go back in time, you get the most antiquated assessed values and -- you get back to 1925 or 1935, and you could say, well, what is there about the ability to pay of those people that we can tell in comparison to Stephanie Nordlinger. You can tell nothing. It's a --

QUESTION: Well, you can tell something, can't you? Can't you say that those people have the greatest percentage -- as a general rule, those people have the greatest percentage of their wealth --

MR. HALL: Untaxed.

QUESTION: -- in unrealized value, and isn't it rational for the State to say that as a general premise of the taxing scheme, people with a large percentage of wealth in unrealized value are less able to keep up with uniform current tax paces -- tax rates than people with a comparatively small percentage in unrealized value?

That's rational, isn't it?

MR. HALL: No. The very irrationality of that premise is demonstrated by the fact that the people who live in Beverly Hills in the mansions in the pictures in the brief are in the highest appreciation areas in Los Angeles, and because those areas have skyrocketed in appreciation, they are paying the lowest effective tax rates.

Now there is nothing you can say that indicates that the people living in mansions in Beverly Hills who have enormous wealth in those homes and presumably what it took to get there and keeping pace with inflation, et cetera, there is nothing that you can say that those people are worse able to pay taxes than the people who are in the Venice bungalow and stretched to pay a $300,000 mortgage.

QUESTION: How about the people in the middle? I assume there is some kind of middle ground between the bungalows and the mansions, and just taking them as kind of a standard to start with, can you not say that in fact it is a rational premise to say that the greater the percentage of wealth in unrealized value, the less the capacity to keep up with an otherwise even and uniform tax rate? Based on fair market value.

MR. HALL: Well, interestingly --

QUESTION: Isn't that true?
MR. HALL: Interestingly enough, the people in -- the people in the middle are the people who still own their homes that owned them in 1978. There are no people in the middle --
QUESTION: I'm sure that's probably true, but what's that got to do with the answer to my question? Isn't it still a rational basis for the system to make the assumption that I just expressed?
MR. HALL: I don't think it's rational to make the assumption that people who live in Beverly Hills mansions --
QUESTION: I didn't ask you about Beverly Hills mansions. I asked you for kind of the person in the middle, somewhere between the mansion and the bungalow. Maybe we're trying to find a standard taxpayer here, at least as a peg to judge rationality. And with respect to that standard taxpayer, isn't it fair to say that the more wealth is unrealized, the less capacity to pay out money?
MR. HALL: No, I don't think so, even if you are talking about a 3 to 1 disparity rather than a 15 to 1 disparity at the ends, there's nothing to justify why one group who's coming in, who's even more strapped to pay the higher mortgage should be paying at the higher rate than the favored group.

QUESTION: Isn't it a pretty good bet that if I can spend the higher amount of money, admitting that I will borrow some, but with the capacity to borrow some, isn't it a pretty good bet that I probably have a capacity to raise more cash on an annual basis, and that I probably have an income sufficient to support a higher cash payment? Isn't there -- isn't it rational to assume there's a correlation there?

MR. HALL: I think it's rational to assume that the person who has the bigger equity, who right now is being favored by Proposition 13, can refinance, yes. They have the ability to refinance, in effect, absolutely.

QUESTION: In other words, you are saying that the State is wrong in assuming that the older home owner should not constantly increase mortgage debt in order to pay taxes?

MR. HALL: No, no, because they also have the benefit of inflation probably, which -- the welcome stranger system doesn't take into account, et cetera.

Again, the irrationality of the system can be seen, and here's another very good example of it in the fact that two-thirds of the property value that's underassessed, in the State of California, is commercial property. And the one thing you can say is that the current market values of commercial property do relate to their ability to generate current income.

QUESTION: Mr. Hall, in cases like Lehnhausen v. Lake Shore Auto, we have said that the standard of rationality for reviewing State tax schemes is the very lowest.

MR. HALL: Yes.

QUESTION: The fact you can poke holes and make other arguments that the legislature could have done this or it wasn't complete here, or there's a big gaping hole here, doesn't mean it's irrational under that sense, so long as there's some rational purpose that the legislature is serving.

