1992


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**INTRODUCTION**

On July 10, 1991, the Nebraska Supreme Court held that the state property tax system violates the Nebraska Constitution and suggested that the system also may violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. In *MAPCO Ammonia Pipeline, Inc. v. State Board of Equalization & Assessment*, the court declared most of the personal property exemptions unconstitutional and severely restricted the legislature's ability to classify and exempt property under the present constitution. The

* The author wishes to thank Professor William H. Lyons, Associate Professor of Law, University of Nebraska College of Law, for his invaluable guidance.
2. Although MAPCO was the result of a culmination of decisions, the holding took the state by surprise. The court's decision was not the only surprise MAPCO had to offer, however. The court broke with tradition by: 1) handing down the decision on a Wednesday and, 2) announcing the subject matter of the decision the day before the opinion was distributed. The legislature was just commencing a
decision has confused many Nebraska citizens and created a crisis for the Nebraska Legislature.

The court has sent the message loud and clear to the legislature: It is time to change the Nebraska property tax structure. However, the court failed to guide the legislature on how to develop a politically acceptable property tax system that passes judicial scrutiny and makes economic sense. Unfortunately, the court leaves the citizens of Nebraska with more questions than this Note possibly can encompass. In recognition of this limitation, this Note addresses three obstacles set out by the court’s opinion: Article VIII, section 1 of the Nebraska Constitution (the “uniformity clause”), article III, section 18 of the Nebraska Constitution (the “special legislation clause”) and the Fourteenth Amendment to the United States Constitution (the “Fourteenth Amendment”). The Note analyzes each of the obstacles in the framework of the property tax system considered by the court in MAPCO. Finally, the Note examines the immediate consequences of the court’s decision.

II. BACKGROUND

MAPCO is clearly an important case, but appreciating its significance is contingent upon understanding the history that shaped the Nebraska property tax problem. As this Note will explore, the heart of the matter is the Nebraska Constitution, specifically article VIII, section 1. Commonly referred to as the uniformity clause, article VIII, section 1 requires that “taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises.” On May 5, 1992, days before this Note went to press, article VIII, section 1 was amended by Amendment I. Amendment I essentially changes the uniformity clause by providing different tax treatment for different types of tangible property. Real estate will continue to be taxed uniformly, except as otherwise provided by the Nebraska Constitution, while the legislature may classify, exempt or tax personal property, so long as the decisions are reasonable. Complementing (or perhaps complicating) the uniformity clause is article VIII, section 2, which au-
thorizes the legislature to classify and exempt personal property as it sees fit.6 Although the uniformity clause is the heart of the matter, it is the case law leading up to MAPCO that makes the court’s opinion so interesting. The first important case is Grainger Brothers Co. v. State Board of Equalization & Assessment, in which the term “all tangible personal property” was held to mean that real property and tangible personal property are in the same class for taxation purposes.7 In 1974, Stahmer v. State8 reviewed the constitutionality of article VIII, section 2. The court upheld Nebraska’s statutory personal property exemptions for: (1) agricultural income-producing machinery and equipment; (2) business inventory; (3) feed, fertilizer and farm inventory; and (4) grain, seed, livestock, poultry, fish, honey bees and fur bearing animals.9 It appears the court in Stahmer believed that the legislature’s power to classify and exempt personal property, granted by article VIII, section 2, prevailed over the uniformity requirement of article VIII, section 1.10

The Eighth Circuit’s decision in Trailer Train Co. v. Leuenberger11 introduced the issues raised in MAPCO. In Trailer Train, the court determined “whether there was discriminatory tax treatment of railroads in the Nebraska tax structure” in violation of section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act (the “4-R Act”).12 “Section 306(1)(d) prohibits states from taxing transportation property when such tax ‘results in discriminatory treatment of a common carrier by railroad . . . .’”13 The federal court found that the Nebraska tax system discriminated against Trailer Train in violation of the 4-R Act because tax exemptions applied to three fourths of the commercial and industrial personal property in Nebraska, but did not apply to railcars.14

Northern Natural Gas Co. v. State Board of Equalization & Assessment15 followed. In Northern Natural Gas, several centrally assessed pipeline companies claimed they were entitled to the same treatment

6. NEB. CONST. art. VIII, § 2.
11. 885 F.2d 415 (8th Cir. 1988).
14. Id.
as railroads and car companies, whose personal property had been exempted from taxation in order to comply with Trailer Train. The court held that "[t]he state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied [the pipeline companies] equal protection of the law contrary to the 14th Amendment to the U.S. Constitution." The court further held that, "if the [State] Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, . . . the complaining taxpayer's valuation [should be lowered] to such an extent so as to equalize it with other property in the state."  

