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Discriminatory Demands and Divided Decisions: State and Local Taxation of Rail, Motor,and Air Carrier Property

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NOTES

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I. INTRODUCTION

To prevent the unreasonable burdening of interstate commerce that results from discriminatory state and local taxation of rail, motor, and air carrier property, Congress enacted section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act),[1] section 31 of the Motor Carrier Act of 1980,[2] and section 532(b) of the Airport and Airway Improvement Act of 1982.[3] These statutes represent the result of two decades of congressional deliberation over property tax discrimination against interstate carriers.[4] Because Congress enacted the 4R Act first and because tax discrimination against rail carriers has been the most egregious, the overwhelming majority of litigation in this area has involved challenges to state and local tax schemes by rail carriers. As a result, this Note concentrates on section 11503. When necessary, analogies are drawn between court decisions interpreting section 11503 and probable interpretations of similar provisions in the motor and air carrier statutes. The fact that the three statutes are identical or nearly identical in many of their significant provisions justifies this approach.

A lack of uniformity has characterized judicial construction of these statutes. Ambiguities within the statutes are responsible for much of the confusion. Courts have differed in their interpretations of terms that are fundamental to the statutes' application. Similarly, courts have differed in their approaches to determining whether an interstate carrier is suffering discrimination.[5] As a consequence of this judicial divergence, carriers in some jurisdictions receive more favorable treatment than those in other jurisdictions.

This Note analyzes the current state of the law concerning property tax discrimination against rail, motor, and air carriers since the passage of sections 11503, 11503a, and 1513(d). Part II discusses the legislative history of the federal statutes, which appears mostly in reports of the congressional committees that considered, but failed to enact, earlier versions of the legislation. Part

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1. Pub. L. No. 94-210, § 306, 90 Stat. 31, 54-55 (codified at 49 U.S.C. § 26c, recodified at 49 U.S.C. § 11503 in accordance with the Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 11503, 92 Stat. 1337, 1445-46) [hereinafter § 11503 or the 4R Act].

2. Pub. L. No. 96-296, § 31, 94 Stat. 793, 823-24 (codified at 49 U.S.C. § 11503a) [hereinafter § 11503a].

3. Pub. L. No. 97-248, § 532(b), 96 Stat. 671, 701-02 (codified at 49 U.S.C. § 1513(d)) [hereinafter § 1513(d)].

4. *See infra* notes 6-33 and accompanying text.

5. For the statutory definition of discrimination, see *infra* text accompanying note 64.

III addresses the constitutionality of the federal statutes. Part IV provides an overview of the statutes' provisions and identifies the ambiguities that have led courts to interpret and apply them differently. Part V considers in detail the judicial construction of the statutes and examines the varying approaches taken in different jurisdictions. Part VI briefly introduces the problems existing in the interstate oil pipeline industry, an industry that has yet to receive federal statutory protection despite congressional recognition more than twenty years ago that pipeline companies were being discriminated against by state and local taxing authorities. Part VII of this Note concludes by outlining several proposals for greater uniformity among courts in the interpretation of these statutes and recommending congressional action promoting uniformity.

II. LEGISLATIVE HISTORY

Pursuant to its plenary commerce clause powers, Congress established statutory protection against discriminatory state and local property taxation[6] for rail, motor, and air carriers in the Railroad Revitalization and Regulatory Reform Act of 1976, the Motor Carrier Act of 1980, and the Airport and Airway Improvement Act of 1982. Congress developed most of the legislative history of these statutes during the fifteen years prior to the statutes' enactment. The bulk of the legislative history relates to tax discrimination against the railroad industry;[7] legislative history concerning the motor and air carrier statutes is minimal.[8] The purpose for enact-

6. Throughout the 1960s and early 1970s, Congress held many hearings and considered various reports pertaining to tax discrimination against interstate transportation carriers. *See* Clinchfield R.R. v. Lynch, 700 F.2d 126, 128 n.1 (4th Cir. 1983); Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 207 nn.4-6 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Atchison, T. & S. F. Ry. Co. v. Lennen, 552 F. Supp. 1031, 1036 & n.8 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984).

During the legislative process, Professors Paul H. Sanders and Paul J. Hartman of Vanderbilt University played a significant role in convincing Congress that it had the constitutional power to prohibit this type of tax discrimination. *See* S. REP. No. 1483, 90th Cong., 2d Sess. 11-12 (1968). Both professors pointed out that this type of legislation was not unconstitutional under the Supreme Court's ruling in Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961), discussed *infra* at notes 243-46 and accompanying text.

7. *See, e.g.*, H.R. REP. No. 1395, 95th Cong., 2d Sess. 4-9, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3009, 3013-18; S. REP. No. 499, 94th Cong., 2d Sess. 14, 65-66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 14, 79-80; S. REP. No. 585, 94th Cong., 1st Sess. (1975); H.R. REP. No. 768, 94th Cong., 1st Sess. (1975); H.R. REP. No. 725, 94th Cong., 1st Sess. (1975); S. REP. No. 1085, 92d Cong., 2d Sess. (1972); S. REP. No. 630, 91st Cong., 1st Sess. (1969); S. REP. No. 1483, 90th Cong., 2d Sess. (1968).

8. The legislative history of the motor carrier statute's taxation provisions lists only

ing these statutes, nevertheless, was the same. Congress intended to revitalize the rail, motor, and air carrier industries by prohibiting discriminatory state and local property taxes. Congress anticipated that interstate commerce would benefit once consumers took advantage of the lower cost of using these carriers resulting from the carriers' protection from discriminatory taxes under this legislation.[9]

Congress long had recognized that state and local governments discriminated in their taxation of interstate transportation carriers,[10] noting that interstate carriers are "targets" for discriminatory state and local taxation because they are nonvoting, often nonresident entities and because they cannot easily remove their rights-of-way and terminals from the state.[11] States frequently practiced this discrimination against interstate carriers by classifying their property at tax rates higher than property owned by other commercial and industrial concerns.[12] Although classification schemes are not in themselves unconstitutional,[13] Congress was particularly suspicious of this practice because reclassification often occurred after a successful challenge of the state's tax system.[14] The legislative history indicates that states discriminated

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the types of taxation that the statute does and does not prohibit. *See* H.R. REP. No. 1069, 96th Cong., 2d Sess. 45, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2283, 2327. The legislative history of the air carrier statute's taxation provisions is even more limited, stating merely, in effect, that the air carrier statute has the same purpose and scope as the motor carrier statute. *See* S. REP. No. 494, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 781, 1188.

9. Congress was aware that consumers paid higher prices for transportation because interstate carriers passed the cost of the discriminatory taxes on to the consumer. *See* S. REP. No. 1085, 92d Cong., 2d Sess. 3-4 (1972) (quoting S. REP. No. 630, 91st Cong., 1st Sess. 3 (1969)). *See generally* Statutory Comment, *The Railroad Revitalization and Regulatory Reform Act of 1976: Improving the Railroads' Competitive Position,* 14 HARV. J. ON LEGIS. 575 (1977) (arguing that, in general, the 4R Act restores competition in the transportation industry).

10. Congress' first major statement on the issue of state and local tax discrimination against interstate transportation carriers appeared in a report entitled "National Transportation Policy" prepared by the Senate Committee on Commerce. *See* S. REP. No. 445, 87th Cong., 1st Sess. 445 (1961). After the report, several unsuccessful bills were proposed to end the discrimination. Finally, Congress passed the 4R Act in 1976. For a list of these bills, see cases cited *supra* note 6.

11. S. REP. No. 1483, 90th Cong., 2d Sess. 2 (1968).

12. *See id.* at 5.

13. *See* Nashville, Chatt. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

14. *See* S. REP. No. 1483, 90th Cong. 2d Sess. 5 (1968) (pointing out that Kentucky took this action in 1965).

By 1969, Congress recognized a clear trend among states to classify the property of interstate carriers at higher tax rates than other commercial or industrial property owners. *See* S. REP. No. 630, 91st Cong., 1st Sess. 6 (1969). Nevertheless, state courts continued to

through variations in assessment or tax rates,[15] and that state and local governments took advantage of interstate carriers by capitalizing on certain economic changes occurring after World War II. Although the market values of residential and commercial properties increased substantially, assessed values remained constant. By contrast, the market value of property owned by interstate carriers did not increase similarly. Interstate carriers, therefore, experienced unfavorable state and local tax consequences.[16]

Congress considered railroads to be the interstate carriers most burdened by discriminatory state and local taxation.[17] As early as 1944, approximately half the states admitted to Congress that they were taxing railroads excessively.[18] In an examination of the railroad industry presented to Congress, the Association of American Railroads[19] concluded that there was "*a studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates.*"[20] As a result, railroads accounted for ninety percent of the approximately one billion dollars that interstate carriers paid in discriminatory state and local taxes from 1960 to 1969.[21] By 1970, at least twenty-one states discriminatied significantly against railroads.[22] Four states taxed railroad property by an excess of more than fifty percent over other commercial and industrial property in their ratio of assessed value to true market value.[23] In response to the degree of existing tax discrimination,

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uphold discriminatory tax classification systems. *See, e.g.*, Apache County v. Atchison, T. and S. F. Ry., 106 Ariz. 356, 476 P.2d 657 (1970) (upholding Arizona's tax classification scheme that assessed railroad property at a higher rate than other business property).

15. S. REP. No. 1085, 92d Cong., 2d Sess. 5 (1972).

16. S. REP. No. 445, 87th Cong., 1st Sess. 458 (1961).

17. S. REP. No. 630, 91st Cong., 1st Sess. 3 (1969).

18. *Id.* at 4 (quoting H.R. Doc. No. 160, 78th Cong., 2d Sess. 124-25 (1944)).

19. The Association of American Railroads (AAR) was founded in 1934 and currently has 240 memhers. 1 ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE U.S. § 3107 (20th ed. 1986). The AAR serves as the "[c]oordinating and research agency of the American railway industry." *Id.*

20. S. REP. No. 630, 91st Cong., 1st Sess. 5 (1969) (emphasis in original); S. REP. No. 1483, 90th Cong., 2d Sess. 4 (1968) (emphasis in original).

21. S. REP. No. 1085, 92d Cong., 2d Sess. 3 (1972); S. REP. No. 630, 91st Cong., 1st Sess. 3 (1969).

22. The total percentage of excessive taxation in the twenty-one most discriminatory states increased from 37.87% in 1968 to 38.31% in 1970. *Compare* S. REP. No. 630, 91st Cong., 1st Sess. 5 (1969) *with* S. REP. No. 1085, 92d Cong., 2d Sess. 6 (1972). These statistics were provided to Congress by the Association of American Railroads.

23. S. REP. No. 1085, 92d Cong., 2d Sess. 6 (1972). The four most discriminatory states were Arizona, Idaho, Mississippi, and South Carolina. *See id.* Although this was an improvement over five years earlier when eight states were taxing railroad property excessively by

Congress passed the 4R Act in 1976, making rail carriers the first interstate carriers protected from discriminatory property taxation.

Congress also was concerned with the judicial process, which failed to arrest the discriminatory state and local tax schemes aimed at interstate carriers. Congress observed that "[s]tate equalization agencies generally ha[d] been given power to equalize assessment ratios between assessment jurisdictions but [were] prohibited from altering the individual assessments made by any one assessor."[24] As a result, the taxpayer had the extremely difficult burden of proving an improper assessment.[25] Additionally, courts exercised limited review in tax assessment cases, reasoning that they should not readily overturn the judgment of local assessors because state legislatures typically did not provide the assessors with standards by which to determine property values.[26] Because courts gave such great deference to state and local taxing authorities, interstate carriers that challenged inequitable assessments were at an almost insurmountable disadvantage when attempting to obtain relief.

Congress recognized the need for a federal forum in which interstate carriers could challenge the allegedly discriminatory taxing policies of state and local governments.[27] Congress, therefore, decided to create an express exception to the Tax Injunction Act.[28] That Act prohibits federal district courts from granting relief against the assessment, levy, or collection of a tax established under state law unless the state courts could not provide a "plain, speedy, and efficient remedy."[29] Congress concluded that the Tax Injunction Act prevented interstate carrier plaintiffs from having access to the federal judicial system, yet the states did not provide an adequate state court remedy.[30] In many states, for example, state law forced plaintiffs to bring suit against the tax collectors rather than the tax assessors. Therefore, because counties generally

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50% or more, Congress wanted to eliminated all discrimination. *See id.;* S. REP. No. 1483, 90th Cong., 2d Sess. 4 (1968).

24. S. REP. No. 445, 87th Cong., 1st Sess. 458 (1961).

25. *See id.*

26. *See id.*

27. *See, e.g.,* H.R. REP. No. 725, 94th Cong., 1st Sess. 76-77 (1975); S. REP. No. 630, 91st Cong., 1st Sess. 6-7 (1969).

28. 28 U.S.C. § 1341 (1982).

29. H.R. REP. No. 725, 94th Cong., 1st Sess. 76-77 (1975); S. REP. No. 630, 91st Cong., 1st Sess. 6-7 (1969).

30. S. REP. No. 630, 91st Cong., 1st Sess. 6-7 (1969).

are the tax collecting bodies, an interstate carrier had to bring suit against every county in which the carrier operated to get complete relief.[31]

Although this procedure clearly did not provide a speedy and efficient remedy, Congress noted that courts previously had held that requiring multiple suits did not preclude the availability of an adequate state remedy.[32] In addition, testimony before the Senate Committee on Commerce pointed out that state courts typically have over-crowded dockets and move more slowly.[33] Congress, therefore, determined that a grant of jurisdiction to the federal courts would provide efficient forums in which plaintiffs could acquire a complete remedy in one judicial proceeding. Congress also recognized the need to provide standards to guide state and federal courts in their review of allegedly discriminatory state and local property taxes. The various provisions of 49 U.S.C. §§ 11503, 11503a, and 1513(d) supply these standards.

III. Constitutional Challenges to Federal Legislation

Decisions upholding the congressional power to regulate state and local tax policy have involved the commerce clause, the tenth amendment, and the supremacy clause. Of the three, only decisions under the supremacy clause have proven to be a threat to congressional authority.[34] This Note, however, concludes that state court decisions upholding supremacy clause challenges to the federal legislation are mistaken.[35]

A. The Commerce Clause

Congress enacted all three of the relevant statutes pursuant to the commerce clause[36] of the United States Constitution. The

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31. *See* H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975) (observing that Southern Pacific had to bring 48 lawsuits in different California courts to challenge its property assessments); S. Rep. No. 1483, 90th Cong., 2d Sess. 6 (1968).

32. *See* H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975) (citing Chicago & North W. Ry. v. Lyons, 148 F. Supp. 787 (S.D. Ill. 1957) (holding that the requirement to bring 24 different suits was not a failure to provide an adequate state remedy)). *But see* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 303 (1952) (suit in 14 counties to protect a single claim not satisfying the requirements of the Tax Injunction Act), *cited with approval* in Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 517 (1981).

33. S. Rep. No. 1483, 90th Cong., 2d Sess. 6 (1968) (testimony by a witness for the Association of American Railroads).

34. *See infra* notes 59-62 and accompanying text.

35. *See infra* note 63 and accompanying text.

36. The commerce clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

United States Supreme Court has ruled that, under the commerce clause, "Congress may regulate any activities except 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.' "[37] Thus, Congress has the power to regulate a state's taxation of interstate rail, motor, and air carrier property located totally within that state because of its potential impact on interstate commerce.[38] Under these circumstances, state tax laws become a federal concern.[39]

Although Congress has broad powers under the commerce clause, it still must act constitutionally in exercising those powers. In *Arizona Public Service Co. v. Snead*[40] the Supreme Court addressed the constitutionality of a federal statute, analogous to sections 11503, 11503a, 1513(d), that Congress enacted pursuant to the commerce clause. The statute invalidated a New Mexico energy tax that discriminated against electricity sold outside the state. Applying a rational basis test, the Court held that Congress did have a rational basis for enacting the antidiscrimination law and that the law was reasonably structured to fulfill its purpose.[41] Under the *Snead* standard, sections 11503, 11503a, and 1513(d) clearly are constitutional. Congress had a rational concern that discriminatory state and local property taxation unreasonably burdened interstate commerce and the provisions of the federal statutes established a reasonable method to eliminate the discriminatory taxing scheme.[42]

B. The Tenth Amendment

States and local taxing authorities have argued that the tenth amendment[43] establishes a constitutional limitation on Congress'

U.S. CONST. art. I, § 8, cl. 3.