I take it your answer to all these questions is that no reasonable person could ever have concluded that this was a sensible taxing scheme?

MR. HALL: Well, I think that the people who are getting the benefits of the taxing scheme think there's perfect rationality --

QUESTION: Well, but --

MR. HALL: -- to it because it's their benefit.

QUESTION: Any time you have a taxing scheme or a change in a taxing, some people are going to benefit, others are not going to benefit. There's no way in the world to prevent that, and we don't throw out taxing schemes because there's a large group of people who are hurt.

MR. HALL: Absolutely. The court's rational basis test is a deferential test, but it is nevertheless a test, and you have -- you just can't just say that because one group has been chosen by another group to bear the burden of increased taxes that are going to directly subsidize the favored group, that there is necessary -- necessarily rationality or legitimacy to the public policies that are being served. You have to, under the rational basis test, take a look at it and see is there a rational purpose being served?

Now Mr. Lee's briefs, the respondent's briefs, they have not tried to point out reasons why that link between the two groups is rational. The authors of Proposition 13, they have given a reason, and they said we picked out the new buyers to bear the -- and recent buyers to bear the brunt of this system and to link, link it so that we will get benefits every time their equities go -- their market values go -- the regular market value goes up. We're going to -- we chose that method and that group of taxpayers because they were there. That's as simple as their explanation. We couldn't keep our taxes low, for us, and still have the government give us services unless we found someone to bear the burden, and they found the new buyers. They were the convenient target. But there is no legitimate public purpose in that, and Mr. Lee's briefs and the respondent's have not tried to make an argument that there is a legitimate public purpose.

QUESTION: Why is there ever a legitimate public purpose in assessing a tax on some things rather than other things? I mean, every jurisdiction taxes some things, it doesn't tax other things. What is legitimate public purpose except because they are there? Is that wrong? I don't understand.

MR. HALL: Well, you -- anytime you have a tax or any other discriminatory classification that the government is undertaking, choosing one group to bear high taxes and another group getting benefitted, there has to be some legitimacy, some rationality to that.

QUESTION: Does there really? Except the fact that we've chosen to tax this. Suppose I -- a jurisdiction chooses to tax milk, doesn't have taxes on other kinds of foods, but it chooses to tax milk. Is that bad?

MR. HALL: No, that wouldn't be bad at all.

QUESTION: Why wouldn't it be bad?

MR. HALL: Because as long as they do it in a rational way. This Court has said there is a --

QUESTION: It's rational because they decided they want to tax milk.

MR. HALL: Well, if they want to and there's a rational reason for it, this Court has said repeatedly that the States and local people have wide discretion in making classifications. But this Court also held in the Allegheny case that the welcome stranger method, the way it's linked, the way it works, the arbitrariness of it, the -- in our case, where you have commercial property that is being subsidized by people living in tiny bungalows and the commercial property has current income flows that are equal in 1 year to the entire value of the bungalow that is subsidizing them, that's completely irrational.

QUESTION: I can understand milk drinkers making this same argument, you know. Saying these people over here are drinking wine, you know, it's just flowing like water, and we can't --

(Laughter.)

QUESTION: But that's too bad, you know. They have chosen to tax the one and not the other.

Suppose this tax had been on a square footage basis, couldn't it have been just as unfair?

MR. HALL: Well, a quantified tax --

QUESTION: So 10 square feet in Beverly Hills is the same as 10 square feet where your client has her bungalow.

MR. HALL: A quantified tax can have some unfairness to it around the edges, but that would still be judged by the rational basis test, and if you had --

QUESTION: And that that might be bad then.

MR. HALL: Ah-hah. Yes, if you had, for example, commercial property, paying the same tax as the bungalow owner, you might say, well, what's the purpose of this tax. Why are we linking these two together when it's a wildly different situation? There still would have to be a rational basis.

QUESTION: So your principle really is that there has to be equality somehow. You cannot tax --

MR. HALL: It's the equal protection clause's principle. It's not my principle.