In November 1989, the legislature responded to Northern Natural Gas by passing two bills: 1) L.B. 7, which exempted railroad rolling stock from taxation and 2) L.B. 1, which redefined the term "real property" to include pipelines. In March 1991, the court responded to the legislature with Natural Gas Pipeline Co. v. State Board of Equalization & Assessment, declaring L.B. 7 unconstitutional and L.B. 1 irrelevant to the equalization of property.  

Next in line was MAPCO, the case that broke the camel's back. MAPCO Ammonia Pipeline, Inc., Mid-America Pipeline Company, Trailblazer Pipeline Company and Natural Gas Pipeline Company of America ("taxpayers") appealed the Nebraska State Board of Equalization and Assessment's ("State Board") decision to tax their property at 92.13 percent of its actual value. In their consolidated appeal, the taxpayers — centrally assessed public service entities — claimed that the State Board erred in holding L.B. 1 and L.B. 7 constitutional and "in failing to grant . . . requests for relief based on the absence of uniformity and proportionality of taxation, in violation of Neb. Const. art. VIII, section 1" and the equal protection clause of the Fourteenth Amendment.  

L.B. 1 amended section 77-103 of the Nebraska Revised Statutes, so that it read in pertinent part:

16. Id. at 815, 443 N.W.2d at 256.  
17. Id. at 815, 443 N.W.2d at 255-56.  
20. MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equal. & Assess., 238 Neb. 565, 567-68, 471 N.W.2d 734, 737 (1991). Taxpayers had asked the State Board to equalize their property with that of certain equipment and railroad rolling stock exempted pursuant to L.B. 1 and L.B. 7 respectively. Id. at 567, 471 N.W.2d at 737.  
21. Id. at 569-70, 471 N.W.2d at 738. The State Board acknowledged that the "Legislature has broad powers to define the nature of property for tax purposes, so long as the definitions established are reasonable . . . ." Id. at 569, 471 N.W.2d at 738.
The terms real property, real estate, and lands shall mean city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto, and pipelines, railroad track structures, electrical and telecommunication poles, towers, lines, and all items actually annexed to such property, and any interest pertaining to the real property or real estate. The sole test for determining whether an item is a fixture or an improvement shall be whether there is actual annexation to the real property or real estate or something appurtenant thereto. Unless specifically enumerated in this section, real property and real estate shall not include machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agriculture or horticultural purposes.

L.B. 7 provides in pertinent part:

Railroad rolling stock shall be exempt from the personal property tax. Railroad rolling stock shall mean locomotives, freight cars, and other flanged-wheel equipment operated solely on rails and owned, leased, or used for or in railroad transportation. For tax year 1989, this subsection shall apply to railroad rolling stock upon which no levy has been made or upon which no tax may lawfully be collected.

The Nebraska Supreme Court held L.B. 1 unconstitutional because it violated the uniformity and special legislation clauses of the Nebraska Constitution. Citing its opinion in Natural Gas, the court held L.B. 7 unconstitutional because “[the legislature had] no reasonable basis for treating railroads differently from other carriers; therefore, the distinction, as a classification and basis for an exemption from personal property tax, ... result[ed] from special legislation, prohibited by Neb. Const. art. III, section 18, and violat[ed] the uniformity clause of Neb. Const. art. VIII, section 1.”

With regard to L.B. 1, the taxpayers contended that L.B. 1 [was] unconstitutional on two bases: “(1) as an abuse of the legislature’s power to define, in that it tends to nullify certain provisions of Neb. Const. art. VIII, sections 1 and 2, and (2) as it creates an arbitrary classification, in violation of Neb. Const. art. III, section 18.” The court agreed on both accounts. Although article VIII, section 2 arms the legislature with the power to exempt personal property from taxation, the court characterized the legislature’s act as “arbitrarily declar[ing] the personal property owned by an unfavored group of taxpayers to be ‘fixtures,’ so that it is presumably taxable as real estate . . . .”

