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NEW YORK'S REAL PROPERTY TAX LAW: THE MORE CHANGES THAT ARE MADE, THE MORE THINGS STAY THE SAME

Ira M. Sockowitz*

“[I]f any tax could have been eliminated by adverse criticism, the general property tax should have been eliminated long ago.”¹

INTRODUCTION

The single largest source of revenue for government in the State of New York is the real property tax, which is derived from approximately 9,200 taxing jurisdictions.² Over half of this revenue finances education, with the remainder allocated to finance the myriad levels of local government in New York State.³ For the fiscal year ending June 30, 1988, the state collected \$15.72 billion in real property taxes.⁴ Local governments have come to rely on these monies for continued delivery of local services. The property tax is a residual tax, or a tax of last resort, and is ultimately the balancer of budgets. A local government determines its desired spending levels and its an-

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The author wishes to extend a sincere note of thanks to George Weissman. This article could never have been accomplished without his sincere dedication and assistance. The time, effort, and wealth of knowledge imparted by Mr. Weissman exemplify the dedication of an effective government attorney and a true friend.

1. 1974 J. JENSEN, *PROPERTY TAXATION IN THE UNITED STATES* 478 (1931), noted in *REPORT OF THE STATE COMM'N ON EMINENT DOMAIN AND REAL PROP. TAX ASSESSMENT REVIEW* 164.

2. 1989 N.Y. STATE BD. EQUALIZATION & ASSESSMENT REPORT 9.

3. *Id.* at 6.

4. *Id.* at 12.

ticipated revenues from sources other than the property tax, and the difference between those two figures becomes the amount to be raised by the property tax.

In use for over 200 years,⁵ the real property tax is the largest and oldest source of revenue for local governments. The tax grew out of the need to finance local services; while property taxes were originally seen as a source of income to government by those who could afford to pay the levies,⁶ general application of the real property tax was soon favored due to the stability of that which was being taxed—land. Compared to personal property, which can be transported from one taxing jurisdiction to another with relative ease, land is immobile and, therefore, considerably easier to locate and tax.⁷ Furthermore, the immobility of land also aids in the enforcement of tax levies, as the lien is placed on the land itself, not on the owner, and survives the sale of the property.⁸

Despite the enormous number of dollars that this tax generates for the various governmental entities in the state, the property tax has long been criticized by taxpayers as being essentially inequitable. The concept of equity under the real property tax is predicated upon similar properties being treated alike. The real property tax is an *ad valorem* tax,⁹ and “is used in the field of taxation to designate an assessment of taxes against property at a certain rate upon its value.”¹⁰ The use of an *ad valorem* tax raises certain assumptions within the con-

5. 2 REPORT OF THE TEMP. STATE COMM'N ON STATE AND LOCAL FIN., THE REAL PROP. TAX, at 11 (1975). In actuality, the property tax has been in use long before the state or even federal government came into existence in the United States.

6. *Id.*

7. *Id.*; see also 1979 STATE OF NEW YORK TEMP. STATE COMM'N ON THE REAL PROP. TAX, REPORT OF THE TEMP. STATE COMM'N ON THE REAL PROP. TAX 1 [hereinafter 1979 REPORTS].

8. *Id.*

9. Black's Law Dictionary defines *ad valorem* as meaning “[a]ccording to value.” BLACK'S LAW DICTIONARY 48 (5th ed. 1979). It further defines the term to mean: “A tax levied on property or an article of commerce in proportion to its value, as determined by assessment or appraisal.” *Id.*

10. *Ampco Printing-Advertisers' Offset Corp. v. City of New York*, 14 N.Y.2d 11, 22, 197 N.E.2d 285, 288, 247 N.Y.S.2d 865, 870, *appeal dismissed*, 379 U.S. 5 (1964).

text of taxpayer equity: first, that the value to be placed upon similar properties will be at the same level; and second, that the rate applied against this value will be the same for properties of a similar nature or classification. Taken together, these assumptions should lead to properties of the same or similar type and of equal value being assessed and taxed at the same level, thereby creating taxpayer equity—an essential ingredient in developing taxpayer confidence.

An assessment of the property is the means used to determine the value of the property to be taxed and, as such, is the basis for the determination of the individual taxpayer's liability. Moreover, assessment practices lie not only at the heart of the real property tax, but by measuring the wealth of a community, these assessments also become the basis for the distribution of several forms of state aid, such as revenue sharing and aid for education.¹¹ Property assessments, once equalized,¹² are also the basis upon which school and county tax levies are apportioned within their jurisdictions. Furthermore, the full value of taxable real estate forms the basis for setting the tax and debt limitations called for by the state constitution.¹³

Assessment practices have resulted in claims of unfair or unequal assessments,¹⁴ overall inequality of the administration of the property tax,¹⁵ and violations of taxpayers' constitutional

11. 1986 N.Y. Bd. EQUALIZATION & ASSESSMENT REPORT ON UNDERSTANDING THE EQUALIZATION RATE 5 [hereinafter UNDERSTANDING EQUALIZATION].

12. Property assessments are equalized using an equalization rate that is prepared by the State Board of Equalization and Assessment. "In simple terms, an equalization rate represents the average level of assessment in a community. A more complete definition is that an equalization rate represents the average percentage of local assessed value of taxable real property to total actual value of the property in a city, town or village." *Id.*

13. See N.Y. CONST. art. VIII, § 10.

14. See, e.g., *Town of Mount Kisco v. State Bd. of Equalization & Assessment*, 101 A.D.2d 462, 463, 477 N.Y.S.2d 701, 702 (3d Dep't 1984); *Town of Bedford v. State Bd. of Equalization & Assessment*, 70 A.D.2d 213, 215, 420 N.Y.S.2d 773, 775 (3d Dep't 1979).

15. See, e.g., *Sterling Estates v. Board of Assessors*, 66 N.Y.2d 122, 124, 485 N.E.2d 993, 993-94, 495 N.Y.S.2d 328, 328 (1985); *Northville Indus. Corp. v. Board of Assessors*, 143 A.D.2d 135, 136, 531 N.Y.S.2d 592, 593 (2d Dep't 1988).

rights,¹⁶ including the equal protection clause arguments under both the state¹⁷ and federal¹⁸ constitutions. Although statutory remedies are available, the legislature has nevertheless limited the admissible forms of proof for these proceedings.¹⁹

This article explores the history of assessment practices, the remedies available to taxpayers who believe that they have been unjustly taxed due to unfair assessment practices, and both the legislation and litigation with respect to both of these areas of law. Section I of the article traces the history of assessment practices in the state, dating from 1788, when the first requirement for "full value" assessment was adopted by the legislature.²⁰ It also traces the lack of conformity with this standard, which led to inequitable assessments both within and between assessing units. It explains the various cases which exemplify the confusion regarding the proper standard, despite the statutory commandment of full value. In addition, it examines *Hellerstein v. Assessor of the Town of Islip*,²¹ which reaffirmed the statutory standard of full value²² and, by implication, required all assessing units in New York State to revalue their properties to comply with this standard.

Section II traces the initial legislative responses to the *Hellerstein* decision, including the moratoria to forestall the effects of the decision and restrictions on methods of proving inequitable assessments. Additionally, this section examines policy concerns held by the legislature and its rationale for preserving the status quo.

16. See, e.g., 423 South Salina St. v. City of Syracuse, 68 N.Y.2d 474, 485, 503 N.E.2d 63, 68, 510 N.Y.S.2d 507, 512 (1986); Keslow v. State Tax Comm'n, 125 A.D.2d 294, 294, 508 N.Y.S.2d 578, 579 (2d Dep't 1986).

17. N.Y. CONST. art. I, § 11.

18. U.S. CONST. amend. XIV, § 1.

19. Article 7 of the Real Property Tax Law (RPTL) provides for judicial review of assessments. N.Y. REAL PROP. TAX LAW §§ 700-726 (McKinney 1984 & Supp. 1989). Section 720(3) expressly limits the types of evidence that will be admissible. *Id.* § 720(3). While certain types of proceedings may still be instituted under article 78 of the Civil Practice Law and Rules (CPLR), section 720(3) gives all actions brought under article 7 of the RPTL preference over all other civil actions and proceedings in all courts. *Id.*

20. Act of Mar. 7, 1788, ch. 65, 1788 N.Y. Laws 769.

21. 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975).

22. *Id.* at 10, 332 N.E.2d at 284, 371 N.Y.S.2d at 395.

Section III of this article considers the legislature's resolution to the *Hellerstein* decision adopted in 1981.²³ By replacing the statutory commandment for full value with a statute that allowed the continued use of uniform fractional assessments,²⁴ the legislature legitimized the existing practices of assessing units. Two provisions for implementing the new statute allowed for various assessing units to preserve the relative tax burdens borne by each class of property, proportionate to the amounts under the pre-*Hellerstein* administration of the property tax.²⁵ In addition, the legislation again altered the forms of proof allowable in inequality proceedings.²⁶ This section also analyzes the case of *Foss v. City of Rochester*²⁷ (*Foss I*), in which the court of appeals invalidated, on equal protection grounds, a portion of the 1981 law that allowed separate tax rates for classes of property, known as the "homestead" and "non-homestead" classes, within a certain assessing unit.²⁸ The basis of the decision was that the provision caused similarly situated taxpayers, located in different assessing units within a county, to pay different amounts of taxes to the county.²⁹

Section IV of the article reviews the legislature's attempt to find a solution to the *Foss I* decision. The response addressed the problems of school districts, condominiums, and the special rules put in place for New York City and Nassau County.

Section V examines the alterations in the methods of proof authorized by the legislature for taxpayer use in attempting to have assessments reviewed. This section reviews many of the

23. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 219 (McKinney).

24. N.Y. REAL PROP. TAX LAW § 305 (McKinney 1984).

25. N.Y. REAL PROP. TAX LAW § 720(3)(c) (McKinney 1984 & Supp. 1989).

26. See *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*).

27. *Id.*

28. *Id.* at 259-61, 480 N.E.2d at 724-25, 491 N.Y.S.2d at 135-36. At the time of the decision, the homestead class was comprised of all one, two and three family residential dwellings, as well as farms and nonresidential property used primarily for residential purposes. Act of Dec. 3, 1981, ch. 1057, § 2, 1981 N.Y. Laws 219, 220-21 (McKinney). The non-homestead class is comprised of the properties not within the homestead class. Act of July 25, 1983, ch. 624, § 11, 1983 N.Y. Laws 1154, 1158 (McKinney).

29. *Foss I*, 65 N.Y.2d at 259, 480 N.E.2d at 724, 491 N.Y.S.2d at 135.

issues in this area and points out the recurring problems faced by the legislature and local governments.

The article concludes with a brief review of the administration of the real property tax and the underlying theme of the article: preservation of the status quo only serves to continue inequitable assessing practices, causing litigation and uncertainty for taxpayers and local governments alike. Lastly, this article suggests how the full value standard of assessment might solve some of the problems facing New York's policy-makers and taxpayers.

I. THE HISTORY OF ASSESSMENT PRACTICES IN NEW YORK STATE: 1788-1974

A. The Full Value Standard: Employed Only When Breached

The foundation of apportioning the real property tax to individual taxpayers is assessment, a method by which property is valued for purposes of placing property on assessment rolls. The assessment roll is then used for a variety of purposes, but principally for the property tax. Property tax liability is determined by multiplying the property's assessed value by the rate of tax. Tax rates should be applied uniformly to like classes of property. Since the real property tax is an *ad valorem* tax, the most variable criterion for tax liability is the value of the property. Therefore, the value recorded for each property as a result of its assessment plays a critical role in determining the individual taxpayer's liability.³⁰

30. A great deal of confusion often arises over the terms "value" and "assessment" or "assessed value." Unfortunately, all too often these terms are used synonymously when they have entirely different meanings. In the appraisal process, which is used to arrive at the "value" of an individual property, the assessor employs a valuation technique to arrive at a fair market value for the property. There are several methods for arriving at a value, such as income capitalization, or the cost approach using a comparable sales approach. Whatever the method, the property's fair market value is determined.

Once the market value for a property has been established for all the properties within a taxing jurisdiction, an assessment percentage is then applied to these values to arrive at the property's "assessed value." Under RPTL section 305, assessment percentages may be anywhere from 1% to 100%, so long as the percentage is em-

Three methods of expressing property assessment have been developed: 1) full value, defined as market value,³¹ means the amount which “‘one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell’”;³² 2) fractional assessment utilizes a uniform percentage applied to the market value of the property; and 3) fractional assessment by class applies a uniform percentage to the market value by class of property.

Underlying all three methods of assessment is the expression of the property's value at full or market value. While this may be evident for jurisdictions that employ full value expressions of assessments, both uniform fractional assessments and fractional assessments by class require an initial determination of the full value of the property to apply a uniform percentage to the property for tax assessment purposes. Theoretically, this should pose no problem to assessors since, historically, both the state and each unit of local government need to determine the total full market value of taxable property within their jurisdictions. A community's property value and, thereby, its wealth, is the standard by which municipalities are compared to determine the level of state aid each should receive,³³ the proper apportionment of the intermunicipality property tax burden it should bear,³⁴ and the constitutional tax and debt limitations³⁵ each will face.

played uniformly among the taxing jurisdictions' properties. See N.Y. REAL PROP. TAX LAW § 305 (McKinney 1984). It is against this “assessment” or “assessed value” that the tax rate will be applied in order to determine the taxpayer's liability.

The use of differing assessment percentages by various taxing jurisdictions is a policy question that each jurisdiction must answer in order to apportion the tax burden among the various property owners.

31. See *Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 3, 332 N.E.2d 279, 280, 371 N.Y.S.2d 388, 389 (1975).

32. *W.T. Grant Co. v. Srogl*, 52 N.Y.2d 496, 510, 420 N.E.2d 953, 959, 438 N.Y.S.2d 761, 767 (1981) (quoting *Heiman v. Bishop*, 272 N.Y. 83, 86, 4 N.E.2d 944, 945 (1936)).

33. See *City of Lackawanna v. State Bd. of Equalization & Assessment*, 16 N.Y.2d 222, 225 n.1, 212 N.E.2d 42, 44 n.1, 264 N.Y.S.2d 528, 530 n.1 (1965).

34. *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dep't 1981), *modifying* 97 Misc. 2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau County 1978), *modified*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

35. N.Y. CONST. art. VII, §§ 4, 10.

The full value standard has a long history in New York State, dating back to 1788.³⁶ As recently as 1981, former section 306 of the Real Property Tax Law (RPTL) required that "[a]ll real property in each assessing unit shall be assessed at the full value thereof."³⁷ It was generally assumed, however, that the standard would be satisfied if the assessments were at a uniform percentage of full value rather than actual full value.³⁸ Despite the statutory mandate for assessments at full value, and because the courts of the state had not been enforcing this standard,³⁹ assessors were essentially free to choose the level of assessment. Historically, residential property was assessed at a lower amount than commercial properties within their jurisdictions because it was believed that property tax costs borne by commercial tenants would be passed through to customers.⁴⁰

As such, assessors created a *de facto* classified system for assessing properties, the benefits of which accrued to residential taxpayers. Also, assessors were unable to assess all the parcels within their jurisdictions on an annual basis. With increasing property values, the lack of yearly assessment increases created large disparities between assessments and market values, both between and within the classes of taxpayers. As a result, not only were assessments of residential properties taking place at less than the required full value standard, but ine-

36. Act of Mar. 7, 1788, ch. 65, 1788 N.Y. Laws 769.

37. N.Y. REAL PROP. TAX LAW § 306 (McKinney 1984), *repealed by* Act of Dec. 3, 1981, ch. 1057, § 1, 1981 N.Y. Laws 219, 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 305 (McKinney 1984)) (permitting fractional assessments at a uniform percentage of value).

38. *Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 7, 332 N.E.2d 279, 282-83, 371 N.Y.S.2d 388, 393 (1975).

39. In *Hellerstein*, the court of appeals traced the history of taxpayer inequality suits challenging the use of fractional assessments. The court discussed prior case law that, while admonishing offending parties for failing to assess at statutorily required full value, still did not render the practice unlawful. *Id.* at 4-7, 332 N.E.2d at 281-82, 371 N.Y.S.2d at 391-93 (citing *People ex rel. Bd. of Supervisors of Fowler*, 55 N.Y. 252 (1873); *Van Rensselaer v. Witbeck*, 7 N.Y. 517 (1852); *People ex rel. Congress Hall v. Outer Kirk*, 120 App. Div. 650 (3d Dep't 1907); and *People ex rel. Sheldon v. Fraser*, 74 Hun 282, 26 N.Y.S.2d 814 (1893), *aff'd*, 145 N.Y. 593, 40 N.E. 163 (1895)).

40. *Foss v. City of Rochester*, 65 N.Y.2d 247, 251-52, 480 N.E.2d 717, 719, 491 N.Y.S.2d 128, 130 (1985) (footnote omitted) (*Foss I*).

qualities among members of the same class of property were systematically created. Since the administration of the property tax is a function of local government, this occurred without the benefit of a common scheme among assessing units either within a single taxing jurisdiction or throughout the state. The result was a series of local assessments that bore no relation to one another. The system of assessment became so random that, in 1970, the Bureau of the Census judged New York's assessment system the fifth most inequitable in the nation.⁴¹

In 1964, in *C.H.O.B. Associates v. Board of Assessors of the County of Nassau*,⁴² the court declared that providing full value assessments "requires merely that the assessments be at a uniform rate or percentage of full or market value for every type of property in the assessing unit."⁴³ This decision finally stated what had been the actual standard for assessment practices in New York and what would be widely followed.⁴⁴

B. The Role of Inequality Suits

Taxpayer suits challenging assessments made at or below full value, yet above the average for the community, presented a problem to New York courts. "On the one hand there was a rather obvious violation of equal protection. But on the other hand the requirements of the statute had been met and if the court ordered a reduction from full value, it would be compel-

41. STATE BD. OF EQUALIZATION & ASSESSMENT, EDUC. FIN. & THE N. Y. REAL PROP. TAX: FULL VALUE ASSESSING & EQUALIZATION, SEPTEMBER 1979, at 3 (1979).

42. 45 Misc. 2d 184, 257 N.Y.S.2d 31 (Sup. Ct. Nassau County), *aff'd*, 22 A.D.2d 1015, 256 N.Y.S.2d 550 (2d Dep't 1964), *aff'd*, 16 N.Y.2d 779, 209 N.E.2d 820, 262 N.Y.S.2d 501 (1965).

43. *Id.* at 192, 257 N.Y.S.2d at 38.

44. A number of cases followed *C.H.O.B. Associates v. Board of Assessors*, 45 Misc. 2d 184, 257 N.Y.S.2d 31 (Sup. Ct. Nassau County), *aff'd*, 22 A.D.2d 1015, 256 N.Y.S.2d 550 (2d Dep't 1964), *aff'd*, 16 N.Y.2d 779, 209 N.E.2d 820, 262 N.Y.S.2d 501 (1965). See *McAlevey v. Williams*, 41 A.D.2d 971, 972, 344 N.Y.S.2d 193, 194 (2d Dep't 1973); *Connolly v. Board of Assessors*, 32 A.D.2d 106, 107, 300 N.Y.S.2d 192, 193-94 (2d Dep't), *appeal denied*, 25 N.Y.2d 739, 251 N.E.2d 806, 304 N.Y.S.2d 1028 (1969); *Nicolette v. Village of Clyde*, 34 A.D.2d 202, 204, 310 N.Y.S.2d 896, 898 (4th Dep't 1970); *Drelich v. Kahn*, 60 Misc. 2d 227, 230, 302 N.Y.S.2d 634, 638 (Sup. Ct. Nassau County 1969).

ling the assessors to 'do an unlawful act.'"⁴⁵ Many courts asserted that the letter of the law precluded them from doing more than merely advising the complainant that he could swear out a writ of mandamus to compel the revaluation of all the property within the jurisdiction which would give the taxpayer a theoretical satisfaction.⁴⁶

In 1923, the United States Supreme Court ended this dilemma in *Sioux City Bridge Co. v. Dakota County*.⁴⁷ The Court held that "the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."⁴⁸ This conclusion was based on the principle that where use of both the true value of the property and the uniformity and equality the law requires is impossible to achieve, "the latter requirement is to be preferred as the just and ultimate purpose of the law."⁴⁹

As a result of the *Sioux City Bridge* decision, New York courts technically were free to lower an assessment, even though it was already below full value and even though it was contradictory to the statutory mandate of full value. In addition, this decision deflected attention from the practice of assessing at less than full value toward this newly formed "right of reduction based on inequality."⁵⁰

What evolved was "a two-step process in proving an inequality case."⁵¹ First, the taxpayer proved the proper ratio of assessed value to fair market value in the assessing unit, and second, established the fair market value of his property.⁵² "Proof

45. *Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 8, 332 N.E.2d 279, 283, 371 N.Y.S.2d 388, 394 (1975) (quoting *People ex rel. Sheldon v. Fraser*, 74 Hun 282, 284, 26 N.Y.S. 814, 815 (1893), *aff'd*, 145 N.Y. 593, 40 N.E. 163 (1895)).

46. *Id.* (quoting 1 BONBRIGHT, VALUATION OF PROPERTY 501 (1965)).

47. 260 U.S. 441 (1923).

48. *Id.* at 446.

49. *Id.*

50. Beebe, *Real Property Tax Administration: An Historical Perspective for New York State*, 2 N.Y. LAND REP. 10032, 10034 (1981).

51. *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 446, 315 N.E.2d 441, 442, 358 N.Y.S.2d 367, 369 (1974).

52. *Id.*

on these two points [led] to the application of a simple arithmetic process whereby ratio times market value [equaled] proper assessed valuation."⁵³

RPTL section 720(3) governs the types of proof that may be used to show the ratio of assessed value to full market value.⁵⁴ Through this subdivision the legislature sought to either facilitate or restrict the ease with which taxpayers could bring inequality suits challenging their assessments. Enacted in 1958,⁵⁵ the statute provided that assessments could be challenged by using the selected parcel method⁵⁶ or the current sales method.⁵⁷ The statute was amended in 1961⁵⁸ to authorize use of the state equalization rate.⁵⁹ Despite this statutory authorization, the court of appeals, in *O'Brien v. Board of Assessors of Mamaroneck*,⁶⁰ held that the equalization rate could not be

53. *Id.*

54. N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989).

55. Act of Oct. 1, 1958, ch. 959, § 2, 1958 N.Y. Laws 1379, 1451-52 (McKinney) (codified as amended at N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989)).

56. N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989). The selected parcel method requires the parties to mutually agree upon a selection of sample parcels. *Id.* Failing such agreement, the court or referee chooses for the parties. *Id.* Once chosen, each side then employs expert appraisers to determine the market value of the sample parcels, with the court or referee being the final arbiter of the values to be assigned. *Id.* The rate of assessment (ratio) is found by dividing the aggregate sum of the assessed value of the sample parcels by the aggregate sum of the market values. *Id.*

57. *Id.* § 720(3)(a). The current sales method provides that evidence of unequal assessments may be proven by the alternative method of showing what the market price for the property would be evidence of "actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made." *Id.*

58. Act of Apr. 24, 1961, ch. 942, § 1, 1961 N.Y. Laws 1798, 1798 (McKinney), repealed by Act of Dec. 3, 1981, ch. 1057, § 7, 1981 N.Y. Laws 219, 233-34 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989)).

59. The equalization rate is the ratio of the assessed value to the State Board of Equalization and Assessment's (SBEA) estimate of its actual or full value. Appraisers on the SBEA staff conduct an appraisal of a sample number of properties for each assessing unit and make judgments about the percentage of full value being used by the unit. This judgment is made by comparing the appraisals with the assessed values listed on the local assessment rolls. See UNDERSTANDING EQUALIZATION, *supra* note 11, at 18-23.

60. 20 N.Y.2d 587, 232 N.E.2d 844, 285 N.Y.S.2d 843 (1967).

the exclusive means of proving that the challenged assessment was unequal, as could the select parcels method.⁶¹

But in 1969, RPTL section 720(3) was amended again, and provided that the parties could use the state equalization rate as the sole form of proof.⁶² In 1974, in *Ed Guth Realty, Inc. v. Gingold*,⁶³ the court of appeals held that the statute permitted the parties to rely solely upon the state equalization rate or on contemporaneous sales; proving the value of selected parcels was no longer a required method.⁶⁴

The *Guth* case was instrumental in opening the courts to taxpayers with inequality claims. The use of the state equalization rates allowed taxpayers to prove, with considerable ease, the existence of the ratio of assessed value to market value in the assessing unit and that the assessments challenged under them were discriminatory. In addition to ease, the use of the equalization rate as proof made the cost of bringing such suits affordable to the average taxpayer, and potentially increased the number of suits filed.⁶⁵

C. *The Re-emergence of Full Value: Hellerstein v. Assessor of the Town of Islip 1975*

In 1975, the court of appeals overturned the entire system of real property tax assessments in *Hellerstein v. Assessor of the Town of Islip*.⁶⁶ The widespread belief that assessments at less than full value satisfied the requirements of the RPTL was re-

61. *Id.* at 595, 232 N.E.2d at 848, 285 N.Y.S.2d at 848-49.

62. Act of Apr. 27, 1969, ch. 302, § 1, 1969 N.Y. Laws 399, 399-400 (McKinney).

63. 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974).

64. *Id.* at 449, 315 N.E.2d at 444, 358 N.Y.S.2d at 372.

65. One example of the exorbitant costs associated with an assessment challenge prior to *Guth* was discussed in *Slewett & Farber v. Board of Assessors*, 97 Misc. 2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau County 1978), *modified*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dep't), *vacating*, 78 A.D.2d 403, 435 N.Y.S.2d 313 (2d Dep't 1981), *modified*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982), where the court cited the \$435,691 fee paid by the petitioners in the case of 860 Executive Towers, Inc. v. Board of Assessors. *Id.* at 640 n.8, 412 N.Y.S.2d at 295 n.8.

66. 37 N.Y.2d 1, 13-14, 332 N.E.2d 279, 286-87, 371 N.Y.S.2d 388, 398-400 (1975).

jected by the court, which declared that the full value standard did not permit assessors to assess at less than full value.⁶⁷

The Town of Islip admitted that assessments had been made at less than 100 percent, but asserted two justifications for assessing at other than full value. First, the town had relied on the court of appeals' earlier refusals to reject this custom, despite having the opportunity to do so, thereby judicially sanctioning this practice by its silence.⁶⁸ The town relied almost solely upon *C.H.O.B.* and its progeny.⁶⁹ Judge Wachtler, writing for the majority, recognized the impact *C.H.O.B.* had in lower New York courts and commented: "[T]he custom of fractional assessments, once roundly condemned as a flagrant violation of the statute, has endured and acquired a new life through a kind of legislation by violation."⁷⁰ However, Judge Wachtler noted that since the validity of fractional assessments was not really at issue in *C.H.O.B.*,⁷¹ the affirmance of the decision by the court of appeals should not be construed as sanctioning the practice of fractional assessments.⁷²

The town's second principle defense was that the creation of the State Board of Equalization and Assessment (SBEA) by the legislature indicated that RPTL section 306 did not require assessment at 100 percent of full value.⁷³ The court rejected this argument stating that "the State Equalization Board is only concerned with maintaining equality among the taxing units"⁷⁴ and that it "does not purport to measure the ratio of assessed valuation to full value of any individual property."⁷⁵ Judge Wachtler found the argument irrelevant insofar as its only relation to the case at hand was the use of the SBEA's ratio as proof in inequality cases.⁷⁶

67. *Id.* at 10, 332 N.E.2d at 284, 371 N.Y.S.2d at 395.

68. *Id.* at 8, 332 N.E.2d at 283, 371 N.Y.S.2d at 394.

69. *See id.*; *see also supra* notes 42-44 and accompanying text.

70. *Hellerstein*, 37 N.Y.2d at 8, 332 N.E.2d at 283, 371 N.Y.S.2d at 393-94.

71. *Id.* at 7-8, 332 N.E.2d at 283, 371 N.Y.S.2d at 393.

72. *See id.* at 7-9, 332 N.E.2d at 282-84, 371 N.Y.S.2d at 393-95.

73. *Id.* at 8, 332 N.E.2d at 283, 371 N.Y.S.2d at 394.

74. *Id.* at 9, 332 N.E.2d at 284, 371 N.Y.S.2d at 395.

75. *Id.* (quoting *O'Brien v. Board of Assessors*, 20 N.Y.2d 587, 596, 232 N.E.2d 844, 849, 285 N.Y.S.2d 843, 840 (1967)).

