Challenging State Accounting Methods and Discriminatory Taxation Against Railroad Properties Under the 4-R Act

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I. INTRODUCTION

This comment analyzes issues and constitutionality concerns that arise from Section 11501(b)(1) of the Railroad Revitalization and Regulatory Reform Act,[1] ("4-R Act"). While the 4-R Act is an expansive federal law enacted to address a wide range of problems confronting the railroad industry,[2] the purpose of Section 11501(b)(1) is to prevent states from assessing "rail transportation property" at levels that "unreasonably burden and discriminate against interstate commerce."[3] The exact scope of Section 11501(b)(1), however, is not clear and has generated a split in the circuit courts of appeal on the issue of "whether a railroad may, in an action under [Section 11501(b)(1)], challenge in the district court the appropriateness of the accounting methods by which [a] State determined the railroad's value, or [whether it] is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied."[4]

Initially, railroads that brought claims under Section 11501(b)(1) would challenge the state's assessed value of the railroad property without challenging the state's accounting methods.[5] Usually, to accomplish this, a railroad would hire an appraiser who would use alternative accounting methods in order to demonstrate that the state's valuation of the railroad's property exceeded values permissible under Section 11501(b)(1).[6] Railroads would also compare the state's property assessment values to the true market value of "other commercial and industrial property in the same assessment jurisdiction"[7] to demonstrate that the state's valuation of the railroad's property exceeded Section 11501(b)(1) limits.[8] More recently, however, railroads have challenged state property assessments by using other accounting methods to show that a state's ac-

1. Tax Discrimination Against Rail Transportation Property, 49 U.S.C. § 11501 (1976) [hereinafter 4-R Act]. Section 11501(b) of the 4-R Act states,

> (b) The following acts *unreasonably burden and discriminate against interstate commerce*, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> *(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction* has to the true market value of the other commercial and industrial property.

(emphasis added).

2. Pub. L. No. 94-210, 90 Stat. 31 (codified at 45 U.S.C. § 801(1976)).

3. 4-R Act, *supra* note 1.

4. Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454, 463 (1987).

5. *Id.; See, e.g.*, Union Pac. R.R. v. State Tax Comm'n of Ut., 716 F. Supp. 543, 552-61 (D. Utah 1988).

6. *Union Pac. R.R.*, 716 F.Supp. at 547.

7. 4-R Act, *supra* note 1.

8. Rochester & S. R.R., Inc. v. New York State Bd. of Real Prop., 1999 WL 34796216 (W.D.N.Y. 1999).

counting method, rather than merely the assessed property valuation, violated the 4-R Act.[9] This comment analyzes whether Section 11501(b)(1) permits a railroad to use such alternative accounting methods to show that a state's accounting method is erroneous and should not be applied.

On December 11, 2006, the Eleventh Circuit published the most recent opinion on the issue of whether a railroad may challenge a state's accounting methods in an action brought under Section 11501(b)(1).[10] In *CSX Transportation Inc. v. State Board of Equalization*, the railroad argued that when a railroad is discriminated against by the state in the calculation of taxes assessed against its railroad properties, the railroad may challenge the validity of the state's accounting methods pursuant to Section 11501(b).[11] The Eleventh Circuit disagreed and found that while the railroad could challenge the state's assessment of the railroad property, it could not challenge the validity of the state's accounting method.[12] In other words, the court rejected the claim that Section 11501(b)(1) subjects the state's accounting methods to judicial scrutiny.[13] This case is just one of four cases that address the scope of 11501(b)(1). The Second and Ninth Circuits have held differently, concluding that railroads may challenge a state's tax accounting methods.[14]

The Supreme Court has not answered the issue of whether a railroad may challenge a state's accounting methods since the Court initially left the issue open in *Burlington N. R.R. Co. v. Oklahoma*.[15] In that case, the Court granted certiorari to review the Tenth Circuit's holding in *Burlington N. R.R. v. Lennen*[16] that the 4-R Act did "not permit the exercise of federal jurisdiction to review claims of state taxation based upon alleged overvaluation of railroad property, unless the railroad 'can make a strong showing of purposeful overvaluation with discriminatory intent.'"[17] Burlington N. R.R. refuted the Tenth's Circuit holding and argued that it could bring suit against Oklahoma because Oklahoma had overvalued its railroad property in violation of Section 11503, currently re-codified at 11501(b)(1).[18] In particular, Burlington N. R.R. argued that in order to

9. *See, e.g.*, CSX Transp., Inc. v. State Bd. of Equalization, 472 F.3d 1281, 1283-86 (11th Cir. 2006).

10. *Id.* at 1287.

11. *Id.*

12. *Id.* at 1288.

13. *Id.*

14. Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473 (2d Cir. 1995); Burlington N. R.R. v. Dep't of Revenue of Wash., 23 F.3d 239 (9th Cir. 1994).

15. Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454, 463, n.5 (1987).

16. Burlington N. R.R. v. Lennen, 715 F.2d 494, 498 (10th Cir. 1983), *overruled by* Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454 (1987).

17. *Burlington N. R.R. Co.*, 481 U.S. at 460 (quoting *Lennon*, 715 F.2d at 498 (internal quotation marks omitted)).

18. *Burlington N. R.R. Co.*, 481 U.S. at 462.

prove that Oklahoma was unreasonably burdening and discriminating against the railroad in interstate commerce, the railroad must be able to challenge Oklahoma's property assessment.[19] After reviewing the statutory language of Section 11501, the Court concluded that the section did provide for review of Burlington's claims and that to hold otherwise would be to disregard the legislative purpose of the section.[20] Moreover, the Court held that Burlington did not have to show "purposeful overvaluation with discriminatory intent" because the purpose of Section 11501 is to eliminate discrimination against railroads, regardless of whether discrimination was done with intent.[21] However, because Burlington did not challenge the validity of Oklahoma's accounting method, the scope of Section 11501(b)(1) remains unanswered.[22]

This comment explores the questions left open in *Burlington N. R.R. v. Oklahoma* and discusses the related circuit court opinions, relevant legislative history, and the provisions of Section 11501. First, this comment will provide a brief overview of the railroad industry as well as the problems that Section 11501(b) was designed to address. Included within this analysis is an inquiry into the constitutionality of Section 11501(b) and the manner in which states have challenged Section 11501(b)(1) when faced with suits by railroads. This comment then reviews various circuit court opinions that address challenges to a state's accounting methods, discusses the legislative history of Section 11501(b), evaluates principles of statutory interpretation, and outlines case law that the circuit courts relied on to justify their holdings. Finally, this comment evaluates the opinions of the circuit courts, the arguments put forth by the plaintiff railroads and defendant states, and the legislative history of the 4-R Act in an attempt to determine whether railroads may challenge state accounting methods in actions brought under Section 11501(b)(1).

Based on the discussion within this comment, it is the opinion of the author that Section 11501(b)(1) permits railroads to challenge the validity of state accounting and valuation methods. Although the language of the Section does not expressly provide that a state's accounting methods may be subject to suit, it is simply another way in which a railroad can show that it has been discriminated against in interstate commerce. Moreover, based on the following discussion of the constitutionality of Section 11501(b)(1) and the Section's legislative history, it is likely that Congress, by using its powers under Section 5 of the Fourteenth Amendment, impliedly permits railroads to subject states to suits under Section 11501.

