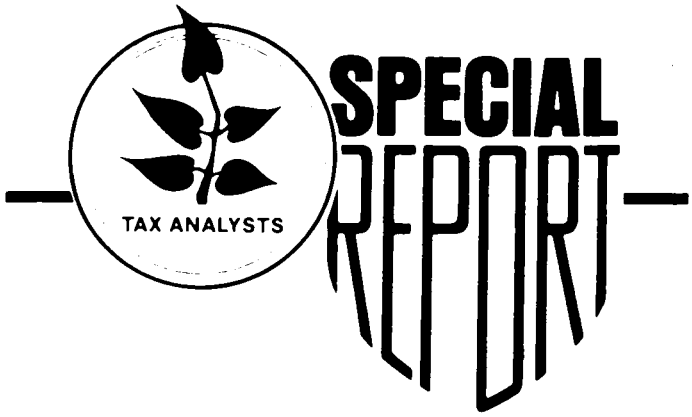

EQUAL PROTECTION RUN AMOK?: AN ANALYSIS OF THE NEBRASKA SUPREME COURT'S DECISION IN THE NORTHERN NATURAL GAS CASE

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In this article, Hellerstein analyzes the Nebraska Supreme Court's decision in Northern Natural Gas Co. v. State Board of Equalization, which held that the state could not constitutionally tax the property of one taxpayer while exempting the property of other taxpayers. In particular, the court held that pipelines were entitled to an exemption of their personal property because the personal property of railroads and carline companies had been exempted from taxation under the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act). Hellerstein first examines the court's reasoning and concludes that the decision rests on principles of both state and Federal law. He observes that the court's construction of state law is highly restrictive and questions the soundness of the court's interpretation of Federal law. Hellerstein then considers the relationship between the Nebraska court's holding and the provisions of the 4-R Act requiring that railroad property be taxed in the same way as other commercial and industrial property in the state. He finds that the provisions of the 4-R Act were unnecessary to the court's decision. Finally, Hellerstein considers the options available to Nebraska in light of the court's decision.

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I. INTRODUCTION

In *Northern Natural Gas Co. v. State Board of Equalization and Assessment*,[1] the Nebraska Supreme Court held that the state could not constitutionally tax the personal property of one taxpayer while exempting the personal property of other taxpayers. Specifically, the court held that pipelines were entitled to an exemption of their personal property because the personal property of railroads and carlines had been exempted from taxation pursuant to the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act),[2] which requires that railroad and carline property be taxed in the same way as other commercial and industrial property in the state.

The Nebraska court's opinion has caused considerable alarm....

The Nebraska court's opinion has caused considerable alarm in Nebraska and other states due to the fear that the Federal law forbidding property tax discrimination against railroads will provide a basis for taxpayers other than railroads to obtain relief from discriminatory property taxes. Indeed, state tax officials in Nebraska have declared that the decision could cost local governments $222 million,[3] and a special session of the Nebraska legislature is meeting to deal with the problems created by the *Northern Natural Gas* opinion as this article goes to press. Wholly apart from the question whether state policymakers should be defending discriminatory state taxing regimes, the perception that the root of the states' difficulties lies in the Federal law prohibiting such discrimination is misguided. As the following analysis of the Nebraska court's opinion demonstrates, the root of the problem created by the *Northern Natural Gas* opinion lies in Nebraska law, as construed by the Nebraska Supreme Court, and there is nothing in Federal statutory or constitutional law that dictated the court's conclusion.

[1] 232 Neb. 806, 443 N.W.2d 249 (1989).

[2] Pub. L. No. 94-210, 90 Stat. 54, section 306 (codified at 49 U.S.C. section 11503).

[3] *Tax Notes*, October 23, 1989, p. 452.

II. ANALYSIS OF THE NORTHERN NATURAL GAS OPINION

In *Northern Natural Gas*, two centrally assessed pipeline companies, Northern Natural Gas Company and Enron Liquid Fuels Pipeline Company (collectively referred to as "Enron"), challenged the State Board of Equalization and Assessment's refusal to exclude the pipelines' personal property from their *ad valorem* property tax base. The pipelines claimed that they were entitled to the same treatment as railroads and car companies, whose personal property had been held excludable from *ad valorem* taxation under the 4-R Act.[4] In the relatively brief portion of its opinion that squarely addressed the pipelines' claim,[5] the Nebraska Supreme Court invoked principles of both state and Federal law.

