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TAXATION

OVERVIEW

This article discusses eight recent decisions by the Tenth Circuit Court of Appeals, many of which required extensive statutory construction. After addressing three commercial cases, this survey considers two estate and trust administration cases. This article then discusses a case in which the timing of a minister's opposition to social security taxes prevented him from qualifying for an exemption from social security taxes. The survey concludes by considering two railway property tax cases in which the Tenth Circuit construed section 306 of the Internal Revenue Code.

I. COMMERCIAL RAMIFICATIONS OF TENTH CIRCUIT DECISIONS

A. *Unreasonable Rental Expenses under Section 162*

In *Harmon City, Inc. v. United States*,[1] the Tenth Circuit considered the deduction of rental expenses incurred by a closely-held corporation in the absence of arm's length dealing. Harmon City, Inc. (taxpayer) operated several retail supermarkets throughout Utah including a market in Granger, Utah. In 1973, Harmon City, Inc. sold the Granger store to Harmon City Associates, a limited partnership whose partners consisted largely of Harmon City shareholders. The partnership leased back the Granger store to the corporation for rental payments which consisted of a base rate rental payment and a percentage override. The percentage override was added to the leasing agreement after the parties discovered that the base rate rental would be insufficient to service the mortgage commitment on the property.

In an opinion by Judge Saffels,[2] the Tenth Circuit upheld the IRS determination that a portion of the taxpayer's rental expenses were not reasonable and therefore not ordinary and necessary expenses deductible under IRC section 162(a)(3). After stating the general rule that it is ordinarily inappropriate for the Commissioner to inquire into the reasonableness of rental payments, Judge Saffels went on to espouse the exception to this rule, that the Commissioner should not defer where there is a close relationship between lessor and lessee.[3] In such a case, the Commissioner may inquire into the reasonableness of the rental

1. 733 F.2d 1381 (10th Cir. 1984).

2. United States District Judge Saffels sitting by designation.

3. 733 F.2d 1381, 1383 (10th Cir. 1984); *see also* Safway Steel Scaffolds Co. v. United States, 590 F.2d 1360, 1362 (5th Cir. 1979). "It is ordinarily inappropriate to inquire into the reasonableness of the rent paid, however, this case presents an exception to the general rule. That exception is the case of a close relationship between the lessor and the lessee." *Id.* at 1362; Brown Printing Co. v. Commissioner, 255 F.2d 436 (5th Cir. 1958); Place v. Commissioner, 17 T.C. 199 (1951), *aff'd*, 199 F.2d 373 (6th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953).

amount paid to determine whether this amount exceeds the amount which the lessee would have been required to pay had he dealt with a stranger at arm's length.[4]

Judge Saffels stated that the reasonableness issue is a question of fact, and that the findings of the trial court will not be disturbed unless found to be clearly erroneous.[5] Based on the testimony of the government's expert witness, as to the fair rental value of the lease,[6] Judge Saffels upheld the trial court's determination that taxpayer's superior management capabilities and the strength of its weekly sales averages placed the taxpayer in an advantageous negotiating position. Such a position would have resulted in a fair rental value below the agreed upon rentals if the lease had been negotiated at arm's length.[7] Moreover, Judge Saffels noted that the record demonstrated that the lease was not intended to reflect a reasonable rental value but merely to provide funds necessary to service the mortgage liability on the property.[8]

Harmon City places the Tenth Circuit outside the mainstream of circuits that have reviewed the reasonableness of rental expenses. In *Southeastern Canteen Co. v. Commissioner*,[9] the Sixth Circuit, on facts very similar to those in *Harmon City*, examined the personal objectives of both the lessor and the lessee in structuring their agreements and upheld the finding that the sale-leaseback agreements were not ends in themselves but merely steps in an overall plan.[10] Thus, in the Sixth Circuit's view, the Commissioner's inquiry should focus upon not only the instant transaction but also upon the entire history of the related parties' interactions. Likewise, the Seventh Circuit in *Safway Steel Scaffolds Co. v. United States* upheld inquiry into the reasonableness of all transactions made between the related parties.[11] *Harmon City* more correctly focuses the inquiry upon the reasonableness of the leasing transaction rather than upon the reasonableness by which related parties structure their affairs.

B. *Federal Withholding, FICA, FUTA: Employee or Independent Contractor?*

An employer is generally responsible for withholding federal taxes

4. Place v. Commissioner, 17 T.C. 199, 203 (1951), *aff'd*, 199 F.2d 273 (6th Cir. 1952), *cert. denied*, 344 U.S. 927 (1953).

