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Special Legislation: The Nebraska Supreme Court Creates New Tests To Confuse an Old Issue:

TABLE OF CONTENTS

I. Introduction ............................................. 343
II. Background ................................................ 345
III. Analysis of *Haman v. Marsh* .............................. 348
    A. Unreasonable Classification ........................... 348
       1. Previous Tests for Valid Classifications .......... 349
       2. The Test in *Haman* ................................ 350
    B. Closed Class ........................................... 357
IV. Conclusion ................................................ 361

I. INTRODUCTION

In March 1991, the Nebraska Supreme Court declared legislation\(^1\) aimed at reimbursing the long-suffering depositors of Nebraska's failed industrial savings and investment companies unconstitutional. The court in *Haman v. Marsh*\(^2\) held that the legislation violated Nebraska's prohibition against special legislation.\(^3\) The court ruled the legislation unconstitutional on three grounds. First, the court held that the legislation created an "unreasonable" classification for legislative purposes and was therefore, special legislation.\(^4\) Second, the

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3. NEB. CONST. art. III, § 18 provides in pertinent part: "The Legislature shall not pass local or special laws in any of the following cases, . . . granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; . . . in all other cases where a general law can be made applicable, no special law shall be enacted."
4. The exact line between special and general laws is difficult to distinguish but the court has attempted to articulate the distinction by stating:
   An act is general, and not special or local, if it operates alike on all per-
court cited the legislation’s “closed” classification as an additional reason the legislation was considered “special.” Finally, the court held that the legislation violated the constitutional prohibition against pledging the credit of the state in support of a private corporation.5

On April 2, 1990, the Governor signed L.B. 272A. The plaintiff, Gayle Haman, a taxpayer and resident of Nebraska commenced the action on April 19, 1990 on behalf of herself and all others similarly situated, naming the state officials empowered to enact the provisions of L.B. 272A as defendants.6

Haman asserted four different grounds to support her claim that L.B. 272A was unconstitutional. First, Haman asserted that the state had no legal obligation to repay the depositors and absent such an obligation, L.B. 272A created an invalid classification of people who would benefit by the legislation, thus, constituting special legislation.7 Second, Haman claimed that legislation which operates upon a class whose membership cannot expand or is fixed creates an unreasonable classification and is special legislation.8 Third, Haman asserted that L.B. 272A had no regulatory function rationally related to the welfare of the public and was, therefore, not a justified exercise of the state’s police power.9 Finally, Haman claimed that L.B. 272A unconstitutionally used the state’s credit to aid a private corporation.10

5. NEB. CONST. art. XIII, § 3 provides in pertinent part: “The credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . .” This note will not analyze the court’s decision regarding the issue of public credit to corporations. See Neb. Op. Att’y Gen. No. 91027 (1991). This opinion details the constitutionality of various restitution options for the depositors in the failed industrials following the decision in Haman.

6. The defendants, in their official capacities, [hereinafter state] named in the action were Frank Marsh, former Treasurer of the State of Nebraska; Deb Thomas, Director of Administrative Services for the State of Nebraska; and Cynthia Milligan, Director of the Nebraska Department of Banking and Finance. Briefs were also submitted by Security Investment Company, as intervenor and successor in interest to and assignee of State Security Investment Co., and the receiver of Commonwealth as amicus curiae, in support of L.B. 272A.


9. Id. at 22-28.

The state claimed that the legislation was a legitimate use of police power and was supported by a "moral obligation" of the state to repay the depositors. The state further contended that the court could not rule the classification unreasonable because it was rationally related to a public purpose as declared by the Legislature and was not permanently closed.

In reaching a decision, the court outlined what it determined to be the proper test for legislative classifications challenged as special legislation. Unfortunately, this test is inconsistent with prior decisions and confusing in its application. Additionally, the court has given a new meaning as to what constitutes a closed or frozen classification; but by redefining closed classifications, the court has opened the door to challenges of classifications found constitutional in prior decisions.

This note will address the questions of what constitutes unreasonable and frozen classifications and criticizes the rationale used by the court to reach its decision. The issues of what constitutes a "moral obligation" and whether the court improperly substituted its own views for those of the Legislature are issues beyond the scope of this note.

II. BACKGROUND

To understand the issues in Haman requires a working knowledge of the history surrounding Nebraska's failed industrial savings and investment companies, as well as the legislative history of the Nebraska Depository Institution Guaranty Corporation (NDIGC).

In 1976, the Nebraska Legislature created the Nebraska Depository Institution Guaranty Corporation as a "private corporation" to insure deposits in Nebraska's industrial savings and investment companies. The Nebraska Department of Banking and Finance had the responsibility of approving NDIGC plans and overseeing the financial

12. Id.
14. NEB. REV. STAT. § 8-401 (1987). An industrial loan and investment company means any corporation incorporated under the laws of Nebraska and which held a certificate of approval from the Department of Banking and Finance as an installment investment company on May 23, 1941.
15. See Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990). In Weimer, the court determined that the NDIGC was a private corporation, not an agency of the state, and therefore, was not shielded from tort liability.
16. NEB. REV. STAT. §§ 21-17,128 to 21-17,145 (Reissue 1987). The NDIGC was initially the Nebraska Cooperative Credit Union Guaranty Corporation. L.B. 848
condition of member institutions. The deposits and savings of any depositor belonging to a member institution would be protected or guaranteed up to amounts established by the corporation. Membership in the corporation was limited to depository institutions chartered and existing under Nebraska laws.