37. Arizona v. Atchison, T. & S. F. R.R. Co., 656 F.2d 398, 407 (9th Cir. 1981) (quoting Katzenbach v. McClung, 379 U.S. 294, 302 (1964)).

38. *See id.*

39. *See supra* note 9.

40. 441 U.S. 141 (1979).

41. *Id.* at 150; *see also* Tennessee v. Louisville & N. R.R. Co., 478 F. Supp. 199, 206-07 (M.D. Tenn. 1979) (discussing *Arizona Pub. Serv. Co. v. Snead*), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

42. *See supra* notes 6-33 and accompanying text.

43. The tenth amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

power to enact sections 11503, 11503a, and 1513(d).[44] The tenth amendment prohibits Congress from acting in a way "that impairs the States' integrity or their ability to function effectively in a federal system."[45] Taxation obviously is a principal way by which state and local governments acquire the revenue necessary to function and to provide public services to their citizens. State taxation of property used in interstate commerce, however, is not within the traditional sovereignty of the states.[46] Consequently, because of Congress' well-established powers to regulate interstate commerce, Congress' prohibition on discriminatory state and local taxation of interstate rail, motor, and air carrier property does not violate the reasonable expectations of the states.[47] Furthermore, states do not necessarily have to suffer a decline in tax revenues as a result of the federal statutes. The states simply could eliminate discriminatory taxing schemes and assess all commercial and industrial property at the same ratio to true market value as the property of interstate carriers.[48]

Lower court decisions rejecting tenth amendment challenges to the federal statutes came during a period when the Supreme Court generally employed a balancing approach in its tenth amendment analysis.[49] This balancing approach was established in *National League of Cities v. Usery*.[50] Under the *National League*

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44. *See* Arizona v. Atchison, T. & S. F. R.R. Co., 656 F.2d 398, 407-09 (9th Cir. 1981) (holding no tenth amendment violation); Atchison, T. & S. F. Ry. Co. v. Lennen, 552 F. Supp. 1031, 1037 (D. Kan. 1982) (rejecting a tenth amendment challenge), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984); Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 205-06 (M.D. Tenn. 1979) (holding no tenth amendment violation), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

45. Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 205 (M.D. Tenn. 1979) (quoting Fry v. United States, 421 U.S. 542, 547 (1975)), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

46. *See* Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 408 (9th Cir. 1981).

47. *See id.*

48. *See id.* & n.9; *see also* Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 206 (M.D. Tenn. 1979) (pointing out that § 11503 does not limit the amount of tax revenues that a state can collect, but only prohibits discriminatory methods), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

49. *See* Arizona v. Atchison, T. & S.F. R.R., 656 F.2d 398, 407-09 (9th Cir. 1981) (citing National League of Cities v. Usery, 426 U.S. 833 (1976)); Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 205-06 (M. D. Tenn. 1979) (citing National League of Cities v. Usery, 426 U.S. 833 (1976), and Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981). These courts point out that the applicability of the five to four decision in *National League of Cities* to cases challenging the constitutionality of § 11503 is uncertain and, therefore, they rely more on several of the Court's earlier decisions.

50. 426 U.S. 833 (1976).

of Cities approach, the balance of relevant interests clearly favors federal legislation prohibiting the unreasonable burdening of interstate commerce, a significant national concern. Furthermore, the states do not experience any loss of their sovereignty or their ability to govern effectively.[51] Not surprisingly, therefore, every court that has considered a tenth amendment challenge to the federal statutes has upheld their constitutionality.[52] Recently, however, in *Garcia v. San Antonio Metropolitan Transit Authority*[53] the Supreme Court revised its tenth amendment analysis. Overruling *National League of Cities*, the Court held that because the American political process enables states to participate in federal lawmaking, Congress will not enact laws that unreasonably burden the states.[54] Under this new constitutional approach, courts are even less likely to invalidate any federal statute, including sections 11503, 11503a, and 1513(d), that survived challenge under the more strict and unpredictable balancing test of *Usery*.[55]

C. *The Supremacy Clause*

The supremacy clause[56] preempts any provision of state or local tax law that conflicts with sections 11503, 11503a, or 1513(d).[57] Federal courts consistently have upheld the congressional power to enact these statutes, and have preserved their supremacy when the courts have found that state and local taxing policies violated the federal statutes.[58] State courts, by contrast, have a greater ten-

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51. *See* Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 408 (9th Cir. 1981).

52. *See, e.g.*, Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398 (9th Cir. 1981); Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984); Tennessee v. Louisville & N. R.R., 478 F. Supp. 199 (M.D. Tenn. 1979), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

53. 105 S. Ct. 1005 (1985).

54. *Id.* at 1020-21.

55. *See id.* at 1022 (Powell, J., dissenting) (stating that the majority's opinion "effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause").

56. The supremacy clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

57. *See* Tennessee V. Louisville & N. R.R., 478 F. Supp. 199, 209 (M.D. Tenn. 1979), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

58. *See, e.g.*, Trailer Train Co. v. State Bd. of Equalization, 511 F. Supp. 553, 557-58 (N.D. Cal. 1981) (stating that § 11503 preempts discriminatory state tax law), *modified*, 697 F.2d 860 (9th Cir. 1983); Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 209 (M.D. Tenn. 1979) (upholding supremacy of federal law), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

dency to guard jealously the rights of states to tax all property within their borders and not to defer to Congress.[59]

In *Western Air Lines, Inc. v. Hughes County*[60] the Supreme Court of South Dakota demonstrated this position by reaffirming an earlier South Dakota decision holding that "absent the clear and manifest intent of Congress, the reserved powers of the States are not superseded by federal legislation."[61] The court concluded that Congress had not expressed a clear and manifest intent when it enacted section 1513(d) and, therefore, ruled that the discriminatory state tax scheme was not preempted.[62]

The South Dakota court is mistaken. Any court, either federal or state, must totally disregard nearly two decades of legislative history to hold that Congress' intent to preempt discriminatory state and local taxation of interstate rail, motor, and air carrier property was not "clear and manifest."[63] The supremacy clause clearly operates to supersede all state and local taxation statutes that conflict with the three federal statutes.

IV. An Overview of the Statutes

In sections 11503, 11503a, and 1513(d), Congress enumerated the means by which courts can prevent the unreasonable burdening of interstate commerce through discriminatory state and local property taxation against rail, motor, and air carriers. First, each statute contains a subsection defining key terms as well as acts that constitute discrimination. Discrimination against a carrier occurs when a state or local government: (1) assesses the carrier's transportation property at a higher ratio to true market value than

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59. *See* State v. Colonial Pipeline Co., 471 So. 2d 408 (Ala. Civ. App. 1984); Apache County v. Atchison, Topeka and Santa Fe Ry. Co., 106 Ariz. 356, 476 P.2d 657 (1970).

60. 372 N.W.2d 106 (S.D. 1985) *prob. juris. noted*, 106 S.Ct. 1180 (1986).

61. *Id.* at 108 (quoting Lead-Deadwood School Dist. v. Lawrence County, 334 N.W.2d 24, 25 (S.D. 1983)).

62. *Id. But see id.* at 111-12 (Henderson, J., dissenting in part) (severely criticizing the majority's holding that § 1513(d) does not preempt South Dakota's airline property tax); Atchison, T. & S. F. Ry. v. Bair, 338 N.W.2d 338, 348 (Iowa 1983) (upholding § 11503 over Iowa law in accordance with the supremacy clause), *cert. denied*, 465 U.S. 1071 (1984).

63. *See* Northwest Airlines, Inc. v. State Bd. of Equalization, 358 N.W.2d 515, 517 (N.D. 1984) (holding that § 1513(d) indicates that Congress "clearly" intended to preempt North Dakota's airline property tax); *see also* Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983) (stating that "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted") (footnote omitted). *See generally* L. Tribe, American Constitutional Law 242-44 (1978) (discussing judicial review of congressional legislation under the commerce clause).

the assessment ratio of other commercial and industrial property in the same assessment jurisdiction; (2) levies or collects a tax on a discriminatory assessment; or (3) levies or collects an ad valorem property tax at a higher tax rate than other commercial and industrial property.[64] The definitions of "assessment jurisdiction"[65] and "commercial and industrial property"[66] contained in the statutes have received varying interpretations among courts construing the statutes. Second, the rail carrier statute prohibits the imposition of any other discriminatory tax and the air carrier statute permits, under certain circumstances, an in lieu tax, but the statutes do not define these terms.[67] Third, the rail and motor carrier statutes create an express exception to the Tax Injunction Act[68] by conferring jurisdiction on federal courts, concurrent with state courts, to grant relief[69] when the assessment ratio of a carrier's property exceeds the assessment ratio of other commercial and industrial property "by at least five percent."[70] Finally, these statutes provide that a plaintiff may prove discrimination through a "sales assess-

64. 49 U.S.C. §§ 11503(b), 11503a(b), and 1513(d)(1) (1982).

65. 49 U.S.C. §§ 11503(a)(2), 11503a(a)(2), and 1513(d)(2)(B) (1982) define "assessment jurisdiction" as "a geographical area in a State used in determining the assessed value of property for ad valorem taxation."

Under these definitions, an entire state or each county within a state may be considered an assessment jurisdiction and tax exempt business property may or may not be considered commercial and industrial property. In the legislative history of the definition of "assessment jurisdiction," Congress recognized that cities and counties as well as the state may serve as the relevant assessment jurisdiction and determined that courts should decide which one to follow under the facts of each case. *See* S. REP. No. 630, 91st Cong., 1st Sess. 14-15 (1969) (amending S. 2289 by substituting "assessment jurisdiction" for the extremely broad term "taxing district"). Courts generally have determined that the state is the relevant assessment jurisdiction. *See, e.g.*, Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 405 (9th Cir. 1981) (holding that the State of Arizona was the relevant "assessment jurisdiction" under the facts of the case); Atchison, T. & S. F. Ry. v. Arizona, No. 81-1279, slip. op. (D. Ariz. May 2, 1983) (holding that the state was the relevant assessment jurisdiction despite possible hardships on the counties resulting from this determination) (available on LEXIS); Atchison, T. & S. F. Ry. v. Lennen, 531 F. Supp. 220, 231 (D. Kan. 1981) (holding that the state was the relevant assessment jurisdiction for purposes of deciding a motion for a preliminary injunction).

66. 49 U.S.C. §§ 11503(a)(4), 11503a(a)(4), and 1513(d)(2)(D) (1982) define "commercial and industrial property" as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy."

For an analysis of the judicial conflicts over the definition of "commercial and industrial property," see *infra* notes 142-49 and accompanying text.

67. *See infra* notes 86-99, 105-22 and accompanying text.

68. 28 U.S.C. § 1341 (1982).

69. For a discussion of the types of relief available under these statutes, see *infra* notes 228-98 and accompanying text.

70. 49 U.S.C. §§ 11503(c) and 11503a(c) (1982).

ment ratio study" or by demonstrating to the satisfaction of a court that the assessment or tax rate on its own property is higher than comparable property.[71] The air carrier statute, by contrast, does not have a provision giving federal courts concurrent jurisdiction or the authority to grant appropriate relief. Consequently, federal courts apparently do not have jurisdiction over these cases.

Sections 11503, 11503a, and 1513(d) prohibit both de jure and de facto discrimination. De jure discrimination is defined as the taxation or assessment of a rail, motor, or air carrier's property "at a rate different from the average rate applied to other commercial and industrial property."[72] State property tax classification systems are typical forms of de jure discrimination.[73] De facto discrimination, by contrast, is a statutorily significant difference in the assessment ratio of carrier property when compared to the ratio for all other commercial and industrial property even though the state tax law is facially valid.[74] De facto discrimination typically occurs when a state's reassessment procedures require the annual reappraisal of rail, motor, and air carrier property, but, for example, require the reappraisal of residential and other commercial and industrial property only every eight years.[75] As a conse-

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71. *See id.* For an analysis of the application of these provisions, see *infra* notes 130-72 and accompanying text.

72. Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1243 (D. Ariz. 1983); *see also* Burlington N. R.R. v. Lennen, 715 F.2d 494, 497 (10th Cir. 1983) (discussing de jure discrimination), *cert. denied,* 467 U.S. 1230 (1984).

De jure discrimination against rail and motor carriers occurs when a state's failure to include various types of property in the assessment ratio of all other commercial and industrial property in an assessment jurisdiction, property which it includes in a rail or motor carrier's assessment ratio, results in an assessment rate for a rail or motor carrier that exceeds the average assessment rate of all other commercial and industrial property by at least five percent. *See id.* This type of discrimination occurs against air carriers when the state's law results in any assessment ratio variation that favors commercial and industrial taxpayers. *Compare* 49 U.S.C. § 1513(d) *with* 49 U.S.C. §§ 11503 and 11503a. Unlike §§ 11503 and 11503a, § 1513(d) does not have a 5% excess requirement.

73. *See* Tennessee v. Louisville & N. R.R., 478 F. Supp. 199 (M.D. Tenn. 1979) (holding that § 11503 prohibits Tennessee's property tax classification system), *aff'd mem.,* 652 F.2d 59 (6th Cir.), *cert. denied,* 454 U.S. 834 (1981).

74. For rail and motor carriers, statutorily significant discrimination would occur when the assessment ratio of rail or motor carrier property exceeds by at least five percent the average assessment ratio of all other commercial and industrial property even though the state tax law is facially valid. *See* Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1243 (D. Ariz. 1983). For air carriers, de facto discrimination is defined as any difference in assessment ratios to the disadvantage of air carriers despite the facial validity of the state tax statute. *See supra* note 72 and accompanying text.

75. *See* Clinchfield R.R. v. Lynch, 700 F.2d 126, 130 (4th Cir. 1983) (discussing North Carolina's reassessment procedures and how they result in de facto discrimination against railroads.).

quence of this process, the interstate carriers pay higher taxes than most other commercial and industrial taxpayers because their assessments reflect current increases in true market value while delayed assessment of other property delays increases in their tax assessments.[76] De jure discrimination has characterized most of the litigation under these statutes.[77]

Based on these statutory provisions, courts have undertaken the task of enforcing Congress' desire to eliminate discriminatory state and local taxation of interstate transportation property and the resulting burdens on interstate commerce with varying and often conflicting results.

V. JUDICIAL CONSTRUCTION OF SECTIONS 11503, 11503A, AND 1513(D)

A. Recodification of the 4R Act

Although Congress passed the 4R Act in 1976, the Act did not become effective for three years.[78] Congress provided this period to allow states to revise their discriminatory taxation policies in accordance with section 306 of the 4R Act.[79] During this delay, Congress passed the Revised Interstate Commerce Act of 1978 and recodified section 306 at 49 U.S.C. § 11503. This recodification resulted in significant substantive changes in the language of the statute.[80] Whether a court follows the original language of the 4R Act or the recodified version at section 11503 may determine the outcome of a case.

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76. *See id.*

77. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 785-86 & n.5 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126 (4th Cir. 1983); *see also* Burlington N. R.R. v. Bair, 766 F.2d 1222 (8th Cir. 1985) (de jure discrimination); Ogilvie v. State Bd. of Equalization, 657 F.2d 204 (8th Cir.) (de jure discrimination), *cert. denied*, 454 U.S. 1086 (1981); Arkansas-Best Freight Sys., Inc. v. Cochran, 546 F. Supp. 904 (M.D. Tenn. 1981) (de jure discrimination); Louisville & N. R.R. v. Louisiana State Tax Comm'n, 498 F. Supp. 418 (M.D. La. 1980) (de jure discrimination).

78. The 4R Act became effective on February 5, 1979. *See* Historical and Revision Notes accompanying 49 U.S.C. § 11503 (1982) (stating that § 11503 "is effective after February 4, 1979"); Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 208 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

79. Section 306 of the 4R Act is codified at 49 U.S.C. § 26c. *See* H.R. REP. No. 725, 94th Cong., 1st Sess. 76 (1975); *see also* Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 865 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983); Atchison, T. & S. F. Ry. v. Arizona, No. 81-1279, slip op. at ____, (D. Ariz. May 2, 1983) (available on LEXIS).

80. Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 11503, 92 Stat. 1337, 1445-46. *Compare* 49 U.S.C. § 26c (1976) *with* 49 U.S.C. § 11503 (1983). *See generally* Historical and Revision Notes accompanying 49 U.S.C. § 11503 (1982) (explaining the changes in the statutory language).

