



Economic Aspects of Potential Legal Challenges to Save Our Homes Portability Proposals

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Introduction

Several proposals for major changes in Florida's state and local tax systems are now under discussion. The intense interest in taxes, and especially property taxes, arises from the interaction of Save Our Homes (SOH) and the recent housing boom. Authorized by Florida's voters as a 1992 constitutional amendment (Article VII, §4 (c) (1)), SOH took effect in 1995, limiting increases in assessed values of individual homestead properties to the lesser of 3% or the rate of inflation. Non-residential and rental properties, however, were not protected. After SOH took effect, average inflation-adjusted house prices in Florida doubled, with most of the increase coming after the year 2000. Some local governments, almost a third, responded by cutting millage rates, though by too little to offset the revenue gain from rising taxable values. Roughly another third left millage rates unchanged, and more than a third raised them.

Arguably the large revenue increases caused by the failure to cut millage rates were politically feasible because homestead residents, protected by SOH, could enjoy the benefits of higher public spending without

themselves incurring the cost. Businesses, owners of rental properties, and recent purchasers of houses, however, saw the result as a large tax hike made even worse by the inequity of its not being applied evenly to all residents. This perception has led to a flood of proposals for reforming property taxes. The recommendations under discussion include: doubling the homestead exemption from \$25,000 to \$50,000; allowing homeowners to retain their SOH benefits in a new home in the state (portability); authorizing caps on assessment increases of 10% for non-homestead property owners; and extending SOH caps to all real property.¹

SOH currently operates as follows: Florida's constitution requires that after ownership of any property changes hands, that property must be assessed at just value as of January 1 of the following year (Article

¹ Other recommendations, unrelated to homestead exemptions and SOH, include limiting the growth of local property taxes through revenue caps, replacing the property tax with an increase in the sales tax, and creating a "Truth in Government Spending" document to be disseminated annually that would include local government tax and budget decisions. See Florida Senate, "Property Tax Facts;" available at: <http://www.flsenate.gov/data/committees/senate/ft/statistics.pdf>.

VII, § 4 (c)).² No cumulative SOH assessment differential can be transferred from the old home to the newly purchased home. Moreover, only owners of permanent residences are entitled to this exemption. Businesses, renters, second-property owners, and anyone else who owns non-homesteaded property receive no SOH benefits and new homesteaders must wait for prices to rise before they gain substantial benefits.

One of the questions is whether a portable SOH cap and a cap that applies to all real property can successfully overcome legal challenges. Obviously, nobody can respond to that question, but a review of past legal challenges and the implications of such changes might be useful at this juncture. I am not an attorney, and I would emphasize that I have no legal expertise on these issues. My purpose instead, in response to the topicality of the proposals, is to explore, hastily because of the possibility of quick action by the Legislature, economic considerations related to three groups of legal topics that may arise if any portability proposals under consideration are enacted: (1) past legal challenges to property tax caps, including challenges to California's Proposition 13, the most renowned example, and implications for future challenges; legal challenges under the Equal Protection Clause and the Commerce Clause; and legal challenges to various property tax cap regimes related to the adequacy and the equity of school funding; (2) possible legal challenges from the increased use of alternative local revenues to pay for Florida's public schools; and (3) a few possible economic implications raised by the more likely challenges to SOH portability raised in this discussion.

² The Florida courts have interpreted "just" value to mean fair market value. See *Walter v. Schuler*, 176 So. 2d 81 (Fla. 1965).

Legal Challenges to Property Tax Caps³

Early Litigation—Florida's Homestead Exemption

Florida's constitution authorizes counties, school districts, municipalities, and special districts, as authorized by statute, to levy property taxes (Article VII, § 9 (a)). The 1968 constitution established exemptions from property taxation, including a homestead exemption which was initially \$5,000 for permanent residences. The exemption was increased to \$25,000 for all property tax levies in 1982 and has remained the same ever since (Article VII, § 6). The homestead exemption triggers the SOH cap on a property and it is not a self-executing right. Such was the Florida Supreme Court's decision in *Zingale v. Powell*.⁴ The owner must follow procedures specified in statute to initiate it and is therefore not entitled to receive the exemption automatically. Florida homeowners must apply to their county property appraisers, as required by FS 196.011. This prescribed action thus requires them to meet a minimum burden in proving both their residency and qualifications for the homestead exemption.⁵ In practice, the burden of proof is usually not onerous, with many counties being willing to accept a simple signed affirmation

³ A more extensive review of these legal issues is in Walter Hellerstein, W. Scott Wright, and Charles C. Kearns, "Legal Analysis of Proposed Alternatives to Florida's Homestead Property Tax Limitations: Federal Constitutional Legal Issues," in Legislative Office of Economic & Demographic Research *Florida's Property Tax Study Interim Report*, February 15, 2007; available at: <http://edr.state.fl.us/property%20tax%20study/Ad%20Valorem%20interim%20report.pdf>. Note that the authors do not consider potential legal challenges from SOH portability to the state's funding scheme for public education.

⁴ *Zingale v. Powell*, 885 So. 2d 277 (Fla. 2004).

⁵ For a discussion of *Zingale v. Powell*, see Pamela M. Dubov, "Advisory Opinion to the Attorney General re Additional Homestead Exemption," 34 *Stetson Law Review* 863, Spring 2005.

that the owner of the property uses it as a permanent residence.

The homestead exemption is not indexed for inflation. Since it was passed its real value has fallen by slightly more than 50%. To maintain its real value, the \$25,000 exemption in 1982 would have to be \$52,000 today. House prices have risen far more than inflation. According to the repeat sales house price index constructed by the Office of Federal Housing Enterprise Oversight (OFHEO), on average a Florida house valued at \$50,000 in the first quarter of 1982 if well maintained would have been worth \$188,000 in the third quarter of 2006. The share of its just value shielded by the homestead exemption would have fallen from 50% to less than 14%. At the same time, houses are being built larger and better, further diminishing the relevance of the homestead exemption, except for rural counties that lose large shares of what otherwise would have been their taxable value.

California's Proposition 13

Californians voted for property tax relief (Proposition 13) on the primary election ballot of June 1978. Legal challenges to Proposition 13 might provide some insight for possible challenges to SOH caps. A comparison of the tax cap regimes under both programs underscores several similarities and differences. The differences suggest that any insights gained from one state's experiences might not transfer completely to another state's.