Under the statutory scheme, the NDIGC would be funded by membership fees paid by the participating associations and “[no] state funds of any kind shall be allocated or paid to the corporation.” Individual accounts were initially insured for amounts up to ten thousand dollars, an amount later raised to thirty thousand dollars. A further requirement was that all member institutions display, at their place of business and in all advertisements, a sign indicating that deposits were insured by the corporation.

On November 1, 1983, Commonwealth Savings Company was closed by order of the Nebraska Department of Banking and Finance. The Lancaster County district court declared Commonwealth insolvent on November 8, 1983 and appointed the Department as receiver and liquidating agent.

Prior to the Department’s approval of Commonwealth as a member of the NDIGC, the Department had been aware of the precarious financial position of Commonwealth, but had failed to undertake any corrective measures or report Commonwealth’s insolvency to other industrial companies.


17. The Nebraska Department of Banking and Finance [hereinafter Department] had the power to approve proposed plans of operation for the corporation and to promulgate rules necessary to implement the plan. NEB. REV. STAT. § 21-17,136 (1987).


19. The definition of depository institutions includes industrial loan and investment companies. NEB. REV. STAT. § 21-17,131(1)(1987).


22. NEB. REV. STAT. § 21-17,135(4)(1987).

23. NEB. REV. STAT. § 21-17,128(1)(1987).


28. See Security Inv. Co. v. State, 231 Neb. 536, 437 N.W.2d 439 (1989). The Department was aware of insider loans prior to approving Commonwealth’s membership into the NDIGC. Four examinations by the Department and a Federal
The Department, acting as receiver, filed two tort claims with the State Claims Board pursuant to the State Tort Claims Act. Both claims alleged that the negligent, wanton and fraudulent acts of the State caused the depositors' losses. The outcome of those claims was an eight and one half million dollar ($8.5 million) settlement reached on September 26, 1985. As part of the settlement, the Department executed a release which waived any further legal claims against the state and its employees.

In addition to closing Commonwealth on November 1, 1983, the Department publicly ordered all industrials, solvent or insolvent, to refuse to allow depositors to withdraw funds until the depositors' certificates of indebtedness had matured. By forcing depositors to withdraw only upon maturity, the Department's order prevented reinvestment in any other industrial; thus, the assets of the industrials were continuously drained until they were forced to merge with other financial institutions or went bankrupt. Two industrials that were forced to protect themselves under federal bankruptcy statutes were American Savings Company, of Omaha, and State Securities Savings Company, based in Lincoln. Like the Commonwealth depositors, no one received full payment for their deposits.

On January 4, 1985, the NDIGC turned over all of its assets to the Commonwealth receiver and since that time, the NDIGC has had no assets. The total assets of the NDIGC were not nearly sufficient to satisfy the claims of the Commonwealth, American Savings, or State Securities depositors.

L.B. 272A was the Legislature's attempt at paying back the depositors of the failed industrials. Following the signing of the release by the Commonwealth receiver and the failure of subsequent lawsuits brought on the behalf of the American Savings and State Securities depositors, no legal obligation for repayment existed on the part of the state. Therefore, the Legislature found that principles of fairness required Nebraska to fulfill the thirty thousand dollar guaranty for

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Bureau of Investigation report alerted the Department of the unethical business practices and the unsound financial condition of Commonwealth. Id. at 540, 437 N.W.2d at 443.

31. Id. at 295, 455 N.W.2d at 152.
32. Id. at 301, 455 N.W.2d at 155. The Department had the right to make a settlement on behalf of the depositors pursuant to NEB. REV. STAT. §§ 8-199, 8-1,103, 81-8,223 (1987). See L.B. 1, 1985 Neb. Laws 61.
35. See supra note 32, and accompanying text.
each deposit. At the heart of L.B. 272A was the Legislature's finding that the acts of the state had "seriously impaired the confidence of the people of this state in the Legislature and in the enactments of the Legislature ...." These acts were: the Department's failure to take action against Commonwealth or its officers prior to its closing; the publication of the order prohibiting industrials from allowing depositors to remove certificates of indebtedness until maturity; the requirement that member institutions display notices that accounts were insured up to thirty thousand dollars by the NDIGC; and the fact that NDIGC had paid all its assets to the Commonwealth receiver and no depositor has been paid in full.