The overwhelming majority of courts have resolved substantive conflicts between the two versions of the statute in favor of the original version.[81] These courts point to Congress' stated intention not to change the law substantively when it recodified section 306.[82] By contrast, the Ninth Circuit has held that because Congress amended the original section 306 language before the statute's effective date, the original version never became law.[83] Therefore, this circuit alone follows the recodified version.[84]

Instead of clarifying the discriminatory taxation provisions of the 4R Act, Congress' 1978 revisions made the statute even more confusing and less likely to result in uniform judicial construction. The recodification and the predominant judicial approach to the Act's provisions have created problems. Courts, however, would experience fewer constructional problems if they followed the recodification rather than the original language at all times.[85] If a court chooses to uphold the original language over the recodified language, then the court first must determine whether a conflict

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81. *See* Richmond, F. & P. R.R. v. Department of Taxation, 762 F.2d 375, 377 (4th Cir. 1983); Louisville & N. R.R. v. Department of Revenue, 736 F.2d 1495, 1496 n.1 (11th Cir. 1984); Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1497 (10th Cir. 1984); Southern Ry. V. State Bd. of Equalization, 715 F.2d 522, 523-24 & n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Clinchfield R.R. v. Lynch, 700 F.2d 126, 128 n.1 (4th Cir. 1983); Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 206 n.1 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 258 & n.2 (10th Cir. 1981).

82. *See* Revised Interstate Commerce Act of 1978, Pub. L. No. 95-473, § 11503, 92 Stat. 1337, 1337, 1466 (preamhle and legislative purpose); H.R. REP. No. 1395, 95th Cong., 2d Sess. 4, 9, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3009, 3013, 3018 (stating that courts should not construe a codification statute as substantively changing the law); *see also* Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 258 (10th Cir. 1981) (Senator Mark Hatfield noted that "by enacting [this law] we are not making any new law; we are merely making existing law more understandable.") (quoting 124 CONG. REC. 16059-60 (1978)).

83. *See* Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 404, 410 (9th Cir. 1981); Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1240 n.1 (D. Ariz. 1983).

In Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 862 n.1 (9th Cir. 1983), the Ninth Circuit stated that it "will refer to the original language of § 306 only when necessary to assist in the interpretation of the statute." This statement should not be inferred to overrule implicitly the Ninth Circuit's 1981 holding, *supra*, that only the recodified version became the law because similar language appeared in the earlier opinion. Instead, this statement merely indicates that the court will compare, as part of its analysis, the original and current laws when the differences are relevant. *See* Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 400 (9th Cir. 1981) (stating that the court will cite to the recodified version "except when the differences between the two are at issue").

84. Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 400 (9th Cir. 1981).

85. Although uniformity among courts is generally encouraged and desired, the near unanimity among the circuits to follow the original § 306 language when a conflict exists with the recodification has the potential to create problems for the development of a uniform construction of § 11503.

exists before it can apply the provisions of the relevant version. This two step process results in courts disagreeing about the threshold issue: whether a conflict even exists. Consequently, two statutes, largely similar but different in several significant respects, govern the law in the area of discriminatory state and local taxation of the rail carrier industry. Thus, to avoid confusion, the most appropriate role for the original language is to provide guidance, as legislative history, for interpreting section 11503's ambiguous provisions and to provide substance when apparently necessary provisions are omitted from section 11503.

B. Scope of the Statutes

1. Rail Carriers

Federal district courts and appellate courts have taken conflicting positions on the scope of section 11503.[86] The appellate court approach, favoring a broad application of the statute, has prevailed.[87] Both statutory interpretations, nevertheless, are viable and merit consideration. Several district courts[88] have limited section 11503 to prohibit only property tax discrimination against rail carriers. The title of section 11503—"Tax discrimination against rail transportation property"—itself suggests a restricted application of the statute to property tax discrimination.[89] In addition, each provision of section 11503 explicitly pertains to property taxation except subsection (b)(4), which is silent regarding its scope.[90] The legislative history of section 11503 also demonstrates that the statute apparently applies only to discriminatory property taxes.[91]

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86. The source of this controversy is subsection (b)(4) of 49 U.S.C. § 11503 (1982). This subsection provides, in relevant part, that "a State, subdivision of a State, or authority acting for a State or subdivision of a State may not . . . *impose another tax* that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title." (emphasis added).

87. The consensus among the appellate courts regarding the proper interpretation of § 11053(b)(4) is welcome because it promotes some uniformity despite the many disagreements that characterize judicial construction of the other provisions in the statute. *Cf. supra* note 85 (noting that near-unanimous approach of appellate courts to recodification of the statute actually promotes a lack of uniformity in result).

88. *See infra* notes 93-94.

89. 49 U.S.C. § 11503 (1982); *see* Alabama Great S. R.R. v. Eagerton, 501 F. Supp. 1044, 1045 (M.D. Ala. 1980), *rev'd*, 663 F.2d 1036 (11th Cir. 1981).

90. 49 U.S.C. § 11503 (1982).

91. Alabama Great S. R.R. v. Eagerton, 501 F. Supp. 1044, 1045-46 (M.D. Ala. 1980), *rev'd*, 663 F.2d 1036 (11th Cir. 1981).

The court quoted the following language from the "Joint Explanatory Statements of the Committee of Conference" to support this conclusion:

Finally, subsection (b)(4) is not without purpose even if courts limit the provision's applicability to cases involving discriminatory property taxation.[92] Thus, according to the strict constructionist view, no validity exists for the argument that Congress included subsection (b)(4) as a "catch-all" for all forms of tax discrimination.[93] As a result, the district courts have held that allegedly discriminatory state income and license taxes are not within the jurisdiction of section 11503.[94]

On the other hand, the federal appellate courts and a few district courts considering the issue have concluded that the statute prohibits all types of discriminatory taxation against rail carriers.[95] According to these courts, section 11503 would be ineffective in fulfilling Congress' intent to revitalize the railroad industry if states could discriminate against rail carriers through non-property

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> The conference substitute follows the Senate bill except that the conferees deleted the provision making this section inapplicable to any State which had, on the date of enactment, a constitutional provision for the reasonable classification of property for State purposes *and limited the provision to taxation of railroad property.*

Id. (quoting S. REP. No. 595, 94th Cong., 2d Sess. 166, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 148, 181 (emphasis added)); *see also* Richmond, F. & P. R.R. v. Department of Taxation, 591 F. Supp. 209, 223 (E.D. Va. 1984) (holding that the legislative history of § 11503 indicates Congress' intention that the statute apply only to property tax discrimination), *modified,* 762 F.2d 375 (4th Cir. 1985); Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 454 (D.N.D. 1980) (stating that the congressional intent in passing § 11503 "was to protect interstate rail carriers from discriminatory *property* taxation") (emphasis added), *aff'd,* 657 F.2d 204 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981).

92. *See* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 453-55 (D.N.D. 1980), *aff'd,* 657 F.2d 204 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981). The court invoked subsection (b)(4) and held that the state's taxation of railroad property was discriminatory because tbe state's method, in effect, taxed the personal property of the railroads but not of locally assessed businesses.

93. *See* Richmond, F. & P. R.R. v. Department of Taxation, 591 F. Supp. 209, 223 (E.D. Va. 1984), *modified,* 762 F.2d 375 (4th Cir. 1985).

94. *See id.* at 225 (denying relief because, according to the court, an action challenging Virginia's allegedly discriminatory income tax was not within the court's jurisdiction under § 11503); Alabama Great S. R.R. Co. v. Eagerton, 501 F. Supp. 1044, 1047 (M.D. Ala. 1980) (denying declaratory and injunctive relief because an action challenging Alabama's allegedly discriminatory license taxes was not within the court's jurisdiction under § 11503), *rev'd,* 663 F.2d 1036 (11th Cir. 1981).

95. *See* Trailer Train Co. v. Bair, 765 F.2d 744, 745 (8th Cir. 1985); Richmond, F. & P. R.R. v. Department of Taxation, 762 F.2d 375, 379-80 (4th Cir. 1985); Trailer Train Co. v. State Bd. of Equalization, 710 F.2d 468, 472 & n.6 (8th Cir. 1983); Alabama Great S. R.R. v. Eagerton, 663 F.2d 1036, 1040 (11th Cir. 1981); *see also* Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 210 (8th Cir.) (noting that the purpose of § 11503 "was to prevent tax discrimination against railroads *in any form whatsoever*") (emphasis added), *cert. denied,* 454 U.S. 1086 (1981); Atchison, T. & S. F. Ry. v. Bair, 338 N.W.2d 338, 344-46 (Iowa 1983) (invalidating a state railroad excise tax pursuant to § 11503), *cert. denied,* 465 U.S. 1071 (1984).

taxes.[96] To reach this interpretation requires courts to construe the absence of any limitation to section 11503(b)(4) as indicating that Congress intended a broad application of the statute.[97] Similarly, the failure of the legislative history to explain the purpose of subsection (b)(4) indicates, according to this argument, that Congress did not intend to limit the statute to prohibiting only property tax discrimination.[98] These courts, therefore, have concluded that discriminatory state income, franchise, and license taxes, as well as any other type of discriminatory tax, are within the jurisdiction of section 11503.[99]

2. Motor Carriers

Although essentially identical to section 11503 in all respects, section 11503a does not have a provision equivalent to subsection (b)(4). All of the section 11503a provisions relate to property tax discrimination against motor carriers. Nevertheless, constructional disputes may arise concerning the applicability of the statute to other forms of tax discrimination. The brief legislative history of the Motor Carrier Act of 1980 indicates that Congress did not intend to limit section 11503a to prohibiting discriminatory property

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96. *See* Trailer Train Co. v. State Bd. of Equalization, 710 F.2d 468, 472 (8th Cir. 1983); Alabama Great S. R.R. v. Eagerton, 663 F.2d 1036, 1041 (11th Cir. 1981).

97. *See* Richmond, F. & P. R.R. v. Department of Taxation, 762 F.2d 375, 379 (4th Cir. 1985) (concluding that Congress intended a broad application of the statute).

98. *See id.* at 380 (holding that "[i]t is entirely reasonable to conclude that the legislative history is silent as to the purpose of § [11503(b)(4)] because that subsection, inserted three weeks before the statute's passage, represented a last minute realization by Congress that prohibiting only discriminatory property taxes would not be enough relief"); Alabama Great S. R.R. v.Eagerton, 663 F.2d 1036, 1041 (11th Cir. 1981) (holding that Congress must have realized, as debate over the 4R Act was concluding, that a catch-all provision was necessary to assure fulfillment of the statutory purpose).

Although the appellant railroads in *Alabama Great Southern* contended that the legislative history cited by the district court, *supra* note 91, was irrelevant and did not stand for the proposition stated, the Eleventh Circuit failed to address that issue. *See id* at 1039. The railroads argued that the legislative history did not limit § 11503(b)(4) to railroad transportation property, but rather limited the statute's scope to railroads instead of expansively applying it to other interstate carriers. *Id.*

99. *See* Richmond, F. & P. R.R. v. Department of Taxation, 762 F.2d 375, 380 (4th Cir. 1985) (holding that an action challenging Virginia's allegedly discriminatory net income tax is under a court's § 11503 jurisdiction); Alabama Great S. R.R. v. Eagerton, 663 F.2d 1036, 1041 (11th Cir. 1981) (holding that an action challenging Alabama's allegedly discriminatory franchise tax is under a court's § 11503 jurisdiction); Kansas City S. R.R. v. McNamara, 563 F. Supp. 199, 200 (M.D. La. 1983) (holding that an action challenging Louisiana's allegedly discriminatory license tax is under a court's § 11503 jurisdiction); *see also* Atchison, T. & S. F. Ry. v. Bair, 535 F. Supp. 68, 70-71 (S.D. Iowa 1982) (holding that Iowa's special excise tax on railway fuel is within the "another tax" provision of § 11503(b)(4)).

taxes.[100] Rather, Congress intended the section to encompass taxes that are part of the "general tax structure applicable to a variety of commodities, operations, and commercial activities."[101] This history, however, enumerates other types that are not within the scope of the statute.[102]

Despite the conflict between Congress' intentions as stated in the legislative history of section 11503a and the language of the statute as codified, no court has attempted to resolve this dispute. In the two cases in which plaintiffs raised section 11503a and alleged that states were discriminating against interstate motor carriers through tax measures other than property taxes, the decisions were based on alternate grounds.[103] If states, however, can impose other types of discriminatory taxes,[104] they can subvert Congress' efforts through section 11503a to protect the motor carrier industry. For these reasons, courts should rule that the scope of section 11503a is coextensive with the expressed legislative intent.

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100. *See* H.R. REP. No. 1069, 96th Cong., 2d Sess. 45, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2283, 2327.

101. *Id.*

102. As Congress stated:

> The prohibition in this section against different tax rates is intended to apply to taxes such as those on real or personal property, general sales taxes, or other levies that are parts of general tax structure applicable to a variety of commodities, operations, and commercial activities. The provisions of this section do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. These highway user taxes include, but are not limited to, motor fuel taxes, registration fees, driver licenses, vehicle user taxes, ton-mile taxes, and other motor vehicle related taxes; the proceeds of these taxes, for the most part, are expended through a State highway fund or otherwise earmarked for highway construction, maintenance, or operation.

Id.

103. *See* American Trucking Ass'ns v. O'Neill, 522 F. Supp. 49 (D. Conn. 1981) (concerning the amendment of a Connecticut statute requiring each interstate motor carrier to pay a $40, rather than a $5, annual registration fee); American Trucking Ass'ns v. Conway, 514 F. Supp. 1341 (D. Vt. 1981) (concerning amendments to Vermont statutes requiring interstate motor carriers to pay increased permit fees).

Both courts held that the Tax Injunction Act, 28 U.S.C. § 1341, applied to the cases at bar. If the courts, however, had concluded that § 11503a was pertinent, the Tax Injunction Act would have been irrelevant because § 11503a(c) provides an explicit exception to that jurisdictional limitation. Although these courts probably did not apply § 11503a because registration fees were involved, *see supra* note 102, the decisions did not provide any reasoning for their failure to apply § 11503a.

104. *See supra* notes 100-103 and accompanying text; *see also infra* note 122 and accompanying text.

3. Air Carriers

Like section 11503a, section 1513(d) does not contain a provision analogous to section 11503(b)(4). Although most of the statute's provisions specifically apply to the property of air carriers, subsection (d)(3), nevertheless, will likely cause constructional disputes. First, this subsection states that it "shall not apply to any *in lieu tax* which is wholly utilized for airport and aeronautical purposes,"[105] but then fails to define the term "in lieu tax." The supreme courts of South Dakota and North Dakota have been the only courts to consider this issue.[106] In *Western Air Lines, Inc. v. Hughes County*,[107] the Supreme Court of South Dakota defined "in lieu tax" as meaning "instead of, or, a substitute for, and . . . not an additional tax."[108] Based upon this definition, the court concluded that the South Dakota tax was not a substitute tax, but rather was the state's first levy of a personal property tax on the plaintiff's airline flight property.[109] The court observed that even though the South Dakota statute labeled itself "in lieu," the substance, not the name, of the statute was determinative.[110] The court, therefore, noted that the relevant subsection of the act was (d)(1)[111] and not (d)(3).[112] The court, nevertheless, concluded that section 1513(d)(1) did not preempt the South Dakota tax.[113] In *Northwest Airlines, Inc. v. State Board of Equalization*[114] the Supreme Court of North Dakota similarly held that North Dakota's personal property tax on air carrier transportation property was not an in lieu tax under section 1513(d)(3) because the state had enacted no other tax for which this tax could be considered a substitute.[115] The court, however, determined that section 1513(d)(1) preempted the North Dakota tax.[116] The scant legislative history

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105. 49 U.S.C. § 1513(d)(3) (1982) (emphasis added).

106. *See* Western Air Lines, Inc. v. Hughes County, 372 N.W.2d 106 (S.D. 1985), *prob. juris. noted*, 106 S. Ct. 1180 (1986); Northwest Airlines, Inc. v. State Bd. of Equalization, 358 N.W.2d 515 (N.D. 1984).

107. 372 N.W.2d 106 (S.D. 1984), *prob. juris. noted*, 106 S. Ct. 1180 (1986).

108. *Id.* at 109 (quoting BLACK'S LAW DICTIONARY 832 (5th ed. 1979)).

109. *Id.*

110. *Id.* Thus, the court found no statutory violation.

111. 49 U.S.C. § 1513(d)(1) (1982). This provision specifies which state or local government actions unreasonably burden or discriminate against interstate commerce. For enumeration of these actions, see *supra* text accompanying note 64.

112. 372 N.W. at 109.

113. *Id.* at 111.

114. 358 N.W.2d 515 (N.D. 1984).

115. *Id.* at 518.