- Proposition 13 created an acquisition-value tax system that imposes limits on both the tax rate and tax valuations. As noted, the SOH cap is applied to the assessed value of property.⁶

⁶ In determining just value, which forms the basis for all valuation of property prior to the application of SOH caps, appraisers must consider the following factors prescribed by FS 193.011. The acquisition value is one such factor but others include "highest and best use," location, quantity or size, cost and

- The tax rate under Proposition 13 has a ceiling of 1% and annual increases in assessed values of individual homestead properties are limited to 2%. SOH limits annual homestead property valuation increases to the rate of inflation or 3%, whichever is less. SOH does not limit tax rates. However, millage caps for counties, cities, school districts, and water management districts are specified in Article VII, § 9(b) of Florida's constitution. The caps for counties, cities, and school districts are ten mills each. Water management district caps are far lower.
- Under both Proposition 13 and SOH, substantial new construction or a change in home ownership triggers removal of the cap.
- In contrast to SOH, Proposition 13 provides portability, though limited portability. It permits taxpayers over 55 who sell their principal residences to transfer assessments from the previous base year to replacement homes that are of equal or lower value. Proposition 13 also allows for transfers from parents to children.
- Proposition 13 applies to both residential and nonresidential property. As noted, SOH applies only to residential property.

Equal Protection Clause Challenges

The most significant challenge to Proposition 13 to date came under the Equal Protection Clause—Amendment 14 of the U.S. Constitution. The most cited case, *Nordlinger v. Hahn*,⁷ was brought by

present replacement value of improvements, income from property, and net proceeds from the sale of the property. However, the weight to be given those factors is left to the appraisers' discretion. See *Valencia Ctr., Inc. v. Bystrom*, 543 So. 2d, 216-217 (Fla. 1989).

⁷ *Nordlinger v. Hahn*, 505 U.S. 1 (1992). For a more extensive discussion, see Hellerstein et al., *supra* note 3, at 44-45.

Stephanie Nordlinger, who purchased a home in 1988 for \$170,000. She subsequently learned that she was paying about five times more in taxes than her neighbors who had owned similarly situated homes since 1975. This case wound its way to the U.S. Supreme Court which ultimately acknowledged the tax disparity but rejected the challenge to the Equal Protection Clause.

The Court reasoned that legislative classifications may result in inequities. However, as long as the selected classification rationally furthers a legitimate state interest, it does not warrant a higher level of scrutiny. The Court identified two rational reasons that could be said to promote state interest: (1) local neighborhood preservation, continuity, and stability. For example, the tax system created by Proposition 13 might discourage newer chain operations from displacing locally-owned businesses and more affluent new-comers from displacing lower income families; and (2) “locked-in” owners may have fewer options to meet their tax obligations, whereas new owners have full information about the scope of their tax liability before purchasing the home. Based on that information, they can decide not to purchase. Finally, the Court in *Nordlinger* made it clear that it was deferential to the states’ selection of tax classification systems:

The rational-basis standard of review under the equal protection clause of the Federal Constitution’s Fourteenth Amendment is especially deferential in the context of classifications made by complex tax laws; the states, in structuring internal taxation schemes, have large leeway in making classifications and in drawing lines which in the states’ judgment produce reasonable systems of taxation.

Of course, state interests might promote certain desirable objectives but at the same

time have arguably adverse and perhaps unintended consequences. There appears to be no disagreement that SOH caps, for example, have contributed to a shift in tax burden from existing homestead owners to newcomers, renters, businesses, and first-time home-buyers. According to the Florida Department of Revenue, without SOH, the shares in the state’s total taxable value of non-residential and non-homestead residential property would be 26.1% and 28.4%, summing to 54.5%. With SOH, the shares are 32.5% and 35.4%, summing to 67.9%.⁸ The advocacy group Florida TaxWatch, notes in a recent report that local governments have compensated for SOH by keeping millage rates higher and school districts, meeting the required local effort set by the state under the Florida Education Finance Program (FEFP), have levied much higher millage rates than would otherwise be the case without SOH.⁹ State interests are arguably not furthered if first-time homebuyers find housing to be unaffordable and new businesses find property taxes too high and therefore decide not to locate in Florida. The tax burden shifts to both these groups could even become more pronounced if the SOH cap were extended to all real property (residential and business).

Interestingly, *Nordlinger* did not involve a situation in which an out-of-state prospective home-buyer seeking residence in California considered herself at a disadvantage relative to existing residents. Ms. Nordlinger was renting in Los Angeles before she purchased her house. The Equal Protection Clause protects the right of all

⁸ Florida Department of Revenue, “Florida’s Property Tax Structure: An Analysis of Save Our Homes and Truth in Millage Pursuant to Chapter 2006-311, L.O.F.” January 2, 2007, Revised January 18, 2007, in *Florida’s Property Tax Study Interim Report*, Legislative Office of Economic & Demographic Research, February 15, 2007, at 15.

⁹ Florida TaxWatch, “Controlling Escalating Property Taxation and Local Government Spending and Revenue,” *Research Report*, December 2006, at 9

citizens to travel; this gets to the heart of the residency vs. newcomer treatment under state property cap regimes. However, neither *Nordlinger* nor any subsequent U.S. Supreme Court case has opined on a right-to-travel challenge to the Equal Protection Clause in conjunction with property tax regimes. As noted, Sephanie Nordlinger was a renter in California prior to purchasing a house there and therefore had no standing on that issue. However, the disparate property tax treatment of residents and non-residents is an issue. And it is bound to become increasingly important if SOH portability is authorized. A case that was ultimately decided by the U.S. Supreme Court on welfare benefits (summarized below) might have implications for portability.

So what are the challenges with respect to newcomers versus residents and homestead exemptions? Two court cases might give us some insight: *Osterndorf v. Turner*¹⁰ and, more recently, *Columbus-Muscogee County Consolidated Government v. CM Tax Equalization, Inc.*¹¹ *Osterndorf* reached the Florida Supreme Court on the issue of residency requirements for the state's homestead exemption. Initially, the exemption was \$5,000 but was increased in 1982 to \$25,000, first to school district property taxes and then to non-school property taxes, to be phased in over three years. A statute enacted to implement this constitutional amendment provided for the \$25,000 exemption to be granted to

homeowners who had lived in Florida for five consecutive years immediately prior to claiming the exemption and \$5,000 to homeowners with less than five years residency. The Florida Supreme Court found the statute to be unconstitutional because it failed to meet even a minimum rational basis test. The statute established two classes of permanent residents for homestead exemptions which the Court found to violate Florida's Equal Protection Clause.