5. 733 F.2d at 1385 (citing Monfort of Colorado, Inc. v. United States, 561 F.2d 190 (10th Cir. 1977)). This power given to the Commissioner is derived from the broader declaration that the substance of a transaction rather than the form is controlling. Gregory v. Helvering, 293 U.S. 465 (1935); Southeastern Canteen Co. v. Commissioner, 410 F.2d 615, 619 n.6 (6th Cir. 1969); Smith v. Commissioner, 370 F.2d 178 (6th Cir. 1966).

6. The government's expert gave two methods for determining fair rental value: (1) by examining leases for similar properties, but between unrelated parties, or (2) by calculating the amount which constitutes a reasonable rate of return on the owner's investment in the property at the date of the lease's inception. 733 F.2d at 1383.

7. Harmon City's weekly sales averages in 1973 outperformed the national average per square foot by more than two to one. The sales averages outperformed local supermarkets. 733 F.2d at 1385.

8. *Id.* at 1384.

9. 410 F.2d 615 (6th Cir.), *cert. denied*, 396 U.S. 833 (1969).

10. *Id.* at 620.

11. 590 F.2d 1360, 1362 (7th Cir. 1979).

and for making FICA and FUTA contributions once the employer-employee relationship has been established. In *Marvel v. United States*,[12] (Marvel II) the Tenth Circuit reviewed the factors to be considered in determining an individual's employment status.

In *Marvel II*, the taxpayers operated a photography business employing the services of thirty-one individuals, some of whom worked at the taxpayer's studio and others who worked primarily out of their homes. Taxpayers treated all of these individuals as independent contractors and accordingly did not withhold or pay federal employment taxes.[13] Upon the district court's judgment that certain individuals were employees, the taxpayers sought Tenth Circuit review.[14]

Under the Internal Revenue Code, common-law distinctions between an employee and an independent contractor determine a person's status for federal employment tax purposes.[15] For this reason, Judge Holloway recognized that the employee status exists when the person for whom the services are performed has the right to direct and control: (1) the method and manner in which the work is done, and (2) the result sought to be achieved.[16] By contrast, an independent contractor status exists "when an individual performs services for another according to his own method and manner, free from the direction and control of the employer, in all matters, except as to the product of his work."[17]

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12. 719 F.2d 1507 (10th Cir. 1983).

13. *Id.* at 1510.

14. The taxpayers raised other attacks on the district court opinion including: (1) that the adjudicatory procedure whereby this cause was referred to a United States Magistrate was statutorily and constitutionally infirm, (2) that assessment notices delivered to the taxpayers in the name of Marvel Photo were defective in that they failed to fulfill due process requirements, and (3) that the penalties imposed on them were punitive and inappropriate in light of the honest controversy over tax liability. On the first issue, Judge Holloway held the 1976 amendments to the Federal Magistrates Act, Pub. L. No. 94-577, § 1, 90 Stat. 2729 codified as amended at 28 U.S.C. 636(b)(2) (1982) provided the statutory authorization for a consensual reference during the period in question. *See Marvel II*, 719 F.2d at 1511. He also found the reference constitutionally permissible under Article III in reliance upon the district court's de novo review of the magistrate's determination. *Id.* at 1513. *See* United States v. Raddatz, 447 U.S. 667 (1980); *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78-79 (1982) (plurality opinion). The taxpayer's reliance on Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978), was held to be misguided in that the final judgment appealed from was the final decision of a United States district court rather than a district appeal from magistrate determination. 719 F.2d at 1513.

On the procedural due process issue, Judge Holloway concluded the assessments were valid and effective in that they listed the correct taxpayer identification number and were issued in the trade name which the taxpayers had adopted. *Id.* at 1513. On the appropriateness of penalties imposed issue, Judge Holloway refused to uphold the taxpayer's position since the issue was not properly before the court. *Id.* at 1516.

15. 26 U.S.C. §§ 3121(d), 3306(i), 3401(c) (1982). *See also* Employment Tax Regulations 26 C.F.R. §§ 31.3121(d)-1, 31.3306(i)-1, 31.3401(c)-1 (1984).

16. 719 F.2d at 1514.

