## UNITED STATES SUPREME COURT

### Nordlinger v. Hahn,

___U.S.___, 92 D.A.R. 8196, No. 90-1912 (June 18, 1992).

*Proposition 13 Upheld*

On June 18, the U.S. Supreme Court upheld Proposition 13 against the equal protection challenge filed by the Center for Law in the Public Interest (CLIPI). *[11:1 CRLR 156–57]* The Court refused to apply the strict scrutiny test that is required when an alleged equal protection violation jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic; in the absence of heightened scrutiny, the Court applied a standard of review which asks only whether the difference in Proposition 13's property tax treatment between newer and older homeowners rationally furthers a legitimate state interest. The Court had "no difficulty" finding "at least" two rational reasons for the difference in treatment: a legitimate state interest in local neighborhood preservation, continuity, and stability, such as protection against gentrification; and the belief that the state legitimately can conclude that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner....[A]n existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase."

The Court distinguished *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989), relied upon by Nordlinger, as a "rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." As to claims that Proposition 13 "frustrates the 'American Dream' of home ownership for many younger and poorer California families," the Court said that it does seem that "California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society, and, as the Court of Appeal surmised, ordinary democratic processes may be unlikely to prompt its reconsideration or repeal." Nonetheless, the Court was not inclined to "upset the will of the people of California."

In lone dissent, Justice Stevens argued that neither of the state interests cited by the majority meets the rational basis test. Although he agreed that neighborhood preservation is a legitimate state interest, Justice Stevens concluded that a tax windfall for all persons who purchased property prior to 1978 does not rationally further that interest; it is "too blunt a tool to accomplish such a specialized goal." As for the second rationale, "if...a law creates a disparity, the State's interest preserving that disparity cannot be a '*legitimate* state interest' justifying that inequity....[A] statute's disparate treatment must be justified by a purpose *distinct* from the very effects created by that statute" (emphasis original). Stevens interpreted the Court's prior decisions as declaring irrational any attempt to treat similarly situated people differently on the basis of the date they joined a particular class. He stated that it would "obviously be unconstitutional to provide one with more or better fire or police protection than the other; it is just as plainly unconstitutional to require one to pay five times as much in property taxes as the other for the same government services."

### New York v. United States,

___U.S.___, 92 D.A.R. 8784, No. 91-543 (June 19, 1992).

*Waste Act Properly Allocates Power Between Federal and State Governments*

On June 19, the U.S. Supreme Court upheld a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 requiring states to either find a regional dump or build one of their own by January 1, 1993. By a 9–0 vote, the Court ruled that the find-or-build requirement of the Act does not violate the tenth amendment to the U.S. Constitution, which reserves to the states all powers not specifically granted to the federal government in Article I of the Constitution. There is no violation because Congress gave the states a choice: "States may either regulate the disposal of radioactive waste...by attaining local or regional self-sufficiency, or their residents who produce radioactive waste will be subject to federal regulation authorizing states [that have their own dumps] to deny access to their disposal sites."

In another part of the same decision, the Court struck down the so-called "take title" provision of the Act, which requires any state that does not have a disposal site to take ownership of and legal responsibility for all low-level radioactive wastes produced in that state after 1996. The Court ruled that the "choice" here was between two unconstitutionally coercive alternatives: either accept ownership of the waste or regulate according to Congress' instructions. While it is proper for Congress to give states positive incentives to take on a regulatory activity, "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the states to regulate," wrote Justice Sandra Day O'Connor for the 6–3 majority on this issue. Strong dissents were written by Justices White and Stevens with Justice Blackmun providing the other dissenting vote. Constitutional scholars noted that this decision marks only the second time since 1937 that the Court has struck down federal legislation on grounds it exceeds Congress' power under Article I of the Constitution. The tenth amendment is now a basis for declaring federal laws unconstitutional.