Portability of the SOH cap could conceivably create two classes of residents once again: those who are automatically eligible and those who are not (new residents to the state who cannot be granted the exemption immediately and must, by virtue of their relocation, wait until the exemption applies, and first-time homebuyers who are currently Florida residents.) The Court in *Osterndorf* acknowledged that there is no total prohibition against tax exemptions and tax disparities. However, among the four reasons cited for justifying its decision, the Court noted: "It is not a legitimate state purpose to reward certain citizens for contributions to the detriment of other citizens." The extent that the tax burden is shifted from one class of residents to the detriment of other residents may be an issue, particularly if the rational basis test is not satisfied and state interest is not promoted. As noted, the U.S. Supreme Court in the *Nordlinger* decision cited local neighborhood preservation, continuity, and stability as one of two rational reasons that could be said to promote state interest. But what if portability actually turns out to have the opposite effect and undermines neighborhood stability?¹² Where is the state interest if this were to occur?

¹⁰ *Osterndorf v. Turner*, 426 So. 2d 539 (Fla. 1982), on rehearing, 426 So. 2d 547 (Fla. 1983). This case is also discussed in Josephine W. Thomas, "Comment: Increasing the Homestead Tax Exemption: 'Tax Relief' or Burden on Florida Homeowners and Local Governments?" 35 *Stetson Law Review* 509, Winter 2006. Also, Hellerstein et al, *supra* note 3, at 21-22.

¹¹ *Columbus-Muscogee County Consolidated Government v. CM Tax Equalization Inc.*, 579 S.E. 2d 200 (Ga. 2003). This case is discussed in Melissa J. Morrow, "Comment: Twenty-Five Years of Debate: Is Acquisition-Value Property Taxation Constitutional? Is it Fair? Is it Good Policy?" 53 *Emory Law Journal* 587, Spring 2004.

¹² Recall that there is limited portability under California's Proposition 13—taxpayers over 55 who sell their principal residences to transfer assessments from the previous base year to replacement homes that are of equal or lower value. However, proposals authorizing SOH cap portability are much more broad-based.

Columbus-Muscogee wound its way up to Georgia's Supreme Court. It was further appealed to the U.S. Supreme Court which refused to review the case. In this case, the CM Tax Equalization Foundation, a private non-profit citizens group from Muscogee, Georgia, contested the constitutionality of a local government amendment that froze the valuation of homestead property at fair market value. The Superior Court of Muscogee County found the tax freeze violated the Equal Protection Clause, including the right to travel. However, the Georgia Supreme Court reversed the lower court decision, arguing, among other points, that nothing in the tax freeze scheme treated new arrivals to the county any differently from long-term county residents who sought to purchase a home there. Moreover, this tax freeze scheme included no cut-off date or durational residence requirement. Because the U.S. Supreme Court refused to review the case, we do not know how the same set of arguments addressed by Georgia's courts might have been addressed by Florida's courts. What is clear, however, is that questions persist concerning the application of the Equal Protection Clause to tax limit schemes both on the grounds of who is affected (long-term residents versus newcomers) and the state interests furthered under the rational basis rule. And we might expect challenges of that sort to continue.

Finally, *Saenz v. Roe* involved a challenge to the right-to-travel protection that was ultimately decided by the U.S. Supreme Court.¹³ Although this case did not address tax benefits, it did address the principle of equal protection accorded residents. The Supreme Court overturned a California statute that limited the amount of welfare benefits for welfare recipients with less than 12 months of residency in California to lesser amounts received in their former home states. The majority opinion concluded that:

¹³ *Saenz v. Roe*, 526 U.S. 489 (1999).

The federal constitutional right to interstate travel discussed in the United States Supreme Court cases embraces at least three different components, as it protects (1) the right of a citizen of one state to enter and to leave another state, (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state.

It is true that this case does not address directly any challenges to tax schemes in conjunction with interstate right to travel but at least there is a precedent for applying the same logic in any future challenges to SOH portability.¹⁴

Challenges to the Commerce Clause

The Nordlinger case did not raise challenges to the Commerce Clause; yet, state taxes are not immune from such challenges.¹⁵ In recent years, the U.S. Supreme Court has applied a test of four principles in cases where the validity of a state tax is challenged on commerce clause grounds. Perhaps the most important test for purposes of our discussion here is the principle that the tax must not discriminate against interstate commerce. However, according to the analysis conducted by

¹⁴ For a more extensive discussion of the implications of *Saenz v. Roe*, see Hellerstein et al., *supra* note 3, at 56-57 and 71-76. Hellerstein et al. also noted that in this case, "the Court attempted to clarify (or, perhaps, recast) its earlier decisions in a manner that will no doubt influence analysis of any constitutional attack on the Save Our Homes portability provisions should they become law." Hellerstein et al. outline the differences between the portability provisions in *Saenz* and those in SOH and offer counter-arguments to an analysis that would invalidate applicability of the Court's findings in *Saenz* to SOH.

¹⁵ Such was the conclusion in *Commonwealth Edison Co. v. Montana*, 453 U.S. 69 (1981). This case is discussed in Hellerstein et al., *supra* note 3, at 47.

Hellerstein et al., Proposition 13 would indeed have been subject to commerce clause scrutiny and the same scrutiny would likely be applied to SOH portability provisions. Case law clearly does not exempt real estate taxes from that scrutiny.¹⁶ As Hellerstein et al. note:

The economic reality of the residential homestead market is that it is associated with enormous interstate flows of capital and labor that are likely to be substantially affected by the Save Our Homes portability provisions. By increasing the relative tax burden on property acquired by newly arriving residents, the Save Our Homes portability provisions are likely to discourage flows of capital into Florida by increasing the cost of acquiring homestead property there.¹⁷

Although Hellerstein et al. contend that a plausible challenge can be made for the discriminatory effect of SOH portability on interstate commerce, they also acknowledge the difficulty of attributing costs associated with interstate moves solely to the tax burden associated with portability.¹⁸ Because of that difficulty, Hellerstein et al. think that a successful constitutional challenge is more probable on the basis of right to travel, although they think a constitutional challenge based on interstate commerce is also likely.¹⁹

Legal Challenges to School Districts

We might expect another possible source of legal challenge to come from the projected effects of SOH portability on either the equity or adequacy of Florida's funding formula (Florida Education Finance Program; hereafter FEFP) for public

education. Florida's Supreme Court has weighed in on the interpretation of Article IX, § 1 of Florida's constitution in the past 10 years.

