[J-133A-B-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JAMES C. CLIFTON, CHARLES AND LORRIE CRANOR, HUSBAND AND WIFE, AND ROY SIMMONS AND MARY LISA MEIER, HUSBAND AND WIFE,	:	No. 20 WAP 2007
Appellees	:	Appeal from the Judgment of the Court of Common Pleas of Allegheny County, entered July 25, 2007 at No. GD-05-028638.
v.	:	
ALLEGHENY COUNTY,	:	
Appellant	:	
	:	ARGUED: September 10, 2008
KENNETH PIERCE AND STEPHANIE BEECHAUM,	:	No. 21 WAP 2007
Appellees	:	Appeal from the Judgment of the Court of Common Pleas of Allegheny County
v.	:	entered July 25, 2007 at No GD-05-028355.
ALLEGHENY COUNTY, PENNSYLVANIA, DANIEL ONORATO, ITS CHIEF EXECUTIVE, AND DEBORAH BUNN, ITS CHIEF ASSESSMENT OFFICER	:	
	:	ARGUED: September 10, 2008
Appellants	:	

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: APRIL 29, 2009**

Appellees challenge the assessment laws of the Commonwealth, which permit real estate taxes to be levied on property values that are premised upon a stagnant base year market value for an indefinite period of time. The trial court found that because the base year assessment method does not require periodic reassessments, the assessment laws are facially unconstitutional and, further, that the evidence of inequality in Allegheny County demonstrated that the assessment laws there under scrutiny were unconstitutional as applied. The Majority presently disagrees with the trial court's holding that the statutes are unconstitutional on their face, but agrees that the base year method of property valuation as applied in Allegheny County violated the Uniformity Clause of our constitution.[1] I agree with the Majority that the assessment laws are not, on their face, unconstitutional, and I further agree with the Majority that the evidence of inequality in Allegheny County demonstrated that the assessment laws, as applied, resulted in inequality that violated the Uniformity Clause. I differ from the Majority, however, regarding whether it is appropriate for this Court to set a constitutional threshold in the absence of legislative action. As is fully explained below, courts have repeatedly taken such action when necessary. I believe this case presents just such an instance. Accordingly, I write to explain why I believe we should establish a test for when the Uniformity Clause is violated, and then to articulate such a test.

Under a base year system of valuation, a county performs a threshold countywide assessment of all real property in the base year, and then uses each property's base year assessment (*i.e.*, assessed value) as that property's basis for taxation in the base year and in all subsequent years, pending a future reassessment. Maj. Slip Op. at 6; Downingtown Area Sch. Dist. v. Chester County Bd. of Assessment Appeals, 913 A.2d 194, 202-03 (Pa. 2006). The base year assessment, however, obviously cannot capture and reflect market

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[1] See the Uniformity Clause of the Pennsylvania Constitution, PA. CONST. art. VIII, § 1.

fluctuations that occur during years subsequent to the base year and preceding a reassessment. Nevertheless, as held by the Majority, the assessment laws permitting the use of a base year are not facially unconstitutional because use of a base year would not implicate the Uniformity Clause if, for example, a county conducted adequate periodic reassessments; if it could be shown that property values in a particular county remained relatively unchanged; or if those values had virtually the same rate of change over the passage of time. Majority Slip Op. at 41.

The more difficult question is whether the use of the base year, as applied in this case, is unconstitutional. As the Majority describes, under the Uniformity Clause, countywide reassessments should result in all property in each county being valued fairly and consistently, when compared to other properties in the county. Maj. Slip Op. at 5. If the base year method of valuation will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated. Maj. Slip Op. at 20 (citing Allegheny County v. Monzo, 500 A.2d 1096 (Pa. 1985)). In property taxation, the uniformity requirement is based on "the general principle that taxpayers should pay no more or less than their proportionate share of government." Maj. Slip Op. at 21 (quoting Downingtown, 913 A.2d at 199).

In evaluating Appellees' position and the trial court's holding, as will be discussed more fully below, the Majority reviews a number of standards that have been developed for measuring whether a system of property valuation produces sufficiently uniform results. Maj. Slip Op. at 25. The Majority, however, recognizes that the various standards and measures it discusses have not been legislatively adopted. Maj. Slip Op. at 46. Thus, the Majority refuses to determine, based on the various standards and measures it recognizes as relevant, and, in fact, uses to conclude that there is an unconstitutional lack of uniformity in this case, the point at which at least a presumption should arise that a base year valuation system's deviation from actual market values runs afoul of the Pennsylvania

Constitution's Uniformity Clause. Rather, the Majority opines that this Court should decline to fix a point where at least a presumption of unconstitutional non-uniformity arises because "the General Assembly is the appropriate place to fashion a more comprehensive and soundly constitutional scheme." Maj. Slip Op. at 51.