QUESTION: Yes, but, well the equal protection clauses is not -- not that there has to be equality in taxation or equality in treatment, it's that the law has to be applied equally. Whatever the law is. You can't give somebody a special exemption from the law. But if the law is you pay taxes on milk, you pay taxes on milk, and people who don't use milk don't pay taxes, and that's not inequality.

MR. HALL: But this court has never found a tax on milk to be -- to flunk the rational basis test, but the court found the welcome stranger method to flunk the rational basis test. I submit that they are very different.

Mr. Chief Justice, if I could reserve the balance of my time.

QUESTION: Very well, Mr. Hall.

Mr. Lee, we'll hear from you.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE RESPONDENTS

MR. LEE: The equal protection analysis of this case is just as simple as it is compelling. There is no justified classification; there is no fundamental right. So the question is not whether California could have done it done it some other better way, or whether the way that it chose is even good policy. The only question is whether California's acquisition value assessment system furthers some legitimate State purpose, and clearly it does, for reasons that have already been identified by Justice O'Connor and other members of the Court.

This was a very serious problem with which California was dealing. People had remarkable increases in their balance sheet, but they didn't have the corresponding money to pay the corresponding increases in taxes. Over a period of 10 years, prior to 1978, the legislature tried no fewer than 19 times to deal with the problem, but none was really effective because none attacked the problem at its core, which was a combination of unusually escalating real estate prices in the State of California, in the 1960's and 1970's, coupled with a current value assessment property tax scheme.

California voters adopted a four-part response, and the part that's at issue here is the one that simply says, for the first time in history, so far as I know -- and California is the only State that's done it -- in response to a correspondingly serious problem we are just going to unhitch our properties tax assessment from current value, and instead we are going to tie it, basically, to an acquisition value basis.

Key to the analysis of this case is the fact that the California courts -- Mr. Hall, to my astonishment, purports to have found what the true basis of this Proposition 13 really was, and he said that the Jarvis and Gan groups have themselves identified, that they have just found a way that they could tie this, that they could shift their -- tax to someone else. That is not the purpose. I invite the Court to read the pages of the Gan Jarvis briefs to which he cites, and they don't say that at all.

But in any event, fortunately what we do have is a statement by the California Supreme Court of the three purposes, perfectly legitimate purposes, for Proposition

13. The first one is, to prevent the taxation of unrealized appreciation in the value of property, and of course, that basically got at the problem. And the second is provide for certainty in the amount of taxes that a person was going to have to pay by tying the amount of the taxes, basically, to the amount that that person was willing to pay at the time that he or she bought the property.

You know, the problem that they were dealing with was that the property owners had no control. That's why they were losing their homes. They had no way to control what the future increase in property taxes is, but --

QUESTION: Well, they certainly could have by insisting that the local and State governing bodies spend less money.

MR. LEE: That is correct. That would have been another solution, but the one they chose was this one.

QUESTION: And that choice inevitably placed a burden on a different group of people.

MR. LEE: That is correct. But Justice Stevens, if the new test is does it place a different burden on some other people, then the equal protection clause is going to cut a swath through our Federal and State taxation laws. It's going to make Sherman's march through

Georgia look like a Sunday picnic. Because those kinds of anomalies abound -- abound -- throughout our tax laws.

QUESTION: Well, Mr. --

QUESTION: You don't say this systems abounds throughout the State, does it?

MR. LEE: No, but you look at -- there are anomalies, there are inequities, there are windfalls throughout the Federal income tax code, and necessarily so. And that's why for a century and a quarter, the rule has been that unless it really is invidious and unless there is no conceivable -- this is where the no conceivable approach to rational basis really had its beginning.

QUESTION: Because why wouldn't that conceivable test satisfy -- been satisfied in the West Virginia case?

MR. LEE: For this reason --

QUESTION: Because the same arguments could have been made there.

MR. LEE: Yeah. And I'm not going to be presumptuous enough to tell you what the underlying basis for the -- but I do have my own idea.

