

COMMENTS

**A State-Centered Approach to Tax Discrimination
under § 11501(b)(4) of the 4-R Act***Samuel Eckman*[†]

INTRODUCTION

Imagine a railroad whose holdings span the country, connecting the nation's largest cities and providing passenger and freight services that are critical to the economy's functioning. State A, through which this rail line runs, finds itself nearing insolvency. Seeking funds but wishing not to upset its politically powerful voters, this state levies a tax exclusively applicable to railroads.

State B, a neighboring state, is more in need of money than State A and decides to impose a tax on all commercial enterprises within its territory. However, due to pressure from local interest groups, State B grants exemptions to trucks, barges, and aircraft. While far from the only business paying the tax, the railroad now finds itself at a severe competitive disadvantage as compared to other carriers.

State C adopts a third approach. This state notices that many common carriers within its jurisdiction—airlines, railroads, barges, and the like—are not local and levies a tax that applies to all transportation businesses on an equal footing. Although this tax applies to railroads and their competitors equally, such that none are at a competitive disadvantage, the predominantly local nontransportation firms are not subject to the tax.

Each of these situations disadvantages the railroad, but do any of them *discriminate* against it illegally? This scenario highlights a problem that has arisen in the interpretation of the Railroad Revitalization and Regulatory Reform Act¹ (4-R Act), a comprehensive statute passed by Congress in 1976 with the purpose of restoring the

[†] BS, BA 2008, University of Pittsburgh; JD Candidate 2013, The University of Chicago Law School.

¹ Pub L No 94-210, 90 Stat 31, codified in various sections of Title 49.

financial sustainability of the nation's railroads.² In relevant part, the statute reads:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.³

The first three subsections of this provision apply exclusively to property taxes⁴ and specify that such taxes may not discriminate against rail operators as compared to all "other commercial and industrial property."⁵ The concluding catch-all provision, which applies

² 4-R Act § 101, 90 Stat at 33, codified at 45 USC § 801 (describing the policy of the 4-R Act as being "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system").

³ 49 USC § 11501.

⁴ 49 USC § 11501(b)(1)–(3).

⁵ 49 USC § 11501(a)(4) (defining "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"). The qualifier "subject to a property tax levy" has led to substantial litigation. The Supreme Court concluded that commercial and industrial property that is *fully exempted* from a tax is not within the comparison class, as it would no longer be "subject to" the allegedly discriminatory levy. *Department of Revenue of Oregon v ACF Industries, Inc.*, 510 US 332, 342 (1994). This means that states can evade the 4-R Act's proscription against discriminatory taxation by simply granting full exemptions to favored taxpayers. However, the Supreme Court has also held that this only applies to *property* tax levies. As such, a taxpayer that is fully exempt from a

to nonproperty taxes, does not provide any comparison class.⁶ This silence has created great uncertainty for states trying to assess the legality of intuitively reasonable distinctions between railroads and other taxpayers in their tax regimes, as well as substantial exposure for railroads, which are left guessing as to potential state tax liability.

The circuit courts are divided over how to determine the class against which allegedly discriminatory taxes should be compared under subsection (b)(4). Some courts—including the Fifth,⁷ Seventh,⁸ and Ninth⁹ Circuits—have adopted a “functional approach,” which imports the “commercial and industrial” comparison class from the preceding three subsections into the catch-all provision. Under this approach, State B’s tax scheme would be permissible despite the competitive harm that railroads will incur, since railroads are not discriminated against as compared to the broader class of all commercial and industrial taxpayers.¹⁰ State C’s tax scheme, however, would violate the 4-R Act, as only transportation businesses are subject to the tax.¹¹ And of course, because State A’s tax applies only to railroads, it would be impermissibly discriminatory under the 4-R Act no matter which comparison class one adopts.

A sizeable minority of courts, including the Eighth Circuit¹² and several state supreme courts,¹³ have crafted a “competitive approach.” Emphasizing the 4-R Act’s goal of restoring railroads to private-sector competitiveness, these courts would only invalidate a

nonproperty tax—taxes that are covered by subsection (b)(4)—remains within the comparison class of § 11501(b). *CSX Transportation, Inc v Alabama Department of Revenue*, 131 S Ct 1101, 1111 (2011) (noting that the analysis undertaken in *ACF Industries* has no bearing on a claim brought under subsection (b)(4)).

⁶ 49 USC § 11501(b)(4).

⁷ *Kansas City Southern Railway Co v McNamara*, 817 F2d 368, 374 (5th Cir 1987).

⁸ *Kansas City Southern Railway Co v Koeller*, 653 F3d 496, 509 (7th Cir 2011).

⁹ *Atchison, Topeka and Santa Fe Railway Co v Arizona*, 78 F3d 438, 443 (9th Cir 2011).

¹⁰ Of course, the fact that direct competitors are exempted from this nonproperty tax does not remove them from the comparison class under this approach. See note 5. Nevertheless, since discrimination is being measured vis-à-vis the larger class of all commercial and industrial taxpayers, it is unlikely that the exemption from the tax of a small subset of this class, even an important subset such as competitors, will constitute discrimination as compared to the class as a whole.

¹¹ Consider *Koeller*, 653 F3d at 509.

¹² *Burlington Northern, Santa Fe Railway Co v Lohman*, 193 F3d 984, 985 (8th Cir 1999). The Eleventh Circuit also applied this approach in *Norfolk Southern Railway Co v Alabama Department of Revenue*, 550 F3d 1306, 1308 (11th Cir 2008). However, in that case the parties stipulated to the approach, and the court, noting its misgivings on how best to resolve the split, declined to definitively adopt the competitive approach. *Id* at 1308 n 3.

¹³ *Atchison, Topeka and Santa Fe Railway Co v Bair*, 338 NW2d 338, 346 (Iowa 1983); *Burlington Northern Railroad Co v Commissioner of Revenue*, 509 NW2d 551, 553 (Minn 1993).

state tax regime that places a higher burden on railroads than their direct competitors. Under this rule, State C's tax scheme would be permissible, whereas State B's would contravene the statute.¹⁴

Despite this disagreement, the Supreme Court has declined to resolve the question.¹⁵ As such, courts interpreting the 4-R Act have tended to adopt the approach most likely to achieve a "fair" outcome in the instant case while strictly cabining their holdings to the facts before them. While this might have an intuitive appeal, it creates considerable difficulties for the courts that must apply the law in future cases and the states and railroads that must conform to its dictates. For example, the comparison class adopted by an earlier court may be inappropriate to the facts of a later case, especially when a different type of tax, or a tax on different conduct, is at issue. On the other hand, adopting a new comparison class would make it exceedingly difficult for states and railroads to determine how the statute will be applied to any given tax and would force courts to make a threshold determination concerning the applicable comparison class before addressing the discrimination issue.

This Comment proposes a new interpretation of subsection (b)(4) that provides a single, coherent approach to these cases while still preserving the flexibility and functionality necessary to give effect to the intent of the 4-R Act. Part I discusses the text, history, and purposes of the 4-R Act, noting in particular Congress's dual concern with protecting the financial sustainability of railroads and preserving states' discretion in crafting tax policy—an area long considered squarely within their domain. Part II reviews the circuit split that has developed in interpreting the 4-R Act, paying particularly close attention to the conflicting and underdetermined approaches that many courts have employed in resolving the comparison-class question under § 11501(b)(4). Part III discusses the shortcomings of these approaches, both as a matter of statutory interpretation and as a matter of policy. Part IV then presents an alternative solution to this circuit split, one that shifts the focus from identifying an elusive comparison class to assessing the rationality of a given state-defined classification. Allowing states to draw reasonable distinctions between taxpayers is consistent with the language and subsequent judicial interpretations of the 4-R Act and reflects the approach employed by the courts in assessing tax discrimination claims in other

¹⁴ Under Supreme Court precedent, full exemptions from nonproperty taxes of the sort addressed by subsection (b)(4) are not removed from the comparison class. See note 5.

¹⁵ *CSX Transportation*, 131 S Ct at 1107 n 5 (2011) (declining to address the issue over a dissent from Justice Clarence Thomas advocating adoption of the functional approach).

contexts—namely, Equal Protection Clause and Dormant Commerce Clause cases. Such an approach affords states wider discretion in exercising their power to tax while continuing to protect railroads against the most egregious forms of discrimination.

I. WORKIN' ON THE RAILROAD: THE INCEPTION, IMPLEMENTATION, AND INTERPRETATION OF THE 4-R ACT

Much of the debate concerning subsection (b)(4) has centered on how to protect railroads from overly burdensome taxation without rendering them “most-preferred taxpayers”—that is, giving them every tax advantage that any other taxpayer may claim. Although this concern reflects the intuition that an overbroad reading of § 11501's protections would be too generous to railroads, it also evinces a concern with protecting states' taxing prerogatives.

The 4-R Act acknowledged the inability of existing law to provide meaningful protection to railroads from adverse tax treatment by the states and sought to remedy this through the implementation of an array of bright-line rules. Although bright-line rules might make sense in the context of subsections (b)(1)–(3), which deal with specific types of tax discrimination, they are ill-suited for the myriad of tax scenarios covered by subsection (b)(4), perhaps explaining the courts' reluctance to commit to a fixed comparison class to cover all claims brought under that provision. A review of the text, legislative history, and subsequent judicial interpretation of the 4-R Act reveals the need for a new approach to this problem.

A. The Text of 49 USC § 11501(b)

Section 11501(b) prohibits states and municipalities from imposing various types of taxes that discriminate against railroads. The first three prohibitions deal specifically with discriminatory property taxes. For example, states may not “[a]ssess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property” than that assessed on “*other commercial and industrial property* in the same assessment jurisdiction.”¹⁶ Similarly, states may not levy or collect a tax based on such assessments.¹⁷ Ad valorem taxes¹⁸ on rail property “at a rate that exceeds

¹⁶ 49 USC § 11501(b)(1) (emphasis added).

¹⁷ 49 USC § 11501(b)(2).

¹⁸ An ad valorem tax is “[a] tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure.” *Black's Law Dictionary* 1594 (West 9th ed 2009).

the tax rate applicable to *commercial and industrial property* in the same assessment jurisdiction” are also barred.¹⁹

Despite the seemingly categorical language of these provisions, there are a number of limitations on their breadth. Notably, the comparison class includes only property “subject to a property tax levy.”²⁰ In *Department of Revenue of Oregon v ACF Industries, Inc.*,²¹ the Supreme Court held this language permits states to grant full exemptions from property taxes to nonrailroad taxpayers since those taxpayers would no longer fall within the comparison class.²² Furthermore, the class explicitly excludes agricultural and timber land, allowing preferential tax treatment with regard to these two industries in which states have traditionally had a special policy interest.²³

In sharp contrast to the detailed prohibitions above, subsection (b)(4) provides a much more open-ended directive, declaring it illegal for a state to “impose another tax that discriminates against a rail carrier providing transportation.”²⁴ The Supreme Court has interpreted this last prohibition as applying to all nonproperty taxes.²⁵ As mentioned above, however, the question of the proper comparison class against which to measure such alleged discrimination has divided the courts.

It bears noting that a defined comparison class is not the only important omission from subsection (b)(4). The statute also fails to describe what constitutes discrimination with regard to nonproperty taxes under that subsection. In the property context, the statute specifically defines discriminatory tax assessments as those in which the ratio of assessed-to-true value of railroad property is greater than 5 percent of that for nonrailroad property and provides a detailed

¹⁹ 49 USC § 11501(b)(3) (emphasis added).