76. *Id.*

The court also acknowledged that the legislature was aware of the use of fractional assessments, and “‘[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence.’”⁷⁷ However, it noted that the principle is only applicable to statutes capable of more than one interpretation and where a court has not previously interpreted the statute.⁷⁸ In this particular instance, the court found that any ambiguity would arise in regard to the term “value,” but noted that it had previously given judicial construction to that term.⁷⁹

Thus, the court of appeals declared the *de facto* system of classified assessments illegal. While refusing to set aside the assessment rolls of prior years, the court said that assessment rolls that did not comply with the full value standard in following years could be voided in their entirety.⁸⁰ Recognizing that the full value standard could not be put into place immediately, the court deferred the implementation of its mandate from the date of its decision on June 5, 1975, until December 31, 1976.⁸¹

Since *Hellerstein* required revaluations to comply with the full value standard, hope was raised that the longstanding inequalities under the old system would be corrected. Full value assessment is crucial to the underlying theory of taxation that those with similar properties of equal value will be assessed and taxed equally. Only full value assessment eliminates inequalities within and among various taxing jurisdictions because each taxpayer is treated the same, regardless of where the property is located or into which class it falls.

Hellerstein, in conjunction with *Guth*, spelled disaster for local governments. Local governments were required to assess at full value. Should they fail to do so, the means by which the taxpayers could prove such failure was significantly enhanced.

77. *Id.* (quoting *Engle v. Talarico*, 33 N.Y.2d 237, 242, 306 N.E.2d 796, 799, 351 N.Y.S.2d 677, 680 (1973)).

78. *Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 10, 332 N.E.2d 279, 284, 371 N.Y.S.2d 388, 395 (1975).

79. *Id.*

80. *Id.* at 13-14, 332 N.E.2d at 287, 371 N.Y.S.2d at 399.

81. *Id.* at 14, 332 N.E.2d at 287, 371 N.Y.S.2d at 399.

The magnitude of the *Hellerstein* decision was so great that the legislature undertook several enactments to meet its mandate. Moreover, the chain of legislation, and the resulting litigation, are still being proffered in the quest for a financially stable, politically sound, and equitably proper system of property tax administration.

II. THE INITIAL LEGISLATIVE RESPONSES TO *HELLERSTEIN*: 1977-1980

Hellerstein touched off debate about the administration of the property tax and, in particular, the methodology of assessment practices. The use of fractional assessments was primarily responsible for the inequitable system of taxation existing at the time of the *Hellerstein* decision, yet the legislature delayed implementation of the full value standard. The legislature and others grappled with the court of appeals' mandate for a full value system of assessment and the anticipated shifting of tax burden between commercial properties and residential properties that would result.

A. 1977: *Hellerstein's Effects: Stalls and Studies*

In 1977, the first attempt at solving some of the problems brought to the fore by *Hellerstein* was a package of three bills.⁸² This package was described as "the culmination of the labor of the past two years by the legislative and executive branches of the government in developing a sound and meaningful program for improving real property tax administration."⁸³

Chapter 888 established a statutory time frame for assessing units to implement the full value standard by amending RPTL section 306.⁸⁴ Until December 31, 1980, it placed a "morato-

82. N.Y.A. 3502-B, 200th Sess. (1977), N.Y.A. 3100-A, 200th Sess. (1977), & N.Y.S. 6135-A, 200th Sess. (1977).

83. Memorandum of Governor Hugh Carey on Approval of chapters 887, 888 and 889, *reprinted in* 1977 N.Y. Laws 2533 (McKinney).

84. Act of Aug. 11, 1977, ch. 888, § 1, 1977 N.Y. Laws 1816, 1816 (McKinney), *repealed by* Act of Dec. 3, 1981, ch. 1057, § 1, 1981 N.Y. Laws 219, 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 305 (McKinney 1984)).

rium" on the filing of final assessment rolls with the newly assigned full values for those assessing units which undertook a revaluation or where the county did so on the unit's behalf.⁸⁵ The moratorium provided those assessing units with a limited defense to *Hellerstein*-type suits while the revaluation was proceeding "in good faith."⁸⁶ This bill was "an effort to give localities sufficient time to revalue property and institute assessments simultaneously as well as to encourage voluntary compliance with the full value standard."⁸⁷ Additionally, it was believed that, "[s]imultaneous implementation of full value assessment rolls throughout the state would help to assure uniform, accurate and up to date assessment data."⁸⁸

More importantly, chapter 887⁸⁹ recognized that the primary factor to be considered in implementing a full value system of assessments was its cost.⁹⁰ Many assessing units were at or close to their constitutional tax and debt limitations at the time, and it was incumbent upon the state to come to the aid of local governments attempting to comply with the full value standard. Therefore, to aid those assessing units that had begun revaluation, and to coax other assessing units to begin,

85. *Id.*. Article 5 of the RPTL governs assessment rolls that must be prepared and published, and the means by which a tentative roll becomes the final assessment roll for a tax year. N.Y. REAL PROP. TAX LAW §§ 500-520 (McKinney 1984); *see also* N.Y. COMP. CODES R. & REGS. tit. 9, pts 190-1 to -15, 192-1 to -4 (1985 as amended through 1988). The importance of the final assessment roll lies in the fact that notice of the roll's completion must be published, N.Y. REAL PROP. TAX LAW § 516 (McKinney 1984 & Supp. 1988), and that the act of publication constitutes constructive notice. *See United Artists Eastern Theaters, Inc. v. Board of Assessors*, 76 Misc. 2d 26, 30, 349 N.Y.S.2d 284, 288 (Sup. Ct. Rockland County 1973). Publication sets running the limitation period during which a certiorari proceeding may be brought. *See People v. Purdu*, 196 N.Y. 270, 276-77, 89 N.E. 838, 840 (1909). Moreover, publication of the final roll satisfies due process requirements. *See Feig v. Board of Assessors*, 69 Misc. 2d 322, 323, 329 N.Y.S.2d 905, 906-07 (Sup. Ct. Sullivan County 1972) (notice of new assessment by posting and publication adequate to satisfy requirements of due process).

86. Act of Aug. 11, 1977, ch. 888, § 1, 1977 N.Y. Laws 1816, 1816 (McKinney), *repealed by* Act of Dec. 3, 1981, ch. 1057, § 1, 1981 N.Y. Laws 219, 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 305 (McKinney 1984)).

87. 1978 ASSEMBLY STANDING COMM. ON REAL PROP. TAX'N REPORT 4.

88. *Id.*

89. Act of Aug. 11, 1977, ch. 887, 1977 N.Y. Laws 1813 (McKinney).

90. *Id.*

chapter 887 created a mechanism for state assistance and appropriated \$1 million for the SBEA to assist municipalities.⁹¹

The third bill of the package, chapter 889,⁹² created a Temporary State Commission on the Real Property Tax, to "make a comprehensive review of the administration and application of the real property tax and . . . make such recommendations as it may find necessary to assure that the burden of taxation is equitably distributed while sound social, economic and governmental purposes are served."⁹³ Specifically, the commission was to review the impact of full value upon the relative classes of taxpayers;⁹⁴ determine the desirability and feasibility of classified assessments, fractional assessments, or other means of lessening the impact of full value assessments;⁹⁵ determine the financial and administrative burdens to local government and what the state's role should be;⁹⁶ and review the administration and granting of tax exemptions to property.⁹⁷ The Temporary Commission was to report by December 31, 1978.⁹⁸

As a package, this was a strong response by the state. Faced with the tremendous burden of correcting a 200-year-old problem in a relatively short period of time, the combination of placing a "moratorium" on *Hellerstein*-type suits during reval-

91. *Id.* § 3, at 1815. The aid was to be distributed according to a formula contained in the then newly created section 1572. N.Y. REAL PROP. TAX LAW § 1572 (McKinney Supp. 1987). Additionally, a ten-year period of probable usefulness was created for the "[i]nstallation of computer assisted system for the preparation and maintenance of assessments and tax rolls," N.Y. LOCAL FIN. LAW § 11(a)(53-a) (McKinney 1968 & Supp. 1989), thus allowing municipalities to take advantage of the SBEA's Real Property Information System or some other computer-assisted system without running afoul of the indebtedness limitations contained in either the Local Finance Law or the New York State Constitution. *Id.*; N.Y. CONST. art. VIII. Periods of probable usefulness are used in connection with a municipality's contracting for a debt and the issuance of notes or bonds to pay for such debt. Under the Local Finance Law, a municipality may not contract indebtedness for a period longer than that set specifically for the completion or probable usefulness of the project. N.Y. LOCAL FIN. LAW § 11(a) (McKinney 1968 & Supp. 1989).

92. Act of Aug. 11, 1977, ch. 889, 1977 N.Y. Laws 1817 (McKinney).

93. *Id.* § 3, at 1818.

94. *Id.* § 3a.

95. *Id.* § 3b.

96. *Id.* § 3c.

97. *Id.* §§ 3g-i, at 1818-19.

98. *Id.* § 9, at 1819.

uations and giving money to local governments to revalue evidenced an initial willingness to meet the judicial mandate requiring full value. The creation of the Temporary State Commission indicated that the two branches realized that this was a grave problem, which required significant study and work to be resolved in a manner not wholly disruptive of local government financing. However, even at this juncture, legislative concerns of shifting tax burdens were obvious. In creating the Temporary State Commission, the legislature found that "[c]onformity with those decisions (e.g., *Hellerstein*) present the state and its localities with substantial and difficult problems, including in some instances the potential shifting of tax burdens among classes of property."⁹⁹ As time progressed, it became evident that this concern played the preeminent role in shaping the overall legislative response — an attempt to preserve the *status quo ante*.

In the time between the enactment of this package and the reconvening of the legislature in 1978, the court of appeals made two decisions which raised a new area of concern for the legislature in dealing with property tax reform. These cases had a significant impact upon the legislature's plans for the real property tax.

First, the court of appeals, in *Waldert v. City of Rochester*,¹⁰⁰ held that municipalities which were taxing in excess of their constitutional limits had to refund those excess taxes. The court found that the fiscal crisis facing certain cities and school districts did not constitute the type of emergency justifying constitutional suspension of taxing limitations.¹⁰¹ The court established a precedent for refunds to taxpayers who were wrongfully forced to pay more than the law allowed.¹⁰² Moreover, the *Waldert* court ruled that municipalities were required to make refunds for all the tax years during which they were collecting taxes above their constitutional limits.¹⁰³

99. *Id.* § 1, at 1817.

100. 44 N.Y.2d 831, 378 N.E.2d 115, 406 N.Y.S.2d 752 (1978).

101. *Id.* at 834, 378 N.E.2d at 116-17, 406 N.Y.S.2d at 754.

102. *Id.* at 835, 378 N.E.2d at 117, 406 N.Y.S.2d at 755.

103. *Id.*

The second decision was *860 Executive Towers, Inc. v. Board of Assessors of the County of Nassau*,¹⁰⁴ which reaffirmed the use of the state equalization rate as a sole basis for determining the ratio of assessed to full value in property tax certiorari proceedings.¹⁰⁵ Finding that the ratio is objectively and expertly arrived at, the court denied a challenge to the methodology and underlying data employed by the SBEA in arriving at its equalization rates.¹⁰⁶

These two decisions made it easier for the taxpayer to prove that municipalities had been exacting too much money from them due to unequal assessments. Upon a showing of such overassessment, municipalities were required to refund the amounts collected in excess of the proper assessment. The potential outcome boded poorly for certain municipalities and assessing units, like New York City and Nassau County, with long histories of unequal assessments and potential liabilities of billions of dollars in taxpayer refunds.¹⁰⁷

B. 1978: More Moratoriums, Legalized Classification, and Restrictions to the Methods of Proving Inequality

The moratorium for compliance with the judicially mandated assessments at full value until December 31, 1980¹⁰⁸ was reiterated by the enactment of chapter 476.¹⁰⁹ It further provided a mechanism for avoiding compliance with *Hellerstein* to any assessing unit by merely requiring the enactment of a local law, ordinance, resolution, or executive action calling for a revaluation.¹¹⁰ The assessing unit need only take such action to create an appearance of intent to revalue, then proceed "with all deliberate speed,"¹¹¹ although evaluations no longer needed

104. 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't 1976), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

105. *Id.* at 467-70, 385 N.Y.S.2d at 608-09 (citing *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974)).

106. *Id.* at 470, 385 N.Y.S.2d at 609.

107. *See infra* note 147 and accompanying text.

108. *Id.* § 1, at 823.

109. Act of July 11, 1978, ch. 476, 1978 N.Y. Laws 823 (McKinney).

110. *Id.*

111. *Id.*

to be implemented prior to December 31, 1980. The original moratorium required assessing units to be "actively carrying out"¹¹² a physical revaluation by December 31, 1980.¹¹³ Many local governments were now ensured the means by which to create an appearance of compliance, and to await further action by the state legislature that might obviate forever the need to actually undergo a revaluation.

Furthermore, until the end of the moratorium, assessments could be made at no more than full value.¹¹⁴ While observing the constitutional limit on assessments,¹¹⁵ it allowed the use of any value less than full value, once again leaving local assessors to determine the percentages of value to be used. This constituted a sanctioned continuation of the use of fractional assessments and the classification of assessments that resulted. This policy may have protected certain types of property from receiving worse treatment in the absence of a comprehensive new standard. By allowing the illegal practices to continue, the legislature and the governor avoided compliance with *Hellerstein* and abdicated their policymaking roles.

The real substance of the legislation, however, was contained in the restrictions placed on the forms of proof allowed in a proceeding to challenge an assessment. Under *Guth*¹¹⁶ and *860 Executive Towers*,¹¹⁷ a property owner only had to prove that his property was assessed at a higher ratio of assessed to full value than the equalization rate, as prescribed by the SBEA for all the real property in the assessing unit. With respect to the moratorium limit of assessing at no more than full value established by the chapter, the petition also had to contain an allegation that the ratio of assessed value to market value of the property under review was greater than the ratio for other

112. Act of Aug. 11, 1977, ch. 888, 1977 N.Y. Laws 1816 (McKinney) (codified as amended at N.Y. REAL PROP. TAX LAW § 306 (McKinney 1984)).

113. *Id.*

114. Act of July 11, 1978, ch. 476, § 1, 1978 N.Y. Laws 823, 823 (McKinney).

115. N.Y. CONST. art. XVI, § 1.

116. *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974).

117. *860 Executive Towers, Inc. v. Board of Assessors*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't 1976), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

properties "of the same major type, as determined by the state board of equalization and assessment."¹¹⁸ By requiring such proof, the ability of taxpayers to bring such suits was greatly hampered, thereby slowing down the rising refund liability of municipalities facing these suits.

A petitioner challenging his assessment would now have to allege not only a higher ratio for his property in relation to all other properties in the assessing unit, but also allege a higher ratio for his property in relation to all other properties in the applicable major type as well. While intended to increase the difficulty of proving an unequal assessment in order to avoid tax refund liabilities,¹¹⁹ a host of other problems attended the

118. Act of July 11, 1978, ch. 476, § 1, 1978 N.Y. Laws 823, 823 (McKinney). At the time chapter 476 was enacted, RPTL section 1200 required the State Board of Equalization and Assessment (SBEA) to sample the ratio of assessments to market value for each major type of property at least once every five years. A major type of property means a general type of taxable real property which exceeds one of the criteria set forth in the market value survey procedure. N.Y. COMP. CODES R. & REGS. tit. 9, § 186-17.1(e) (1986). The general types of property used in the 1978 market survey were residential, commercial, apartment, vacant, farm, industrial, utility, or loft (only in the City of New York). *Id.* § 186-17.1(c). For a general discussion of a market survey, see *id.* § 186-1.13 (1988). These samples are known as "market surveys" and are normally conducted in order to develop the equalization rate. *Id.* § 186-1.2(b). The purpose of classification of parcels into major types of property is to aid the SBEA's staff in developing the equalization rate. By classifying the parcels in each assessing unit, they may be more accurately sampled, appraised, and equalized. For a general description of the procedures used by the SBEA staff for conducting a market survey, see *id.* § 186-1.13(b). For the specific procedures used in each market survey since 1978, see *id.* § 186-17. The Administrative Code requires that appraisals of individual parcels must be conducted for differing types of property, using different methods of valuation for each. See *id.* §§ 186-1.14, 186-16. As a result of these different valuation methods, property type classification becomes a necessary means by which the proper value is calculated for sample parcels and the class that they represent.

119. See generally Memorandum from Peter Piscitelli, Legislative Representative of New York City, to Governor Hugh Carey (July 7, 1978); Internal Memorandum within the Executive Chamber from Henrik Dullea to Judah Gribetz, Counsel to the Governor (July 6, 1978); Letter from Ed Koch, Mayor of New York City, to Governor Hugh Carey (June 29, 1978); Memoranda from Allen Schwartz, Corporation Counsel of New York City, to Governor Hugh Carey (June 29, 1978) and to Robert Morgado, Secretary to the Governor (April 28, 1978).

use of these ratios that rendered them either impossible or excessively expensive to employ.¹²⁰

The problems with the new statute were spread across constitutional, programmatic and policy lines. Furthermore, there were additional uncertainties regarding the construction to be given the language employed.¹²¹ The bill contained potential constitutional problems because it introduced the concept of classified assessments. While this has been a *de facto* practice for many years, codification of a system of classification subjected the practice to constitutional scrutiny. Although the legislature was not prohibited by the constitution from establishing a classified system of taxation, case law required that the legislature set forth definitive guidelines detailing the means by which classification was to be achieved.¹²²

120. The statutory language that gave rise to the use of the major types of property calls for their use as they are "determined by the state board of equalization and assessment." Act of July 11, 1978, ch. 476, § 1, 1978 N.Y. Laws 823, 823 (McKinney). However, according to the SBEA, the ratio of assessed value to market value for each major type of property is not determined by the State Board for the assessment rolls. Letter from Robert L. Beebe, SBEA Counsel, to Judah Gribetz, Counsel to the Governor (June 30, 1978). Rather, they are informally developed by the SBEA staff for use in developing the equalization rate for the unit under survey. *Id.* Therefore, since the bill does not change the board's procedures, the evidence required of the petitioner is impossible to produce as it does not exist. Furthermore, had new legislation been passed to alter the board's procedures so that these ratios would have been calculated: one, they could not be determined retroactively; and two, to do so would have required a doubling of the board's funding at that time, estimated by the Governor's Division of Budget to cost \$8.8 million if doubled. Letter from Robert Beebe, SBEA Counsel, to Judah Gribetz, Counsel to the Governor (June 30, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney). These concerns were made known to Governor Carey and his counsel prior to the governor signing the bill into law. *See generally* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

121. *See* 6 Op. Counsel SBEA No. 2, at 9 (1977).

122. The enunciated rule regarding the legislature's power to tax was concisely summarized by the court of appeals in the case of *United States Steel Corp. v. Gerosa*, 7 N.Y.2d 454, 166 N.E.2d 489, 199 N.Y.S.2d 475 (1960), where it stated:

In New York, the State Legislature has the exclusive power to tax, including the power to determine the class of persons to be taxed, which it may delegate to its municipal subdivisions, including the City of New York. But any taxes imposed by the latter *must be within the expressed limitations* and, unless authorized, a tax so levied is constitutionally invalid. It is equally well settled that the legislature may classify property for tax purposes in any manner it

In this legislation, however, the delegation of the taxing authority was made, in two instances, without any statutory guidelines. The first instance was the delegation of authority to the SBEA to establish major types of property.¹²³ That power was delegated by incorporating RPTL section 1200,¹²⁴ which authorized classification of major property types. Section 1200 contained no definitions or distinctions for these property types, so that classifications made pursuant to that section were not specifically authorized by law. Instead, the SBEA merely allowed the staff to use informal classifications in the determination of the equalization rate.

The second instance was found in the delegation of power to the local assessors. Under RPTL section 307, the assessors were free to assess at any rate they chose, without any prescribed standards other than the maximum assessment at full value.¹²⁵ Local assessors always had a degree of autonomy in setting the property's value, since they were appraisers and used personal judgments to set assessed values. However, the legislature established statutory criteria upon which appraisers' judgments had to be based in an attempt to eliminate variances and discrepancies between assessments of like properties.¹²⁶

deems proper. Its power in that regard is not without limitations, for the *classification must have some reasonable basis*.

Id. at 459, 166 N.E.2d at 491, 199 N.Y.S.2d at 478 (citation omitted) (emphasis added).

123. N.Y. REAL PROP. TAX LAW § 1200 (McKinney 1989).

124. *Id.*

125. Act of July 11, 1978, ch. 476, § 1, 1978 N.Y. Laws 823, 823 (McKinney).

126. Until this legislation, that standard in New York had been full value since at least 1788. *See supra* note 36 and accompanying text. The use of a standard that allows too wide a discretion will not be upheld. *See infra* notes 151-54 and accompanying text. The courts have passed on this issue on several occasions. The New York Court of Appeals, in the case of *Gautier v. Ditmer*, 204 N.Y. 20, 97 N.E. 464 (1912), stated that "it would be incompetent for the legislature to leave to a state officer or department the power to determine whether a tax should be levied, or at what rate, or upon what property . . ." *Id.* at 28, 97 N.E. at 467. In the case of *Weissenger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971), the U.S. District Court held unconstitutional an Alabama law limiting the ratio of assessed to market value at no more than 30%. *Id.* at 625. That finding was predicated upon three grounds, all of which are relevant to this statute. First, the court found that "a [s]tatute which fails to provide clearly ascertainable and well-defined standards to guide the ministerial officers charged by law with its implementation and administration cre-

Another constitutional concern was that by failing to establish a policy that uniformly corrected previous violations of the statutory full value command, the bill failed to meet the requirements of article 8, section 12 of the New York State Constitution.¹²⁷ That section makes it the duty of the legislature to prevent taxation and assessment abuses by counties, cities, towns and villages.¹²⁸

Administratively, the bill presented a solution for a single municipality, New York City, in a statewide format. Many of the municipalities that would have been affected by the bill neither needed nor warranted the provisions it contained.¹²⁹ The SBEA claimed that it did not prepare the type of information required by the bill, nor did it possess the necessary staff

ates an unwarranted and void delegation of legislative power." *Id.* at 624-25 (footnote omitted). As discussed, the statute at issue here does not appear to provide the necessary standards to guide the officers to whom the taxing power is delegated. Second, the court found that due process was violated by the Alabama statute, and that:

Due process requires of a statute a reasonable degree of certainty and definiteness—a requirement that applies with special force to a taxing statute. When it leaves the legislature, a statute must be complete in all its terms, and it must be definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution.

Id. at 624. In the New York statute, no clear classifications of property were made, and the standard for assessment was left open to the assessor's discretion. As a result, no taxpayer could, on the reading of the statute, determine his rights or obligations under it. Finally, the court found that equal protection would be violated by unequal taxation as a result of permitting assessments to range from 0 to 30% of fair market value, and stated that "[v]esting such wide discretion in the hands of tax officers, no matter how good their motives, necessarily will result in an arbitrary and discriminatory system of taxation." *Id.* at 625. In the New York statute, the range was far wider (0 to 100%) as the limit is the actual full value of the property.

127. N.Y. CONST. art. VIII, § 12.

128. *Id.*

129. Recognition of this fact was taken by New York City. In a memorandum regarding the bill, the New York City Corporation Counsel stated that, "[t]he proposals would apply to the entire State although they are geared to the City alone." Letter from Allen G. Schwartz, Corporation Counsel to the City of New York, to Robert Morgado, Secretary to the Governor (April 28, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney). In further recognition of the bill's impact, the letter went on to summarize the city's priorities, which included several alternative plans for these provisions to take effect in Nassau and Suffolk counties and New York City, or just the city alone. *Id.*

or resources to comply with the statutory requirements.¹³⁰ Additionally, the SBEA samples did not always include all types of property, so that in many instances ratios did not exist for certain classes of property.¹³¹ As a result, the taxpayers within those classes had no statutory remedy. Further complicating this was the fact that class ratios did not exist for residences in New York City as a whole, but rather, for each borough. The SBEA feared an unhealthy competition would result between boroughs to reduce assessments.¹³² Moreover, as to New York City, it was believed that higher effective tax rates for commercial, industrial and apartment properties would be preserved, thereby decreasing the ability to attract and keep businesses in the city.¹³³

Among the possible statutory construction problems was the bill's intended retroactive effect. Section three stated that the act was to be construed as remedial.¹³⁴ The limitation on retroactive legislation was that, absent unequivocal, express legislative intent, the act could not interfere with a vested right.¹³⁵ This limitation generally applies to substantive rights, not to

130. See *supra* notes 119-20 and accompanying text.

131. In a market survey, "[t]he minimum percent of assessed value sampled is 85%, except that large units in non-sampled classes will always be sampled." Letter from Robert Beebe, SBEA Counsel, to Judah Gribetz, Counsel to the Governor (June 30, 1978), reprinted in Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney). While use of the 85% is based on limited resources of the SBEA, the result is that not all classes are sampled in the market survey. *Id.*

132. See Memorandum from David Gaskell to Tom Frey (June 22, 1978), reprinted in Bill Jacket of ch. 476, 1978 N.Y. Laws 824 (McKinney).

133. *Id.*

134. Act of July 11, 1978, ch. 476, § 3, 1978 N.Y. Laws 823, 824 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 307 (McKinney 1984 & Supp. 1989)). This amendment was designed to correct imperfections in chapters 888 and 889 of the laws of 1977. Act of Aug. 11, 1977, ch. 888, 1977 N.Y. Laws 1816 (McKinney) and Act of Aug. 11, 1977, ch. 889, 1977 N.Y. Laws 1817 (McKinney). The N.Y. STATUTE LAW §§ 51-61 (McKinney 1971) concerning retroactive operation of statutes, contains several references indicating that state statutes may be treated as retroactive when they contain an express provision or by legislative intent. *Id.* §§ 51(b), (d). Among the references is 51(a), which states that "[w]ith the exception of the proscription of ex post facto laws in the Constitution of the United States, there is no provision in either the federal Constitution or the New York State Constitution expressly concerned with retroactive legislation." *Id.* § 51(a) (footnote omitted).

135. See N.Y. STATUTE LAW §§ 51-61 (McKinney 1971).

procedural rights.¹³⁶ The SBEA questioned its validity on the premise that requiring allegations of class inequity was a substantive amendment, not merely a procedural one.¹³⁷ As such, it could not have a retroactive effect. The Division of Budget saw it as questionable because substantially reducing the relief available was substantive, not procedural.¹³⁸

Finally, the question of whether the bill was good policy for the state was raised. Both the SBEA and the Department of State found that the bill moved away from the implementation of more equitable property tax assessment administration.¹³⁹ Then Secretary of State Mario Coumo, on behalf of the Department of State, recommended disapproval of the bill by the governor, noting "that the bill is not consonant with the stance taken by the administration."¹⁴⁰ The SBEA's counsel, Robert Beebe, termed the legislation "yet another attempt to delay or halt the current progress toward a modern and equitable system of real property tax assessment administration."¹⁴¹

136. *Gramott Corp. v. Graves*, 255 A.D. 255, 7 N.Y.S.2d 457 (3d Dep't 1938), *aff'd*, 280 N.Y. 588, 20 N.E.2d 27, 7 N.Y.S.2d 457 (1939).

137. See Letter from Robert Beebe, SBEA Counsel, to Judah Gribetz, Counsel to the Governor (June 30, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

138. DIVISION OF BUDGET 10-DAY REPORT ON BILLS FOR A. 12216-B, *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

139. Letter from Robert Beebe, SBEA Counsel, to Judah Gribetz, Counsel to the Governor (June 30, 1978); Memorandum from Mario Cuomo, Secretary of State, to Judah Gribetz, Counsel to the Governor (July 11, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

140. Memorandum from Mario Cuomo, Secretary of State, to Judah Gribetz, Counsel to the Governor (July 11, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney). The Secretary's memorandum quoted with approval the memorandum issued by Governor Carey upon enactment of chapters 887, 888 and 889 of the laws of 1977, in which Governor Carey stated that those chapters "assure the people of this State that State and local officials are working in harmony to assure the most equitable, efficient and progressive real property tax administration. . . ." Memorandum from Governor Hugh Carey on Approval of chapters 887, 888 and 889, *reprinted in* 1977 N.Y. Laws 2534 (McKinney).