Take it in two steps. You start from the premise, of course, that what you have to do first of all is identify what is the State's end, what is its objective. And then you ask, is there sufficiently tight fit between the means and the end. The very opening sentence in the Allegheny Pittsburgh case states, and I assume with good reason, that the West Virginia constitution commits the State of West Virginia to a market-based value system.

Now, my analysis of that is that there is just is no way that you can satisfy that fit, once you start from the premise, the fit between the means and the end, when you start from the premise that the end is a market value-based system.

You just can't say that --

QUESTION: But Mr. Lee, if you base it on the difference between the State law in West Virginia and California, what do you do with the dictum from the Sunday Lake Iron Company case that your opponents quoted at page 25 of their brief and you didn't even mention in your brief? Do you know what I'm referring to? That --

MR. LEE: I (inaudible) --

QUESTION: It doesn't matter whether it's part of the expressed terms of the statute --

MR. LEE: Oh. Oh.

QUESTION: -- or by its improper execution through duly constituted agents.

MR. LEE: Yes.

QUESTION: Do you think there is -- does make a difference?

MR. LEE: Well, I think we do. We don't refer specifically to that language. But that is a fundamental difference in approach between our opponents and us as to the analysis of this case, and particularly with regard --

QUESTION: Well, do you think that's a correct statement of the law?

MR. LEE: Of course it is, but it has nothing to do with this case. And let me tell you why. If you start from the premise as my opponents do, that any scheme that is not tied to market value is unconstitutional, then it doesn't matter whether that comes about by constitutional amendment, by an erratic operation, an erratic practice of the assessor or anyone else.

And that is necessarily their premise. I'll get to that in a minute. That is necessarily their premise. The only constitutionally acceptable scheme is one that ties to market value. Now, if you start from that premise, then of course those cases become relevant, that it doesn't matter who it comes about.

If, on the other hand, your basis for analysis is the rational basis test and you ask first of all, what was California trying to do here. And then you ask, is there some reasonable fit between Proposition 13 and what they were trying to do, then it does matter. It does matter, the difference between California's constitution and West Virginia's constitution.

Because it is crucial because they -- identifies the different purposes, and the purpose itself also provides the base sign by which you judge the tie, the necessary fit, between those two schemes.

What the case really comes down to -- what the case really comes down to, is whether California is constitutionally entitled to adopt a different scheme than West Virginia. And I think the hardest part of our case is kind of the common sense, intuitive, practical one that for centuries, going back to England, we've been accustomed to anything that is called the property tax has to be tied to current value. And this is the first time in history that any taxing jurisdiction has unhitched itself from that kind of value.

QUESTION: Well, Mr. Lee, in the Allegheny case, the opinion says the constitutional requirement is the seasonable attainment of a rough equality in the tax treatment of similarly situated property owners. Is that a valid statement?

MR. LEE: Of course it is. Anything that comes from the Supreme Court is a valid statement.

(Laughter.)

QUESTION: And how does Proposition 13 meet that?

MR. LEE: In this way. That the seasonable equality in the case of California is accomplished against an entirely different background, that is the background of the different policy that California has adopted than was the case in West Virginia. And that statement, of course, in Allegheny Pittsburgh was made in the context of a value-based system.

Let's assume, Justice O'Connor -- yes?

QUESTION: Well, (inaudible) you say that the California treatment is a seasonable attainment of equality?

MR. LEE: Well, I really think that that word seasonable means -- just recognizes that even with a current value system, it's going to take some time to make some adjustments. And if I can just drop a footnote and say that we've got big problems in this country if it is true that the only constitutionally acceptable scheme is current value, because even in California and other places, you never have a complete -- you never have a complete one for one because of the cycles that are required to make these assessments.

But what that refers to is that, with a current value system, it's going to take some time to make these adjustments, just because it takes some time for the assessor to get around and make his appraisals.

But the big question is --

QUESTION: Mr. Lee, before you get off of Allegheny Pittsburgh, suppose the West Virginia legislature in Allegheny Pittsburgh had passed a statute that said, yes, we know we have a current market value system, but elderly people who shouldn't be assessed on their current value, and we think this is a competing State policy and, although we are using a current market value system, the elderly should not be taxed on their unrealized income. And they passed a statute to that effect.