116. *Id.*

on section 1513(d) provides no assistance in defining an "in lieu tax" in the context of this statute. Instead, the legislative history may create even more confusion.

The second likely dispute concerning construction of section 1513(d) is over its scope. The legislative history indicates Congress intended to equate section 1513(d) with section 11503a.[117] As discussed above, however, the scope of section 11503a is not without its own constructional problems.[118]

The interrelationship of the various provisions of section 1513, however, suggests the need for an expansive reading of subsection (d). For example, section 1513(b), if read literally, demonstrates that states easily can circumvent the restrictions of subsection (d). Subsection (b), limited only by subsections (a) and (d),[119] provides that states may levy or collect "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services."[120] If the courts, therefore, restrict subsection (d) to prohibiting only *property* tax discrimination, a state apparently can discriminate against air carriers through various taxes other than property taxes. Arguably, Congress intended that the prohibition against unreasonably burdening interstate commerce, as embodied in subsection (d), be extended to the taxes enumerated in subsection (b), or taxes which that subsection contemplates.[121] The fact that states may disguise their property taxes in other forms demonstrates the need for a broad application of section 1513(d).[122]

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117. *See* S. REP. No. 494, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS, Vol. 2, 1188.

118. *See supra* notes 100-04 and accompanying text.

119. 49 U.S.C. § 1513(a) provides in pertinent part that "[n]o state . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce, or on the sale of air transportation or on the gross receipts derived therefrom."

49 U.S.C. § 1513(d), on its face, prohibits only property taxes that unreasonably burden and discriminate against interstate commerce. A failure to interpret this statute broadly has resulted in air carriers paying taxes that other carriers do not have to pay. *See* Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984) (not raising § 1513(d), the court upheld Florida's sales tax on fuel purchased by interstate air carriers even though the state did not tax railroads similarly).

120. 49 U.S.C. § 1513(b) (1982). This subsection also provides that states may levy or collect "*reasonable* rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." *Id.* (emphasis added).

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

122. The problems associated with a strict interpretation of 1513(d) may be highlighted by looking to other code provisions with only limited breadth. For example, the United States Supreme Court has recognized and invalidated Hawaii's attempt to enact a gross receipts tax prohibited by 49 U.S.C. § 1513(a). The fact that Hawaii "styled" the gross receipts tax as a property tax did not make the tax legal. *See* Aloha Airlines, Inc. v. Director

C. Burden of Proof

As in other types of litigation, the level of a plaintiff's burden of proof in an action arising under sections 11503, 11503a, and 1513(d) often will be outcome determinative. Under sections 11503 and 11503a, "[t]he burden of proof in determining assessed value and true market value is governed by State law."[123] Similarly, state burden of proof laws also govern cases tried in state court pursuant to section 1513(d), which does not confer jurisdiction on the federal courts.[124] Congress' failure to establish a federal burden of proof standard for use in these cases may foster a lack of national uniformity in the judicial construction of these statutes and may ultimately defeat Congress' purpose in enacting these laws. Without a federal standard, jurisdictions may adopt conflicting burden of proof requirements. For example, a plaintiff bringing an action in federal court, challenging a Kansas property tax law under sections 11503 or 11503a, may have to prove discrimination by clear and convincing evidence.[125] In a similar lawsuit in federal court in Iowa, by contrast, that same plaintiff would have the burden to prove discrimination only by a preponderance of the evidence.[126] Thus, plaintiffs apparently will prevail more often under the federal interpretation of Iowa law than Kansas law. In addition, the burden of proof never shifts to the state in an action governed by Iowa law,[127] but the burden does shift to the state in a suit brought, for instance, under North Carolina law.[128] States could

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of Taxation, 464 U.S. 7, 13 (1983). The Court did not consider § 1513(d) because Congress enacted this statute "after the relevant periods." *Id.* at 10 n.3. The factual situation in *Aloha Airlines* is particularly relevant because states could attempt to evade § 1513(d) by similarly disguising their property taxes as well as their gross receipts taxes.

123. 49 U.S.C. §§ 11503(c) and 11503a(c) (1982).

124. *See* 49 U.S.C. § 1513(d) (1982).

125. In Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984), the district court, in a § 11503 case, held that Kansas law required a clear and convincing evidence standard. 552 F. Supp. at 1051 (apparently relying on Northern Natural Gas v. Williams, 208 Kan. 407, 430, 493 P.2d 568, 587 (1972) (Fatzer, C.J., concurring in part and dissenting in part)). On appeal, the Tenth Circuit held that the proper Kansas standard was a preponderance of the evidence, but the appellate court sustained the district court's ruling on the merits. 732 F.2d at 1500 & n.4 (citing In re Wright's Estate, 170 Kan. 600, 228 P.2d 911 (1951)).

126. *See* Burlington N. R.R. v. Bair, 766 F.2d 1222, 1226 (8th Cir. 1985) (applying Iowa's burden of proof standards in a case concerning the railroad's challenge to the state's allegedly discriminatory personal property tax scheme).

127. *See id.* (citing Michigan Wisconsin Pipe Line Co. v. Iowa St. Bd. of Tax Review, 368 N.W.2d 187 (Iowa 1985)).

128. *See* Clinchfield R.R. v. Lynch, 700 F.2d 126, 131-32 (4th Cir. 1983) (citing N.C. GEN. STAT. §§ 105-333 through 105-341).

even increase the burden of proof required to prevail in these actions because their laws establish the governing standard.[129] These differences undermine the chances for a uniform judicial construction of these statutes.

D. *Proving Discrimination Under the Statutes*

1. Sales Assessment Ratio Studies

Under sections 11503 and 11503a, plaintiffs may prove property tax discrimination through a method known as a "sales assessment ratio study."[130] The purpose of this study is to calculate the assessments of a "hypothetical 'average' taxpayer," which a court then compares with a rail or motor carrier plaintiff's tax assessments in determining whether discrimination exists.[131] When the plaintiff's assessment ratio exceeds the "hypothetical taxpayer's" assessment ratio by at least five percent, a court may grant relief.[132] Although several courts have concluded that the sales assessment ratio study is the method Congress prefers in determining the average assessed value of other commercial and industrial

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129. States are unlikely to take this action because Congress would certainly respond unfavorably in its disbursement of funds to those states. Furthermore, such a development would force Congress into establishing a burden of proof standard for actions arising under these statutes. *But cf.* Burlington N. R.R. v. Bair, 766 F.2d 1222, 1226 (8th Cir. 1985) (holding that Congress intended the civil standard to apply).

130. *See* 49 U.S.C. §§ 11503(c) and 11503a(c) (1982). One court has concisely defined this method:

> The sales assessment ratio study is a statistical study used to measure the average ratio of market value to assessed value of locally-assessed property within a tax jurisdiction. The method of the study is randomly to select recently sold properties and to compare the sales prices with the assessed values. This composite of randomly-selected properties can provide, within a margin of error, the average ratio of market value to assessed value of property in the jurisdiction.

Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1241 n.2 (D. Ariz. 1983); *see also* Louisville and N. R.R. v. Public Serv. Comm'n, 493 F. Supp. 162, 164 n.2 (M.D. Tenn. 1978) (defining the sales assessment ratio study), *aff'd*, 631 F.2d 426 (6th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

Plaintiffs can conduct their own sales assessment ratio study or use a study already prepared. *See* Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1049 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984).

The air carrier statute does not provide a method by which plaintiffs can prove tax discrimination. The legislative history, however, indicates that Congress intended § 1513(d) to be analogous to § 11503a. *See* S. REP. No. 494, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS, 781, 1188. Under these circumstances, Congress may have intended that air carrier plaintiffs use this statistical method.

131. *See* S. REI

132. *See* 49 U.S.C. §§ 11503(c) and 11503a(c) (1982).

property, other methods of calculation are permissible.[133] A sales assessment ratio study merely establishes a prima facie case of discrimination. When a party challenges the accuracy or methodology of the study, a court may grant relief only if satisfied that the plaintiff has proven discrimination regardless of the study's outcome.[134]

Courts as well as litigants have disagreed over whether a sales assessment ratio study should include both personal and real property. A study that includes only real property is more efficient because information on arms length transactions of real property is readily available.[135] Personal property, on the other hand, cannot be studied through arms length transactions because the parties generally do not keep statistical records.[136] As a result, railroad plaintiffs have argued that a study on personal property is impossible. Defendants, by contrast, contend that a sales assessment ratio study is incomplete without statistics on personal property.[137] Some district courts have held that Congress determined that a proper sales assessment ratio study includes only real property and selected this statistical method for determining tax discrimination because of the method's speed and efficiency.[138] According to these

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133. *Compare* Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1241 (D. Ariz. 1983) (stating that the sales assessment ratio study is the "preferred method") *and* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 787 (E.D.N.C. 1981) (stating that "Congress incorporated [a] preference for a sales-assessment ratio study into Section [11503]"), *aff'd*, 700 F.2d 126, 129 & nn.3-4 (4th Cir. 1983) *with* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 451 (D.N.D. 1980) (stating that the legislative history "does not indicate" that the sales assessment ratio study is the only allowable method), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

134. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 789-90 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126 (4th Cir. 1983).

135. *See id.* at 787-88 & n.7.

136. *Id.* at 788 n.7. The court, however, pointed out that a study on personal property is feasible, but only through more time-consuming appraisals and field reports. *Id.*

137. *See* Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1042-44 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984); Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 787-88 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126, 133 n.4 (4th Cir. 1983) (pointing out that a study on personal property would likely benefit plaintiffs).

Plaintiffs in *Lennen* apparently argued that sales assessment ratio studies of personal property would be too costly and unreliable. Plaintiffs, therefore, were willing to follow the real estate study results even if a personal property study would lower the assessment ratio. Defendants, on the other hand, apparently believed that plaintiffs could not obtain relief if they did not undertake a study on personal property.

138. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 787 (E.D.N.C. 1981), *aff'd on other grounds*, 700 F.2d 126, 133 (4th Cir. 1983). The court cited the following congressional hearings to support its analysis: *Hearings Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. (July 1964); *Hearings Before the Subcomm. on Aeronautics of the Comm. on Inter-*

courts, Congress was willing to sacrifice a certain degree of accuracy for a speedier process.[139] Appellate courts considering this issue have disagreed with the analysis of these courts. Appellate courts note that because Congress has prohibited discrimination concerning both personal and real property, only a study of personal property can demonstrate discrimination in that aspect of a tax scheme.[140] Appellate courts, however, have held that plaintiffs can use methods less laborious and expensive than a sales assessment ratio study to prove personal property discrimination.[141]

Courts have taken various approaches in deciding whether a state that exempts the personal property of all other commercial and industrial taxpayers may properly include a carrier's personal property in its assessment ratio. The diversity in court decisions stems from the definitions of "commercial and industrial property" in sections 11503, 11503a and 1513(d). Each definition provides that only property "subject to a property tax levy" constitutes commercial and industrial property.[142] Under one approach, only rail carriers could receive an exemption for personal property taxes because section 11503(b)(4) prohibits a state from taxing a rail carrier's personal property if the state does not impose a tax on similar commercial and industrial property.[143] Motor and air carriers

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state and Foreign Commerce on H.R. 736, H.R. 10169, 88th Cong., 2d Sess. (1964); *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Comm. on Commerce,* 91st Cong., 1st Sess. (1967). *Id. See also* Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1043-44 (D. Kan. 1982) (pointing out the efficiency of a sales assessment ratio study conducted only on real property), *aff'd in part and rev'd in part,* 732 F.2d 1495 (10th Cir. 1984).

Congress has stated that the results of a sales assessment ratio study, including data only on real property, "can be statistically demonstrated to be accurately representative of the level of assessment of all other property in the geographical area (i.e., taxing district) represented by the sample." S. REP. No. 1483, 90th Cong., 2d Sess. 23-24 (1969).

139. Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1041 (D. Kan. 1982) (holding that "Congress could not have intended to burden plaintiffs with the task of conducting extensive and unprecedented personal property studies when its announced intent was to ease procedural barriers to relief"), *aff'd in part and rev'd in part,* 732 F.2d 1495 (10th Cir. 1984); Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 788 (E.D.N.C. 1981) (holding that "Congress necessarily sacrificed a degree of accuracy which could be obtained through a vastly more expensive and time-consuming method of proof, that of county-by-county personal property studies") (footnote omitted), *aff'd on other grounds,* 700 F.2d 126 (4th Cir. 1983).

140. *See* Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1502-04 (10th Cir. 1984); Clinchfield R.R. v. Lynch, 700 F.2d 126, 133-34 & n.11 (4th Cir. 1983).

141. These methods include appraisal studies and expert testimony. Clinchfield R.R. v. Lynch, 700 F.2d 126, 133 (4th Cir. 1983).

142. *See* 49 U.S.C. § 11503(a)(4), 11503a(a)(4), and 1513(d)(2)(D) (1982).

143. *See* Trailer Train Co. v. State Bd. of Equalization, 710 F.2d 468, 471-73 (8th Cir. 1983); Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 453-55 (D.N.D. 1980), *aff'd,* 657 F.2d 204 (8th Cir.), *cert. denied,* 454 U.S. 1086 (1981).

would have to pay personal property taxes because sections 11503a and 11503(d) do not have analogous provisions.[144] In addition, tax exempt personal property of locally assessed businesses is ineligible for comparison with motor and air carrier personal property because that property, by definition, is not included in the assessment ratio of the average taxpayer.[145] Under a second approach, courts have concluded that tax exempt business inventories are not within the definition of commercial and industrial property and cannot be used for comparison.[146] Thus, unless rail, motor, or air carriers have business inventories similar to other commercial and industrial taxpayers, they receive no exemption from personal property taxes.[147] Finally, under a third approach, when other commercial and industrial taxpayers are exempt from personal property taxes, motor and air carriers, as well as rail carriers, also are exempt.[148] This approach avoids the "absurd" result of the first approach—that motor and air carriers could obtain relief from discrimination when the state taxes other businesses' personal property at a very low rate, but not when that personal property is exempt.[149]

Courts as well as litigants also have disagreed over how to include public utility property in a sales assessment ratio study. Including public utility property in the study avoids the problems associated with including personal property because (1) the total assessed value of the property is known, and (2) the property's assessment ratio is one hundred percent.[150] Under the standard procedures for conducting a proper sales assessment ratio study, however, public utility property would be excluded despite its inclusion in the statutory definition of commercial and industrial

144. *See supra* notes 100-22 and accompanying text.

145. *See* Ogilvie v. State Bd. of Equalization, 492 F. Supp. 446, 453-54 (D.N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Western Air Lines, Inc. v. Hughes County, 372 N.W.2d 106, 111 (S.D. 1985) (adopting the *Ogilvie* district court's analysis in a case arising under § 1513(d)), *prob. juris. noted*, 106 S. Ct. 1180 (1986).

146. *See* Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1245 (D. Ariz. 1983); Trailer Train Co. v. State Bd. of Equalization, 538 F. Supp. 509, 512 & n.5 (N.D. Cal. 1982) (concerning alleged discrimination against rail transportation property and holding that such a comparison would be like comparing "apples and oranges").

147. *See id.*

148. *See* Northwest Airlines, Inc. v. State Bd. of Equalization, 358 N.W.2d 515, 517-18 (N.D. 1984) (deciding this case under § 1513(d)).

149. *See id.*

150. Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 788-89 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126 (4th Cir. 1983); *see also* Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1044 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984) (relying on and extensively quoting from the district court's opinion in *Clinchfield*, *supra* this note).

property.[151] Courts, nevertheless, generally have agreed that a sales assessment ratio study should include public utility property.[152]

Courts as well as litigants also have disagreed over what method of calculation to use when including public utility property and other centrally assessed property in the study. The parties may use either the "value weighted mean"[153] approach or the "median" approach.[154] Although either method can determine the "average" taxpayer in the assessment jurisdiction, each leads to a significantly different result because the approaches are fundamentally different. Under the value weighted mean approach, a court must determine the ratio of total assessed value to total true market value of locally assessed commercial and industrial real and personal property and state assessed public utility property.[155] The impact of public utility property on the assessment ratio varies depending on its proportion of the total tax base.[156] States advocate the value weighted mean approach rather than the median approach because the value weighted mean approach produces greater tax revenue.[157] When public utility property constitutes a significant proportion of the tax base and a party uses the value weighted mean approach in a sales assessment ratio study, the assessment ratio of commercial and industrial property will be much higher than if the party had used the median approach. Under the median approach, by contrast, public utility property is treated, regardless of its value, equally with all other property in determining the assessment ratio.[158] Plaintiffs, including railroads,

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151. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 788 (E.D.N.C. 1981); *see also* Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 209 (8th Cir.) (observing that Congress could have excluded public utility property from this definition, as it excluded agricultural property, but because it did not, public utility property is included), *cert. denied*, 454 U.S. 1086 (1981).