First, a bit of history. Florida's 1868 Constitution provided the first legal requirement that the state provide a free public school system to serve all of Florida's children. "Adequacy" was first included in the 1968 Constitution (Article IX, § 1), requiring that "adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require." During the 1990s, the Florida Supreme Court tackled the interpretation of this section, perhaps most significantly in *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles* in 1996.²⁰ In citing an earlier case, *St. Johns County v. Northeast Florida Builders Association*, the Florida Supreme Court noted: "The constitutional mandate is not that every school district in the state must receive equal funding nor that each educational program must be equivalent. Inherent inequities, such as varying revenues because of higher and lower property values or difference in millage assessments will always favor or disfavor some districts."²¹ In a later case, *Florida Department of Education v. Glasser*²², the Florida Supreme Court also declined to provide a more specific definition of "a uniform system of free schools," and deferred instead to legislative construction. In that case, the concurring opinion of Justice Kogan observed that the uniformity clause was not to be interpreted in a restrictive manner; rather it should

¹⁶ *Id.* at 62.

¹⁷ *Id.* at 62-63.

¹⁸ *Id.* at 68.

¹⁹ *Id.* at 67.

²⁰ *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles* 680 So. 2d 400 (Fla. 1996).

²¹ *Id.* Also see *St. Johns County v. Northeast Florida Builders Association* 583 So. 2d 635 (Fla. 1991).

²² *Florida Department v. Glasser*, 622 So. 2d 944 (Fla. 1993).

provide a larger framework that permits “a broad degree of variation.”²³

In 1998, the Constitutional Revision Commission proposed and the voters approved the following language for Article IX, § 1:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

The 1998 version added the language that education is a fundamental value and a paramount duty. Moreover, the standards “efficient, safe, secure, and high quality” were added to “uniform” as an attempt to measure the “adequacy” provision.²⁴ The earlier court cases reacted to the 1968 version of Article IX, § 1. A more recent case (*Bush v. Holmes*) on the Opportunity Scholarship Program interprets that section in light of the 1998 language. In that case, the Florida Supreme Court declared the voucher program unconstitutional because it was promoting non-uniformity based on the standards applied to public schools—efficient, safe, secure, and high quality.²⁵

²³ *Id.* at 950.

²⁴ For an explanation of intent governing these standards, see Jon Mills and Timothy McLendon, “Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make ‘Adequate Provision’ for Florida Schools,” 52 *Florida Law Review* 329, April 2000.

²⁵ *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006)

So where does that leave us with respect to adequacy and equity? The Florida Supreme Court construed “uniformity” pretty liberally by deferring to the Legislature and viewing it more as a framework. Equity has been construed liberally, as well. However, the Court’s recent decision on the Opportunity Scholarship Program applies standards to the concept of uniformity. Moreover, in that decision, the Florida Supreme Court appears to be concerned about the diversion of public funds from the public school system to a program benefiting private schools that are not subject to the same uniformity requirements as public schools.²⁶

The application of standards and the concern with funding diversion add new dimensions to legal scrutiny of funding adequacy going forward. If SOH had never existed, in 2006 the required local effort levied by schools could have been reduced by 20%.²⁷ All things equal, SOH shifts the required local effort burden to school districts with lower valuation differentials. Portability might be criticized for reducing local revenues even more than is currently the case and by shifting the property tax burden even more to regions of the state with generally lower valuation differentials. What if these revenue inequities undermine the standards defining adequacy so that Florida’s school districts become increasingly non-uniform? What if funding is diverted to such an extent from local revenues that issues of funding diversion become more pronounced? Though we might expect the federal courts to be inhospitable venues for equity challenges to school finance formulas following the U.S. Supreme Court’s decision in *Rodriguez v.*

²⁶ For a critical appraisal of that decision, see Lila Haughey, “Case Comment: Florida Constitutional Law: Closing the Door to Opportunity: the Florida Supreme Court’s Analysis of Uniformity in the Context of Article IX, Section 1,” 58 *Florida Law Review*, 945, September 2006.

²⁷ Florida Department of Revenue, *supra* note 8, at 49.

San Antonio Independent School District (1973),²⁸ the degree of hospitality is less clear with respect to adequacy challenges to state funding formulas.

Local Revenue Constraints

We now turn to the implications of increasing special assessments and impact fees to offset projected reduced local revenues from SOH portability. One concern has been that special assessments and impact fees will increasingly be used to replace foregone property tax revenues from SOH. The questions are the following: (1) to what extent is such substitution occurring? and, (2) is that substitution raising legal issues? Florida TaxWatch noted that special assessments have almost tripled and impact fees have increased five-fold in the ten years from 1994 to 2004.

But does this growth in alternative local revenue sources substitute for reduced property tax revenues from SOH? An examination of special assessment usage since SOH was implemented shows 47 counties using special assessments from FY 1994-1995 to FY 1998-1999.²⁹ These are typically affluent and coastal counties and adjoining counties which have experienced increasing property values. The results are mixed with respect to city usage of special assessments. Whereas a number of cities in

the 47 counties increased assessments during that 5-year period, nearly the same number reduced or eliminated them.

While there may not be a constitutional issue with special assessments for school districts, the issue might be less clear cut when it comes to impact fees. Florida's school districts may impose and benefit from impact fees. Yet, they have no power to impose impact fees for land development.³⁰ So one possible concern is whether they are using those fees for questionable purposes.³¹ Another possible concern relates to the implications of impact fees for providing uniform and free education in Florida's public schools. In *St. Johns County v. Northeast Florida Builders Association*, the Florida Supreme Court found that an impact fee on building permits to pay for new school facilities did not in itself violate the Florida constitution's uniformity clause in Article 1X, § 1.³² The Court did have a problem with how the impact fee was structured, however, because it excluded homeowners without children, thus transforming the impact fee into a user fee. So the use of impact fees for school district purposes may be an issue depending on the intended purpose or fee structure.

Economic Implications of Potential Legal Challenges

Potential Challenges to the Equal Protection Clause

The U.S. Supreme Court's decision in *Nordlinger* supports the argument that newer and older property owners can be treated differently if the state can

²⁸ This observation was from Isaac Martin, "Does School Finance Litigation Cause Taxpayer Revolt? Serrano and Proposition 13," 40 *University of Massachusetts Law & Society Review* 525, September 2006. However, *Serrano v. Priest* (Serrano II) in 1976 arguably provided advocates hope for future successful state challenges to school finance inequalities when the California Supreme Court decided for the plaintiffs and ordered the state legislature to develop a new school finance system that equalized "wealth-related" expenditures.

²⁹ Theodore J. Stumm and Pamela Pearson Mann, "Special Assessments in Florida Cities and Counties; Dodging Amendment 10?" *Journal of Public Budgeting, Accounting & Financial Management* 16(2) Summer 2004, 171-188.

³⁰ Thomas, *supra* note 10, citing Michael W. Woodward, "Free Schools and Cheap Mobile Homes: School Impact Fees Come to Rural Florida," 70 *Florida Bar Journal* (May 1996), at 70. I would note that it is unclear to what extent these fees are used for land development purposes.