17. *Id.* Judge Holloway also listed other factors which could shed light on the distinction. "Other factors . . . include: (1) the substantiality of the investment of the person rendering the service with his own tools and equipment, (2) the cost incurred by the alleged employee in rendering the service, as by the employment of his own laborers, (3) the ability of the person rendering the service to profit from his own 'management skill', (4) whether or not the service involved requires a special skill, (5) the permanency of the relationship between the parties, and (6) whether the person rendering the service works

Applying this standard, Judge Holloway found the tasks performed at the studio dispositive of the employee-independent contractor issue. In so finding, he referred to the testimony that the delivery boys assisted in drying pictures daily at the studio.[18] He also referred to the work of the oil colorist packaging proofs and cutting strips of film at the studio.[19] Similarly, Judge Holloway enumerated the duties the other employees performed in the studio. The only evidence relied on by the court which did not demonstrate control was the testimony of some of the workers that the Marvels would "take care of their taxes."[20]

Thus, the Tenth Circuit views the performance of tasks at an employer's place of business as largely dispositive of the employee-independent contractor issue. The court's rationale is based upon its assumption that an employer's right to control at the place of business is greater than its right to control elsewhere.

The Tenth Circuit's view, however, denigrates the "total situation" standard set forth by the Supreme Court in *United States v. Silk*.[21] In *Silk*, the Court stated "[t]he Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No *one* is controlling nor is the list complete."[22] *Marvel* is misleading to the extent that it implies that the right to direct and control is dispositive. *Silk* directs that all of the above factors should be examined and that no one factor is controlling.[23]

C. *Assumption Reinsurance Transactions and Accounting for Loading*: Security Benefit Life Insurance Co. v. United States

In *Security Benefit Life Insurance Co. v. United States*,[24] the Tenth Circuit construed complex portions of the Internal Revenue Code concerning life insurance companies.[25] *Security Benefit* resolved two issues under the Phase II tax of the Life Insurance Company Income Tax Act of 1959.[26] The first issue concerned whether life insurance companies must report as compensation an amount equal to the reserve they are required to establish in an assumption reinsurance transaction. The second issue was whether life insurance companies must employ the same accounting method in computing the inclusion in income of the net valuation por-

in the course of the recipient's business rather than in an ancillary capacity." *Id.* at n.11 (citing Avis Rent A Car Sys. v. United States, 503 F.2d 423, 429 (2d Cir. 1974)).

18. 719 F.2d at 1515.

19. *Id.*

20. *Id.*

21. 331 U.S. 704, 719 (1947).

22. *Id.* at 716 (emphasis added).

23. *Id.*

24. 726 F.2d 1491 (10th Cir. 1984).

25. The Tenth Circuit has previously addressed the tax treatment of unpaid insurance premiums in Commissioner v. Standard Life & Acc. Ins. Co., 525 F.2d 786 (10th Cir. 1975), *rev'd*, 433 U.S. 148 (1977).

26. 26 U.S.C. §§ 801-820 (1982).

tion of deferred and uncollected premiums as when computing the net valuation portion of the gross premium added to the insurance company's reserves.

1. Background

In an effort to augment federal tax revenues realized from the operation of domestic insurance companies, Congress enacted the Life Insurance Company Income Tax Act of 1959.[27] The special treatment prescribed by the Act was designed to require a clearer reflection of insurance company income.[28] Among other issues, the Act sets forth the tax implications of reinsurance transactions and the tax treatment of deferred and uncollected premiums.

In an assumption reinsurance transaction, one company transfers policies to another company, the "reinsurer," which receives the insurance premiums, maintains the requisite statutory reserves,[29] and pays the death benefits.[30] In such a transaction, the company assigning the policies, "the reinsured," can reduce its required reserves, but must increase its income by the amount of such reduction.[31] By contrast, the reinsurer must increase its required reserves, but may take a current deduction from income for the increase in reserves.[32]

The Fifth Circuit in *Mutual Savings Life Insurance Co. v. United States*[33] was faced with determining the tax consequences of a reinsurance transaction. As a result of its assumption of policies of another company, Mutual Savings was required to increase its insurance reserves by $1,047,142.[34] For its assumption of these policies, Mutual Savings received only $682,990 in tangible assets.[35] Thus, the company gained a deduction of over $1,000,000 and was required to include only $682,990 in income. The government sought to impute an additional amount of income so that the recognizable income would equal the allowable deduction.

Section 809(c)(1) provides for the inclusion in income of considera-

27. *Id.* For a discussion of this Act, see Kentucky Cent. Life Ins. Co., 57 T.C. 482, 498 (1972). *See also* Kaufman, *Life Insurance Company Income Tax Act of 1959—An Appraisal of the Effects on the Life Insurance Industry*, (pts. 1 & 2) 16 NAT'L TAX J. 337 (1963).

28. Kentucky Cent. Life Ins. Co., 57 T.C. 482, 498 (1972).

29. State law prescribes the amount of the premium which must be added to insurance reserves to provide for future death benefits. This amount, referred to as the "net valuation premium," is determined under mortality and interest assumptions. Commissioner v. Standard Life & Acc. Ins. Co., 433 U.S. 148 (1977).