26. Id. at 573, 471 N.W.2d at 740.
The court cited previous decisions that limited the definitional powers of the legislature to definitions ordinarily understood to be embraced within that term\textsuperscript{27} and decided that the property designated as “fixtures” in L.B. 1 is generally understood to be personal property rather than real property.\textsuperscript{28} Thus, the court concluded that the legislature had exceeded its constitutional powers to classify. That conclusion appears to have been overshadowed, however, by the court’s next sentence, which seems to affirm the fact that whether the property is considered a “fixture” and thus real estate, or personal property, is irrelevant because “personal property and real property are both ‘tangible property’ under Nebraska law and must be equalized and taxed uniformly pursuant to Neb. Const. art. VIII, section 1.”\textsuperscript{29}

The court also found that L.B. 1 violated article III, section 18, which provides that “where a general law can be made applicable, no special law shall be enacted.”\textsuperscript{30} Following guidelines recently established in \textit{Haman v. Marsh},\textsuperscript{31} the court determined that “[t]he classification [was] not based on a real and substantial difference between ‘machinery and equipment used for business purposes or center pivot or other irrigation systems of a type used for agricultural or horticultural purposes’ and the same machinery and equipment used for other purposes,” and thus violated article III, section 18.\textsuperscript{32}

Recounting pivotal cases concerning Nebraska’s discriminatory property tax scheme, the court analogized \textit{Northern Natural Gas} to \textit{State Bank v. Endres}.\textsuperscript{33} In \textit{Endres}, the court reviewed the legislature’s classification of bank stock. The legislature had separated bank stock from other intangible property and placed it on the same basis as tangible property for taxation purposes. That was significant because Nebraska taxed intangible property at a lower rate than tangible property, and federal law at the time provided that state taxation of shares in the national banks “shall not be at a greater rate than is assessed upon other moneied capital . . . .”\textsuperscript{34} Consequently, in violation of federal law, Nebraska was taxing the stock of state and na-

\textsuperscript{27} \textit{Id.} at 572, 471 N.W.2d at 739-40. See \textit{State ex rel. Meyer v. Peters}, 191 Neb. 330, 215 N.W.2d 520 (1974)”household goods” could not include “major appliances attached . . . to real property” where such property is considered real estate under the common law of fixtures; Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934)(intangible personal property cannot be defined as tangible personal property).


\textsuperscript{29} \textit{Id.}

\textsuperscript{30} \textit{Id.} at 574, 471 N.W.2d at 740.

\textsuperscript{31} 237 Neb. 699, 467 N.W.2d 836 (1991).


\textsuperscript{33} 109 Neb. 753, 192 N.W. 322 (1923).

\textsuperscript{34} U.S. REV. STAT. § 5219 (2d ed. 1878).
tional banks located in Nebraska at a greater rate than other moneyed capital. Having concluded that the national banks could not be taxed lawfully on the same basis as tangible property, the court held that, under the uniformity clause, state banks could not be taxed on the same basis as tangible property either. The court in MAPCO believed the situation it faced was similar to Endres in that federal law had rendered invalid the present Nebraska state property tax scheme.

MAPCO also decided the continuing vitality of Stahmer. The court addressed Stahmer sua sponte because, in the court’s view, such analysis was necessary to reach a reasonable and sensible disposition of the issues presented. Recognizing that Stahmer addressed no issue of federal law, the court overruled Stahmer, concluding that the court’s reasoning is now obsolete “in light of subsequent developments in federal law.” As such, the personal property tax exemptions enumerated in Nebraska Revised Statutes Section 77-202(6) through (9), accounting for the exemption of three fourths of the commercial and industrial property in Nebraska, were declared unconstitutional by the court.

The court determined that the State Board erred in failing to assess or tax the rolling stock of railroad or carline companies operating in Nebraska in 1990 and stated that the taxpayers were entitled to the same tax treatment as other centrally assessed taxpayers. The court then turned its attention to the appropriate relief. Characterizing the taxpayers’ plea for equalization at zero percent as a desire for exemption, the court denied the taxpayers’ request. The court held that such a remedy would be inappropriate because equalization cannot be applied to property that is not taxed. The court clarified its conclusion in Northern Natural Gas, explaining that it did not “exempt” the taxpayers’ personal property. Rather, it “remanded the matter to the State Board, noting that the appellants’ unitary value, including both real and personal property, might need to be adjusted so as to achieve uniformity and proportionality of taxation in compliance with Neb. Const. art. VIII, section 1.” Similarly, the court in MAPCO remanded the cause “with directions to assess the property of the [tax-

36. Id. at 585, 471 N.W.2d at 747.
37. Id. at 584, 471 N.W.2d at 746.
38. Id. at 583, 471 N.W.2d at 745-46.
39. Id. at 585, 471 N.W.2d at 747.
40. Id. at 577, 471 N.W.2d at 742.
41. Id.
42. Id.
43. Id. at 579, 471 N.W.2d at 743.
payers] and 'equalize' its value as required by article VIII, section 1."