²⁰ 49 USC § 11501(a)(4).

²¹ 510 US 332 (1994).

²² Id at 347–48 (finding that, although partial exemptions are prohibited by the Act, full exemptions are not since such exempted property is not “subject to a tax”). Note, however, that this holding is limited to property taxes. Because the language on which *ACF Industries* relied mentioned only that the property must be subject to a *property* tax, full exemptions from nonproperty taxes do not take a taxpayer outside the ambit of the comparison class. See *CSX Transportation, Inc v Alabama Department of Revenue*, 131 S Ct 1101, 1111 (2011).

²³ 49 USC § 11501(a)(4).

²⁴ 49 USC § 11501(b)(4). The original language of the 4-R Act stated that “the imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad” would violate the statute. 4-R Act § 306(d), 90 Stat at 54 (emphasis added). The wording was changed as part of a general recodification, but Congress made clear that the rewording should not be understood to change the meaning or interpretation of the terms. *CSX Transportation*, 131 S Ct at 1105 n 1.

²⁵ *CSX Transportation*, 131 S Ct at 1107–08 (rejecting the view that subsection (b)(4) applies only to in-lieu taxes). See text accompanying notes 91–98.

description of how to allocate the burden of proof and calculate true market value.²⁶ It also specifies that a discriminatory ad valorem tax is any tax that applies to rail property at a higher rate than to other commercial and industrial property.²⁷ But no such definition of discrimination is provided with regard to subsection (b)(4). Although the Supreme Court has held that the term “discrimination” must take its ordinary definition in this context—“failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored”²⁸—the content and operation of this standard were not elucidated.²⁹ The result is a very vague prohibition, applying to all nonproperty taxes but describing neither how to determine if a tax discriminates nor against whom any differentials should be compared.

B. The Legislative History of 49 USC § 11501(b)

The 4-R Act was over fifteen years in the making,³⁰ and over that time the language of what would become § 11501(b) underwent substantial modification. First, this Section considers the problems facing railroads in the middle of the twentieth century that motivated Congress to adopt the 4-R Act. It then discusses the competing goals Congress sought to balance in addressing these problems. Finally, this Section reviews how these policies were reflected in the various drafts of the bill that emerged in the decade and a half preceding the Act’s ultimate adoption.

1. The financial plight of the railroads.

To give content to the ambiguous text of § 11501(b), it is helpful to consider the historical moment in which the 4-R Act arose. Beginning with the conclusion of World War I, the rail industry in America entered a period of slow decline.³¹ This decline accelerated mid-century as competition from new modes of transportation eroded the

²⁶ 49 USC § 11501(c).

²⁷ 49 USC § 11501(b)(3).

²⁸ *CSX Transportation*, 131 S Ct at 1108.

²⁹ See *id.* at 1109 n 8 (observing that evidence of discrimination only establishes a prima facie violation of subsection (b)(4), which might be rebutted with a sufficient justification from the state).

³⁰ *National Transportation Policy*, S Rep No 87-445, 87th Cong, 1st Sess III–IV (1961) (describing the report as addressing the “fundamentals” that need attention and situating the report as a first step in the process of legislative reform).

³¹ See US Department of Transportation, *The Northeast Problem*, in Paul W. MacAvoy and John W. Snow, eds, *Railroad Revitalization and Regulatory Reform* 9, 11–12 (American Enterprise Institute 1977).

railroad industry's market share in both freight³² and passenger services.³³ Consequently, the number of miles of railroad track carrying passengers fell by over two-thirds between 1950 and 1971, from 147,511 miles to 42,000 miles.³⁴ Between 1960 and 1970 alone, one-third of all railroad companies went out of business.³⁵ The outlook for the rail industry only grew grimmer over the next decade as the number of operating rail carriers declined by an additional 46 percent.³⁶ The high cost of maintaining rail infrastructure did not help matters.³⁷

At the same time, the broader economy was changing in ways unfavorable to the railroads. Growth in the services industry and decline in the commodity markets chipped away at railroads' potential business.³⁸ New businesses tended to be fairly mobile and able to easily cross state lines, thus constraining states' ability to tax them. In contrast, the large and immobile fixed capital of railroads left them captive to the states in which they were located, making them an attractive source of revenue for state legislatures. That these railroads were often nonlocal enterprises further incentivized policymakers to target them, as the railroads faced greater costs in exacting political

³² Between 1960 and 1975, the ton-miles of freight moved by air transportation rose by 527 percent versus just over 30 percent for railroads (data for intercity truck transportation is not available for this time period). See Research and Innovative Technology Administration, Bureau of Transportation Statistics, *Table 1-49: U.S. Ton-Miles of Freight* (July 2011), online at http://www.bts.gov/publications/national_transportation_statistics/html/table_01_49.html (visited Sept 19, 2012) (noting that ton-miles of freight increased from 553 to 3,470 for air transportation and from 572,309 to 754,252 for rail).

³³ Between 1960 and 1975, passenger-miles traveled increased by 285 percent for air transit and 89 percent for highway transit, while falling by 77 percent for rail transit. See Research and Innovative Technology Administration, Bureau of Transportation Statistics, *Table 1-40: U.S. Passenger-Miles* (Jan 2012), online at http://www.bts.gov/publications/national_transportation_statistics/html/table_01_40.html (visited Sept 19, 2012) (reporting an increase in passenger-miles from 31,099 to 119,591 for air transportation, an increase from 1,272,078 to 2,404,954 for highway transportation, and a decrease from 17,064 to 3,931 for rail).

³⁴ Oliver Jensen, *The American Heritage History of Railroads in America* 299 (American Heritage 1975).

³⁵ See Research and Innovative Technology Administration, Bureau of Transportation Statistics, *Rail Profile* (April 2011), online at http://www.bts.gov/publications/national_transportation_statistics/html/table_rail_profile.html (visited Sept 19, 2012) (noting that the number of railroad companies declined from 106 to 71 during this period).

³⁶ See *id.*

³⁷ The cost of rehabilitating one mile of railroad could reach as high as \$100,000 in 1980. Missouri Highway and Transportation Department, *Missouri Rail Plan 1980 Update* table 4-106 table 4-53 (Sept 1980).

³⁸ US Department of Transportation, *The Northeast Problem* at 17-20 (cited in note 31).

retribution against the politicians of a state in which they were not resident.³⁹

The Doyle Report, a 1961 US Senate study, first documented the extent of state overtaxation of railroads.⁴⁰ Focusing solely on property tax assessments, the Doyle Report found that all thirty-one states studied assessed railroad property at a higher percentage of true value than other property, resulting in railroads paying over \$140 million more in taxes than they otherwise would.⁴¹ Although this was not typically a result of facial discrimination against railroads (indeed, many states nominally prohibited such practices), the wide discretion granted to tax assessors and the difficulty of ensuring equitable assessments allowed the “political problem” to fester.⁴² This practice was still widespread into the mid-1970s.⁴³

Needless to say, the combination of shrinking income and rising tax liabilities⁴⁴ proved toxic, threatening the bankruptcy of national rail carriers and, impliedly, their nationalization at taxpayer expense.⁴⁵ Although Congress first began to consider reforms to the rail industry in the early 1960s,⁴⁶ it was the collapse of the Penn Central Transportation Company in 1970 that finally spurred action. In that year, Congress passed the Rail Passenger Service Act,⁴⁷ which created the National Railroad Passenger Corporation (“Amtrak”) to take over Penn Central’s passenger lines. The Regional Rail Reorganization Act of 1973⁴⁸ (3-R Act) created Consolidated Rail Corporation (“Conrail”), which similarly took over the operations of many freight carriers.⁴⁹ Seeking to stave off more bankruptcies and stem the need

³⁹ See *Discriminatory State Taxation of Interstate Carriers*, S Rep No 91-630, 91st Cong, 1st Sess 3 (1969).

⁴⁰ See S Rep No 87-445 at 449 (cited in note 30) (reporting that railroads are more heavily taxed than other carriers because of state property tax liability).

⁴¹ *Id.* at 487.

⁴² *Id.* at 485–86.

⁴³ *Rail Revitalization and Regulatory Reform Act of 1975*, HR Rep No 94-725, 94th Cong, 1st Sess 78 (1975).

⁴⁴ S Rep No 87-445 at 486 (cited in note 30) (noting that between 1955 and 1957, railroad income fell by 53.9 percent, while property tax bills rose by 9.3 percent).

⁴⁵ US Department of Transportation, *The Northeast Problem* at 13 (cited in note 31) (observing that, in the mid-1970s, 13 percent of all railroad mileage was owned by railroads that had filed for bankruptcy).

⁴⁶ See S Rep No 87-445 at 449–66 (cited in note 30).

⁴⁷ Pub L No 91-518, 84 Stat 1327. See US Department of Transportation, *The Northeast Problem* at 13 (cited in note 31) (discussing Penn Central’s decline and Amtrak’s assumption of passenger rail service).

⁴⁸ Pub L No 93-236, 87 Stat 985, codified at 45 USC § 701 et seq.

⁴⁹ For evidence that Conrail was intended to take over rail carrier work, see Rail Services Act of 1975, S 2718, 94th Cong, 1st Sess (Dec 2, 1975), in 121 Cong Rec 38118 (statement of Sen Vance Hartke).

for further nationalization, Congress considered more systemic reforms. This culminated in the adoption of the 4-R Act.

2. The purposes and policies of the 4-R Act.

The evolution of § 11501(b) of the 4-R Act reveals a clear concern about the widespread practice of extracting exorbitant taxes from railroads due to their nonlocal, nonvoting status and the lock-in effect they face due to the high upfront cost of constructing track.⁵⁰ However, that was not the only concern. Congress did not seek to provide railroads protection at all costs, such as by treating them as most-preferred taxpayers and categorically infringing upon the states' right to use their tax systems as a means of obtaining certain valid policy goals.⁵¹ Instead, the Act engaged in a careful balancing of these competing concerns. The current approaches to subsection (b)(4), unfortunately, fail to appreciate this balancing and, in doing so, undermine both goals.

a) Declaration of policy. In its statement of purpose, Congress noted that the 4-R Act was intended, among other things, “to restore the financial stability of the railway system” and “to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector.”⁵²

The statement of policy provides further insight into the concerns underlying the adoption of § 11501(b)(4). In particular, Congress noted that the Act should “balance the needs of carriers, shippers, and the public”⁵³ and “foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service-related enterprises.”⁵⁴

⁵⁰ See, for example, S Rep No 91-630 at 3 (cited in note 39).

⁵¹ See, for example, *id.* at 4 (citing a letter sent to the Senate Committee on Commerce by the Department of Transportation acknowledging the need for legislation proscribing discriminatory taxes, but noting that considerations including “[f]ederal involvement in matters of State and local concern, tax revenue loss, and the possible impairment of other valid State policies ought to be given weight”); *Discriminatory State Taxation of Interstate Carriers*, S 2289, 91st Cong, 2d Sess (May 29, 1969), in 116 Cong Rec 2023–24 (Jan 30, 1970) (statement of Sen Clifford Hansen) (emphasizing that “we must be careful not to discourage those states who for good and proper reasons establish different classifications of property”); HR Rep No 94-725 at 77–78 (cited in note 43) (observing that relief under the 4-R Act would require balancing the interest of the railroad in obtaining relief against the interest of the community in maintaining its tax structure).

⁵² 45 USC § 801(a).

⁵³ 45 USC § 801(b)(1).