Declaring the "necessary public purpose" of the act to be the restoration of the public confidence in the Legislature and financial institutions organized pursuant to its acts, the Legislature set up a repayment scheme under which the Department would distribute money appropriated by the Legislature to the depositors until the thirty thousand dollar guaranty was met. To achieve that end, the Legislature appropriated sixteen million nine hundred thousand dollars ($16,900,000) from the General Fund for the year July 1, 1990 to June 30, 1990, and the same for the following year.

It was against this backdrop that Haman commenced her successful challenge to the constitutionality of L.B. 272A and against which the court fashioned its decision.

III. ANALYSIS OF HAMAN V. MARSH

The court offered two ways in which legislative acts can violate the special legislation prohibition. First, the Legislature can create an arbitrary and unreasonable method of classification. Second, the Legislature may create a permanently closed, or frozen class.

A. Unreasonable Classification

The first prong of the court's attack on L.B. 272A's constitutionality was on the Legislature's designation of persons comprising a proper class for purposes of the legislation. The court held the classification of depositors of failed industrials insured by the NDIGC unrea-
sonable and therefore, the legislation was unconstitutional special legislation.

1. Previous Tests for Valid Classifications

The Legislature has the power to classify objects for purposes of legislation. Historically, the court has given the Legislature wide discretion in determining what is an appropriate classification. However, the Legislature must adhere to certain rules of classification or the classification will be held invalid.

To avoid enacting special legislation, the Legislature must base its classification upon some distinction between the group of persons or objects classified and other persons or objects similarly situated. Mandating that distinction exists between the class selected and others upholds the purpose for the requirement — the prevention of favoritism by the Legislature. It is generally settled that the Legislature has the power to classify for legislative purposes if the people or objects classified bear a reasonable or substantial distinction from others similarly situated, and the legislation operates equally upon all members of the classification.

Additionally, the classification cannot be "unreasonable"; that is, the classification must be related to a legitimate purpose of the legislation. It is this rule against unreasonableness and the search for the proper "test" for class validity that has made the area of special legislation a semantic Gordian knot.

Nebraska case law disgorges a plethora of terms and phrases describing the proper relationship between a purpose of an act and the attendant classification. One line of reasoning states that an act is not

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45. NEB. CONST. art. III, § 18.
51. State ex rel. Douglas v. Marsh, 207 Neb. 598, 609, 300 N.W.2d 181, 187 (1980). "The test is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act." Id.
special legislation if the classification "has a basis in reason, and is not purely arbitrary." Additionally, a classification "must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation which renders appropriate its enactment." A classification will not be "interfered with by the courts if real and substantial differences exist which afford a rational basis for classification." To be valid a classification "must be based upon some reason of public policy, . . . that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." A classification is proper if it has some reasonable distinction from other subjects of a like general character, and the distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The differences between the proper relationships are not clear. How much more stringent a requirement is a "reasonable" relationship than a "rational basis"? Does "naturally suggest" mean the same thing as "render appropriate"? Adding to the confusion is the tendency of the court to apply more than one of the tests in a single case.

What is important is understanding the two step approach the court has historically taken. First, the class selected must have some "reasonable" or "substantial" distinction from others similarly situated. Second, the distinction must provide a "rational basis" for or a "reasonable relation" to the legislation.

2. The Test in Haman

In Haman, the state asserted the validity of L.B.272A because the Legislature had a "rational basis" for treating depositors of failed industrials who were members of the NDIGC as a class. The state contended that a classification is valid if "the Legislature has a rational basis for establishing the classification or there is a valid public policy reason for establishing the legislative classification." The court refused to accept this proposition claiming that a valid public policy does not by itself make a classification valid. Haman v. Marsh, 237 Neb. at 711-12, 467 N.W.2d at 846. The court was clearly correct in this determination. See Killenbeck, supra note 13, at 111-14.

58. See Brief of Defendants, supra note 11, at 16. The state contended that a classification is valid if "the Legislature has a rational basis for establishing the classification or there is a valid public policy reason for establishing the legislative classification." The court refused to accept this proposition claiming that a valid public policy does not by itself make a classification valid. Haman v. Marsh, 237 Neb. at 711-12, 467 N.W.2d at 846. The court was clearly correct in this determination. See Killenbeck, supra note 13, at 111-14.
subject of the legislation which renders appropriate its enactment.”

Relying upon the Legislature's factual findings the state argued that L.B. 272A was enacted in response to "broken promises, misrepresentations, deception, negligence, poor judgment, and turning a blind eye to an unpleasant reality" and to "real differences surrounding the members of the class affected and those persons outside the class." While conceding that the accuracy of the legislative findings could not be verified, the state claimed that such verification was unnecessary so long as the legislative history showed the discussions and findings that resulted when the legislature created a classification which it determined was rational based. In essence, the state based its argument on the Legislature's "right" to declare a public purpose and to designate a class of persons "rationally" related to the legislation enacted to fulfill that public purpose.