A. State Law Considerations

The court first approached the issue under state constitutional law principles. After reciting the state constitutional provision requiring uniformity of taxation,[6] the court declared that

> it would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher or achieves the same result because of legislative action, this court must correct the constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state.[7]
>
> "This being the case," the court continued, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.[8]

These pronouncements by the court, standing alone, provide a sufficient predicate for its decision. The court's reasoning is straightforward:

> (1) the Board, whether acting on its own initiative or under legislative compulsion, may not arbitrarily undervalue one class of property by comparison to another class of property;
>
> (2) if it does so, it must lower the value of the more highly valued property to the level of the undervalued property; and
>
> (3) the obligation to equalize valuations does not depend on the source of the inequality (whether from the Board's conduct, legislative action, or Federal court order).

In light of these principles, the pipelines' case for equalization was manifest. One class of property (railroad and carline property) was undervalued in comparison to another class of property (pipeline property); the Board was under an obligation to lower the value of the more highly valued property (pipeline property) to the level of the undervalued property (railroad and carline property); and it was irrelevant that the source of the inequality was a Federal court order as distinguished from action taken by the Board on its own initiative or at the behest of the legislature.

It was irrelevant that the source of the inequality was a Federal court order....

Whether or not the foregoing reasoning of the court was compelled by the relevant precedents,[9] it was unmistakably based entirely on principles of *state* constitutional law. This fact—that state constitutional law principles by themselves provide an ample basis for the court's decision—is significant for several reasons. First, it seriously jeopardizes the possibility of Supreme Court review.[10] Second, it means that even if the Nebraska court could be persuaded in the future that its analysis of the Federal equal protection clause is misguided—an effort the Nebraska Attorney General unsuccessfully undertook in his petition for rehearing in *Northern Natural Gas*,[11] the effort would be futile if the court adhered to its interpretation of state law. Third, it may limit the options available to the state in the event the Nebraska Supreme Court's decision remains undisturbed.[12]

The question remains whether the Nebraska Supreme Court's decision was justified as a matter of state constitutional law. The decision is undeniably restrictive. Other state courts would no doubt have concluded that differential treatment of pipelines, on the one hand, and railroads and carlines, on the other, constitutes an acceptable classification under their states' uniformity and equality provisions.[13] Moreover, it can be argued that there is precedent in Nebraska that would support the exemption of railroad and carline property and the taxation of pipeline property.[14]

Nevertheless, the Nebraska Supreme Court has generally been quite restrictive in its interpretation of its uniformity provision.[15] Indeed, as the leading student of

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[4]See *Trailer Train Co. v. Leuenberger*, CV87-L-29 (D. Neb., Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir., Dec. 19, 1988), *cert. denied sub nom. Boehm v. Trailer Train Co.*, 109 S. Ct. 2065 (1989); *Burlington Northern R.R. Co. v. Leuenberger*, CV87-L-565 (D. Neb., Dec. 19, 1987); *Oklahoma Gas & Electric Co. v. Leuenberger*, CV88-L-52 (D. Neb., Jan 26, 1988).

[5]See 232 Neb. at 815-16, 443 N.W.2d at 255-56.

[6]"Taxes shall be levied by valuation uniformly and proportionately upon all tangible property...." Neb. Const. art. VIII, section 1.

[7]232 Neb. at 815, 443 N.W.2d at 255-56 (citations omitted).

[8]232 Neb. at 815, 443 N.W.2d at 255-55.

[9]This question is considered further immediately below.

[10]See note 51 *infra*.

[11]See Appellee's Brief in Support of Motion for Rehearing, *Northern Natural Gas Co. v. State Board of Equalization and Assessment*, *supra*. The Nebraska Supreme Court denied the petition for rehearing. *Tax Notes*, October 23, 1989, p. 452.

[12]See text accompanying notes 51-55 *infra*.

[13]See J. Hellerstein & W. Hellerstein, *State and Local Taxation* 70 (4th ed. 1988).

[14]See *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974) (state may classify personal property as it sees fit, and may exempt any of such classes from taxation).