19. *Id.*; 4-R Act, *supra* note 1.

20. *Burlington N. R.R. Co.*, 481 U.S. at 462.

21. *Id.* at 464.

22. *Id.* at 463, n.5.

II. The Development of the 4-R Act and The Provisions Under Attack

A. Congress Takes Action: The Passing of Section 11501(b)(1)

Railroads depend upon their track to move extensive amounts of goods across the country, the construction and maintenance of which often results in high costs to the railroad.[23] In return, the public depends on railroads to carry those goods across the country. The value of railroads is obviously immense but it is worth noting the benefits that the railroad industry offers the transportation industry. In 2000, for example, railroads reduced congestion on the United State's highway system by handling "28 percent of our nation's freight mile tonnage."[24] Had the same freight been moved by motor carriers, the traffic on the highway system would have increased by fifty percent.[25] Moreover, "[f]reight rail is a critical link in the nation's intermodal network, serving the trucking and maritime shipping industries, and supporting our global competitiveness."[26] The need for railroad carriers is not going to end any time soon. According to a study conducted by the Department of Transportation in 2003, "freight transportation will increase by nearly seventy percent between 2000 and 2020."[27] This translates into increased freight traffic for all modes of transportation, including railroads.[28] Therefore, in order to provide for the increasing freight traffic, railroads must be able to maintain and add to existing structures.

Burlington N. Santa Fe Corp., for example, is preparing for the increase in freight traffic by investing its capital in the maintenance of its rails, ties, bridges, and signals.[29] Unlike other modes of transportation, the railroad must spend "far more . . . on maintenance and renewal to ensure the reliability and safety of its physical plant."[30] In addition, Burlington N. Santa Fe Corp. is preparing for the increased freight traffic by extending its track lines. Just recently, the company added "about 33 miles of second main track [to its] line between Chicago and Los Angeles," and "19 miles of second main track on the coal line in Wyoming and Nebraska," with plans to add more track in the near future.[31] Yet the

23. Edward M. Emmett, *Battles in ocean, rail and international transportation*, Transp. & Distribution Nov. 1, 1997, at 1, 1.

24. Burlington Northern Santa Fe Corporation, 2006 Annual Report and Form 10-K, at 9, http://www.bnsf.com/investors/annualreports/2006annrpt.pdf.

25. *Id.*

26. *Id.*

27. *Id.* at 10.

28. *Id.*

29. *Id.* at 11.

30. Burlington Northern Santa Fe Corporation, 2006 Annual Report and Form 10-K, at 11.

31. *Id.* at 13-14.

cost of increasing lines and maintaining structures is immense. Over the past three years, Burlington N. Santa Fe Corp. spent $1.75 billion to increase track lines and in 2006 alone spent $1.2 billion to maintain its existing track.[32]

In order to ensure that railroads can maintain and improve their current structure, railroads must not only keep a successful business running but also be shielded from acts which would hinder the railroads' ability to prosper.[33] In passing Section 11501 of the 4-R Act, Congress chose to prohibit discriminatory taxation as a way to protect and maintain the railroad industry[34] because "railroads are easy prey for State and local tax assessors in that they are nonvoting, often nonresident, targets for local taxation, which cannot easily remove themselves from the locality."[35] In other words, state laws might not offer railroads the same protection from over-taxation because railroads do not have the same leverage as voters in the state, and because railroads are unable to move out of the state due to the amount of tracks they have invested on their properties.[36] Moreover, when Congress passed Section 11501 in 1976, proof of the then-prevalent discriminatory taxation was the fact that railroads were being over-taxed by fifty million dollars per year.[37] While today this figure seems relatively small compared to the amount that railroads are spending on maintenance and construction of existing structures, current suits under Section 11501 allege that states have over-valued railroad properties in the billion dollar range.[38] For example, in *CSX Transp. Inc.*, the railroad alleged that the state had overvalued its property approximately $2 billion above the true market values of other commercial and industrial properties in violation of Section 11501(b)(1).[39] In *CSX Transp. Inc.*, the result of overvaluing the railroad's property could mean that one railroad alone was overtaxed in the $100 million range.[40]

Therefore, because railroads are potentially being overtaxed in such significant amounts, it is likely that the funds that could be spent on maintenance or construction of tracks are diverted to other uses in the state.[41] With the limited amount of track in the country and the overwhelming need to transport goods,[42] the federal government has an important inter-

32. *Id.* at 11-13.
33. Pub. L. No. 94-210, § 2718, 90 Stat. 31 (codified at 45 U.S.C. § 11501 (1976)).
34. *Burlington N. R.R.*, 481 U.S. at 457.
35. Dep't of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332, 336 (1994).
36. *Id.*
37. *Id.*
38. *See, e.g., CSX Transp., Inc.*, 472 F.3d at 1285-86.
39. *Id.*
40. *Id.* at 1286.
41. Pub. L. No. 94-210, §2718, 90 Stat. 31 (codified at 45 U.S.C. § 11501 (1976)).
42. Burlington Northern Santa Fe Corporation, 2006 Annual Report and Form 10-K, at 1-8.

est in preserving the railroad industry from the potentially overreaching arms of state governments. Congress thus enacted Section 11501 of the 4-R Act as a means to protect railroads from discriminatory taxation by states.[43]

While the power to levy taxes is a power that is within the state's discretion and is considered an essential tool in carrying out vital state functions, it cannot be used to discriminate against the railroad industry.[44] Prior to the passing of the 4-R Act, railroads wishing to challenge a state's taxation method were generally limited to actions in state courts. If a railroad did bring a cause of action against a state in federal court, the railroad would first have to overcome a high bar set forth in the Tax Injunction Act.[45] Pursuant to the Tax Injunction Act, "district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[46] Absent any statute or exception to the contrary, the Tax Injunction Act requires that a railroad prove that no "plain, speedy and efficient remedy"[47] is available in state court. Thus, the purpose of the Tax Injunction Act is to "eliminate interference by federal courts in state internal economy and taxation matters."[48] However, when Congress passed the 4-R Act, it created an exception to the Tax Injunction Act. Subsection 11501(c) declares that the Tax Injunction Act will not bar suits from railroads challenging a state's alleged discriminatory taxation.[49] This is because the 4-R Act "contains its own jurisdictional predicate, and creates an explicit exception of the jurisdiction bar of [S]ection 1341."[50] This means that Section 11501(c) provides federal courts with jurisdiction to decide claims brought under the Section's provisions without having to overcome the Tax Injunction Act.

The question remains as to what type of relief Congress intended to provide railroads under Section 11501. The type of relief granted to the railroads in suits against states is a delicate issue. For example, if Congress were to provide for relief in the form of monetary damages, the state might arguably defeat the railroad on Eleventh Amendment

43. *Id.*

44. *CSX Transp., Inc.*, 472 F.3d at 1288 (citing Dows v. City of Chicago, 78 U.S. (11 Wall.) 108, 110 (1871)).