³¹ *Id.* at 545.

³² *St. Johns County v. Northeast Florida Builders Association*, *supra* note 16.

demonstrate that this difference rationally promotes a legitimate state interest. As Hellerstein et al. observe, those rational bases for SOH portability could include facilitating residential home sales, the resulting economic development of the residential home market, and protecting the reliance interest of Florida's homeowners in protection from tax increases associated with rapidly escalating real estate valuations.³³ With respect to the last concern, the Court in *Nordlinger* determined that the state "could legitimately conclude that a new owner did not have the same reliance interest warranting protection against local taxes as did an existing owner." What is meant by "reliance interest" in that context is that existing homeowners are "locked in" and have fewer options if indeed their property taxes escalate and therefore are more deserving of protection than prospective homeowners.³⁴ Other justifications for portability might be encouraging mobility of homeowners to move closer to their workplaces, thus reducing traffic congestion, and providing Floridian residents incentives for homeownership. If someone plans to move to Florida from another state, that person will move anyway and will not need property tax incentives.

We return to the issue of the reliance interest of homeowners in protection from higher property taxes caused by escalating real estate values. At least two sets of questions arise concerning the validity of this interest. First, how much of a problem is the property tax valuation increase for Floridians over time, and are the elderly most likely to be adversely affected? Second, can homeowners access other financing tools to deal with soaring tax increases, and what are the implications for portability? We respond to each of these questions below.

³³ Hellerstein et al., *supra* note 3, at 5-6.

³⁴ *Nordlinger v. Hahn*, *supra* note 7.

How much of a problem is the property tax valuation increase over time, and are the elderly most likely to be adversely affected?

There is no doubt that SOH has been effective in constraining property tax assessments. In every year since 1995, the median sales price of an existing house has exceeded the constraint on assessments authorized by SOH (the lower of 3% or the rate of inflation). Only in 1995, the first year of SOH implementation, was the increase lower (2%) than the cap. In real dollars, homeowners have realized lower tax bills in 2006 than in 1995.³⁵ The increases in house prices were particularly high in 2004 (17%) and 2005 (29%). But it is fair to ask whether this trend will continue. The recent downturn in housing sales nationwide has dampened price increases to 6% in 2006, the lowest annual increase since 1998. So the problem might be abating and, if that is the case, the justification for portability might also become less acute.

What do analysts predict about the housing market? Was 2006 a temporary aberration or is it the beginning of a slower but steadier increase in the value of Florida's homesteads? Federal Reserve Chairman Bernanke suggested that while nationally the downward trajectory in housing sales seems to have flattened, the backlog in unsold homes is expected to dampen homebuilders' investments in the residential market, at least in the short term.³⁶ Reliable long-term projections are always hard to come by. At a recent conference organized by the Chicago Federal Reserve Bank, Robert Schiller of Yale suggested that the huge appreciation in

³⁵ Legislative Office of Economic & Demographic Research, Florida's Property Tax Study Interim Report, *supra* note 3, at 12.

³⁶ CNNMoney.com, "Read Bernanke's Testimony: Fed Chairman's Monetary Policy Report to Congress before the Committee on Banking, Housing, and Urban Affairs," February 14, 2007; available at: http://money.cnn.com/2007/02/14/news/economy/bernanke_remarks/index.htm.

housing prices since 2000 was not supported by fundamentals and was much greater than in any other period in U.S. history. He attributed this huge appreciation to speculation and observed that it was unclear whether in the long-term home prices would increase at all.³⁷

Housing slowdowns have different effects on various regions of the country. A recent study shows that housing prices are above their predicted level in the past six years, primarily along the coasts of California, Florida, and the Northeast. However, much of the increase occurred when mortgage rates were declining and incomes were growing.³⁸ In Florida, single-home market sales are softening and condominium market sales are struggling but sales prices have apparently not tumbled.³⁹ The Florida Economic Estimating Conference projects new single family home construction to decline over 38% from 2006 to 2007 and to increase only by 11% in 2008-2009. In the following 7 years through 2015-2016, single family home starts are projected to grow on average by less than 3%, in contrast to over 23% in 2003-2004 and over 11% in 2004–2005.⁴⁰ Therefore, we might expect property valuation increases not to continue at the same pace in the future as in recent years. Indeed the Ad Valorem Estimating Conference projections for just valuation of real property growth show an almost 7% increase from 2006 to 2007, compared to an

almost 30% increase from 2005 to 2006.⁴¹ Because backlogs of unsold housing stock also vary around the state, we might also expect the housing market to rebound at different speeds throughout the state.

Arguably, housing downturns could have certain negative effects on homeowners if the broader economy goes into a recession. For example, with less spending for construction there is a lower contribution to the overall tax base. (This might be a cautionary note to policymakers who are contemplating replacing the property tax base with a higher sales tax rate.) And homeowners will have less equity in their homes or less disposable income. However, any negative impact on homeowners should be more than offset by the significant valuation gains they experienced in recent years and broadened access for tapping into those gains (a point addressed further below). Moreover, unemployment continues to be low and wages have been increasing.⁴² These offsetting trends need to be considered in any discussion of property tax relief because the property tax is not the only thing affecting existing homeowners' pocketbooks.

We might expect the impact of property tax increases to affect different age groups of homeowners differently. For example, older people on fixed incomes might have a harder time paying their property taxes than younger people with monthly paychecks. Indeed, the majority of states have property tax relief programs for seniors, including

³⁷ Cabray Haines, "Developments and Innovations in Real Estate Markets: A Conference Summary," *Chicago Fed Letter*, No. 231a, October 2006.

³⁸ Cabray L. Haines and Richard J. Rosen, "Bubble, Bubble, Toil, and Trouble," *Economic Perspectives*, Federal Reserve Bank of Chicago, 1Q, 2007.

³⁹ Cathy Keen, "UF Study: Outlook for Florida Real Estate Market Not Entirely Negative," December 5, 2006.

⁴⁰ Florida Economic Estimating Conference, Long Run Tables, October 26, 2006; available at: http://edr.state.fl.us/conferences/fleconomic/FEEC0610_LRTABLES.pdf.

⁴¹ Ad Valorem Estimating Conference, Table 6, November 9, 2006; available at: <http://edr.state.fl.us/conferences/advalorem/adval1106.pdf>. This table includes homestead and non-homestead property; however, the percentage changes for just valuation of homestead properties are projected to be similar: 29.5% for 2005-2006, and 8.0% for 2006-2007. See Table 10.