[15]See, e.g., *Banner County v. State Board of Equalization and Assessment*, 226 Neb. 236, 411 N.W.2d 35 (1987); *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Grainger Bros. Co. v. County Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966); *cf. United States Cold Storage Co. v. Stolinksi*, 168 Neb. 513, 96 N.W.2d 408 (1959).

state constitutional uniformity and equality provisions concluded in his study of Nebraska, under the rubric "The Staying Power of the Idea of Strict Uniformity":

> The Nebraska experience is an excellent illustration of the situation in which a strict uniformity limitation is adopted at an earlier period and retained in the state constitution, but modified by necessity, by a series of piecemeal and specific amendments which cut out occasional exceptions to that strict uniformity. But the Nebraska court has adhered to the policy underlying the strict uniformity provision and, with rare exception, has continued to insist on maintaining that policy by the use of restrictive and confining interpretations of the repeated attempts to liberalize the limitation by specific constitutional amendment. That attitude of the Nebraska Supreme Court has spanned a number of decades, so that it cannot be attributed to a single set of justices; and it is not just a reflection of a period from the distant past, recognized now only in spirit. As the above review indicates, as recently as the 1970s the Nebraska Supreme Court has demonstrated its determination to enforce strict uniformity and see that the policy underlying it is adhered to, and only begrudgingly has given way to occasional amendments.[16]

In short, whatever one's view of the Nebraska Supreme Court's decision in *Northern Natural Gas* as a matter of fiscal policy, it is consistent with a long history of restrictive judicial interpretations of the state's uniformity provision.

B. Federal Law Considerations

Although the court's state constitutional analysis provided a sufficient basis for its decision, the court also relied on the Federal equal protection clause in reaching its conclusion. Indeed, most of the court's brief discussion of the legal basis for requiring that the pipelines receive the same treatment as the railroads and car companies focused on the equal protection clause, and the court did not draw a sharp line between the state and Federal predicates for its ruling. After indicating that the differential treatment of pipeline and railroad/carline property failed to pass state constitutional muster, the court in the next breath declared that

> [t]he state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.[17]

In support of this proposition, the Court relied on *Sioux City Bridge v. Dakota County*,[18] and *Sunday Lake Iron Co. v. Wakefield*,[19] for the settled proposition that intentional and systematic undervaluation of other taxable property in the same class as the taxpayer's property violates the equal protection clause and that the taxpayer suffering such arbitrary discrimination has the right to have his or her assessment reduced to the percentage of true value at which comparable property is assessed. The court then concluded:

> [I]t makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: The equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of Enron as that in the case of the railroad and car companies.[20]

The Nebraska Supreme Court's view of the requirements of the equal protection clause does not accurately reflect the United States Supreme Court's reading of that clause. The Supreme Court has long made it clear that "the Equal Protection Clause...imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."[21] Hence "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."[22] Invoking these principles, the Court has sustained state taxing schemes that have distinguished between anthracite coal and bituminous coal,[23] between steam-generated electricity and oil-generated electricity,[24] and between commercial warehouses and private warehouses.[25] The Court has also made it plain that the equal protection clause does not preclude the separate classification and taxation of different types of property.[26] "Since, so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, the only relevant question for us is whether the state has done so."[27]

'The Equal Protection Clause...imposes no iron rule of equality....'

In light of these precedents, it is simply inconceivable, the Nebraska Supreme Court to the contrary notwithstanding, that the United States Supreme Court would invalidate a state taxing scheme that classified railroad and carline property separately from pipeline property and taxed them under different regimes. Inasmuch as the high court requires only that there be a rational basis for

[16] 1 W. Newhouse, *Constitutional Uniformity and Equality in State Taxation*, at 1040 (2d ed. 1984).
[17] 232 Neb. at 815, 443 N.W.2d at 256.
[18] 260 U.S. 441 (1923).
[19] 247 U.S. 350 (1918).
[20] 232 Neb. at 816, 443 N.W.2d at 256.
[21] *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959).
[22] *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).
[23] *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922).
[24] *Broad River Power Co. v. Query*, 288 U.S. 178 (1933).
[25] *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70 (1947).
[26] See, e.g., *Charlestown Federal Savings & Loan Co. v. Alderson*, 324 U.S. 182 (1945).
[27] *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940).

the lines that state legislatures draw in their taxing statutes,[28] and embraces the view that "a classification, though discriminatory, is not arbitrary nor violative of the Fourteenth Amendment if any statement of facts reasonably can be conceived that would sustain it,"[29] a state statute that classified and taxed railroad and carline property differently from pipeline property would undoubtedly survive constitutional scrutiny.