## NINTH CIRCUIT COURT OF APPEALS

### Assembly of the State of California v. U.S. Department of Commerce,

968 F.2d 916, 92 D.A.R. 15217, No. 92-15217 (July 1, 1992).

*Computer Tapes of 1990 Census Are Not Exempt from Freedom of Information Act*

In this proceeding, the Department of Commerce (DOC) appealed a decision of the U.S. District Court for the Eastern District of California requiring it to release computer tapes containing statistically adjusted figures from the 1990 census to the Assembly under the federal Freedom of Information Act (FOIA), 5 U.S.C. section 552 *et seq.*

Because statisticians have recognized that the decennial census undercounts the actual number of persons living in the United States, particularly among urban minority populations, the DOC's Census Bureau has developed a method to adjust for that undercount. Specifically, the Bureau starts with the actual enumeration resulting from the head count (the unadjusted data), conducts a post-enumeration survey sampling 170,000 housing units,

and develops an adjustment factor which estimates the extent to which specific statistical categories were incorrectly counted in the initial enumeration, thus enabling the Bureau to produce an adjusted census. Although both the Undercount Steering Committee within the Census Bureau and the Director of the Census recommended that the adjusted census data be adopted as the official United States census, the DOC Secretary announced his decision not to adopt the adjusted census, stating that it had not been proven to be more accurate than the unadjusted census.

Following that announcement, the Assembly made a FOIA request for the formulas used to create the adjusted census data, including "census population data for California, by block and census tract, broken down by race and age...after adjustment in accordance with the post-enumeration survey taken by the Bureau of the Census in 1990." DOC denied that request, contending that the tapes are protected by FOIA Exemption 5's deliberative process privilege, 5 U.S.C. section 552(b)(5), which protects documents that are both "predecisional" and "deliberative."

In considering whether the adjusted census tapes are predecisional, the court noted that a document may be considered predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his/her decision. The court noted that DOC official Mark Plant had reviewed a sample of the adjusted data, but that sample was not released to the public "because it did not enter in any way direct or indirect into the Secretary's decision." The court found that "[m]aterial which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense."

Regarding DOC's claim that the tapes are "deliberative" material, the court noted that a useful rule of thumb in examining the deliberative process privilege requires the court to contrast "factual" and "deliberative" materials; the idea behind this distinction is that agencies have no legitimate interest in keeping the public ignorant of the facts from which the agencies worked, while they do have a legitimate interest in shielding their preliminary opinions and explorations. The Ninth Circuit noted that the district court had "analyzed the requested tapes to see where they fell along the continuum of deliberation and fact, and found that they, like the unadjusted census data from which they were derived, fell closer to fact and would not reveal the agency's protectable thought processes"; the Ninth Circuit held that this finding was not clearly erroneous. Accordingly, the Ninth Circuit affirmed the district court's decision requiring that the computer tapes be released to the Assembly; on September 17, the Ninth Circuit rejected DOC's petition for rehearing and its request for rehearing *en banc.*

## Senate of the State of California v. U.S. Department of Commerce,

968 F.2d 974, 92 D.A.R. 9363, No. 91-55887 (July 6, 1992).

### *Senate Cannot Use Census Statutes or Constitution to Compel Discovery*

While the California Assembly was seeking disclosure of the computer tapes containing the adjusted census data through a FOIA request (*see supra*), the California Senate was attempting to obtain the same information by contending that release is required by the Constitution, the census statutes (13 U.S.C. section 1 *et seq.*), and the Voting Rights Act (42 U.S.C. section 1973); the Senate did not seek release of the tapes pursuant to FOIA. The U.S. District Court for the Central District of California granted a preliminary injunction ordering the release of the adjusted census figures, concluding that the Senate would be irreparably harmed if not provided with the adjusted census calculations for use in the state's redistricting process. The district court found no harm at all to the DOC, which had already calculated and prepared the adjusted figures, and had even been ready to send them out to the states.

The Senate argued that because the Constitution provides for a census based upon an "actual Enumeration" of the people in this country, there is a right to an accurate count. Moreover, the Senate argued that because Congress delegated the task of taking the census to the DOC Secretary and directed the Secretary to produce the census report data to the President and the states, the State of California is entitled to the adjusted census information. The Ninth Circuit rejected this argument, stating that the Secretary has in fact conducted the census and reported the results, as required by law. The court concluded that neither the census statutes nor the Constitution offer a basis for the Senate's demands, noting that the Senate is attempting "to use the Constitution and the census statutes as freedom of information laws so that it can obtain release of that governmental data." The court added that "[w]hile Congress can undoubtedly direct release of information,...it has not done so in the census statutes."