The court asserted that the state had relied upon an erroneous test. According to the court, even though equal protection and the prohibition against special legislation both emanate from article III, § 18 of the Nebraska Constitution, the tests for determining the validity of classifications challenged under the respective doctrines are "clearly" not the same. According to the court, the "rational basis" test relied on by the state is only proper when classifications are challenged under the equal protection doctrine. For determining the validity of classifications made under the "narrower" special

59. Brief of Defendants, supra note 11, at 17.
60. Id.
61. Id. at 17-18.
62. A pivotal issue in most special legislation litigation is when can the court reverse the Legislature's determination of what constitutes a legitimate public purpose. As a general rule, the Legislature, as duly elected representatives of the people, decides what is a public purpose. But when the court disagrees with the Legislature's finding of public purpose, the court may find a method to substitute its own opinion for that of the Legislature. See infra notes 106-07, and accompanying text.
63. See Neb. Op. Att'y Gen. No. 90002 (1990). The Attorney General determined that the public purpose, as set forth in the Legislature's findings and statement of intent in L.B. 272A, was to restore public confidence in the Legislature and the financial institutions of the state. L.B. 272A was deemed to be an appropriate legislative response to the circumstances surrounding the failed institutions because restoring public confidence in the integrity and credibility of government actions works to further the welfare and stability of the state.
65. Id.
66. Id. Under equal protection, a classification that does not involve a suspect class or fundamental right is tested for a rational basis. If a rational relationship exists between a legitimate state interest and the statutory means selected by the Legislature to fulfill the interest, then the classification is valid. See Distinctive Printing & Packaging Co. v Cox, 232 Neb. 846, 443 N.W.2d 565 (1989); Drennen v. Drennen, 229 Neb. 204, 426 N.W.2d 252 (1988); Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106 (1979).
67. The court states that the special legislation prohibition is "narrower" in the sense
legislation prohibition, a more stringent test is required.68

Under the more stringent test for the validity of statutes challenged as special legislation, the statute will be upheld only if it bears a "reasonable" and "substantial relation" to the purpose of the legislation.69 The court cites Benderson Development Co. v. Sciortino70 to support this proposition. In Benderson, the court found Virginia's Sunday-closing laws71 constitutional under the Equal Protection clause of the Fourteenth Amendment72 but unconstitutional under the special legislation prohibitions of the Virginia Constitution.73 The Benderson court distinguished the test under the Equal Protection clause of the Fourteenth Amendment74 from the special legislation test on the rationale that the Equal Protection clause has historically deferred to state laws making economic classifications,75 while the prohibition against special legislation, passed to correct a perception that the General Assembly was swayed by "moneyed interests," is "aimed squarely" at preventing economic favoritism.76

It is interesting that even though the applicable test had been "succinctly" set out by prior case law,77 the court felt compelled to search Virginia case law. The natural question to ask is why did the court not use the "succinct" Nebraska case law to articulate the proper test? The probable explanation for the court citing Benderson is that prior decisions by the Nebraska Supreme Court do not recognize the need for a separate test and would not have granted the court the degree of judicial scrutiny it desired.

69. Id. at 713-14, 467 N.W.2d at 847.
71. Virginia had a statutory scheme wherein business establishments not providing "necessary" goods or services were not allowed to remain open on Sundays. The avowed purpose of the statute was to provide Virginians with a common day of rest "to prevent the physical and moral debasement" of uninterrupted work. See Mandell v. Haddon, 121 S.E.2d 516, 524 (Va. 1961). At the time of the litigation in Benderson, only twenty percent of the state's employed persons were covered by the statute. Therefore, the statute was found not to be reasonably and substantially related to the avowed purpose of creating a common day of rest.
73. VIRGINIA CONST. art. IV, §§ 14, 15.
74. U.S. CONST. amend. XIV, § 1.
75. Benderson Dev. Co. v. Sciortino, 372 S.E.2d 751, 756 (Va. 1988). The court asserted that because the Fourteenth Amendment was enacted during the period of Reconstruction to prevent racism the court has been "markedly" deferential to economic classifications in state laws.
76. Id.
In State ex rel. Douglas v. Marsh,78 a case cited by both the state79 and the court,80 the court ruled legislation creating a fund to reimburse governmental subdivisions in several counties for lost revenue due to property tax exemptions was special legislation.81 The court stated: "While the question of classification is one primarily for the Legislature and in the exercise of this power the Legislature possesses a wide discretion, there must, nevertheless, be some rational basis for the classification."82 In State ex rel. Douglas v. Gradwohl,83 to determine that a statute, providing that persons convicted of exceeding the speed limit by not more than ten miles an hour on interstate highways, was exempt from the normal requirement of paying court costs was not special legislation, the court stated: "The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification."84 Likewise, in State ex rel. Halloran v. Hawes,85 the court ruled a statute based upon differing classifications of school districts constitutional.86 The court used the rational basis test to determine that the statute did not constitute special legislation.87 If the "rational basis" test is, as the court asserts, only used for classifications challenged under the equal protection doctrine, then the court has consistently confused the tests. It is, therefore, rather