⁵⁴ 45 USC § 801(b)(2).

Although these broad statements are not terribly enlightening, they do establish that the 4-R Act was not designed to operate purely as a method for subsidizing railroads by transforming them into most-preferred taxpayers. Rather, Congress had more nuanced aims and sought to enhance the overall public good by promoting *competition* among all modes of transportation. Of course, the Act makes clear that a vibrant rail industry is a critical component of such competition; nevertheless, it is a means to an end rather than the end itself. And while the enunciation of certain bright-line rules in the 4-R Act indicates a congressional determination as to how this public interest is best advanced in particular circumstances, a court must carefully consider whether those rules will achieve this broader public purpose before importing them into other provisions that lack such clear direction.⁵⁵

b) Statements and reports. The legislative history of the 4-R Act further indicates that, although protecting railroads was the motivating purpose of the Act, the means adopted to accomplish this end were narrowly crafted so as to minimize intrusion upon state taxing prerogatives and to prevent making railroads most preferred taxpayers. This is most clearly displayed by Senator Clifford Hansen, who proposed the amendment that exempted agricultural, nonindustrial, and noncommercial property from the comparison class applicable to subsections (b)(1)–(3). As he noted in proposing the amendment, which was later adopted, “we must be careful not to discourage those states who for good and proper reasons establish different classifications of property.”⁵⁶ It is not differences alone that matter, but *reasons*. While Congress provided clear rules for determining areas where no state justification could vindicate differential treatment (such as the formula defining what constitutes discriminatory property valuation), it declined to do so with respect to subsection (b)(4)— the only tax discrimination provision in which Congress declined to provide a comparison class. This omission, therefore, can best be interpreted as delegating to courts the responsibility of assessing state justifications in light of the purposes of the Act, an especially appropriate decision considering the broad range of taxes that subsection (b)(4) covers.⁵⁷

⁵⁵ Indeed, insofar as Congress provided clear guidance with respect to the appropriate comparison class under subsections (b)(1)–(3), the omission of a comparison class from subsection (b)(4) provides strong evidence that the omission was intentional. See Part III.A. The failure of the current approaches to further this policy confirms this intuition. See Part III.B.

⁵⁶ 116 Cong Rec at 2023–24 (statement of Sen Hansen) (cited in note 51).

⁵⁷ See notes 91–97 and accompanying text.

At the same time, however, protecting railroads from the states was a primary motivation of the legislation. The House Report accompanying the bill cited research demonstrating that railroads were overtaxed by at least \$50 million per year.⁵⁸ The Report also noted the procedural hurdles railroads faced in bringing a claim of discriminatory taxation: because the Tax Injunction Act⁵⁹ denies federal courts the ability to enjoin state taxes when an adequate remedy is available in state courts, railroads were frequently forced to litigate their claims at the state level.⁶⁰ But state law typically requires bringing a complaint against the tax collecting, rather than the tax assessing, body; since taxes are collected at the county level, this requires numerous suits to challenge a single state tax. Indeed, “[t]he Southern Pacific . . . had to bring 48 separate suits in 48 separate California courts to challenge the level of assessments of that railroad’s property.”⁶¹ The House concluded that “[i]n view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property and ‘in lieu’ taxation should be ended.”⁶²

Similarly, the Senate acknowledged the politically vulnerable position of railroads in justifying legislative action: “Railroads . . . are nonvoting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals.”⁶³ This problem was exacerbated by industrial decline in the Northeast, which left communities increasingly dependent upon tax revenues from the dwindling ranks of remaining businesses.⁶⁴ Combined with shrinking revenues, railroads found themselves squeezed from both ends.⁶⁵

This concern was moderated, however, by an acknowledgment that states might have sound economic or policy reasons for differentiating between railroads and other taxpayers.⁶⁶ The House was careful to note that the 4-R Act would not provide railroads with an

⁵⁸ HR Rep No 94-725 at 78 (cited in note 43). It is not clear why this number differentiates so drastically from the \$140 million figure cited in the Doyle Report. See text accompanying note 41. Notwithstanding these disparate quantitative measures, the fact of overtaxation is not disputed.

⁵⁹ Act of June 25, 1948, ch 646, 62 Stat 932, codified at 28 USC § 1341.

⁶⁰ 28 USC § 1341.

⁶¹ HR Rep No 94-725 at 77 (cited in note 43).

⁶² *Id* at 78.

⁶³ S Rep No 91-630 at 3 (cited in note 39).

⁶⁴ Rail Services Act of 1975, S Rep No 94-499, 94th Cong, 1st Sess 4 (1975).

⁶⁵ 121 Cong Rec at 38118 (statement of Sen Hartke) (cited in note 49).

⁶⁶ 116 Cong Rec at 2023–24 (statement of Sen Hansen) (cited in note 51).

exemption from taxation.⁶⁷ Not only would the burden of proving discrimination fall on railroads, but “[f]ederal courts [would] be able to devise remedies that [would] not be burdensome to the communities involved.”⁶⁸ Importantly, enjoining the discriminatory tax was not a foregone conclusion.⁶⁹

The Senate version of the bill also reflected purposes beyond protecting railroads. This bill contained an explicit exemption to the antidiscrimination provision for states that, at the time of the law’s enactment, had provisions in their constitution affording “reasonable classification of property.”⁷⁰ The conference committee dropped this exemption,⁷¹ but it nevertheless serves to highlight the measured and prudent approach Congress took in drafting § 11501(b).⁷²

This is not to say that these concerns dominated the formulation of the 4-R Act. As courts attempt to resolve the ambiguities in the 4-R Act’s text, however, they must remember that Congress designed the legislation to balance a number of policy considerations and not simply to protect railroads from discriminatory taxation at all costs.

3. The early proposals and the addition of subsection (b)(4).

The problem of discriminatory overtaxation by states was first raised in the Doyle Report, which documented and quantified the pervasive practice.⁷³ To combat this problem, the Doyle Report recommended adopting legislation proposed by the Association of American Railroads.⁷⁴ This proposal, which only barred differentials in property assessments and levies upon those assessments, is largely maintained in § 11501(b)(1)–(2). It made no mention of discriminatory ad valorem taxes or other, nonproperty taxes, leaving states substantial discretion in these realms.

Subsequent iterations of the proposal incorporated prohibitions on discriminatory ad valorem taxes of the type now codified in

⁶⁷ See HR Rep No 94-725 at 77–78 (cited in note 43).

⁶⁸ *Id.* at 77–78.

⁶⁹ *Id.* at 78.

⁷⁰ S Rep No 94-499 at 233 (cited in note 64).

⁷¹ See Joseph A. Laronge, *Property Tax Exemptions under Section 306 of the 4-R Act*, 26 Willamette L Rev 635, 651–52 (1990).

⁷² The Senate version contained two key restrictions on the tax provisions: the “subject to a property tax” limitation on the comparison class and the constitutional classification exception. The House version contained neither qualification. The compromise reached in the conference committee resulted in the inclusion of the “subject to a property tax” limitation but the exclusion of the constitutional classification exception. See *id.*

⁷³ See S Rep No 87-445 at 449–66 (cited in note 30).

⁷⁴ See *id.* at 465–66.

§ 11501(b)(3).⁷⁵ However, it was only several months before passage of the 4-R Act that a prohibition on nonproperty tax discrimination was proposed.⁷⁶ Although the text of the bill itself referred to “any other tax which results in discriminatory treatment of a carrier by railroad,”⁷⁷ the House report accompanying the proposal indicated that its operation was limited to in-lieu taxes.⁷⁸ The conference committee report similarly indicated a more limited scope for the seemingly expansive term “any other tax.”⁷⁹

As a result of this incongruity between the text of the statute and the legislative history, it was unclear for several decades whether the scope of the provision was as expansive as its plain language suggested or if it was limited to levies designed to offset the loss in property taxes due to the preceding three subsections of the Act. It was only with the intervention of the Supreme Court, in *CSX Transportation, Inc v Alabama Department of Revenue*,⁸⁰ that it was decisively resolved that subsection (b)(4) applied to *all* nonproperty taxes.⁸¹ However, many lower courts prior to the *CSX* decision had already assumed that subsection (b)(4) applied more broadly than just in-lieu taxes, albeit based on anticircumvention principles rather than on the scope of the term “another tax.”⁸² It is not clear if the *CSX* decision forecloses this anticircumvention analysis or simply clarifies what the lower courts had already held. It therefore remains to be seen whether lower courts will invoke subsection (b)(4) to

⁷⁵ See Discriminatory Taxation of Common Carriers, S 927, 90th Cong, 1st Sess (Feb 8, 1967), in 113 Cong Rec 2909–10; S 2289, 116 Cong Rec at 2023 (cited in note 51); HR 11207, 92d Cong, 1st Sess (Oct 13, 1971), in 117 Cong Rec 36080; HR 11824, 92d Cong, 1st Sess (Nov 17, 1971), in 117 Cong Rec 41871.

⁷⁶ *Hearings on Legislation Relating to Rail Passenger Service before the Subcommittee on Surface Transportation of the Committee on Commerce*, 94th Cong, 1st Sess 1837 (1975) (testimony of Stephen Ailes, President, Association of American Railroads) (proposing a prohibition “against taxes that are in lieu of discriminatory property taxes that are covered by the first three prohibitions” in the bill).

⁷⁷ HR Rep No 94-725 at 19 (cited in note 43).

⁷⁸ *Id* at 113. An in-lieu tax is one that is passed as a substitute for a prohibited tax, designed to offset the losses from the latter levy. See *Black’s Law Dictionary* at 1594 (cited in note 18).

⁷⁹ See Laronge, 26 Willamette L Rev at 658–59 (cited in note 71) (noting that both the House and Senate bills employed the phrase “any other tax,” but that the conference committee report referred to language from the House bill as prohibiting in-lieu taxes).

⁸⁰ 131 S Ct 1101 (2011).

⁸¹ See *id* at 1107–08.

⁸² See, for example, *Kansas City Southern Railway Co v McNamara*, 817 F2d 368, 373 (5th Cir 1987) (noting that subsection (b)(4) was included “to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections”); *Richmond, Fredericksburg & Potomac Railroad Co v Department of Taxation, Commonwealth of Virginia*, 762 F2d 375, 379 (4th Cir 1985); *Atchison, Topeka and Santa Fe Railway v Bair*, 338 NW2d 338, 345 (Iowa 1983).

strike down all discriminatory nonproperty taxes—however the comparison class issue is resolved—or only those which appear to be employed by states pretextually to circumvent the proscriptions of subsections (b)(1)–(3).

4. The subsequent legislation modeled on 49 USC § 11501(b).

The 4-R Act was part of a broader trend toward deregulation of the transportation industry that occurred in the late 1970s and early 1980s. Following the implementation of the Act, Congress passed the Motor Carrier Act of 1980,⁸³ which deregulated the trucking industry, and the Airport and Airway Improvement Act of 1982,⁸⁴ which deregulated the airline industry.

Both of these statutes contain language tracking that of § 11501(b).⁸⁵ There is, however, one important exception: they contain no analogue to subsection (b)(4). As such, these provisions contain no bar to discriminatory taxation against trucking or air interests outside the context of property taxes. This lends further support to the proposition that subsection (b)(4) dealt with a fundamentally different type of problem than subsections (b)(1)–(3). As such, it merits a different analytical approach.