Now, would we strike that statute down because it does not have a rational basis, given the constitutional prescription of the West Virginia constitution?

MR. LEE: I would surely hope not, Justice.

QUESTION: Okay, now what if the tax assessor makes the same conclusion and just doesn't move against elderly people? And you know what my next question's going to be. What if the tax assessor does what the tax assessor did in Allegheny Pittsburgh?

In fact, he made himself the individual judgment that, although we have a general value system, I'm going to modify it by some unappreciated income theory. I'm not going to charge those people who haven't gotten the money out of their land yet.

MR. LEE: It feels most comfortable, most logical to me, in light of what this Court has said about rational basis and particularly in tax cases and the difficulties that you've just mentioned, to draw that line between those instances where the official policy makers of the State, the legislature or the constitution makers, have set forth the policy.

I think the real -- the real -- one of the real vices in the Webster County case was that you just had a runaway assessor, who in the face of what the State had done, that said, I'm just not going to follow.

QUESTION: And the effect of the runaway assessor was that, taking Justice Scalia's hypothesis, that in West Virginia, as it were, some young taxpayers, to use his term, were subsidizing the old taxpayers and other young taxpayers weren't. That's why there was no systemic fairness.

MR. LEE: Yes, Justice Souter. And you always have that. Now you look at the amicus briefs that have been filed --

QUESTION: Well, I'm not sure what your equal protection principle is. Is it your submission that there's a violation of equal protection if the State official does not enforce the State law as written?

MR. LEE: Well, I would prefer to look at it, Justice Kennedy, through a slightly different prism. That's the approach that my opponent takes. My view is that what you ask is, has there been a legitimate policy identified by the official policy makers of the State?

And then secondly, does the particular scheme at issue pursue and is it reasonably contemplated to achieve that objective.

QUESTION: Mr. -- no, but the hypothetical put to you by Justice Scalia and I think echoed by Justice Souter and the one I'm interested in, is what happens if the official refuses to enforce the State policy as written? Is that a violation of equal protection?

MR. LEE: I think that falls closer to the Allegheny Pittsburgh side of the line. And the reason is because you then don't -- an individual can certainly violate the equal protection clause and is not doing it pursuant to an official State policy, so that you don't have the vent between means and end.

QUESTION: And what is the best authority you have for that proposition, other than Allegheny?

MR. LEE: I cannot think of any other than just the general ones that establish the rational basis test and the general approach. Well, and the language in Allegheny Pittsburgh.

QUESTION: Because it seems to me that that is a far more vast expansion of equal protection jurisprudence than the petitioner's submission here, which is that equal property tax -- that property tax should be treated equally for similarly situated persons. It seems to me that that is a much less sweeping equal protection analysis.

MR. LEE: Well, maybe I don't understand your position. And if I don't, I really do want to understand it. But in Allegheny Pittsburgh, the Court went out of its way to say that they had looked and were not able to find any indication that there had been a de facto adoption by the State of West Virginia of this as their policy.

QUESTION: We don't want to review every State decision to decide whether every State administrative official is being faithful to the constitution. Wasn't it key to Allegheny Pittsburgh that this was just one county? Might we not have let that scheme stand in Allegheny Pittsburgh if it had been adopted, just as contrarily to the State constitution by the State Attorney General and had been applied uniformly throughout the State by all county assessors at the direction of the Attorney General, who is not the people and who is not an authoritative expositor of State policy. But at least it wold make it uniform throughout the State, right?

MR. LEE: Yes.

QUESTION: Isn't that an adequate explanation of Allegheny Pittsburgh?

MR. LEE: It may well be. The people who really know what underlies Allegheny Pittsburgh, of course, are the people whom I'm facing right now.

But I will simply say this.

(Laughter.)