30. Mutual Sav. Life Ins. Co. v. United States, 488 F.2d 1142, 1144 (5th Cir. 1974).

31. *Id.*

32. 26 U.S.C. § 809(a)(1) (1982). For a discussion of the statutory scheme of subchapter L and its policy implications see Commissioner v. Standard Life & Acc. Ins. Co., 433 U.S. 148, 152-54 (1977). "Throughout the history of the federal income tax, Congress has taken the view that life insurance companies should not be taxed on the amounts collected for the purpose of paying death benefits." *Id.* at 152. This policy is effectuated by the allowance of current deductions for the required contributions to policy "reserves."

33. 488 F.2d 1142 (5th Cir.), *cert. denied*, 419 U.S. 882 (1974).

34. *Id.* at 1145.

35. *Id.*

tion received in respect of the assumption of insurance liabilities.[36] Section 809(d)(2) provides for the deduction from income of the net increase in reserves.[37] In 1962 the Internal Revenue Service (IRS) issued a regulation which attempted to clarify the meaning of consideration received in reinsurance transactions.[38] In Example 1 of this regulation the reinsurer was not required to impute an additional amount of income up to the deduction for increased reserves.[39]

Pursuant to this regulation, the Fifth Circuit in *Mutual Savings* held that the reinsurer was required to include in income only tangible assets received.[40] In response to this decision, the IRS amended the 1962 regulation and formulated new rules for determining the consideration received in the sale of insurance policies.[41] The 1976 amendments provide that where the reinsurer receives a net amount less than the increase in the required reserves, the reinsurer shall be treated as having received consideration equal to the increase in reserves.[42]

2. Reinsurance Transactions

In *Security Benefit Life*,[43] the Tenth Circuit was faced with a reinsurance transaction indistinguishable from the transaction in *Mutual Savings*. Security Benefit assumed the life insurance policies of another insurer. In recognition of this assumption, Security Benefit reported over $5,900,000 as income.[44] This "consideration received" represented the fair market value of the cash, real estate, and securities received by Security Benefit. The company also deducted over $7,500,000 as the required increase in reserves attributed to the assumption of these policies.[45]

In district court, the government contended that the difference between the reported income and the allowable deduction represented additional income which must be imputed to the taxpayer.[46] The issue was whether the 1976 amendments covered the transactions and, therefore, whether the amendments would require the imputation as income of an additional amount.[47] The district court held for the taxpayer, reasoning that the additional imputation has no application outside the scope of a "netting transaction."[48]

On appeal to the Tenth Circuit, the government again pressed its

36. 26 U.S.C. § 809(c)(1) (1982).
37. 26 U.S.C. § 809(d)(2) (1982).
38. Treas. Reg. § 1.817-4 (1962).
39. Treas. Reg. § 1.817-4(d)(3) (1962).
40. 488 F.2d at 1145.
41. 40 Fed. Reg. 34128 (1975).
42. Treas. Reg. § 1.817-4(d)(2)(ii) (1976).
43. 726 F.2d 1491 (10th Cir. 1984).
44. *Id.* at 1493.
45. *Id.* The reserve was calculated by arriving at the present value of future benefits of these policies.
46. 517 F. Supp. 740 (D. Kan. 1980).
47. *Id.* at 761. District Judge Rogers adopted the taxpayer's labeling of double imputation as arbitrary and mechanical. *Id.* at 762.
48. *Id.* A netting transaction occurs when either the reinsurer or the reinsured pays a

position that the difference between the two figures should be imputed as additional income.[49] The government argued that the transaction was covered by the 1976 amendments. The Tenth Circuit denied the additional imputation of income and held that a company is required to report as income only the fair market value of the tangible assets received.[50] The Tenth Circuit affirmed the district court's conclusion that the transaction was not covered by the 1976 amendments but the court did not go so far as to state that the application of the 1976 amendments should be restricted to netting transactions.[51] The thrust of the court's opinion was that the discrepancy between income and deduction was created by the use of an unrealistically low interest rate for determining the reserves. Thus, remedy should lie with a change of the interest rate and not with an imputation of income.

During consideration of the Life Insurance Company Tax Act of 1959, the Senate Committee on Finance expressed concern over the ability of insurance companies to reduce their tax burdens by manipulating the statutory interest rate which establishes the reserves.[52] The Senate Committee specifically expressed its concern with the ability to take larger deductions, by a large addition to the reserve account, while limiting the income included under Phase I of the Act.[53]

The IRS attempt to balance the allowed deduction with the income realized comports with the plain language of the statute and its legislative history. Thus, the Treasury Regulation, as amended, should have been applied on the basis of its implementation of the congressional intent.[54]

Notwithstanding the Tenth Circuit's narrow construction of the 1976 amendments, the application of this regulation should not be denied to transactions which generate a deduction greater than the recognized income. Clearly in such circumstances the reinsurer is willing to accept a smaller package of assets when that package is accompanied by

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net amount to the other instead of both companies exchanging payments. 726 F.2d at 1494 n.1.