45. Tax Injunction Act, 28 U.S.C. §1341 (2006).

46. *Id.*

47. *Id.*

48. Arizona v. Atchison, Topeka & Santa Fe R.R., 656 F.2d 398, 402 (9th Cir. 1981) (citing Great Lakes Dregde & Dock Co. v. Huffman, 319 U.S. 293, 298-99 (1943)).

49. 4-R Act, *supra* note 1 (providing that "[n]otwithstanding section 1341 of title 28 . . . a district court of the United States has jurisdiction . . . to prevent a violation of subsection (b) of this section.").

50. *Atchison, Topeka and Santa Fe R.R. Co.*, 656 F.2d at 402.

grounds.[51] In *McKesson Corp.*, however, the U.S. Supreme Court held that where "a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."[52] Therefore, it is possible that the railroads could use *McKesson* to argue that they are entitled to monetary damages in the form of "backward-looking relief"[53] because the state's discriminatory taxation arguably violated the Commerce Clause.[54]

States, of course, could counter this argument on traditional Eleventh Amendment grounds. For example, the state could argue that allowing railroads to seek monetary relief from the state hinders the state's ability to provide for its citizens. As articulated by the Supreme Court in *Hans v. Louisiana* over a century ago, "there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[55] In other words, the Court in *Hans* proposes that if states were subject to suits for monetary damages, the states would lose their financial independence – at least to the extent that a state is able to self-sustain.[56] The purpose behind the Eleventh Amendment immunity is, therefore, to shield the states from suits seeking monetary damages which might drain their economic resources.[57]

Thus, in an attempt to avoid the application of the Eleventh Amendment, at least with regard to suits for monetary relief, Congress fashioned a different remedy. Pursuant to Section 11501(c), "a district court of the United States has jurisdiction . . . to prevent a violation of subsection (b) of this Section." Put differently, a federal court has the power to grant a railroad some form of injunctive relief in order to prevent a violation of the 4-R Act.[58] Unlike monetary damages, injunctive relief is permitted

51. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Business, 496 U.S. 18, 32 (1990).

52. *Id.*

53. *Id.*

54. *Id.* (citing Atchison, T. & S.F.R. Co. v. O'Connor, 223 U.S. 280 (1912)).

55. 134 U.S. 1, 13 (1890).

56. *Id.*

57. *Id.*

58. Burlington N. and Santa Fe Ry. Co. v. Burton, 270 F.3d 942, 944 (10th Cir. 2001). *See also* Trailer Train Co. v. State Bd. of Equalization, 697 F.2d 860, 866 (9th Cir. 1983) (finding that the 4-R Act has a "procedural component" that allows railroads to sue for injunctive relief in federal court).

under the Eleventh Amendment as interpreted in *Ex Parte Young*.[59] While the traditional standard for granting injunctive relief is whether the moving party can demonstrate irreparable harm and "a likelihood of success on the merits,"[60] a railroad seeking injunctive relief under the 4-R Act must show "reasonable cause" that a violation of the 4-R Act has or will occur.[61] The purpose of the increased standard of reasonable cause is to prevent railroads from filing claims based on a mere "scintilla of evidence," which in turn protects the states from frivolous claims while still allowing railroads an opportunity to present legitimate claims of discriminatory taxation to the district court.[62]

B. Constitutional Challenges to the 4-R Act

Currently, railroads may bring suits against states in federal court without having to hurdle the Tax Injunction Act and perhaps only with a reasonable burden to seek injunctive relief.[63] Thus, states have had to strengthen their defensive tactics, at least since the passing of the 4-R Act, and have begun to attack the constitutional validity of Section 11501. First, because the language of Section 11501 seems to imply that Congress was acting pursuant to its Commerce Clause[64] powers when enacting its taxation provisions,[65] states have attacked the Section on Tenth Amendment grounds. In particular, states have argued that the Commerce Power does not permit Congress to interfere with state taxation matters because those matters are reserved to the states under the Tenth Amendment.[66] Pursuant to the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[67] For

59. 209 U.S. 123, 190 (1908).

60. Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 478-79 (2d Cir. 1995) (quoting Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 61 (2nd Cir. 1992) (citations omitted)).

61. CSX Transp., Inc. v. Tenn. Bd. of Equalization, 964 F.2d 548, 551 (6th Cir. 1992).

62. *Id.* at 555.

63. 4-R Act, *supra* note 1 (providing that "[n]otwithstanding section 1341 of title 28 [the Tax Injunction Act]. . . a district court of the United States has jurisdiction . . . to prevent a violation of subsection (b) of this Section."). *See also Atchison, Topeka & Santa Fe R.R.*, 656 F.2d at 402 (finding that the 4-R Act creates an exception to the jurisdictional bar set forth in the Tax Injunction Act); *CSX Transp. Inc.*, 964 F.2d at 551 (finding that the railroad must show "reasonable cause" that a violation of the 4-R Act has or will occur when seeking injunctive relief). *Cf.*, *Polymer Tech. Corp.*, 975 F.2d at 61 (holding that a "preliminary injunction may issue if the plaintiff demonstrates irreparable harm, and either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor.").

64. U.S. Const. art. I, §8, cl. 3.

65. 4-R Act, *supra* note 1 (stating that "[t]he following acts *unreasonably burden and discriminate against interstate commerce*") (emphasis added).

66. *Atchison, Topeka & Santa Fe R.R.*, 656 F.2d at 406, 410.

67. U.S. Const. amend. X.

example, in *Atchison, Topeka and Santa Fe R.R. Co.*, the State of Arizona relied on *National League of Cities v. Usery*[68] for the proposition that the power to tax, including the power to tax the railroad industry, is an integral function of the Arizona government and therefore reserved to the state.[69] The Ninth Circuit rejected Arizona's argument, holding that Section 11501 did not violate the Tenth Amendment.[70] In so holding, the Ninth Circuit relied on *United States v. California*, which held that the federal government is permitted to regulate railroads that operate in interstate commerce.[71] Although the Ninth Circuit seemed to agree that the assessment of property taxes is an integral function of the government, Arizona could not expect to be exempt from federal regulations because railroads are instrumentalities of interstate commerce.[72] The Ninth Circuit also applied Justice Blackman's balancing test in *National League of Cities* and concluded that the federal government's interest in protecting railroads against discriminatory taxation outweighs Arizona's interest to regulate railroads free from federal regulations.[73]

Although Arizona did not succeed in its Tenth Amendment challenge in *Atchison, Topeka and Santa Fe R.R. Co.*,[74] states have also looked to the Eleventh Amendment, albeit unsuccessfully,[75] to challenge the 4-R Act as an unconstitutional infringement on state sovereignty. As previously mentioned, *Ex Parte Young* held that suits for injunctive relief are permissible.[76] Nonetheless, the Supreme Court has yet to address the validity of an Eleventh Amendment claim to Section 11501. Therefore, to the extent a state may confront such a challenge in the Supreme Court (as well as other courts), the Eleventh Amendment argument merits discussion.