MR. LEE: That's right. That's right. But I will simply say this. That of all of the many possible explanations for Allegheny Pittsburgh, you come back to this basis proposition, that what California did here, and that's what we're looking at, was to take hold of a very serious problem, to deal with it in a responsible way, and what they did squarely responds to the problem that they were facing and under the rational basis test, particularly in tax cases --

QUESTION: May I ask this question about the elderly people justification for the statute. What about the grandchildren and the children of these elderly people? How do they fit into this scheme? They get the same benefit and they're not all that elderly, as I understand it. They're just sort of a class of nobility in California. They inherit this tax break and it goes on through generation to generation.

(Laughter.)

MR. LEE: It's just another policy judgment that has been made by the State of California. And I agree fully with Justice Scalia, the last thing in the world that you want to do is start taking a red pencil and mark -- and start going through --

QUESTION: Well, but Mr. Lee, you've argued that this is an acquisition-based value tax. And that does not at all fit with able to give commercial property to your children. It does not all fit with a downward adjustment which is unlimited, and it seems to me that you have to respond to that because the supposition here, the charge, is that there's a favored group and you attacked that in the very opening part of your submission to us.

And it seems to me that the hodge-podge created by these exemptions strongly undercuts the acquisition value theory that you advance for this tax.

MR. LEE: It is inconsistent. There are two exceptions that I'm aware of, and they are exceptions to the acquisition value. They are not at issue in this case. They would certainly be severable. But I submit that they also fit within the rational basis test.

In the case of the family passing on of the favorable basis, that's simply an assumption that is no stranger to tax laws in other contexts, in an attempt to treat the family the same and treat family properties the same, and preserve it across generations. It's reflected in our inheritance taxes as well.

QUESTION: But it hardly fits the acquisition value theory, because at the time of the transfer within the family --

MR. LEE: That is correct.

QUESTION: -- there should be some kind of valuation capable of being placed on it.

MR. LEE: Of course there could, just like there could at the time that my grandfather died and my father got a step up in basis in his income tax property.

But there is nothing in the equal protection clause or the rational basis test that says that you can't adopt a basic acquisition value test and then have -- and then make it a modified acquisition value test.

Let's assume that what California had done was to simply repeal its property tax -- it doesn't exist any more -- and then enact in its place, if you will -- maybe they call it an acquisition value tax, or an acquisition price tax, or a sales tax on real property. And then, permit people to pay it off over a period of time.

I assume there would be no problem with that. And yet, when they accomplish something that is very similar to that, certainly that should not raise constitutional questions.

With regard to --

QUESTION: It really isn't similar, because the real estate property tax pays for a group of services that the owner of the property gets -- police protection, fire protection, schools, as so forth.

And you've got neighbors who get the same benefits out of the State -- identical kinds of property, and the same number of children going to school and the like, and one of them pays a very large tax, and the other pays a very small tax for the same State benefits.

MR. LEE: Sure.

QUESTION: Something counter-intuitive about this. It's not a sales tax.

MR. LEE: Well, I think what's really counter-intuitive is just the assumption -- just the assumption that that's the way we've done it over the years. But it is similar in this respect. Or I have two responses to that, Justice Stevens.

One is that we have never assumed that there has to be a one-to-one matching, benefits to what you pay, from the tax. Tax policy can be used for the achievement of a number of other nontax -- and that's simply one of the premises of our tax policies. And the other is, if we just said that we will use those revenues for the same purposes.

I will submit this. You read every word in my opponent's brief and you listen to every word that has been said here orally today, and what it necessarily all comes back to is that you have to, as a consequence of something that is said in the Fourteenth Amendment, tie your property -- if you're going to call it a property tax, you have to tie it. You have to tie the assessment system to the current value.

There are cases in which this Supreme Court -- in which this Court has said that that is not the case. In related contexts, it can be tied, for example, to nominal value or par value, rather than current value.

Say just a word about the other argument that is made, and that is the right to travel argument. In the first place, it's not properly before this Court, if the Court applies using the Prudential rules, because even though Ms. Nordlinger has article 3 case or controversy standing to make the argument, she is not a person affected.