49. 726 F.2d at 1493.

50. *Id.* at 1495.

51. *Id.* at 1494.

52. S. REP. No. 291, 86th Cong., 1st Sess. 1, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 1575 (1959).

53. S. REP. No. 291, 86th Cong., 1st Sess. 1, 14-17, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 1575, 1589-91 (1959).

54. The Commissioner promulgated the amendments to Treas. Reg. § 1.817 under his authority to "prescribe all needful rules and regulations." 26 U.S.C. § 7805(a) (1982). The courts have recognized a lower standard of deference when regulations are issued under this general authorization. Rowan Cos. v. United States, 452 U.S. 247, 253 (1981). In contrast, regulations issued under a specific grant of authority are given greater deference: "When the Commissioner acts under specific authority, our primary inquiry is whether the interpretation or method is within the delegation of authority." *Id.* An even higher degree of deference is provided for legislative regulations, i.e., those regulations promulgated by an administrative agency using these regulations to fill gaps either explicitly or implicitly left by Congress. Morton v. Ruiz, 415 U.S. 199, 231 (1974). Legislative regulations are given controlling weight provided they are neither arbitrary, capricious, nor manifestly contrary to the statute. Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 104 S. Ct. 2778, 2782 (1984).

a sizable tax deduction. The 1962 regulation, as amended, should be interpreted as providing that when the reinsurer receives a net amount equal to the value of the assets paid, less the tax benefits, the reinsurer will recognize consideration equal to the increase in the required reserves.[55]

Courts should not restrict this regulation to those transactions where the consideration received is expressly reduced by credits owed to the exchanging party. The regulation, as amended, should have equal validity where the consideration received is implicitly offset by tax savings.

3. Tax Treatment of Deferred and Uncollected Premiums

Apart from the tax treatment of reinsurance transactions discussed above, the Life Insurance Company Income Tax Act of 1959 sought to clarify the tax implications of deferred and uncollected premiums. The Act, as codified in section 809 of the Internal Revenue Code, provides that premium income must be included in the insurance company's taxable income.[56]

To understand how deferred and uncollected premiums are included in taxable income, it is necessary to explain the various components of insurance premiums. Gross premiums received by the company consist of a "net valuation premium" portion and a "loading" portion. The "net valuation premium" is the portion of the premium that will enable the company, given mortality and interest rate projections, to pay the death benefits to the policyholder.[57] "Loading" is the excess of the gross premium over the "net valuation premium."[58]

Faced with the question of what portion of unpaid premiums should be included in gross premium income, and accordingly, what portion should be added to the company's reserves, the Supreme Court in *Commissioner v. Standard Life & Accident Insurance Co.*[59] held that only the net valuation premium portion need be included in taxable income. The *Standard Life* Court sought to avoid the uncertainty and confusion inherent in segregating unpaid loading into deductible and nondeductible parts and opted for a "practical rule which should minimize the likelihood of future disputes."[60]

Following *Standard Life*, Judge Logan held in *Security Benefit* that insurance companies need not employ the same accounting method used to compute the net valuation portion of unpaid premiums as they use to compute the net valuation portion of such premiums added to reserves. Adopting the district court's reasoning that "the factors that determine

55. Treas. Reg. § 1.817-4(d) (1976).
56. 26 U.S.C. § 809(c)(1) (1982).
57. *Security Benefit Life*, 726 F.2d at 1496. State statutes require reserves equal to the "net valuation premium" to ensure that death benefit funds are maintained.
58. *Id.* Loading is comprised of the company's expenses and profits. *See also* Commissioner v. Standard Life & Acc. Ins. Co., 433 U.S. 148, 150 (1977).
59. 433 U.S. 148 (1977).
60. *Id.* at 162.

the amount of the increase in reserves are not the same as the factors that determine the amount of loading on unpaid premiums,"[61] *Security Benefit* extended the reasoning in *Standard Life* to hold that perfect symmetry between the increase in reserves and the amount of loading includable in taxable income is not required.[62]

The method of accounting used by Security Benefit to increase its reserve deduction was a method approved by the National Association of Insurance Commissioners (NAIC).[63] Judge Logan emphasized, as did the Supreme Court in *Standard Life*, that section 818(a) provides for rejection of the NAIC approach only if that approach is found to be inconsistent with the dictates of accrual accounting.[64]