C. The Judicial Interpretation of 49 USC § 11501(b)

The Supreme Court has decided two major cases that might inform the reading of § 11501(b)(4). First, in *ACF Industries*, the Court considered a property tax exemption that applied to motor carriers but not to railroads.⁸⁶ *ACF* conceded that the tax could not violate subsection (b)(3); that subsection specifically applies the “commercial and industrial property” comparison class, and since the motor carrier was not subject to the property tax levy, it did not fall within

⁸³ Pub L No 96-296, 94 Stat 793.

⁸⁴ Pub L No 97-248, 96 Stat 671.

⁸⁵ Compare the language of the 4-R Act, 49 USC § 11501(b)(3) (prohibiting “levy[ing] or collect[ing] an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction”), with the language in the Motor Carrier Act, 49 USC § 14502(b) (barring a state from “[l]evy[ing] or collect[ing] an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction”) and the Airport and Airway Improvement Act, 49 USC § 40116(d)(2)(A) (barring a state “levy[ing] or collect[ing] an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction”).

⁸⁶ See *ACF Industries*, 510 US at 335.

the comparison class.⁸⁷ The railroad instead argued that subsection (b)(4), which did not specifically mention a comparison class and therefore did not necessarily exclude fully exempt property, nevertheless operated to invalidate the tax. The Court conceded that the operation of subsections (b)(1)–(3) created an anomaly: states could avoid violating the 4-R Act by fully exempting property from a given tax (effectively charging a 0 percent tax rate), but partial exemptions (say, charging a 2 percent tax rate when railroads pay a 4 percent tax rate) would constitute discrimination. It nevertheless concluded that subsection (b)(4) could not be read to invalidate a tax that would otherwise be permissible under the preceding provisions.⁸⁸ Otherwise, it would subvert the specific exemptions provided for in the Act, such as those for agricultural and timber property. More generally, the Court noted that federalism concerns “compel” the Court to avoid reading a limitation on state taxing authority more broadly than its express terms demand, even if it leads to such an anomalous consequence.⁸⁹ Because the taxing authority is central to state sovereignty, federal laws will only be read to preempt that authority “if that result is ‘the clear and manifest purpose of Congress.’”⁹⁰ When ambiguities exist, deference must be shown to the states.

The Supreme Court revisited § 11501(b) in *CSX Transportation*. In this case, CSX challenged an Alabama sales and use tax from which its main competitors were exempt.⁹¹ The Court first acknowledged the holding in *ACF Industries* that subsection (b)(4) does not apply to property taxes, which are covered exclusively by subsections (b)(1)–(3). The Court, however, also found that subsection (b)(4) does apply to *all* other types of tax, and not simply in-lieu taxes, as some lower courts had concluded.⁹² The Court also noted that the *ACF Industries* Court’s ruling permitting full exemptions from property taxes might not apply in the nonproperty tax context. The only reason such full exemptions were permitted with respect to property taxes is because the “commercial and industrial” comparison class definition explicitly limited its scope to properties “subject to a *property* tax levy.”⁹³ Because the full exemption was not from a property

⁸⁷ The statute defines “commercial and industrial property” as “property . . . subject to a property tax levy.” 49 USC § 11501(a)(4).

⁸⁸ See *ACF Industries*, 510 US at 342.

⁸⁹ See *id.* at 345.

⁹⁰ *Id.* (quotation marks omitted).

⁹¹ See *CSX Transportation*, 131 S Ct at 1104–05.

⁹² See *id.* at 1107. See also notes 78–82 and accompanying text.

⁹³ *CSX Transportation*, 131 S Ct at 1111, quoting § 11501(a)(4) (emphasis added).

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tax, but a sales and use tax, the competitor was not brought outside the ambit of § 11501(b).⁹⁴

Importantly, however, the Court emphasized that this would not make railroads most-preferred taxpayers, eligible for any tax break that any other business received.⁹⁵ This is because, discrimination not being otherwise defined in the context of subsection (b)(4), the “ordinary meaning” of the term must control.⁹⁶ As such, a full exemption would provide only prima facie evidence of discrimination, which the state could rebut if it could offer sufficient justification for declining to provide the exemption to rail carriers.⁹⁷ In the immediate case, the Court only determined that the tax *might* discriminate and remanded the case without determining the appropriate comparison class for subsection (b)(4) claims.⁹⁸

* * *

In passing the 4-R Act, Congress’s primary goal was to ensure railroads’ financial sustainability by preventing tax discrimination against them. But this was not its only goal. Rather, Congress recognized that competition within the transportation industry was critical, and it was therefore careful not to make railroads most-preferred taxpayers. Moreover, it recognized that states might have valid policy reasons for applying differential taxes and sought to provide them room to exercise their traditional taxing prerogatives.

Additionally, the primary type of tax discrimination that Congress sought to end was discriminatory *property* taxation of the sort addressed in subsections (b)(1)–(3). Although subsection (b)(4) operates to prohibit other types of discriminatory taxes, in light of the foregoing considerations, this ought not be read as providing the same categorical proscription of any differences in tax treatment. As such, the most plausible interpretation of subsection (b)(4) provides greater flexibility to the states than is found in subsections (b)(1)–(3), where, for example, specific comparison classes and definitions of discrimination are provided.

⁹⁴ See id at 1111.

⁹⁵ See id at 1109 n 8.

⁹⁶ See id at 1107.

⁹⁷ See *CSX Transportation*, 131 S Ct at 1109 n 8.

⁹⁸ See id at 1114.

II. COMPETING INTERPRETATIONS OF 49 USC § 11501(b)(4)

Courts have developed two general solutions to the comparison class problem. The dominant view, adopted by all but one federal circuit court to consider the matter, is the functional approach. Drawing upon subsections (b)(1)–(3), this approach advocates using a “commercial and industrial” comparison class to assess allegedly discriminatory nonproperty taxes under subsection (b)(4). In contrast, several other courts have adopted the competitive approach, which compares railroads’ tax treatment to that of their competitors. Minor variations have also been proposed but have not attracted broad support from other courts.⁹⁹

An important point to note at the outset is that the courts adopting these various approaches have found tax differences between railroads and their comparison classes to constitute virtually *per se* discrimination. Although courts permit *de minimis* variations within a class, they do not inquire into the reasons explaining differential treatment.

A. The Functional Approach

The majority of courts have adopted the functional approach, which holds that taxes alleged to violate subsection (b)(4) should be compared to a class of other commercial and industrial interests. Generally speaking, courts adopting this approach argue that it is most consistent with the broader text of the statute, which employs such a comparison class in the other provisions of § 11501(b). They also contend that this comparison class protects against the risk of discrimination against nonlocal firms by tying railroads’ fate to that of a large and local group of businesses.

The functional approach was first adopted by the Fifth Circuit in *Kansas City Southern Railway Co v McNamara*.¹⁰⁰ There, the court invalidated a gross receipts tax that applied only to “public utilities,” a classification that included railroads, motor bus lines, motor freight lines, express companies, boat or packet lines, and pipe lines.¹⁰¹ Rejecting the state’s argument that its tax could not violate the 4-R Act because it ensured the ability of railroads to compete on an even footing with other carriers, the court stressed that the comparison

⁹⁹ See, for example, *Kansas City Southern Railway Co v Koeller*, 653 F3d 496, 508 (7th Cir 2011) (explaining that a “universal approach,” comparing railroads to *all* other taxpayers, has not received the endorsement of any court).

¹⁰⁰ 817 F2d 368 (5th Cir 1987).

¹⁰¹ *Id.* at 374.

class must comprise a sufficient number of local taxpayers so as to protect against unfair distribution of the tax burden. In this case, the class of taxpayers was “simply too small and too foreign” to fulfill this function.¹⁰²

The court, however, hedged its view. It noted that, although the 4-R Act is a prophylactic that precludes even ostensibly fair differentiation, there might be circumstances in which the state can justify a smaller tax class based on the nature of the tax and on a direct relationship between the tax and benefits limited to the class, such that railroads are not cross-subsidizing other taxpayers.¹⁰³ It also noted special concerns that might arise when a type of tax, by its very nature, can *only* apply to railroads or a similarly limited group.¹⁰⁴ Thus, the court left some flexibility to tweak the comparison class based upon the unique facts of a given case.

The Ninth Circuit cited *McNamara* in adopting the functional approach in *Atchison, Topeka and Santa Fe Railway Co v Arizona*.¹⁰⁵ However, whereas *McNamara* struck down a tax that applied exclusively to railroads and their competitors, the Ninth Circuit used the functional approach to uphold transaction privilege and use taxes applicable to seventeen classes of commercial and industrial businesses, including railroads but excluding motor carriers.¹⁰⁶ Satisfied that the railroads’ tax burden was tied to a large and local group of taxpayers, the court worried that finding liability due to the exemption for competitors might turn railroads into most-preferred taxpayers,¹⁰⁷ eligible for every tax break that any other transportation company received.¹⁰⁸ Because 82 percent of local business classes were subject to the tax, the 4-R Act was not violated.¹⁰⁹

The Seventh Circuit has also endorsed the functional approach, albeit somewhat tentatively. In *Kansas City Southern Railway Co v Koeller*,¹¹⁰ the court considered a tax imposed on landowners within a

¹⁰² Id at 375.

¹⁰³ See id.

¹⁰⁴ See *McNamara*, 817 F2d at 376.

¹⁰⁵ 78 F3d 438, 441 (9th Cir 1996).

¹⁰⁶ See id at 443–44.

¹⁰⁷ See id at 442.

¹⁰⁸ The court also noted that a contrary rule would be inconsistent with the Supreme Court’s holding in *ACF Industries*, which permitted full exemptions in § 11501(b)(3) cases. Id at 442–43. The Court’s holding in *CSX Transportation*, however, has cast doubt on *ACF Industries*’s applicability to § 11501(b)(4) claims. See text accompanying notes 91–98.

¹⁰⁹ See *Arizona*, 78 F3d at 443.

¹¹⁰ 653 F3d 496 (7th Cir 2011).

flooding zone in order to fund a levee and drainage system.¹¹¹ While most commercial and industrial properties paid the tax on a per-acre basis, railroads, pipelines, and utilities were assessed on a “benefit” basis, resulting in massive disparities in total tax burden between the two classes.¹¹² The court echoed many of the arguments made by earlier courts concerning the textual justification for the functional approach and the importance of ensuring that railroads’ interests have political representation. The court also noted, however, that because the railroad was the only common carrier within the taxing district, a competitive approach would have been without content.¹¹³ Again, the court noted that different facts might call for a different rule in a future case.¹¹⁴

B. The Competitive Approach

Although only one federal circuit court has adopted the competitive approach, which directs courts to compare allegedly discriminatory taxes to those applicable to railroads’ main competitors, this approach has also been endorsed by at least two states’ highest courts.¹¹⁵

The courts endorsing the competitive approach contend that the goal of ensuring railroads’ financial stability is furthered by protecting their ability to compete on an even footing, which is best achieved by comparing how an allegedly discriminatory tax affects railroads as compared to their main competitors. However, as with the courts adopting the functional approach, these courts have displayed a reluctance to establish a bright-line rule, leaving themselves substantial room to take a different tack should different factual circumstances arise.

In *Burlington Northern, Santa Fe Railway Co v Lohman*,¹¹⁶ the Eighth Circuit considered a general sales and use tax on diesel fuel

¹¹¹ Although only levied on landowners, this tax did not fall within § 11501(b)(1)–(3) because the amount of the tax was unrelated to the property’s value and was not imposed in an ad valorem manner. See *Koeller*, 653 F3d at 510–12.