The Eleventh Amendment commands that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

68. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

69. *Atchison, Topeka & Santa Fe R.R. Co.*, 656 F.2d at 406.

70. *Id.*

71. *Id.* at 408.

72. *Id.*

73. *Id.*

74. At the time this article is written, there have been very few challenges to the 4-R Act on Tenth Amendment grounds. The other known case addressing the issue was heard in the U.S. District Court of Tennessee. In that case, the court rejected the Tenth Amendment challenge and upheld the constitutionality of the 4-R Act. Tennessee v. Louisville & Nashville R.R., 478 F. Supp. 199, 203 (M.D. Tenn. 1979).

75. The following Section notes the cases where states have tried unsuccessfully to overturn the 4-R Act with the Eleventh Amendment.

76. 209 U.S. 123, 190 (1908).

State."[77] Thus, pursuant to the Eleventh Amendment, citizens cannot bring suits against the state absent consent because the state has sovereign immunity.[78] However, consent is not the only exception to Eleventh Amendment grant of state sovereignty. Congress may also abrogate a state's immunity if it has "unequivocally expresse[d] its intent to abrogate the immunity" and has acted "pursuant to a valid exercise of power."[79]

Applying this test to Section 11501(b), the states would first need to argue that Section 11501(b) was not an unequivocal expression of Congress to abrogate its immunity. One state has argued that while Congress has declared that the 4-R Act gives jurisdiction to bring a claim in federal court under 11501(c), the Act fails to identity whether the suit can be brought for discrimination on a sales tax claim or merely a property claim.[80] Therefore, the state argues, the railroad cannot bring its claim of discriminatory taxation in federal court because Congress did not unequivocally express that a state's sovereign immunity is abrogated for discriminatory sales tax claims.[81]

Second, in order to show that Congress impermissibly abrogated state immunity, the state must also show that the 4-R Act is an invalid exercise of Congressional power. Here, *Seminole* has clearly held that Congress cannot use its Commerce Clause powers to abrogate state immunity under the Eleventh Amendment.[82] Therefore, a state may argue that Section 11501(b) is an unconstitutional exercise of Congress's Commerce Clause powers pursuant to the Eleventh Amendment. Moreover, the state would argue, the language of Section 11501(b) was enacted specifically through the use of Congress's Commerce Clause powers because it directly forbids acts which "unreasonably burden and discriminate against interstate commerce."[83] Even the legislative history behind the 4-R Act seems to support a finding that it was passed pursuant to Congress's Commerce Clause powers.[84]

Unfortunately for the states, the majority of circuit courts that have heard challenges to Section 11501(b) on Eleventh Amendment grounds

77. U.S. CONST. amend. XI.

78. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54-55 (1996) (citing Hans v. Louisiana, 134 U.S. 1, 10 (1890).

79. *Id.* at 55 (citing Green v. Mansour, 474 U.S. 64, 68 (1985)).

80. *See* Union Pac. R.R. v. Utah State Tax Comm'n, No. 22:06CV00500 TC, 2006 WL 2968271, at *3 (D. Utah 2006).

81. *See id.* at *1.

82. *See Seminole*, 517 U.S. at 58.

83. 4-R Act, *supra* note 1, at 49 U.S.C. § 11501(b).

84. *See, e.g., Common and Contract Carrier State Property Tax Discrimination Hearings Before the Subcomm. on Transportation and Aeronautics of the H. Tax Comm'n on Interstate and Foreign Commerce*, 91st Cong. 7 (1970) (testimony discussing the power of Congress to legislate under the Commerce Clause).

hold that it is a valid exercise of Congress's power, not under the Commerce Clause, but under Section 5 of the Fourteenth Amendment.[85] The circuits courts rely on *Seminole*, which held that although Congress could not abrogate a state's sovereign immunity under the Commerce Clause, Section 5 of the Fourteenth Amendment would permit Congress the authority to abrogate state sovereignty where it otherwise could not with its Commerce Clause authority.[86]

Section 5 of the Fourteenth Amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[87] The types of legislation that Congress may enforce within the Fourteenth Amendment "include the due process and equal protection rights."[88] However, Congress's power prescribed by the Fourteenth Amendment is remedial in nature and cannot be used to "determine what constitutes a constitutional violation."[89] To determine whether Congress has acted pursuant to its powers under Section 5 of the Fourteenth Amendment involves a two-part test.[90] First, did "Congress identify a history and pattern of Constitutional discrimination by the states against the non-suspect class?"[91] Second, if so, is there a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end?"[92]

According to the reasoning set forth in *CSX Transp., Inc.*, Congress satisfied the two-part test set forth above. Congress identified a history

85. *See* CSX Transp., Inc. v. N.Y. Office of Real Prop. Servs., 306 F.3d 87, 96 (2d Cir. 2002); Union Pac. R.R. v. Utah, 198 F.3d 1201, 1203 (10th Cir. 1999); Wheeling & Lake Erie Ry. v. Pub. Util. Comm'n of Pa., 141 F.3d 88, 100 (3d Cir. 1998); Or. Short Line R.R. v. Dep't. of Revenue Or., 139 F.3d 1259, 1265 (9th Cir. 1998).

86. However, in *Atchison, Topeka and Santa Fe R.R. Co.*, the Ninth Circuit took a different view and upheld the constitutionality of the 4-R Act as a valid exercise of Congress' Commerce Clause power. 656 F.2d at 410. In addition to finding that the 4-R Act does not violate the Tenth Amendment, as previously discussed, the Ninth Circuit concluded that the 4-R Act does not intrude on a state's sovereignty because it "requires no change in structure of state government," and at most, "requires states to alter their tax structures so that railroad property is assessed at a ratio no higher than that of other commercial and industrial properties." *Id.* at 408. This case is instructive in two respects, on the one hand it upholds the constitutionality of the 4-R Act, and on the other hand, provides an argument for the railroad's challenge to a state's accounting methods. The argument follows that states will only be required to change their accounting methods to accommodate the provisions of the 4-R Act – versus having to comply with a court imposed regulatory system. Thus, if the state fails to alter its accounting methods so as to not unreasonably burden and discriminate against the railroad, the railroad's cause of action under the 4-R Act is simply to force the state's hand in adopting non-discriminatory measures.

87. U.S. CONST. amend. XIV, § 5.

88. *CSX Transp., Inc.*, 306 F.3d at 96 (citing City of Beorne v. Flores, 521 U.S. 507 (1997)).

89. *City of Beorne*, 521 U.S. at 519.

90. *See CSX Transp., Inc.*, 306 F.3d at 97.

91. *Id.* (citing Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001)).