141. Letter from Robert L. Beebe, SBEA Counsel, to Judah Gribetz, Counsel to the Governor (June 30, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

Despite the deficiencies and disapproval by numerous agencies,¹⁴² Governor Carey signed the bill into law on July 11, 1978.¹⁴³ Due to potential fiscal hardship resulting from tax refunds, long-range planning for an improved tax administration policy took a back seat to more pressing concerns. Instead of creating an equitable system, the legislative stopgap measure dealt primarily with the problems that New York City and Nassau County believed they were facing. In the light of *Guth*,¹⁴⁴ *Waldert*,¹⁴⁵ and *860 Executive Towers*,¹⁴⁶ New York City estimated it might owe as much as \$2.7 billion, and Nassau County estimated it might owe as much as \$200 million in tax rebates if the courts lowered assessments based on the equalization rate.¹⁴⁷ In a letter calling the bill "the single most important legislation to the City,"¹⁴⁸ New York City's former Mayor, Ed Koch, added, in his own hand, a plea to Governor Carey not to "fail [him] on this."¹⁴⁹ The impact of this legislation on the city was not lost in the legislature, which passed it, and not on the governor, who signed it despite its shortcomings.¹⁵⁰

142. The list, which is long, included the Division of Budget, the SBEA, the Department of State, the Temporary Commission on the Real Property Tax, several assessment officers of various counties throughout the state, as well as others too numerous to list. For the exhaustive compilation of correspondence regarding the bill, see Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

143. Act of July 11, 1978, ch. 476, 1978 N.Y. Laws 823 (McKinney).

144. *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974).

145. *Waldert v. City of Rochester*, 44 N.Y.2d 831, 378 N.E.2d 115, 406 N.Y.S.2d 752 (1978).

146. *860 Executive Towers, Inc. v. Board of Assessors*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't 1976), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

147. Memorandum from David A. Mannis, City of New York Office of the Mayor, to David Jaffe (June 22, 1978).

148. Letter from Ed Koch, Mayor of New York City, to Governor Hugh Carey, at 1 (June 29, 1978), *reprinted in* Bill Jacket of ch. 476, 1978 N.Y. Laws 824 (McKinney).

149. *Id.* at 2.

150. Evidence of the collective state of mind can be found in the handwritten note at the end of the Division of Budget's report recommending disapproval of the bill where Howard Miller, then acting Director of the Budget, stated "I support the staff recommendations (for disapproval) but recognize that some type of relief for

The deficiencies of the legislation were quickly exploited by the certiorari bar, and section 307 was soon declared unconstitutional in *Slewett & Farber v. Board of Assessors of Nassau County*¹⁵¹ and *Rego Properties Corporation v. Finance Administrator of the City of New York*.¹⁵² The respective courts found that the lack of guidelines or standards under which the SBEA was to establish classes of property for taxing purposes were unconstitutional delegations of legislative power.¹⁵³ Both courts also found that the unlimited discretion granted to the local assessors to vary the percentage of value between classes of property was constitutionally impermissible under both the due process and equal protection clauses of the fourteenth amendment.¹⁵⁴ The *Slewett* court also found an equal protection clause violation insofar as the statute sought to make its provisions retroactive and, thereby, applicable to pending proceedings.¹⁵⁵

C. 1979: Further Restriction on Methods of Proving Inequality

The *Slewett* decision was handed down quickly,¹⁵⁶ and prior to the legislature's return for the 1979 session. As a response to *Slewett*, as well as in anticipation of other adverse decisions declaring the 1978 legislation invalid, chapters 126 and 127 were enacted, again altering the forms of evidence admissible as proof for inequality proceedings. Chapter 126 repealed the use of the state equalization rate as evidence.¹⁵⁷ The intent was to clarify the legislature's attempts to provide true respite from

the city is necessary." DIVISION OF BUDGET 10-DAY REPORT ON BILLS FOR A. 12216-B, reprinted in Bill Jacket of ch. 476, 1978 N.Y. Laws 823 (McKinney).

151. 97 Misc. 2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau County 1978), modified, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dep't), vacating, 78 A.D.2d 403, 435 N.Y.S.2d 313 (2d Dep't 1981), modified, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

152. 102 Misc. 2d 641, 424 N.Y.S.2d 621 (Sup. Ct. Queens County 1980).

153. *Id.* at 646, 424 N.Y.S.2d at 624; *Slewett*, 97 Misc. 2d at 648, 412 N.Y.S.2d at 300.

154. *Id.*

155. *Slewett*, 97 Misc. 2d at 651-52, 412 N.Y.S.2d at 302.

156. *Id.* at 637, 412 N.Y.S.2d at 292.

157. Act of May 22, 1979, ch. 126, § 3, 1979 N.Y. Laws 351, 352 (McKinney).

inequality actions until 1981.¹⁵⁸ Its real effect, therefore, was aimed at reducing the ability of commercial and industrial property owners to take advantage of an inexpensive means by which to challenge their assessments because “[t]he use of the equalization rate [had] resulted in dramatic assessment reductions or potential reductions, causing fiscal instability in many localities.”¹⁵⁹

This conclusion was supported by the enactment of chapter 127,¹⁶⁰ which permitted owners of residential property of three units or less to use “any evidence deemed relevant and material . . . notwithstanding any provision of law to the contrary.”¹⁶¹ Thus, a special class of petitioners in assessment reviews—homeowners—were still allowed to use the state equalization rate as proof. Having declared that the equalization rate “was never intended to determine property values for taxing purposes”¹⁶² and that their use produced “undesirable and unintended”¹⁶³ as well as “spurious and counter-productive results,”¹⁶⁴ the legislature nevertheless reversed on the issue with respect to homeowners. It stated that the use of the rate would provide homeowners with proof of inequality that they could “assemble and present in a summary and inexpensive manner.”¹⁶⁵

Chapter 127 also made the bills applicable to all proceedings commenced on or after January 1, 1970, in which no final de-

158. See Act of Aug. 11, 1977, ch. 888, § 1, 1977 N.Y. Laws 1816, 1816 (McKinney); Act of July 11, 1978, ch. 476, § 1, 1978 N.Y. Laws 823, 823 (McKinney). In this regard, the memoranda of chapters 126 and 127 cite the fact that chapter 476 of 1978 was intended to temporarily limit property owner suits, yet was being judicially challenged due to conflicting views about the law's intent, resulting in potentially severe financial impact upon local government tax revenues. Memorandum in Support of ch. 126, 1979 N.Y. Laws 1666 (McKinney); Memorandum in Support of ch. 127, 1979 N.Y. Laws 1667 (McKinney).

159. 1979 ASSEMBLY STANDING COMM. ON REAL PROP. TAX'N REPORT 7.

160. Act of May 22, 1979, ch. 127, 1979 N.Y. Laws 352 (McKinney).

161. *Id.* § 3, at 353.

162. Act of May 22, 1979, ch. 126, § 1, 1979 N.Y. Laws 351, 351 (McKinney).

163. *Id.*

164. *Id.*

165. Act of May 22, 1979, ch. 127, § 1, 1979 N.Y. Laws 352, 352-53 (McKinney).

termination had been made, as well as to those proceedings commenced after the effective date of the act.¹⁶⁶

The intent of chapters 126 and 127 notwithstanding, the courts declared these chapters unconstitutional shortly after their enactment. At the appellate division, the *Slewett* court reviewed the 1979 legislation and found the homeowner's provision offensive to equal protection principles.¹⁶⁷ It struck down retroactive application of chapters 126 and 127 on both separation of powers considerations and because the consequences were so harsh and oppressive that they were deemed violative of the fundamental fairness implicit in due process.¹⁶⁸ In *Johnson v. Town of Haverstraw*,¹⁶⁹ the court found the statutes unconstitutional on equal protection grounds and also to the extent that they applied retroactively.¹⁷⁰

Both courts found equal protection problems with the availability of the equalization rate to homeowners of property with three units or less while its use was prohibited for all other property owners.¹⁷¹ The *Slewett* court found that the elimination of the equalization rate to all taxpayers as a method of proving inequality was constitutional because availability of the select parcel and actual sales methods did not effectively deprive a taxpayer of redress.¹⁷²

166. *Id.* § 3, at 353. The Act took effect on May 22, 1979. *Id.* at 352.

167. *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 210-11, 438 N.Y.S.2d 544, 562 (2d Dep't), *vacating*, 78 A.D.2d 403, 435 N.Y.S.2d 547, (2d Dep't 1981), *modified*, 54 N.Y.2d 771, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

168. *Id.* at 221-22, 438 N.Y.S.2d at 569.

169. 102 Misc. 2d 923, 425 N.Y.S.2d 192 (Sup. Ct. Rockland County 1980).

170. *Id.* at 931-32, 425 N.Y.S.2d at 198. The court relied on the reasoning of *Slewett*. *Id.*

171. *Id.*; *Slewett*, 80 A.D.2d at 209, 438 N.Y.S.2d at 561-62.

172. *Slewett*, 80 A.D.2d at 215-16, 438 N.Y.S.2d at 565-66. The court stated whether the elimination of the state equalization rate survived a due process challenge in *Slewett* depended upon "whether the alteration in evidentiary rules ha[d] totally deprived the tax review petitioners of their right to a tax refund, for due process demands that litigants be afforded a reasonably efficient mode of redress for their wrongs." *Id.* at 213, 438 N.Y.S.2d at 564 (citations omitted).

D. The Legislative Perspective

From 1976 to 1979, the legislature had put off the effects of *Hellerstein* in order to devise a scheme for revaluations that would prove both politically acceptable and constitutionally permissible. To do this, the legislature devised numerous machinations regarding the types of proof admissible to prove inequality, thereby limiting the impact of the onslaught of tax refund suits. The number and impact of such suits forced the legislature to concentrate on avoiding fiscal disaster for several municipalities throughout the state instead of devising an equitable system of property tax administration. The potential fiscal impact was avoided despite the fact that most of the legislation was declared unconstitutional after its enactment.

In 1980, the legislature returned to the task of creating a system of property tax assessment in compliance with *Hellerstein*.¹⁷³ The most controversial bill¹⁷⁴ attempted to return to the pre-*Hellerstein* method of assessing. It provided that "all real property in each assessing unit shall be assessed by any of the same methods of assessment as such assessing unit used prior to the year nineteen hundred seventy-five, provided, however, another method of assessment may be adopted."¹⁷⁵ The last proviso allowed assessing units to continue to operate as if they had chosen to undertake a revaluation.¹⁷⁶

173. In 1980, four bills were introduced to address the issue. Of the four, two passed the Senate, one passed the Assembly, but none were presented to the governor for approval. A. 6136, N.Y. Leg., 1979-80 Reg. Sess. (1980) (Mr. Esposito); A. 10,000-D, N.Y. Leg., 1979-80 Reg. Sess. (1980) (Speaker Fink); S. 8803, N.Y. Leg., 1979-80 Reg. Sess. (1980) (Mr. Marchi); S. 9357-A, N.Y. Leg., 1979-80 Reg. Sess. (1980) (Mr. Present).

174. The legislation creating the most excitement was Assemblyman Esposito's bill, which had been introduced in the Senate by Mr. Padavan, S. 4130-B, N.Y. Leg., 1979-80 Reg. Sess. (1980).

175. A. 6136, N.Y. Leg., 1979-80 Reg. Sess. (1980); S. 4130-B, N.Y. Leg., 1979-80 Reg. Sess. (1980).

176. The bill was passed by the Senate, but failed to get out of the Assembly Real Property Taxation Committee, despite a motion to discharge from committee. A motion to discharge a bill from committee is the means by which a member attempts to have the bill considered by the entire body, despite its not being reported out of committee in the normal fashion. Under the Assembly Rules, a standing committee shall not be discharged from the consideration of a bill until a motion is made and a majority of all the members vote upon the motion. RULES OF THE

The impact of full value assessment on homeowners had been the primary focus of the legislature in fashioning a policy response to the *Hellerstein* mandate. The assembly believed that compliance with the court's ruling would lead to a major shift of the real property tax burden from commercial and industrial properties to residential and farm properties in the state.¹⁷⁷ The Temporary State Commission on the Real Property Tax, established by the legislature to study the problem,¹⁷⁸ found that moving to full value would cause such a shift to occur,¹⁷⁹ and that its magnitude would be determined by the degree of deviation from the legal standard of full value that had already taken place as a result of local assessing practices.

The result of the *de facto* classification of properties was a feared tax shift, under which assessors valued properties by class and inequitably assessed properties within each class. Tax shifts take two forms, inter-class and intra-class. Inter-class shifts are the transfer of the burden from one class of property to another, for example, from commercial to residential. These shifts would occur as a result of assessors having assessed properties in the commercial class at a higher percentage of actual value than those in the residential class. If the full value standard were to be applied, the result would be that commercial properties would experience a reduction in their assessments, with a corresponding increase in the assessments in the residential class.

In intra-class shifts, the burden of taxation shifts between taxpayers within the same class of property. These tax shifts would occur either as the result of assessors having failed to keep assessments current or assessing at a varying percentage

ASSEMBLY FOR 1987-88, at 20. Although the bill was not enacted into law, the Esposito/Padavan bill, and Mr. Esposito himself, were responsible for the creation of a great deal of hoopla over the implementation of full value and the effect that it might have on homeowners.

177. NEW YORK STATE ASSEMBLY TASK FORCE ON SCHOOL FINANCE AND REAL PROPERTY TAXATION, THE LEGISLATIVE RESPONSE TO THE PROPERTY TAX CRISIS: AN ANALYSIS OF PUBLIC POLICY APPROACHES TO CLASSIFICATIONS 1 (Sept. 1979) [hereinafter LEGISLATIVE RESPONSE].

178. Act of Aug. 11, 1977, ch. 889, § 1, 1977 N.Y. Laws 1817, 1817-18 (McKinney).

179. 1979 REPORTS *supra* note 7, at 57-58.

of full value among one class of properties. It was a common assessment practice to alter a property's assessment only upon its improvement or upon sale.¹⁸⁰ As a result, the longer a property remained in the hands of a single owner, the lower the assessment for that property was in relation to newer, improved, or more recently sold properties. The rise in the market value of property further exacerbated the undervaluation of assessments on many parcels. Again, it was assumed that if full value was implemented, the burden that overassessed properties bore would fall onto these underassessed properties.

In response to *Hellerstein*, numerous municipalities throughout the state revaluated their properties to comply with the full value mandate. To determine the impact of such revaluations, tax shift analysis were conducted by the SBEA.¹⁸¹ In its 1981 report, the SBEA examined 127 city and town revaluation projects.¹⁸² Most experts had expected the inter-class shifting to be far greater than the intra-class shifting. However, the results showed the opposite of that expectation, as the "*intra-class changes far outweigh[ed] the overall shift in tax burdens between the residential and other classes of property.*"¹⁸³

Regarding inter-class shifts involving commercial property, the study revealed that "large decreases did not automatically result in large increases to the residential class."¹⁸⁴ The data concerning intra-class shifts revealed that the commercial class as

180. *Id.*

181. These revaluations took place in the years 1978, 1979, 1980 and 1981. NEW YORK STATE DIVISION OF EQUALIZATION & ASSESSMENT, 1981 REVALUATIONS PROP. TAX SHIFT ANALYSIS: INTRA-CLASS AND INTER-CLASS ANALYSIS 1 (Dec. 1981). [hereinafter REVALUATIONS].

182. *Id.*

183. *Id.* at 7 (emphasis added).

184. REVALUATIONS, *supra* note 181, at 16. The median percentage of residential inter-class shift was 2.5% with a low of -13.2% and a high of 37.2%. *Id.* at 12. This meant that the actual shift was based on the local assessor's past practices, but for all the parcels analyzed, the median point showed a smaller shift than was expected by the legislature. LEGISLATIVE RESPONSE, *supra* note 177, at 1.

a whole was the most consistently overassessed, yet many residential parcels received large percentage increases.¹⁸⁵

These yearly surveys revealed some shifting of the tax burden from the commercial class of property towards the residential class of property. However, the degree of intra-class shifting presented a different problem from that which the legislature had expected. Tax policy analysis had focused on the means to control the burdens placed on the residential taxpayers as a result of the shift from the commercial class.¹⁸⁶ The legislature now faced the task of controlling not only inter-class but intra-class shifts as well.¹⁸⁷

Having failed to enact a new assessment administration method, the legislature merely extended the moratoria.¹⁸⁸

185. For 53,533 residential parcels matched in classification and in tax map identification for 1980 and 1981 assessment rolls (matched parcels), the shift was by:

Decrease of more than -10%	30%
Remained about the same +/-10%	35%
Increase of more than +10%	35%

For 3,645 commercial matched parcels compared, the shift was by:

Decrease of more than -10%	45%
Remained about the same +/-10%	25%
Increase of more than +10%	35%

Id. at 7.

The conclusions regarding intra-class shifts that can be drawn from these analyses is that "collectively, 65% had decreases or increases greater than 10%. The balance of 35% remained within a range of (+) or (-) 10%. In comparison, the median property tax shift to the residential class was +0.5%." *Id.* at 2. Moreover, the analyses discovered that 15% of property owners had made appointments for informal reviews of their appraisals and 5% filed for formal grievances. However, municipalities having a high rate of formal grievances were not necessarily those which had large inter-class shifts in their tax burdens towards the residential class. "When the municipalities were ranked according to number of formal grievance filed, 2 of the top 5 had negative residential inter-class shifts." *Id.* at 3.

186. LEGISLATIVE RESPONSE, *supra* note 177, at 8. For example, in a 1979 statement of policy, the Assembly made it clear that it believed that "any tax policy that provides a substantial tax windfall to business at the expense of homeowners and farmers serves no beneficial economic or social purpose for the state as a whole." *Id.*

187. *Id.* at 20.

188. Act of Nov. 26, 1980, ch. 880, 1980 N.Y. Laws 18 (McKinney) (extended section 306 and 307 moratoriums through May 15, 1981); Act of Jan. 29, 1981, ch. 3, 1981 N.Y. Laws 4 (McKinney) (extended chapters 126 and 127 through May 15, 1981); Act of May 15, 1981, ch. 107, 1981 N.Y. Laws 220 (McKinney) (extended Act of Nov. 26, 1980, ch. 880, 1980 N.Y. Laws 18 (McKinney) and Act of

III. 1981: THE NEW METHOD AND ITS CHALLENGE

A. The Repeal of Full Value: The Fractional Assessment Standard

The central question of property tax reform was the policy issue of which classes of taxpayers were to bear what percentages of the overall tax burden. Particular concern was given to the impact that the full value standard might have on homeowners if no adjustments to its application were made. Since allowing such shifts was politically unacceptable, the legislature fashioned a bill to allow the various assessment practices to continue.¹⁸⁹ "[T]he intent of this proposal was to establish new tax procedures that would protect homeowners from tax shifts."¹⁹⁰ The bill was complex and designed to encompass the varying assessment systems then in place around the state. Senate bill 7000-A became chapter 1057 during the course of an extraordinary session of the legislature in December of 1981.¹⁹¹

The legislation was comprehensive in its approach, incorporating alterations to the RPTL which had previously been made in a piecemeal fashion. In this bill, not only were the standards of assessment,¹⁹² the contents of tax certiorari petitions,¹⁹³ and the types of proof allowable altered,¹⁹⁴ but so were the requirements for the SBEA to conduct its periodic surveys used to establish the state equalization rate and the creation of

Jan. 29, 1981, ch. 3, 1981 N.Y. Laws 4 (McKinney) through June 15, 1981); Act of June 16, 1981, ch. 259, 1981 N.Y. Laws 441 (McKinney) (extended sections 306 and 307, and chapter 126 through October 30, 1981).

189. See Memorandum from Senate Rules Committee on S. 7000-A, *reprinted in* 1981 N.Y. LEGIS. ANN. 546.

190. 1981 ASSEMBLY STANDING COMM. ON REAL PROP. TAX. REPORT 2.

191. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 219 (McKinney). The governor vetoed the proposed legislation. Governor's Veto Memorandum 115, *reprinted in* 1981 N.Y. LEGIS. ANN. 622, but the legislature overrode the veto and adopted the measure. *Id.*

192. Act of Dec. 3, 1981, ch. 1057, § 1, 1981 N.Y. Laws 219, 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW, § 305 (McKinney 1984)).

193. *Id.* § 6, at 233.

194. *Id.* § 7, at 233-34.

class ratios for certain municipalities.¹⁹⁵ The bill represented a true reformation of the relevant property tax practices as addressed by *Hellerstein* and subsequent legislation. *Hellerstein* had been an interpretation of the statutory requirement for full value. Therefore, in order to avoid compliance with this standard, chapter 1057 repealed the full value standard.¹⁹⁶ In its stead, section 305 was enacted, setting forth a new assessment standard: the fractional assessment.¹⁹⁷ Section 305 authorized the continuance of existing assessment methods, legitimizing previously illegal practices, and provided that all property be assessed at a uniform percentage of value, except in cities of a million or more inhabitants, where the administrative code of that city would govern, i.e., New York City, unless that city chose to adopt this new standard.¹⁹⁸

Under the system of fractional assessments, the ratio to be applied assumes that an initial determination of full value of the property had been made.¹⁹⁹ By eliminating the full value standard and legally continuing the existing practices, this bill failed to remedy the inequalities that existed, and those taxpayers unfairly burdened by improper or inequitable assessments continued to be so burdened. Despite the legislature's desire to aid the cause of inequitably assessed homeowners, the bill did not require any revaluation of property.²⁰⁰ It merely allowed the adoption of the tax rolls that were already in place. The decision not to require revaluations was attributed to recognition of "the diverse nature of the state and the different needs of particular communities."²⁰¹ This may be the case for implementing a policy of preventing inter-class shifts, but intra-class shifts do not alter the fiscal stability of a municipality. Instead, they would apportion the burden more fairly among the taxpayers in each class.

195. *Id.* § 2, at 219-25.

196. *Id.* § 1, at 219.

197. *Id.*

198. *Id.*

199. 1 Op. Counsel SBEA 7 (1969).

200. See Memoranda from Senate Rules Committee on S. 7000-A, reprinted in 1981 N.Y. LEGIS. ANN.. 546.

201. Memorandum in Support of S. 7000-A, reprinted in Bill Jacket of ch. 1057, 1981 N.Y. Laws 219 (McKinney).

In its adoption of fractional assessments, the legislation failed to specify the percentages to be used, leaving this determination in the hands of the local assessors. Assessments were supposed to be made uniformly, but wide discretion in the hands of assessors meant that inequitable assessments could continue to be placed on the tax rolls. Thus, this practice exposed the bill to the same constitutional challenges faced in the past.²⁰² Moreover, while this bill was intended to be a reform of the tax system, the lack of a publicly promulgated assessment percentage increased individual taxpayer confusion, continued to hinder the appeals process, and again exposed the bill to due process challenges in the courts.²⁰³

B. Articles 18 and 19

While section 305 applied to most of the assessing units in the state, chapter 1057 preserved the class share of taxes in special assessing²⁰⁴ and approved assessing units.²⁰⁵ By doing so, it attempted to avoid shifting the tax burden as a result of a revaluation²⁰⁶ between classes in New York City and Nassau County.²⁰⁷

202. Not only were virtually all of the cases that arose under the *Hellerstein* and *Guth* principles the result of inequitable assessments, but the court also had struck down previous legislative enactments on the theory that unlimited discretion in the hands of local assessors to set and vary the percentage of value to be applied was unconstitutional under both the due process and equal protection clauses. *Rego Properties Corp. v. Finance Adm'r of New York*, 102 Misc. 2d 641, 424 N.Y.S.2d 621 (Sup. Ct. Queens County 1980); see *supra* notes 122-26, 151-54 and accompanying text.

203. See DIVISION OF BUDGET 10-DAY REPORT ON BILLS FOR 7000-A, *reprinted* in Bill Jacket of ch. 1057, 1981 N.Y. Laws 219 (McKinney).

204. Act of Dec. 3, 1981, ch. 1057, § 2, 1981 N.Y. Laws 219, 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1801(a) (McKinney 1989)).

205. *Id.* § 3, at 226 (codified as amended at N.Y. REAL PROP. TAX LAW § 1901(d) (McKinney 1989)).

206. See N.Y. REAL PROP. TAX LAW § 1901(a) (McKinney 1989).

207. See N.Y. REAL PROP. TAX LAW § 1801 (McKinney 1989); see also Act of Apr. 18, 1986, ch. 55, § 1, 1986 N.Y. Laws 136, 136-37 (McKinney), *reprinted* in N.Y. REAL PROP. TAX LAW § 1801, legislative findings, at 451-52 (McKinney 1984).

Chapter 1057 created the new article 18 of the RPTL,²⁰⁸ which established a classification system for “special assessing units” of a million or more inhabitants — New York City and Nassau County.²⁰⁹ Under this article, four classes of property were created: Class One consisted of one, two and three family residences; Class Two consisted of apartments, cooperatives, and condominiums; Class Three consisted of utility property; and Class Four consisted of all other property.²¹⁰ The tax shares of each class were developed from the assessment rolls of 1981-82 (the assessed value of the property as of July 1, 1981),²¹¹ known as the “base proportions.”²¹² The base proportions for prepared assessment rolls could be altered in two ways. First, each year an adjustment could be made to accommodate changes in tax roll classifications, for example, new construction or improvements made to existing properties.²¹³ The second adjustment to the base proportions could be made by the local legislative body.²¹⁴ This adjustment was discretionary on the part of the elected officials in an amount up to five percent of the base proportion in any year.²¹⁵ A limitation was placed on allowable increases to any individual parcel, classified in Class One, of no more than six percent in any one year and no more than twenty percent in any five-year period.²¹⁶ Furthermore, beginning four years after the bill’s effective date, December, 1985, the SBEA was required to conduct market value surveys every three years in order to calculate adjustments to future proportions so the relative tax shares

208. Act of Dec. 3, 1981, ch. 1057, § 2, 1981 N.Y. Laws 219, 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW §§ 1801-1805 (McKinney 1989)).

209. N.Y. REAL PROP. TAX LAW § 1802 (McKinney 1989).

210. N.Y. REAL PROP. TAX LAW § 1802 (McKinney 1989), *amended by* Act of June 13, 1989, ch. 143, § 4-a, 1989 N.Y. Laws 395, 396 (McKinney).

211. *Id.* § 1804(2)(a), *repealed by* Act of June 13, 1989, ch. 143, § 7, 1989 N.Y. Laws 395, 400 (McKinney).

212. *Id.* § 1801(f).

213. *Id.* § 1803(2)(a).

214. *Id.*

215. *Id.* § 1803(2)(b).

216. *Id.* § 1805(1).

were maintained.²¹⁷ These are known as “adjusted base proportions.”²¹⁸

The special assessing units were created on the view that the problems of New York City and Nassau County were thought to be different than those of the rest of the state because of their size, wide assessment differences and complex property types.²¹⁹ This bill codified the belief that New York City’s Administrative Code already provided a system of assessing real property by class.²²⁰ Through article 18, New York City and Nassau County were able to maintain their systems of assessment and so avoid litigation over these practices.

The legislation incorporated alterations of the type of proof allowable to prove inequality for property owners in “special assessing units.” In order to use the latest applicable class ratio, petitioners were required to allege that their assessment was at least 12.5% higher than the average for their class of property.²²¹ As seen in *860 Executive Towers v. Board of Assessors of Nassau*,²²² proving inequality without the availability of the state-created rates is a very expensive proposition.²²³ Undoubtedly, such expense was intended to foreclose litigation by homeowners.

Chapter 1057 also created article 19 of the RPTL, which predominantly pertained to upstate municipalities that had either undertaken or were considering revaluations.²²⁴ This arti-

217. *Id.* § 1804(3), *repealed by* Act of June 13, 1989, ch. 143, § 7, 1989 N.Y. Laws 395, 400 (McKinney).

218. For computation of adjusted base proportions, see *id.* § 1804(4) (McKinney 1989).

219. 1982 ASSEMBLY STANDING COMM. ON REAL PROP. TAX’N REPORT 2.

220. See *Colt Indus. Inc. v. Finance Adm’r of New York*, 54 N.Y.2d 533, 430 N.E.2d 1290, 446 N.Y.S.2d 237, *appeal dismissed sub nom. Equitable Life Assurance Soc’y v. Finance Adm’r of New York*, 459 U.S. 983 (1982).

221. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 219 (McKinney); N.Y. REAL PROP. TAX LAW § 720(3)(c) (McKinney 1984 & Supp. 1989), *amended by* Act of July 26, 1986, ch. 679, § 1, 1986 N.Y. Laws 1547, 1547-49 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989)).

222. 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep’t 1976), *aff’d sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

223. *Id.* at 469, 385 N.Y.S.2d at 608. The petitioners, in this case, paid a fee of \$435,691. See *supra* note 65.