⁴² Mark Trumbull, "As Housing Goes, So Goes the Economy? Researchers Say that the Recent Housing Downturn Doesn't Necessarily Mean an End to Economic Growth," *The Christian Science Monitor*, November 30, 2006.

Florida. However, this nation's seniors are less likely to be poor than their children. Indeed, families whose head of household is between 65-74 have the highest net worth of families in any age group. So it might make more sense to target property tax relief to people who really cannot afford to pay their taxes and not to people on the basis of age.⁴³

Can homeowners access other financing tools to deal with soaring tax increases, and what are the implications for SOH portability?

To respond to this set of questions, we will consider two groups—existing homeowners and first-time homebuyers. These groups will be affected by SOH portability in a different manner as I will explain. As I noted above, one of the rational bases for furthering state interests cited in the *Nordlinger* decision was protecting the “reliance interest” of Florida’s homeowners from tax increases associated with rapidly escalating real estate valuations. If homeownership is something we want to encourage because it is vital to “neighborhood preservation, continuity, and stability,” we might ask whether property tax incentives of any kind are even the right approach. According to one study, the home mortgage interest deduction does not appear to be an effective way to increase the homeownership rate.⁴⁴ If that is the case, perhaps the same case could be made for SOH, with and without portability. Another interesting question is whether property tax incentives actually discourage homeownership. We might expect SOH

⁴³ For this argument, see Daphne A. Kenyon, “Talking Sense on Property Tax Relief,” *Tax Analysts*, March 20, 2006. In Florida, voters approved a constitutional amendment in 2006 which increased the homestead exemption from \$25,000 to \$50,000 for low-income seniors and provided a discount on property taxes of permanently disabled veterans 65 and older.

⁴⁴ Edward L. Glaeser and Jesse M. Shapiro, “The Benefits of the Home Mortgage Interest Deduction,” National Bureau of Economic Research, Working Paper No. 9284, October 2002.

without portability to impede existing homeowners from moving up and purchasing bigger homes and perhaps affect prospective first-time homebuyers’ decisions to purchase homes (although that is difficult to prove because property taxes are only one factor in the overall purchase decision). We also might expect portability to affect the home purchase decisions of existing homeowners differently than first-time homebuyers for reasons explained below.

Existing homeowners have more options for tapping into their equity now than they did in the 1978 when Proposition 13 was adopted. Presumably, equity withdrawn from mortgages can be applied to paying off property taxes. Specifically, homeowners may take advantage of home equity loans which were made more palatable with a change in the tax laws in 1986. Moreover, they can use newer mortgage products to tap into home equity, such as cash-out refinancing and declining transaction costs.⁴⁵ Mortgage equity withdrawals have risen significantly when compared to income growth, and there is some limited evidence that the pace of these withdrawals may have increased annual consumption by 1-3% from 2000-2005.⁴⁶ Consumers have been increasingly tapping into mortgage products that allow for these withdrawals and therefore have more options for paying their property tax bills than they had almost

⁴⁵ Cash-out refinancing permits homeowners to refinance their mortgages for more than they currently owe, with the remaining balance going to them. In contrast to home equity loans, cash-out refinancing replaces the first mortgage and is not a separate loan.

⁴⁶ John V. Duca, “Making Sense of the U.S. Housing Slowdown,” *Economic Letter – Insights from the Federal Reserve Bank of Dallas*, 1(11), November 2006. Citing a recent Federal Reserve study, *The Wall Street Journal* noted that “borrowing against home values added \$600 billion to American consumers’ spending power in 2005, or 7% of personal disposable income, up from 3% in 2000, and 1% in 1994.” James R. Haggerty, “Trends (A Special Report): Housing; What’s Behind the Boom,” *Wall Street Journal* November 21, 2005, at R.4.

30 years ago. With these options, they can exercise more control and do not need to be in the position of deciding whether to divert income away from the purchase of food, clothing or other necessities to pay their property taxes – a concern articulated in *Nordlinger* to support the “reliance interest” of existing homeowners.⁴⁷

First-time home-buyers are another group that will be affected by SOH portability. The tax burden shift from portability would arguably increase their burden because the base of non-homesteaders can be expected to shrink with portability. Even without portability, SOH had the effect of adding \$387 to average statewide property taxes for the purchase of a median-valued home (\$150,000) in 2005.⁴⁸ As noted above, another rational consideration articulated in *Nordlinger* for state interest in policies that distinguish between existing and new homeowners is local neighborhood preservation, continuity, and stability. At the risk of oversimplifying, we might argue that policies impeding renters from purchasing homes in the neighborhoods where they are renting do not promote long-term stability in those neighborhoods. This is particularly the case in less affluent neighborhoods that are a mixture of owner-occupied and rental units when rental units come up for sale. All things equal, homeowners have a greater

interest than renters in increasing their long-term property value and preserving their neighborhood so we would expect rental housing that is purchased for occupation by long-term residents to promote neighborhood stability.⁴⁹ On the other hand, portability might help homeowners who would like to move up from their starter homes but currently cannot afford the property taxes of more expensive homes. This increased mobility could free up affordable homes that are in short supply in very expensive metro areas of the state.⁵⁰ So the potential effects of portability on first-time homebuyers are mixed.

From 1994-2004 homeownership in the nation grew from 64% to 69%. Reasons for the growth include low interest rates and, more importantly, the introduction of new mortgage products that made financing a starter house easier by reducing the required down payment.⁵¹ Innovations in mortgage products include wider use of adjustable rate loans, interest-only loans, and payment option loans.⁵² Besides these changes enabling first-time homebuyers with little equity to purchase homes, credit has also been extended to higher-risk borrowers in

⁴⁷ *Nordlinger v. Hahn*, *supra* note 7. The U.S. Supreme Court distinguished the relatively more “locked in” situation of existing homeowners as follows: “A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, or other necessities. In short, the State may decide it is worse to have owned and lost, than never to have owned at all.”

⁴⁸ Legislative Office of Economic & Demographic Research, *supra* note 3, at 35.

⁴⁹ For a comparison of homeowners to renters and their respective relationship to neighborhood stability, see National Association of Realtors, “Social Benefits of Homeownership and Stable Housing,” January 2006. The report citing census data noted that while 7.4% of residents in owner-occupied homes moved from 2002-2003, nearly one-third of renters moved.

⁵⁰ For anecdotal evidence of this occurring in Boca Raton, see Linda Rawls, “Middle-class Crunch: Affordable Housing Crisis Threatens Local Economy,” *Palm Beach Post*, November 13, 2005.