This does not mean, however, that the Nebraska Supreme Court necessarily erred as a matter of Federal constitutional law. If the state *as a matter of state law* considers that a particular species of property, though amenable to separate classification and taxation under Federal equal protection standards, is in fact a single class of property for state law purposes, the state's differential treatment of a subspecies of such property may nevertheless violate Federal equal protection standards. The Court's recent decision in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*,[30] illustrates this point. In that case, the Court held that gross disparities in tax assessments attributable to the widespread practice of assessing property based on recent sales prices violates equal protection standards when no adjustment is made to comparable unsold properties to reflect current value. In so holding, however, the Court was careful to point out that the county assessor made no attempt to justify the disparities in assessment on the ground that recently sold and unsold property constituted two different classes of property that were to be treated differently as a result of a deliberate policy. Indeed, the contrary was true: West Virginia's constitution and implementing statutes provided that all the property in question was to be taxed at a uniform rate throughout the state according to its value. Given the state's own professed adherence to a standard of uniformity and equality of assessments based on market value, the county assessor's reliance on the occurrence of a sale as the basis for achieving such equality could not pass constitutional muster.[31]

If Nebraska is viewed as having only a single class of tangible personal property for assessment purposes (even though such a restrictive classification is not constitutionally compelled), the argument can, therefore, be made that Federal equal protection standards require that all such property be treated alike.[32] The question, of course, is whether Nebraska in fact has only one class of tangible personal property for assessment purposes. The Nebraska Supreme Court appears to have undercut any such argument by recognizing in *Northern Natural Gas* that pipeline property and railroad and carline property constitute two classes of property.[33] Moreover, even if pipeline, railroad, and carline property were considered to fall within a single class of property for state law purposes, as the Nebraska court's decision in *Banner County* suggests they might,[34] judicial authority from other states supports the view that the lowering of assessed property values of railroads under Federal court order pursuant to the 4-R Act does not provide other taxpayers with a right to the same treatment under the equal protection clause, even though such taxpayers may be treated as a single class of property along with railroads under state law.

The lowering of assessed property value . . . pursuant to the 4-R Act does not provide other taxpayers with a right to the same treatment . . . .

In *State v. Colonial Pipeline Co.*,[35] the Alabama Court of Civil Appeals considered an oil pipeline's challenge to the assessment of its property at the highest applicable

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[28]See, e.g., *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648. 668 (1981).

[29]*Allied Stores of Ohio, Inc. v. Bowers*, *supra*, 358 U.S. at 528.

[30]109 S. Ct. 633 (1989).

[31]If the differential tax treatment of recently purchased property and of other property had been adopted as a deliberate state policy, the outcome might well have been different. This is, of course, precisely the case with California's Proposition 13, a fact the Court duly noted:

> We need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a State, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy as Article XIIIA of its Constitution, popularly known as "Proposition 13." Proposition 13 generally provides that property will be assessed at its 1975-76 value, and reassessed only when transferred, constructed upon, or, in a limited manner for inflation.... The system is grounded in the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.

109 S. Ct. at 638 n.4. Although it may seem odd that the equal protection clause would be less offended by discrimination that reflects deliberate state policy than by discrimination resulting from the aberrational actions of a single assessor, the distinction suggested by the Court is deeply rooted in equal protection doctrine. The equal protection clause only protects against unjustifiable discrimination. If "rational basis" is the standard of justification, as it is in the context of tax classifications that do not implicate Federal concerns apart from equal protection, see *Western & Southern Life Insurance Co. v. State Board of Equalization*, *supra*, then if the discrimination has a "rational basis," as it arguably does in California, it will pass muster under the equal protection clause.

[32]*Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, *supra*; *Nashville, C. & St. L. Ry. v. Browning*, *supra*.