II. Federal Tax Implications of Estate and Trust Administration

A. *Federal-State Comity*

The bar and the courts have long been burdened by the problem of deciding what effect should be given to a state trial court decree which is determinative of federal estate taxes.[65] In *Estate of Selby v. United States*,[66] the Tenth Circuit faced this difficult issue. *Selby* originated in a Colorado probate court. The Colorado court permitted a personal representative's successor to renounce all rights and interests in property passed to the decedent by the rules of survivorship by reopening a closed estate.[67] The sole purpose of the renunciation was to reduce the estate's federal tax liability.

When the IRS refused the estate's claim for a refund, the estate brought a refund suit in federal district court. The district court, in an effort to maintain "proper federal–state comity," deferred to the state probate court's interpretation of Colorado law and upheld the renunciation.[68]

On appeal, Judge Barrett recognized the broad federal power to review state court decisions affecting federal tax liability. Noting several factors set forth in *Commissioner v. Estate of Bosch*,[69] Judge Barrett's review

61. 517 F. Supp. 740, 770 (D. Kan. 1980).

62. 726 F.2d at 1498 (emphasis added). *Standard Life* does require symmetry regarding the *net valuation portion* of deferred and uncollected premiums includable under § 809(c)(1) and deductible under § 809(d)(2). *Standard Life* implied, and *Security Benefit* held, that symmetry is not required between the taxable and deductible portions of loading.

63. *See* Rev. Proc. 78-6, 1978-1 C.B. 588 (allowing companies that had adhered to the treasury regulation prior to *Standard Life* to elect to change retroactively their method of accounting).

64. 726 F.2d at 1498. *See also Standard Life*, 433 U.S. at 162-63.

65. Commissioner v. Estate of Bosch, 387 U.S. 456, 462 (1967).

66. 726 F.2d 643 (10th Cir. 1984).

67. *Id.* at 646.

68. *Id.* at 645 (discussion of the district court decision).

69. 387 U.S. 456, 463-64 (1966). The Court listed the following factors: (1) whether the Tax Commissioner was made a party to the state proceedings, (2) whether the state proceedings were brought for the purpose of directly affecting federal estate tax liability, (3) whether the legislative history of the marital deduction indicated that state court determinations be "final," and (4) whether the state determination was made by the highest

of the state court determination revealed that the probate court proceeding was *ex parte* in nature, instituted solely to reduce federal tax liability, and concerned, at least in part, with the application of the marital deduction.[70] Most important, Judge Barrett found that the probate court's determination did not express the law of the state as envisioned by *Erie Railroad Co. v. Tompkins*[71] because it was the decision of a probate court rather than the Colorado Supreme Court.

The Tenth Circuit opinion embraced the *Bosch* rationale, adopting the Court's conclusion that:

> It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should a fortiori not be controlling . . . . If there be no decision by [the highest state court] then *federal authorities must apply what they find to be the state law after giving "proper regard"* to relevant rulings of other courts of the State.[72]

The problem with the Tenth Circuit's adoption and application of the proper regard standard is its use outside the arena where it originated. The proper regard standard is derived from a report of the Senate Finance Committee recommending enactment of the marital deduction.[73] *Bosch* stated that "proper regard," not finality, "should be given to interpretations of the will," by the state courts.[74] By applying this standard in *Selby*, the Tenth Circuit opened the door to federal court review of all state trial court proceedings that might jeopardize the federal fisc. The decision failed to recognize the specific federal interests involved in Congress' allowance of the marital deduction under section 2056(a).[75] Such specific congressional legislation was used as the vehicle for applying the proper regard only to decisions of the highest state court. Thus, specific congressional action enabled the federal court to examine the lower state court determination on state property law. The Tenth Circuit failed to recognize that the *Bosch* Court's reliance on the proper regard standard was necessary to construe the marital deduction strictly, as Congress intended.[76] *Selby* lacked such a specific federal in-

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state court and thus viewed as the "law of the state" as envisioned by Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

70. 726 F.2d at 646. Although the court characterized the probate court's determination as impacting the marital deduction, the impact is dubious. *Selby* merely ascertained when, under Colorado law, assets are "accepted" by an estate. Yet Judge Barrett's characterization enables him to adopt the standards of *Bosch* which were derived from the legislative history underlying enactment of the marital deduction.

71. 304 U.S. 64 (1938).

72. 726 F.2d at 646 (emphasis in original) (quoting *Bosch*, 387 U.S. at 465).