79. See Brief of Defendants supra note 11, at 14.
80. See Haman v. Marsh, 237 Neb. 699, 711, 713, 467 N.W.2d 835, 846-47 (1991). The court attempted to show that reasonable and substantial circumstances were required for a classification to be valid. What the court omitted from its cite was any mention of the test requiring a "rational basis" and "public policy" for the classification to be valid. See also Killenbeck supra note 13, at 25. (Killenbeck claims that the omission was due either to seriously defective assistance from the judicial clerks or a mistaken assumption that no one would read the briefs).
81. L.B. 882, 1980 Neb. Laws 962. The legislation was intended to remedy problems encountered when Nebraska's Constitution was amended to allow the Legislature to classify personal property and allow tax exemptions based on the classifications. See Neb. Const. art. VIII, § 2. L.B. 882 was to provide money appropriated by the Legislature to the counties losing tax revenues due to the exemptions. The problem with L.B. 882 was that the appropriated monies were based on a county's status as of 1979-1980 with no provision for a change in status due to an increase or decrease in the amount of personal property exempted. The court held that L.B. 882 was a "frozen classification" and had no "rational basis." State ex rel. Douglas v. Marsh, 207 Neb. 598, 607, 300 N.W.2d 181, 186-87 (1980).
84. Id. at 749, 235 N.W.2d at 858 (citing Fougeron v. County of Seward, 174 Neb. 753, 119 N.W.2d 298)(emphasis added).
disingenuous for the court to claim that the state, having relied upon prior decisions, used an "erroneous test."

If one accepts the Haman court's assertion that the tests are clearly different, then one would expect the Nebraska court to have been careful in distinguishing the proper tests. However, prior case decisions have never been based on a distinction between the tests for equal protection and special legislation classifications.

In *State v. Edmunds* the court determined the constitutionality of the motor vehicle inspection statute. The court never specifically stated whether the constitutional challenge came under the equal protection doctrine or the special legislation provision, although a close reading would lead one to believe that the court was addressing the issue of special legislation. In holding the statute unconstitutional, the court stated that there was no "rational basis" to uphold the exemptions allowed under the statute. Apparently, the *Edmunds* court found it unnecessary to distinguish between equal protection and special legislation challenges because either challenge would require the same rational basis test.

In *Distinctive Printing & Packaging Co. v. Cox*, the court found a statute constitutional which limited the liability of parents whose children cause intentional personal injury but did not limit the liability of parents whose children inflict intentional property damage was constitutional. The court stated: "Thus article III, § 18, concerns itself with disparate treatment in much the same manner as does the language of U.S. Const. amend. XIV, which prohibits a state from making or enforcing any law which denies any person within its jurisdiction 'the equal protection of the laws'." The court then applied the "rational basis" test, determining that the statute did not violate either the equal protection clause of the Fourteenth Amendment or the prohibition against special legislation contained in article III, § 18 of the

88. 211 Neb. 380, 318 N.W.2d 859 (1982).
89. NEB. REV. STAT. § 60-1701 (repealed 1981).
90. The court refers to the prohibition against special laws but never mentions equal protection. In reaching its decision, the court states that the only reason for allowing the exemptions under the statute was the special interest of the owners of the exempted vehicles. *State v. Edmunds*, 211 Neb. 380, 387-88, 318 N.W.2d 859, 863 (1982).
91. *Id.* at 386-87, 318 N.W.2d 859, 860-62. The statute required that vehicles weighing over five thousand pounds be inspected once a year with the exception of mopeds, trailers weighing less than five thousand pounds, and farm implements. The court determined that the exempted vehicles were at least as dangerous as the vehicles requiring inspection and could find no rational basis for the exemptions. *Id.*
Nebraska Constitution. 95

The Nebraska Supreme Court's interpretation of Article III, section 18 in Distinctive cannot be reconciled with the Virginia Supreme Court's interpretation of Virginia's special legislation provision in Benderson. Yet, in Haman, the Nebraska Supreme Court adopted the Benderson test and, in so doing, implicitly adopted the Virginia court's rationale. 96 The Haman court, in adopting the Benderson test, has put itself at odds with the Distinctive court which, like the Edmunds court, found it unnecessary to distinguish between equal protection and special legislation challenges. It appears that the Haman court, by confusion or convenience, has adopted a test that has no basis in prior Nebraska case law and which relies on a distinction that the Nebraska Supreme Court has never articulated.

Instead of directly addressing the issue of conflicting case law, the court chose to exculpate itself by stating: "There has obviously been a judicial tendency to blur the difference between the two tests, leading to the present confusion." 97 The court then cites City of Dover v. Imperial Casualty & Indemnity Co. 98 to prove its point. It is unclear whether the court intended to spread the blame for the confusion to other jurisdictions, and therefore, deflect some of the blame from itself. What is clear is that, by citing Dover, the court proved itself quite capable of blurring its own articulated tests. Even the most tortured reading of Dover will not support the claim that the court blurred the tests for classifications challenged under equal protection and special legislation because nowhere in Dover does the court address the issue of special legislation. This lack of distinction between the two tests is not surprising because New Hampshire is one of only ten states to have no prohibition against special legislation. 99 Therefore, Dover is of no help in determining the proper standard in judging special legislation.