III. ANALYSIS

A. Article VIII, Section 1: The Uniformity Clause

In 1875, eight years after Nebraska's admission to the Union, Nebraska adopted a relatively brief and simple strict uniformity structure in its constitution. The principal provision was that all property be taxed in proportion to its value. There also was a provision allowing the exemption of public property and property used for religious, charitable and educational purposes. The 1920 constitutional convention renumbered the pertinent provisions and relieved intangible property from the operation of the strict uniformity limitation. The principal provision, article VIII, section 1, read: "[T]axes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." The 1920 change carved out a single substantive exception to strict uniformity, while retaining the strict general limitation.

In 1952, Nebraska voters ratified an amendment to section 1 of article VIII, authorizing a different method of taxing motor vehicles. Several significant amendments authorizing exceptions for designated classes of personal property followed, including special treatment of agricultural or horticultural property, intangible property, livestock, and grain and seed. Nebraska voters also approved several amendments to the exemption provision, section 2 of article VIII. Most notably, the following provision was added in 1970: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes or may exempt all personal property from taxation."

On the surface, the amendments appear compatible and, in fact, were recognized as such by the Nebraska Supreme Court in Stahmer. The court in Stahmer interpreted the amendment to section 2 of arti-

44. Id. at 585, 471 N.W.2d at 747.
45. 1 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1714 (2d ed. 1984); 2 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1714 (2d ed. 1984).
46. 1 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 1017 (2d ed. 1984).
47. Id. at 1018.
48. Id.
49. Id.
50. Id. at 1024.
51. Id. at 1033.
52. Id. at 1019-20.
53. Id. at 1020.
54. Id.
icle VIII to confer broad classification and exemption powers on the legislature.\(^5\) The power to classify and exempt personal property was separate and distinct from the requirement of section 1 of article VIII to equalize or tax uniformly. The court emphasized that section 2 "represents a special constitutional provision adopted later than and with full knowledge of the [other] constitutional provisions . . . [and] when general and special provisions of a state Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control when the special provisions do not apply."\(^5\)

Rather than resorting to a rule applied to "conflicts" of "general and special provisions," the court in *Stahmer* could have found support for its decision by recognizing the clear distinction between equalization and exemption. An *exemption* is an element of the initial process of determining the tax base, guided by article VIII, section 2. *Equalization* is the process of ensuring that the tax base, property not exempted, is taxed uniformly according to article VIII, section 1. Acknowledging that difference eliminates the tension that the court perceived between sections 1 and 2 of article VIII.

Regardless of the decision's foundation, *Stahmer* is an exception in an otherwise unbroken line of cases in which the Nebraska Supreme Court has interpreted article VIII, section 1 strictly.\(^5\) Repeated attempts to liberalize the limitation of the state's uniformity clause, by specific constitutional amendment, have failed. The court vigorously has applied the requirement of absolute uniformity.\(^5\) The Nebraska Supreme Court, clearly in the minority with its strict uniformity requirement,\(^5\) refuses to join the growing national trend towards liberalization.\(^6\)

Tracing the line of cases, it appears the court often employs federal law to avoid the liberation of the uniformity clause. *Endres, Northern*

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\(^{5}\) *Id.* at 1036.


\(^{57}\) *1 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION* 1040 (2d ed. 1984).

\(^{58}\) *Id.* at 1038.

\(^{59}\) *2 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION* 1725 (2d ed. 1984). In order to understand the context of the term "strict uniformity," it may be helpful to know the different types of uniformity clauses used in other states. As of 1983, six states did not have any form of uniformity clause (Connecticut, New York, Iowa, Montana, Alaska and Hawaii). Slightly more than half of the states — 27 out of 50 — had literal liberal provisions with such clauses as "taxes shall be uniform upon the same classes of property", "taxes shall be uniform upon the same class of subjects", and "taxation shall be equal and uniform." *Id.* at 1725.

\(^{60}\) *1 WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION* 1040 (2d ed. 1984).
Natural Gas and MAPCO are illustrative of the court's use of federal law. A closer review of those cases exposes between them a distinction that merits the use of federal law in Endres alone. In Endres, the issue was the taxation of certain intangible property, bank stock, which — as previously stated — was relieved to some extent from the operation of the strict uniformity requirement. Specifically, section 1, article VIII gave the legislature the power to classify intangible property, but required that any tax on intangible property be uniform within the class of property subject to the tax. Bank stock, both state and federal, comprised the class of intangible property Nebraska sought to tax. Because federal law prohibited Nebraska from taxing national bank stock, only some of the intangible property in the class of bank stock remained subject to tax. As a result, imposing the tax on the state bank stock violated the uniformity clause.