[33]"It would seem that no question exist[s]" that if the Board arbitrarily undervalues *a particular class of property* so as to make *another class of property* disproportionately higher. . . . the court must correct that constitutional inequity. . . ." 232 Neb. at 815, 443 N.W.2d at 255-56 (emphasis supplied). *See also* Headnote 7 to the opinion as reported in Nebraska Reports, 232 Neb. at 807, which indicates that the author of the opinion, Judge Hastings, is apparently of the belief that two classes of property are involved; *but see* Headnote 8, *id.*, which suggests that the personal property at issue is all in the "same class." The battle of headnotes may be beside the point, however, since they are not citable.

[34]The court, while recognizing that "the Legislature can divide the class of tangible property into different classifications," has nevertheless declared that "these classifications remain subdivisions of the overall class of 'all tangible property,' and there must be a correlation between them to show uniformity." *Banner County v. State Board of Equalization and Assessment*, *supra*, 226 Neb. at 253, 411 N.W.2d at 46.

[35]471 So. 2d 408 (Ala. Civ. App. 1984), *writ quashed, Ex Parte Colonial Pipeline*, 471 So. 2d 413 (Ala. 1985), *appeal dismissed*, 474 U.S. 936 (1985).

rate, which was prescribed for utility (Class I) property. As in *Northern Natural Gas*, the property of railroads and certain other utilities in *Colonial Pipeline* had been assessed at a lower rate than the Class I rate applicable to the pipeline's property because of the requirement of the 4-R Act and analogous legislation mandating the assessment of protected property at the rate generally applicable to other commercial and industrial property in the state.

In its opinion rejecting the pipeline's objections to its assessment as Class I property, the court dismissed the suggestion that the disparate treatment of pipelines, on the one hand, and railroads, on the other, would violate the equal protection clause *even though the pipelines and railroads were considered a single class of property as a matter of state law*:

> If there may be some discrimination against Colonial, it is not arbitrary or unreasonable. Until the state was specifically forbidden to tax the property of railroads at a higher assessment ratio than other commercial and industrial property by Congress in 49 U.S.C. section 11503, it classified the property of railroads as Class I property. Moreover, until forbidden to do so by the Circuit Court of Montgomery County in *Delta Airlines v. Department of Revenue*, Civil Action No. CV-80-116-G, the Department classified the property of airlines as utilities and taxed them as Class I property. The Tax Equity and Fiscal Responsibility Act of 1982 section 532 amending 49 U.S.C. sections 1513(b) and (d), now has the effect of forbidding the state from assessing property of air carriers at a higher rate than other commercial and industrial property.
>
> Currently, the state is specifically forbidden to classify the property of motor carriers as Class I property by 49 U.S.C. section 11503a, which gives the motor carriers the same protection from high assessment rates that is afforded railroads and air carriers. Were it not for the supremacy of federal statutes over state law, airlines, trucklines, and railroads, which are included in [Class I], would be subject to the same Class I classification as is assigned to Colonial's property. The preemption for tax purposes of those other entities does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong.[36]

In *Federal Express Corp. v. Tennessee State Board of Equalization*,[37] the Tennessee Supreme Court considered the taxpayer's challenge to the assessment of its property at the 55 percent rate applicable to public utility property rather than the 30 percent rate applicable to commercial and industrial property. In rejecting the contention, similar to that made by the taxpayer in *Colonial Pipeline*, that the equal protection clause forbade the state from assessing the taxpayer's property at the rate applicable to utility property while assessing railroad property at the lower rate applicable to commercial and industrial property, the court declared:

> The legislature classified railroads as public utilities and assessed them for *ad valorem* tax purposes at 55 percent of the value of their properties. However, the Congress of the United States, by section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. section 11503 ("4-R Act"), preempted the state classification of railroads and provided that they should be taxed as industrial and commercial property are taxed. The Act, having as its purpose the revitalization of railroads, affected only that business. Thus leaving in effect the state classification of other businesses as public utilities. The assessment of each of the businesses classed as public utilities is at the same ratio to value as the assessment of Federal Express property; consequently, we find no violation of either Article II, section 28 of the Tennessee Constitution or the Equal Protection Clause of the Federal Constitution.[38]

In both *Colonial Pipeline* and *Federal Express*, then, the courts have held—contrary to the holding in *Northern Natural Gas*—that the equal protection clause does *not* require that all property the state places in the same class (e.g., public utility property) be treated alike, at least when Federal law dictates that one subclass of such property (e.g., railroad property) be assessed at a lower rate than that prescribed by the state for the class in question. Moreover, *Colonial Pipeline* and *Federal Express* can be reconciled with the United States Supreme Court cases (*Allegheny Pittsburgh Coal*[39] *and Nashville, C. & St. L. Ry.*[40]) that appear to support the opposite view embraced by the Nebraska Supreme Court in *Northern Natural Gas.*

The equal protection clause does not require that all property the state places in the same class...be treated alike....when Federal law dictates that one subclass of such property... be assessed at a lower rate.