The Senate also argued that the Voting Rights Act imposes an implied duty on the DOC Secretary to prevent "the implementation of voting changes (*e.g.*, redistrictings) that would have a 'retrogressive' effect upon minority voting rights in certain jurisdictions, including four counties in California." According to the court, "[i]f the State knows that the census data is [sic] underrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process." Ignoring the fact that this was the purpose for the Senate's attempt to obtain DOC's adjusted data, the court concluded that "[i]t is the state's responsibility, and not the Secretary's, to satisfy the mandates of the Voting Rights Act." Although acknowledging that "large numbers of Blacks, Hispanics, Asian-Pacific Islanders, and Native Americans were missed" by the unadjusted census data, the court concluded that none of the laws relied upon by the Senate give it the right to compel the Secretary to release the tapes.

In a terse dissent, Justice Harry Pregerson commented that the official 1990 census data missed over five million people, one million of whom reside in California. Pregerson opined that "[b]y refusing to disclose the adjusted census data, the Secretary may have impermissibly interfered with the Senate's duty to redistrict congressional and state legislative seats under the United States Constitution and under the Voting Rights Act. As the majority points out,...it is for the state to satisfy the mandates of the Voting Rights Act....It is not for us, nor for the Census Bureau, to decide whether the data will aid California in its attempt to comply with the Voting Rights Act or to correct inequities in its redistricting." Pregerson added that "the Senate and the public will be irreparably injured by denying the requested preliminary injunction. This injury far outweighs any possible injury the Secretary may suffer."

## UNITED STATES DISTRICT COURTS

### Gomez v. Gates,

__F.Supp.__, 92 D.A.R. 10875, No. CV 90-0856 JSL (July 31, 1992).

*Attorneys in Undesirable Cases Are Eligible For Lodestar Amount Plus Multiplier Fees*

In this proceeding, the U.S. District Court for the Central District considered whether attorneys who provide successful representation in "undesirable cases" are entitled to an award of attorneys' fees using the lodestar method (multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate) and a multiplier (a number by which the lodestar would be multiplied to determine the final fee).

The court noted that although the U.S. Supreme Court's recent decision in *City of Burlington v. Dague*, 60 U.S.L.W. 4717 (1992), held that there may be no enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent fee basis, that decision did not address whether the undesirability of a case may be a basis for enhancing a fee otherwise determined by a simple lodestar calculation; the court defined the term "undesirable cases" as those in which the plaintiff is unlikely to prevail for reasons having nothing to do with the merits of the claim or the quality of the attorney's performance. For example, the court commented that in some civil rights cases, "primarily those involving use of allegedly excessive force by police against unattractive plaintiffs...it is extremely difficult for the plaintiff to prevail, and virtually impossible to obtain a recovery large enough to support a reasonable fee. This is so regardless of the merits of the claim, or the skill, experience or diligence of counsel....Jurors have no desire to believe criminals, or to reward them even if the jurors chance to believe their stories."

The court found support for this contention in the facts of the underlying action for which the attorneys were requesting fees. In that action, the Los Angeles Police Department's Special Investigation Section witnessed four people robbing a McDonald's restaurant. After allowing the suspects to get into their vehicle, the officers boxed in that vehicle with police cars and proceeded to fire approximately twenty shotgun rounds into the car, a large number of which struck the suspects. After this initial barrage, one officer shot and killed one of the suspects who was attempting to flee the scene; another officer shot a second suspect, who was already fatally or near-fatally wounded, through the top of the head from a distance of two feet; the same officer then shot another suspect (the only one to survive) in the stomach from a distance of about eighteen inches; and another officer then shot the fourth suspect, who also was already fatally or near-fatally wounded, from approximately the same distance. In a lawsuit filed by the one surviving suspect and the survivors of the three dead suspects, the jury held liable all of the officers who fired shots and former Los Angeles Police Chief Daryl Gates; however, the jury awarded no compensatory damages and awarded a total of $44,000 in punitive damages to the plaintiffs.

The court found that because it is difficult for plaintiffs in unattractive cases to prevail for reasons unrelated to the relative merits of the claim or to the difficulties in establishing those merits which are ordinarily reflected in the lodestar, a fee computation which considers only those two factors is not reasonable and will not attract lawyers to take those cases. Accordingly, the court concluded that a multiplier of 1.75 must be used to reflect the peculiarly undesirable nature of this case from the standpoint of a lawyer who regularly accepts employment on a contingent fee basis.

## CALIFORNIA SUPREME COURT

### Christopher v. Fair Political Practices Commission,

No. S025815, 92 D.A.R. 11630 (Aug. 20, 1992).