⁵¹ Matthew Chambers, Carlos Garriga, and Don E. Schlagenhauf, “Accounting for Changes in the Homeownership Rate,” paper presented at the 2004 Annual Meetings of the Society for Economic Dynamics, Iowa State University.

⁵² Interest-only loans defer principal payments for a specified number of years. Payment option loans allow borrowers to make minimum payments at interest rates below the interest for the loan and apply the balance to the amount owed.

recent years. For example, the Technology Open to Approved Lenders (TOTAL) scorecard lets the Federal Housing Administration distinguish between borrowers within the high-risk category that might be more prone to delinquency. Interestingly, this expansion in homeownership was accompanied by a reduction in the total number of renters nationwide.⁵³

The down-side of innovative mortgage products is that they may contribute to the default of a certain segment of homebuyers (particularly first-time homebuyers) on their mortgage payments. Indeed, late payments have risen significantly over the past year on subprime mortgages—loans usually made to higher-risk homeowners.⁵⁴ It is true that the impact of some of these alternative mortgage products might not be felt in the initial months of home ownership before SOH caps kick in (assuming the new homeowners apply for the homestead exemption which activates them.) Nonetheless, property taxes under a SOH portability scheme would initially be higher for first-time homebuyers than they would in the absence of portability. Public policies that on balance reduce housing affordability for less affluent first-time homebuyers would arguably not contribute to long-term neighborhood stability or preservation.

Economic Implications—Potential Challenges to the Commerce Clause

According to Hellerstein et al., a plausible case for discrimination against interstate commerce with SOH portability would need to demonstrate, among other things, the following:

the portability provisions effectively imposed a higher cost on interstate

than on (many) intrastate relocations; that individual decisions about whether to relocate in Florida were adversely affected by such costs, thereby affecting interstate labor mobility; that businesses were deterred from relocating in Florida due to the increased costs associated with relocating their employees in the state; and that there were nondiscriminatory alternatives for achieving the ostensible purpose of the portability provisions (e.g., making them available to newly arrived homesteaders on an “as if” basis, *i.e.*, as if their homestead had been in Florida.)⁵⁵

Even if taxpayers can amass sufficient data to support their arguments, Hellerstein et al. note that it would be difficult to prove that the increased tax burden attributable to portability affected individual relocation decisions. However, given the probability of a challenge on the basis to discrimination against interstate commerce, we might ask what type of firms is most likely to be affected by portability and how portability will affect their relocation decisions? Currently, Florida firms have no assessment limits although a proposal currently under consideration would impose a 10% cap. However, if commercial assessments were capped, Florida companies relocating within the state would have at least two competitive advantages over out-of-state firms seeking to relocate in Florida. First, Florida companies could take advantage of the cap for their property and out-of-state companies would need to pay property taxes on the just value. Second, Florida residents employed by firms relocating within the state could benefit from portability, whereas employees relocating with out-of-state firms would have to purchase houses assessed at just value and would not initially be eligible for SOH.

⁵³ Haines, *supra* note 37.

⁵⁴ Christopher Conkey and James R. Hagerty, “Drop in Housing Starts Stirs Worry That Wider Economy Will Weaken,” *The Wall Street Journal*, February 17-18, 2007, at A1, A 7.

⁵⁵ Hellerstein et al., *supra* note 3, at 67.

An article on strategic considerations of relocating companies divides out-of-state firms into three categories: (1) the company's entire operation moves from one part of the country to another and takes along most of its employees (these are called "pick up and go") companies; (2) the company selects a location to start-up a new business or reposition an existing business. Most of the employees are hired in the new location (these are called "new horizons" companies); and (3) the company consolidates geographically dispersed operations where the company already has some presence. The company may bring some senior executives from out of state but most of the workforce is in the new location (these are called "consolidation to beachhead" companies).⁵⁶

The "pick up and go" companies tend to be rare because of the cost of moving high salary employees.⁵⁷ Low real estate costs and facility costs are reported as being less important than the overall mix in costs of housing, employee commutes to work, proximity to airports, and the locally-based labor pool for support operations. Therefore, for those companies, the extent to which portability promotes intrastate mobility and frees up affordable housing for middle management and professional out-of-state employees would probably be balanced in their relocation decision-making calculus against the initially higher cost of property taxes for all their out-of-state employees. Indeed, these companies might benefit to the extent that portability frees up affordable

housing for locally-based support staff so they can be closer to the workplace.

The "new horizons" companies are more likely scenarios. Those companies are more interested in lowering their overall costs. To them lower wages and tax savings, such as on property, are important, as are a quality workforce and a desirable location. Because these companies typically draw most of their workforce from the new location, portability would probably be less of a concern to them than to "pick up and go" companies. In fact, to the extent that portability promotes intrastate mobility in homeownership, it actually might benefit these companies.

The "consolidation to beachhead" companies seek to consolidate several geographically-dispersed units on the same campus, in part so they can reduce operating costs and exercise more control and flexibility. An example of this strategy was Citicorp's decision to consolidate its operations in Tampa rather than in New York City. Many factors came into play including labor costs and supply, median housing prices, average commuting times, recreational amenities, crime, weather risks, and spousal accommodation. These companies tend to draw most of their workforce from the new location so portability would also probably be less of a concern to them than to "pick up and go" companies.

For all three company categories, relocation strategies take into account many factors and property taxes are only a small component. As Hellerstein et al. observed, isolating the effect of a property tax policy change on them and then demonstrating causality would certainly be difficult at best.

Economic Implications—Potential Challenges to Funding Equity and Adequacy in Florida's Public Schools

Potential challenges from SOH portability might be more difficult to mount in the case of public schools than challenges to the right to travel and to interstate commerce. As

⁵⁶ For the typology of companies and ensuing discussion of factors important to these companies, see Martha A. O'Mara, "Strategic Drivers of Location Decisions for Information-Age Companies," *Journal of Real Estate Research*, 17(3), 1999, 365-386.

⁵⁷ Another factor might be that employees may be less willing to relocate than in the past. For possible explanations, see Linda K. Stroh, "Does Relocation Still Benefit Corporations and Employees? An Overview of the Literature," *Human Resource Management Review*, 9(3), 1999, 279-308.

noted, post-Rodriguez the federal courts have been less hospitable to challenges to school formulas based on equity. Challenges based on adequacy have been winding through a number of courts in various states. As I noted, the standards “efficient, safe, secure, and high quality” were added to “uniform” in Florida’s constitution in 1998 as an attempt to measure the “adequacy” provision in the constitutional requirement: “The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make *adequate provision* [italics added] for the education of all children residing within its borders.” Therefore, one might need to demonstrate that portability impairs those standards in some way. As I discussed above, Florida’s courts have interpreted “uniform” pretty liberally in the past. That interpretation has always applied to the education delivered to Florida’s children (output equity) and not to inputs from school districts, no matter how different local effort has been among the districts. So probably the more salient question is: to what extent, if at all, will portability affect the standards (other than uniformity) that describe “adequate provision”? Are individual school districts rendered less efficient, safe, secure, and of lower quality with SOH portability than they would be in the absence of portability? More importantly, causality is very difficult to demonstrate because of other factors that might, and probably would, explain changes in any of those dimensions.