92. *City of Beorne*, 521 U.S. at 520.

and pattern of Constitutional discrimination during its fifteen year deliberation period in which railroads had been overtaxed approximately fifty million dollars per year, received unequal tax treatment when compared to other property owners, and had little if any political power to halt the discriminatory tax treatment.[93] In addition, Section 11501(b) is also a congruent and proportional remedy to address a railroad's discriminatory tax treatment: Section 11501(b) is only available to the railroads, the provisions are meant to exclusively address discriminatory tax treatment, the taxation must "exceed by at least 5 percent" of the assessed value of "other commercial and industrial property,"[94] and the remedy is only for injunctive relief as to the excess amount taxed on the railroad property.[95]

Based on the holdings of several circuit courts, it appears that the states will face an uphill battle when challenging the constitutionality of Section 11501(b) of the 4-R Act. Nevertheless, states continue to challenge the validity of the provision in the trial courts.[96] In *Union Pacific Railroad Co v. Utah State Tax Commission* for example, the State of Utah is currently arguing that Congress created a new right under the Fourteenth Amendment and did not fashion a remedy that passes the "congruence and proportionality" test.[97] However, until the Supreme Court definitively decides the issue, Section 11501(b) will continue to regulate the states, and the states will continue to challenge its constitutional validity.

III. A Split in the Circuit Courts

A. The Fourth Circuit And *Chesapeake Western Railway v. Forst*

Obviously, if a state prevails on constitutional grounds, there is no need to address the issue of whether a railroad may challenge a state's accounting methods under Section 11501(b) of the 4-R Act. Section 11501(b) would be invalidated and the states would be free to tax the railroads in accordance with their preferred methods of taxation. The focus of this Section now turns away from the constitutionality of Section 11501(b) and towards the issue of whether a railroad may challenge a state's accounting methods.

The first circuit court to hear a challenge was the Fourth Circuit in *Chesapeake Western Railway v. Forst*.[98] In that case, appellants Chesa-

93. *See CSX Transp., Inc.*, 306 F.3d at 97. (citations omitted).

94. 4-R Act, *supra* note 1, at 49 U.S.C. §11501(c).

95. *See CSX Transp., Inc.*, 306 F.3d at 97.

96. *See, e.g.*, CSX Transp., Inc. v. Fla. Dep't. of Revenue, No. 4:06-CV-342SPM, 2007 WL 540557, at *2 (N.D. Fla. 2007); *Union Pac. R.R.*, 2006 WL 2968271, at *1.

97. *See Union Pac. R.R.*, 2006 WL 2968271, at *2.

98. Chesapeake W. Ry. v. Forst, 938 F.2d 528, 528 (4th Cir. 1991).

peake Western Railway, along with several other railroad companies that operate in Virginia, brought suit against the Virginia state tax commissioner claiming the accounting methods (not just the assessed value) discriminated against them in violation of Section 11501(b)(1) of the 4-R Act.[99] In particular, appellants argued "the inventory and summation methods[100] [used by the state] resulted in such property being assessed at a value greater than true market value."[101] If this is true, as the court explained, then the appellant's properties were being assessed at a value greater than one while all other properties in the state were being assessed at a value less than one, which would have been discrimination prohibited under the 4-R Act.[102] The alleged discriminatory taxation however, was based on the appellant's use of other accounting methods. In other words, the appellants challenged the validity of the state's accounting methods by comparing it to other accounting methods which the state did not use.

The court rejected the appellant's argument that Section 11501(b)(1) provides an opportunity for a railroad to challenge a state's accounting methods.[103] First, the court looked to the history of general prohibitions on federal intrusion into state tax matters.[104] The court cited to 28 U.S.C. §1341, the Tax Injunction Act, and *Burlington N. R.R. v. Lennen*[105] for the general principle that the federal government is not to interfere with state taxation matters.[106] Because there is no express language in Section 11501 providing that a railroad may challenge a state's accounting methods, the Fourth Circuit declined to make an exception to the policy of non-interference in state matters.[107] In so holding, the court found that "federal courts are ill equipped to evaluate the merits of a challenge to a

99. *See id.* at 529.

100. Virginia uses two accounting methods when determining the value of railroad property, one for land and another for non-land. *See id.* at 529. The first method assesses the fair market value of the railroad property land on the basis of what other adjacent or similarity situated commercial properties are worth. *See id.* This method is termed the "over-the fence" accounting method because it values the railroad property "on the best use and value . . . of the land across the fence from the railroad land." *Id.* The second method however, is limited to non-land railroad property. In calculating the value of non-land railroad property, the state first determines the value of the property when it was originally purchased, less a fixed value to account for depreciation of the property. *Id.* Collectively, these two methods are called the "inventory and summation" evaluation methods. *Id.*

101. *Id.* at 530.

102. *See id.*

103. *See id.* at 531.

104. *See id.*

105. 715 F.2d 494, 498 (10th Cir. 1983), *overruled by* Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454 (1987).

106. *Chesapeake W. Ry.*, 938 F.2d at 531.

107. *Id.*

state taxation scheme."[108]

However, *Lennen* has since been overruled by *Burlington N. R.R. v. Oklahoma*. Recall that in *Lennon,* the Court of Appeals for the Tenth Circuit held that the railroad must make a "prima facie case of retaliation or intentional discrimination" before bringing a claim under the 4-R Act.[109] The Supreme Court has of course rejected this argument and now holds that no preliminary showing of discrimination is necessary for the railroads to file suit under Section 11501.[110] Rather, the Supreme Court found that the Section 11501(b)(1) expressly allows a railroad to challenge the state's assessed value of the railroad property.[111] Therefore, to the extent that the Fourth Circuit relies on principles of non-interference to prohibit a railroad from challenging a state's accounting methods, its rationale has been diminished.

Nevertheless, the Fourth Circuit in *Chesapeake W. Ry.* found that Section 11501(b)(1) did not expressly provide that a railroad may challenge a state's evaluation methods.[112] To determine whether Congress intended to provide railroads with such an opportunity, the court turned to the legislative history of the 4-R Act.[113] Citing to Senate Bill 927, the court concluded that Congress did not intend to create an avenue whereby a railroad could challenge the state's accounting methods.[114] The testimony from the bill states that the purpose of the 4-R Act

> does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.[115]

Using the language set out in Senate Bill 926, the court concluded that the 4-R Act provided railroads with the ability to challenge the end result of the state's taxation accounting methods, but not the accounting methods itself.[116] This seems to be a proper conclusion, particularly if the court focused on the language of the 4-R Act which instructs that the Act "merely provides a single standard against which all affected assessments must be measured."[117]

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108. *Id.* at 531.
109. *Lennen,* 715 F.2d at 498.
110. *Burlington N. R.R.*, 481 U.S. at 462-63.
111. *Id.* at 461-63. 4-R Act, *supra* note 1, at 49 U.S.C. §11501(b).
112. *Chesapeake W. Ry.*, 938 F.2d at 531.
113. *Id.*
114. *Id.*
115. *Id.* (citing S. REP. No. 1483, 90th Cong., 2d Sess. app. B (1968)).
116. *Id.* at 533.
117. *Id.* at 531.