Readers of the Haman opinion and prior Nebraska decisions will be confused by the tension existing between Haman and prior decisions. This tension could have been remedied had the Haman court acknowledged that it was expressly disavowing the tests used in prior decisions and adopting the rationale behind the Benderson rule. However, the Haman court chose to simply ignore prior tests from its consideration. The lesson to be learned is that relying upon Nebraska case law will not guarantee success in special legislation challenges. The state learned this lesson the hard way when it received the court's

95. Id. at 853, 443 N.W.2d at 572.
96. Supra notes 71-76, and accompanying text.
99. See SINGER supra note 47, § 40.01 n. 4 and accompanying text.
cynical scolding that "ignorance of the law is no excuse and that everyone is presumed to know the law." If it is true that ignorance of the law is no excuse, then the court is as guilty as the state.

An important question which arises is how the test is to be applied? The court does not give much instruction in administering the test. It is not clear what elements need to be "reasonably and substantially related." The court asked: "[W]hether payments to a class of failed industrial company depositors bear a reasonable and substantial relation to instilling confidence in the Legislature, its enactments, and the state banking system[?]" Therefore, it is likely that the court meant that the legislative means chosen — payments to the class of depositors — must be reasonably and substantially related to the legislative purpose — instilling confidence. The court then posed, but did not answer, the question of whether a moral obligation provides reasonable and substantial support for the classification. The court is apparently saying that the underlying obligation must be reasonably and substantially related to the classification. And finally, the court determined that the classification must be reasonably and substantially related to the object sought to be accomplished by the legislation. It appears that the means (payment to a class of depositors), purpose (instilling confidence), underlying obligation (moral), class (depositors of failed industrials), and object sought to be accomplished, must all be reasonably and substantially related. If the court retains the Haman test, it will need to refine the test’s requirements. However, until such refinements are made, the requirement of reasonably and substantially related remains unduly vague.

If the court intends that the legislative purpose must be reasonably and substantially related to both the legislative means and the classification, the court has definitely changed the rules. As noted, previous decisions have required that the classification have reasonable and substantial distinctions that provide a rational basis for classification; but nowhere in prior Nebraska case law is there a requirement that the class must be reasonably and substantially related to the legislative purpose. This enhanced level of judicial scrutiny is not at all

101. Id. at 714, 467 N.W.2d at 847.
102. The court found no moral obligation. The court determined that a moral obligation only "attaches" when a law is passed notifying and warning taxpayers and citizens that the state will undertake the burden of damages. Id. (citing Wakeley v. Douglas County, 109 Neb. 396, 400, 191 N.W. 337, 339 (1922)). The issue of whether or not a moral obligation existed in L.B. 272A is beyond the scope of this note. See also Killenbeck, supra note 13, at 73-74. (Killenbeck asserts that the court adopted a very narrow view of the holding in Wakeley, and that a moral obligation existed).
104. Id. at 715, 467 N.W.2d at 848.
105. Supra note 54, and accompanying text.
consistent with prior case law or the general principle of allowing the Legislature wide discretion in making classifications. By adopting an enhanced level of scrutiny the court has limited the Legislature's discretion and has unilaterally granted unto itself a degree of discretion to use for its own ends. If the Legislature is required to conform to this enhanced scrutiny, then the Legislature's legitimate use of the state police power may be inhibited by the court's apparent willingness to substitute its own judgment for that of the Legislature.

B. Closed Class

The second attack on the constitutionality of L.B. 272A was the court's determination that the Legislature had created a "frozen class." The court began its analysis by reciting the rule from City of Scottsbluff v. Tiemann where that court announced that a classification limiting the application of a law to a present condition and leaving no room for future growth of the class, violates the prohibition against special legislation. With this general rule in mind, to which both Haman and the state agreed, the court shifted its focus to the parties' arguments.

Haman, having the burden of proof, argued that L.B. 272A created a closed class because only through a set of highly unlikely events could any party ever enter the class. The state argued that the act's plain wording was open-ended and a possibility for future growth in

107. The court attacked the Legislature's use of the police power by attacking the public purpose of L.B. 272A. "It appears the opposite result of that intended by the Legislature in enacting L.B. 272A would occur. The act would instill fear rather than confidence, ... The result could be either economic bankruptcy or economic suffocation." Haman v. Marsh, 237 Neb. 699, 715, 467 N.W.2d 836, 848 (1991). Apparently the court is willing to substitute its own views for those of the legislature and thereby exercise a form of judicial legislation.
108. 185 Neb. 256, 175 N.W.2d 74 (1970). The court stated:
   The rule appears to be settled by an almost unbroken line of decisions stating that a classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted.
   Id. at 262, 175 N.W.2d at 79 (quoting State ex rel. Conkling v. Kelso, 92 Neb. 628, 139 N.W. 226 (1912)).
111. Haman outlined what she deemed to be a highly unlikely, or impossible, series of events that would need to occur before a party could enter the class. First, new industrials would need to be chartered. Second, the new industrials would need to become members of the NDIGC. Third, these industrials would have to go into bankruptcy or receivership. And fourth, the depositors of these industrials would need to suffer deposit losses. Reply Brief of Plaintiff, supra note 10, at 14.
112. L.B. 272A refers generally to all depositors of failed member institutions of the
the class existed; therefore, the class was not closed.\textsuperscript{113}