¹¹² See *id.* at 502 (noting that the two railroads paid annual assessments of \$85,545 and \$93,920 under the new regime, whereas they would have paid only \$3,898 and \$2,578, respectively, under the per-acre regime).

¹¹³ See *id.* at 509–10 (observing that the presence of fourteen other commercial and industrial entities provides a comparison class sufficiently large to ensure local political representation).

¹¹⁴ See *id.* at 509.

¹¹⁵ See *Atchison, Topeka and Santa Fe Railway Co v Bair*, 338 NW2d 338, 346 (Iowa 1983); *Burlington Northern Railroad Co v Commissioner of Revenue*, 509 NW2d 551, 553 (Minn 1993).

¹¹⁶ 193 F3d 984 (8th Cir 1999).

from which trucks and barges were exempt.¹¹⁷ The court expressed concern that a “commercial and industrial” comparison class would undermine the purpose of the 4-R Act by allowing states to impose taxes that frustrate railroads’ ability to compete. For instance, a strategic legislature could still favor motor carriers over railroads if enough unrelated commercial organizations also had to pay the tax.¹¹⁸ At the same time, however, the court noted that “the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case,” indicating that the competitive approach might yield to a different comparison class under different facts.¹¹⁹

The Iowa Supreme Court has apparently also adopted the competitive approach. In *Atchison, Topeka and Santa Fe Railway Co v Bair*,¹²⁰ the court struck down an excise tax on fuel that did not apply to trucks, barges, and aircraft. However, the reasoning in this case was more equivocal: because a fuel tax was at issue, and because many commercial and industrial taxpayers do not use fuel in the ordinary course of business, it would not make sense to apply the functional approach.¹²¹ The implication, of course, is that the comparison class might adjust based on the nature of the tax at issue.

Finally, the Minnesota Supreme Court also employed the competitive approach in addressing a state sales and use tax on rolling stock from which airlines and barges were exempt. In *Burlington Northern Railroad Co v Commissioner of Revenue*,¹²² the court invalidated the tax, distinguishing *McNamara* on the ground that, in this case, there was a blanket tax from which competitors were exempt, as opposed to a general tax of limited scope.¹²³ In essence, the court seemed to be concerned about the possibility of states circumventing the spirit of the 4-R Act by strategically employing tax exemptions to benefit favored businesses, indicating that a contrary rule might govern absent such dubious legislative motives.¹²⁴

¹¹⁷ See *id.* at 985. Although trucks paid a similar tax at the pump, from which railroads were obviously exempt, barges paid no analogous fuel tax. *Id.*

¹¹⁸ See *id.* at 986 (noting that a railroad could still be placed at a competitive disadvantage if “too broad a comparison class is chosen” because railroads could remain “subject to a generally imposed nonproperty tax, while their direct competitors are not”).

¹¹⁹ *Id.*

¹²⁰ 338 NW2d 338 (Iowa 1983).

¹²¹ *Id.* at 346.

¹²² 509 NW2d 551 (Minn 1993).

¹²³ *Id.* at 553.

¹²⁴ See note 108.

* * *

None of the courts that has addressed the question of which comparison class to apply in assessing § 11501(b)(4) claims have provided a firm and fixed answer. Rather, they have preferred to reserve the right to reconsider the proper comparison class as different fact patterns arise. This reflects both a recognition that there are reasonable grounds for a state to differentiate between railroads and other taxpayers and a reluctance to endorse a single, fixed comparison class to govern all cases, especially in light of the virtually per se invalidity that accompanies disparities in tax treatment between railroads and the selected comparison class.

Arguments for the functional approach tend to rely on the textual argument that the “commercial and industrial” comparison class employed in subsections (b)(1)–(3) should logically fill the gap in subsection (b)(4), as well as the policy argument contending that this is the best way to ensure railroads have proper political representation without making them most-preferred taxpayers. The competitive approach would not adequately protect railroads in the event that their competitors were also small and foreign, in which case *all* transportation firms could be discriminated against in violation of the spirit of the 4-R Act. Moreover, these courts recognized the need for some differentiation among taxpayers and expressed concern that the small comparison class would effectively force states to offer railroads any tax exemption available to any of their competitors.

The competitive approach, on the other hand, is typically employed in assessing generally applicable taxes from which railroads’ competitors are exempt. Either explicitly or implicitly, courts in these cases expressed concern about states circumventing the 4-R Act’s purpose of ensuring that railroads can compete effectively in the private sector.

III. SHORTCOMINGS OF THE CURRENT APPROACHES

The approaches discussed above fail to provide a satisfying solution to the problem posed by the omission of a comparison class from § 11501(b)(4). The textual arguments that courts have asserted are unpersuasive, and both approaches fail to adequately balance the twin policies of the 4-R Act: ensuring railroads’ competitiveness and protecting states’ autonomy in crafting their tax systems. Indeed, the pronounced differences in the type and breadth of taxes addressed by subsections (b)(1)–(3) and (b)(4) provide substantial reason to question whether Congress intended the rigid comparison-class analysis applied to the former to be extended to cover the latter, as well.

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A. The Text of the Statute Does Not Support Either Approach

As noted above, proponents of each of the current approaches have advanced textual arguments for their preferred comparison class. Ultimately, however, these arguments are predicated on the unquestioned assumption that *some* comparison class must govern subsection (b)(4). This assumption has blinded these courts to the most sensible inference to draw from the text: no comparison class governs these claims.

1. The functional approach.

The key textual argument supporting the functional approach is that the commercial and industrial comparison class is the only one that appears elsewhere in the statute. If Congress explicitly provided for that comparison class to govern every other antidiscrimination provision, it is logical to use the same class to fill the gap in subsection (b)(4).¹²⁵

Advocates for the competitive approach have an easy answer. In light of the inclusion of the commercial and industrial comparison class in the preceding three subsections, its exclusion from subsection (b)(4) must be read to imply that this class does not apply to subsection (b)(4) claims.¹²⁶ Indeed, Congress clearly knew how to provide for that class had it wanted to do so.¹²⁷

While this argument itself seems fatal to the functional approach, there are still further difficulties squaring the approach with the text of the statute. Notably, the comparison class includes only commercial and industrial property “subject to a *property tax* levy.”¹²⁸ First, this indicates that Congress was thinking first and foremost about property taxes when it wrote the comparison class, not the nonproperty taxes covered by subsection (b)(4). Second, it is hard to understand what it would mean to exclude from a comparison class for *nonproperty* tax purposes those taxpayers not subject to a *property tax* levy. Indeed, the Supreme Court in *CSX Transportation* hinted at the oddity of this

¹²⁵ See, for example, *Koeller*, 653 F3d at 509.

¹²⁶ See, for example, *Lohman*, 193 F3d at 985–86.

¹²⁷ See *Meghrig v KFC Western, Inc.*, 516 US 479, 485 (1996) (comparing the overlapping scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Resource Conservation and Recovery Act but noting that the absence of a remedy for recovery of cleanup costs in the latter, when present in the former, leads to the presumption that no such remedy exists in the latter); *Lehman v Nakshian*, 453 US 156, 162 (1981) (contrasting a provision of the Age Discrimination in Employment Act of 1967 explicitly providing for a jury trial with one that did not and holding that the latter therefore did not merit a jury).

¹²⁸ 49 USC § 11501(a)(4) (emphasis added).

construction. Acknowledging that *ACF Industries* permits full exemptions from property taxes since such property would not be “subject to a property tax levy,” the Court nevertheless mused that full exemptions from the nonproperty taxes addressed by subsection (b)(4) might not be permissible, since the provision only explicitly applies to property taxes.¹²⁹ If that is the case, we are left with two possibilities for interpreting the role of this qualifying term in subsection (b)(4) claims. First, it could be neglected, in which case the qualifier is rendered wholly superfluous. Alternatively, it could limit the comparison class, with the absurd consequence of excluding from a comparison class for nonproperty tax purposes those taxpayers not subject to an entirely different tax. Either option requires engaging in tenuous textual contortions to arrive at an imperfect answer to the comparison class question, and should not be pursued when a better solution exists.

2. The competitive approach.

Courts adopting the competitive approach have not advanced a strong textual argument for their preferred comparison class. Instead, these courts reject the functional approach’s textual arguments only to settle on a class of competitors, as if this were the only possible alternative solution. Of course, if the deficiency with the functional approach stems from the omission of the commercial and industrial class provided for elsewhere in the statute, it is difficult to see how the application of a wholly extratextual comparison class, which no part of the statute even hints at, could provide a more coherent solution.

These courts began with the assumption that *some* comparison class must apply to subsection (b)(4) claims and thus proceeded to twist the language of the statute to justify their preferred approach. The disappointing results of this endeavor demand reexamination of their assumptions. As the dissent in *Arizona* observed, “I refuse to provide for an exclusive comparison class under [§ 11501(b)(4)] when Congress explicitly chose not to.”¹³⁰

B. The Policies of the 4-R Act Are Not Adequately Balanced by the Current Approaches

The 4-R Act sought to strike a balance that protected railroads from discriminatory taxation while preserving the states’ power to

¹²⁹ See *CSX Transportation*, 131 S Ct at 1111.

¹³⁰ *Arizona*, 78 F3d at 445 (Nielsen dissenting).

tax. The principle is easier to state than to apply: although it is easy to say that these were competing concerns, that does not illuminate how to resolve concrete problems of interpretation or how to measure trade-offs between the two. Nevertheless, all of the proposed approaches to this split of authorities present a serious potential for both circumvention and unduly restrictive constraints on the state taxing power.

There are compelling reasons, moreover, to suppose that whatever logic motivated Congress to adopt the balance it struck in subsections (b)(1)–(3), this logic is not readily transferable to subsection (b)(4). The general approach that Congress took in the property tax context was one of bright-line rules barring any differentials between the railroads and other commercial and industrial taxpayers. While this might be sensible in the context of property taxes, either due to the nature of property or the defined world of possible revenue sources affected, extending this approach into the broader and more varied world of taxes covered by subsection (b)(4)—including any and every nonproperty tax—has broad implications that drastically alter the scope and effect of the 4-R Act’s proscription of tax discrimination.

1. The protection of railroads.

The 4-R Act was designed to put an end to overtaxation of railroads by the states. This was accomplished in subsections (b)(1)–(3) through the use of clear rules for assessing whether a property tax discriminated, including a means by which to measure the value of property and an allocation of the burdens of proof. Subsection (b)(4) was designed at the very least to prevent circumvention of the preceding provisions and has been interpreted by the Supreme Court as providing even broader protection by prohibiting discrimination with regard to *all* other types of taxes.¹³¹

The fixed comparison class approaches—the functional and competitive approaches—allow for easy circumvention by legislatures, however. A brief survey of the cases reveals how artfully crafted laws can accomplish the same impermissible ends that the rest of § 11501(b) aims to foreclose.

Take *Arizona*, for example, the case in which the Ninth Circuit upheld two taxes that applied to railroads but from which their main competitors were exempt. The court reasoned that because the number of other commercial and industrial taxpayers subject to the

¹³¹ *CSX Transportation*, 131 S Ct at 1107.

challenged tax was “so large that the Taxing Authorities [could not] provide an exact number,”¹³² the tax fate of railroads was tied to that of a sufficiently large and local group of taxpayers so as to protect them against discrimination. This statement, however, highlights a flawed premise of the functional approach. Those subject to the tax were large and diffuse, whereas the other carriers who received an exemption were small and concentrated.¹³³ These small and concentrated competitors will have greater political influence in the state, and their low coordination costs will make it easier for them to lobby state legislatures for laws that put competing railroads at a disadvantage.¹³⁴ This classic case of interest group politicking nevertheless evades the strictures of the 4-R Act as construed under the functional approach, thus presenting a serious challenge to protecting the financial sustainability of railroads by upholding taxes that apply to most commercial and industrial taxpayers, even when those actually within railroads’ market are exempt.