Assuming one can demonstrate causality, we might look at the pressures affecting Florida’s school districts if portability is authorized.⁵⁸ Funding for the FEFP comes

⁵⁸This discussion generally relies on data contained in Legislative Office of Economic & Demographic Research, *supra* note 3, 37-40. Implications for portability are mine unless otherwise noted. Also, see Florida Department of Education, 2006-2007 *Funding for Florida School Districts, Statistical Report*.

from a mix of state and local revenues. There are essentially two constraints on school district spending. First, FS 1011.62(4) provides that local property tax contributions to the FEFP can not exceed 90% of each district’s FEFP funding. This means that districts exceeding that threshold contribute less local required effort (proportionately less local funding than do districts under the 90% threshold) and the state picks up the remainder. Currently ten districts exceed the 90% adjustment: Charlotte, Collier, Franklin, Gulf, Indian River, Lee, Martin, Monroe, Sarasota, and Walton. This is up from six districts in 2004-2005. Second, a constitutional cap of 10% applies to the combined school millage rate for required local effort, discretionary effort, and capital improvements. The combined school millage rate in all districts is now 7.46 mills.

The 90% constraint on FEFP funding has the effect of shifting the property tax burden from counties that experience more growth to those that experience less. With SOH, that shift is even more pronounced and portability could only be expected to exacerbate it. For example, Broward has 6.3% less of a property tax burden under the existing SOH program than it would in its absence and could even have less than that with portability. However, districts that have more of a burden under the existing SOH program, like Orange, could expect to see that burden increased. The existing SOH program represents a 1.8% property tax burden shift that has disproportionately benefited central and south Florida, and the extreme edges of north Florida; to compensate for this shift in tax burden, other districts have had to raise their school district rates higher than would otherwise have been the case. The tax burden on these counties will even be greater as more counties approach the 90% threshold and the 10 mill cap. The projected slowdown in property valuation, discussed above, will also put more pressure on districts to raise

the millage rate. The FEFP 90% cap, even without SOH, has inherent regressive biases. That is, high-growth, more affluent districts use proportionately less of their local dollars to fund the FEFP than do slow-growth, less affluent districts. SOH and portability would compound those regressive propensities. The regressivity caused by the 90% cap is partially offset by supplements for declining enrollment and for sparsity. Overall, however, the FEFP is highly progressive within the state, redistributing revenue from richer to poorer districts.⁵⁹

Another scenario that could shift the tax burden disproportionately to lower growth, less affluent counties includes less state funding for the FEFP over time. This could occur because housing slowdowns contribute to slower sales tax growth. If the country spirals into a recession, homeowners will be consuming less and will have less disposable income for discretionary purchases, too. In that case, the state would be under more pressure to fund non-FEFP educational programs with stagnating state tax proceeds. The slower growth in lottery proceeds associated with a mature lottery and the projected sluggish long-term funding for the Public Education Capital Outlay (PECO) from the utility gross-receipts tax could put even more pressure on the state's revenue base.⁶⁰ Of course, the effect of portability on individual school districts will depend on the nature of the adopted portability scheme and the turnover

rate of homestead property. Moreover, we might expect homeowners to buy their subsequent homes in the same district as their current residences. But districts, particularly those in large metro areas, could be affected disproportionately by portability where homeowners might choose to live in one district but work in an adjoining district. If more of the tax burden gets shifted to lower growth, less wealthy regions of the state and local property taxes in those affected districts continue to rise, we might see a public outcry. However, it might be more the issue of political outrage and frustration at the magnitude of the cross-subsidy for required local education funding than a concern that could successfully sustain a legal challenge on the grounds of equitable or adequate funding.

Conclusion

One never knows what legal challenges will be raised when a new government policy is authorized. The case law referenced above suggests that interstate right to travel under the Equal Protection Clause and impediments to interstate commerce might be reasons for concern. The effects on school districts might also be a source of concern. We might expect them to further raise their required local effort millage rate to offset reduced property tax revenues resulting from SOH portability. Successful legal challenges on the grounds of equity or uniformity might be difficult to mount given the Florida court decisions referenced above. However, if the other constitutionally-prescribed standards (efficiency, safety, security, and high quality) for measuring adequacy are compromised, red flags might be raised. In addition, we might expect school districts to rely even more on alternative funding sources if portability provisions for SOH are authorized. Yet, growing dependence on impact fees might result in more public scrutiny of their use and effects.

Finally, first-time homebuyers and out-of-state homebuyers would be disproportionately

⁵⁹ In a national context, the FEFP may be regressive. Every Florida district spends less per student than the national average, and the FEFP as implemented does not allow any Florida district to reach the national average.

⁶⁰ The Legislature authorized in SB 360 the use of a portion of the Documentary Stamp Tax proceeds to be directed to the PECO Trust Fund, so that additional funding will augment the gross receipts tax proceeds for that purpose. Also gambling revenues from slot machines in Broward County should bring in additional funding, to be used for one-time expenditures for public schools. But we may see some substitution for lottery proceeds.

affected by portability, as would out-of-state firms seeking to relocate in Florida. We could also expect school districts to experience a tax burden shift even though it may not result in a successful constitutional challenge.

The property tax has a good history in terms of both stability and revenue elasticity. It typically keeps pace with other revenue sources but lacks their cyclical variations. As policymakers contemplate various schemes to reform the property tax, they might keep the following observation in mind:

Rather than being a wounded, defective tax instrument, the property tax unbound appears to be a productive tax with a number of positive attributes, not the least of which is that it provides “fiscal empowerment” to local governments. For local governments to

be effective in a federal system, they must have independent sources of revenue. The property tax base is one of the few taxes that is not either preempted by higher levels of government or severely hampered by the mobility of the tax base. If this is the case, why then is the property tax so constrained? It will be suggested here that the restrictions and constraints imposed on the property tax are likely the result of political factors in the decision-making process, not structural problems with the tax itself.⁶¹

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⁶¹ J. Fred Gertz, “The Property Tax Unbound,” *National Tax Journal*, 59 (3), September 2006.