Respectfully, in my view, absent the unlikely prospect of prompt legislative action, the Majority's decision not to offer substantive criteria for interpretation of the Uniformity Clause will result in ongoing uncertainty for the Commonwealth's many taxing authorities and property owners alike. The consequence will be hundreds of thousands of taxpayers and the local governments of the sixty-seven counties of this Commonwealth being uncertain about whether the result of this Court's decision means that their county has become unconstitutionally non-uniform and must therefore engage in a county-wide reassessment. Taxpayers and the groups that represent them will be unsure about whether to bring a lawsuit challenging their counties' assessment system. The counties themselves will be unsure whether their current assessed values satisfy or vioaltes the Uniformity Clause, as interpreted herein. These pervasive uncertainties will lead to endless litigation throughout the Commonwealth with regard to whether each county's assessment scheme is unconstitutional, as applied. These lawsuits will result in inconsistent findings in the courts of common pleas as to the proper demarcation between constitutionality and unconstitutionality. Indeed, possibly premised upon substantially the same facts, some trial courts may find a county's property tax assessment unconstitutional, as applied, leading to direct appeals to this Court, while other trial courts will find a county's property tax assessment system constitutional, leading to appeals to the Commonwealth Court. With no uniform approach to evaluate the claims and defenses or to render consistent opinions on the constitutionality of each county's assessment scheme, the result will be an *ad hoc* evaluation of each county's particular disparities and assessment ratios, resulting in the

waste of millions of dollars in what may be unnecessary reassessments and/or litigation costs, as well as the loss of incalculable amounts of judicial resources.

Although I generally agree that the legislature remains the optimum branch of government to fashion a comprehensive constitutional scheme, I also believe that it is entirely proper for this Court to articulate criteria for evaluating whether a peculiar factual scenario will meet constitutional muster under the Uniformity Clause. There is substantial precedent for courts acting in a situation such as this to fill a void where the legislature has not acted. For example, in a recent case interpreting and applying Section 2 of Voting Rights Act of 1965, 42 U.S.C. § 1973, where Congress did not specify what percentage of minority voters in a district would call for the protections of Section 2 of the Voting Rights Act when it prohibited what courts have termed "vote dilution," and the United States Supreme Court had, until this case, avoided picking a number, the high Court established a numerical threshold, holding that only election districts in which minorities make up at least fifty percent of the voting age population are entitled to the protections of Section 2 of the Voting Rights Act that seeks to ensure and preserve minority voting power. See Bartlett v. Strickland, __ U.S. __, 129 S.Ct. 1231 (2009) (Kennedy, J., opinion announcing the judgment of the Court). The bright line rule established in Bartlett makes litigation over the legality of particular districts less likely. Justice Kennedy reasoned that although the Court had in the past declined to decide the minimum size minority group necessary in the context of a vote dilution claim, its bright-line rule "provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." Id. at *12.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870 (1992), Justices O'Conner, Kennedy, and Souter explained why the Court in Roe v. Wade, 410 U.S. 113 (1973), had established viability as the appropriate point for finding a compelling state interest in prohibiting abortion: "legislatures may draw lines which appear

arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable." See also Ford v. Wainright, 477 U.S. 399 (1986) (finding unconstitutional Florida's procedures for determining sanity for purposes of execution, and setting forth guidelines for states to follow to ensure constitutionally adequate safeguards in future litigation); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (finding unconstitutional the imposition of the death penalty as cruel and unusual punishment in violation of the 8th and 14th Amendments to the United States Constitution, and suggesting that death sentences could be constitutionally imposed if states limit the class of murderers to which the death penalty may be applied); Brooks v. Hobbie, 631 So.2d 883, 889-90 (Ala. 1993) (holding that in a redistricting case, the legislature has the initial responsibility to act, but in the event the legislature fails to act, the responsibility shifts to the state judiciary); Morgan County Commission v. Powell, 293 So.2d 830 (Ala. 1974) (Heflin, C.J., dissenting) (recognizing that when other branches of government are remiss in their constitutional duties, the judiciary must act). In Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005), this Court defined mental retardation pursuant to a directive from the United States Supreme Court in Atkins v. Virginia, 536 U.S. 304 (2002), where the General Assembly declined to formulate a standard. Accordingly, when the legislature has created a vacuum by failing to act, the courts must act where, as here, a potential constitutional violation is at issue. We should not, in the guise of judicial restraint, abdicate our fundamental responsibility to provide a proper framework for the assessment of actual constitutional violations. Thus, I now turn to an examination of how to determine uniformity in property taxation and how to determine whether a county's property tax assessment scheme has become unconstitutional.