The competitive approach, meanwhile, fails to account for the possibility that railroads will have no competitors to which the tax might apply. *Koeller* provides a fitting example. There, the challenged tax was for the maintenance of a levee and drainage system to mitigate flooding of a nearby river. Although this was a tax on the benefit obtained from the system rather than a property tax, it was levied on nearby landowners in proportion to the estimated benefits the levee would provide to them. The court adopted the functional approach, acknowledging that the competitive approach would be unhelpful due to the lack of competitors who owned land in the relevant taxing area and were thus subject to the tax.

*Burlington Northern Railroad Co v City of Superior, Wisconsin*¹³⁵ provides a variant on this theme. In that case, the tax pertained to the operation of iron-ore-concentrate docks, all of which were owned and operated by railroads.¹³⁶ While the court struck down the

¹³² *Arizona*, 78 F3d at 443.

¹³³ *Id.* at 439 n 2, 443 (noting that the 140,000 taxpayers subject to the tax operated across seventeen classifications of business activities, including retail sales, mining, and membership camping).

¹³⁴ Mancur Olson Jr, *The Logic of Collective Action: Public Goods and the Theory of Groups* 53–57 (Harvard 1965). Even assuming that railroads are capable of organizing to receive an exemption as well, this does not remedy the key conceptual hole in the functional approach’s argument. Requiring only that railroads be compared to a large and local group of taxpayers does little to protect against unfavorable treatment in a political sphere dominated by small and organized interest groups. Indeed, this approach effectively requires resort to the state political system—a result inconsistent with the federal legislation.

¹³⁵ 932 F2d 1185 (7th Cir 1991).

¹³⁶ *Id.* at 1186.

tax in this case, it appears likely that the competitive approach would not yield the same result.

In both variants of the competitive approach, the lack of discrimination vis-à-vis competitors could sustain the taxes notwithstanding the clear way in which the laws exploit the railroads' large and immobile investment to extract taxes that they cannot procure from other sources. By isolating a particular market or activity in which railroads have no competitors, a legislature could circumvent the proscriptions of § 11501(b) and, in doing so, undermine the financial sustainability of railroads.

One might argue that the courts could adopt a competitive approach as a general rule but employ the functional approach when the lack of any competitors renders the default rule inappropriate. Indeed, this appears to be the approach endorsed by the *Arizona* dissent.¹³⁷ While this hybrid approach is an improvement upon the pure competitive and pure functional approaches, it also introduces uncertainty while maintaining a degree of ham-handedness in the application of the statute. It does so by replacing an analysis of the facts surrounding the imposition of an allegedly discriminatory tax with a set of proxies—How many taxpayers are subject to the tax? Does the number of taxpayers subject to the tax represent a “singling out” of railroads?—that imperfectly capture the truly relevant considerations, such as the extent to which a tax exploits the railroads' immobility or distinguishes between railroads and other taxpayers without a rational ground for such distinction. Despite the apparent parsimony of such an approach, its shortcomings when it comes to separating reasonable disparities from discriminatory ones give cause for concern.

2. The protection of states' taxing prerogatives.

While the fixed comparison classes present opportunities for circumvention, they also risk unduly tying legislatures' hands. This is especially pronounced in cases of market dominance, complementary taxation, and special assessments. While this adverse consequence is not a necessary result of the current approaches, the fixed nature of the comparison classes renders them a blunt instrument that amplifies the risk that reasonable distinctions among taxpayers will be foreclosed under the 4-R Act.

¹³⁷ See *Arizona*, 78 F3d at 444–45 (Nielsen dissenting) (arguing that the functional approach should be applied when “the class of taxpayers burdened by the tax [is] ‘unnecessarily small,’” but that when a case “involves a broad tax that exempts the Railroads' primary competitors,” the competitive approach is appropriate).

The problem of market dominance appears when a tax is levied upon an activity in which only railroads engage. One example of this is *City of Superior*, discussed above. Although the dock business was not a part of the railroad's ordinary business (a point the court did not consider relevant), the Seventh Circuit nevertheless refused to consider whether similar taxes were imposed on comparable activities of other businesses. Instead, the court "infer[red] a congressional desire that courts avoid the thicket of incidence analysis and forbid states to single out railroads for taxation . . . by levying a tax on an activity in which . . . only railroads engage."¹³⁸ Rooted in a commonsense intuition that such a deep analysis would be difficult to administer and adjudge, the effect of this was to foreclose the city from taxing an otherwise taxable activity because, by happenstance of the marketplace, only railroads engaged in it.

The complementary tax problem occurs when a tax is levied upon one taxpayer in place of another tax that cannot be levied upon it. Such regimes typically appear in the case of fuel purchases, as different vehicles purchase fuel in different ways. Despite the seeming reasonableness of these plans, they are often invalidated under the 4-R Act.¹³⁹ In *Union Pacific Railroad Company v Minnesota Department of Revenue*,¹⁴⁰ the Eighth Circuit invalidated a sales and use tax on the purchase and consumption of fuel when the tax was imposed only on railroads and ships, even though motor carriers and air carriers paid an excise tax on such purchases instead.¹⁴¹ The court refused to consider the relative burdens that the complementary taxes imposed on other members of the comparison class, instead finding that the lower court "should have confined its analysis to only the sales and use taxes on transportation fuel."¹⁴²

Finally, differential taxes might be levied in proportion to benefits that accrue solely to the railroads. This problem has not arisen in the major cases, as infrastructure expenses are typically funded by

¹³⁸ *City of Superior*, 932 F2d at 1188.

¹³⁹ See, for example, *id.* at 1187–88 (inferring that Congress did not intend for courts to assess the overall burden of a state's tax system); *McNamara*, 817 F2d at 377–78 (concluding that such inquiries are "a paradigm of the kind of polycentric problem for which courts are ill-suited"); *Lohman*, 193 F3d at 986 (concluding that "the actual fairness of those [taxing] arrangements is too difficult and expensive to evaluate"). See also *Alabama Great Southern Railroad Company v Eagerton*, 541 F Supp 1084, 1086 (MD Ala 1982).

¹⁴⁰ 507 F3d 693 (8th Cir 2007).

¹⁴¹ *Id.* at 696.

¹⁴² *Id.* But see *McNamara*, 817 F2d at 376 (considering in dicta that in a future case a complementary tax might be permissible, but that the issue need not be decided because the tax regime at issue did not impose complementary taxes).

railroads directly rather than through taxes.¹⁴³ Nevertheless, following the trend in the complementary tax cases, courts generally decline to consider the overall fairness of the tax system and so will not consider whether a higher tax rate on railroads might be justified by a proportionate benefit that railroads receive.¹⁴⁴

In *Arizona*, for example, the Ninth Circuit held that a tax levied equally upon railroads and others in the comparison class was valid even though the other comparison class members received a benefit back from those tax payments while railroads did not.¹⁴⁵ The converse of this, then, should also hold: if railroads are taxed at a higher rate to compensate for the specific burdens they impose, the in-kind repayment of those tax dollars should not save the tax.¹⁴⁶ As such, states are precluded from either increasing tax revenue in an otherwise permissible manner or seeking remuneration for those expenses from the taxpayers imposing the costs.

To be sure, these flaws are not inextricably tied to the current approaches, and some courts have in other situations shown a greater willingness to consider the whole tax structure.¹⁴⁷ But the fixed comparison class approaches nevertheless diminish the opportunity to draw reasonable distinctions among taxpayers by defining a fixed subset of taxpayers against whom any differences in tax rates are presumptively invalid.

As one court observed, “[t]he 4-R Act puts severe limits on the broad discretion usually afforded state taxing authorities.”¹⁴⁸ Although a classification may be “perfectly fair and reasonable,” the 4-R Act “forbids some fair arrangements because the actual fairness of those

¹⁴³ See, for example, *Bair*, 338 NW2d at 347 (finding a tax on railroads discriminatory despite an ostensibly lower tax rate as compared to motor carriers because the motor carriers’ taxes went entirely to the maintenance of highways).

¹⁴⁴ See, for example, *Arizona*, 78 F3d at 443 (“The 4-R Act reaches only tax burdens and not tax benefits.”); *City of Superior*, 932 F2d at 1187 (“The preceding subsections of the statute . . . forbid states to tax railroad properties proportionately more heavily than other commercial and industrial property, even if the railroad derives a greater benefit from the public services defrayed by the cost.”); *McNamara*, 817 F2d at 377 (refusing to assess the basic fairness of a state tax system because “an attempt to make the assessment would be extraordinarily costly both to the parties and the judicial system”).

¹⁴⁵ *Arizona*, 78 F3d at 443–44.

¹⁴⁶ But see *Koeller*, 653 F3d at 505–06 (noting the possibility that a special assessment on railroads for railroad-specific purposes, as opposed to a tax going into general funds, might not violate § 11501(b)); *McNamara*, 817 F2d at 375.

¹⁴⁷ See *City of Superior*, 932 F2d at 1188 (summarizing cases in which the Supreme Court has endorsed an assessment of a state’s entire tax structure, but concluding that the rationales justifying such an inquiry in those cases did not apply to the present circumstances).

¹⁴⁸ *McNamara*, 817 F2d at 375.

arrangements is too difficult and expensive to evaluate.”¹⁴⁹ While this might be true when faced with a fixed comparison class, an analysis that starts with a state’s classification and simply evaluates whether there is a reasonable basis for that treatment might reduce the detrimental effects of such prophylaxis while providing more robust protection for railroads. Although this is a much different approach from that employed in subsections (b)(1)–(3), consideration of the differences between property taxes and other taxes indicates that the approach applicable to the former might not be appropriate when assessing the disparate and wide-ranging scope of the latter.

* * *

The problems outlined above do not arise in every application of subsection (b)(4); indeed, any of the current approaches will probably capture a substantial proportion of the discriminatory taxes that Congress sought to prohibit in § 11501(b). Moreover, these errors will surely occur from time to time in the property tax context as well, where Congress explicitly provided for a fixed comparison class. Thus, before we can jettison the general approach used elsewhere in the statute, it is necessary to consider what would justify a wholesale reconsideration of how to approach claims of nonproperty tax discrimination.

To start, the text of the statute is inconsistent with both of the fixed comparison class approaches.¹⁵⁰ Advocates of these approaches relied on the assumption that a fixed comparison class must apply to subsection (b)(4) claims yet struggled to find a class that made sense in light of the clear (and, considering subsections (b)(1)–(3), apparently intentional) omission of such a class from subsection (b)(4). Having considered the underwhelming effects of these approaches, it appears increasingly persuasive that the statute means what it says: no comparison class applies to claims brought under subsection (b)(4).

Further, the fact that fixed comparison classes frustrate the purposes of the 4-R Act in regard to property and nonproperty taxes alike counsels *against* extending the class beyond the bare minimum required by the text of the statute. Indeed, in *CSX Transportation*, the Supreme Court took just this approach. There, the Court reasoned that the definition of the comparison class as including commercial and industrial taxpayers “subject to a property tax” meant that full exemptions from property taxes were permitted (as such

¹⁴⁹ *Id.* at 375.