In determining if the class was closed, the court was not content to limit itself to examining the face of the legislation, but was intent on considering the act's application.\textsuperscript{114} Such an intent led the court to proclaim a rule — a court must consider the "actual probability" that others might enter the class. "If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment."\textsuperscript{115} In applying this rule, the court found the state could not rely on the form of the act, and the state could not force Haman to disprove every possible method of a party entering the class. The court went on to find that except for a highly improbable series of events including (i) new industrials being chartered, (ii) new industrials joining the NDIGC, (iii) new industrials going bankrupt, and (iv) depositors of those industrials incurring losses, the class was closed.\textsuperscript{116}

On its face, the court's rule that entry into a class must not be only a theoretical possibility, but must be reasonably probable, has a certain appeal. The rule appears to favor certainty over mere possibility, and appears to draw a bright line for legislators. In its own words, the court will not "accept artful draftsmanship over reality."\textsuperscript{117} However, in applying its rule, the court may not find the results so appealing.

The Haman court's reasonable probability test is a departure from a previously articulated test. In School District No. 46 v. City of Bellevue,\textsuperscript{118} the plaintiff challenged the constitutionality of a statute permitting transfer of territory from one class III school district to another class III school district, claiming the statute was special legislation.\textsuperscript{119} The court articulated the test for lawful classifications as "not whether a particular entity may exercise a right in a given situation but, rather, whether the class is so constructed that other entities may exercise rights and be a part of the class if they acquire the necessary characteristics and meet the necessary prerequisites."\textsuperscript{120} Under this line of inquiry, the emphasis is not on the individual seeking entry into the class but on whether that individual or entity will be provided the benefit of the legislation once it acquires the needed characteris-

\textsuperscript{113} Brief of Defendants, \textit{supra} note 11, at 43, 46.
\textsuperscript{115} Id. at 717-18, 467 N.W.2d at 849 (emphasis added).
\textsuperscript{116} Id. at 716, 467 N.W.2d at 848-49.
\textsuperscript{117} Id. at 718, 467 N.W.2d at 849.
\textsuperscript{118} 224 Neb. 543, 400 N.W.2d 229 (1987).
\textsuperscript{119} \textit{NEB. REV. STAT.} § 79-801(4)(1987). The plaintiff alleged that the transfer of property out of his district increased his financial burden and benefitted taxpayers in the other district.
\textsuperscript{120} School Dist. No. 46 v. City of Bellevue, 224 Neb. 543, 400 N.W.2d 229, 234 (1987).
tics. Therefore, the reasonable probability of entrance into the class is not a factor to consider when determining the lawfulness of the classification.

The court relied on several Nebraska cases to support its ruling. In *Axberg v. City of Lincoln*, the court held unconstitutional a statute requiring cities of the first class having a paid fire department to provide pensions for all firemen except those cities that had heretofore adopted a home rule charter. The classification in *Axberg* divided those cities that had adopted home rule charters before the act's passage from those cities that had not. The exempted cities were a frozen class and the division of the classification along historical lines violated the uniformity requirement of article III, section 18 of the Nebraska Constitution.

A similar situation arose in *City of Scottsbluff* where a classification of cities based on the 1960 census was held unconstitutional because there was no method by which any other city could ever join the class.

The lesson to be learned from *Axberg* and *City of Scottsbluff* is that if the court determines that an act makes distinctions based on past events that permanently close the class, the classification will be ruled invalid because the act fails to operate uniformly. The question of reasonable probability was not at issue in either *Axberg* or *City of Scottsbluff* because both classes were permanently closed with no chance of additional members.

The court relied on *Republic Investment Fund I v. Town Of Surprise*, an Arizona case dealing with the constitutionality of Arizona's deannexation laws. *Surprise* does support the proposition that if it is not probable a city can join the class, the classification will be held invalid. However, *Surprise* also states that a law may be general and apply to only one person if that person is the only member of the legitimate class. Therefore, a reasonable application of *Surprise* to L.B. 272A could support the idea that no other members need ever enter the class if, in fact, the Legislature has already brought all members into the class. Therefore, it appears that *Surprise* is not helpful in explaining the court's rationale.