The situations posed in Northern Natural Gas and MAPCO are different. The cases involved the taxation of tangible personal property, which is not recognized as a separate class of property for purposes of constitutional analysis. As stated previously, the Nebraska Supreme Court has held that, except to the extent of special classes of property specifically authorized by the Nebraska Constitution, real and tangible personal property are in the same class and, therefore, must be taxed uniformly. Thus, the 4-R Act was unnecessary to the court's decision in Northern Natural Gas. The court simply could have construed strictly the uniformity clause, as it did in MAPCO, and held that different tax treatment of tangible personal property is unconstitutional. The tangible personal property of the pipeline and railroad companies must be taxed uniformly because they are members of the same class of property.

However, the court in Northern Natural Gas focused on the inequity caused by the 4-R Act. As such, the court held that, based on the Fourteenth Amendment, the state could not constitutionally tax the personal property of pipeline companies, but exempt the personal property of railroads and carlines. Assuming the court followed its practice of not acknowledging the difference between equalization and exemption, it appears the court overlooked the fact that the tax was unconstitutional with or without the 4-R Act. Nebraska's tax system, which exempted 75 percent of commercial and industrial personal property, was the sole cause of the discrimination which prompted the

62. See supra note 46 and accompanying text.
exemption of the railroads' and carlines' personal property.65

It is important to note that, had the court acknowledged the distinction between equalization and exemption, its decision in *Northern Natural Gas* may have been different. *Northern Natural Gas* involved an exemption, necessitated by federal law, and arguably did not require equalization.66 As noted in *Stahmer*, section 2, article VIII provided the constitutional basis for the exemptions of 75 percent of the tangible personal property within the State of Nebraska.67 Federal law, the impetus, required the exemption of the railroad's personal property. Only the remaining property was required to be taxed uniformly.

It was inappropriate for the Nebraska Supreme Court to employ the exemptions in its analysis. When the federal court evaluated Nebraska's personal property exemptions in search of a discriminatory tax, it evaluated the system as a whole to determine whether the state had unreasonably burdened interstate commerce by taxing rail carrier property. The federal court did not invalidate the state's general ability to exempt certain property. Furthermore, as stated previously, there is no state constitutional mandate to equalize exempt property with nonexempt property.

Unfortunately, the court blurred the concepts of equalization and exemption and incorrectly diagnosed the ailment. Such a contention is supported by the court's response to the "Band-Aid" legislation passed after *Northern Natural Gas*.68 Passed in special session, L.B. 1 and L.B. 7 attempted to limit the potential effect of *Northern Natural Gas* by exempting property within the 4-R Act's coverage. The court declared such legislation unconstitutional in *Natural Gas* and *MAPCO*, thus indicating that the real issue is the Nebraska Constitution and not the dilemma created by the interaction between the federal law and the uniformity clause. Handicapped by this blurred vision of equalization, the *MAPCO* court stepped forward to overrule *Stahmer*. Unfortunately, the court failed to recognize that the "subsequent developments in federal law" gave the court no cause to overrule *Stahmer*. The court in *MAPCO* based its decision solely on a literal interpretation of the uniformity clause, holding that uniformity requires that all tangible property, personal and real, be treated the same for tax purposes.69 This is the same uniformity clause and the same exemptions that were before the court in *Stahmer*. The 4-R Act,

68. *See supra* note 3.
as previously discussed, was unnecessary to the Nebraska Supreme Court cases that followed. The only contribution made by the "federal law" was the emphasis it placed on the various tax treatments applied to the tangible personal property located in Nebraska. Thus, the court's strict interpretation of the uniformity clause was no more imperative in 1991 than it was in 1974.

It is curious that, irrespective of the legislature's power to exempt, the court declared unconstitutional the exemptions enumerated in (6) through (9). Although the court attacked only exemptions (6) through (9), it appears no exemption is free from the court's reasoning. All property must be taxed or no property may be taxed. That reasoning places the legislature in an impossible situation. Taxing all property would be practically and politically impossible, and taxing no property would be a fiscal disaster. Either way, the legislature is subject to criticism. No Nebraska citizen would want all of his or her property taxed, particularly when one considers the administrative problems incurred when attempting to tax all property including incidental household goods. And although Nebraska citizens initially would enjoy the thought of no property tax, the consequences would not be attractive. The state's property tax is the primary source of revenue for local governments. If the tax were abolished, the lost revenue would have to be generated from the sales and/or income tax, both of which presently fund the state government. And because the state government does not appear to have sufficient funds to share, an increase in the rates could be expected.