And under Moose Lodge v. Irvis, which is square on point on this issue, since she is not one who has moved interstate, she does not have standing to make this argument. And on the merits, this just isn't the kind of case -- even if she were from out of State -- this just isn't a right to travel kind of case. It applies equally.

The triggering feature is not travel. The triggering feature is acquisition of the property. And it would be an improper expansion of this Court's right to travel cases.

What the case comes down to, I submit, is this. Inflation in the price of real estate in the State of California over the past 20 years has been a reality. It's going to cause some problems to someone. It caused serious problems in the 1960's and 1970's. It has caused other problems, as Mr. Hall has pointed out, since 1978.

There are six briefs, amicus briefs, who say that the problems that the problems that Proposition 13 has created are very serious. There are a few more than that that say what it cured, the problems that it eliminated prior to 1978, are much more serious.

Now, who's right? Who's right? Are the problems of possibly being taxed out of your homes and not knowing what kind of financial obligations you're going to have more serious than the problem of an imbalance between property tax -- between the value and the amount of tax you pay?

I don't know. I don't think anyone -- well, different Californians will have different views on that issue, but that's a matter for Californians to solve themselves.

QUESTION: Of course, an easy way to solve it would just be as inflation pushes the price up and up, just lower the tax. There's no reason why the fact that there's an unreasonable inflation in the value of property has to result in unreasonably high taxes.

MR. LEE: You're dead right. And -- but you would be the last person in the world, Justice Scalia, to suggest that because of the existence of that alternative, we ought to strike down the one that California --

QUESTION: Of course, there's another solution for some of these elderly people who have suddenly found their $10,000 homes are worth a million dollars. Some of them can sell those homes and still live, you know.

MR. LEE: Of course. Of course.

And I can give you a lot of other examples. Examples abound of how we can eliminate anomalies in the tax laws.

But that is not the judicial function. The judicial function is a very simple one, for which every member of this Court should be very grateful.

And that is that you just ask, was there a serious problem that California was trying to deal with. And second, did they deal with it in a responsible way that demonstrated some kind of a reasonable fit -- some kind of a reasonable fit between what they were trying to deal with, and what they in fact did?

I submit that in this case, the answer to that question -- the answer to that question has to be yes, and that the judgment of the lower courts should be affirmed.

QUESTION: Thank you Mr. Lee.

Mr. Hall, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF CARLYLE W. HALL, JR.

ON BEHALF OF THE PETITIONER

MR. HALL: Thank you, Your Honor.

With respect to Justice Kennedy's question about exceptions to the acquisition value premise of this system, I'd also point out that all of property that has a 1975 base year, which is approximately 44 percent of the property in the State, is not operating according to the acquisition value premise. It's all -- it's had its basis increased up to 1975, irrespective of what the acquisition date or acquisition value was.

With respect to whether we are asserting that there is a need for a current market value system, that's clearly not what we're saying. And I think our briefs indicate that absolutely clearly.

What we're saying is, you can't have a system -- property tax system in which some people are taxed at current market values and other people are taxed at antiquated assessed values. And this is not the first time that this Court has ever considered, or that there has ever been a welcome stranger system. Indeed, there was one in the Webster County case.

And finally, I don't agree that -- with Mr. Lee's characterization of what this case boils down to. I think really what it comes down to is whether this Court really wants to get into the whole business of looking at the way State administers -- administrators have administered State law, and whether they've reconciled State law policies with their own policies, and whether they've strayed too far from official State policies in their implementation of the law.

And that's the precise implication of what the respondents' attempted distinguishing of the Allegheny cases is, is that this Court would get into the business of measuring the compliance of State law officials -- State executive and local officials -- with how far they've strayed from some official State policy, as they've tried to adopt their own policies on a local basis or executive basis to temper those official policies.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hall. The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

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NO. 90-1912 - STEPHANIE NORDLINGER, Petitioner v. KENNETH HAHN, IN HIS CAPACITY AS TAX ASSESSOR FOR LOS ANGELES COUNTY, ET AL

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