224. See 7 Op. Counsel SBEA No. 77, at 157 (1982).

cle was designed primarily to prevent a shift of the tax burden between the homeowner class and all other property as a result of the revaluation.²²⁵ Upon undertaking a revaluation, an assessing unit could apply to the SBEA to be certified as an "approved assessing unit."²²⁶ If approved, the unit might classify its properties and determine the proportional share of the tax burden according to "homestead properties" (one, two, or three family residential and farm dwellings)²²⁷ and non-homestead properties.²²⁸ As in article 18, the assessing unit established the proportion of the overall tax burden borne by each class according to its proportion of the overall assessed value of properties within the assessing unit.²²⁹ Again, the SBEA was responsible for certifying adjusted base proportions.²³⁰ The difference here was that the unit had undergone revaluation and, therefore, adopted a tax roll reflecting such revaluation. To mitigate the effects of the revaluation, the assessing unit could adopt a five-year transition procedure to phase-in new assessments.²³¹

Under article 19, in addition to controlling the intra-class shifts, the assessing unit was also capable of controlling the inter-class shifting of the tax burden. This was accomplished by adopting a "homestead base proportion," which was the proportion of the taxable assessed value of the homestead class to the total assessed value of all properties, based on the last assessment roll prior to the revaluation.²³² Through the use of this proportion, an assessing unit could continue to tax each class of property in the relative amount that it had borne prior to the revaluation. Further, the unit might alter this allocation of the burden by the use of the "locally-adjusted homestead proportion."²³³ This figure effectively reduced the burden

225. *Id.*

226. N.Y. REAL PROP. TAX LAW § 1902(1) (McKinney 1989).

227. *Id.* § 1901(e)(1).

228. *Id.* §§ 1901(p), 1903(2).

229. *Id.*

230. *Id.* § 1902(1).

231. *Id.* § 1904.

232. *Id.* § 1901(f).

233. The locally adjusted homestead base proportion is derived by subtracting the homestead base proportion from the base percentage for the homestead class. The base percentage is a figure determined by the SBEA and is the percentage that the

placed on commercial properties, with a corresponding increase to residential properties, permitting some inter-class shifting to occur. The legislature seemingly intended these localities to have flexibility regarding the proportionate shares to be borne between the classes and to allow such localities to ameliorate the tax burden previously placed on the non-homestead class.²³⁴

In addition to establishing a homestead base proportion for the unit as a whole, each assessing unit was responsible for establishing a homestead base proportion for each portion of a taxing jurisdiction contained within its boundaries.²³⁵ This jurisdiction excluded villages, but included special districts and school districts.²³⁶ Often, the base proportions for these portions of taxing jurisdictions differed from one another and from the assessing unit as a whole because the properties included in the calculation of the proportions were different.

The use of the homestead and adjusted homestead base proportions allowed the unit to maintain previous levels of class sharing of the tax burden, but the system also permitted the use of dual tax rates. Once the unit classified its properties into homestead and other properties, different tax rates were applied to raise the amount of money necessary for each class' share of the tax burden. This dual tax rate structure was, in effect, an adoption of previous assessment methods which had

estimated taxable market value of the homestead class constitutes of the total estimated market value of all property within the unit (the figures to be used are from the assessment roll used in certifying the unit as an approved assessing unit). The difference may then be multiplied by 25%, 50%, or 75%, with the product added to the homestead base proportion to yield the locally adjusted homestead base proportion. For an illustration of how this is applied, see Fox & Foss, *Real Property Taxes: An Overview of Article 19*, 55 N.Y. St. B.J. 4, 8-9 n.18 (1983).

The possibility exists that the homestead base proportion will exceed the base percentage (i.e., based upon the revaluation, the share of the tax levy for the homestead class would be less than it was prior to revaluation). Where this occurs, the formula requires adding a negative number to the homestead base proportion. In a 1972 opinion, the SBEA's counsel found no basis for denying the use of a negative number to vary the class tax share in that fashion. 7 Op. Counsel SBEA No. 77, at 157, 159 (1982).

234. 7 Op. Counsel SBEA No. 77, at 159-60.

235. N.Y. REAL PROP. TAX LAW § 1903(2)(a)(ii) (McKinney 1989).

236. *Id.* § 1903(1)(a).

created differing tax burdens between the classes of property as a result of assessing practices.

Chapter 1057 again altered the forms of allowable proof in an inequality proceeding, once again allowing the use of the state equalization rate.²³⁷ Therefore, petitioners again were able to establish the ratio in an inexpensive and expeditious manner. In addition, the requirement for the SBEA to conduct the survey that establishes the state equalization rate was changed from once every five years to once every three years (every two years in New York City and Nassau County).²³⁸ Moreover, petitioners in article 19 assessing units were permitted to claim that their assessments were either illegal, specifying the alleged illegality, or erroneous due to overvaluation or misclassification of property.²³⁹

This bill was enacted by legislative override of former Governor Carey's veto. The veto had been urged for a variety of reasons, including constitutional problems;²⁴⁰ as a retreat from the forward-moving progress that had been made toward correcting past inequities; and for its failure to implement an equitable tax assessment administration.²⁴¹

Nevertheless, this was the legislature's answer to the *Hellerstein* mandate for full value. The statute went into effect and remained undisturbed for a few years, and while some units implemented article 19 revaluations, others refused, and the

237. Act of Dec. 31, 1981, ch. 1057, § 7, 1981 N.Y. Laws 219, 233 (McKinney).

238. *Id.* § 8, at 234.

239. *Id.* § 5, at 232.

240. See Letter from New York State Assessor's Association (Nov. 2, 1981); Letter from New York State Association of County Directors of Real Property Tax Services (Oct. 27, 1981); DIVISION OF BUDGET 10-DAY REPORT ON BILLS FOR S. 7000-A, all of which are reprinted in Bill Jacket of ch. 1057, 1981 N.Y. Laws 219 (McKinney).

241. See DIVISION OF BUDGET 10-DAY REPORT ON BILLS FOR S. 7000-A; Letter from Dean Richard Netzer, New York University Graduate School of Public Administration (Nov. 2, 1981), reprinted in Bill Jacket of ch. 1057, 1981 N.Y. Laws 219 (McKinney). Perhaps the statement of Stephen Woods, Director of Independent Business, summed up the legislation best, in which he stated "the bill . . . is a political answer to a problem that clearly requires a courageous, statesmanlike solution." Letter from Stephen Woods, Director of Governmental Relations/New York for the National Federation of Independent Business (Oct. 29, 1981), reprinted in Bill Jacket of ch. 1057, 1981 N.Y. Laws 219 (McKinney).

City of New York and Nassau County managed to escape some of the tremendous liability once thought to plague their fiscal futures.

In November, 1983, chapter 1057's alteration of the method of assessment contained in section 305 was upheld by the fourth department in *Stemmer v. Board of Assessors of Pompey*.²⁴² In that action, the plaintiff sought a declaratory judgment that the method of fractional assessment required by section 305 was unconstitutional. The court disagreed, finding that the statute was not unconstitutionally vague because value meant market value,²⁴³ and the statute was not violative of equal protection because assessing units need not assess at 100% of value as long as all properties are assessed at a uniform percentage of value.²⁴⁴ The fourth department recognized and relied upon two important elements of chapter 1057's altered assessment practices. First, since *Hellerstein* was not a constitutional argument, but was decided under the language of former section 306 of the RPTL, it did not control the constitutional issue.²⁴⁵ Second, by repealing section 306 and enacting section 305, the legislature had reverted to pre-*Hellerstein* standards and had authorized fractional, but uniform, assessments.²⁴⁶ Thus, chapter 1057 had survived its first constitutional challenge. However, during 1984 and 1985, a case was working its way through the judicial system that would challenge the law on several fronts.

C. Foss v. City of Rochester: *The Next Round*

In May of 1985, the court of appeals heard the case of *Foss v. City of Rochester*,²⁴⁷ which challenged article 19 of the RPTL.²⁴⁸ The City of Rochester had passed a local law adopting the provisions of article 19 and had revalued its prop-

242. 97 A.D.2d 979, 468 N.Y.S.2d 785 (4th Dep't 1983).

243. *Id.*

244. *Id.* (citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)).

245. *Id.*

246. *Id.*

247. 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*), *modifying* 104 A.D.2d 99, 481 N.Y.S.2d 191 (4th Dep't 1984).

248. *Id.* at 252, 480 N.E.2d at 719, 491 N.Y.S.2d at 130.

erty.²⁴⁹ Afterward, the city applied the statutory formula for determining the applicable tax levies and sought to collect the taxes.²⁵⁰ Under this formula, non-homestead properties in Rochester, which comprised 52.46% of the total assessed value, paid 65.55% of the taxes levied by the city and by the County of Monroe. Homestead properties, which comprised 47.54% of total assessed value, paid only 34.45% of the taxes levied.²⁵¹

The petitioner, an owner of non-homestead property located in the city, instituted a suit based on three causes of action. First, he challenged the standard of assessment set forth in section 305 of the RPTL as violative of the due process clauses of both the state and federal constitutions because it deprived taxpayers of the opportunity to determine whether assessments were proper.²⁵² He claimed that the phrase "at a uniform percentage of value"²⁵³ was unconstitutionally vague because the term "value" could mean something other than full value, and the statute did not provide the percentage at which the property was to be valued.²⁵⁴ However, the court found that the lower courts had properly rejected this argument, based on previous judicial construction of the term "value" as "market value" and because, even though the statute did not provide the actual percentage to be used, the percentage could be ascertained easily and inexpensively.²⁵⁵

249. *Id.* at 256, 480 N.E.2d at 721, 491 N.Y.S.2d at 133.

250. *Id.*

The proportion of the levy imposed on each class is determined by the following formulae: *Assessed value of all homestead properties* (the homestead base properties) divided by Total assessed value of all property in the assessing unit and *Assessed value of all other properties* (non-homestead base properties) divided by Total assessed value of all property in the assessing unit.

Id.

Computation of the tax levies for the homestead and non-homestead classes is made pursuant to the formula contained in N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989).

251. *Foss I*, 65 N.Y.2d at 256, 480 N.E.2d at 722, 491 N.Y.S.2d at 133.

252. *Id.* at 252, 480 N.E.2d at 719, 491 N.Y.S.2d at 130.

253. *Id.*

254. *Id.*

255. *Id.* at 253, 480 N.E.2d at 720, 491 N.Y.S.2d at 131.

The second cause of action was the contention that article 19 was an unconstitutional delegation of the legislative authority to tax. Here, too, the court found the contention to be without merit, holding that the statute did not permit the assessor to set tax rates, but that the legislature had properly delegated this authority to the local legislative body.²⁵⁶ The appellate division had found that the legislative purpose of the statute was to prevent tax shifts from burdening the homestead class, and this was effectuated by the adopting of the homestead base proportion.²⁵⁷ The fact that the proportion was based on the last assessment roll prior to revaluation did not delegate the taxing power to assessors; rather, it was a determination by the legislature to adopt the historical tax burdens for each class that these rolls reflected.²⁵⁸ This reasoning was adopted by the court of appeals, which pointed out that the option of adopting article 19 was vested in the local legislative body, not the local assessor.²⁵⁹

The plaintiff's third cause of action claimed that due to the application of article 19, the disparity in the amount to be collected in county taxes denied him equal protection of the law. Specifically, he claimed that there would be a higher tax on non-homestead properties than on homestead properties in the City of Rochester and also a higher county tax on non-homestead properties in the city than that levied against identical non-homestead properties in the county outside the city.²⁶⁰ The court agreed that the application of article 19 resulted in invidious discrimination and denied equal protection of the law.²⁶¹ The court made this finding, however, only with regard to the treatment of the non-homestead properties located within and without the city and not with regard to the differing tax rates

256. *Id.*

257. *Foss v. City of Rochester*, 104 A.D.2d 99, 105, 481 N.Y.S.2d 191, 195 (4th Dep't 1984).

258. *Id.*

259. *Foss v. City of Rochester*, 65 N.Y.2d 247, 253-54, 480 N.E.2d 717, 722, 491 N.Y.S.2d 128, 131 (1985) (*Foss I*).

260. *Id.* at 252-53, 480 N.E.2d at 719, 491 N.Y.S.2d at 130-31.

261. *Id.* at 254, 480 N.E.2d at 723-24, 491 N.Y.S.2d at 134-35.

between the homestead and non-homestead tax rates within the city.²⁶²

Since similarly situated taxpayers should pay the same share of a common tax burden, the court found that the inability to equalize the tax rate between non-homestead properties in the city and those in the rest of the county was a violation of equal protection.²⁶³ This occurred simply because Rochester, in its use of article 19, imposed a higher share of its tax burden on non-homestead properties than did the rest of the assessing units in the county. This was so because the city based its tax on a proportionate share of the burden these properties were to bear, while the rest of the county used standards related to full or assessed value. Previously, discrepancies had been challenged on the basis of inequitable assessments and were sometimes remedied by the use of the equalization rate. Here, the bone of contention was not inequitable assessments but differing tax rates resulting from the use of class shares, a problem that the use of the equalization rate could no longer solve.

Finding that there was no rational basis for deliberately imposing different tax burdens on similar properties because of their geographic location, a portion of the statute was declared unconstitutional in its application.²⁶⁴

Although recognizing that a disparity in the share of the tax burden between similar properties existed, Chief Justice Wachtler's strongly worded dissent adopted the view that the disparity between the homestead properties in the city and in the rest of the county was "incidental" and absent such inci-

262. *Id.*

263. *Id.* at 258-59, 480 N.E.2d at 723-24, 491 N.Y.S.2d at 134-35.

264. *Id.* at 257, 480 N.E.2d at 722, 491 N.Y.S.2d at 134.

Although article 19 does not purport by its terms to create geographic classifications, such classifications result from its application because of the presence of several independent assessing units in the country-wide taxing unit, some of which have adopted article 19 and some of which have not. Though such geographic classifications are not per se prohibited when article 19 is applied in this case the taxes levied result in invidious discrimination between owners of similar properties in differing assessing units.

Id. (citations omitted).

dental disparity, article 19 would be constitutional.²⁶⁵ The dissent argued that this incidental effect should be viewed in the proper perspective, as “an undesirable by-product of an otherwise permissible legislative attempt to solve a complex and long-standing problem”²⁶⁶ and, therefore, should withstand judicial scrutiny.²⁶⁷

Having struck down the application of article 19 to intra-class disparities based on geographic location, the court did not find the statute, in its classification of properties and the imposition of differing tax rates on each class, violated either the state or federal constitutions.²⁶⁸ Instead, the court noted that “the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class.”²⁶⁹ To this end, the court found reasonable both the application of properties within the City of Rochester and the application of differing tax rates to each class “because arguably greater services may be required for non-homestead properties within the city than for homestead properties.”²⁷⁰

Foss I presented a new problem involving taxing jurisdictions which extended beyond the assessing unit boundaries (i.e., counties and school districts encompassing more than one city or town). Assessing units which adopted article 19 were free to create class shares and dual tax rates that differed from other assessing units within the tax jurisdiction. If a tax jurisdiction’s boundaries were coterminous with an assessing unit’s, it could levy its tax through the assessing unit’s dual rate sys-

265. *Id.* at 261-62, 480 N.E.2d at 725, 491 N.Y.S.2d at 136-37 (Wachtler, C.J., dissenting in part, concurring in part).

266. *Id.*

267. *Id.* at 263, 480 N.E.2d at 726, 491 N.Y.S.2d at 137. This argument assumes that the statute should receive a low level of scrutiny employing the “rational basis” test; that the majority ignored the presumption that all statutes are constitutional; and that special deference is to be given legislative enactments in the area of taxation, in accordance with what the dissent believed to be long-established principles used to review taxing legislation challenged on equal protection grounds. *Id.* It is also interesting to note that in 1975 then Associate Judge Wachtler wrote the majority opinion in the *Hellerstein* decision.

268. *Id.* at 256, 480 N.E.2d at 722, 491 N.Y.S.2d at 133.

269. *Id.*

270. *Id.* at 257, 480 N.E.2d at 722, 491 N.Y.S.2d at 133.

tem; otherwise, the tax had to be levied on a uniform basis within the article 19 portion of the jurisdiction. Therefore, a tax levy imposed by a county or school district encompassing different assessing units could not be equalized by class for purposes of having each class bear its proportionate share of the overall tax burden.

IV. THE POST-FOSS ERA: THE STRUGGLE TO FIND A CONSTITUTIONAL MEANS OF PERPETUATING THE STATUS QUO

A. *The Initial Legislative Response: Chapter 828*

In response to the June 6, 1985, *Foss I* decision, the legislature quickly passed chapter 828 of the laws of 1985,²⁷¹ amending the County Law and the RPTL in an attempt to remedy the constitutional infirmities of article 19. Chapter 828 altered the law under which counties and many school districts levy their real property taxes. Relying on the *Foss I* court's reasoning that "the effect of the legislation must be viewed from the perspective of the taxing unit, the county, where the invalidity is manifested, . . . not [from] the perspective of the assessing unit,"²⁷² the legislature seemed to have reasoned that the constitutional infirmities of article 19 could be alleviated by creating the appearance of taking the establishment of the tax rate and the actual levy of the tax out of the hands of the counties and school districts comprised of more than one assessing unit and placing these functions, instead, in the province of the cities and towns.²⁷³

271. Act of Aug. 2, 1985, ch. 828, 1985 N.Y. Laws 2186 (McKinney).

272. *Foss v. City of Rochester*, 65 N.Y.2d, 247, 249, 480 N.E.2d 717, 724, 491 N.Y.S.2d 128, 135 (1985) (*Foss I*).

273. See Memorandum from Senate Rules Committee on S. 6609/ A. 8140, reprinted in 1985 N.Y. LEGIS. ANN. 304 ("in order to comply with the Court's ruling in *Foss* . . . this legislation mandates that county and school district levies be made on behalf of those jurisdictions by the assessing units comprising them."); see also N.Y. COUNTY LAW § 360(3) (McKinney 1989); N.Y. REAL PROP. TAX LAW § 1306 (McKinney 1989). The means by which the property tax is determined and levied is a multi-stepped process. First, a determination of the total amount to be raised by the tax is made. *Id.* Then, the taxing jurisdiction must equalize the tax among the assessing units comprising the jurisdiction to insure that each unit will bear its pro-

Section 2 of chapter 828²⁷⁴ altered New York County Law section 355,²⁷⁵ changing the phrase “tax levied by the Board of Supervisors” to read “tax levied on behalf of the county.”²⁷⁶ Sections 3 through 6 of the bill²⁷⁷ amended various sections of the RPTL (sections 808, 820, 822 and 826(2)),²⁷⁸ to change references from “county tax levy” to tax levy “on behalf of the county.”²⁷⁹ These sections refer to the use in the tentative county budget of the amount to be raised and to the county equalization process. Through these amendments, a county appeared to be no longer directly responsible for these functions. Sections 7 through 10 of the bill²⁸⁰ amended other sections of the RPTL (sections 900, 902 and 904)²⁸¹ changing the tax levying procedure for counties. It made cities and towns responsible for the calculation of the tax rates and the extension of the tax, wherein these actions were subject to the approval of the county board of supervisors before the tax could become a lien.²⁸² Despite these amendments, a county was still responsible for determining the total amount to be raised, equalizing

portionate share of the tax burden. *Id.* §§ 804, 900, 1306, 1314. In the case of a city or town that has adopted the provisions of section 1903, a homestead and non-homestead tax rate is established. *Id.* § 1903(4)(a), (c). The tax rates are then extended on the final tax rolls forwarded to the county by each city and town. *Id.* §§ 900, 1306. Last, a warrant is attached to each final assessment roll for the collection of the tax extended. *Id.* §§ 904, 1306.

274. Act of June 6, 1985, ch. 828, § 2, 1985 N.Y. Laws 2186, 2188 (McKinney) (codified as amended at N.Y. COUNTY LAW § 355(2) (McKinney 1972 & Supp. 1989)).

275. N.Y. COUNTY LAW § 355(2) (McKinney 1972 & Supp. 1989).

276. Act of Aug. 2, 1985, ch. 828, § 2, 1985 N.Y. Laws 2186, 2188 (McKinney) (codified as amended at N.Y. COUNTY LAW § 355(2) (McKinney 1972 & Supp. 1989)).

277. *Id.* §§ 3-6, at 2188-89.

278. *Id.*

279. *Id.*

280. Act of Aug. 2, 1985, ch. 828, §§ 7-10, 1985 N.Y. Laws 2186, 2189-91 (McKinney).

281. *Id.*

282. N.Y. REAL PROP. TAX LAW § 102 (McKinney 1989). For the purposes of the RPTL, “tax lien means an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district which is an encumbrance on real property, whether or not evidenced by a written instrument.” *Id.*

the tax, and annexing the warrant for the collection of the tax.²⁸³

For school districts, the bill made section 1306²⁸⁴ applicable solely to "school districts located wholly within a city or town,"²⁸⁵ and created a new section 1307²⁸⁶ for "school districts partially located in a city or town,"²⁸⁷ under which cities and towns were responsible for issuing warrants for the collection of the tax.²⁸⁸ The school district authorities completed all other aspects of the tax levying process.²⁸⁹ An exception provided, however, that if a town or city failed to issue a warrant within ten days after the issuance of a certificate by school authorities of the proportion of the tax to be raised by the city or town,²⁹⁰ then school authorities could issue a warrant for the amount previously certified.²⁹¹ Thus, the levying process could be completed without any city or town involvement. Again, as with the county, the school district still determined the amount to be raised, equalized the tax, calculated rates, extended the tax, and, in certain situations, even issued the warrant.²⁹²

Thus, despite many alterations to the wording of the laws, no real changes had been made to the process. Rather, the changes for both counties and school districts were merely illusory. It was an obvious attempt to alter the process in a manner which would both pass constitutional muster and make the fewest actual changes to the process by which taxes were determined and collected. It appeared that assessing units were to act as agents for the counties and school districts, not as

283. Memorandum from Richard Sinnot and Michael Kupferman to Robert Beebe, SBEA Counsel (July 10, 1985) (discussing Assembly bill No. 8140, which became ch. 828, 1985 N.Y. Laws 2186 (McKinney)).

284. N.Y. REAL PROP. TAX LAW § 1306 (McKinney 1972).

285. Act of Aug. 2, 1985, ch. 828, § 11, 1985 N.Y. Laws 2186, 2191 (McKinney).

286. *Id.* § 12, at 2191-92, *repealed by* Act of Dec. 13, 1985, ch. 914, § 12, 1985 N.Y. Laws 2409, 2413 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1307 (McKinney 1989)).

287. *Id.*

288. *Id.* § 12, at 2192.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

their own taxing jurisdictions, since money was turned over to the county for county services provided on a countywide basis as part of the county budget. The bill failed, however, to achieve its desired goal of separating the county from the taxing function.

The bill also altered the language of RPTL section 1903,²⁹³ which had been at issue in the *Foss I* decision. To this end, sections 13, 14 and 15 of the bill²⁹⁴ amended section 1903 and removed the power of counties and school districts to use the homestead and non-homestead tax rates, unless their assessing units had adopted section 1903. Prior to this amendment, where the assessing unit was not a village, it was required to establish homestead and non-homestead tax rates for taxes levied by counties and school districts.²⁹⁵

Section 16²⁹⁶ created a new article 19-A, entitled "Apportionment of Tax District Levies in Approved Assessing Units Which Have Adopted Class Shares."²⁹⁷ Essentially a recodification of the provisions of section 1903, article 19-A created a new "taxing district"²⁹⁸ as well as a new "approved assessing unit class"²⁹⁹ to distinguish it from article 19.³⁰⁰ However, other than this difference, the provisions of the new article merely re-enacted the means by which the counties and school districts established their homestead and non-homestead tax rates. The bill simply removed these provisions from one article of the RPTL and placed them in another in an attempt to make them distinct from the tax rates established under article 19 and, thereby, make them constitutional.

293. *Id.* §§ 13-15, at 2192-93 (codified as amended at N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989)).

294. *Id.*

295. Act of Dec. 3, 1981, ch. 1057, § 3, 1981 N.Y. Laws 219, 227-29 (McKinney).

296. Act of Aug. 2, 1985, ch. 828, § 16, 1985 N.Y. Laws 2186, 2193 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, § 16, 1985 N.Y. Laws 2409, 2413 (McKinney).

297. *Id.*

298. *Id.*

299. *Id.* § 16, at 2194.

300. Act of Dec. 3, 1981, ch. 1057, § 3, 1982 N.Y. Laws 219, 227-29 (McKinney).

In section 1 of the bill,³⁰¹ the legislature argued a rational basis in order to uphold for both the establishment of dual tax rates and obviate the court of appeals' basis for declaring parts of article 19 unconstitutional as applied.³⁰² Three propositions were advanced for the use of the homestead and non-homestead tax rates. The first premise was the assurance of stability in the share of the tax burden each class would bear. The prevention of tax shifts between classes was the original intent of article 19 and the preservation of that policy was the primary intent of this bill as well.³⁰³ This intention was of great importance, since article 19 was the legislature's answer to *Hellerstein*,³⁰⁴ and the court of appeals had stated in *Foss I* that "preservation of the status quo is not a legitimate end of government, however, if the status quo has been found judicially wanting"³⁰⁵ The second premise was the notion that the home rule justified the use of the assessing units' rolls in levying taxes for their portion of a larger taxing jurisdiction. Based on this premise, the legislature concluded that "the assessing unit should continue to bear the responsibility for determining, within standards and constraints established by the state, the relative shares of the tax burden, by whichever taxing jurisdiction levied, to be borne by taxpayers within its boundaries."³⁰⁶ Finally, it was claimed that the law improved local property tax administration by encouraging revaluations by assessing

301. Act of Aug. 2, 1985, ch. 828, § 1, 1985 N.Y. Laws 2186, 2186-88 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, 1985 N.Y. Laws 2409 (McKinney).

302. *Id.*; *see also* *Foss v. City of Rochester*, 65 N.Y.2d 247, 260, 480 N.E.2d 717, 724, 491 N.Y.S.2d 128, 135 (1985) (*Foss I*).

303. *Id.* The sponsor's memorandum for the legislation states that "the legislation also repeals the provisions of Article 19 relating to overlay levies and enacts a new Article 19-A of the real property tax law designed to protect those communities which are approved assessing units and adopted the provisions of Section 1903." Memorandum from Senate Rules Committee on S. 6609/A. 8140, *reprinted in* 1985 N.Y. LEGIS. ANN. 304.

304. *Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 332 N.E.2d 593, 371 N.Y.S.2d 388 (1975).

305. *Foss I*, 65 N.Y.2d at 260, 480 N.E.2d at 724, 491 N.Y.S.2d at 138.

306. Act of Aug. 2 1985, ch. 828, § 1, 1985 N.Y. Laws 2186, 2187 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, 1985 N.Y. Laws 2409 (McKinney) (emphasis added).

units, provided that they had the means by which to avoid tax burden shifts.³⁰⁷

The findings played at least two important roles. First, these policy findings were part of the basis upon which the legislature hoped to have the statute deemed constitutional. Having assumed that the statute would be a chance to relitigate *Foss I*, the drafters attempted to show the requisite rational basis for re-enacting provisions similar to those struck down in section 1903 on equal protection grounds.³⁰⁸ Second, section 17 of the bill³⁰⁹ vested a temporary power in the SBEA to issue written opinions regarding construction of the bill, in a manner consistent with the legislative intent and findings and with the RPTL, upon the request of local governments or upon their own initiative. Moreover, the statute commanded that state courts were to take notice of these opinions and "accord substantial weight to these opinions"³¹⁰ in any action commenced prior to March 31, 1986, regarding the provisions of the entire enactment.³¹¹

307. *Id.* §1, at 2188.

308. *See, e.g.*, Letter from Dwight Ryan, Xerox Corporation, to Gerald Crotty, Counsel to the Governor (June 27, 1985), *reprinted in* Bill Jacket of ch. 828, 1985 N.Y. Laws 2186 (McKinney) ("We don't guarantee the constitutionality of this law, but at least it would give us a new shot before the court.") (quoting Edward Margolis, Assembly Counsel).

309. Act of Aug. 2 1985, ch. 828, § 17, 1985 N.Y. Laws 2186, 2195 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, § 1, 1985 N.Y. Laws 2409, 2409 (McKinney).