In *Colonial Pipeline* and *Federal Express*, it may be suggested, Federal law created a classification scheme that is binding on the states. So long as this classification scheme has a rational basis, as the 4-R Act and kindred legislation indisputably do, no substantial equal protection attack can be leveled against the classification. And this is so regardless of how the states might originally have classified the property in question apart from their obligation to conform to Federal law.

In *Allegheny Pittsburgh Coal* and *Nashville, C. & St. L. Ry.*, by contrast, the states were under no Federal obligation to classify or not to classify. The state's choice whether and how to classify therefore definitively established the classification scheme that would govern the equal protection inquiry. So long as the states' classification scheme met the loose "rational basis" requirement, the only judicially cognizable question was whether the

[36] *State v. Colonial Pipeline Co.*, *supra*, 471 So. 2d at 412-13.
[37] 717 S.W.2d 873 (Tenn. 1986).
[38] *Id.* at 876.
[39] See note 30 *supra*.
[40] See note 27 *supra*.

state had in fact accorded equal treatment to property it had placed in a particular class.[41]

In sum, the Nebraska Supreme Court is unwarranted in concluding that the equal protection clause requires that pipeline property be taxed in the same way as railroad and carline property. Furthermore, even though the equal protection clause may require equal treatment if pipeline, railroad, and carline property constitutes a single class of property under state law, a persuasive case can be made that the equal protection clause does not require such equal treatment if Federal legislation effectively creates a separate class of railroad and carline property.

III. RELATIONSHIP BETWEEN NORTHERN NATURAL GAS AND THE 4-R ACT

Despite the central role that the 4-R Act appears to play in the Nebraska Supreme Court's conclusion that pipelines were entitled to an exemption of their personal property from state taxation, the 4-R Act in fact was unnecessary to the court's decision. Indeed, the court's reasoning would have led to precisely the same result had the 4-R Act never been enacted, and the 4-R Act's modification or repeal would therefore have no impact on the Nebraska Supreme Court's ruling.

A. State Law

The core of the Nebraska Supreme Court's state law holding that the pipelines are entitled to an exemption of their personal property is that pipeline property must be treated the same as other property in the state. As explained in Part II of this article, the court reasoned that the state's constitutional uniformity provision required that one "class of property" be assessed in the same manner as "another class of property,"[42] and that the state's obligation to equalize valuations does not depend on the source of the inequality. To be sure, the ostensible source of the inequality (to which the court adverted) in *Northern Natural Gas* was the exemption of the railroads' and carlines' personal property pursuant to Federal court order under the 4-R Act. The critical point, however, is that *the exemption of the railroads' and carlines' personal property pursuant to the 4-R Act was attributable entirely to the fact that most commercial and industrial personal property in Nebraska was likewise exempt.*[43] But for the discriminatory treatment of railroad and carline personal property by comparison to the treatment of most other commercial and industrial personal property in the state, the railroads and carlines would have had no cause of action under the 4-R Act.

The factual predicate underlying the railroads' and carlines' 4-R Act claim—that railroad and carline personal property was taxed more heavily than most other commercial and industrial personal property in the state—would provide the pipelines with an equally good claim under state constitutional principles, wholly apart from the 4-R Act. If most commercial and industrial personal property in Nebraska is exempt, and the courts have so found,[44] then the pipelines have a right to the exemption of their personal property regardless of whether the railroads' personal property has been exempted under Federal court order. For if pipeline property is taxed "disproportionately higher" than most other commercial and industrial property in the state, "this court must correct the constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state."[45]

If most commercial and industrial personal property in Nebraska is exempt, . . . the pipelines have a right to the exemption of their personal property. . . .