In summary, the court's view of the uniformity clause, expressed in Northern Natural Gas and MAPCO, is "irreconcilable with the constitutional authorization for tax classification and exemption," as provided in section 2 of article VIII. Therefore, the legislature should act. The court has passed the buck to the legislature, or — more appropriately — passed the accounts receivable. Considering the court's obsession with strict construction, the liberal practices of other states, and the need for the legislature to respond to the state's needs and desires, the uniformity clause should be repealed. The legislature — not the court — should have the power to establish the fiscal policy for

70. Should the court be referring to a development of federal law other than the 4-R Act, its role in the decision to overrule Stahmer still is questionable for two reasons: 1) some states have no uniformity clause or literal liberal provisions; See supra note 60, and 2) the Fourteenth Amendment does not mandate such result; See infra note 94.


72. Id. at 594, 471 N.W.2d at 751 (Shanahan, J., concurring in part, and in part dissenting).
B. Article III, Section 18: Nebraska's Special Legislation and Equal Protection Clause

A discussion of article III, section 18 is important for two reasons. First, it was a component of the court's decision that held L.B. 1 and L.B. 7 unconstitutional. But more importantly, it is yet another obstacle to a vital Nebraska property tax system. As indicated by Judges White and Fahrnbruch in their concurring opinion in *Natural Gas*:

> When property, regardless of whether it is real or tangible personal property, is classified so that it provides exemption from taxation to all but a small amount of property, the classification and exemption may well be unreasonable and arbitrary and may fall within the prohibition of Neb. Const. art. III, section 18, which is this state's 'equal protection clause'.

Article III, section 18 does not prohibit classifications, provided they are not arbitrary. Even classifications granting special or exclusive privileges to their members are constitutional if their primary purpose is the promotion of the public welfare, rather than the private benefit of the grantees. The established rule is that classification is permitted "if the classification is reasonable and the tax operates uniformly upon all members of the class."

At this juncture, it appears that the present Nebraska property tax system arguably would pass judicial scrutiny if the present uniformity clause were repealed and the legislature were allowed to classify tangible property. This contention is particularly true because "[t]he power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation." It is not clear that the Nebraska Legislature has used an
artificial or baseless classification.\(^80\)

Equal protection challenges based on article III, section 18 are determined by a rational basis test.\(^81\) "All that is required is that there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose."\(^82\) Again, it appears as though the Nebraska tax system would pass muster. However, in Natural Gas, the Nebraska Supreme Court employed a very strict view of what is required. In Natural Gas, the court held L.B. 7 unconstitutional because the court "fail[ed] to see any real and substantial difference between personal property used for income production by one type of business and the same type of income-producing personal property used by another type of business."\(^83\) The court explained that:

classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class.\(^84\)

The court further characterized as "illusory" the legislature's finding and declaration that a "rational basis exists to classify railroad rolling stock as a separate and distinct class of property."\(^85\)

Haman followed, solidifying the requirement that there be a "substantial difference."\(^86\) Identifying two separate tests, the court in Haman explained that article III, section 18 is both an equal protection clause and a prohibition against special legislation.\(^87\) A classification violating the equal protection clause implicates a rational basis test,\(^88\) while "[t]he test of validity under the special legislation prohibition is more stringent . . . [requiring] some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified."\(^89\)


\(^82\) Id. (emphasis added).

\(^83\) Id. at 712, 467 N.W.2d at 846.

\(^84\) Id. at 713, 467 N.W.2d at 846-47.
The distinction drawn by the Haman court becomes significant as one reviews the language in Natural Gas and MAPCO. In both opinions, the legislation was held unconstitutional because the classification was “not based on a real and substantial difference.” It therefore appears that, when reviewing property tax classifications, the Nebraska Supreme court will apply the more stringent test for special legislation rather than the rational basis test. Regardless of the label, the court will construe strictly article III, section 18, and require the legislature to articulate a substantial difference inherent in the property. Thus, the legislature’s task becomes more difficult because the court will always have the last word on what constitutes a “substantial difference.”

C. Fourteenth Amendment to the United States Constitution: The Equal Protection Clause

The equal protection clause of the Fourteenth Amendment has been considered by the Nebraska Supreme Court in past Nebraska property tax cases and certainly may be utilized in future tax cases. Although the per curiam opinion in MAPCO did not specifically address the Fourteenth Amendment’s equal protection clause, it was the basis of the decision in Northern Natural Gas. The Nebraska Supreme Court in Northern Natural Gas agreed with the proposition that “intentional and systematic undervaluation of other taxable property in the same class [whether by legislative enactment, the Board or a federal court’s judgment] ... violates the equal protection clause.” The court further explained that “[t]he equal protection clause of the Fourteenth Amendment mandates that the same result be reached with respect to the personal property of [the pipeline companies] as that in the case of the railroad and car companies.” Again, the language seems to indicate that the court is seeking absolute equality.