310. *Id.*

311. Lastly, the bill contained several references to Tax Law section 1262. *Id.* at 2186-95; *see* N.Y. TAX LAW § 1262 (McKinney 1987 & Supp. 1989). The provisions of this section concern the distribution and disposition of revenues to cities, towns, and school districts from the sales tax. For cities and towns, the revenues may be used either as an offset to what the municipality owes as its portion of the county real property tax, or it can be paid directly to the municipality to reduce property, general city, or town taxes. N.Y. TAX LAW § 1262(c), (d) (McKinney Supp. 1989). School districts used to be paid directly. N.Y. TAX LAW § 1262(c) (McKinney Supp. 1989). The drafters believed that the application of the sales tax revenues to the county property tax had some bearing on the constitutionality of article 19 and thus to article 19-A. This belief was predicated upon the notion that the application of the sales tax money paid to each assessing unit automatically created differing tax burdens for each assessing unit because the amounts would differ between units. The SBEA pointed out in its discussion of this bill that the Counsel for the City of Rochester had urged this argument upon the court of ap-

The shortcomings of chapter 828 were in the methods by which the legislature attempted to resurrect the invalid provisions of article 19. This enactment purported to shift the responsibility of creating tax rates and levying taxes from the county or school district to the cities and towns within the county or encompassed within the school district. The actual result of applying the new statute was that the same taxpayers paid the same unequal taxes to the same taxing jurisdictions in the same manner under which the taxes were held to be unconstitutionally levied in *Foss I*.³¹² This occurred because the changes made by the statute were insubstantial in anything other than form, with the cities and towns merely replacing the county in raising the same tax dollars in a slightly different manner. Even prior to litigation over the statute, the bill's provisions did not seem to remedy the problem of similarly situated taxpayers paying different rates of county taxes and so would be declared unconstitutional.³¹³

It was feared that if the bill were found to be too similar to the original statute and not remedial in nature, the court might order its decision to be applied retroactively, creating the possibility that counties and school districts would be forced to pay substantial refunds to taxpayers.³¹⁴ This concern was well founded, given the ample court precedents in similar circumstances where the effect of legislation enacted as a "solution"

peals during the argument in *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*), but to no avail as neither the majority nor the dissent mentioned this point in the decision. Memorandum from Richard Sinnott and Michael Kupferman to Robert Beebe, SBEA Counsel (July 10, 1985) (discussing the provisions and implications of Assembly bill No. 8140, which became ch. 828, 1985 N.Y. Laws 2186 (McKinney)).

312. *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*).

313. See Letter from Louis Nash, Corporation Counsel, to Gerald Crotty, Counsel to the Governor (July 29, 1985) (attached Memorandum from Richard Sinnott and Michael Kupferman to Robert Beebe, SBEA Counsel (July 10, 1985), discussing Assembly bill No. 8140); see also DIVISION OF BUDGET 10-DAY REPORT No. 8140.

314. Letter from Lucien A. Morin, County Executive, to Governor Mario Cuomo (July 19, 1985), reprinted in Bill Jacket of ch. 828, 1985 N.Y. Laws 2186 (McKinney). The County of Monroe estimated that should it be forced to make refunds, the liability would range from six million to ten million for the City of Rochester alone. *Id.*

to a court decision was a change in form without a change in substance.³¹⁵ In those cases, the courts clearly rejected attempts at circumventing constitutional principles by legislative enactments of similar provisions operating under a different

315. The first instance where the court ordered tax refunds was a result of a fiscal crisis that affected certain cities and their school districts following the court of appeals' decision in *Hurd v. City of Buffalo*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974), *aff'g* 41 A.D.2d 369, 343 N.Y.S.2d 950 (4th Dep't 1973). In *Hurd*, the court of appeals interpreted Article VIII, sections 10 and 11(b) of the New York State Constitution to mean that annual pension and social security contributions made by cities could not be excluded from the computation of their tax limitations on money raised by city real property taxes. In an effort to ease the ensuing fiscal crisis, this decision caused the legislature to pass "temporary measures" which were essentially re-enactments of the laws held to be unconstitutional, and later passed revisions to those "temporary measures," to provide a form of state aid should cities and their school districts be unable to manage within their constitutional tax and debt limits. This state aid was actually tax money collected by the city "on behalf of" the state, which would later be offset as a credit to make the state and city ledgers coincide. *Id.*

As a result of this scheme, two cases litigated held the remedial statutes unconstitutional. *See Bethlehem Steel Corp. v. Board of Educ. of City School Dist. of Lackawanna*, 91 Misc. 2d 258, 397 N.Y.S.2d 882 (Sup. Ct. Erie County 1977) *modified* 61 A.D.2d 147, 402 N.Y.S.2d 655 (4th Dep't), *appeal denied*, 44 N.Y.2d 831, 378 N.E.2d 947, 405 N.Y.S.2d 1031 (1978); *Waldert v. City of Rochester*, 90 Misc. 2d 472, 395 N.Y.S.2d 939 (Sup. Ct. Monroe and Ontario Counties 1977). In *Bethlehem Steel*, the court of appeals noted that in *Hurd*, the plaintiffs only received prospective relief because they relied on legislation that was later invalidated. In *Bethlehem Steel*, the cities and their school districts were notified that circumventing the constitutional limits would be intolerable and, as such, were liable to the taxpayers for refunds. *Bethlehem Steel*, 44 N.Y.2d at 835, 378 N.E.2d at 117, 406 N.Y.S.2d at 755.

The second instance in which the court ordered refunds was in *Gandolfi v. City of Yonkers*, 101 A.D.2d 188, 475 N.Y.S.2d 469 (2d Dep't), *appeal dismissed*, 62 N.Y.2d 882, 467 N.E.2d 529, 478 N.Y.S.2d 865 (1984), which arose out of the legislation concerning sales tax in Westchester County. The City of Yonkers had imposed a 3% sales tax on its residents, in accordance with the state's tax law, which utilizes a 3% cap between the city and the county. Westchester, however, imposed a 1% sales tax of its own, and later raised it to 1½%, thereby reducing the income to the City of Yonkers from its sales tax. In an attempt to get around Yonkers' constitutional tax limit (N.Y. CONST. art. VIII, § 10), the legislature amended the tax law to require the county to distribute to the cities the amount of sales tax collected. The county then increased the county real property tax in order to recover lost revenue. The appellate division did not allow this scheme, finding it an attempt to disguise an increase in the city property tax, which was held to violate the state constitution. Relying on *Bethlehem Steel*, the court, in *Gandolfi*, imposed retroactive liability. *Gandolfi*, 101 A.D.2d at 198, 475 N.Y.S.2d at 435.

name or in a different manner.³¹⁶ This legislative "solution" to the *Foss I* case closely paralleled the circumstances surrounding earlier instances in which the courts had ordered refunds. The enactment of the provisions of section 1903 in new section 1951³¹⁷ did not substantively alter the process by which taxes were apportioned. It easily could have been construed as a legislative means to circumvent the constitutional principle declared in *Foss I* because the net result of applying the new statute was the same as applying the old statute for those taxpayers similarly situated within the taxing jurisdiction but not within the same assessing unit.

Nonetheless, the governor signed the bill into law on August 2, 1985. The governor stated that "there [were] a number of defects in the bill that required correction,"³¹⁸ which the legislature intended to address in the fall of that year.³¹⁹ Swift enactment of the bill, despite its defects, was recognition of the fact that chapter 828 needed to be in place prior to the adjournment of the legislature to provide counties and school districts with the mechanism to formulate their budgets and levy the taxes necessary to support themselves in time for the coming fiscal year.

The fall of 1985 saw the legislative staff in both houses, in cooperation with local government officials, begin to work out amendments that would "provide more workable mechanisms to achieve [chapter 828's] objectives."³²⁰ The results of the combined efforts of the interested parties was Senate 6767/Assembly 8298 of 1985.³²¹ This bill was crafted to clarify and refine chapter 828; to make the language changes necessary to conform various sections of the RPTL to the wording of chapter 828; and to allay the concerns that chapter 828 had created

316. See *supra* note 315.

317. Act of Aug. 2, 1985, ch. 828, § 16, 1985 N.Y. Laws 2186, 2194 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, § 16, 1985 N.Y. Laws 2409, 2413 (McKinney).

318. Memorandum from Governor Mario Cuomo on Approval of ch. 828, *reprinted in* 1985 N.Y. LEGIS. ANN. 305.

319. *Id.*

320. Memorandum in Support of S. 6767/ A. 8298, *reprinted in* 1985 N.Y. LEGIS. ANN. 305.

321. N.Y.S. 6767, 208th Sess. (1985); N.Y.A. 8298, 208th Sess. (1985).

among county and school district officials in regard to the effected sections.³²² The primary features of the bill amended the means by which a certificate of apportionment of the amount due by each city and town was handed down from the county or school district and the detailing by those local governmental units of the means by which they would meet their burden.³²³ In addition, the bill clarified the ownership of certain tax liens, a major concern of counties throughout the state.³²⁴

At the same time that considerable efforts to make the provisions of chapter 828 workable were undertaken, chapter 828 was being judicially reviewed. As Senate 6767/Assembly 8298 was being introduced in the legislature, the court of appeals was preparing to hear oral argument in *Foss v. City of Rochester* (*Foss II*) which challenged chapter 828.³²⁵

B. Foss II

Upon the passage of chapter 828,³²⁶ David Foss, the plaintiff in *Foss I*,³²⁷ and both the City and County of Rochester agreed to submit their controversy over the new article 19-A to the Supreme Court of Monroe County.³²⁸ Foss sought declaratory relief that article 19-A and the City of Rochester's Local Law No. 6 of 1983³²⁹ were unconstitutional as applied to taxes levied by the county within the city, and a permanent injunction against the use of the city's homestead base proportion to levy

322. Memorandum in Support of S. 6767/A. 8298, *reprinted in* 1985 N.Y. LEGIS. ANN. 305.

323. N.Y.S. 6767, 208th Sess. (1985); N.Y.A. 8298, 208th Sess. (1985).

324. *Id.*

325. *Foss v. City of Rochester*, 66 N.Y.2d 872, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*). Aware of the impending court date, the Senate Majority Leader, Warren Anderson, and the Speaker of the Assembly, Stanley Fink, sent a letter to the court of appeals advising the members of the bench of the corrective legislation. Letter from Warren Anderson and Stanley Fink to Donald Sheraw, Clerk of the New York Court of Appeals (Nov. 14, 1985).

326. Act of Aug. 2, 1985, ch. 828, 1985 N.Y. Laws 2186, (McKinney), *amended by* Act of Dec. 13, 1985, ch. 914, 1985 N.Y. Laws 2409 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989)).

327. *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*).

328. N.Y. CIV. PRAC. L & R. 3222 (McKinney 1970 & Supp. 1987).

329. City of Rochester, N.Y., LOCAL LAWS No. 6 (1983).

these taxes. Judge Conway of the supreme court held for Foss³³⁰ and the parties submitted their appeal directly to the court of appeals.³³¹

Rochester argued that "because cities and towns have been delegated the responsibility for determining what sources of revenue shall be used to finance their allocated portion of the annual county budget, the equal protection clause no longer requires that county real property taxes be levied uniformly throughout the county."³³² It was argued that chapter 828 made cities and towns the taxing units for county tax purposes and it had, thus, taken that status away from the county.³³³ Where *Foss I* found equal protection violations in the county's imposition of different taxes upon similarly situated taxpayers,³³⁴ it was argued here that, as a result of the legislation, the county was no longer responsible for the levy of the taxes, and, therefore, taxpayers could no longer be considered similarly situated for purposes of the county tax levy, thus obviating the need for county uniformity in property taxes levied for county purposes.³³⁵ Also, it was urged that the use of the sales tax revenues and any surpluses the municipality might have were evidence that the municipality was the sole determiner of how the amount to be "contributed" to the county for its portion of the county tax was to be raised.³³⁶ The City of Rochester did concede, however, that the money to be raised was still for the county and that the county determined how to spend it.³³⁷

Rochester argued that the standard of equal protection review to apply was "whether the tax system is 'rationally re-

330. *Foss v. City of Rochester*, No. 8280-85 (Sup. Ct. Monroe County, Sept. 30, 1985).

331. The appeals were submitted to the court of appeals pursuant to section 5601 of the CPLR. N.Y. CIV. PRAC. L. & R. 5601(b)(2) (McKinney 1978).

332. Brief for Appellant, at 21, *Foss v. City of Rochester*, 66 N.Y.2d 872, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) [hereinafter Appellant's Brief *Foss II*].

333. *Id.* at 22.

334. *Foss v. City of Rochester*, 65 N.Y.2d 247, 260, 480 N.E.2d 717, 724, 491 N.Y.S.2d 128, 135 (1985) (*Foss I*).

335. Appellant's Brief *Foss II*, *supra* note 332, at 22.

336. *Id.* at 23.

337. *Id.* at 17.

lated to a legitimate state interest.' ”³³⁸ Rochester proposed that encouraging and promoting the improvement of local assessment administration through the use of revaluation was a legitimate state interest and that the method chosen by the state to accomplish this goal, the decentralization of the process in some regard to the cities and towns, was rationally related to that goal.³³⁹

Foss argued that article 19-A³⁴⁰ called for the same distinctions as article 19,³⁴¹ and that those same distinctions had not gained any rational basis since the date of the decision in *Foss I*.³⁴² According to *Foss*, section 1 of the bill stated that it was legislation merely clarifying that county taxes have always been levied in the same manner.³⁴³ If the court were to accept this view, then the bill did not create a new statutory context and the same equal protection analysis should apply.³⁴⁴ Foss also argued that the bill did nothing other than change the label of the county tax; that the money to be raised was still determined by the county and used for county purposes; and that since the tax was levied from property owners everywhere within the county,³⁴⁵ the system of taxation under this bill paralleled the system declared unconstitutional in *Foss I*.³⁴⁶

In a memorandum opinion, the court of appeals affirmed the judgment of the supreme court and declared that the constitutional deficiencies identified in *Foss I* had not been cured by chapter 828.³⁴⁷ The court stated that the legislation shifted the

338. *Id.* at 29.

339. *Id.* at 30.

340. Act of Aug. 2, 1985, ch. 828, § 16, 1985 N.Y. LAWS 2186, 2193 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, § 16, 1985 N.Y. LAWS 2409, 2413 (McKinney).

341. N.Y. REAL PROP. TAX LAW §§ 1901-1905 (McKinney 1989).

342. Brief for Respondent at 5, *Foss v. City of Rochester*, 66 N.Y.2d 872, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) [hereinafter Respondent's Brief *Foss II*].

343. Act of Aug. 2, 1985, ch. 828, § 1, 1985 N.Y. LAWS 2186, 2186-88 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, § 1, 1985 N.Y. LAWS 2409, 2409 (McKinney).

344. Respondent's Brief *Foss II*, *supra* note 342, at 9.

345. *Id.* at 11-12.

346. *Id.* at 17.

347. *Foss v. City of Rochester*, 66 N.Y.2d 872, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*).

responsibility for calculating and levying the tax from the county to the cities and towns, but that "imposition of demonstrably different tax burdens, solely by reason of geographic location, continues unabated pursuant to chapter 828."³⁴⁸ The court further stated that, absent legislative effort to provide interjurisdictional equality between taxpayers in different assessing units, its decision in *Foss I* was binding upon each member of the court under the principles of stare decisis.³⁴⁹ Thus, article 19-A was declared unconstitutional as violative of the equal protection clauses of both the federal and state constitutions.³⁵⁰

C. *The Repeal of Article 19-A*

Faced with this court of appeals decision, the legislature had no recourse but to repeal the offensive sections of article 19-A.³⁵¹ It also changed the various procedures regarding county and school district tax levies enacted by chapter 828,³⁵² since they were designed solely to support the constitutionality of article 19-A and, thus, were no longer necessary.³⁵³ The repeal restored the law to pre-chapter 828 status in regard to county and school district tax levying procedures and was made retroactive to June 6, the effective date of chapter 828.³⁵⁴ This was intended to validate the procedures that many counties and school districts had used prior to chapter 828 or those that the counties and school districts had already begun to employ to

348. *Id.*

349. *Id.*

350. *Id.*

351. Act of Aug. 2, 1985, ch. 828, § 16, 1985 N.Y. Laws 2186, 2193 (McKinney), *repealed by* Act of Dec. 13, 1985, ch. 914, § 16, 1985 N.Y. Laws 2409, 2413 (McKinney).

352. *Id.*

353. Memorandum from State Executive Department, *reprinted in* Act of Dec. 13, 1985, ch. 914, 1985 N.Y. Laws 2409 (McKinney) [hereinafter *Executive Department Memorandum*]. This change was achieved by passage of a Governor's Program Bill in a special session of the legislature in December of 1985, which became chapter 914 of the laws of 1985. Act of Dec. 13, 1985, ch. 914, 1985 N.Y. Laws 2409 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989)).

354. Act of Dec. 13, 1985, ch. 914, 1985 N.Y. Laws 2409, 2413 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989)).

levy their 1985-86 school and 1986 county taxes in accordance with the provisions of chapter 828 then in effect.³⁵⁵

In order to comply with the decisions of *Foss I*³⁵⁶ and *Foss II*,³⁵⁷ the repeal of the provisions authorizing counties, except countywide approved assessing units, and school districts located in more than one city or town to establish homestead and non-homestead tax rates became necessary. However, the legislature did amend section 1903 to allow school districts located wholly within a city or town to establish separate class tax rates.³⁵⁸ Since the constitutional infirmities declared by the court of appeals dealt only with the use of separate class tax rates to county or school district taxes when applied to more than one assessing unit, the use of homestead and non-homestead tax rates for taxes imposed within an assessing unit, such as city, town, or village taxes, were not affected by this bill.³⁵⁹

By rejecting the use of homestead and non-homestead classifications in the allocation of county and certain school district taxes, the *Foss* decisions forced the allocation of taxes in these jurisdictions to be on a uniform basis. Reverting to a uniform rate had the effect of causing a shift in tax burdens within those municipalities and school districts affected. The result of this tax shift was presumed to be that taxes on commercial

355. *Id.*

356. *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 419 N.Y.S.2d 128 (1985) (*Foss I*).

357. *Foss v. City of Rochester*, 66 N.Y.2d 873, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*).

358. Act of Dec. 13, 1985, ch. 914, § 14, 1985 N.Y. Laws 2409, 2413 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989)).

359. *Executive Department Memorandum*, *supra* note 353; *see also* DIVISION OF BUDGET 10-DAY REPORT ON BILLS FOR ASSEMBLY 6 OF EXTRAORDINARY SESSION, *reprinted in* Bill Jacket of ch. 914, 1985 N.Y. Laws 2409 (McKinney).

properties would decrease and taxes on residential properties would increase.³⁶⁰

D. The New Legislative Response After Repeal

1. School District Assessment

During the legislature's 1986 session, legislation was enacted to alleviate some of the financial hardships created by the *Foss*

360.

MUNICIPALITY	COUNTY TAX BILL		SCHOOL TAX BILL	
	HOMESTEAD	NON-HOMESTEAD	HOMESTEAD	NON-HOMESTEAD
MONROE COUNTY				
City of Rochester	+ 45 %	-23 %	Not Affected	
NIAGARA COUNTY				
City of Niagara Falls	+ 35 %	-26 %	+ 34 %	-27 %
City of No. Tonawanda	+ 17 %	-28 %	+ 17 %	-29 %
Town of Niagara	+ 32 %	-17 %		
Nia. Falls Sch. Dist.			+ 23 %	- 9 %
Nia. Wheatfield S.D.			+ 29 %	-18 %
RENSSELAER COUNTY				
Town of E. Greenbush	+ 2 %	- 3 %		
E. Greenbush Central S.D.			+ 2 %	- 3 %
Averill Park Central S.D.			- 3 %	+ 18 %
SARATOGA COUNTY				
Town of Waterford	+ 15 %	-11 %		
Shenendehowa S.D.			- 2 %	+ 1 %
Waterford S.D.			+ 12 %	- 8 %
ROCKLAND COUNTY				
Town of Orangetown	+ 22 %	-26 %		
Nanuet S.D.			+ 57 %	-25 %
So. Orangetown S.D.			+ 16 %	-24 %
Nyack S.D.			+ 17 %	-18 %
Pearl River S.D.			+ 23 %	-34 %
Town of Stony Point	+ 55 %	-23 %		
Haverstraw/St. Pt. S.D.			+ 42 %	-20 %
SUFFOLK COUNTY				
Town of Islip	+ 6 %	-13 %		
Bayport S.D.			+ 1 %	- 1 %
Hauppauge S.D.			+ 1 %	- 1 %
Beach S.D.			+ 1 %	- 1 %
Sachem S.D.			-10 %	+ 24 %

Memorandum of Richard Sinnott and Michael Kupferman to Robert Beebe, SBEA Counsel (July 10, 1985).

The second set of estimates employed what was at the time the latest tax rates for municipal, county and school purposes and reflected, in most instances, a change in both county and school rates from differential to uniform rates as required by the *Foss* decisions. Thus, the following figures represent the impact of these combined

1990]

REAL PROPERTY TAX LAW

121

decisions³⁶¹ for school districts which encompassed more than

tax rates on property owners (where, for instance, the impact on county taxes for the City of Rochester homeowners would have been +45%, that change in rates represented a +\$5.21, or 21% increase in the combined tax rate).

MUNICIPALITY	HOMESTEAD				NON-HOMESTEAD			
	ACTUAL COMBINED AFTER TAX RATE FOSS	CHANGE FOSS	\$	%	ACTUAL COMBINED AFTER TAX RATE FOSS	CHANGE FOSS	\$	%
MONROE COUNTY								
City of Rochester	\$24.54	\$29.75	+5.21	+21.2	\$48.11	\$47.12	-0.99	-2.1
NIAGARA COUNTY								
City of Nia. Falls	\$31.34	\$37.21	+5.87	+18.7	\$55.52	\$47.54	-7.98	-14.4
City of No. Tonawanda	\$29.85	\$33.62	+3.77	+12.6	\$48.07	\$37.83	-10.24	-21.3
TOWN OF NIAGARA								
Nia. Falls Sch. Dist.	\$17.78	\$22.96	+5.18	+29.1	\$26.76	\$23.92	-2.84	-10.6
Wheatfield S.D.	\$18.91	\$24.47	+5.56	+29.4	\$29.75	\$25.43	-4.32	-14.5
RENSSELAER COUNTY								
Town of E. Greenbush								
E. Greenbush C.S.D.	\$33.39	\$37.21	+3.82	+11.4	\$42.10	\$38.19	-3.91	-9.3
Averill Park C.S.D.	\$31.15	\$32.34	+1.19	+3.8	\$31.44	\$33.32	+1.8	+6.0
SARATOGA COUNTY								
Town of Waterford								
Shenendehowa S.D.	\$22.03	\$22.33	+0.30	+1.4	\$24.23	\$23.30	-0.93	-3.8
Waterford S.D.	\$22.52	\$24.54	+2.02	+9.0	\$27.17	\$25.51	-1.66	-6.1
ROCKLAND COUNTY								
Town of Orangetown								
Nanuet S.D.	\$20.27	\$29.34	+9.07	+44.7	\$40.76	\$31.20	-9.56	-23.5
S. Orangetown S.D.	\$20.63	\$23.85	+3.22	+15.9	\$31.96	\$25.71	-6.25	-19.6
Nyack S.D.	\$29.21	\$34.22	+5.01	+17.2	\$43.49	\$36.03	-7.41	-17.0
Town of Stony Point								
St.Pt. S.D.	\$18.77	\$25.93	+7.16	+38.1	\$34.91	\$28.89	-6.02	-17.2
SUFFOLK COUNTY								
Town of Islip								
Bayport S.D.	\$61.30	\$62.26	+0.96	+1.6	\$67.13	\$65.32	-1.81	-2.7
Hauppauge S.D.	\$46.54	\$47.80	+1.26	+2.7	\$51.88	\$50.86	-1.02	-2.0
Beach S.D.	\$20.42	\$20.84	+0.42	+2.1	\$24.13	\$23.90	-0.23	-1.0
Sachem S.D.	\$51.11	\$51.49	+0.38	+0.7	\$54.79	\$54.55	-0.24	-0.4

Memorandum from Bob Kitchen to Robert Beebe, SBEA Counsel (July 16, 1985) (discussing the estimated impact of the *Foss* decisions).

361. *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 419 N.Y.S.2d 128 (1985) (*Foss I*); *Foss v. City of Rochester*, 66 N.Y.2d 873, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*).

one assessing unit.³⁶² In recognition of the fact that not all assessing units within a school district had adopted the dual tax rates provided for in article 19,³⁶³ this legislation operated when one third or more of the parcels of a school district were within an approved assessing unit that did adopt the provisions of section 1903 of the RPTL.³⁶⁴ Designed to allow the use of homestead and non-homestead tax rates in the allocation of a school district's tax to "ameliorate the school district tax burden shift,"³⁶⁵ chapter 500³⁶⁶ avoided the problem of similarly situated taxpayers paying different amounts of tax based solely on geographic distinctions. This was accomplished by creating aggregate school district homestead and non-homestead proportions³⁶⁷ for each portion of a school district.³⁶⁸ Once created, these proportions were used to apportion the total levy according to the established class shares. Tax rates were then determined for each portion by dividing the apportioned share

362. Act of July 21, 1986, ch. 500, 1986 N.Y. Laws 1041 (McKinney), *amended* by Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742 (McKinney).

363. N.Y. REAL PROP. TAX LAW §§ 1901-1905 (McKinney 1989).

364. Act of July 21, 1986, ch. 500, 1986 N.Y. Laws 1041 (McKinney), *amended* by Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742 (McKinney).

365. Memorandum in Support of S. 9386-A, which became ch. 500, 1986 N.Y. Laws 1041, *reprinted in* Bill Jacket of ch. 500, 1986 N.Y. Laws 1041 (McKinney).

366. Act of July 21, 1986, ch. 500, 1986 N.Y. Laws 1041 (McKinney), *amended* by Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742 (McKinney).

367. *Id.* § 1, at 1041 (adding N.Y. REAL PROP. TAX LAW §§ 1901(t), (u)).

(t) "Aggregate school district homestead proportion" means the proportion of the total taxable full valuation of real property in the homestead class to the total taxable full valuation of all real property on the current assessment rolls or parts thereof used by a school district for the levy of school district taxes.

(u) "Aggregate school district non-homestead proportion" means the proportion of the total taxable full valuation of real property in the non-homestead class to the total taxable full valuation of all real property on the current assessment rolls or parts thereof used by a school district for the levy of school district taxes.

Id.

368. N.Y. COMP. CODES R. & REGS. tit. 9, § 190-4.1(n) (1988). *Portion* means a part of an assessing unit included within the boundaries of a school district located in a city having a population of 125,000 or more inhabitants; a town excluding all villages therein; and that part of an assessing unit which is a special district which encompasses the entire assessing unit with the exception of any villages which may be located therein. In the case of a county assessing unit, it shall mean the part of such assessing unit included within the boundaries of a city, town, village or school district. *Id.*

of the district's tax levy for each class by the taxable real property in the class according to the final assessment rolls used for the levy of the district's tax.³⁶⁹ Then, assuming that each portion (cities and towns) was assessed in a uniform manner as prescribed by section 305(2),³⁷⁰ the taxpayers in each city and town would pay the same effective rate of tax, thus reaching the result of similarly situated taxpayers paying equally, as required by the *Foss* decisions.³⁷¹

The operation of this statute requires assessing units which have not adopted the provisions of article 19 to provide school districts with information regarding their properties as though they were classified under article 19. Section 4 of the bill³⁷² authorizes local assessors to provide school district officials with any information necessary to determine aggregate school district homestead and non-homestead proportions, including classifications of property.³⁷³ The school districts are authorized to pay the assessors for this information.³⁷⁴ The SBEA found this to be "the most troublesome aspect of the entire bill from an administrative perspective."³⁷⁵ It found the ad hoc procedure for these provisions justifiable to implement the bill in time for the 1986-87 school levies.³⁷⁶ But the SBEA believed that the classification of properties should be part of the normal process of preparing assessment rolls so that taxpayers

369. Act of July 21, 1986, ch. 500, § 2, 1986 N.Y. Laws 1041, 1041-43 (McKinney) (enacting N.Y. REAL PROP. TAX LAW § 1903(a)(4)), *amended by* Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742-43 (McKinney).

370. N.Y. REAL PROP. TAX LAW § 305(2) (McKinney 1984).

371. *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 419 N.Y.S.2d 128 (1985) (*Foss I*); *Foss v. City of Rochester*, 66 N.Y.2d 873, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*).

372. Act of July 21, 1986, ch. 500, § 4, 1986 N.Y. Laws 1041, 1043 (McKinney), *amended by* Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742-43 (McKinney).