¹⁵⁰ See Part III.A.

taxpayers were not “subject to” the tax) but that full exemptions from nonproperty taxes were not.¹⁵¹ Conceding that it was not readily apparent why the two different types of taxes should receive different treatment, the Court nevertheless determined that inconsistency between property and nonproperty taxes was preferable to extending the anomalies that arose from permitting full exemptions—but not partial exemptions—in the property tax context. The Court therefore “hesitate[d] to extend the distinction between [permissible] tax exemptions and [impermissible] differential tax rates in order to avoid a distinction between property and nonproperty taxes.”¹⁵² This hinged on the fact that allowing full exemptions “would frustrate the purposes of the Act even more than [differential tax rates]” and would not be assumed absent explicit textual instruction to do so.¹⁵³

Similarly, the fixed comparison class approaches only apply explicitly to the provisions governing property taxes. Considering the perverse results that their expansion might create, these approaches should not be expanded when an alternative exists that is more consistent with the purposes of the Act.

Furthermore, defining a comparison class simply delineates the groups that a court must compare; it does not tell a court how to determine what differences between those groups give rise to liability under the Act. For claims brought under subsections (b)(1)–(3), other provisions of the 4-R Act answer this question. For example, if discriminatory property assessments are alleged, it must then be shown (with burdens allocated by state law) that the ratio of assessed-to-market value of railroad property is greater than 5 percent the comparable ratio of nonrailroad property, with property values determined by a sales-assessment-ratio study.¹⁵⁴ If a discriminatory ad valorem tax is alleged, the text of the statute clearly states that *any* difference in tax rate gives rise to liability.¹⁵⁵ In contrast, the Act does not provide further elaboration as to what gives rise to liability for nonproperty tax discrimination. Where Congress provides clear metrics by which courts can measure impermissible discrimination, it makes sense for Congress also to clearly define a comparison class within which those formulas should be applied. Where Congress has not provided any guidance on the content of a discrimination analysis,

¹⁵¹ See *CSX Transportation*, 131 S Ct at 1110–12.

¹⁵² *Id.* at 1114.

¹⁵³ *Id.*

¹⁵⁴ 49 USC § 11501(c).

¹⁵⁵ 49 USC § 11501(b)(3).

as is the case with respect to subsection (b)(4) claims, insisting upon a fixed comparison class against which discrimination should be measured puts the cart before the horse. Congress's decision not to clearly state what differentials give rise to liability under subsection (b)(4) most plausibly reflects its recognition that the bright-line rules adopted for the narrower types of taxes covered by subsections (b)(1)–(3) are inappropriate for the broad and varied taxes addressed by subsection (b)(4). This same insight counsels against looking to the preceding subsections for a fixed comparison class to import into subsection (b)(4).

IV. A STATE-CENTERED APPROACH TO TAX DISCRIMINATION UNDER § 11501(b)(4)

In light of the foregoing discussion, “a serious question [] remain[s] about whether to transplant [the] construction of subsections (b)(1)–(3) to subsection (b)(4)’s very different terrain.”¹⁵⁶ Fortunately, the Supreme Court has provided a helpful clue from which to craft a workable solution. This solution rejects the assumption adopted by the current approaches that subsection (b)(4) requires a fixed comparison class. Instead, it suggests that courts should simply evaluate classifications drawn in a state’s tax law to determine reasonableness. This approach is consistent with the text, purposes, and judicial interpretation of the 4-R Act. It also complements analogous areas of law that, although applicable to tax discrimination claims, have proven insufficient to address the concerns underlying the 4-R Act.

A. States as Determinants of the Comparison Class

The key to a workable solution lies in shifting courts’ focus from identifying a fixed and immutable comparison class in the sense provided by subsections (b)(1)–(3), to granting states discretion to make reasonable classifications subject to judicial scrutiny. Under such an approach, states that classify taxpayers in a way that places undue burdens upon railroads without any relation to a valid state purpose would be struck down. When such a distinction is a reasonable means of pursuing ends beyond discrimination, however—for example, exempting trucks from a sales and use tax on fuel and levying a pump tax on them instead due to administrative efficiency concerns or taxing railroads to compensate for the increased burdens they place on the state—courts should be willing to uphold the tax as within the realm of discretion that Congress preserved for the states.

¹⁵⁶ *CSX Transportation*, 131 S Ct at 1109 n 8.

This is exactly the approach that the Supreme Court indicated might govern other aspects of § 11501(b). In *CSX Transportation*, the Court responded to concerns that a rule denying states the authority to grant full exemptions from nonproperty taxes would make railroads most-preferred taxpayers by clarifying that “[w]hether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers.”¹⁵⁷ This insight picks up on the fact that the statute does not provide a clear definition of nonproperty tax discrimination, but stops short of taking the next logical step by dispensing with the assumed requirement of a fixed comparison class altogether. Once states are permitted to litigate whether a distinction between taxpayers provides “sufficient justification” for differential tax treatment, however, the existence of a comparison class serves no discernible purpose. This is because even the broadest comparison class would seldom give rise to liability even when facial disparities in tax treatment are rampant, due to the many plausible bases for distinguishing between railroads and individual members of the comparison class. For example, differences in the tax treatment of railroads and individual households are almost certain to have sufficient justification due to the manifest differences between private citizens and corporate common carriers.

Under this conception, then, a *prima facie* showing of disparate treatment between railroads and any other taxpayer will shift the burden to the state to justify the disparity. While one might borrow from the Equal Protection Clause’s tiered-scrutiny analysis to determine how skeptically courts should view purported state justifications, it ultimately must be a question for the courts based on the circumstances of the individual case. This is especially so due to the varying amounts of political sway that a railroad might have from state to state.¹⁵⁸ Indeed, the utility of bright-line distinctions among levels of scrutiny is open to question even within the Equal Protection context.¹⁵⁹ As such, this state-centered approach is, for better or worse, a fact-driven exercise: “The question then is whether

¹⁵⁷ *Id.*

¹⁵⁸ See *United States v Carolene Products*, 304 US 144, 153 n 4 (1938).

¹⁵⁹ See *Craig v Boren*, 429 US 190, 212 (1976) (Stevens concurring) (contending that the levels of scrutiny applicable to equal protection claims “do not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion”).

the . . . justification put forward by the State is sufficient to make an otherwise offensive classification acceptable.”¹⁶⁰

To be sure, such an approach might increase courts’ decision costs. It might require complex assessments of complementary taxes, evaluations of the overall tax burdens imposed by the state on railroads and other industries, and inquiries into whether a state’s professed motives are genuine or pretextual. But courts take exactly this approach in assessing claims of discrimination in other contexts. For example, when faced with claims that a law discriminates in violation of the Equal Protection Clause, courts must look beyond objective factors such as discriminatory effects in order to determine whether the law was passed with a discriminatory purpose.¹⁶¹ This inquiry oftentimes requires extensive consideration of matters including the context in which the law was passed, the history of discrimination in the jurisdiction, and numerous other complicated and fact-specific considerations.

Admittedly, courts have shown great reluctance to employ the Equal Protection Clause (and other general antidiscrimination provisions, such as the Dormant Commerce Clause) to state tax regimes,¹⁶² and the practical difficulties attendant to litigating these claims have diminished their utility to aggrieved taxpayers. As such, they have proven insufficient to protect railroads from discriminatory treatment. This does not mean, however, that an interpretation of the 4-R Act that brings the statute’s analysis into harmony with analogous antidiscrimination laws is inappropriate or otherwise redundant. Rather, the 4-R Act acknowledges the shortcomings of existing antidiscrimination provisions and provides clear statutory authority by which courts may invalidate certain state taxes, thus dispelling the prudential concerns that otherwise underlie courts’ reluctance to invalidate tax provisions as discriminatory. When such a statute lacks a clear method for assessing discrimination—as does subsection (b)(4)—general antidiscrimination laws provide guidance in interpreting and applying the Act.

It is also important to note that this approach does not contradict *CSX Transportation*’s holding that subsection (b)(4) is more than a simple anticircumvention rule. First, that holding spoke only to the types of taxes covered by subsection (b)(4), determining that *all* nonproperty taxes fell within its ambit, and not simply those passed in lieu of a tax prohibited under subsections (b)(1)–(3). It did

¹⁶⁰ *Id.* at 212–13.

¹⁶¹ See *Washington v. Davis*, 426 US 229, 242 (1976).

¹⁶² For a discussion of the reasons for this, see Part IV.B.

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not speak to the standard for determining whether a tax discriminates, nor did it preclude courts from assessing the rationality of distinctions made by states among taxpayers. Second, this approach is not confined to situations where the tax was designed with the *intent* to circumvent the property tax provisions: if a tax draws distinctions between railroads and other taxpayers without sufficient justification, it would be invalidated under this approach regardless of whether the means chosen were designed to evade subsection (b)(1)–(3)’s explicit proscriptions. As such, this interpretation gives effect to the Supreme Court’s command that subsection (b)(4) be read as containing real and independent force.

B. Harmonizing Antidiscrimination Law

While the most prominent antidiscrimination statutes contain some fixed comparison class,¹⁶³ either explicitly or implicitly, a more freewheeling approach is far from unprecedented. Indeed, both Equal Protection Clause and Dormant Commerce Clause jurisprudence offer vague pronouncements against unequal treatment. In both contexts, courts have adopted an analytical framework that takes state-created classifications as a starting point and then subjects these classifications to some level of judicial scrutiny to determine the permissibility of differential treatment on a case-by-case basis.

1. Equal Protection Clause.

The Fourteenth Amendment of the US Constitution states that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁶⁴ This provision has been invoked as a basis for challenging state laws alleged to discriminate against certain classes of people or corporations.¹⁶⁵ Similarly to § 11501(b)(4), § 1 of the Fourteenth Amendment provides

¹⁶³ See, for example, Americans with Disabilities Act, Pub L No 101-336, 104 Stat 327 (1990), codified as amended at 42 USC § 12101 et seq (barring discrimination “on the basis of disability”); Age Discrimination in Employment Act of 1967, Pub L No 90-202, 81 Stat 602, codified as amended at 29 USC § 621 et seq (rendering it unlawful “to discriminate against any individual because of such individual’s age, or to classify or refer for employment any individual on the basis of such individual’s age”); Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, codified as amended at 42 USC § 2000e et seq (outlawing “discriminat[ion] against any individual . . . because of such individual’s race, color, religion, sex, or national origin”).

¹⁶⁴ US Const Amend XIV, § 1.

¹⁶⁵ See, for example, *Allied Stores of Ohio v Bowers*, 358 US 522, 526 (1959) (“[T]he States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment.”).

no comparison class and no definition of discrimination (indeed, it does not even use the term). The Supreme Court, however, has filled these gaps in a manner that guides an interpretation of the analogous ambiguities found in the 4-R Act.

As a general matter, the Equal Protection Clause does not require complete equality among all citizens. Rather, “where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices.”¹⁶⁶

But this prerogative is not without limit. Only classifications that satisfy the “rational basis test,” requiring a rational relationship between the distinction and the accomplishment of a legitimate governmental end, pass constitutional muster.¹⁶⁷ This guarantees states substantial autonomy in drawing distinctions among citizens while protecting against arbitrary and oppressive impositions placed upon disfavored groups.

Unfortunately, courts have applied the Equal Protection Clause such that it provides little relief to railroads facing discriminatory taxation. These shortcomings demonstrate the need for the 4-R Act’s more robust statutory protections; they do not, however, illustrate a shortcoming of the general analytical approach described above.