The court’s view of the equal protection clause appears to be severely restrictive in comparison with the United States Supreme Court’s reading of the clause. The Supreme Court recognizes that the equal protection clause allows classification of different types of property, provided there is a rational basis for the classifications. The Court will uphold “a classification, though discriminatory, ... if any

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91. Walter Hellerstein, Equal Protection Run Amok?: An Analysis of the Nebraska Supreme Court’s Decision in the Northern Natural Gas Case, TAX NOTES, November 20, 1989, at 997.
statement of facts reasonably can be conceived that would sustain it."94 Further, the Court does not require absolute equality, acknowledging that "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."95

Whether the Nebraska Supreme Court will continue to interpret strictly the federal equal protection clause is difficult to determine because the court in Northern Natural Gas may have incorporated the Fourteenth Amendment only to disguise the real problem: the demanding requirements of Nebraska's uniformity clause. However, if the uniformity clause is repealed and the legislature identifies classifications based on substantial inherent differences, it is possible that the Nebraska Supreme Court might use this one last obstacle to reach its ideal of absolute equality, even though the classifications probably would be permissible under the analysis of the United States Supreme Court. It is only certain that the federal equal protection clause will be yet another consideration for the Nebraska Legislature, as indicated by the concurring opinions of Judges White and Fahrnbruch in Natural Gas and MAPCO.96

D. Application of the MAPCO Decision

Presently, compliance with MAPCO requires the State Board to revalue and assess the affected personal property and all real property in the state to arrive at a uniform and proportionate result.97 This approach is much different than that employed by the court in Northern Natural Gas and Natural Gas. In Northern Natural Gas and Natural Gas, the court "correct[ed] the constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state."98 The court in MAPCO expressed its disapproval of such language and emphasized that the taxpayers' remedy "does not involve 'equalization.'"99

The remedy specified by the court placed the State Board in a predicament because the court's order essentially requires the impossible — the location and valuation of all property that should have been on the rolls in 1989. On October 30, 1991, the State Board responded to the order and attempted to comply by reducing the taxpayers' equalized unit value by 18.81 percent, the ratio of the value of all exempt property in Nebraska to the total value of property in the state. The taxpayers, dissatisfied with the State Board's order, have appealed, contending that the taxation of 81.19 percent of their unit value is contrary to the mandate of the Nebraska Supreme Court and violates the uniformity clause and the Fourteenth Amendment. In their brief, the taxpayers cite the Nebraska Attorney General's official opinion advising the State Board against the aggregate ratio approach for equalization, noting that the court in Northern Natural Gas did not accept such methodology. The State Board has not complied with the court's mandate, but such compliance appears impossible. Considering such difficulty, one may wonder whether the MAPCO decision was delivered primarily to make a statement to the legislature. Whatever the case, the appeal is likely to force the court to explain exactly what it meant when it remanded the cause with directions to assess the taxpayers' property and "equalize" its value in accordance with the uniformity clause.

Whether MAPCO will be applied retroactively introduces yet another interesting issue. The doctrine governing retroactivity and prospectivity in unconstitutional state tax cases appears unsettled. Previously, the three-part Chevron test routinely had been applied to determine whether a new court ruling was to be applied prospectively. The Chevron test consists of the following: 1) whether the decision establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression, 2) whether retrospective operation will further the rule's purpose, and 3) whether the equities of the case favor retroactive application.
Applying the *Chevron* tests to *MAPCO* yields no solid conclusion. Considering the first test, *MAPCO* may require a prospective application. *MAPCO* overruled *Stahmer*, a clear past precedent, and held several property tax exemptions unconstitutional. However, it may be argued that the *MAPCO* decision was reasonably foreseeable given the development of the 4-R case law in Nebraska. The "court has consistently interpreted the discriminatory taxation of railroad rolling stock to be in violation of federal law" and that "the same illegally discriminatory tax system was at issue in *Trailer Train, Northern Natural Gas, [and] Natural Gas.*"\(^{108}\) The two remaining tests are also inconclusive; the purpose of the court’s decision may be furthered by retroactive application, but such application would "produce substantial inequitable results by depleting the state treasury."\(^{109}\)

In light of the United States Supreme Court’s recent decision in *James B. Beam Distilling Co. v. Georgia,*\(^{110}\) the *Chevron* analysis is not imperative. In *Beam*, the Court held that the new rule announced in *Bacchus Imports, Ltd. v. Dias*\(^{111}\) should be applied retroactively because "similarly situated litigants should be treated the same."\(^{112}\) Without considering the *Chevron* analysis, Justice Souter based the determination on "principles of equality and stare decisis."\(^{113}\) In one of three concurring opinions, Justice Blackmun further expressed his belief that the Court’s judicial responsibility is fulfilled by requiring retroactive application of each new rule announced.\(^{114}\) Although in *Beam* the Court applied the decision retroactively, it is difficult to ascertain what the Court will do in the future, considering there were five separate opinions written on the case.