152. *See, e.g.*, ACF Indus., Inc. v. Arizona, 714 F.2d 93, 94-95 (9th Cir. 1983); Ogilvie v. State Bd. of Equalization, 657 F.2d 204, 209 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1044 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495, 1504 (10th Cir. 1984); Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 789 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126 (4th Cir. 1983).

153. *See infra* notes 155-67 and accompanying text.

154. *See infra* notes 168-72 and accompanying text.

155. Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1504 (10th Cir. 1984).

156. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 789 (E.D.N.C. 1981) (discussing the arguments of defendants in favor of the value weighted mean approach), *aff'd*, 700 F.2d 126 (4th Cir. 1983).

157. *See id.; see also* ACF Indus., Inc. v. Arizona, 714 F.2d 93, 95 (9th Cir. 1983) (noting carlines' argument that the value weighted mean would result in much higher taxes).

158. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 789 (E.D.N.C. 1981) (discussing the plaintiffs' arguments in favor of the median approach); *see also* ACF Indus., Inc. v.

advocate the use of the median approach because, depending upon how the median is calculated,[159] this method can result in a much lower assessment ratio for other commercial and industrial property and, therefore, a much lower tax liability. When public utility property is only one of many calculations in a median, the utility property has little or no impact on the assessment ratio. Recent decisions have favored the value weighted mean approach[160] as the most appropriate method.[161] In *Atchison, Topeka and Santa Fe Railway v. Lennen*[162] the United States Court of Appeals for the Tenth Circuit found that the value weighted mean approach was the favored method because "each category [of property] should be factored in proportion to its share of the total true market value of all such property."[163] In *Lennen*, the court found that "parcels" are not appropriate units of measurement and, therefore, property consisting of a small farm and all the property of a public utility should not be treated as equivalent individual parcels in calculating the average commercial and industrial taxpayer's assessment ratio.[164] The court also found that the median approach was not viable when the assessment ratio included "parcels" of both personal and real property.[165] The United States Court of Appeals for the Ninth Circuit also has selected the value weighted mean approach, holding that taxpayers have the burden to prove that this approach is discriminatory and not merely unpreferable because of its more burdensome tax consequences.[166] The Ninth Circuit rejected the argument that Congress required the median approach, holding that only the value weighted mean approach considers a state's "legitimate" and "fundamental" interest in its tax classifi-

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Arizona, 714 F.2d 93, 94-95 (9th Cir. 1983) (discussing plaintiffs' reasoning in favor of the median approach).

159. If public utilities own many parcels in an assessment jurisdiction and these parcels are treated individually in the median calculation, rather than as one total unit, plaintiffs will not benefit nearly as much under this approach.

160. This method also has been termed the "mean aggregate" approach. *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 789 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126 (4th Cir. 1983).

161. *See* Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495 (10th Cir. 1984).

162. *Id.*

163. *Id.* at 1504. The court pointed out that "[a] median has no significance if the items on the continuum are not alike in some relevant way." 732 F.2d at 1504 (citing International Ass'n of Assessing Officers Assessment Standards Comm., Standard on Assessment Ratio Studies § 3.10.3 (1980)).

164. 732 F.2d at 1504-05.

165. *Id.* at 1505.

166. ACF Indus., Inc. v. Arizona, 714 F.2d 93, 95 (9th Cir. 1983) (implying that the value weighted mean approach complies with § 11503).

cation system.[167]

Before the value weighted mean approach's recent popularity, other courts had adopted the median approach. In *Clinchfield Railroad v. Lynch*, for example, the United States District Court for the Eastern District of North Carolina favored the median approach,[168] determining that "Congress implicitly mandated the use of a median to determine the average taxpayer."[169] The district court accepted plaintiffs' argument that the impact of public utility property on the sales assessment ratio study should be "insignificant."[170] The court also acknowledged that adoption of the median approach, rather than the value weighted mean approach, would benefit the railroads.[171] Although the district court in *Lennen* quoted extensively from the *Clinchfield* opinion, an opinion affirmed by the Fourth Circuit, to support using the median approach, the Tenth Circuit subsequently reversed the *Lennen* decision,[172] thus creating confiict with the Fourth Circuit.

2. The Valuation Process

Plaintiffs may prove that a state discriminates in its valuation process as an alternative to, or in conjunction with, demonstrating discrimination through a sales assessment ratio study.[173] Some federal courts, however, have established considerable barriers to judicial review of a state's valuation process.[174] According to one view, federal courts should not participate in the valuation of interstate carrier property because Congress did not intend for them to do so.[175] This approach permits an exception when a state purpose-

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167. *Id.* (labeling plaintiff's argument that "the legislative history of § 11503 requires the 'median' approach to the exclusion of others" as "self-serving").

168. 527 F. Supp. 784, 789 (E.D.N.C. 1981), *aff'd*, 700 F.2d 126, 130 n.5 (4th Cir. 1983) (concluding that the district court properly adopted the median approach).

169. *Id.*

170. *See* 527 F. Supp. at 789.

171. *See id.* at 789 n.9.

172. *See* Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1044-45 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495, 1504-05 (10th Cir. 1984).

173. *See* ACF Indus., Inc. v. Arizona, 561 F. Supp. 595, 599 (D. Ariz. 1982) (pointing out tbe two alternative methods of proving discriminatory state property taxation), *aff'd*, 714 F.2d 93 (9th Cir. 1983).

174. Because federal courts do not have jurisdiction to decide cases concerning alleged property tax discrimination against air carriers, air carrier plaintiffs also must seek valuation relief in state court.

175. *See* Burlington N. R.R. v. Lennen, 573 F. Supp. 1155, 1164-65 (D. Kan. 1982) (deciding, after considering the relevant legislative history, that federal courts should not participate in the valuation of railroads), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 464 U.S. 1067 (1984); Louisville & N. R.R. v. Louisiana Tax Comm'n, 498 F. Supp. 418, 421

fully has overvalued a carrier's property in retaliation for relief granted in a prior case. Under these circumstances, a court has jurisdiction to evaluate the state's valuation process under the court's broad equity powers.[176] Under a second approach, plaintiffs may sue for valuation relief in federal court irrespective of a retaliatory overvaluation, but they must make a "strong showing" that the state acted purposefully and with discriminatory intent.[177] This standard presents a nearly insurmountable obstacle for plaintiffs because of the difficulties in proving that a state acted purposefully and intentionally to discriminate.[178] Under a final approach, federal courts may adjudicate valuation issues whether the discrimination occurred either "purposefully or by honest error."[179] Federal courts, according to this view, must make independent factual findings regarding the assessed and true market values of the plaintiff's property, as well as all other commercial and industrial taxpayers' property, to properly equalize assessment ratios and to grant relief from overvaluation.[180]

(M.D. La. 1980) (holding that states should determine "fair" or "true" market value under § 11503). *But see* Brief for the United States as Amicus Curiae at 14, Atchison, T. & S. F. Ry. v. State Bd. of Equalization, No. 84-1554, on appeal to the Ninth Circuit from the Northern District of California (submitted Mar. 1985) (arguing that "the district court misconstrued the language, purpose, and legislative history of Section [11503] and erroneously concluded that federal courts never have jurisdiction to award overvaluation relief").

176. *See* Burlington N. R.R. v. Lennen, 573 F. Supp. 1155, 1165 (D. Kan. 1982) (stating that § 11503 confers "significant equity power to remedy discriminatory taxation"), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 464 U.S. 1067 (1984).

177. *See Burlington N. R.R.*, 715 F.2d at 498 (upholding Kansas' valuation of railroads' property because railroads did not satisfy their burden for relief). *But see* Brief for the United States as Amicus Curiae at 4, Burlington N. R.R. v. Oklahoma Tax Comm'n, No. 85-1657, on appeal to the Tenth Circuit from the Western District of Oklahoma (submitted Nov. 1985) (urging Tenth Circuit to overrule its decision in Burlington N. R.R. v. Lennen, *supra*, en banc, citing Burlington N. R.R. v. Bair, 766 F.2d 1222, 1225-26 (8th Cir. 1985), and requesting the court to hold that "federal courts have jurisdiction under Section [11503] to prohibit discriminatory overvaluation of railroad property without regard to 'intent' ").

178. *See* Union Pacific R.R. v. State Tax Comm'n, 635 F. Supp. 1060 (C.D. Utah 1986). Although bound by *Burlington N. R.R. v. Lennen*, the court suggested that the Tenth Circuit should reconsider that decision because its interpretation of § 11503 "may perpetuate discrimination against railroads by placing one leg of the caliper for measuring discrimination—valuation—firmly in the hands of the very party accused of discriminating (the state)." *Id.* at 1067.

179. *See* Burlington N. R.R. v. Bair, 766 F.2d 1222, 1225-27 (8th Cir. 1985) (rejecting argument of Iowa's Director of the Department of Revenue that § 11503 does not authorize federal courts to review valuations); *see also* Atchison, T. & S.F. Ry. v. State Bd. of Equalization, 795 F.2d 1442, 1446 (9th Cir. 1986) (holding that "the 4-R Act authorizes federal district courts to hear claims of specific instances of overvaluation in state tax assessment of the true market value of rail transportation property").

180. *See id.* at 1226. All three approaches require a plaintiff to satisfy its burden of proof, as governed by state law, to prevail. *See supra* notes 123-29 and accompanying text.

Rail carrier plaintiffs argue that section 11503 empowers federal courts to determine their property's true market value in an action for relief from discriminatory taxation; states, however, contend that valuation falls outside federal court jurisdiction.[181] Ironically, rail carriers initially contended that the federal statute protecting them from discriminatory taxation did not confer jurisdiction on federal courts to review state valuations. In 1967, during congressional hearings on a bill nearly identical to section 11503, a representative of the Association of American Railroads[182] stated that the proposed bill "is *not* a standard for determining value; it is a standard to which values that have already been determined must be compared."[183] In hearings on a similar bill two years later, another representative of that organization stated that "we are *not* dealing with the valuation question. This is not our problem. We speak only of the equalization of the tax rate."[184] This original view of rail carriers is currently the states' position in suits under section 11503.[185] Equally ironic, the states originally argued that courts must decide valuation and assessment issues at the same time.[186] The railroads now advocate this viewpoint.

E. Federal Court Abstention[187]

Federal courts have a responsibility to exercise jurisdiction conferred on them by Congress and the United States Constitu-

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181. *See* Burlington N. R.R. v. Lennen, 573 F. Supp. 1155, 1159 (D. Kan. 1982) (outlining railroad's argument that the "plain" statutory language of § 11503 requires federal court involvement in the valuation process), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 464 U.S. 1067 (1984).

182. *See supra* note 19.

183. 573 F. Supp. at 1161-62 (quoting *Hearings Before the Subcomm. on Surface Transportation of the Comm. on Commerce on S. 927*, 90th Cong., 1st Sess. 29 (1967) (statement by James N. Ogden, Vice President and General Counsel of the Gulf, Mobile and Ohio R.R., on behalf of the Association of American Railroads) (emphasis added)).

184. *Id.* at 1162 (quoting *Hearings Before the Subcomm. on Surface Transportation of the Comm. on Commerce on S. 2289*, 91st Cong., 2d Sess. 39 (1969) (statement by Phillip M. Lanier, Vice President-Law, Louisville and Nashville R.R. on behalf of the Association of American Railroads) (emphasis added)).

185. *See id.* at 1159-60 (detailing defendant's argument that federal courts have no jurisdiction under § 11503 to review state valuations).

186. As the executive secretary of the National Association of Tax Administrators testified before Congress, "The matter of assessment levels cannot be considered apart from the basic valuations put on properties of all kinds including railroad property." *State Tax Discrimination Against Interstate Carrier Property: Hearings Before the Subcomm. on Surface Transportation of the Comm. on Commerce on S. 2289*, 91st Cong., 2d Sess. 74 (1969) (testimony of Charles F. Conlon).

187. The abstention issue may not apply to air carriers because Congress apparently has not granted jurisdiction to federal courts under § 1513(d). *See supra* notes 68-70 and

tion.[188] Federal courts, nevertheless, occasionally have declined jurisdiction under the discretionary doctrine of abstention.[189] The Supreme Court has stated that "[t]he doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."[190] The Court has further determined that a federal court's "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to [litigate in] State court would clearly serve an important countervailing interest."[191] This deference to state courts under limited circumstances originates in the principle of comity, a belief that the federal system functions best when the national government recognizes the separate sphere of the states.[192]

Challenges to state taxation policies are one area in which federal courts have been reluctant to exercise jurisdiction.[193] The Supreme Court has recognized that "the important and sensitive nature of state tax systems" requires federal jurisdictional restraint.[194] Congress acknowledged the need for such restraint

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accompanying text. Courts, however, may hold that Congress intended the same jurisdictional grant under § 1513(d) as under § 11503a. *Cf. supra* note 117 and accompanying text; *infra* notes 233, 252 and accompanying text (analogous reasoning regarding other § 1513(d) issues). In that event, identical considerations would govern the possibility of abstention under the air carrier statute.

188. North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 314 (N.D. Ind. 1984) (quoting Bally Mfg. Corp. v. Casino Control Comm'n, 534 F. Supp. 1213, 1215 (D.N.J. 1982)); *see* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959).

189. *See* Missouri Pac. R.R. v. Tax. Div., 504 F. Supp. 907 (E.D. Ark. 1980). The abstention doctrine is defined as the process "whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." Railroad Comm'n v. Pullman Co., 312 U.S. 296, 501 (1941).

190. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959).

191. *Id.* at 188-89.

192. *See* Younger v. Harris, 401 U.S. 37, 44 (1971). Although *Younger* concerned a criminal proceeding, the Supreme Court has extended its application to civil suits. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

193. *See* Fair Assessment In Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 102-103 (1981).

194. *Id.* The Supreme Court observed the following over a century ago:

> It is upon taxation tbat the several States chiefiy rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

Id. at 102 (quoting Dows v. Chicago, 11 Wall. 108, 110 (1871)).

when it enacted the Tax Injunction Act in 1937.[195] Under this Act, Congress prohibited federal courts from intruding into state taxation matters unless state remedies were inadequate.[196] Therefore, although interstate transportation carriers experienced state tax discrimination, the Tax Injunction Act generally barred federal courts from asserting federal question jurisdiction.[197]

The Supreme Court has four recognized categories of abstention.[198] First, a federal court may abstain from hearing a case when it may become unnecessary to decide a federal constitutional issue after a state court applies state law.[199] Second, abstention is proper when a federal court decision on important state law issues would inhibit the development of a consistent state policy.[200] Third, abstention is appropriate when federal courts cannot act without unreasonably interfering with legitimate state interests.[201] These categories, promulgated in Supreme Court decisions, are commonly known as the *Pullman*, *Burford*, and *Younger* abstention doctrines respectively.[202] Last, a federal court may abstain for reasons of judicial economy when state and federal courts have concurrent

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195. *See id.* at 102-03. The Tax Injunction Act is codified at 28 U.S.C. § 1341 (1982).

196. 28 U.S.C. § 1341 provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

197. *See* Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 402 (9th Cir. 1981) (discussing applicability of the Tax Injunction Act); *see also* Alterman Transport Lines, Inc. v. Public Serv. Comm'n, 259 F. Supp. 486 (M.D. Tenn. 1966) (holding that motor carriers had a "plain, speedy, and efficient" state court remedy), *aff'd*, 386 U.S. 262 (1967); Mid-Continent Airlines, Inc. v. Nebraska State Bd. of Equalization, 105 F. Supp. 188 (D. Neb. 1952) (denying federal jurisdiction to an air carrier because a "plain, speedy, and efficient remedy" was available in state court).

198. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-18 (1976).

199. *Id.* at 814.

200. *Id.*

201. Younger v. Harris, 401 U.S. 37, 44 (1971); *see also supra* note 192. Although *Younger* concerned a criminal proceeding, the Court has extended its comity-based abstention principles to civil actions, including those actions regarding the collection of state taxes. *See* Fair Assessment In Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 112-13 (1981); *see also* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) (noting that "[t]he component of *Younger* which rests upon the threat to our federal system is [as] applicable to a civil proceeding . . . as it is to a criminal proceedings"); Juidice v. Vail, 430 U.S. 327, 334 (1977) (stating that the doctrines enunciated in *Younger* and *Huffman* are not restricted to the facts of those cases).