373. *Id.*

374. *Id.*

375. Memorandum from Robert Beebe, SBEA Counsel, to Evan Davis, Counsel to the Governor, at 6 (July 10, 1986) [hereinafter SBEA Letter] (the memorandum was a discussion of 9386-A, then under consideration for signature by the governor, which eventually became ch. 500, 1986 N.Y. Laws 1041 (McKinney)).

376. *Id.*

may have notice of the classifications and an opportunity for administrative review before the school taxes were imposed.³⁷⁷

The bill did not address this concern. It did, however, include the term "error in essential fact,"³⁷⁸ an incorrect entry as to a property's classification. By virtue of having an incorrect classification fall under section 550(3),³⁷⁹ the taxpayer could have the tax roll corrected and his tax, or a portion thereof, refunded.³⁸⁰ Unfortunately, this inclusion was only valid for the school district levies of 1986-87.³⁸¹ A partial solution to this problem has since been derived.³⁸²

Another potential flaw in the legislation was its failure to address the problems raised by *Verga v. Town of Clarkstown*.³⁸³ Under this decision, it is unconstitutional to assess some, but not all, condominiums in a taxing jurisdiction without regard to the assessment ceiling embodied within section 339-y of the Real Property Law,³⁸⁴ since similarly situated properties would be taxed unequally.³⁸⁵ Any school district containing condominiums located in both approved assessing

377. *Id.*

378. Act of July 21, 1986, ch. 500, § 5, 1986 N.Y. Laws 1041, 1043 (McKinney), amended by Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742-43 (McKinney).

379. N.Y. REAL PROP. TAX LAW § 550(3) (McKinney 1984 & Supp. 1989).

380. N.Y. REAL PROP. TAX LAW § 556(1)(a) (McKinney 1984 & Supp. 1989).

381. Act of July 21, 1986, ch. 500, § 5, 1986 N.Y. Laws 1041, 1043 (McKinney), amended by Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742-43 (McKinney).

382. During the 1987 legislative session, legislation was enacted that had a direct bearing upon the problem of assessing units which had not adopted the provisions of article 19. The legislation, S. 6037-A, became ch. 447, 1987 N.Y. Laws 777, (McKinney), which allowed villages located wholly within a town approved assessing unit to adopt a local law and thus become an "eligible non-assessing unit village" entitled to adopt the provisions of article 19 of the RPTL. Therefore, these non-assessing unit villages may classify their properties as homestead and non-homestead and, thereby, apply the dual tax rate structure authorized by article 19. The importance of this in relation to the problem with chapter 500 had been the classification of properties on an ad hoc basis. This problem is, at least in part, obviated by having the non-assessing unit villages prepare their own assessment rolls in a classified fashion.

383. 115 A.D.2d 600, 496 N.Y.S.2d 262 (2d Dep't 1985). See *infra* notes 447-52 and accompanying text.

384. N.Y. REAL PROP. LAW § 339-y (McKinney 1989).

385. *Verga*, 115 A.D.2d at 600-01, 496 N.Y.S.2d at 262.

units which have adopted section 1903³⁸⁶ and in assessing units which have not, runs the risk of a suit based on *Verga*.³⁸⁷ Moreover, while other school districts, those without condominiums and those with condominiums located entirely within a city or town, which have adopted section 1903 are not directly affected by *Verga*, they may be indirectly affected if the assessment rolls of these cities and towns were invalidated under a *Verga*-type challenge.³⁸⁸ The potentially negative effects of lowered assessments upon the school district would be a reduction in the levels of funding from the municipality and a decrease in state aid, which would be predicated upon the municipality's full value if tax rates were not increased commensurately to maintain the revenue raised by the property tax.

Finally, for school purposes only, the bill eased the means by which the provision of section 1903 may be adopted. Where an assessing unit must revalue all of its parcels to become an approved assessing unit,³⁸⁹ school districts may take advantage of homestead and non-homestead classifications where only 33% of its parcels have undergone revaluation.³⁹⁰

Despite its imperfections, chapter 500³⁹¹ represents a significant step forward in reconciling the desire to mitigate tax burden shifts with the constitutionally required equal protection. For the first time since the introduction of chapter 1057³⁹² in 1981, legislation that appears to meet the constitutional standards of equal protection has been enacted. While the application of this bill is limited to thirteen school districts,³⁹³ the lim-

386. N.Y. REAL PROP. TAX LAW § 1903 (McKinney 1989).

387. SBEA Letter *supra* note 375, at 3.

388. *Id.*

389. Cities and towns must comply with articles 15-B and 19 of the RPTL, as well as other SBEA rules and regulations, to become approved assessing units. See N.Y. COMP. CODES R. & REGS. tit. 9, §§ 190 -4.1 to -4.6 (1988).

390. *Id.* § 190 -1.1(b).

391. Act of July 21, 1986, ch. 500, 1986 N.Y. Laws 1041 (McKinney), amended by Act of July 29, 1988, ch. 388, § 6, 1988 N.Y. Laws 740, 742-43 (McKinney).

392. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 1057 (McKinney) (codified at N.Y. REAL PROP. TAX LAW arts. 18, 19 (McKinney 1989)).

393. See Memorandum from Bob Kitchen to Robert Beebe, SBEA Counsel (July 14, 1986), reprinted in Bill Jacket of ch. 500, 1986 N.Y. Laws 1041 (McKinney).

ited application may, in fact, provide a microcosm under which to study the effects of its provisions and their potential adaptability to other larger, tax-levying jurisdictions.³⁹⁴

2. Special Assessing Units

The 1986 session also saw legislation amending chapter 1057³⁹⁵ in regard to article 18 "special assessing units"³⁹⁶ (Nassau County and the City of New York) as a result of problems incurred by New York City and the SBEA. All real property in these two assessing units was classified into one of four categories for the purpose of allowing taxation at different rates.³⁹⁷ To determine the tax rate for a class, the locality was to establish a "base proportion"³⁹⁸ for each class.³⁹⁹ The SBEA

394. Additional legislation was passed in 1986 to study the effects upon school districts of current assessment practices. *See* Act of July 26, 1986, ch. 660, 1986 N.Y. Laws 1472 (McKinney). Chapter 660 created a task force to be composed of, but not limited to, the SBEA and the State Education Department. *Id.* The purpose of this task force was "to study the impact of current assessment practices in assessing units in which at least two school districts are wholly contained." *Id.* The legislature believed that this type of study was necessary because the use of the equalization rate in these assessing units produced either under or overestimation of the school district's full value, and that these estimates had serious implications for the school districts in determining the amounts of state aid they would receive. *Id.* The bill appropriated \$500,000 to study a variety of eligible school districts that were enumerated within the bill. *Id.*

395. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW arts. 18, 19 (McKinney 1989)).

396. N.Y. REAL PROP. TAX LAW. §§ 1801-1805 (McKinney 1989).

397. *Id.* § 1802(1).

398. *Id.* § 1801(f).

"Base proportion" means . . . the proportion of the taxable assessed value of real property which each class constituted of the total taxable assessed value of all real property as entered on the final assessment roll completed and filed in calendar year nineteen hundred eighty-one of such special assessing unit or on the part of that assessment roll applicable to a portion of the special assessing unit. . . .

Id.

Under the provisions of section 1803(2)(a), the base proportion was required to be altered by the locality to reflect additions of new property, physical changes to existing property, changes in taxable status, and changes in class designation. In addition, the locality could further alter the base proportion, as adjusted by 1803(2)(a), by up to 5% of the class share used for the preceding tax year's levy under 1803(2)(d). *Id.*

399. *Id.* § 1803(1).

was required to establish a "base percentage"⁴⁰⁰ for each class equal to its share of full value based upon a market survey two years after the establishment of the base proportions.⁴⁰¹ The SBEA was also to certify an "adjusted base proportion."⁴⁰² The calculation of the adjusted base proportion involved the use of a "current percentage," which was an updated base percentage, and reflected the most current market survey values for each class.⁴⁰³ The adjusted base proportion was calculated by multiplying the base proportion by the percent increase or decrease in the current percentage from the base percentage.⁴⁰⁴

When article 18 became law in 1981, its provisions called for the classification of all properties in accordance with the assessment rolls for 1981,⁴⁰⁵ thereby setting the base proportion according to that data as of 1982. The base percentage would have been set by the SBEA in 1984, with the calculation of the adjusted base proportions taking place two years later in 1986. The problem was that the City of New York claimed that its completed 1981 assessment roll was in accordance with chapter 1057. However, that assessment roll did not classify properties according to the requirements set forth in the legislation.⁴⁰⁶ The result was that the city and the SBEA based their administration of article 18 on different versions of the city's 1981

400. N.Y. COMP. CODES R. & REGS. tit. 9, § 186-10.1(c) (1988). "Base percentage means the percentage that the estimated taxable market value of a class constitutes of the whole estimated taxable market value of all real property on the . . . assessment rolls. . . ." *Id.*

401. N.Y. REAL PROP. TAX LAW § 1804(2) (McKinney 1989).

402. *Id.* § 1801(h). "[A]djusted base proportion' means any proportion established in accordance with section eighteen hundred four of this article." *Id.*

403. *Id.* § 1804(3).

404. *Id.* § 1804(4). The procedure described in the statute can be demonstrated by assuming a base proportion for the homestead class of 25% with the base percentage showing the homestead class being made up of 50% of the market value of the locality. Upon a recent market survey, however, the class now makes up 55% of the market value of all property. Thus, in calculating the adjusted base proportion, the current percentage is 10% greater than the base proportion, therefore, the base proportion is increased by 10%, or 2.5% to arrive at an adjusted base proportion of 27.5% for the homestead class.

405. Act of Dec. 3, 1981, ch. 1057, § 2, 1981 N.Y. Laws 219, 221 (McKinney) (codified as amended at N.Y. REAL PROP. TAX LAW § 1803 (McKinney 1989)).

406. *See* Act of Apr. 18, 1986, ch. 55, § 1, 1986 N.Y. Laws 136, 136-37 (McKinney).

assessment roll.⁴⁰⁷ This meant that the class designations on the partially converted version of the city's 1981 roll used by the SBEA for its market value surveys of 1981 (setting the base percentage) and 1983 (setting the current percentage) differed greatly from those used by the city in establishing its class shares for the 1982-83 tax levy. Nonetheless, the SBEA would have been required to issue its certification of the adjusted base proportions in 1986, but in a manner that could have led to changes in the class shares beyond the extent desired, or allowed, by law.

In an attempt to cure this problem, the legislature passed chapter 55 of the laws of 1986, amending relevant sections of article 18.⁴⁰⁸ Essentially, this legislation provides that the city and the SBEA start the process over again, this time using the 1984 assessment roll from the city. Under chapter 55, the year for calculating the base proportions was 1984 and the SBEA's adjusted base proportions would have been initially certified in 1989.⁴⁰⁹ This was accomplished by changing the definition of base proportion to mean the class shares for the city according to the 1984 roll;⁴¹⁰ having the city certify its base proportions upon the 1984 roll by 1986;⁴¹¹ by altering the requirements for an SBEA market survey to be conducted not later than 1989; by determining market values as of July 1, 1984;⁴¹² and by

407. According to the Senate, this result came about because the SBEA used the roll provided to the board by the city in accordance with the rules pertaining to special assessing units, *see* N.Y. COMP. CODES R. & REGS. tit. 9, § 190-3 (1985), and the city used data prepared subsequent to this filing. *See* Memorandum in Support of S. 7998, *reprinted in* Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney). This data includes significant corrections to class designations. The discrepancies between the two data bases involves thousands of parcels and hundreds of millions of dollars of taxable assessed value. However, the city prepared its 1981 assessment roll, then sought to reclassify retrospectively approximately 870,000 parcels. This attempt was seriously flawed, however, due to insufficient data upon which to make these reclassifications. *See* DIVISION OF BUDGET 10-DAY BUDGET REPORT ON BILLS, S. 7998, *reprinted in* Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney). The basis for chapter 55 was that the SBEA used a different assessment roll for its market survey than the one used by the city to establish its base proportions.

408. Act of Apr. 18, 1986, ch. 55, 1986 N.Y. Laws 136 (McKinney).

409. *Id.* § 4, at 138.

410. *Id.* § 2, at 137.

411. *Id.* § 5, at 139.

412. *Id.* § 4, at 138.

having certification of the adjusted base proportions by the SBEA begin in 1989.⁴¹³ In addition, the bill required an annual adjustment to the adjusted base proportion, as certified by the SBEA, to be made by the special assessing unit to account for physical changes, changes in taxable status, and changes in class designation.⁴¹⁴ This mechanism was the means of avoiding major tax shifts that might occur between the calculation of the base proportion (1981 for Nassau County, 1984 for New York City) and the first certification of adjusted base proportions by the SBEA.⁴¹⁵ Finally, the bill made all taxes levied by the city valid from the effective date of article 18⁴¹⁶ until the effective date of the bill⁴¹⁷ and prevented any taxes to be levied by the city during the 1986-89 period from being invalidated on the basis of definitions of base proportion or adjusted base proportion in use prior to the effective date of the bill.⁴¹⁸ These last two provisions had an important impact upon one of the primary uses of class ratios: proof in assessment review proceedings.⁴¹⁹

413. *Id.*

414. *Id.* § 3, at 137.

415. This amendment had additional importance for the purpose of mitigating tax burden shifts. As originally enacted, chapter 1057 of the laws of 1981 authorized adjustments to the class shares by the special assessing units on their 1982-84 assessment rolls as an interim measure pending SBEA certification of adjusted base proportions in 1985 and every other year thereafter. Act of Dec. 3, 1981, ch. 1057, § 2, 1981 N.Y. Laws 219, 221 (McKinney). The law was changed by chapter 830 of the laws of 1984 to delay the SBEA's initial certification of adjusted base proportions until 1986 and to increase the period of subsequent certifications to three years. Act of Aug. 5, 1984, ch. 830, § 3, 1984 N.Y. Laws 2414, 2415 (McKinney). Chapter 55's provisions are important because while the special assessing unit's authority to make interim adjustments extended for the extra year until 1986, chapter 830 did not grant additional authority for the extended three-year period between subsequent SBEA certifications. This bill solved that problem by requiring the special assessing units to make these adjustments annually. *Id.*

416. N.Y. REAL PROP. TAX LAW art. 18 (McKinney 1989) (effective Dec. 3, 1981).

417. Act of Apr. 18, 1986, ch. 55, 1986 N.Y. Laws 136 (McKinney) (effective Apr. 18, 1986).

418. *Id.* § 7, at 139.

419. See N.Y. REAL PROP. TAX LAW §§ 716, 720 (McKinney 1984 & Supp. 1989).

On the theory that the *Foss*⁴²⁰ decisions make it important to treat all similarly situated taxing jurisdictions alike,⁴²¹ the legislation also applied to Nassau County in several respects, even though Nassau County did not suffer from this problem. Since New York City and Nassau County are in such close proximity to one another and are the only municipalities subject to article 18, it was deemed best to treat them alike.⁴²² The bill was considered desirable to Nassau County since the changes would help reduce the potential risk of upsetting the existing class share relationships. This beneficial effect was envisioned to be the result of the retention of 1981 as the base roll year for the county, the postponement of the SBEA's involvement in the class share process, and the expansion of the local legislative body's control over class share adjustments.⁴²³

Notwithstanding all of the purported benefits, some opposition did arise. Class Three property owners (utilities) believed they would suffer under the provisions of this legislation. They argued that the bill would increase their share of the tax burden because of the change in the base roll year from 1981 to 1984, since the city increased the utility class share in those years by amounts claimed to be as much as nine percent.⁴²⁴ By postponing the initial SBEA certification of the adjusted base proportion until 1989, the utilities believed the reduction they would have been granted in 1986, as a result of their decreased share of the market value of their properties, would result in an improper share being borne by their class.⁴²⁵ Taken together, this result was contrary to the original intent of article

420. *Foss v. City of Rochester*, 66 N.Y.2d 872, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*); *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*).

421. *Foss II*, 66 N.Y.2d at 873, 489 N.E.2d at 727, 498 N.Y.S.2d at 759; *Foss I*, 65 N.Y.2d at 259, 480 N.E.2d at 724, 491 N.Y.S.2d at 135.

422. See DIVISION OF BUDGET 10-DAY BUDGET REPORT ON BILLS, S. 7998, reprinted in Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney).

423. See Memorandum from Robert T. Bloom, Deputy Chief of Nassau County Real Property Bureau, to C. Bruce Pearsall, Bureau Chief (Mar. 12, 1986), reprinted in Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney).

424. See Consolidated Edison Co. Legislative Memorandum in Opposition to S. 7998/ A. 9745, reprinted in Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney).

425. *Id.*

18, which was to maintain the status quo among the classes in regard to the share of taxes to be borne by each.⁴²⁶ Instead, argued the utilities, what was occurring was a disproportionate increase for Class Three properties, despite the decrease in market value of the class relative to the other classes.⁴²⁷ These arguments did not prove persuasive.

3. Condominiums

Concern with the assessment of condominiums under sections 581 of the RPTL⁴²⁸ and 339-y of the Real Property Law⁴²⁹ first arose in the context of their classification within article 19.⁴³⁰ In the enactment of article 19 in 1981,⁴³¹ the homestead class included all one, two, and three family dwelling units, regardless of their form of ownership.⁴³²

As the result of several inquiries concerning the eligibility of condominiums for inclusion within the homestead class, the SBEA issued an opinion construing the terms of the 1981 legislation.⁴³³ The SBEA concluded that, in keeping with the spirit of chapter 1057,⁴³⁴ since it is the physical structure of the property that is determinative, only a structure housing three families or less qualified for inclusion within the homestead class.⁴³⁵

426. See Letter from Edward W. Livingston, Vice President of Community and Governmental Relations of Consolidated Edison Co., to Governor Mario Cuomo (Apr. 21, 1986) (strongly opposing S. 7998/ A. 9745), *reprinted* in Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney).

427. See Memorandum from New York Telephone Co. in Opposition to S. 7998/ A. 9745; Letter from Edward W. Livingston, Vice President of Community and Governmental Relations of Consolidated Edison Co., to Governor Mario Cuomo (Apr. 21, 1986) (strongly opposing S. 7998/A. 7045), *reprinted* in Bill Jacket of ch. 55, 1986 N.Y. Laws 136 (McKinney).

428. N.Y. REAL PROP. TAX LAW § 581 (McKinney 1984 & Supp 1989).

429. N.Y. REAL PROP. LAW § 339-y (McKinney 1989).

430. N.Y. REAL PROP. TAX LAW §§ 1901-1905 (McKinney 1989).

431. See Act of Dec. 3, 1981, ch. 1057, § 3, 1981 N.Y. Laws 219, 225-32 (McKinney).

432. *Id.* at 226.

433. 7 Op. Counsel SBEA No. 85, at 180 (1982).

434. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 219 (McKinney) (codified at N.Y. REAL PROP. TAX LAW arts. 18, 19. (McKinney 1989)).

435. 7 Op. Counsel SBEA No. 85, at 181 (1982).

The legislature, however, disapproved of this interpretation and enacted corrective legislation. Chapter 800 of the laws of 1983⁴³⁶ was passed as "a clarifying amendment . . . made necessary by an arbitrary SBEA ruling."⁴³⁷ Its sponsor's view was that:

a residence which is owner-occupied is a homestead and deserves to be classed as such, regardless of whether its walls stand on their own or are attached to other owner-occupied condominiums It was never the intention of the Legislature to distinguish between one owner-occupied residence and another owner-occupied residence on the basis of their architectural structure.⁴³⁸

The bill amended section 1901⁴³⁹ to include all condominiums of more than three dwelling units within the homestead class definition, subject to two exceptions.⁴⁴⁰ In addition to this change of classification, the bill also affected the method of assessment for these properties. It amended both section 581 of the RPTL,⁴⁴¹ which limits the method of valuation⁴⁴² and sec-

436. Act of July 30, 1983, ch. 800, 1983 N.Y. Laws 1492 (McKinney) (codified as amended at N.Y. REAL PROP. LAW § 339-y (McKinney 1989)); N.Y. REAL PROP. TAX LAW § 581 (McKinney 1984 & Supp. 1989); N.Y. REAL PROP. TAX LAW § 1901 (McKinney 1989).

437. Assemblyman P. Harenberg's Memorandum in Support of S. 600-c/ A. 626-c (enacted as ch. 800, 1983 N.Y. Laws 1492 (McKinney)), *reprinted in* Bill Jacket of ch. 800, 1983 N.Y. Laws 1492 (McKinney).

438. *Id.*

439. N.Y. REAL PROP. TAX LAW § 1901 (McKinney 1989).

440. Act of July 30, 1983, ch. 800, § 1, 1983 N.Y. Laws 1492, 1492 (McKinney). These two exceptions to inclusion of condominiums within the homestead class are:

1. Buildings which have been converted to condominiums but had appeared on assessment rolls as other than condominiums, and
2. Condominiums of more than three units, where approved assessing units adopted homestead base proportions before the bill's effective date of April 30, 1983 and enacted local legislation excluding such condominiums from the homestead class.

Id.

The SBEA pointed out a most interesting contradiction within the legislation. Claiming that condominiums should be afforded homestead property status, the legislature then allowed the seven existing approved assessing units to continue to deny condominiums this status by use of the second exception. *See* Memorandum from Richard Sinnott and James O'Keefe to Robert Beebe, SBEA Counsel (July 12, 1983), *reprinted in* Bill Jacket of ch. 800, 1983 N.Y. Laws 1492 (McKinney).

441. N.Y. REAL PROP. TAX LAW § 581 (McKinney 1984 & Supp. 1989).

tion 339-y of the Real Property Law,⁴⁴³ which imposed a ceiling on the assessment,⁴⁴⁴ to provide that, as of January 1, 1984, neither of these provisions applied to condominiums in approved assessing units.⁴⁴⁵

The question of assessing condominiums arose after the *Foss* decisions had been rendered in 1985.⁴⁴⁶ In *Verga v. Town of*

442. When section 581 was added to the Real Property Tax Law in 1981, the SBEA was called upon to construe its effects. See 7 Op. Counsel SBEA No. 81, at 166, 173 (1982). The SBEA found this section to be a limitation on the method of valuation of condominiums. They stated that, "[w]here a comparable sales approach is used to assess conventional apartment houses, any value attributable to possible conversion to cooperative or condominium ownership must be excluded. . . . [A] condominium [may not] be valued based upon a totaling of sales prices of individual condominium units." *Id.* at 174.

443. N.Y. REAL PROP. LAW § 339-y (McKinney 1989).

444. Section 339-y states that, "[i]n no event shall the aggregate of the assessment of the units plus their common interests exceed the total valuation of the property" *Id.* (1)(b). "That is, the assessor must value the entire complex, using a methodology which does not include the sales price of individual units. Once this value is determined, it is apportioned among the units." 7 Op. Counsel SBEA No. 81, at 166, 174 (1982).

445. Act of July 30, 1983, ch. 800, § 3, 1983 N.Y. Laws 1492, 1493 (McKinney).

446. See *Foss v. City of Rochester*, 66 N.Y.2d 878, 489 N.E.2d 727, 498 N.Y.S.2d 758 (1985) (*Foss II*); *Foss v. City of Rochester*, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (*Foss I*). Two cases arose in Monroe County in 1986 that tested other areas of the law as a result of the applications of section 305 and articles 19 and 19-A. They did not prompt legislation, but nonetheless raised some interesting issues. *Xerox Corp. v. Town of Webster*, 131 Misc. 2d 817, 502 N.Y.S.2d 379 (Sup. Ct. Monroe County 1986), raised the question of whether one municipality is obligated to indemnify another municipality for the loss of school tax revenues which occur as the result of one municipality's having adopted the dual tax rates authorized by articles 19 and 19-A. *Id.* at 818, 502 N.Y.S.2d at 379. In this action, the Webster Central School District sought to recover from the Town of Webster approximately \$892,000 by which the school district was required to reduce their tax levy upon the properties of the Xerox Corporation as a result of an earlier ruling in which the dual rates such as those applied to Xerox were declared unconstitutional. *Id.* As a result of this earlier ruling, the amount that would be payable by Xerox would only be the amount payable by Xerox as though a uniform rate of tax were applied. As such, the school district sought to recover the money it could no longer levy. While the court found that the lost revenues did in fact result from the town's adopting the local law to implement articles 19 and 19-A, and that a valid claim for implied indemnification could exist in favor of one municipality against another, recovery was denied. *Id.* at 820-22, 502 N.Y.S.2d at 381, 383. The court reasoned that the town had been performing a governmental function when it implemented articles 19 and 19-A. While the state, and thereby its

Clarkstown,⁴⁴⁷ owners of single family condominiums brought an action for declaratory judgment against the town. They

subdivisions, had waived its sovereign immunity, this waiver was not absolute. The court stated, "[g]enerally, no liability attaches for the performance of governmental functions involving the exercise of judgment and discretion" *Id.* at 820, 502 N.Y.S.2d at 381. Accordingly, the court did not impose liability, even though the legislation on which the municipality had relied was later determined unconstitutional by the court of appeals in the *Foss* decisions. *Id.* at 821, 502 N.Y.S.2d at 382.

In the second case, *Forward v. Webster Cent. School Dist.*, 133 Misc. 2d 480, 506 N.Y.S.2d 528 (Sup. Ct. Monroe County 1986), plaintiffs, residents of Penfield, on behalf of themselves and a class of owners of homestead properties in the towns of Penfield, Walworth, and Ontario, claimed that the Town of Webster's adoption, and subsequent use by the school district, of dual tax rates under articles 19 and 19-A caused them to pay a higher proportion of the school tax burden than did similarly situated owners of residential properties in the Town of Webster, solely as a result of geographic location. *Id.* at 482, 506 N.Y.S.2d at 529. The plaintiffs sought recovery of property taxes which had been collected under articles 19 and 19-A prior to the decision that these articles were unconstitutional. The plaintiffs submitted exhibits showing that a residence of the same value in each of the four towns making up the school district would pay a different amount of tax. *Id.* at 483, 506 N.Y.S.2d at 530. These figures were not contested by the school district. The court, following the precedent established by the decisions in *Foss I* and *Foss II*, declared the levy for 1985-1986 unconstitutional. *Id.* at 483, 506 N.Y.S.2d at 530. The court did not, however, grant a tax refund to the plaintiffs. In reaching this conclusion, the court distinguished *Bethlehem Steel Corp. v. Board of Educ.*, 44 N.Y.2d 831, 378 N.E.2d 115, 406 N.Y.S.2d 752 (1978), and *Hurd v. City of Buffalo*, 34 N.Y.2d 628, 311 N.E.2d 504, 355 N.Y.S.2d 369 (1974), from the case at bar. Both of these cases concerned municipalities that had maintained taxing schemes under state laws that were ultimately held unconstitutional. In *Hurd*, however, retroactive relief was denied due to the insurmountable financial burden such payments would place upon the municipality.

First, the court noted the difference between the types of constitutional violations involved, and stated that while the *Hurd* and *Bethlehem Steel* cases involved violations that could be determined with mathematical precision, the *Foss* decisions involved the "more nebulous concept of equal protection" and could not have been determined arithmetically. *Forward*, 133 Misc. 2d at 485, 506 N.Y.S.2d at 531. The second distinction was found to be the amount of time that elapsed between the decisions in each pair of cases. Between *Hurd* and *Bethlehem Steel*, four years and five fiscal years passed before refunds were deemed proper. Moreover, in *Bethlehem Steel* the court noted that the legislature had completely ignored the decisions in *Hurd* and passed bills authorizing taxes exceeding the constitutional limits. By comparison, the two *Foss* decisions were written in the same year and the complete and repeated "disregard of the constitutional mandate" present in *Bethlehem Steel* was not present. *Id.* at 485-86, 506 N.Y.S.2d at 531-32. Based on this reasoning, the court declared that *Bethlehem Steel* was not authority for granting refunds in this case. *Id.* at 487, 506 N.Y.S.2d at 532-33.

447. 115 A.D.2d 600, 496 N.Y.S.2d 262 (2d Dep't 1985).

sought to have sections of the RPTL declared unconstitutional because there were differing assessments in the county, and, additionally, certain assessing units had adopted the dual tax rates provided for in article 19. The plaintiff claimed that the inapplicability of the protective ceiling on the aggregate assessment value of condominium units⁴⁴⁸ to assessing units that adopted the provisions of article 19 caused condominiums in those assessing units to be assessed at a different value from those condominiums assessed under the cap.⁴⁴⁹ Thus, similarly situated properties were being taxed unequally.⁴⁵⁰ The second department agreed with the trial court that the plaintiffs were entitled to enjoin Clarkstown from using article 19, but were not entitled to have all the property located in the town assessed at full value, since the law did not require it.⁴⁵¹ Currently, under *Verga*, it is unconstitutional to assess some, but not all, condominiums in a taxing jurisdiction without regard to the assessment ceiling embodied within section 339-y of the Real Property Law.⁴⁵² As a result, the second department has created yet another distinction, condominiums, to which the provisions of article 19 are no longer applicable.