However, considering present law and Justice Souter’s reasoning, it appears that *MAPCO* may be applied retroactively. That contention is further supported by the Nebraska Supreme Court’s recent review of a tax refund claim. In *Dairyland Power Cooperative v. State Board of Equalization & Assessment*, the court affirmed the district court’s order that the plaintiff’s taxes be refunded pursuant to section 77-1775,\(^{115}\) which specifically provides for the refund of "invalid" taxes. The court held that the tax levied against the rolling stock of the

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109. *In American Trucking Ass'ns., Inc. v. Scheiner*, 483 U.S. 266 (1987), the Court considered the depletion of the state treasury a factor in favor of applying the decision prospectively.
113. *Id.* at 2440.
114. *Id.* at 2450.
claimants was in violation of section 306(1)(d) of the 4-R Act and was therefore invalid within the meaning of section 77-1775.116

Anticipating the court's response to Dairyland, the legislature focused attention on ways to minimize the potential financial disruptions caused by the possible influx of refund claims. The recently enacted legislation introduces three main limitations. First, the relief granted in section 77-1735 and 77-1775 is limited to taxes that are illegal or a result of a misunderstanding or honest mistake, for any reason other than the valuation or equalization of the property.117 Second, the legislature has attempted to reduce the number of people entitled to a refund. "A person shall not be entitled to a refund [for illegal taxes paid] unless [he or she has] filed a claim with the county treasurer or prevailed in an action against the county" when the county has refused to make a refund, "even if another person has successfully challenged a similar tax or payment."118 Similarly, section 77-1736.04 limits refunds to only those who have "instituted legal proceedings to declare the tax or penalty unconstitutional."119 Third, the legislature has attempted to limit court orders affecting real or personal property tax to prospective application.120 Essentially, the legislature codified the Chevron test vesting the determination with the tax commissioner, subject to the court's review.

The ramifications of MAPCO are still unclear, notwithstanding the Dairyland decision and recent legislation. The legislature's efforts were not realized in Dairyland as the court held that the "case[] should be decided under the statutes existing at the time the action[] [was] commenced."121 Further, the issue in Dairyland was the discriminatory taxation of car company personal property, which was clearly a violation of the 4-R Act as supported by established case law. Thus, the court was able to easily declare the tax "invalid" for purposes of section 77-1775. Whereas, in MAPCO, an argument can be made that the invalidity of the tax was not so prevalent, nor was the taxpayers' property taxed for an "illegal or unauthorized purpose."122

It appears the legislature has done everything it can to limit the refunds that are bound to follow a decision such as MAPCO. The United States Supreme Court, through McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,123 recently gave the state its blessing to retain substantial flexibility in crafting the form of retroactive re-

116. Id.
120. NEB. REV. STAT. § 77-1736.04(4) to (6)(Supp. 1991).
122. Id.
lief. However, the real issue is whether the court will interpret Beam to require the retroactive application of MAPCO so “similarly situated taxpayers will be treated the same.”

IV. CONCLUSION

The Nebraska property tax structure is in desperate need of attention. After MAPCO, there is no hiding behind the 4-R Act; the problem is clearly with the Nebraska Supreme Court’s strict interpretation of the uniformity clause. The court’s reading of article VIII, section 1 contradicts the legislature’s ability to classify and exempt personal property as provided in section 2 of article VIII. The court’s reasoning does more than declare unconstitutional the personal property tax exemptions for: agricultural income-producing machinery and equipment; business inventory; feed, fertilizer and farm inventory; and grain, seed, livestock, poultry, fish, honey bees and furbearing animals. The court’s reasoning also identifies every exemption for tangible property in Nebraska as free game.

In order for the Nebraska Legislature to reclaim its power to determine the fiscal policy of the state, the uniformity clause must be repealed. The state need not worry about the legislature being held hostage by influential special interest groups because any classification that the legislature defines must be based on a substantial inherent difference and pass the scrutiny of the Nebraska Supreme Court’s interpretation of the Fourteenth Amendment. Thus, the legislature will gain some flexibility in its ability to respond to the changing needs of the state, but will not be able to escape entirely from the court’s strict judgment.

Tami L. Johnson, '93