202. *See* North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 315 (N.D. Ind. 1984). These cases referred to are Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943); and Younger v. Harris, 401 U.S. 37 (1971). Courts have considered these cases to represent the "three traditional forms of abstention." *See* North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 316 (N.D. Ind. 1984).

jurisdiction.[203]

Even without considering the impact of the express jurisdictional grants contained in sections 11503 and 11503a, none of the four recognized bases for abstention should apply in cases concerning alleged state tax discrimination against rail or motor carriers.[204] First, the *Pullman* abstention doctrine is inappropriate because federal courts can decide federal statutory issues that plaintiffs raise under sections 11503 and 11503a without addressing constitutional questions.[205] Additionally, although state courts have adjudicated the legality of state taxing policies regarding interstate carriers for decades, Congress has concluded that state courts generally have failed to provide an adequate and efficient remedy.[206] Even if the litigation covered only constitutional issues,[207] federal judicial abstention would injure plaintiffs because state courts have not provided a speedy remedy for preventing property tax discrimination. Second, the *Burford* abstention doctrine is inapplicable because a federal court applies federal rather than state law when

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203. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). The standard of this category is "wise judicial administration." *Id.* at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)); *see also* North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 315 (N.D. Ind. 1984).

204. *See, e.g.*, Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 527 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1249 (D. Ariz. 1983). *But see* North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 315 (N.D. Ind. 1984); Missouri Pac. R.R. v. Tax Div., 504 F. Supp. 907, 913 (E.D. Ark. 1980).

205. *See* Pue v. Sillas, 632 F.2d 74, 78 (9th Cir. 1980).

The Ninth Circuit has developed the following three requirements that a court must consider in determining whether the *Pullman* abstention doctrine applies in a particular case:

(1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."

(2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."

(3) The possibly determinative issue of state law is douhtful.

Id. (quoting Canton v. Spokane School Dist., 498 F.2d 840, 845 (9th Cir. 1974)).

Because none of these three criteria is satisfied, the *Pullman* abstention doctrine plainly is inapplicable in § 11503 and § 11503a cases.

206. *See supra* notes 27-33 and accompanying text.

207. The United States Supreme Court has stated that "[t]here are fundamental objections" to requiring a plaintiff that properly filed a lawsuit in a federal district court claiming federal constitutional violations to accept a state court decision. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964). Thus, when an interstate carrier alleges only federal constitutional violations and invokes the jurisdiction of a federal district court, all parties, as well as the judicial system, have an interest in avoiding unnecessary delay by having the federal court decide the case. *See* Bally Mfg. Corp. v. Casino Control Comm'n, 534 F. Supp. 1213, 1216-18 (D.N.J. 1982) (applying the *Pullman* and *England* rules).

evaluating claims under sections 11503 and 11503a. Applying federal law poses no threat to the development of a coherent state taxation policy.[208] Third, the *Younger* abstention doctrine is inappropriate because the national importance of unburdened interstate commerce outweighs any state interest in maintaining a discriminatory property tax structure.[209] Finally, judicial economy is an insufficient reason for abstention because Congress, confronted with inadequate state remedies, specifically enacted these statutes to provide a federal forum for rail and motor carrier plaintiffs.[210] Abstention is improper even when state court proceedings challenging the validity of the state tax law has already commenced. Although the United States Supreme Court has recognized that duplicative proceedings in federal courts typically are undesirable, the general rule is that a suit may proceed in federal court despite the pendency of a similar action in state court.[211]

While most federal courts have properly accepted jurisdiction over suits alleging violations of sections 11503 and 11503a, all four categories have served as the basis for abstention. *Missouri Pacific Railroad Co. v. Tax Division*[212] is the most prominent example of federal abstention. In *Missouri Pacific* the plaintiff railroads sued

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208. *See* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 527 (11th Cir. 1983) (holding that *Burford* abstention is inapplicable in a § 11503 action), *cert. denied*, 465 U.S. 1100 (1984). The fact that the federal statutes direct the use of state burden of proof standards demonstrates congressional deference to coherent state taxation policies. *See supra* notes 123-29 and accompanying text.

209. *See* Arkansas-Best Freight Sys., Inc. v. Cochran, 546 F. Supp. 904, 910-11 (M.D. Tenn. 1981).

210. *See* Atchison, T. &. S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1038 (D. Kan. 1982), *aff'd in part and rev'd in part*, 732 F.2d 1495 (10th Cir. 1984).

The United States Supreme Court has observed that federal courts have "virtually [an] unflagging obligation . . . to exercise the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Consequently, abstention for judicial economy is valid only under circumstances even more exceptional than those circumstances required for invoking the three traditional abstention categories. *See id.* at 818; *see also supra* notes 27-33 and accompanying text (legislative history).

211. 424 U.S. at 817. The Supreme Court has determined that a federal court may consider several factors in deciding wbether to abstain in favor of a state court with concurrent jurisdiction. These factors include, but are not limited to, the convenience of the federal forum, the preference for litigating all issues in one suit, and whether the federal or state court obtained jurisdiction first. *Id.* at 818. The Court stated that *"[o]nly the clearest of justifications will warrant dismissal." Id.* at 819 (emphasis added). More recently, the Court reiterated that *the balance of these factors is "heavily weighted in favor of the exercise of jurisdiction."* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983) (emphasis added).

212. 504 F. Supp. 907 (E.D. Ark. 1980). *Missouri Pacific* was the first case in which a federal court abstained in an action brought pursuant to §§ 11503 or 11503a. *See id.* at 912 & n.1.

in the United States District Court for the Eastern District of Arkansas, complaining that the Arkansas ad valorem property tax assessments and collections violated section 11503, deprived them of property without federal due process, and denied them of the fourteenth amendment guarantee of equal protection under the law.[213] According to the district court, even though section 11503 provided for the concurrent jurisdiction of federal and state courts, federalism and comity mandated that an Arkansas state court first decide the issues because of the great importance of property taxes to the state.[214] In addition, the court noted that state courts have equal responsibilities to uphold federal constitutional principles and concluded that the Arkansas state court system would provide a fair, speedy, and adequate forum.[215] Consequently, the court declined to exercise jurisdiction, invoking the *Pullman*, *Burford*, and *Younger* doctrines of abstention.[216] Similarly, in *North American Van Lines, Inc. v. State Board of Tax Commissioners*[217] the plaintiff alleged that Indiana's newly revised taxing policies regarding the transportation property of interstate motor carriers violated section 11503a and several federal and state constitutional provisions.[218] Although the court concluded that the traditional *Pullman*, *Burford*, and *Younger* categories did not apply, the court found that the "wise judicial administration of judicial resources" required that it refuse jurisdiction.[219]

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213. *Id.* at 909.

214. *Id.* at 910-11.

215. *Id.* at 911.

216. *Id.* at 910-13. The court wrote its opinion as if all three abstention doctrines applied. *See* North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 316-17 (N.D. Ind. 1984) (stating that it was "unclear as to which of the three traditional forms of abstention the court relied upon").

217. 590 F. Supp. 311 (N.D. Ind. 1984).

218. *Id.* The Indiana statute imposed an ad valorem tax on "indefinite—situs distributable property" of interstate motor carriers. *Id.* at 313.

The court considered the following factors to decide whether to exercise its jurisdiction: "(1) the desire or ability of avoiding piecemeal litigation, (2) the order in which jurisdiction was obtained by the concurrent forums, (3) the inconvenience of the federal forum, and (4) the court first assuming jurisdiction over any property which may be involved in the suit." *Id.* at 317 (quoting Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1234 (7th Cir. 1979)).

219. North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 315-19 (N.D. Ind. 1984) (citing Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952)). The court determined that it should stay the proceedings because an appeal was pending in state court pertaining to the constitutionality of the state tax scheme. *See id.* at 319.

In Huie v. Private Truck Council, Inc., 466 N.E.2d 435 (Ind. 1984), the case in favor of which the *North American Van Lines* court stayed its proceedings, the Indiana Supreme Court affirmed the lower court's holding that Indiana's ad valorem tax system discriminated

Federal court abstention in lawsuits alleging violations of sections 11503 and 11503a is inappropriate,[220] however, because Congress specifically created exceptions to the Tax Injunction Act in these sections and authorized federal courts to exercise jurisdiction over cases concerning state tax discrimination against rail and motor carrier transportation property.[221] Congress conferred this jurisdiction on the federal courts because it determined that state remedies were inadequate.[222] In *Southern Railway Co. v. State Board of Equalization*,[223] the United States Court of Appeals for the Eleventh Circuit noted that the legislative history of section 11503 indicates that Congress concluded "both a federal remedy

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against interstate commerce by imposing unreasonably burdensome property taxes on interstate motor carriers. Consequently, the federal district court did not need to decide *North American Van Lines. See also* Atchison, T. & S.F. Ry. v. State Bd. of Equalization, 795 F.2d 1442, 1448 (9th Cir. 1986). Altbough the Ninth Circuit found that federal courts have jurisdiction to resolve valuation issues under section 11503, it held that "the district court sbould abstain from deciding the merits of the valuation issue" in this case because the railroads had chosen to file suit in state court initially and not to cballenge "the administrative assessment action in federal court in the first instance." *Id.* The court apparently failed to consider tbat the confused state of tbe law regarding federal court jurisdiction over valuation issues was the likely reason for plaintiffs filing suit in both forums.

220. *See* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 527 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). (holding that because "Congress meant unconditionally to ensure a federal forum for section 11503 claims, . . . the statute bars abstention in cases alleging de facto discrimination as well as de jure"); Atchison, T. & S. F. Ry. v. Arizona, 559 F. Supp. 1237, 1248-49 (D. Ariz. 1983) (denying state's request that the court abstain from deciding plaintiff's de facto discrimination claim).

221. Sections 11503(c) and 11503a(c) each state in pertinent part that *"[n]otwithstanding section 1341 of title 28* . . . a district court of the United States has jurisdiction . . . to prevent a violation of subsection (b) of tbis section." (emphasis added). *See* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Burlington N. R.R. v. Lennen, 715 F.2d 494, 498 (10th Cir. 1983), *cert. denied*, 464 U.S. 1067 (1984); Burlington N. R.R. v. Bair, 584 F. Supp. 1229, 1232 (S.D. Iowa 1984), *modified*, 766 F.2d 1222 (8th Cir. 1985); *see also* S. REP. No. 630, 91st Cong., 1st Sess. 6-7 (1969) (discussing the negative impact of the Tax Injunction Act on interstate carriers).

The United States Supreme Court has held that, under the comity principle, federal courts must abstain when taxpayers bring actions against states under 42 U.S.C. § 1983, provided that state remedies are "plain, adequate, and complete." Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 116 (1981). By contrast, 49 U.S.C. §§ 11503(c) and 11503a(c) specifically require federal courts to invoke their jurisdiction. *See* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 527 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (stating that the legislative history of § 11503, "unlike that of section 1983, evinces a congressional intent to exempt taxpayer plaintiffs from the Tax Injunction Act as well as from tbe comity principle"). The court distinguished a § 11503 action from a § 1983 action. *Id.* at 529-30. This distinction is significant because rail or motor carrier plaintiffs may bring suit under either or both statutes.

222. *See supra* notes 27-33 and accompanying text.

223. 715 F.2d 522 (11th Cir. 1983).

and a federal forum were necessary to further the strong national policy of protecting interstate commerce from the disruptive effects of discriminatory state and local taxation of railroad property."[224] The court decided that all categories of abstention are inapplicable because Congress enacted section 11503 to guarantee that railroads have the opportunity to bring lawsuits alleging state tax discrimination in federal courts.[225] Federal court abstention defeats Congress' purpose by bypassing this remedial legislation and returning to deficient state remedies.[226] In addition, the delay that abstention causes could irreparably harm a plaintiff's case and financial situation by prohibiting the plaintiff from using the disputed funds because of the possibly improper state or local tax assessment.[227]

F. Statutory Relief

1. Injunctive Relief

Federal and state courts have concurrent jurisdiction, pursuant to sections 11503(c) and 11503a(c), "to prevent" state and local tax laws from unreasonably burdening and discriminating against

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224. *Id.* at 529.

225. *See id.* at 529-30; *see also* Atchison, T. & S. F. Ry. v. Arizona, 599 F. Supp. 1237, 1249 (D. Ariz. 1983) (holding that federal court abstention in a case arising under the 4R Act is improper); Atchison, T. & S. F. Ry. v. Lennen, 552 F. Supp. 1031, 1038 (D. Kan. 1982) (holding that the legislative history "envisions" a federal forum for cases arising under the 4R Act because state court remedies are clearly insufficient), *aff'd in part and rev'd in part on different issues*, 732 F.2d 1495 (10th Cir. 1984).

226. *See supra* notes 27-33 and accompanying text.

227. *Cf.* North Am. Van Lines, Inc. v. State Bd. of Tax Comm'rs, 590 F. Supp. 311, 318-19 & nn.1-2 (N.D. Ind. 1984).

In *North American Van Lines*, the court determined that the parties minimized the harm that the abstention's delay caused by placing the disputed tax money in an interest bearing escrow account. *Id.* at 318. Furthermore, the court observed that if plaintiff prevailed in federal district court, the state likely would appeal, resulting in additional delay. *Id.* Thus, according to the court, staying the federal court proceedings in favor of the Indiana Supreme Court's decision in a separate case concerning a different plaintiff likely would reduce the delay and benefit plaintiff. *See id.* at 318-19.

This reasoning is improper for several reasons. First, Congress enacted the statutes under consideration to alleviate the interstate carriers' economic hardships. By restricting the carriers' use of valuable funds that they may or may not have owed to the state, the court may have caused these carriers to endure unnecessary financial burdens for an extended period. Second, the delays that appeals may cause are part of the judicial process that any victorious plaintiff should expect and, therefore, should not serve as a basis for a court declining to invoke its jurisdiction. Finally, if a federal district court stays a lawsuit to await a decision in a different state court case and that decision proves unfavorable to plaintiff in the stayed proceedings, the federal court then must invoke its jurisdiction. This policy clearly extends the delay.

interstate commerce.[228] Because the language of these statutes is ambiguous, an examination of the original language of the 4R Act provides guidance[229] on the appropriate preventive action. Section 306 of the 4R Act states that a court may grant "mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent" any violations of the statute's provisions.[230] Thus, injunctive relief is available to prevent discriminatory taxation under both sections 11503 and 11503a.[231] A court should enjoin the assessment or collection of any discriminatory state or local tax.

A major flaw of section 1513(d) is that it provides no remedy for plaintiffs once a court determines that a state or local government has unreasonably burdened or discriminated against interstate commerce through taxation of air carrier transportation property.[232] The statute merely describes prohibited acts and defines key terms. The statute's brief legislative history, however, indicates that Congress intended the existing law regarding property tax discrimination against motor carriers to apply to air carriers.[233] All remedies available to motor carrier plaintiffs, including an injunction, should, therefore, be available to air carrier plaintiffs.

Plaintiffs may seek a preliminary injunction in cases arising under sections 11503, 11503a, or 1513(d).[234] Plaintiffs, however, need not satisfy the "standard requirements" for a preliminary injunction because these statutes authorize injunctive relief.[235] Al-

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228. 49 U.S.C.A. §§ 11503(c), 11503a(c) (West Supp. 1986) (partial revision of title 49).

229. *See supra* text following note 85 (noting appropriate occasions for comparison of original and recodified language).

230. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 396, 90 Stat. 31, 54.

231. *See, e.g.*, Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 261 (10th Cir. 1981) (remanding with orders to district court to enter a preliminary injunction); Clinchfield R.R. v. Lynch, 605 F. Supp. 1005, 1020 (E.D.N.C. 1985) (ordering permanent injunction); Burlington N. R.R. v. Bair, 584 F. Supp. 1229, 1238 (S.D. Iowa 1984) (ordering injunction), *modified*, 766 F.2d 1222 (8th Cir. 1985); Arkansas-Best Freight Sys., Inc. v. Cochran, 546 F. Supp. 904, 915 (M.D. Tenn.1981) (ordering permanent injunction against state from assessing discriminatory taxes on motor carrier transportation property).

232. *See* 49 U.S.C. § 1513(d) (1982).

233. *See* S. REP. No. 494, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1188.

234. The obvious advantage of a preliminary injunction is that a court will prohibit the application of an allegedly discriminatory state or local tax scheme to plaintiff until it decides the merits of the case.