First, courts have shown particularly wide latitude to states when confronting alleged discrimination in a state’s tax system under the Equal Protection Clause. Indeed, “[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.”¹⁶⁸ As the Court in *Nordlinger v Hahn*¹⁶⁹ noted, “the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification. . . . This standard is especially deferential in the context of classifications made by complex tax laws.”¹⁷⁰

¹⁶⁶ *City of Cleburne, Texas v Cleburne Living Center*, 473 US 432, 441 (1985).

¹⁶⁷ *Allied Stores*, 358 US at 528. Although higher levels of scrutiny may be employed when a distinction is made based upon a suspect classification (such as race or alienage) or when the distinction results in the circumscription of a fundamental right, “[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.” *Cleburne*, 473 US at 440.

¹⁶⁸ *Lehnhausen v Lake Shore Auto Parts Co.*, 410 US 356, 359 (1973).

¹⁶⁹ 505 US 1 (1992).

¹⁷⁰ *Id.* at 11 (upholding a California property tax that assessed property value at the time of a transfer of title, after which the maximum tax liability could only increase at a much lower

This deference arises from a presumption that states, as sovereigns, are free to tax their citizenry as they like so long as doing so does not impinge the prerogatives of the federal government or violate federal rights.¹⁷¹ When Congress passed the 4-R Act, however, it overrode this background presumption of disengagement by explicitly authorizing courts to invalidate taxes that unjustifiably impose greater burdens on railroads as compared to other taxpayers. In doing so, Congress demanded a more searching review of such taxes than the Equal Protection Clause requires: courts must inquire, for example, whether the tax exploits railroads' immobile or nonlocal status and whether it undermines the Act's purposes. But in light of the close analogue to the Equal Protection Clause, an interpretation of the 4-R Act that draws upon the Equal Protection Clause's practice of assessing discrimination claims on the basis of the distinctions that the state has crafted is both serviceable and sensible.

Second, under the Equal Protection Clause there is even greater deference shown to state tax regimes when dealing with common carriers. Relying on the special privileges that accrue to many such carriers—for example, the right of eminent domain and the use of public property—the Supreme Court has held that “these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions.”¹⁷² While not every tax is correlated to such special privileges, this nevertheless adds another hurdle for railroads challenging an allegedly discriminatory state tax, thus justifying statutory provisions to further protect railroads from abusive state taxing practices.

Third, in addition to these substantive matters, the 4-R Act also provides two major procedural advantages over the Equal Protection Clause.¹⁷³ First, claims under the Act bypass the Tax Injunction Act, allowing federal district courts to enjoin the collection of an allegedly discriminatory tax, rather than requiring railroads to pay the tax and then sue for reimbursement, as would otherwise be required. Second, the 4-R Act allows railroads to bring a single suit in a federal district court concerning the validity of the tax. This is a substantial improvement over the previous legal regime, where railroads had to

annual rate than real property values, such that new home buyers paid substantially more in property taxes than long-time owners).

¹⁷¹ See *Allied Stores*, 358 US at 526–27.

¹⁷² *New York Rapid Transit Corp v City of New York*, 303 US 573, 579 (1938) (upholding an excise tax levied only upon railroads and other public utilities for the privilege of exercising their franchise in New York City).

¹⁷³ 49 USC § 11501(c).

sue in state court and were typically required to file an individual suit in every county in which the tax was collected.¹⁷⁴

Against this background, the omission of both a comparison class and a definition of discrimination from subsection (b)(4) appears to reflect a deliberate desire to preserve the case-by-case assessment otherwise applicable to state-created classifications while permitting courts to enjoin discriminatory taxes more freely and more efficiently.¹⁷⁵ Congress meant what it said—and what it did not say—in subsection (b)(4), and for a court to insert a fixed comparison class where the text of the statute plainly omits one undermines this legislative determination. This interpretation of subsection (b)(4) is consistent with the text of the 4-R Act, its dual purposes, and its legislative history, which reveals a primary concern with property taxes (where the prohibition on discrimination is accompanied by careful definitions) and a late adoption of subsection (b)(4) to serve an anticircumvention function.

2. Dormant Commerce Clause.

Similarly to the Equal Protection Clause, the Dormant Commerce Clause protects against discrimination, yet it is far from clear whether it provides a fixed comparison class and, if it does, what that comparison class comprises.¹⁷⁶ While in some cases the Court seems to apply a straightforward comparison class of out-of-state competitors, in others it takes a more nuanced view, either wholly dispelling the idea that disparities vis-à-vis out-of-state interests are relevant, or else showing much greater tolerance for such disparities when the

¹⁷⁴ See note 61 and accompanying text.

¹⁷⁵ Indeed, 49 USC § 11501(c) grants federal courts authority to issue injunctions against discriminatory state taxes, notwithstanding the Tax Injunction Act.

¹⁷⁶ Compare *Exxon Corp v Governor of Maryland*, 437 US 117, 127–28 (1978) (observing that “the [Dormant Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations”), with *Oregon Waste Systems, Inc v Department of Environmental Quality of Oregon*, 511 US 93, 99 (1994) (noting that “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter”). But see *C&A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 394–95 (1994) (upholding a challenge to a local ordinance brought by a local business on the ground that it inhibited the business from engaging in trade with nonlocal firms). Consider also Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va L Rev 563, 570–75 (1983) (reconciling courts’ disparate approaches to Dormant Commerce Clause claims by distinguishing between “interferences,” which other states may replicate, and “exploitations,” where the defending state has a monopoly over the protected good or service).

questioned program appears reasonable.¹⁷⁷ Whatever the framing, the case law reveals that states are granted substantial discretion to draw distinctions among taxpayers, especially when necessary to implement state policies. This is a far cry from the virtually per se invalidity that applies under the fixed comparison class approaches under subsection (b)(4).¹⁷⁸

Some Supreme Court precedent indicates that there is no fixed comparison class for Dormant Commerce Clause claims, since the primary concern of the provision is preventing “interfere[nce] with the natural functioning of the interstate market either through prohibition or burdensome regulation.”¹⁷⁹ While the nature of politics is such that states will typically interfere with interstate markets by discriminating against foreign interests and in favor of local ones, adopting an inflexible comparison class of out-of-state competitors risks significant errors when laws burdening interstate commerce operate to the detriment of some, but not all, local firms. The Supreme Court seems to have acknowledged as much and has invalidated state policies under the Dormant Commerce Clause even when they discriminate against local rather than foreign interests.¹⁸⁰ This indicates that the true standard under the Dormant Commerce Clause is not whether a policy discriminates against a fixed comparison class but whether a given policy unjustifiably allocates burdens or benefits in a manner contrary to the purpose of the Dormant Commerce Clause, with courts assessing the distribution of these burdens and benefits—as well as their justifications—based on the facts of the individual case.

Even when the courts do speak in terms implying a fixed comparison class of out-of-state competitors, they provide greater deference to states than the current approaches to subsection (b)(4). The scrutiny that courts show in determining whether the discrimination prong of this test is satisfied varies based upon the form and effect of the statute at issue. Importantly, however, the fact that the burden might be borne disproportionately by out-of-state interests does not itself spell invalidity. For example, in *Commonwealth Edison Company v Montana*,¹⁸¹ the Supreme Court upheld a state severance tax on coal notwithstanding the fact that 90 percent of such coal was

¹⁷⁷ See Levmore, 69 Va L Rev at 566, 575–92 (cited in note 176) (noting the “confused and chaotic” approach that the Supreme Court has taken in assessing Dormant Commerce Clause claims).

¹⁷⁸ See Part II.D.

¹⁷⁹ *Hughes v Alexandria Scrap Corp*, 426 US 794, 806 (1976).

¹⁸⁰ *C&A Carbone*, 511 US at 394–95.

¹⁸¹ 453 US 609 (1981).

shipped out of state.¹⁸² In another case, a state law requiring divestiture of retail service stations by companies that also produced or refined petroleum was permitted, although only out-of-state corporations satisfied those conditions.¹⁸³ Although the statutes at issue in these cases did not classify based on residence in so many words, neither did many of the taxes invalidated under the functional and competitive approaches. So long as these regimes were reasonably related to a valid local purpose, the Court deferred to the states' judgment.

Even distinctions that facially distinguish between in-state and out-of-state interests may be upheld, although they are subject to stricter scrutiny.¹⁸⁴ Considering a state law banning the import of waste from out of state, the Supreme Court specifically noted that "discriminating against articles of commerce coming from outside the State [is impermissible] *unless there is some reason, apart from their origin, to treat them differently.*"¹⁸⁵ In *Maine v Taylor*,¹⁸⁶ just such a reason existed. There, Maine had issued a blanket ban on the import of live baitfish into the state, as such fish might carry parasites not present locally. The Supreme Court upheld this prohibition because it served a legitimate local purpose, and there was no nondiscriminatory means by which the state could have protected against the harm.¹⁸⁷

Indeed, the Court has even rejected the proposition that interstate commerce itself is immune from reasonable state taxation.¹⁸⁸ Instead, states are shown some leeway in framing taxes that may disproportionately burden interstate commerce, and such a tax will be upheld when it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the service provided by the State."¹⁸⁹

Although the analogy is imperfect, the Court's approach to Dormant Commerce Clause claims reflects an understanding that the lack of a specified comparison class provides greater flexibility in assessing alleged violations, with a primary focus on the reasonable-

¹⁸² *Id.* at 618–19.

¹⁸³ *Exxon Corp.*, 437 US at 127–28.

¹⁸⁴ *City of Philadelphia v New Jersey*, 437 US 617, 624 (1978) (noting that a statute passed out of "simple economic protectionism" is "virtually per se" invalid).

¹⁸⁵ *Id.* at 626–27 (emphasis added).

¹⁸⁶ 477 US 131 (1986).

¹⁸⁷ *Id.* at 151.

¹⁸⁸ *Complete Auto Transit, Inc v Brady*, 430 US 274, 288 (1977).

¹⁸⁹ *Id.* at 279.

ness of state classifications. Whether courts frame their analysis as eschewing a fixed comparison class or modifying how compelling a rationale must be to justify a distinction, the fact remains that the assessment is much more fact-dependent than the virtually per se invalidity that the current approaches to subsection (b)(4) entail.

CONCLUSION

The question of which comparison class to apply to alleged tax discrimination under § 11501(b)(4) of the 4-R Act has divided the courts. This division has created great uncertainty for both railroads trying to forecast their tax liabilities and states attempting to devise a tax regime that advances their policy goals without violating federal statutory commands. Furthermore, the efficient and expeditious attainment of the goals of the 4-R Act is undermined by such disharmony, especially in a market defined by its interstate scope.

The various approaches that courts have adopted to solve this problem have erroneously assumed that § 11501(b)(4) requires a fixed comparison class against which to measure alleged discrimination. Such approaches, however, are inconsistent with both the text and the structure of the statute. Moreover, they fail to adequately protect railroads while unjustifiably discounting Congress's concern that the 4-R Act not unduly impinge upon states' taxing authority. Rather than writing a comparison class into the text of a statute that appears to purposefully omit one, courts should instead grant states the prerogative to classify their taxpayers as they see fit, while readily invalidating classifications that perniciously capitalize on railroads' nonlocal status or their large fixed-capital investment in the state.

This state-centered approach provides adequate protection for railroads while also preserving the states' taxing prerogatives. This approach is analogous to the analysis employed by courts in similar antidiscrimination contexts, but which in their present form incompletely or inadequately redress the problems identified by Congress in the 4-R Act.