In 1986, the special assessing units (Nassau County and New York City) sought to change⁴⁵³ the provisions of section 1802,⁴⁵⁴ those governing the classification of property, into four classes. Under that scheme, condominiums of all sizes were placed in Class Two while one, two, and three family homes were placed in Class One.⁴⁵⁵ Pursuant to chapter 218 of the laws of 1986,⁴⁵⁶ all condominiums of less than four stories in height that have not appeared on a tax roll in some form of ownership are designated as Class One properties in special as-

448. N.Y. REAL PROP. LAW § 339-y(1)(b) (McKinney 1989).

449. *Verga*, 115 A.D.2d at 601, 496 N.Y.S.2d at 262.

450. *Id.*

451. *Id.* at 601, 496 N.Y.S.2d at 263.

452. *Id.*

453. Memorandum of Legislative Representative of City of New York, *reprinted in* Act of June 28, 1986, ch. 218, 1986 N.Y. Laws 362 (McKinney).

454. N.Y. REAL PROP. TAX LAW § 1802(1) (McKinney 1989).

455. *Id.*

456. Act of June 28, 1986, ch. 218, § 1, 1986 N.Y. Laws 362, 362 (codified as amended at N.Y. REAL PROP. TAX LAW § 1802 (McKinney 1989)).

sessing units. Like chapter 800 of the laws of 1983,⁴⁵⁷ the valuation methodology limitations of section 581 of the RPTL⁴⁵⁸ and the assessment ceiling contained in section 339-y of the Real Property Law⁴⁵⁹ no longer apply to these condominiums.

The benefits of this legislation certainly accrue to those condominiums placed within Class One, since the limitations pertaining to assessment increases of that class are far more stringent than those of Class Two. While Class Two properties of this size may be faced with increases of eight percent per year and up to 30% over five years, Class One properties cannot have their assessments altered by more than six percent a year or 20% over five years.⁴⁶⁰ Of course, there is a benefit to the municipalities. Where the assessment cap imposed by section 339-y⁴⁶¹ is removed, the taxes that will be collected should increase because the aggregate value of the now distinct parcels should be higher than the assessment allowed under the cap.⁴⁶²

While these benefits accrue, certain problems may also arise. In Nassau and Suffolk counties, school districts that encompass more than one assessing unit may run afoul of *Verga*.⁴⁶³ Moreover, the adjusted base proportions were not to be set by the SBEA until 1989.⁴⁶⁴ However, while authorizing the change in classification, this bill did not authorize a corresponding change in the base proportions. As such, the tax rates for Class One and Class Two may be distorted.⁴⁶⁵

457. Act of July 30, 1983, ch. 800, 1983 N.Y. Laws 1492 (codified as amended at N.Y. REAL PROP. TAX LAW § 1901 (McKinney 1989)).

458. N.Y. REAL PROP. TAX LAW § 581 (McKinney 1984).

459. N.Y. REAL PROP. LAW § 339-y(1)(b) (McKinney 1989).

460. N.Y. REAL PROP. TAX LAW § 1805(1) (McKinney 1989).

461. N.Y. REAL PROP. LAW § 339-y(1)(b) (McKinney 1989).

462. "Generally, the aggregate sales value of condominium units exceeds the aggregate value of units in comparable rental buildings. Consequently, the City's tax base would probably increase as a result of the proposed change, generating additional tax dollars." Letter from Mayor Ed Koch to Governor Mario Cuomo (June 18, 1986), *reprinted in* Bill Jacket of ch. 218, 1986 N.Y. Laws 362 (McKinney).

463. *Verga v. Town of Clarkstown*, 115 A.D.2d 600, 496 N.Y.S.2d 262 (2d Dep't 1985).

464. *See supra* notes 395-427 and accompanying text.

465. This distortion would result from the artificially reduced class one and class two tax rates. Memorandum from Steven Stark-Riemer to Robert Beebe, SBEA Counsel (June 20, 1986), *reprinted in* Bill Jacket of ch. 638, 1986 N.Y. Laws 362 (McKinney).

V. CONTINUED ALTERATION OF ALLOWABLE METHODS OF PROOF FOR INEQUITY PROCEEDINGS: SAVING THE LOCAL GOVERNMENTS

The law regarding the types of proof available to taxpayers under section 720⁴⁶⁶ for use in certiorari proceedings also continued to change. In 1981, section 720(3) authorized the use of the select parcels or actual sales methods in all assessing units;⁴⁶⁷ the state equalization rate in all assessing units except special assessing units (the City of New York and Nassau County);⁴⁶⁸ and class ratios in special assessing units provided the inequality claimed by a taxpayer within the class was greater than 12½ percent above the class ratio.⁴⁶⁹

In 1985, chapter 878⁴⁷⁰ amended section 720(3) to limit the methods of proof available to taxpayers in all assessing units outside New York City and Nassau County. The legislation barred the use of the actual sales method⁴⁷¹ and required petitioners using the selected parcels method to select the parcels included in their samples "so as to constitute a random sample of parcels on the assessment roll containing the assessment under review."⁴⁷² This legislation did not make any alteration with regard to the use of the state equalization rate. The provisions of the bill were enacted with a sunset provision dated June 30, 1986, the date upon which the prior provisions would again take effect.⁴⁷³ Finally, the bill was made applicable to all proceedings already commenced, but not finally determined as of its effective date, as well as to those commenced after its effective date.⁴⁷⁴

466. N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989).

467. *Id.* § 720(3)(a).

468. *Id.* § 720(3)(b).

469. *Id.* § 720(3)(c).

470. Act of Aug. 2, 1985, ch. 878, § 1, 1985 N.Y. Laws 2270, 2270-71 (McKinney) (codified as amended at N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989)).

471. *Id.* §§ 1, 2, at 2270-71.

472. *Id.*

473. *Id.* § 2, at 2271.

474. *Id.*

The 1986 legislative amendment to section 720⁴⁷⁶ re-enacted the provisions of chapter 878⁴⁷⁶ on a permanent basis: banning the use of sales surveys; requiring the use of the random sample; and extending these provisions to the special assessing units.⁴⁷⁷ In addition, it again altered the select parcel method to require a "stratified random sample"⁴⁷⁸ based upon newly created classes called "major types of property."⁴⁷⁹ Further,

475. Act of July 26, 1986, ch. 679, 1986 N.Y. Laws 1547 (McKinney) (codified as amended at N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989)).

476. Act of Aug. 2, 1985, ch. 878, § 2, 1985 N.Y. Laws 2270, 2271 (McKinney). Chapter 878 embodied within it a sunset provision that had its effective expiration on June 30, 1986, which resulted in the prior provisions of section 720(3) again taking effect.

477. *Id.* A difference between the application of the random sample requirement in special assessing units and the rest of the state is that within the special assessing units the random sample is to be based upon the class of property in which the challenged parcel is classified, using the classes defined by section 1802(1). Act of July 26, 1986, ch. 679, § 1, 1986 N.Y. Laws 1547, 1547-48 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 720(3)(b)(1) (McKinney 1984 & Supp. 1989)).

478. Act of July 26, 1986, ch. 679, § 1, 1986 N.Y. Laws 1547-49 (McKinney). A stratified random sample is one where the parcels are sorted into a number of mutually exclusive categories known as "major types of property," each of which is sampled independently in such a manner to provide that each parcel will have an equal chance of being selected for use. Having sampled parcels within each property type, the selected parcels are then consolidated into one sample of selected parcels, thereby constituting a sample of all the locally assessed taxable properties.

The bill also states that its provisions are not meant to prevent any alternative method of stratification in place of or in addition to the use of the major types of property, so long as the parties agree upon, and the court approves, the alternative or additional method. *Id.*

479. *Id.* For assessing units other than article 18 & 19 special assessing units, and for those special assessing units for assessment rolls completed before January 1, 1982, four types of property were designated, as follows:

- (i) residential: 1, 2, & 3 family residences, except cooperatives and condominiums, or the homestead class for approved assessing units;
- (ii) farm, forest or vacant lands;
- (iii) public utility; and
- (iv) all other properties. An exclusion to the use of public utility properties in the sample was incorporated into the bill, however, except where these properties make up a significant portion of the total assessed value of the assessing unit or where the parties agree or the court directs that such properties be included.

Id. at 1547.

For special assessing units for assessment rolls completed after December 31, 1981, the major property types are the same classes that are set out in section 1802

the bill allowed for the use of the state equalization rate in special assessing units for challenges to assessment rolls completed prior to January 1, 1982.⁴⁸⁰ It required the SBEA to create class ratios for 1982 and 1983 and eliminated the requirement that the petitioner prove inequality greater than 12½% of the class ratio.⁴⁸¹

The legislation continued the policy begun in 1985 in order to ease the existing and potential financial burdens faced by local governments as a result of certiorari proceedings.⁴⁸² The means to effect this policy was the elimination of the actual sales method. It was believed that the use of the actual sales

of the RPTL. Here, however, the random sample is limited to parcels within the class containing the assessment that is being challenged, as opposed to parcels from all the classes as is used in the other assessing units. *Id.* at 1549.

It should be understood that the "major types of property" are used as a basis for developing market value surveys, with such surveys being used by the Division of Equalization and Assessment to compute equalization rates. A stratified random sample, on the other hand, is often viewed as the means of deriving an up-to-date equalization rate. *See infra* note 499 and accompanying text.

480. Act of July 26, 1986, ch. 679, § 1, 1986 N.Y. Laws 1547-49 (McKinney).

481. *Id.* § 2, at 1549. Upon the enactment of this bill, there existed three different sets of rules for the types of proof allowable in inequity suits, as set forth below:

1. Special Assessing Units (New York City & Nassau County) - Assessment Rolls Completed Prior to January 1, 1982:

- (a) the State equalization rate;
- (b) stratified random sample of all locally assessed taxable parcels on the roll.

2. Special Assessing Units - Assessment Rolls Completed After January 1, 1982:

- (a) class ratio;
- (b) stratified random sample based on assessed value of other property within the same class.

3. All Other Assessing Units:

- (a) State equalization rate;
- (b) stratified random sample of all locally assessed taxable parcels on the roll.

Id.

All the assessing units also included locally assessed public property if it constitutes a "significant portion of the locally assessed taxable" real property. Memorandum from Richard Sinott to Robert Beebe, SBEA Counsel (July 11, 1986) (discussing A. 11684-A, which became ch. 679, 1986 N.Y. Laws 1547 (McKinney)), reprinted in Bill Jacket of ch. 679, 1986 N.Y. Laws 1547 (McKinney).

482. Letter from George Friedman, Chairman of the Assembly Committee on Real Property Taxation, to Evan Davis, Counsel to the Governor (July 22, 1986), reprinted in Bill Jacket of ch. 679, 1986 N.Y. Laws 1547 (McKinney).

data created a statistically invalid ratio, which led to unfavorable results insofar as local governments were concerned.⁴⁸³

While the policy questions focused on the actual sales method, the legislation affected the selected parcels method as well, apparently upon the theory that they were closely interrelated. First, the legislature believed that "[s]ales which occur in any particular area are by definition, not equal to a random sample of the property on a local assessment roll."⁴⁸⁴ The drafters believed that parcels being sold in a given year were not statistically representative of all parcels on the assessment roll since sales statistics underrepresented non-residential and older parcels in less desirable locations.⁴⁸⁵ Prior to these enactments, the use of the actual sales method was thought to create "a lower ratio of assessed value to market value than [was] actually the case."⁴⁸⁶ Due to this statistical invalidity, petitioners using this method were often able to receive large assessment reductions and tax refunds.⁴⁸⁷

Second, requiring that the parcels used in the select parcel method be chosen so as to constitute a random sample would "make it statistically valid and thus more useful."⁴⁸⁸ The select

483. Letter from Senator Flynn, sponsor of S. 6608, to Gerald Crotty, Counsel to the Governor (July 16, 1985), *reprinted in* Bill Jacket of ch. 878, 1985 N.Y. Laws 2270 (McKinney).

484. Memorandum in Support of S. 6608 from Senator Flynn and Assemblyman Brodsky, *reprinted in* Bill Jacket of ch. 878, 1985 N.Y. Laws 2270 (McKinney).

485. *Id.*

486. Letter from Senator Flynn, sponsor of S. 6608, to Gerald Crotty, Counsel to the Governor (July 16, 1985), *reprinted in* Bill Jacket of ch. 878, 1985 N.Y. Laws 2270 (McKinney).

487. *Id.* In addition to establishing a ratio that entitled them to an assessment reduction and potential tax refund, petitioners often set a rate that would be used against the municipality many times over. This result occurred because of the collateral estoppel effect that the establishment of a sales ratio in one case had upon other challenges to assessments within the municipality for the same tax year. *See* 860 Executive Towers v. Board of Assessors, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't 1976), *aff'd sub nom.* Pierre Pellaton Apartments, Inc. v. Board of Assessors, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977); *see also* Slewett & Farber v. Board of Assessors, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

488. Letter from Senator Flynn, sponsor of S. 6608, to Gerald Crotty, Counsel to the Governor (July 16, 1985), *reprinted in* Bill Jacket of ch. 878, 1985 N.Y. Laws 2270 (McKinney).

parcel method had been criticized as not being truly representative of all classes of property in an assessing unit because taxpayers sought parcels with low assessments and governments sought parcels with high assessments to use as their representative samples in determining the assessment ratio.⁴⁸⁹ This provided the impetus for the stratified random sample which would ensure proper representation from all classes of property.⁴⁹⁰ Moreover, the belief was that since the use of actual sales produced misrepresentations, only a random sample would be representative of the general population under study⁴⁹¹ and, thereby, produce results in certiorari proceedings that would be less onerous to the governments involved.

The potential liability for refunds to taxpayers had grown immensely, and municipalities sought the aid of the legislature in assuring continued fiscal viability.⁴⁹² From the legislative history surrounding the two bills, it appears that the legislature and municipalities believed that the primary means to prevent local governments from facing liability for tax refunds was to repeal the use of the actual sales method, first for all assessing units outside of the special assessing units and, later, for special assessing units upon their request.⁴⁹³ The use of the stratified random sample was required to reflect, more accurately,

489. DIVISION ON BUDGET 10-DAY REPORT ON BILLS, S. 6608, *reprinted in* Bill Jacket of ch. 878, 1985 N.Y. Laws 2270 (McKinney).

490. *See supra* note 478 and accompanying text.

491. *Id.*

492. In addition to the two bills being discussed, the same sponsors (Senator Flynn and Assemblyman Brodsky) also persuaded the legislature to pass S. 5692/ A. 7504. This bill would have eliminated the requirement that cities and towns be responsible for the refunding of county taxes to successful petitioners where the court-ordered refund was \$10,000 or less. However, the governor vetoed the bill citing the increased costs to the counties, and the lack of any reliable estimate as to the precise fiscal impact. Governor's Veto Message, *reprinted in* 1985 N.Y. LEGIS. ANN. 363.

493. *See, e.g.*, Letter from Edwin L. Crawford to Evan A. Davis, Counsel to the Governor (July 17, 1986) (supporting S. 9595/ A. 11684-A); Letter from Adrian Stanton to Gerald Crotty, Counsel to the Governor (July 15, 1985) (supporting S. 6608-A, Assembly Reprint 30010 which was adopted by both houses of the New York State Legislature); Letter from Henrietta Acampora to Gerald Crotty, Counsel to the Governor (July 16, 1985) (supporting S. 6608-A/ A. 30010); Letter from Anthony F. Veteran to Gerald Crotty, Counsel to the Governor (July 8, 1985) (supporting S. 6608-A/ A. 30010); Letter from Ed Koch by Claudia Wagner to Gover-

the information needed.⁴⁹⁴ Municipalities also hoped that the use of random samples would ensure more favorable results.⁴⁹⁵

As expected, the elimination of the actual sales method was met with strong objection by those who stood to lose the most: commercial and industrial property owners.⁴⁹⁶ While these enactments might have saved local governments from the fiscal impact of correcting inequitable assessments, non-homestead property owners relied on challenges to their assessments to obtain reductions and refunds where improper assessments had taken place. Taxpayers saw this legislation as an infringement upon their right to seek redress.⁴⁹⁷ Among the deficiencies cited by taxpayers were: the lack of specificity of the number of parcels required for a valid sample; the fact that the mathematically chosen random sample parcels were not subject to appraisal; the lack of access to the appraisals; and the lack of precise methodology for the random sample.⁴⁹⁸ However, this argument might have been countered, in part, by pointing out that a stratified random sample is not altogether different from a market value survey, which is used by the SBEA to formulate class ratios and equalization rates and is generally considered reliable.⁴⁹⁹

nor Mario Cuomo (July 15, 1985) (supporting and stating no objection to S. 6608/A. 30010).

494. *Id.*

495. *Id.*

496. See Letter from Raymond Schuler, President of Business Council of New York State, to Gerald Crotty, Counsel to the Governor (July 16, 1985); Memorandum from Lesley Douglass, Deputy Commissioner and Counsel to the Department of Commerce, to Gerald Crotty, Counsel to the Governor (July 23, 1985); Letter from Robert Weibolt and Gary Dutchess, New York State Builders Association, to Gerald Crotty, Counsel to the Governor (July 12, 1985), *reprinted in* Bill Jacket of ch. 828, 1985 N.Y. Laws 2186 (McKinney).

497. *Id.*

498. *Id.*

499. The methodology of creating a stratified random sample called for by chapter 679 is to divide all of the taxable parcels, except public utility property, into a number of mutually exclusive categories. Each of these categories is then sampled independently in such a manner that each parcel has an equal chance of being selected. N.Y. REAL PROP. TAX LAW § 720(3)(a)(3) (McKinney 1984 & Supp. 1989). Quite similarly, the SBEA classifies each assessment roll by major type of property in order to conduct their surveys. These classifications are then stratified in

Irrespective of the merits, several concerns arose regarding tax certiorari proceedings for the future. Again, questions surfaced about due process and equal protection in respect to the administration of the property tax and the remedies available where it was administered inequitably. These concerns served not only as a review of many of the issues previously dealt with by the legislature and the courts, but also showed how little progress had been made toward achieving an overall system of tax administration that is just and equitable.

The equal protection question arose in two contexts. The second time the question arose was upon the passage of chapter 878 in 1985.⁵⁰⁰ That legislation preempted the use of the sales method for all assessing units outside of special assessing units⁵⁰¹ and raised concern over the legality of a law based on geographic and population-related rationales. While potentially legal under the rational basis theory elucidated in *Colt Industries v. Finance Administrator of the City of New York*,⁵⁰² this problem was eliminated upon passage of chapter 679 in 1986,⁵⁰³ which made this form of proof unavailable in any part of the state.⁵⁰⁴

The question of equal protection had first been raised in the context of the disallowance of the equalization rates as a form of proof in suits involving special assessing units from that allowed in all other assessing units under section 720(3).⁵⁰⁵ However, in 1982, the court of appeals decided *Colt* and upheld the ban on the use of the equalization rate in special assessing units in inequality suits, based upon a finding of constitutional-

order to have the parcels selected randomly. See also N.Y. COMP. CODES R. & REGS. tit. 9, § 186-22 (1988) for market survey procedures.

500. Act of Aug. 2, 1985, ch. 878, 1986 N.Y. Laws 2270 (McKinney).

501. *Id.*

502. 54 N.Y.2d 533, 430 N.E.2d 1290, 446 N.Y.S.2d 237 (1982), *reargument denied sub nom.* Equitable Life Assurances Soc'y v. Finance Adm'r of New York, 56 N.Y.2d 646, 436 N.E.2d 196, 450 N.Y.S.2d 1026 (1982), *appeal dismissed*, 459 U.S. 983 (1982).

503. Act of July 26, 1986, ch. 679, 1986 N.Y. Laws 1547 (McKinney).

504. *Id.* §§ 1-3, at 1547-50.

505. N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989).

ity of section 720(3).⁵⁰⁶ Using a rational basis analysis, the court found that the legislature had a rational basis for designating New York City and Nassau County as special assessing units and restricting the admissibility of the state equalization rate in such units because of their unique nature, the diversity of property, and the heavy density of population.⁵⁰⁷ The rationale for the use of class ratios instead of the state equalization ratio after 1982 is the same and it should, therefore, meet equal protection requirements.

The use of class ratios raised a different concern. In its memorandum regarding chapter 679,⁵⁰⁸ the SBEA noted the disparity between the supposedly uniform standard of assessment called for by section 305(2)⁵⁰⁹ and the inability of taxpayers in special assessing units to obtain relief for anything other than intra-class inequality.⁵¹⁰ Under sections 701(8)⁵¹¹ and 720(3)(c),⁵¹² allegations of inequality by taxpayers within special assessing units must be based upon an unequal assessment "which is made at a higher proportionate valuation than the assessed valuation of other real property in the same class"⁵¹³ and the form of proof to be used is the class ratio.⁵¹⁴ These requirements do not comport with the uniformity standard as it is applied to all other assessing units. However, the Appellate Division, Second Department, in *Metz v. Seldin*,⁵¹⁵ affirmed a lower court's holding that section 305(2) required only that assessments be made uniformly within each class and that the pleading requirement of section 701(8) is not inconsistent with section 305(2).⁵¹⁶ This finding rested on the legisla-

506. *Colt Indus. v. Finance Adm'r of New York*, 54 N.Y.2d 533, 544, 430 N.E.2d 1290, 1293-94, 446 N.Y.S.2d 237, 240-41 (1982).

507. *Id.* at 544, 430 N.E.2d at 1293, 446 N.Y.S.2d at 240.

508. Act of July 26, 1986, ch. 679, 1986 N.Y. Laws 1547 (McKinney).

509. N.Y. REAL PROP. TAX LAW § 305(2) (McKinney 1984).

510. Letter from Robert Beebe, SBEA Counsel, to Evan Davis, Counsel to the Governor (July 22, 1986), reprinted in Bill Jacket of ch. 679, 1986 N.Y. Laws 1547 (McKinney).

511. N.Y. REAL PROP. TAX LAW § 701(8) (McKinney 1984).

512. *Id.* § 720(3)(c).

513. *Id.* § 701(8)(b).

514. *Id.*

515. 105 A.D.2d 749, 481 N.Y.S.2d 646 (2d Dep't 1984).

516. *Id.*

ture's intention to create separate classes, the goal being uniformity within each class, through chapter 1057 of the laws of 1981.⁵¹⁷ The court had a duty to adopt a construction of the law that effectuated the legislature's intent.⁵¹⁸

Another case indicated that this disparity may be suspect. In 1986, the same second department, in *860 Executive Towers, Inc. v. Board of Assessors of the County of Nassau*,⁵¹⁹ held that:

the settled rule is that assessments must be made at a uniform rate or percentage of all market value for every type of property in the assessing unit. . . . This uniformity rule effectively prohibits assessment by category of property in certiorari proceedings, and this is so whether one utilizes the State equalization rate or the selected parcel method, for both establish an average ratio for all property classes.⁵²⁰

Until a decision from the court of appeals settles the matter, the inconsistency between the standard of assessment and the standard for judicial review will continue to be an unclear area of the law.

The changes wrought by these pieces of legislation also raised potential due process concerns. "The due process question . . . is whether the alteration in evidentiary rules has totally deprived tax review petitioners of their right to a refund, for due process demands that litigants be afforded a reasonably efficient mode of redress"⁵²¹ With the elimination of the actual sales method, the remaining alternatives are the state equalization rate, the select parcels method, and class ratios in special assessing units.

The select parcels method, although existing for the longest period of time, has fallen into disfavor. It is no longer generally employed due to the "prohibitive nature of the expense in-

517. Act of Dec. 3, 1981, ch. 1057, 1981 N.Y. Laws 2270 (McKinney).

518. *Metz*, 105 A.D.2d at 749, 481 N.Y.S.2d at 646.

519. 53 A.D.2d 463, 385 N.Y.S.2d 604, (2d Dep't 1976), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

520. *Id.* at 471, 385 N.Y.S.2d at 609.

521. *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 213, 438 N.Y.S.2d 544, 564 (2d Dep't 1981), *modified*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

volved" with its use,⁵²² and because the "opinion evidence of appraisers as to the true value of parcels of real estate selected may vary greatly."⁵²³ Additionally, the problem of expense arises because of the failure to specify the number of parcels necessary to construct a valid sample. With appraisal costs rising, the use of large samples creates a significant expense for the petitioner. Moreover, the use of parcels from all classes requires the inclusion of commercial and industrial properties, which are often difficult and expensive to appraise.

In *Slewett and Farber v. Board of Assessors of the County of Nassau*,⁵²⁴ the court examined the costs associated with this method and stated that even "if parcel selection seems an unconstitutionally expensive method by which to prove inequality"⁵²⁵ and even if "the constitution protects an aggrieved taxpayer's right to an 'effective' method of redress,"⁵²⁶ the constitution does not guarantee "taxpayers be provided a cheap means of establishing that their parcels have been assessed in unequal proportion."⁵²⁷ Despite this language, precedent⁵²⁸ indicates that the method may be so prohibitively expensive as to be unconstitutional, thereby making the use of the select parcel method, even in its revamped form, susceptible to challenge.

522. *Id.* at 215, 438 N.Y.S.2d at 565; see *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 449, 315 N.E.2d 441, 445, 358 N.Y.S.2d 367, 372 (1974). "[T]he selected parcel and actual sales method . . . create discouraging and enormous expense for the taxpayer." *Id.*; *Colt Indus. v. Finance Adm'r of New York*, 54 N.Y.2d 533, 430 N.E.2d 1290, 446 N.Y.S.2d 237 (1982).

523. *Mid Island Shopping Plaza, Inc. v. Podynn*, 25 Misc. 2d 972, 978, 204 N.Y.S.2d 11, 17 (Sup. Ct. Nassau County 1960), *aff'd*, 14 A.D.2d 571, 218 N.Y.S.2d 249 (2d Dep't), *aff'd*, 10 N.Y.2d 966, 180 N.E.2d 63, 224 N.Y.S.2d 283 (1961).

524. 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dep't 1981), *modified*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

525. *Id.* at 215, 438 N.Y.S.2d at 565.

526. *Id.*

527. *Id.*

528. *Ed Guth Realty, Inc. v. Gingold*, 54 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974); *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 438 N.Y.S.2d 544 (2d Dep't 1981), *modified*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982); *860 Executive Towers, Inc. v. Board of Assessors*, 84 Misc. 2d 525, 377 N.Y.S.2d 863 (Sup. Ct. Nassau County 1975), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors*, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

The use of the state equalization rate has also come under attack in recent cases and has been found to be unreliable as proof of ratio.⁵²⁹ The reason for this attack has been the lengthening time lag between the survey used to develop the rate and its application to the actual assessment in question. This time lag has grown from twenty-nine months to as much as fifty-nine months.⁵³⁰ In addition to the time lag, another

529. See *Technicon Instruments Corp. v. Assessor of Greenburgh*, 133 A.D.2d 271, 519 N.Y.S.2d 61 (2d Dep't 1987); *Great Atl. & Pac. Tea Co. v. Kiernan*, 79 A.D.2d 371, 437 N.Y.S.2d 851 (3d Dep't 1981).

530. The following table itemizes the time lag for each state equalization since 1971:

ASSESSMENT ROLL	SURVEYS	VALUE DATE	MONTHS LAG BEHIND 6/1 STATUS DATE
1985	1980	7/1/80	59
1984	1978 & 1980	11/1/79	55
1983	1978 & 1980	3/1/79	51
1982	1978	7/1/78	47
1981	1978	7/1/78	35
1980	1976 & 1978	7/1/77	35
1979	1976	7/1/76	35
1978	1974 & 1976	7/1/75	35
1977	1974	7/1/74	35
1976	1973 & 1974	7/1/73	35
1975	1973	1/1/73	29
1974	1970 & 1973	1/1/72	29
1973	1970	1/1/70	29
1972	1968 & 1970	1/1/69	29
1971	1968	1/1/68	29

Letter from William Siegel, Tax Certiorari & Condemnation Committee, Real Property Law Section of the New York State Bar Association, to Gerald Crotty, Counsel for the Governor (July 18, 1985). Since this letter has been written, the SBEA has strived for a three-year lag to be maintained. A three-year lag has been deemed appropriate because of the time it takes to conduct and analyze a market value survey. It takes roughly two and one-half years to sample the approximately 77,000 parcels sampled, with an additional 35-40,000 parcels from sales. In addition, once a tentative rate has been established, the complaint and review procedures, both individuals and locality administrative reviews, take approximately another year. As a result of these time-consuming procedures, a three-year lag between market surveys and the equalization rate that such surveys produce is considered appropriate.