235. *See* Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 869 (9th Cir.) (concluding that "traditional prerequisites for equitable relief need not be satisfied before a preliminary injunction may be issued under § 11503"), *cert. denied*, 464 U.S. 846 (1983); Atchison, T. & S. F. Ry. v. Arizona, No. 81-1279, slip op. at ____ (D. Ariz. May 2, 1983)

though trial courts have discretion over whether to order an injunction, they must base their decisions on Congress' legislative purpose and on the facts of each case.[236] Courts have deferred to congressional intent by not requiring plaintiffs to prove that they will experience irreparable harm or that their legal remedies are inadequate before granting a preliminary injunction.[237] Courts may order a preliminary injunction without requiring plaintiffs to show that they "positively" will prevail on the merits. Plaintiffs must demonstrate merely a "reasonable probability of success."[238] Finally, in considering the issuance of a preliminary injunction, courts must determine whether there is reason to believe that defendants have violated or will violate the statutes.[239] To obtain a preliminary injunction, plaintiffs need not show that defendants intentionally discriminated against them.[240]

After obtaining a preliminary injunction, a plaintiff may seek permanent relief. Plaintiff's primary goal under sections 11503, 11503a, and 1513(d) is to convince a court to enjoin permanently the assessment and collection of discriminatory taxes. To obtain a permanent injunction, a plaintiff must satisfy its burden of proof and prevail on the merits.[241] Another available form of permanent relief is for a court to order the discriminating state to modify its tax system so that the ratio of assessed value to true market value

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(holding that "[e]ven if equitable decisions are allowed to play a role in this decision . . . it cannot be argued seriously that the State and counties have not been put on notice that their tax practices have been discriminatory and would violate the 4-R Act when it came into effect") (available on LEXIS).

236. *See* Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 258-59 (10th Cir. 1981) (holding that the district court abused its discretion by considering only the facts of the case and not the purpose of § 11503).

237. *See* Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 210 (M.D. Tenn. 1979), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981); *see also* Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 259 (10th Cir. 1981) (quoting *Tennessee v. Louisville & N, supra*, and noting that courts in various cases have applied the rule that this court established for use in a § 11503 action).

238. Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 260-61 (10th Cir. 1981) (suggesting that "[t]he purpose of a preliminary injunction is to preserve the status quo" until plaintiff can prove its case).

239. *See id.* at 261; Atchison, T. & S. F. Ry. v. Lennen, 531 F. Supp. 220, 234 (D. Kan. 1981).

240. *See* Burlington N. R.R. v. Bair, 766 F.2d 1222, 1226 (8th Cir. 1985); Louisville and N. R.R. v. Department of Revenue, 736 F.2d 1495, 1498 (1th Cir. 1984); Burlington N. R.R. v. Department of Revenue, No. C85-767T, slip op. at 4 (W.D. Wash. Oct. 25, 1985).

241. *See supra* notes 123-29 and accompanying text; *see also* Clinchfield R.R. v. Lynch, 605 F. Supp. 1005 (E.D.N.C. 1985) (permanently enjoining defendants from assessing and collecting taxes in accordance with discriminatory state and local tax structure violating § 11503).

of the rail, motor, or air carrier property involved in the litigation is reduced to, or below, the ratio of assessed value to true market value of other commercial and industrial property.[242] This remedy, if applied in rail or motor carrier litigation in federal court, however, may conflict with the Supreme Court's holding in *Moses Lake Homes, Inc. v. Grant County*.[243] In reversing the district court, the Supreme Court held that a federal court has no power to substitute a valid tax for an invalid tax because "[f]ederal courts may not assess or levy taxes."[244] While a court may grant a permanent injunction ordering the repayment of any funds collected under a discriminatory assessment,[245] a permanent injunction effectively requires a state to change its tax laws in accordance with the federal court's decision. A federal court order directing a state to equalize taxes and eliminate the state's discriminatory tax provisions may be an unconstitutional action to assess or levy taxes under the *Moses Lake* standard.[246]

Under sections 11503 and 11503a, a court may grant injunctive relief when the assessment ratio of rail or motor carrier property "exceeds by at least five percent" the assessment ratio "of other commercial and industrial property in the same assessment jurisdiction."[247] When a plaintiff proves that this discriminatory variation exists, a court should enjoin completely the assessment and collection of taxes above the rates established for other commercial and industrial property and not merely above the five percent threshold. In *Louisville & Nashville Railroad Co. v. Louisiana Tax Commission*[248] the United States District Court for the Middle District of Louisiana confronted defendants' contention that an in-

242. *See* Alabama Great S. R.R. v. Eagerton, 472 F. Supp. 60, 64 (D. Ala. 1979) (ordering the State of Alabama to eliminate discriminatory taxation by equalizing assessment ratios of the railroad's property and the property of other commercial and industrial taxpayers). *But see* Louisville & N. R.R. v. Louisiana Tax Comm'n, 498 F. Supp. 418, 423 (M.D. La. 1980) (enjoining assessments under Louisiana tax scheme, but stating it "will not require . . . defendants to do anything").

243. 365 U.S. 744 (1961).

244. *Id.* at 752.

245. *See infra* notes 259-96 and accompanying text.

246. *See* Tennessee v. Louisville & N. R.R., 478 F. Supp. 199, 210 (M.D. Tenn. 1979) (distinguishing case at bar from *Moses Lakes*), *aff'd mem.*, 652 F.2d 59 (6th Cir. 1981), *cert. denied*, 454 U.S. 834 (1981). *But see supra* note 242 and accompanying text.

247. *See* 49 U.S.C. §§ 11503(c) and 11503a(c) (1982).

For a discussion of relief under § 1513(d), see *infra* notes 250-52 and accompanying text.

248. 498 F. Supp. 418, 423 (M.D. La. 1980). Defendants argued that because the assessment ratio for other commercial and industrial property was 15%, § 11503 permitted them to tax rail transportation property at a rate of 20%. *Id.*

junction should apply only to taxes levied against railroads that surpass the five percent excess permitted by section 11503(c). The court rejected defendants' argument, noting that Congress selected the five percent standard to distinguish between material discrimination, which required a remedy, and immaterial variations in assessments, which if remedied would unnecessarily overburden courts with innumerable minor lawsuits. Once a tax system exceeds that five percent threshold, however, the court noted that it then has statutory jurisdiction to prevent *all* discrimination, defined as *any* difference in assessment ratios to the disadvantage of the carrier.[249] The court, therefore, completely enjoined defendants from collecting discriminatory taxes from plaintiffs.

On the face of section 1513(d), air carrier plaintiffs have an advantage over rail and motor carrier plaintiffs in obtaining relief.[250] Section 1513(d) does not establish any threshold requirements to invoke the court's remedial powers.[251] A court, therefore, may prohibit any minor variation in assessment ratios resulting in the collection of more taxes from air carriers than from other commercial and industrial property owners. However, because the legislative history of section 1513(d) indicates that Congress intended the provisions of the motor carrier statute to apply to air carriers, Congress also may have intended to require a five percent variation in assessment ratios before a court could grant relief under section 1513(d).[252] To date, no court has addressed this issue.

2. Relief From Tax Rate Discrimination

A state or locality can discriminate through differing tax *rates* as well as through assessments or valuations. Although tax discrimination may occur when the assessment ratio of a rail or motor carrier's transportation property does not exceed the assessment ratio of other commercial and industrial property by at least five percent in the same assessment jurisdiction, sections 11503 and 11503a indicate that a five percent difference in the ratio must exist before a court may grant relief. The Ninth Circuit has addressed this percentage question in a suit involving tax rate dis-

249. *See id.;* 49 U.S.C. §§ 11503 and 11503a (1982).

250. This apparent advantage may be offset by the possible disadvantage of not having access to a federal forum. *See* 49 U.S.C. § 1513(d) (1982); *supra* note 187.

251. *See id.*

252. *See* S. REP. No. 494, 97th Cong., 2d Sess. 37, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1188.

crimination against a rail carrier.[253] In affirming the district court's grant of injunctive relief to plaintiffs, the court determined that it must construe section 11503 according to Congress' intent in enacting the statute rather than narrowly and literally so as to defeat its purpose.[254] Congress enacted sections 11503 and 11503a to prevent all discriminatory state and local property taxation because of its unreasonable burden on interstate commerce.[255] A court, therefore, should be able to grant relief from discrimination in tax rates as well as from discrimination in assessments.[256] The Ninth Circuit held that because a literal reading of the statute would lead to an "absurd result," a court may "look beyond [its] express language."[257]

3. Restitution and the Eleventh Amendment[258]

The eleventh amendment[259] creates a formidable jurisdictional limitation on the power of federal courts to order states to refund taxes collected under invalid state tax laws.[260] Under a Supreme Court rule, "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[261] Congress, however, can abrogate state immunity, through appropriate legislation, in two ways. First, the enforcement provisions of section 5 of the four-

253. *See* Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983); *see also* Burlington N. R.R. v. Department of Revenue, 604 F. Supp. 1575 (W.D. Wis. 1985) (enjoining state from applying discriminatory tax rate).

Because the 5% variation is not an express requirement for relief under § 1513(d), air carriers clearly can obtain relief from tax rate discrimination despite the absence of an assessment ratio variation.

254. Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 865 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983).

255. *See supra* notes 6-33 and accompanying text.

256. Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 865-66 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983).

257. *Id.* at 866.

258. The eleventh amendment issue does not apply to air carriers because federal courts apparently do not have jurisdiction under § 1513(d). *See supra* note 187.

259. The eleventh amendment provides the following: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

260. *See* Burlington N. R.R. v. Bair, 584 F. Supp. 1229, 1232 Iowa 1984), *modified*, 766 F.2d 1222 (8th Cir. 1985).

261. Edelman v. Jordan, 415 U.S. 651, 663 (1974). The Supreme Court, however, also has concluded that plaintiffs may obtain prospective injunctive relief against state officials who have violated the fourteenth amendment. *See id.* at 663-64; *Ex Parte* Young, 209 U.S. 123 (1908).

teenth amendment[262] empower Congress to limit state sovereignty through "appropriate legislation."[263] Second, the supremacy clause[264] enables Congress to abrogate state sovereignty through legislation that is "unmistakably and clearly" designed to accomplish that purpose.[265] Additionally, states may waive their immunity.[266] Without a waiver by the states or congressional legislation authorizing tax reimbursements by the states, a federal court must dismiss a complaint seeking reimbursement because plaintiffs have failed to state a claim upon which relief can be granted.[267]

The federal courts' broad equitable powers, however, directly conflict with the eleventh amendment. The Supreme Court has recognized that federal courts can exercise any or all of their available equitable powers over suits in equity. In *Porter v. Warner Holding Co.*[268] the Court held that "[u]nless otherwise provided by statute, all inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[269] Later, in *Mitchell v. Robert DeMario Jewelry, Inc.*[270] the Court quoted extensively from *Porter* and held that "[w]hen Con-

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262. Section 5 of the fourteenth amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

263. *Id.*; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that "Congress may, in determining what is 'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts") (footnote omitted)).

264. *See supra* note 56.

265. *See* Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3147 (1985); *see also* Employees v. Department of Puh. Health & Welfare, 411 U.S. 279, 285-87 (1973). The Supreme Court apparently has retreated from its decision in Parden v. Terminal Ry., 377 U.S. 184, 192 (1964), which held that the states relinquished their sovereignty to impose restrictions on interstate commerce when they ratified the commerce clause. *See* Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); Employees v. Department of Puh. Health & Welfare, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting).

266. *Cf.* Edelman v. Jordan, 415 U.S. 651, 671-72 (1974).

267. *See* Atchison, T. & S. F. Ry. v. Lennen, 531 F. Supp. 220, 236 (D. Kan. 1981) (dismissing plaintiff's claim for tax refund because the 4R Act only provides for prospective relief); *see also* Edelman v. Jordan, 415 U.S. 651, 668-69 (1974) (denying retrospective relief to state taxpayer); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (denying refund to state taxpayer who paid taxes under protest, pursuant to an unconstitutional law, because the eleventh amendment barred the action).

268. 328 U.S. 395 (1946).

269. *Id.* at 398. *Porter* concerned the enforcement provisions of § 205(a) of the Emergency Price Control Act of 1942, which empowered federal courts to prevent violations of the statute by issuing "a permanent or temporary injunction, restraining order, *or other order.*" *Id.* at 399 (emphasis added). The Court interpreted the "or other order" clause to authorize any appropriate equitable relief other than an injunction, including restitution, that is necessary and proper to fulfill the statutory purpose. *See id.* at 399-401.

270. 361 U.S. 288 (1960).

gress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[271] The Court reaffirmed these decisions in *Renegotiation Board v. Bannercraft Clothing Co.*,[272] concluding that limitations on the federal courts' inherent equitable powers should not be inferred from a statute's remedial provisions because "Congress knows how to deprive a court of broad equitable power when it chooses so to do."[273]

Although Congress was aware of the federal courts' expansive equitable powers, Congress did not expressly limit those powers when enacting sections 11503 and 11503a. Instead, Congress explicitly stated that federal courts may exercise their equity jurisdiction "to devise remedies that will not be burdensome to the communities involved."[274] Thus, federal courts should have the authority to order restitution as an equitable remedy appropriate and necessary to fulfill the purpose of these statutes.

Federal courts have reached conflicting conclusions over whether Congress, acting pursuant to its commerce clause powers, abolished the states' eleventh amendment immunity to lawsuits for the recovery of retrospective monetary relief when it passed the 4R Act.[275] In *Atchison, Topeka & Santa Fe Railway Co. v. Lennen*

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271. *Id.* at 291-92. The Court held that restitution was an appropriate equitable remedy to prevent violations of § 15(a)(3) of tbe Fair Labor Standards Act of 1938. *Id.* at 289-96.

272. 415 U.S. 1 (1973).

273. *Id.* at 19-20. The Court explained that its *Porter* decision was based primarily on the traditionally broad inherent powers of an equity court rather than the statute's "or other order" provision. *See id.* at 19. For a discussion of the possible limited applicability of *Porter* and *Mitchell* to cases involving state rather than private defendants, see also *infra* note 280.

274. H.R. REP. No. 725, 94th Cong., 1st Sess. 78 (1975).

275. The claim for tax refunds has arisen in several § 11503 suits, but not directly in a § 11503a or § 15131(d) action. Nevertheless, tax refunds have been an issue in at least two cases, indirectly related to § 11503a, concerning interstate motor carriers. *See* American Trucking Ass'ns, Inc. v. O'Neill, 522 F. Supp. 49, 55 (D. Conn. 1981) (considering refund issue under Connecticut law in a case deciding legality of state's annual registration fee for interstate motor carriers); American Trucking Ass'ns, Inc. v. Conway, 514 F. Supp. 1341, 1344 (D. Vt. 1981) (considering refund issue under the Tax Injunction Act in a case concerning Vermont statutes requiring interstate motor carriers to purchase more expensive permits).

Additionally, tax refunds have been recognized as an issue related to enforcement of § 1513(d). *See* Letter from Norman Y. Mineta, Nancy Landon Kassebaum, Bob Packwood, and Howard W. Cannon to Paul R. Ignatius, President of the Air Transport Ass'n of America (Dec. 21, 1982) (suggesting states should refund property taxes assessed and collected in violation of § 1513(d) after Sept. 3, 1982, the statute's effective date), *reprinted in*

the district court dismissed plaintiffs' claim for the refund of taxes paid without protest.[276] The district court refused to decide the claim without "an *express or implied* grant of jurisdiction by Congress . . . to provide such relief" and it found no grant "in either the *language or purpose* of the 4-R Act."[277] On appeal[278] the Tenth Circuit observed that the district court's reasoning was "sensible," but analogized plaintiffs' refund claim to cases presenting similar issues decided by the Supreme Court and concluded that the 4R Act did not necessarily prohibit restitution.[279] Although the court affirmed the dismissal below, it suggested that had the plaintiffs paid their 1979 Kansas property taxes under protest, they would have preserved an equitable basis for relief and restitution would have been appropriate.[280] By contrast, in *Burlington Northern Railroad Co. v. Bair*,[281] the United States District Court for the Southern District of Iowa determined that the 4R Act did not "clearly" empower federal courts to order states to reimburse taxpayers for funds collected through an illegal tax and, therefore, concluded that the eleventh amendment barred such an action.

Courts should find that the 4R Act's language and purpose

Western Air Lines, Inc. v. Hughes County, 372 N.W.2d 106, 113 (S.D. 1985), *prob. juris. noted*, 106 S. Ct. 1180 (1986). Any prohibition against federal courts ordering refunds would not apply in an action under § 1513(d) because those cases apparently fall only under state court jurisdiction. *See supra* note 186. The eleventh amendment does not limit the state courts' authority to order tax refunds.