In short, the essential reasoning underlying the court's state law holding in *Northern Natural Gas* shows that the pipelines were entitled to the relief they obtained without regard to the fact that the railroads and carlines had previously achieved similar relief in Federal court. It is also apparent that the railroads and carlines themselves, had they anticipated the court's opinion in *Northern Natural Gas*, would have had no need to pursue their remedies in Federal court under the 4-R Act because identical relief was available in state court, to wit, equalization with most other commercial and industrial property in the state. Not only does this reveal the irrelevance of the 4-R Act to the court's decision in *Northern Natural Gas*, it also indicates that even if the 4-R Act were repealed or modified, the pipelines, railroads, and carlines would be in precisely the same position in Nebraska as they are today. Indeed, the irony of the suggestion that the 4-R Act is somehow to "blame" for the predicament in which the *Northern Natural Gas* opinion has placed the state of Nebraska is that if the *Northern Natural Gas* case reflected the law in most states, there never would have been any need for the 4-R Act! It was the very absence of the right of railroads under state and Federal law to have their property assessed like most other commercial and

[41] In *Allegheny Pittsburgh Coal*, differential taxation of property violated the equal protection clause because the state failed to provide equal treatment to property it had placed in a single class. In *Nashville C. & St. L. Ry.*, differential taxation of property did not violate the equal protection clause because the state failed to provide equal treatment to property it had placed in different classes.

[42] 232 Neb. at 815, 443 N.W.2d at 256.

[43] *See* note 4 *supra*. As the Federal court in the *Trailer Train* case observed:

> Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an *ad valorem* tax on its actual value. . . . [T]he Nebraska system favors a majority of the property of possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment.

Trailer Train Co. v. Leuenberger, *supra*, slip. op. at 6 (quoted in *Northern Natural Gas Co. v. State Board of Equalization and Assessment*, 232 Neb. at 810, 443 N.W.2d at 253).

[44] *See* note 4 *supra*.

[45] *Northern Natural Gas Co. v. State Board of Equalization and Assessment*, *supra*, *232 Neb. at 815, 443 N.W.2d at 256.*

industrial property in the state that gave rise to the need for the 4-R Act in the first place.[46]

B. Federal Law

For largely the same reasons set forth above with regard to the relationship of the 4-R Act to the Nebraska Supreme Court's holding that pipelines were entitled to an exemption of their personal property under state constitutional principles, it can be argued that the court's similar holding under Federal equal protection principles is likewise independent of the railroads' and carlines' right to equalization relief under the 4-R Act. Although I have indicated above that the court's equal protection analysis may well be flawed,[47] if it is taken at face value, it leads to the conclusion that the pipelines were entitled to an exemption of their personal property even if the railroads and carlines had no right to such an exemption under the 4-R Act. If all tangible personal property constitutes a single class of property under Nebraska law,[48] and the equal protection clause requires that all property of the same class be treated equally,[49] then the pipelines' right to an exemption of their personal property derives from the fact that most other commercial and industrial property in Nebraska is exempt. It does not depend on the fact that the railroads and carlines may have obtained the right to an exemption of their personal property under Federal law.

It should be pointed out, however, that there may be some connection in the court's mind between the pipelines' right to relief under Federal equal protection principles and the railroads' and carlines' right to relief under the 4-R Act. In the portion of the court's opinion dealing with Federal equal protection principles, its references to the pipelines' right to an exemption are always linked to the exemption the railroads and carlines obtained under the 4-R Act.[50] Moreover, in stressing the problem of intraclass discrimination, upon which the court seems to focus in its equal protection discussion, the court may have been assuming that it was dealing with a single class of centrally-assessed utility property rather than with all commercial and industrial property in the state. If this was in fact the case—and the court's opinion is simply too opaque to reach any firm conclusions on this score—then the relief that the railroads and carlines obtained under the 4-R Act may have played a more significant role in the court's analysis than if the court had been considering all commercial and industrial property in the state. In any event, even if the existence of the 4-R Act had some impact on the court's dubious equal protection analysis, it remains true that the court's state constitutional analysis is fully independent of the 4-R Act.

IV. OPTIONS AVAILABLE TO THE STATE OF NEBRASKA

The final question to be considered is what options are available to the state of Nebraska on the assumption that the *Northern Natural Gas* opinion is neither modified nor overturned.[51] The options available to the state, of course, depend on how one reads the court's opinion. As the preceding discussion indicates, one cannot be entirely confident about the precise meaning of the court's decision. Nevertheless, it does suggest several available courses of action—assuming, of course, that one regards some action as appropriate.