To further assist in the currency of the equalization rate produced by the market surveys, the SBEA is conducting "update surveys," which utilize the same base data but attempt to obtain more current numbers, especially in current sales. One update survey will be used for each three-year sampling.

problem with the state rate occurs where the property under review constitutes a statistically significant percentage of the taxing unit's total assessed valuation. In this case, the use of the state equalization rate becomes suspect since the market value survey used to develop the rate includes the property under review. First hypothesized by the courts in *860 Executive Towers*,⁵³¹ it was dealt with directly in *Standard Brands, Inc. v. Walsh*.⁵³² The property under review constituted 6.83% of the total assessed valuation for three years, 8.07% for another year, and from 44% to 66% of the total value of the properties included in the sample used to develop the state rate.⁵³³ The court found that the state rate was suspect for this reason and that an alternative means of proof was a better indication of the proper ratio.⁵³⁴ Courts may be calling for a "practical, non-prohibitively expensive means"⁵³⁵ as an alternative to the state rate when such circumstances exist, but with the elimination of the actual sales method, such an alternative may not exist.

For these reasons, the use of the select parcel method, in the form of stratified random samples, and the state equalization rate are now suspect in their applicability to prove ratio. If the courts continue to find the use of these methods invalid, a "reasonably efficient mode of redress"⁵³⁶ under due process may be absent, and these statutes may be vulnerable to constitutional attack.

While the prior discussion of existing law is an indication of potential problems, two things should be noted. First, the legis-

531. 53 A.D.2d 463, 471, 385 N.Y.S.2d 604, 609 (2d Dep't 1976), *aff'd sub nom.* Pierre Pellaton Apartments, Inc. v. Board of Assessors, 43 N.Y.2d 769, 372 N.E.2d 801, 401 N.Y.S.2d 1013 (1977).

532. 92 Misc. 2d 903, 402 N.Y.S.2d 264 (Sup. Ct. Westchester County), *aff'd*, 60 A.D.2d 605, 399 N.Y.S.2d 1020 (2d Dep't 1977), *appeal denied*, 43 N.Y.2d 649, 374 N.E.2d 1250, 403 N.Y.S.2d 1028 (1978).

533. *Id.* at 914, 402 N.Y.S.2d at 270-71.

534. *Id.* at 915-16, 402 N.Y.S.2d at 271.

535. Letter from Robert Beebe, SBEA Counsel, to Evan Davis, Counsel to the Governor (July 22, 1986), *reprinted in* Bill Jacket of ch. 679, 1986 N.Y. Laws 1547 (McKinney).

536. *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 213, 438 N.Y.S.2d 544, 564 (2d Dep't 1981), *modified*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

lature has always ensured that two methods of proof have been available in case one method was ruled unconstitutional by a court.⁵³⁷ Second, and less positively, the state of affairs in regard to proof has again been changed to protect municipalities who are responsible for the unequal assessment practices. Unfortunately, the state legislature is in the difficult position of having to choose between the continued fiscal stability of local governments, or in the alternative, funding them with state money, and individual taxpayers seeking redress in the courts. For now, that choice has favored municipalities. One obvious side effect of limiting evidence regarding commercial and industrial properties is the undermining of the state's economic development policy of attracting new businesses. One effect of these enactments that does seem certain, however, is that the flood of litigation will continue.

CONCLUSION

The primary problem with our present system of real property tax administration is the policy which places maintenance of the status quo above the correction of assessment inequities.

In many instances this policy inevitably is accompanied by a marked disinclination to facilitate taxpayer knowledge and understanding. Nothing is more characteristic of these attitudes than the 1981 repeal of the full value standard of assessment.⁵³⁸

Throughout this article, legislative efforts and court decisions have been analyzed for their effect upon the methods by which real property tax assessments and inequality proceedings are undertaken in New York State. While the need for this analysis arose many years ago, it was not until certain key cases were decided by the court of appeals that these issues were forced to the forefront. The cases which created this flurry of legislation and resulting court decisions were: *Ed Guth Realty, Inc. v. Gingold*,⁵³⁹ which made challenging as-

537. N.Y. REAL PROP. TAX LAW § 720(3)(a)(3) (McKinney 1984 & Supp. 1989).

538. Letter from Robert Beebe, SBEA Counsel, to Evan Davis, Counsel to the Governor (July 22, 1986), *reprinted in* Bill Jacket of ch. 679, 1986 N.Y. Laws 1547 (McKinney).

539. 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974).

sessments easier; *Hellerstein v. Assessor of the Town of Islip*,⁵⁴⁰ which required that the full value standard be followed; and *Foss v. City of Rochester*,⁵⁴¹ which invalidated, in part, the system created by the legislature in its effort to maintain the status quo in the wake of *Hellerstein*.

As a result of these decisions, New York State has been provided with the opportunity to remedy assessment practices that have been characterized by the U.S. Bureau of the Census as "one of the most inequitable systems in the nation."⁵⁴² Despite this opportunity to alter the system dramatically to encompass greater equity in assessments, the legislature chose to preserve, to the largest extent possible, the status quo as it existed for pre-*Hellerstein* tax burden apportionment. The advancements in assessing practices made after *Hellerstein* were the result of local governments undertaking actions themselves, in the belief that the full value standard of assessment would be implemented statewide.

Despite the statutory standard of full value, a system of *de facto* fractional assessing had developed in the state. This practice had existed for a long time prior to *Hellerstein*, and its eradication was not welcomed by many taxpayers. The taxpayers who benefit from this system are predominantly from one class of property owners, homeowners, and are also primarily responsible for electing the government officials who create and modify the system of taxation. After *Hellerstein*, this group of voters exerted sufficient pressure upon their elected officials to ensure that the system would not be disturbed. While this characterization deserves some mitigation, both the governor and the legislature chose to maintain what has been clearly shown to be an inequitable system of assessing real property. Furthermore, this choice has allowed real property tax-related problems to continually plague the governor, the legislature,

540. 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975).

541. 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 367 (1974) (*Foss I*).

542. NEW YORK STATE DIVISION OF EQUALIZATION & ASSESSMENT, FULL VALUE ASSESSMENTS: 1980 REVALUATION PROJECTS & AN ANALYSIS OF IMPACT ON SCHOOL REAL PROPERTY TAXES, at 3 (1981) [hereinafter FULL VALUE ASSESSMENTS].

and the local governments, as evidenced by the need for recurring remedial legislation.

As a result of *Hellerstein* and *Guth*, the focus of attention has been on the impact that applying the full value standard of assessment has in creating tax burden shifts and the ease with which aggrieved taxpayers get courts to compel compliance with the standard. This concern raised important questions of tax policy regarding the question of who should bear the burden of taxation within a community. Unfortunately, this question became integrally related to assessment practices. The intertwining of these concepts is clearly erroneous, at least in the context of article 19,⁵⁴³ since apportioning the taxes borne by each class of taxpayer is not the same as determining the basis for the individual taxpayer's liability. The relation is merely that the determination of individual taxpayers' liabilities, in the aggregate, provides some of the information necessary to make tax policy choices in apportioning the tax burden, such as the classification of assessments or tax rates, homestead exemptions, and circuit breakers.⁵⁴⁴ Thus, it is important to bifurcate the process by which assessments are made from policy decisions regarding who will bear tax burdens.

The basic premise and requirement in the equitable administration of a real property tax is that similarly situated property owners be treated in a similar fashion.⁵⁴⁵ As such, the overall goal of an assessment standard is uniformity. This premise is true regardless of the method by which assessments are determined. The use of anything other than the full value standard to initially value properties, however, creates the possibility of a lack of uniformity both within and between assessing units. Moreover, in New York State, where school districts often, and counties virtually always, include all or portions of several as-

543. See N.Y. REAL PROP. TAX LAW §§ 1901-1905 (McKinney 1989); N.Y. REAL PROP. TAX LAW § 1906 (McKinney 1989).

544. 1980 DIVISION OF EQUALIZATION & ASSESSMENT, REPORT ON PROPOSED REFORMS IN REAL PROP. TAX ADMIN. 4.

545. *Foss v. City of Rochester*, 65 N.Y.2d 247, 254, 480 N.E.2d 717, 720, 491 N.Y.S.2d 128, 132 (1985) (*Foss II*).

sessing units, the interjurisdictional inequities become more acute, despite the equalization process.⁵⁴⁶

The use of fractional assessments on a uniform basis can result in equity being achieved. This result is possible when uniformity is achieved within each and every assessing unit comprising a taxing jurisdiction. Historically, had the assessors followed the rulings of the courts that validated the use of uniform fractional assessments prior to *Hellerstein*, the impact of that decision would not have been so great. The problems arose because assessors had not assessed uniformly within each locality. A significant portion of the financial impact that municipalities faced under decisions authorizing tax refunds did not result from imposition of the full value standard, but from the past practices of non-uniform assessment that were exposed by applying the full value standard. Further, it is the lack of uniformity that engenders the equal protection challenges as well as the inter-class and intra-class tax shifts upon revaluation.

Currently, under section 305(2),⁵⁴⁷ the uniformity required is limited to assessing units. Experience indicates that differing fractions will be employed by different assessing units within a single taxing jurisdiction. Notwithstanding the equalization rate, this non-uniformity can raise legal challenges within counties and school districts. Moreover, the employment of fractional assessing itself does not obviate the need to initially determine the property's value in accordance with the full value standard. A fractional assessment is the application of a percentage of the full value to the property in question. If this fraction is to be applied uniformly, then the basis to which it applies must also be uniform. This is best achieved through the use of the full value standard. Recognition of this principle may be seen from a study done by the state assembly in which even the argument for preservation of the status quo takes note that "the key to the establishment of a classification system is that all property must be valued at base [full] value."⁵⁴⁸

546. FULL VALUE ASSESSMENTS, *supra* note 542, at 2.

547. N.Y. REAL PROP. TAX LAW § 305(2) (McKinney 1984).

548. LEGISLATIVE RESPONSE, *supra* note 177, at 21.

Should the full value standard be applied statewide, several benefits would accrue. First, the legislature's chosen distribution of the tax burden need not be disrupted. An identical distribution of the tax burden could be created by the use of uniform full value assessments and classified tax rates.⁵⁴⁹ Under such a system, assessment judgments would be made independently of the policy decisions regarding the apportionment of taxes. This would allow for changes in the relative share of the burden to be shifted merely by altering tax rates for each class. Currently, such a policy change is complex in nature and would require authorizing legislation. Assessment changes may occur in quantities no greater than those prescribed by law in approved and special assessing units⁵⁵⁰ and there is great risk of suit in the other assessing units due to the existing inequities that are exposed as well as those created to effectuate such a shift. These problems greatly limit the appropriate governmental unit from making and implementing policy choices it should have available.

Second, the use of full value would help to eliminate inter-class and intra-class inequities within assessing units and between assessing units within a taxing jurisdiction. Both the legislature and the courts devoted significant time and resources in finding ways to alleviate this problem. On several separate occasions since 1969, the legislature acted to change the types of proof that a taxpayer may use in a certiorari proceeding. Under these various enactments and the court decisions construing them, the use of the state equalization rate was first permitted, next limited, then abolished, and finally reinstated as a method of proof. Now, however, it may be suffering from judicial disfavor due to the time lag between the market surveys used to develop the rate and the actual use date of the rate. The actual sales method, which gained favor with the taxpayers and courts, was abolished by the legislature in 1986.

549. NEW YORK STATE LEGIS. ASSEMBLY WAYS & MEANS COMMITTEE, ASSESSMENT ADMIN., at 21 (1978).

550. See N.Y. REAL PROP. TAX LAW § 1903(2)(b)(ii) (McKinney 1989) (formula used by approved assessing units to adjust proportions); N.Y. REAL PROP. TAX LAW § 1803(2)(b) (McKinney 1989) (for special assessing units, the limit is 5% of the base proportion of the class per year).

Finally, the selected parcels method⁵⁵¹ has been found to be so prohibitively expensive that its constitutionality is in question, despite amendments to its application.⁵⁵² Restrictions on the methods of proof might not be required if revaluations utilizing the full value standard were undertaken. Upon such revaluations, past inequities could be eliminated completely, and with proper administrative practices,⁵⁵³ not allowed to recur. Should the assessment of the properties take place in a uniform manner, there are no state or federal constitutional prohibitions against the application of different tax rates to the various classes of property.

The third benefit of using full value concerns the state's constitutional tax and debt limitations, both of which are based on the average full value of the real property located in a municipality, obtained from the last five assessment rolls. Currently, the state equalization rate is used to determine the full value of the property of a municipality. This use of the ratio also suffers from the important problem of time lag. The SBEA estimates a municipality's full value by computing a "full value trend" based on the four most recent market surveys and applying this trend to the latest full value estimate. The problem is the significant time lag between the completion date of the survey

551. The reference to the "old" select parcels method is in deference to the currently mandated stratified random sample method required by N.Y. REAL PROP. TAX LAW § 720(3)(a)(3) (McKinney 1984 & Supp. 1989). The "old" select parcel method was one in which the parties themselves selected the parcels that best represented their argument and presented those parcels as proof. N.Y. REAL PROP. TAX LAW § 720(3) (McKinney 1984 & Supp. 1989). The "new" select parcels method, or the stratified random sample method, should prove to be more accurate, as it is considerably similar to the market value survey employed by the SBEA in formulating equalization rates. *See supra* note 499 and accompanying text.

552. *See supra* notes 524-28 and accompanying text.

553. This hypothesis assumes that the implementation of the full value standard would be undertaken on a statewide basis. Any effort short of such a wholesale changeover inevitably results in problems with tax administration, continued inequity, and, of course, numerous suits resulting in tax refunds which inevitably threaten the fiscal basis of the municipality involved. These results occur when one or a few assessing units within a taxing jurisdiction undergo revaluation while the others do not. This results in interjurisdictional problems of similarly situated taxpayers receiving different treatment from the taxing jurisdiction. *See Foss v. City of Rochester*, 65 N.Y.2d 247, 254, 480 N.E.2d 717, 720, 491 N.Y.S.2d 128, 132 (1985) (*Foss I*).

and the period during which it will be used. For example, the 1983 survey is the first survey used in computing the trend factor as late as 1998-99 because the 1983, 1986, 1989 and 1992 surveys will be the four most recent until the 1995 survey is completed in 1998. If the full value standard were in place this problem would not occur since a municipality's aggregate full value could easily be ascertained by adding the values of all of its parcels together. Moreover, this simple addition does not suffer from the inclusion of sixteen-year-old data, allowing it to more accurately reflect recent inflation and market adjustments to the value of the property. In fact, this method might prove to expand the tax and debt limits of the municipalities.

The course chosen by the governor and the legislature was the incorrect means to achieve their desired goal. Preservation of a pre-*Hellerstein* apportionment of the property tax burden is a tax policy decision largely realized by perpetuating the status quo in assessment practices and its attendant inequities. This has proven to be the least suitable means by which to effectuate that policy choice. Proof of this may be easily seen in the incessant stream of legislative enactments and litigation that followed. It is not the intention here to make a judgment regarding the tax policy question of who should bear the burden of the property tax. However, insofar as the standard of assessment is concerned, considered from fiscal, constitutional, and administrative perspectives, the best policy for the state to follow is that of full value.

ADDENDUM

In the course of publication of this article, numerous changes to the Real Property Tax Law have taken place as the property tax continues to be in a state of flux. Briefly described below are two of the more important recent events.

One significant case, *Krugman v. Board of Assessors of the Village of Atlantic Beach*,⁵⁵⁴ was decided by the second department in 1988. The court determined that the practice of selective reassessment of only those properties in the village which had been sold during the year prior to the next taxable

554. 141 A.D.2d 175, 533 N.Y.S.2d 495 (2d Dep't 1988).

status date was violative of the equal protection clauses of both the federal and state constitutions.⁵⁵⁵

In discussing the mandates of the RPTL, the court stated that all property within a given jurisdiction is to be assessed at a uniform percentage of market value⁵⁵⁶ and further that this statutory requirement was in keeping with the New York constitutional mandate that assessments within assessing units be equalized for taxation purposes.⁵⁵⁷ The court further found that no legitimate governmental purpose could be served by the differential treatment between similarly situated properties and that the respondents did not suggest any rational basis in their opposing papers.⁵⁵⁸ Additionally, the court stated:

It would appear that the sole purpose of the different classes is to serve administrative convenience by relieving the village of the burden of conducting a total review of the tax roll and instead permitting a piecemeal approach to reassessments. This approach lacks any rational basis in law and results in invidious discrimination between owners of similarly situated properties.⁵⁵⁹

As such, the village's method of assessment was found to be violative of both the fourteenth amendment of the United States Constitution and the New York State Constitution.⁵⁶⁰

Krugman preceded a United States Supreme Court ruling on the same topic by approximately three months. In *Alle-*

555. *Id.* at 184, 533 N.Y.S.2d at 501. The petitioner, Charles Krugman, purchased a parcel of property in June 1986 for \$166,000. The property's assessed value at the time was \$14,505. Upon transfer of title to Krugman, the property was reassessed at \$36,520. Krugman filed a protest application with the Board of Assessment Review, but the final assessment roll reflected the new, higher assessment, implicitly confirming the new assessed value. Krugman then commenced a proceeding pursuant to RPTL article 7 alleging three causes of action: first, Krugman alleged that his assessment was excessive by \$20,219; second, that the assessor's reassessment of only those properties that had been transferred within the previous year and not of all similar properties was violative of equal protection; and finally, it was claimed that a higher tax burden was placed upon these recent purchasers than upon all other property owners as a result of this selective reassessment practice. *Id.* at 177-78, 533 N.Y.S.2d at 497-98.

556. *Id.* at 183, 533 N.Y.S.2d at 501; *see also* N.Y. REAL PROP. TAX LAW § 305(2) (McKinney 1984).

557. *Id.*; *see also* N.Y. CONST. art. XVI, § 2.

558. *Krugman*, 141 A.D.2d at 184, 533 N.Y.S.2d at 501.

559. *Id.*

560. *Id.*

gheny Pittsburgh Coal Company v. County Commissioner of Webster County, West Virginia,⁵⁶¹ the Supreme Court held that the valuation of recently sold properties at their sale price and the intentional systematic undervaluation of other similarly situated, yet not recently transferred properties, was violative of the equal protection clause of the fourteenth amendment.⁵⁶² The Court stated that “the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.”⁵⁶³ However, in the case at bar, Allegheny’s property was found to have been assessed at eight to thirty-five times more than comparable neighboring properties and that the discrepancies between these properties had changed little over the course of ten years.⁵⁶⁴ As such, because “the fairness of one’s allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings,”⁵⁶⁵ the relative undervaluation of the properties comparable to Allegheny’s denied Allegheny equal protection of the law.⁵⁶⁶

Insofar as New York State is concerned, however, assessors, at a minimum, will be required to review all the parcels on the tax roll in order to assess at a uniform percentage of value pursuant to RPTL 305(2) to ensure that each property owner is paying their equitable share of their class’ total tax burden.

The second significant event was a change in the manner of reapportioning the tax burden in the special and approved assessing units. Article 18 categorizes all properties in special assessing units (i.e., Nassau County and New York City) into four classes.⁵⁶⁷ The purpose is to have the class bear the same relative percentage of the tax base that it had borne prior to classification. The maintenance of the base proportions would

561. 109 S. Ct. 633 (1989).

562. *Id.* at 639.

563. *Id.* at 637.

564. *Id.*

565. *Id.* at 639.

566. *Id.*

567. N.Y. REAL PROP. TAX LAW § 1802 (McKinney 1989 & Supp. 1990).

prevent a shifting of the tax burden onto homeowners.⁵⁶⁸ The SBEA was to make certain adjustments, known as adjusted base proportions,⁵⁶⁹ which would reflect the changing market values of the respective classes. In addition, the local legislative bodies could adjust the base proportion by up to five percent in each year.⁵⁷⁰

The SBEA's certification of adjusted base proportions, originally scheduled for 1985,⁵⁷¹ had already been postponed until 1989.⁵⁷² With the approach of that event in 1989, concern arose as to the consequences the adjustments would have on homeowners. As a result of the steep climb in real estate values during the 1980's, it was anticipated that adjusting the base proportions would shift a large portion of the tax burden toward the homeowners. The Class One base proportion in New York City would have increased by approximately 28% while those in Nassau County would increase between 12% and 24%.⁵⁷³

In 1989, a legislative proposal⁵⁷⁴ that would alleviate the shifting tax burden was finally adopted. Chapter 143 changed the year upon which the base proportions were calculated⁵⁷⁵ and further, it altered the computation of the adjusted base proportions.⁵⁷⁶ The bill also redefined Class Three (utility) property⁵⁷⁷ and reclassified certain vacant land parcels.⁵⁷⁸

568. *Id.* §§ 1801(f), 1803(l). The year upon which the base proportions were based was changed from 1981 to 1984 for New York City but remained 1981 for Nassau County. *See supra* notes 407-17 and accompanying text.

569. N.Y. REAL PROP. TAX LAW § 1804(1) (McKinney 1989 & Supp. 1990); *see supra* notes 402-04 and accompanying text.

570. *Id.* § 1803(2).

571. Act of Dec. 3, 1981, ch. 1057, § 3, 1982 N.Y. Laws 219, 223 (McKinney).

572. Act of Dec. 3, 1981, ch. 1057, 1982 N.Y. Laws 219 (McKinney), *amended by* Act of Aug. 5, 1984, ch. 830, 1984 N.Y. Laws 2414 (McKinney), *amended by* Act of Apr. 18, 1986, ch. 55, 1986 N.Y. Laws 136 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1804(1) (McKinney 1989 & Supp. 1990)).

573. 1989 ASSEMBLY COMM. REAL PROP. TAX'N REPORT 2-3; 1988 ASSEMBLY COMM. ON REAL PROP. TAX'N REPORT 7.

574. Act of June 12, 1989, ch. 143, 1989 N.Y. Laws 395 (McKinney).

575. *Id.* § 5, at 396.

576. *Id.*

577. *Id.* § 2, at 395. Beginning with the 1990 assessment roll, the definition of Class Three (utility) property will be altered to exclude land and buildings but retain actual equipment. Land and buildings will become part of Class Four.

The bill effectively put into place a two-year moratorium on adjusted base proportions by leaving intact the current system for setting class shares for the 1989 and 1990 assessment rolls.⁵⁷⁹ Moreover, the five percent local discretionary shifts were maintained for this period as well.⁵⁸⁰ As such, it will be business as usual until the 1991 assessment roll for class share calculations.

Beginning with the 1991 assessment roll, adjusted base proportions will occur on an annual basis.⁵⁸¹ This change should prove to be the one significant improvement made under the new law. By reducing the time lag between adjustments, more current market conditions may be reflected in the class shares, and, therefore, a more equitable apportionment of the tax burden may be realized.

Unfortunately, the annual adjustments may be the only improvements which concern inter-class equity. Under chapter 143, the "current base proportion"⁵⁸² becomes the heart of adjusting the base proportion. The calculation of a current base proportion utilizes a new "local base proportion," defined as the adjusted proportion from the 1990 assessment roll.⁵⁸³ The adjusted proportion from the 1990 assessment roll will likely be

578. *Id.* § 4-a, at 396. A technical amendment was then needed. *See* Act of July 16, 1989, ch. 544, 1989 N.Y. Laws 1043 (McKinney). Beginning with the 1990 assessment roll, the classification of certain vacant lands will be changed from Class Four to Class One. These lands are: (a) all vacant lands not below 110th Street in Manhattan that are zoned residential; and (b) all vacant land that is not zoned residential that is not larger than 10,000 square feet, is adjacent to properties improved by a residential structure, and was and is owned by the same owner as the improved parcel immediately prior to and since January 1, 1989.

579. Act of June 12, 1989, ch. 143, 1989 N.Y. Laws 395 (McKinney). Section 5 of the bill repeals the old section 1803 of the RPTL and enacts new sections 1803, 1803-a and 1803-b. The provisions of the new section 1803 and the dates for action required under the new section 1803-a make the 1989 and 1990 assessment roles operate under the current system.

580. *Id.*

581. *Id.* Under the new section 1803-a(1), adjusted base proportions must be calculated beginning with the 1991 assessment roll and every year thereafter.

582. Act of June 12, 1989, ch. 143, § 5, 1989 N.Y. Laws 395, 397 (McKinney) (codified at N.Y. REAL PROP. TAX LAW § 1803-a(1) (McKinney 1989 & Supp. 1990)).

583. *Id.* § 4, at 396 (codified at N.Y. REAL PROP. TAX LAW § 1801(k) (McKinney 1989 & Supp. 1990)).

the post-discretion class shares approved by the local legislative bodies. The importance of this change is two-fold. First, the base year has been changed from 1981 and 1984 in Nassau County and New York City, respectively, to 1989 for both.⁵⁸⁴ This new base year eliminates the inclusion of the market value changes that have taken place since the inception of the classified system in 1981; a period of fantastic growth in real estate values, particularly in residential properties.⁵⁸⁵ Second, the allowance of two more years of discretionary shifting by the local legislative bodies will likely result in even lower Class One shares, which then become the basis for the new local base proportions. This may serve to drive the class share even further from the actual proportion of market value that Class One properties actually represent.

Chapter 143 goes even further, however, in protecting homeowners. In order to minimize the degree of impact that not only the first of these annual calculations may have, but also any subsequent large jumps in class to class changes, the increase resulting from adjusting the base proportion has been limited to five percent annually.⁵⁸⁶ Thus, no matter what degree of shift the market values might call for, the annual increase can never exceed this five percent limitation. It appears unlikely, then, that Class One will ever capture its true share of the market value, barring a dramatic turnaround in the real estate market.⁵⁸⁷

584. N.Y. REAL PROP. TAX LAW § 1804 (McKinney 1989) *amended by* Act of June 12, 1989, ch. 143, 1989 N.Y. Laws 395 (codified at N.Y. REAL PROP. TAX LAW § 1803-a (McKinney 1989 & Supp. 1990)).

585. Memorandum from Mr. Gaskell and Mr. Jones to SBEA members (Oct. 18, 1988).

586. Act of June 12, 1989, ch. 143, § 5, 1989 N.Y. Laws 395, 397 (codified at N.Y. REAL PROP. TAX LAW § 1803-a(1)(c) (McKinney 1989 & Supp. 1990)).

587. The legislature evidently intends just such a result. "It is incumbent upon the legislature to avoid substantial homeowner tax increases while at the same time creating a mechanism to provide a high degree of stability in the relative tax burden of taxpayers." Memorandum of Assembly Rules Committee on A. 8626, *reprinted in* 1989 N.Y. LEGIS. ANN. 116, 117 (which became Act of June 12, 1989, ch. 143, 1989 N.Y. Laws 395 (McKinney)).

Chapter 143 also contains similar provisions for article 19 properties,⁵⁸⁸ as the tax share adjustment mechanism contained therein is substantially similar. The potential for a homestead property tax burden increase was 16% if the scheduled adjustment to the base proportion had taken place.⁵⁸⁹ Therefore, article 19 was included in chapter 143. The approved assessing units will continue to modify class shares as they have until 1991,⁵⁹⁰ then will base all future changes from a 1989 base and will employ the five percent limitation on any annual increases as a result of adjusted base proportions,⁵⁹¹ as do the special assessing units. Because of the similarity between the special and approved assessing units new methodology, no further detail is required here.

588. *Id.* §§ 11-15, at 401-09 (codified at N.Y. REAL PROP TAX LAW §§ 1903-1906 (McKinney 1989 & Supp. 1990)).

589. 1989 ASSEMBLY COMM. ON REAL PROP. TAX'N REPORT 3.

590. Approved assessing units for which the SBEA established 1989 adjusted base proportions may elect, for the 1989 and 1990 tax levies, to use those adjusted base proportions. They have as their option, using instead (1) the homestead and non-homestead base proportions, (2) the adjusted homestead and non-homestead base proportions, or (3) the locally adjusted homestead and non-homestead proportions, whichever were used in the preceding year. 1989 STATE BD. OF EQUALIZATION & ASSESSMENT REPORT 73.

591. Act of June 12, 1989, ch. 143, §§ 9-14, 1989 N.Y. Laws 395, 401-09 (codified at N.Y. REAL PROP. TAX LAW §§ 1903-1906 (McKinney 1989 & Supp. 1990)).