The Fourth Circuit in *Chesapeake W. Ry.* also cited to the Hearing Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245.[118] There, the court seemed to have found another reason to prohibit railroads from challenging the state's evaluation methods. According to the testimony cited in the hearing records, Section 11501 of the 4-R Act "does not deal with valuation methods that any State wishes to use [and such valuation methods] would be totally unaffected by this legislation."[119] On the one hand, this statement means that courts are not intended to explore the validity of the state's evaluation methods. On the other hand, a state's valuation methods which "unreasonably burden and discriminate against interstate commerce" come directly into play under Section 11501(b) of the 4-R Act, be it not directly, but through the means achieved by the state's evaluation methods. Thus, contrary to the Fourth Circuit's opinion, it appears that Congress has not provided a clear and definite answer on the issue.

Finally, the court in *Chesapeake W. Ry.* found that allowing a railroad to challenge a state's accounting methods would be an inefficient waste of judicial resources. The court's justification for coming to this conclusion is that the judiciary would, in essence, be battling with the state legislature over which accounting methods to use.[120] This, according to the court, is really "at its core, a policy choice."[121] Moreover, the court found that when the states undertake the task of determining the "true market value" of railroad property, there is no set standard.[122] For example, in *Union Pacific R.R.*, to which the *Chesapeake W. Ry.* court cited, the District Court of Utah spent countless pages attempting to determine whether the state's accounting method was discriminatory.[123] In a court system already inundated with full dockets, efficiency considerations would seem to disfavor requiring courts to engage in this level of fact finding. However, the court did not explain why clearly unreasonable accounting methods could not be scrutinized, particularly if the discrimination was readily apparent.

In summary, the Fourth Circuit's holding that a railroad is not permitted to challenge a state's accounting methods hinges closely on principles of state sovereignty and non-interference with state matters absent express language from Congress. While the Fourth Circuit places considerable weight on the Congressional history of the 4-R Act, it is the opin-

118. Burlington N. R.R. v. Lennen, 573 F. Supp. 1155, 1163 (D. Kan. 1982).
119. *Id.*
120. *Chesapeake W. Ry.*, 938 F.2d at 531.
121. *Id.*
122. *Id.*
123. Union Pac. R.R. v. State Tax Comm'n of Ut., 716 F. Supp. 543, 553-60 (D. Utah 1988).

ion of the author that the intent of Congress with regard to challenges to a state's accounting methods does not provide a clear answer. Nonetheless, the Fourth Circuit discussed important legal issues and policy considerations in attempting to determine whether it could review a state's accounting methods. In the next three circuit court opinions, we will see these considerations addressed again, often with some variation in their application.

B. The Ninth Circuit and *Burlington Northern Railroad Company v. Department of Revenue of Washington*

The next circuit court to hear a challenge to a state's accounting method under Section 11501 of the 4-R Act was the Ninth Circuit in *Burlington N. R.R. Co. v. Dep't. of Revenue of Washington.*[124] In that case, Burlington Northern Railroad ("Burlington") sued the state of Washington alleging that the state had violated section 11501(b)(1) in assessing Burlington's property values.[125]

Although the Ninth Circuit concluded that the state had not overvalued the property, the court nonetheless held that it could consider the state's accounting method to determine if the accounting method itself amounted to discriminatory taxation under the 4-R Act.[126] The Ninth Circuit rejected the holding in *Chesapeake W. Ry. v. Forst* that a railroad is prohibited from challenging the state's method under Section 11501(b)(1).[127] Instead, the court looked to Section 11501(c), which provides that the "burden of proof in determining assessed value and true market value is governed by State law."[128] In particular, the court looked to the Washington Revised Code which provides that "the determination of the value of property by public officials is presumed correct" and may only be defeated by "clear, cogent, and convincing" evidence.[129] Although the court did not expressly provide why the burden of proof is relevant in considering whether a state's accounting methods can be challenged, the Eleventh Circuit in *CSX, Transp. Inc.* interpreted the Second Circuit's holding to mean that "[b]ecause determinations of property value by public officials in the State of Washington may be defeated by 'clear, cogent and convincing evidence,' the . . . state valuation methodologies may likewise be defeated by clear, cogent, and convincing

124. Burlington N. R.R. v. Dep't of Revenue of Wash., 23 F.3d 239 (9th Cir. 1994).

125. *Id.* at 240-41.

126. *Id.*

127. *Id.*

128. 4-R Act, *supra* note 1, at 49 U.S.C. §11501(c).

129. *Burlington N. R.R.*, 23 F.3d at 240 (quoting Wash. Rev. Code §84.40.0301(1) (2007)).

evidence."[130]

Therefore, because Washington allows its method of determining property value to be overcome by "clear, cogent, and convincing" evidence, the Ninth Circuit could have considered Washington's accounting methods as long as Burlington had presented clear, cogent, and convincing evidence that the state's method assessed Burlington's railroad property in excess of the true market value of other commercial or industrial properties. Because Burlington failed to meet this burden of proof, the Ninth Circuit denied Burlington relief.[131]

The Ninth Circuit's approach, however, leaves a critical link unanswered as to why the burden of proof is relevant to subjecting a state's accounting methods to judicial scrutiny. Section 11051(c) merely provides that the "burden of proof . . . is governed by State law."[132] It does not provide that the state may authorize suits challenging its accounting methods - rather, it means that the state can set the standard as to how much evidence the railroad must put forward to demonstrate that the state's property assessment violated Section 11501(b).[133] Despite the Ninth Circuit's unclear answer, it is the opinion of the author that the court's holding rests on the fact that because the state of Washington expressly provided that property determinations by its public officials may be overcome by "clear, cogent, and convincing,"[134] so too can the state's accounting methods be overcome. In this way, it is not merely the assessed value of the railroad property that the railroad may challenge, but the accounting method that the officials used to determine the value as well.

C. The Second Circuit and *Consolidated Rail Corporation v. Town of Hyde Park*

Just one year after *Burlington N. R.R.*, the Second Circuit became the third circuit court to hear a challenge to a state's evaluation method in *Consolidated Rail Corp. v. Town of Hyde Park*.[135] Like Burlington in *Burlington N. R.R.*, Consolidated Rail Corporation ("Conrail") alleged that the state had discriminated against it in violation of Section 11501(b)(1).[136] In this case, however, the Second Circuit found that the state had discriminated against Conrail not only by over-taxing the rail-

130. CSX Transp., Inc. v. State Bd. of Equalization, 472 F.3d 1281, 1287 (11th Cir. 2006) (quoting *Burlington N. R.R.* ., 23 F.3d at 240).

131. *Burlington N. R.R.* ., 23 F.3d at 240.

132. 4-R Act, *supra* note 1, at 49 U.S.C. §11501(c).

133. *Id.*

134. Wash. Rev. Code §84.40.0301.

135. Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 475 (2d Cir. 1995).