One could take the position that the court's decision does not deprive the state of the power to classify by exemption.

First, one could satisfy the court's strict view of uniformity and equality under state and Federal law by either exempting all personal property in the state or by taxing all personal property in the state. Needless to say, these alternatives may be neither fiscally attractive nor politically feasible. Nevertheless, they are "solutions" that would be consistent with the court's opinion.

Second, one could amend the state constitution to make it clear that specified classification was constitutionally sanctioned. Such an approach could eliminate the state constitutional bar to differential treatment of railroads and carlines, on the one hand, and pipelines, on the other, and thus overturn the result and implications of *Northern Natural Gas.* This approach should also eliminate any Federal constitutional bar to differential treatment of the property in question, because taxpayers could no longer assert that Federal equal protection principles required equal treatment of property the state had placed in the same class.[52] One cannot, however, be

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[46]*See Burlington Northern R.R. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987).

[47]*See* text accompanying notes 21-29 *supra*.

[48]*See* note 34 *supra*.

[49]Which it clearly does. *See*, e.g., *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, *supra*.

[50]*See* 232 Neb. at 815-16, 443 N.W.2d at 256.

[51]As indicated above, *see* note 11 *supra*, the Nebraska Supreme Court has already denied the Attorney General's petition for rehearing in the case, so the only opportunity for the court to modify its views expressed in *Northern Natural Gas* would be in some future opinion. Moreover, the possibility that the United States Supreme Court would grant review of the Nebraska Supreme Court's decision in *Northern Natural Gas* is extremely remote. Even under the most propitious circumstances, one cannot be confident about the prospect of inducing the high court to give plenary consideration to a case, given the number of significant controversies competing for the Court's attention. In this instance there are two very important considerations weighing against the likelihood of Supreme Court review. First, the Nebraska Supreme Court's decision does not deny any constitutional rights. At the very worst, the court erred in its interpretation of the equal protection clause. But it did so in a manner that gave too much rather than too little deference to Federal concerns. The Court is not likely to be particularly perturbed about an error of that kind, given the pleas of many petitioners who claim that their Federal constitutional rights were violated.

Second, and more importantly, the Court probably lacks jurisdiction to consider the case. As explained above, *see* text accompanying notes 6-12 *supra*, the Nebraska court's decision rests in part on principles of state constitutional adjudication. Because the court's decision appears to rest on an independent and adequate state ground, namely, the interpretation of the Nebraska uniformity provision, the Supreme Court would likely dismiss the case for lack of jurisdiction. *See* R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 168-85 (6th ed. 1986).

[52]*See Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, *supra*.

absolutely certain of this outcome. If the Nebraska Supreme Court is of the view, mistaken though it may be, that the Federal equal protection clause itself forbids the separate classification of railroad and carline property from other property (or from other centrally-assessed property), then a state constitutional amendment would not solve the problem raised by *Northern Natural Gas*.[53] Furthermore, the path to the adoption of a constitutional amendment is long and uncertain. Hence it may not be a feasible alternative, at least in the short run.

Third, one could take the position that the court's decision does not deprive the state of the power to classify by exemption.[54] On this assumption, if the legislature were to classify railroad and carline personal property separately and exempt it, there would still be a case for taxing the personal property of pipelines and other taxpayers. The problem with this approach, however, is that it gives the court's opinion a narrower reading than may be warranted. If the court truly believes in the idea of "strict uniformity,"[55] then there may be no escape from a constitutional amendment as a means of introducing greater flexibility into the Nebraska property tax system.

[53]Although United States Supreme Court review of the Nebraska court's erroneous interpretation of the equal protection clause would be possible, and there would be no jurisdictional bar to review based on the existence of an independent and adequate state ground (on the assumption that the state constitution had been amended), it remains quite unlikely that the Court would agree to hear such a case. *See* note 51 *supra*.

[54]*See* Neb. Const. art. VIII, section 2 ("The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation"). *See also Stahmer v. State*, *supra*.

[55]*See* 1 W. Newhouse, *Constitutional Uniformity and Equality in State Taxation*, *supra* note 16, at 1040.