73. S. REP. No. 1013, Pt. 2, 80th Cong., 2nd Sess. 4 (1948).

74. *Bosch*, 387 U.S. at 464.

75. *Id.*

76. *Id.* Outside the arenas of the marital deduction and the administration of estates, commentators have persuasively argued that the stricter examination of state court decisions prescribed by *Bosch* needs to be distinguished when assessing deductibility of administrative expenses under 26 U.S.C. § 2053 (1982). Pursuant to section 2053(a)(2), administration expenses are deductible if they are "allowable by the laws of the jurisdiction . . . under which the estate is being administered." 26 U.S.C. § 2053(a)(2) (1982).

terest as estate administration is purely a function of state probate law. Unlike the federal interest underlying the marital deduction in *Bosch*, the administration in *Selby* involved no specific federal interest. In the absence of such specific federal interest, federal–state comity necessitates greater federal deference to state court decisions which construe and apply state property laws.

The Tenth Circuit opinion, moreover, failed to acknowledge the criticism leveled at the *Bosch* decision by focusing upon its parity with the supporting doctrine of *Erie Railroad*.[77] *Erie* is based largely on the proposition that only the highest state court can make a final determination of the state's common-law principles.[78] By contrast, any final state court decision, in the absence of fraud or collusion, settles the property interests at issue in the case even if it has done so in a way later found to be at variance with the law of the state.[79] In other words, *Bosch* failed to recognize that the *Erie* doctrine considers the controlling effect of local law, not local adjudication.[80]

In *Selby*, Judge Barrett reviewed Colorado law, finding that the as-

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Thus, in the arena of an estate's administrative expenses, despite the specific federal interest in providing a deduction for these expenses, Congress chose to defer to state court determination. The critics cite the pronouncement in *Bosch* that:

> We cannot say that the authors [of Section 2056(a)] intended that the decrees of state trial courts were to be conclusive and binding on the computation of the federal estate tax as levied by the Congress. *If the Congress had intended state trial court determinations to have that effect on the federal actions, it certainly would have said so—which it did not do.*

387 U.S. at 646 (emphasis added). *See, e.g.*, Estate of Smith v. Commissioner, 510 F.2d 479, 484 n.1 (2d Cir.) (Mulligan, J., dissenting) (observing that in *Bosch*, there "was no act of Congress . . . citing jurisdiction to the state [courts]"), *cert. denied*, 423 U.S. 827 (1975); Comment, Estate of Smith—*Deductibility of Administration Expenses Under the Internal Revenue Code and Under the Treasury Regulations: Resolving the Conflict*, 17 WM. & MARY L. REV. 363, 377 (1975) (*Bosch* should not apply to section 2053(a) because the section "itself specifically makes its operation dependent upon state law.") Note, *Current Problems Facing the Executor Taking The Section 2053 Estate Tax Deduction*, 30 VAND. L. REV. 795, 803, 804 (1977) ("[R]eliance [on *Bosch*] is misplaced . . . [t]he Court in *Bosch* was considering the marital deduction under section 2056. In contrast, section 2053(a) *does* proclaim that state court determinations are conclusive. . . .") (emphasis in original); R. STEPHENS, G. MAXFIELD AND S. LIND, FEDERAL ESTATE AND GIFT TAXATION ¶ 5.03(1), at 5-6 (5th ed. 1983) [hereinafter cited as R. STEPHENS] (all of the items listed in section 2053(a) pass final muster as estate tax deductions only if they are "allowable" under applicable local law. There is *no* federal law that purports to say whether they are allowable in the obvious sense of the requirement. The question is whether state law permits the amount to be paid by the executor out of estate assets. This is a classic example of express reference to local law for a principle to be applied in the implementation of a federal statute.) (emphasis in original).

77. *See, e.g.*, R. STEPHENS, *supra* note 76, ¶ 4.05(2)(b), at 4-93. Under *Bosch*, the *Erie* doctrine is stretched to permit Federal reexamination of a state decision which has settled the property rights as between the litigating parties.

78. *Id.* at 4-93 n. 11.

79. *See, e.g.*, Brown and Hinckle, *Tax Effects of Non-Tax Litigation—Bosch and Beyond*, 27 N.Y.U. INST. ON FED. TAX'N 1415, 1421-23 (1969); Note, *Taxation: The Role of State Trial Decisions in Federal Tax Litigation*, 21 OKLA. L. REV. 227, 229-30 (1968); Note, *Bosch and the Binding Effect of State Court Adjudication Upon Subsequent Federal Tax Litigation*, 21 VAND. L. REV. 825, 840-41 (1968); Note, *Binding Effect of State Court Judgment in Federal Tax Cases*, 21 SW. L.J. 540, 544-45 (1967).