136. *Id.* at 475.

road property in violation of Section 11501(b)(1), but also by applying impermissible methods to assess the property's value.[137]

Conrail, an interstate railroad carrier with extensive holdings of property in New York, argued that New York had used a tax accounting method that assessed its property in excess of five percent of "the calculated ratio with respect to all other commercial and industrial property."[138] For years leading up to the lawsuit, Conrail had received special treatment in the form of a tax exemption when New York calculated the railroad's property values.[139] The tax exemption employed a formula for calculating the highest rate that the state was permitted to tax the railroad.[140] In 1993, however, the New York legislature discontinued the exemption and, as a result, the New York State Board of Equalization and Assessments ("SBEA") allegedly overtaxed Conrail's railroad property by $19 million.[141] With the exemption removed, there was no longer a maximum rate at which the state could tax the railroad - therefore, Conrail filed suit alleging that the new taxation scheme assessed its property values in violation of Section 11501(b)(1).[142]

In order to determine whether New York assessed Conrail's property within the scope permitted by Section 11510(b)(1), the Second Circuit concluded that it must be able to consider the state's accounting methods.[143] According to the court, the "4-R Act prohibits . . . discrimination against railroads in the ratios of sets of numbers: assessed values [of the railroad properties] and true market values . . . of other commercial and industrial properties."[144] By evaluating the state's accounting methods, the court is able to compare the accounting methods used to assess the railroad against those that are used to assess other commercial and industrial properties.[145]

The Second Circuit rejected the argument that a state's accounting method is an area of state control.[146] "If the [4-R] Act were to be interpreted . . . so that the [state, here, New York] could adopt a special method for railroads alone, then the whole nondiscrimination objective of the statute could be circumvented."[147] Thus, the Second Circuit found that Congress empowered the federal courts to review and otherwise de-

137. *Id.* at 481-82.
138. *Id.* at 479-80.
139. *Id.* at 476.
140. *Id.*
141. *Id.* at 476-77.
142. *Id.*
143. *Id.* at 482.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

feat a state's accounting method. Furthermore, the Second Circuit viewed the evaluation of a state's accounting methods as an efficient tool to determine whether the state is violating the 4-R Act. This is in direct conflict with the Fourth Circuit's holding in *Chesapeake W. Ry.* which found that evaluating a state's accounting methods would be a burden on judicial resources. These are, of course, arguments of judicial efficiency and ultimately may not have a momentous impact on the debate surrounding challenges to a state's accounting methods. The reality is that the final ratio assessed against the state "must exceed, by at least 5%"[148] the value of other commercial and industrial properties, whether that is shown using the state's evaluation method or not.

D. The Eleventh Circuit and *CSX Transportation Inc. v. State Board of Equalization*

The most recent case concerning whether a railroad can challenge a state's accounting methods was heard by the Eleventh Circuit in *CSX Transp., Inc. v. State Bd. of Equalization.*[149] Decided in December 2006, the Eleventh Circuit pushed the pendulum in the opposite direction and concluded the railroads were prohibited from challenging the state's accounting methods.

At issue in *CSX Transp., Inc.* was the adoption of a new accounting method that the state of Georgia used to calculate the property tax assessments against CSX Corporation ("CSX").[150] The decision of what accounting method to use in calculating the values of railroad properties is determined by the Property Tax Division of the Georgia Department of Revenue ("the Department").[151] Once the accounting method is chosen and the property values are calculated, the Department will issue a digest of its assessments to the State Board of Equalization of Georgia ("the Board").[152] The Board will then review the digest.[153] If the Board finds the values satisfactory, the Board will certify the proposed assessments to the counties of Georgia.[154] In return, the counties are permitted to use the certified values to determine the railroad's tax assessment.[155] In this particular case, "59 of the 71 Georgia counties . . . adopted the proposed assessment of the Board."[156]

148. *Id.* at 475.
149. CSX Transp., Inc. v. State Bd. of Equalization of Ga., 472 F.3d 1281, 1283 (11th Cir. 2006).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

To calculate the property assessments in *CSX Transp., Inc.*, the Department had used three accounting methods: the "stock and debt method," the "cash flow method" and the "market multiples method."[157] These values were then averaged together, the lowest of which was used to tax CSX which, according to the Department, amounted to $8.2 billion.[158] Using its own expert and accounting methods, CSX came up with less than $6 billion - a value far below the Department's assessed value of the railroad property.[159] Thus, CSX filed suit. Specifically, CSX argued that the Department's accounting methods violated Section 11501(b)(1) "because the true market value of its property for 2002 [the preceding tax year] did not exceed $6 billion."[160]

CSX sets out several arguments for the proposition that the court may review the Department's accounting methods. First, CSX argued that the language in the Supreme Court's opinion in *Burlington N. R.R. v. Oklahoma* implies that a railroad may challenge the state's evaluation method.[161] For example, in *Burlington N. R.R. v. Oklahoma*, the Court provided that "[the 4-R Act] speaks only in terms of 'acts which unreasonably burden and discriminate against interstate commerce."[162] Therefore, if a state's accounting methods constitute an act by the state and a court may review a discriminatory act by a state, a court may review the state's accounting methods. Although the Eleventh Circuit did not flatly reject this argument, the court concluded that Section 11501(b)(1) does not permit challenges to a state's accounting methods because Congress did not expressly provide for such review in Section 11501.

The second argument CSX asserted derives from earlier opinions in the Eleventh Circuit. In *S. Ry. v. State Bd. of Equalization*, for example, the Eleventh Circuit stated that the "legislative history and broad language of the Act show Congress possessed a general concern with the discrimination in all its guises."[163] Taking the Eleventh Circuit's language

157. *Id.* The stock and debt method determines the value of the railroad company by taking the railroad's total equity less its outstanding debts. The cash flow method determines the value of the railroad company by projecting the expected cash flow of the company for a certain period of years less its expected depreciation in value. Finally, the market multiples method is determined by an appraiser who compares the value of the railroad stock to other similarly situated companies. *Id.* at 1284. The accounting methods used by Georgia, as well as CSX, take into consideration real property and equities. However, the 4-R Act does appear to restrict how a railroad's transportation property value is calculated. Therefore, the accounting methods used by the parties in *CSX Transp., Inc.* do not appear to conflict with the provisions of the 4-R Act.

158. *Id.*

159. *Id.*

160. *Id.* at 1285-86.

161. *Id.* at 1287.

162. *Id.* (quoting Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454, 463 (1987)).

163. *Id.* at 1288 (quoting S. Ry. v. State Bd. of Equalization, 715 F.2d 522, 528 (11th Cir. 1983)).

by its literal meaning, CSX argued that the court has expressed an intention to protect railroads from discrimination and should therefore protect CSX from discriminatory taxation in this case.[164] The Eleventh Circuit rejected CSX's argument and found that the court's statement in *S. Ry. v. State Bd. of Equalization* was not intended to be an absolute or unconditional protection afforded to the railroad.[165] CSX argued in the alternative that even if the court did not find the language of the court's earlier cases persuasive, "principles of federalism and comity should play no role in [the court's] interpretation of the 4-R Act."[166] In other words, because Congress has carved out an exception to the general principle of non-interference with state matters,[167] the court may review Georgia's accounting methods.