276. 531 F. Supp. 220, 236 (D. Kan. 1981).

277. *Id.* (emphasis added).

278. Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1506 (10th Cir. 1984). Although this decision was the direct result of an appeal from the district court's 1982 ruling, reported at 552 F. Supp. 1031 (D. Kan. 1982), it was the culmination of litigation initiated in federal court in 1981, discussed *supra* at 276-77 and accompanying text.

279. Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1506-07 (10th Cir. 1984). The court quoted extensively from Porter v. Warner Holding Co., 328 U.S. 395 (1946), and Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960), discussed *supra* at notes 268-73 and accompanying text.

280. *See* 732 F.2d at 1507. The court contended that plaintiffs' failure to protest caused the state taxing agencies to budget and spend the money collected from these taxes. Restitution at that point, therefore, would have been inequitable. *Id.* One should note, however, that the Tenth Circuit relied upon Supreme Court decisions involving private rather than state defendants. The Supreme Court itself has observed that "[s]ince neither [*Porter* nor *Mitchell*] involved a suit against a State or a state official, it did not purport to decide the availability of equitable relief consistent with the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 672-73 n.15 (1974). *See also* Trailer Train Co. v. State Bd. of Equalization, 511 F. Supp. 553, 558 (N.D. Cal. 1981) (suggesting that although money damages against the State of California were appropriate, an injunction would more adequately safeguard plaintiff's rights), *aff'd in part and rev'd in part*, 697 F.2d 860 (9th Cir. 1983), *cert. denied*, 464 U.S. 1067 (1984).

281. 584 F. Supp. 1229, 1232 (S.D. Iowa 1984), *modified*, 766 F.2d 1222 (8th Cir. 1985).

"unmistakably and clearly"[282] confer jurisdiction on federal courts to order refunds for taxes that states assess and collect in violation of the Act's provisions.[283] In determining the 4R Act's intent, a court first must examine the statute's "plain" language.[284] Section 306 of the 4R Act originally conferred jurisdiction on federal district courts "to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgements as may be necessary to prevent, restrain, or terminate any acts in violation of this section."[285] As finally codified, section 11503 states that federal courts have jurisdiction *"to prevent a violation"* of the statute.[286] Although Congress intended no substantive change when recodifying the 4R Act,[287] the specific authorization to federal courts *to prevent* state and local tax discrimination against rail transportation property plainly became the effective law.[288] Furthermore, Congress gave no indication that it intended the types of relief specified in the original language to be exclusive remedies. In addition, Congress delayed the statute's effectiveness for three years, giving the states an opportunity to eliminate their discriminatory practices.[289] Consequently, Congress gave federal courts a

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282. *See supra* notes 267-73 and accompanying text. By enacting the 4R Act under its broad commerce clause powers, Congress made its language and purpose binding on the states through the supremacy clause. *See id.*; Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 407 (9th Cir. 1981) (stating Congress has broad commerce clause powers).

283. *See* Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1506-07 (10th Cir. 1984) (implying that refunds are appropriate under certain circumstances). Under similar reasoning federal courts also may order refunds in cases arising under § 11503a.

See also Richmond, F. & P. R.R. v. Department of Taxation, 591 F. Supp. 209, 224-25 (E.D. Va. 1984) (stating that facts of certain cases might require a refund), *modified*, 762 F.2d 375 (4th Cir. 1985); *supra* note 265 and accompanying text (arguing that the limitation on *Parden v. Terminal Ry.* enunciated by the Supreme Court in *Employees v. Department of Pub. Health & Welfare* should not apply in suits arising under §§ 11503 and 11503a because these statutes' purpose and language indicate that Congress intended to abrogate state sovereignty).

284. Atchison, T. & S. F. Ry. v. Lennen, 531 F. Supp. 220, 236 (D. Kan. 1981) (quoting Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 512 (1981)).

285. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (emphasis deleted).

286. 49 U.S.C. § 11503(c) (1982) (emphasis added).

287. *See* Atchison, T. & S. F. Ry. v. Lennen, 640 F.2d 255, 258 (10th Cir. 1981); *supra* notes 81-85 and accompanying text.

288. *See* Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 410 (9th Cir. 1981) (holding that "only the recodification of section 306 ever went into effect" and that "[i]t is not necessary to interpret language in a statute that never went into effect"); *supra* notes 83-84 and accompanying text.

289. States' failure to eliminate discriminatory taxation after this three year period also may constitute a waiver of immunity and subject states to refunds ordered by federal courts. *See supra* note 269 and accompanying text; *cf.* Edelman v. Jordan, 415 U.S. 651, 673

mandate to redress violations of section 11503 through remedies that will most effectively prevent the unreasonable burdening of interstate commerce through discriminatory property taxation. Effective remedies available to federal courts include, but are not limited to, the refund of taxes collected under the invalid state tax law and injunctive and declaratory relief.

Although taxpayers may seek refunds under sections 11503, 11503a, and 1513(d), courts nevertheless should consider several additional factors in determining whether refund relief fulfills the statutory purpose of each Act.[290] First, courts should consider the particular state's history of property tax discrimination against rail, motor, and air carriers.[291] Second, courts should examine the state's efforts to eliminate discrimination after the passage of these statutes.[292] Third, courts should study plaintiff's efforts to determine whether taxes were discriminatory before payment.[293] Fourth, courts should ascertain whether the taxpayer paid the discriminatory taxes under protest.[294] Fifth, courts should determine how soon after the state assessed and collected the taxes that plaintiffs filed suit.[295] Last, and most importantly, courts should determine

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(1974) (holding that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights" and that the Court "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' ") (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).

290. *Cf.* Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1507 (10th Cir. 1984). The court held that restitution in this particular case would not serve the purposes of § 11503 after considering several factors, including plaintiffs' failure to pay under protest and the probability that local taxing authorities had budgeted and spent the taxes improperly assessed and collected. *Id.*

291. Refunds may be the only significant way for courts to impress upon state taxing authorities with long histories of legislating discrimination that the courts will enforce vigorously the congressional purpose embodied in these statutes. *Cf.* Richmond, F. & P. R.R. v. Department of Taxation, 591 F. Supp. 209, 224-25 (E.D. Va. 1984), *modified*, 762 F.2d 375 (4th Cir. 1985).

292. Section 11503, in particular, was enacted three years before becoming effective. The states, therefore, had an extensive period to reform their taxing policies regarding rail transportation property. Once the rail carrier changes were made, states should have been able to eliminate discrimination more easily against motor and air carriers following the passage of §§ 11503a and 1513(d).

293. Plaintiffs failing to undertake a good faith effort to determine whether a state tax is discriminatory and, therefore, in violation of §§ 11503, 11503a, or 1513(d) do not deserve equitable monetary relief.

294. Courts should not award refunds to plaintiffs that fail to protest the assessment and collection of a discriminatory tax. A protest puts the state and local taxing authorities on notice that they should not immediately budget and spend those taxes. *Cf.* Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1507 (10th Cir. 1984).

295. Prompt filing of a lawsuit against state or local taxing authorities following the

the potential impact of the refund order on state and local services.[296]

Despite the constitutional, statutory, and judicial complexities related to awarding restitution, tax refunds should become less important in future litigation concerning sections 11503, 11503a, and 1513(d). Since Congress enacted these statutes, rail, motor, and air carrier plaintiffs have had the opportunity to develop strategies to preserve their claims to refunds under potentially discriminatory property tax laws. The interstate carriers have recognized that by failing to adequately safeguard their interests, they are vulnerable to ad hoc judicial decision-making on the issue of tax refunds.

4. Denial of Permanent Relief

Upon the denial of permanent relief, a court should not allow a state or local government to penalize a plaintiff for failure, pursuant to a preliminary injunction, to pay disputed taxes. A penalty under these circumstances would thwart the congressional purpose in enacting sections 11503, 11503a, and 1513(d).[297] Tax discrimination may continue uncorrected if potential plaintiffs determine that paying a discriminatory tax is more economical than bearing delinquency penalties and the high costs of litigation. Although courts should not hold plaintiffs responsible for penalties on disputed taxes, plaintiffs should pay interest for the nonpayment of funds representing undisputed taxes. Otherwise, plaintiffs would enjoy unjust enrichment because they had the opportunity to use funds properly owed to the state.[298]

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assessment and collection of an allegedly discriminatory property tax serves as constructive notice of a protest.

296. If a refund would result in unreasonable hardship on citizens by limiting the availability of essential services such as police and fire protection, then such relief seems highly burdensome and, therefore, contrary to congressional intent. *See supra* note 274 and accompanying text.

297. *See* Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1506 (10th Cir. 1984) (denying payment of a penalty and stating that "[a]ny state law that frustrates or conflicts with the lawful objective of a federal statute must yield to the federal authority") (quoting United States v. Composite State Bd. of Medical Examiners, 656 F.2d 131, 135 n.4 (5th Cir. 1981)); Burlington N. R.R. v. Lennen, 715 F.2d 494, 498 (10th Cir. 1983) (prohibiting a penalty for the withholding of taxes pursuant to a preliminary injunction), *cert. denied*, 464 U.S. 1067 (1984).

298. *See* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 530-31 (11th Cir. 1983) (ordering district court to modify its preliminary injmction and to require payment of interest on undisputed taxes), *cert. denied*, 465 U.S. 1100 (1984).

Problems may arise in calculating the proper interest penalty when a plaintiff withholds funds in accordance with a preliminary injunction. *See id.* at 531. Under these circumstances, a state would be acting inequitably by demanding a penalty at a rate greater than

VI. INTERSTATE OIL PIPELINES

The negative tax consequences that led Congress to pass legislation protecting rail, motor, and air carriers continue to burden interstate oil pipelines. Although Congress originally considered oil pipelines among the industries requiring federal protection from discriminatory state and local property taxation, Congress has failed to enact any corrective legislation.[299] Consequently, states continue to classify oil pipeline property in the same category as public utilities, at the highest assessment and tax rates.[300] This taxing policy is constitutional under the fourteenth amendment's equal protection clause,[301] provided the state has a rational basis for its classification and equally taxes all types of property within the classification.[302] Under these standards, a court likely will not hold that a state legislature has exceeded its powers by arbitrarily enacting a tax system that discriminates against oil pipelines even though Congress prohibits identical state tax discrimination against other interstate carriers. Although no reasonable justification exists for denying federal statutory protection to oil pipelines when other interstate carriers enjoy such protection, Congress, through its inaction, has perpetuated tax discrimination against oil pipelines. This situation, nevertheless, offers Congress an excellent opportunity to develop legislation that effectively remedies property tax discrimination against oil pipelines. This situation also provides an impetus to amend the present rail, motor, and air carrier statutes to clarify ambiguities and promote uniformity among the courts.

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that which the plaintiff reasonably could have earned through investment.

299. *See* S. REP. No. 1085, 92d Cong., 2d Sess. 3 (1972); S. REP. No. 630, 91st Cong., 2d Sess. 3 (1969); S. REP. No. 1483, 90th Cong., 2d Sess. 1-2 (1968); S. REP. No. 445, 87th Cong., 1st Sess. 445 (1961).

300. *See* State v. Colonial Pipeline Co., 471 So. 2d 408 (Ala. Civ. App. 1985) (upholding the State of Alabama's tax classification of oil pipelines in "Class I" along with public utilities). *But see Ex Parte* Colonial Pipeline Co., 471 So. 2d 413 (Ala. 1985) (Embry, J., dissenting) (contending, in an extensive analysis, that Alabama's tax classification scheme is arbitrary and capricious and that the state should not tax oil pipelines differently than other common carriers).

301. The fourteenth amendment's equal protection clause provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

302. *See* State v. Colonial Pipeline Co., 471 So. 2d 408, 412-13 (Ala. Civ. App. 1985) (discussing rational basis test); Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 366-70 (1940) (holding a tax classification system is constitutional under the equal protection clause).

VII. CONCLUSION

After approximately twenty years of deliberation, Congress enacted legislation to protect rail, motor, and air carriers from discriminatory state and local property taxation. Despite the extended debate, Congress left many ambiguities in the statutes that require courts to legislate in their judicial interpretations. Diverse judicial interpretations of sections 11503, 11503a, and 1513(d) have left the status of these laws in confusion. Courts disagree over both the extent of their jurisdiction under the statutes and the application of these statutory provisions in resolving litigation. Congress' failure to specify the factors courts should consider in developing an "average" commercial and industrial taxpayer to compare with plaintiffs in determining whether tax discrimination exists is responsible for much of this judicial disagreement.

As a consequence of judicial differences, a plaintiff may receive complete relief in one jurisdiction, but, under the same facts, little or no relief in another. No justification exists for this possible inconsistency. Certain plaintiffs should not benefit because they were fortunate to have their property located within a favorable jurisdiction. Either Congress must amend these statutes to correct their ambiguous provisions and promote a more uniform judicial interpretation or the United States Supreme Court must finally grant certiorari,[303] denied several times,[304] and establish a precedent for lower courts to follow in resolving issues arising under these statutes. The availability of valuation relief and the proper method for proving discriminatory assessments under the statutes are the two most ripe areas of conflict among federal appellate

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303. SUP. CT. R. 17.1 states that the Supreme Court will grant certiorari only for "special and important" reasons. These reasons, in pertinent part, include conflicts among federal courts of appeals and decisions by state or federal courts on important federal law issues that the Court has not decided. *See* SUP. CT. R. 17.1(a) and (c). *See also infra* note 305 and accompanying text.

304. *See, e.g.*, Atchison, T. & S. F. Ry. v. Bair, 338 N.W.2d 338 (Iowa 1983), *cert. denied*, 465 U.S. 1071 (1984); Southern Ry. v. State Bd. of Equalization, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Burlington N. R.R. v. Lennen, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 464 U.S. 1067 (1984); Ogilvie v. State Bd. of Equalization, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Tennessee v. Louisville & N. R.R., 478 F. Supp. 199 (M.D. Tenn. 1979), *aff'd mem.*, 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).

The United States Supreme Court has noted probable jurisdiction in Western Air Lines, Inc. v. Hughes County, 106 S. Ct. 1180 (1986), on appeal from the Supreme Court of South Dakota, 372 N.W.2d 106 (S.D. 1985). Because that case raises only a limited number of issues, any decision by the Court can only begin to resolve the confused state of the law regarding § 1513(d).

courts that the Supreme Court should resolve.[305]

Although the statutes' shortcomings have resulted in much litigation, Congress' purpose, nevertheless, has been achieved. Courts have invalidated many state and local tax schemes because of their discriminatory effects. While the courts' conflicting standards for finding statutory violations have contributed to the continuation of discriminatory taxation, a more uniform interpretation and application of these laws will fulfill Congress' goal and efficiently and effectively deal with property tax discrimination against rail, motor, and air carriers.

Scott M. Schoenwald

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305. For the conflict over valuation relief, see Burlington N. R.R. v.Bair, 766 F.2d 1222, 1225-27 (8th Cir. 1985), and Burlington N. R.R. v. Lennen, 715 F.2d 494, 498 (10th Cir. 1983), *cert. denied,* 464 U.S. 1067 (1984), discussed *supra* at notes 173-86 and accompanying text. *See also* Brief for the United States as Amicus Curiae in the Supreme Court of the United States on Petition for a Writ of Certiorari, Burlington N. R.R. v. Lennen, 715 F.2d 494 (10th Cir. 1983), *cert. denied,* 464 U.S. 1067 (1984). The United States implied that when legal issues are no longer novel and the circuits conflict in their statutory construction, the Supreme Court must provide a resolution. *Id.* at 16.

For the conflict over the proper methods for proving discriminatory assessments, compare Atchison, T. & S. F. Ry. v. Lennen, 732 F.2d 1495, 1504 (10th Cir. 1984), and ACF Indus., Inc. v. Arizona, 714 F.2d 93, 95 (9th Cir. 1983), with Clinchfield R.R. v. Lynch, 700 F.2d 126, 130 n.5 (4th Cir. 1983), discussed *supra* at notes 153-72 and accompanying text.

In addition, the conflict among federal circuits over whether to follow the 4R Act's original or recodified language requires resolution by the Supreme Court. For an example of this conflict, see Richmond, F. & P. R.R. v. Department of Taxation, 762 F.2d 375, 377 (4th Cir. 1985), and Arizona v. Atchison, T. & S. F. R.R., 656 F.2d 398, 404, 410 (9th Cir. 1981), discussed *supra* at notes 81-84 and accompanying text.