The difficulty with the court's rationale in *Haman* appears most clearly when applied to cases previously decided by the court. For example, in *Gossman v. State Employees Retirement System*, the

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121. *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942).
122. *Id.* at 64, 2 N.W.2d at 617.
124. 800 P.2d 1251 (Ariz. 1990). It is interesting to note that once again the court found it necessary to go to another jurisdiction to determine the proper test.
125. *Id.* at 1259.
126. *Id.* at 1258.
127. 177 Neb. 326, 129 N.W.2d 97 (1964).
plaintiff claimed that a one percent charge on his monthly salary to fund a prior service class of employees was special legislation because the class of prior service employees was permanently closed. The court found that the class was valid and furthered a valid public policy. However, if the court in Gossman was forced to labor under the "reasonably probable" test of Haman, the outcome would have been different. Under this rule, the class would be closed because it was not reasonably probable that any person could join the prior service class. Indeed, it would be impossible to do so.

It is difficult to determine what the court means by "reasonably probable." The court does not intimate whether a timeframe for accomplishing attainment is required, or whether it is sufficient that at some point in the future it is reasonably probable that another entity will join the class. This distinction can be brought into focus by looking at Dwyer v. Omaha-Douglas Public Building Commission. In Dwyer, the plaintiff contested the constitutionality of a statute that allowed cities of the metropolitan class, those with a population exceeding three hundred thousand, to elect a commission that could impose taxes to acquire property. Because Omaha was the only city of the metropolitan class in Nebraska, the plaintiff argued that the class was closed. The court held that the class was open, but took cognizance of the fact that the next largest city, Lincoln, had a population of one hundred fifty-four thousand. It is unclear if the court would have found it was not only "theoretically" possible, but reasonably probable that Lincoln would join the metropolitan class when Dwyer was decided in 1972. The court leaves unanswered the question of how long a timeframe is to be considered when determining if it is reasonably probable that any city will join the metropolitan class. If the possibility of other cities joining the metropolitan class is only theoretical, then the metropolitan class is an invalid classification. And, if that is the case, the Haman "reasonably probable" test calls into question the validity of any statute dealing specifically with cities of the metropolitan class and casts a shadow on the validity of any act creating a classification based on population.

There are additional problems with the court’s requirement that there be a reasonable probability of new members being able to enter a class. If the court intends to use this standard in future challenges to legislative classifications, then the likelihood of such challenges is greatly increased: Plaintiffs will attempt to trump state public policy

128. The class of prior service employees included those who had been employed by the state prior to the retirement plan's effective date in 1964 and continuously since December 1, 1958. Id. at 329, 129 N.W.2d at 100.
129. Id. at 338, 129 N.W.2d at 105.
130. 188 Neb. 30, 195 N.W.2d 236 (1972).
131. Id. at 50, 195 N.W.2d at 248.
arguments underlying legislative classifications with assertions that entrance into the disputed class is only theoretical. In the end, the court will likely invalidate the classifications and undermine the Legislature's public policies.

It is not difficult to imagine the problems the Legislature will confront when drafting legislation that is intended to encompass a defined group. Consider the problems that will result from the Legislature declaring the need to regulate a previously unregulated industry a public purpose. If the Legislature attempts to grant a "Grandfather" exception to certain members of that industry based upon past performance, experience, differences in educational background, or other relevant factors, it will not be able to do so because the membership of the class to be "grandfathered" will be permanently closed. Hence, the Legislature's discretion will be limited. Or, as was the case in Gossman, suppose the Legislature decides that a valid public purpose exists for enacting legislation conveying to a defined group a tangible benefit such as pension or health benefits. Such an act, no matter how valid the public purpose, will not be valid if entrance into its class is only theoretical. In essence, the test limits the Legislature's discretion in making classifications for legitimate legislative purposes.

Due to the problems inherent in the court's "reasonable probability" test, it is likely that the court will be forced to retreat from this test. If the court retains this test, it is likely that the number of successful challenges to legislative classifications will increase. Ironically, when such successful challenges to legislative classifications increase, it is probable that the people's confidence in the Legislature and its enactments will be undermined, thereby bringing full circle the problem that the Legislature was attempting to cure by enacting L.B. 272A.

IV. CONCLUSION

Haman adds a new level of confusion to the issue of special legislation. First, in defining unreasonable classifications as those not reasonably and substantially related to the purpose of the legislation, the court has invoked a higher level of scrutiny than the rational basis test, but, by specious distinction, has ignored prior holdings. Second, in holding that classifications are closed unless it is reasonably probable that others may enter the disputed class, the court has displayed a lack of foresight that will, in all likelihood, require the court to rethink its position. In both instances the court has displayed a willingness to override the Legislature's discretion in making legislative classifications. By not applying tests gleaned from Nebraska case law to reach its decision, the court may have inadvertently signalled that precedent has little or no meaning in special legislation challenges. Unfortunately, there is no guarantee that the court, the next time it's
faced with a special legislation question, will not avail itself of yet another test to achieve the outcome it desires. Thus, by resorting to tests that contradict prior case law the court has given the appearance of adding a disingenuous flavor to its opinion, and has sent an unfortunate, and hopefully unintentional, signal that in the future an act will be declared special legislation at the whim of the court.

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