Our constitution requires equality in taxation to the extent reasonably achievable. Beattie v. Allegheny County, 907 A.2d 519, 530 (Pa. 2006). The statistical data relied upon by the trial court and cited by the Majority establish that the use of an indefinite base year

system in Allegheny County has failed to conform to our Constitution's Uniformity Clause. As the Majority explains, inequity will rise at different rates in different taxing districts, depending upon the stability of property values in the municipality, the variety of real estate extant, and other market factors. Maj. Slip Op. at 50. Thus, it is not possible to predict the length of time between reassessments which will result in a peculiar county's assessment morphing from constitutional to unconstitutional. Rather, to permit counties and taxpayers alike to have guidance as to when such mutation from a constitutional to unconstitutional system is occurring, this Court should adopt one of the well-established, judicially addressed, state verified and generally accepted measures of equality and inequality, as described by the Majority.

The standards cited by the Majority and established in the Standard on Ratio Studies issued by the International Association of Assessing Officers (IAAO) have been widely accepted as the criteria to judge the adequacy of an assessment. Specifically, the statistical indicator known as the coefficient of dispersion (COD) is the most widely accepted tool used to measure inequality in tax assessments, and is recognized as a suitable means of measuring inequality in property taxation in Pennsylvania.[2] The IAAO has characterized the COD as the most generally useful measure of variability or uniformity. See R.R. 1374a. See also IAAO's Standard on Ratio Studies, 13 (2006). A

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[2] In Beattie v. Allegheny County, we described the COD as follows:

> The coefficient of dispersion (COD) is the average deviation from the median, mean, or weighted mean ratio of assessed value to fair market value, expressed as a percentage of that figure. A "high coefficient of dispersion indicates a high degree of variance with respect to the assessment ratios under consideration. A low coefficient of dispersion indicates a low degree of variance. In other words, a low coefficient of dispersion indicates that the parcels under consideration are being assessed at close to an equal rate."

907 A.2d 519, 530 (Pa. 2006) (internal citations omitted).

COD of fifteen indicates a low level of variance, and thus general or substantial uniformity in property assessment. In a county with a COD of fifteen, approximately fifty percent of property owners are neither over-assessed nor under-assessed by more than fifteen percent of fair market value. See Trial Ct. Op. at ii. Of the remaining property owners, half are over-assessed by at least fifteen percent of fair market value and half are under-assessed by at least the same percentage. Conversely, a high COD such as forty indicates a substantial level of variance, and thus inequality, in property assessments. Trial Ct. Op. at iii.

Because the COD is the most generally useful measure of uniformity, the IAAO has optimized its usage between establishing maximum acceptable CODs for various types of properties. See R.R. 1374a, Standard on Ration Studies, supra. According to the IAAO, the maximum COD for a single family residential property is ten percent for newer, more homogenous areas; fifteen percent for older, heterogeneous areas; and twenty percent for rural residential and seasonal properties. See Maj. Slip Op. at 29; Trial Ct. Op. at 20. According to the testimony of the former executive director of the IAAO, which the trial court credited, the IAAO standards for acceptable CODs reflect a level of uniformity that is readily achievable. See Trial Ct. Op. at 20. These IAAO standards, which were first adopted in 1980, have never been readjusted and have withstood the test of time. T.C. Op. at 20, R.R. at 1383a-1384a. Further, these figures are easily obtained. Since 1988 the Pennsylvania State Tax Equalization Board (STEB) has published assessment statistics for each county in the Commonwealth, including the COD. The COD for each county in Pennsylvania is available over the internet to anyone. This availability limits the uncertainty regarding where a county's COD is in relation to the IAAO standards.

According to the COD standards established by the IAAO as discussed above, for counties where the current market value is the legal basis for assessment, a COD of twenty is the maximum COD envisioned by the IAAO before a county becomes generally non-

uniform and should conduct a reassessment. Because a COD of twenty is the highest COD acceptable, once a county's COD, as demonstrated by STEB, reaches this threshold, it seems appropriate that a presumption should arise that the county's assessment scheme has become non-uniform and therefore unconstitutional in accord with the Uniformity Clause. Once this presumption arises, the county would have the choice to reassess, or await a lawsuit challenging its system. If such lawsuit was filed, the county whould have the opportunity to rebut the arising presumption by demonstrating that its assessment system has not, in fact, become constitutionally infirm.

Ultimately, given the inequality of Allegheny County's property tax assessment system, as demonstrated before the trial court, I agree with the Majority's decision to remand this matter to the trial court to determine Allegheny County's progress in executing a countywide reassessment and to set a realistic timeframe for its completion. Likewise, I would urge counties whose COD exceeds twenty to begin reassessment, or to stand ready to defend the lawsuit which will inevitably come. Conversely, I would urge taxpayers whose counties' COD is less than twenty to recognize the unlikelihood of success in litigation, and to save themselves, their counties and the courts the massive resources that go into this type of litigation.