The Eleventh Circuit disagreed. Citing to *Dept. of Revenue of Oregon v. ACF Industries, Inc.*, the court found that in order to review challenges against a state's accounting methods and thereby preempt the powers reserved to the states, it must be "the clear and manifest purpose of Congress."[168] In *ACF Industries, Inc.*, several carline companies, or companies that lease railroad cars to shippers, brought suit against Oregon under Section 11501(b)(4) because the carline companies did not qualify under Oregon's tax exemption for business property.[169] The carline companies argued that Oregon was discriminating against them by exempting other commercial and industrial properties from certain taxation while requiring them to pay in full.[170] The Supreme Court rejected the carline companies' argument, finding that the 4-R Act does not expressly "restrict state power to exempt nonrailroad property."[171] Moreover, the Court stated, "[p]roperty tax exemptions are an important aspect of state and local tax policy" and therefore, absent language permitting interference in this area, courts should refrain from meddling in a state's

164. *Id.*

165. *Id.*

166. *Id.* at 1289.

167. 4-R Act, *supra* note 1, at 49 U.S.C. §11501(c).

168. CSX Transp., Inc. v. State Bd. of Equalization of Ga., 472 F.3d 1281, 1289 (11th Cir. 2006) (citing Dep't. of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332, 345 (1994)). Justice Fay argues in the dissenting opinion that language of the statute is clear: state's "could not use one method to asses the market value of the railroad property and a different methods to asses other commercial and industrial property if such resulted in the gross discrimination toward the railroad." *Id.* at 1293. Agreeing with the Second Circuit in *Consolidated Rail Corp.*, Justice Fay argues that to permit this type of discriminatory tax method would skirt the entire purpose behind the 4-R Act. *Id.* at 1294. Therefore, the railroad should be allowed to contest the state's accounting methods to effectuate the purpose behind the 4-R Act. *Id.* at 1293.

169. *ACF Indus., Inc.*, 510 U.S. at 335.

170. *Id.* at 337.

171. *Id.* at 344.

taxation processes.[172]

Unlike tax exemptions for nonrailroad carriers in *ACF Industries, Inc.*, the 4-R Act does speak directly to discriminatory taxation against railroad properties.[173] Nonetheless, the Eleventh Circuit went on to agree with the Fourth Circuit in *Chesapeake W. Ry.* that the 4-R Act does not permit a railroad to challenge a state's evaluation methods.[174] In addition to the reasoning set forth above, the court found that the selection of a state's accounting methods involves "[i]mportant questions of state policy. Time pressures and limited resources, for example, may compel a state to choose a simple valuation methodology rather than a complicated one."[175] Lastly, the Eleventh Circuit cited to the same legislative history as *Chesapeake W. Ry.* and concluded that its decision not to allow railroads to challenge a state's accounting methods is thoroughly supported.[176] In the end, the $8.2 billion tax assessment against the railroad by the Board was upheld.[177]

In summary, the Eleventh Circuit's opinion in *CSX Transp., Inc.* parallels the Fourth Circuit's opinion in *Chesapeake W. Ry.* in many respects. Both opinions rely on principles of state sovereignty and on the absence of clear language in the 4-R Act to hold that a state's accounting methods cannot be challenged. Both circuit courts interpreted the legislative history of the 4-R Act to protect a state's accounting methods to judicial review. Finally, both circuit courts looked to arguments of judicial efficiency and public policy choices to support their holdings against permitting a railroad to challenge a state's accounting methods. However, for other courts that have not decided the issue, there are other significant considerations to weigh before denying the railroad's claim or subjecting the state's accounting methods to judicial review.

IV. Conclusion

The need to protect and maintain the railroad industry is at the core of the debate concerning challenges to the 4-R Act. Railroads transport much of the nation's essential goods, some of which would be inefficient to transport by any other means. Because railroads play a fundamental role in the U.S. economy, Congress clearly has an incentive to preserve

172. *Id.*

173. The dissent in *ACF Industries, Inc.* sets forth a broad argument (similar to the argument that CSX puts forth in citing to the Supreme Court's decision *Burlington N. R.R. v. Oklahoma*) that the purpose of the 4-R Act is "to bar discrimination by any means." *Id.* at 350. Being a dissenting opinion however, the Ninth Circuit takes note of Justice Stevens' interpretation of the 4-R Act but goes no further. *CSX Transp., Inc.*, 472 F.3d at 1290.

174. *CSX Transp., Inc.*, 472 F.3d at 1288.

175. *Id.* at 1288-89.

176. *Id.* at 1289.

177. *Id.*

the railroad industry. In deciding how best to protect the railroad industry, Congress must also consider the state's ability to maintain control over its internal government structure. A state's ability to tax, for instance, provides a state with vital resources to stabilize and run an efficient state government and economy. Therefore, it is the balance of these two competing interests that lies at the heart of the issues surrounding the 4-R Act. If a court were to declare Section 11501 of the 4-R Act unconstitutional, the railroads would loose a vital tool to protect themselves from discriminatory state taxation. By the same token, if a court were to find that a state's accounting methods violate Section 11501(b)(1) of the 4-R Act, the state might lose considerable tax revenues and incur incidental costs of having to comply with a judicially imposed tax accounting system. This is, of course, assuming that the state could not simply recalculate its property tax assessment against the railroad or select another tax system of its own choosing.

With these important considerations in mind, it is the opinion of the author that Section 11501(b)(1) permits a railroad to challenge the validity of the state's accounting methods under the reasoning set forth in *Consolidated Rail Corp. v. Town of Hyde Park.*[178] "If the [4-R] Act were to be interpreted . . . so that the [state] could adopt a special method for railroads alone, then the whole nondiscrimination objective of the statute could be circumvented."[179] Although the language of Section 11501(b)(1) does not expressly provide that a state's accounting methods may be subject to suit, it is simply another way in which a railroad can show that it has been discriminated against in interstate commerce. Moreover, the 4-R Act already allows a state to be subject to suit by the railroads,[180] which means that a state may have to change its accounting methods to comply with the 4-R Act if it is found in violation of Section 11501(b)(1), regardless of whether its accounting methods are subject to scrutiny. However, it may be beyond the powers of the court to require a state to comply with a certain accounting method. Rather, the court is likely limited to providing injunctive relief to the railroad,[181] or perhaps in some instances, backward looking relief.[182]

In closing, the issue concerning a railroad's ability to challenge a state's accounting methods affects not only the continued maintenance and structure of the railroad industry, but also a state's ability to run an efficient government. Until the Supreme Court grants certiorari on this

178. Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 482 (2d Cir. 1995).

179. *Id.*

180. Burlington N. R.R. v. Okla. Tax Comm'n, 481 U.S. 454, 462 (1987).

181. Ex Parte Young, 209 U.S. 123, 190 (1908).

182. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Business, 496 U.S. 18, 32 (1990).

issue,[183] railroad companies and states must be willing to recognize that both have important interests at stake.

183. On March 23, 2007, CSX Transportation Inc. filed a Petitioner for Writ of Certiorari to the United States Supreme Court. CSX Transp., Inc. v. State Bd. of Equalization, 472 F.3d 1281 (11th Cir. 2006), *petition for cert filed*, 2007 WL 868962 (U.S. Mar. 23, 2006) (No. 06-1287). CSX is appealing the decision of the Eleventh Circuit and has submitted the following question for review: "Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. §11501(b)(1), a federal district court determining the 'true market value' of railroad property must accept the valuation method chosen by the State." *Id.*