*Court Agrees to Hear Petition to Resurrect Proposition 68*

On August 20, the California Supreme Court granted review of California Common Cause's petition for a writ of mandate seeking reinstatement of Proposition 68, the campaign financing reform measure passed by the voters in 1988. Proposition 68 (which included campaign contribution limits, expenditure limits, and a public financing mechanism for statewide and legislative races) was held inoperative in its entirety by the California Supreme Court in 1990 because a competing measure, Proposition 73, had garnered a larger majority. Reinstatement of Proposition 68 became a possibility when the U.S. Court of Appeals for the Ninth Circuit upheld a district court decision that major portions of Proposition 73's campaign financing "reforms" unconstitutionally discriminate against electoral challengers. *[12:2&3 CRLR 273–74; 11:1 CRLR 153; 8:2 CRLR 1]*

## CALIFORNIA COURTS OF APPEAL

### Roberts v. City of Palmdale,

7 Cal.App.4th 1130, 92 D.A.R. 9230, No. B063688 (June 30, 1992).

*Palmdale City Council Followed Improper Closed Session Procedure*

At the request of the Palmdale City Council, the City's attorney prepared a memorandum discussing an appeal from a decision of the City's Planning Commission. Without first stating publicly its intent to do so, the City Council considered its attorney's memorandum in a closed session and refused to disclose it to plaintiff, an interested party. Plaintiff contended that the Council's efforts to keep the memorandum confidential violated both the Ralph M. Brown Act, Government Code section 54950 *et seq.*, and the Public Records Act, Government Code section 6250 *et seq.*

In considering whether the City's actions violated the Brown Act, the Second District Court of Appeal noted that the Brown Act "compels public agencies to conduct their business openly," and that writings distributed to the members of a city council by an employee or agent of the council for discussion or consideration at a public meeting are public records under the Public Records Act unless the writing is exempt from public disclosure under specified sections of the Public Records Act. The court acknowledged that under Government Code section 6254(k), disclosure is not required of records "the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Although agreeing that the memorandum qualifies as a confidential communication between lawyer and client within the meaning of the attorney-client privilege, the court noted that the analysis does not

end there. Instead, the court found that the Council's "decision to address the issue in a closed session on the ground it relates to pending litigation and is therefore privileged *must be made and announced publicly prior to the closed session*. This procedure was not followed" (emphasis original).

The court also rejected the City's argument that the memorandum is exempt as the attorney's work product unrelated to litigation, finding that "[c]ommunications between the City Council and its attorney unrelated to 'pending litigation' within the meaning of section 54956.9 must be disclosed (unless exempted for some other unrelated reason) and cannot be withheld in reliance upon some perceived permeation of the attorney-client relationship."

The court concluded that had the Council complied with the Brown Act by publicly announcing prior to the public hearing its intent to consider the memorandum in a closed session, the memorandum would not be subject to disclosure. The court held that, in this case, the Council's failure to comply with the statutorily compelled procedure constitutes a waiver of the pending litigation privilege, and ordered that a writ of mandate be granted compelling the Council to disclose the memorandum.

The California Supreme Court granted the City of Palmdale's petition for review on October 1.

### Freedom Newspapers, Inc., v. Orange County Employees Retirement System Board of Directors,

9 Cal.App.4th 134, 92 D.A.R. 12312, No. G011490 (Aug. 31, 1992).

*Brown Act Requires Committee Meetings of a Retirement System to be Open to the Public*

In this proceeding, the Fourth District Court of Appeal considered the proper interpretation of the Brown Act as it applies to the Orange County Employees Retirement System's board of directors' committee meetings. The court initially noted that the Brown Act requires all meetings of the legislative body of a local agency to be open and public. The Act includes several definitions of the term "legislative body," including "[a]ny advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency." The court found that there is no doubt that the retirement system's board of directors, which consists of nine members, falls within at least two of the Act's definitions of the term "legislative body."

However, the dispute in this case is whether the board's four-person committees also fall within the definition. The court noted that if the committees are advisory, they would fall under the definition of the term "legislative body" contained in Government Code section 54952.3; however, language at the end of that section exempts from its definition a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body. It is upon this proviso that the retirement board relies in denying public access to its committee meetings.

However, the court found that the board's committees also fall within the scope of Government Code section 54952, which defines the term "legislative body" to include "any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." Noting that the "less-than-a-quorum" exception contained in section 54952.3 "does nothing to affect bodies that fall within the definition of 'legislative body' under section 54952," the court held that meetings of the various committees of the board must be open to the public under the terms of the Brown Act.

The board intends to appeal the Fourth District's decision.