80. R. STEPHENS, *supra* note 76, ¶ 5.03(1) at 5-6, n. 14; *see also* Estate of Carson v. Commissioner, 33 T.C.M. 1434 (1974). Thus local adjudication of property interests should be given effect.

sets were properly accepted by the estate. He concluded there was no erroneous distribution of property to the estate. Judge Barrett found no Colorado authority that would allow reopening a closed estate merely to reduce the amount of federal estate tax. He also found the probate court action was neither irregularly made nor procured by fraud or mistake.[81] Later the opinion asserted that "[t]o countenance the reopening of estates on this basis, or other such self-serving purposes, would diminish the finality intended by estate closing procedures and place new burdens on those responsible for assessing and collecting federal estate taxes."[82]

Facilitation of the assessment and collection of federal taxes, however, was not among the concerns of the Colorado legislature in enacting its probate code. Assuming the probate court incorrectly applied Colorado law, correction in the Colorado courts and not in the federal courts is in keeping with the long-standing policy expressed in the Rules of Decision Act[83] and envisioned by *Erie*.[84]

B. *General Powers of Appointment*

A taxpayer's power to invade the trust corpus generally will cause the entire trust corpus to be included in the taxpayer's gross estate.[85] In *Estate of Sowell v. Commissioner*,[86] the Tenth Circuit addressed the question of whether the power to invade the trust corpus "in case of emergency or illness" precipitated inclusion of the entire trust corpus in the taxpayer's estate.

The basic test for determining whether a power to invade a trust rises to the status of a general power of appointment under section 2041(b)[87] is whether such a power is one that can be exercised by the decedent for his or her own benefit.[88] In *Sowell*, Judge Doyle measured the power of appointment by first questioning whether the standard of invasion was ascertainable[89] and, second, by questioning whether the standard was related to, or reasonably measurable in terms of, the decedent's health, support or maintenance.[90]

The extent or terms of a decedent's ability to invade a trust depends

81. 726 F.2d at 648 (citing *Williams v. Hankins*, 82 Colo. 251, 258, 258 P. 1114, 1116 (1927)).

82. *Selby*, 726 F.2d at 648.

83. 28 U.S.C. § 1652 (1982).

84. 304 U.S. 64 (1938). Federal interests would still be protected in state court adjudications by command of the Supremacy Clause that "the laws of the United States . . . shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST., art. VI.

85. *See* 26 U.S.C. § 2041 (1982).

86. 708 F.2d 1564 (10th Cir. 1983).

87. 26 U.S.C. § 2041(b) (1982).

88. R. STEPHENS, *supra* note 76, ¶ 4.13(3) at 4-242.

89. 708 F.2d at 1566. The ascertainable standard requires that a standard be capable of being interpreted and applied by a court of law. *See generally* Randall and Schmidt, *The Comforts of the Ascertainable Standard Exception*, 59 TAXES 242 (1981).

90. *See* R. STEPHENS, *supra* note 76, ¶ 4.13(4)(a), 4-243.

on state statutes and case law.[91] Judge Doyle examined state law for guidelines in measuring whether the trust provision would be capable of interpretation and application in a court of law, and found that the standard of invasion was ascertainable.[92]

Once the powers the decedent enjoyed under state law have been ascertained, the question of whether such powers constitute a general power of appointment for estate tax purposes is a federal question.[93] The Internal Revenue Code provides that a power will not be treated as a general power of appointment if the invasion power is related to the decedent's health, education, support or maintenance.[94]

Judge Doyle scrutinized the trust's appointment clause as it related to the decedent's health, education and support. He found the tax court erred in its underlying assumption that the word "emergency" was inherently broader in meaning than health, education and support.[95] He recognized that the fundamental circumstance of an emergency is need and that the power to invade the trust only in emergency situations denied the decedent unfettered command of the trust corpus. Satisfied that the purposes of section 2041 were not being thwarted, Judge Doyle held that, since such invasion would be tolerated only in times of need, this power was sufficiently related to invasions on the basis of health, education and support.[96]

III. SELF-EMPLOYMENT TAX: THE BELATED BELIEF CASE

As part of the Social Security Amendments of 1967,[97] Congress changed the framework for the exemption of ministers from self-employment taxes. Prior to 1967, ordained ministers were automatically excluded from Social Security coverage.[98] Since the adoption of the amendments, ministers may still be exempt provided they meet the statutory requirements of Internal Revenue Code section 1402(e).[99]

Section 1402(e)(1) allows an exemption from self-employment taxes for compensation earned from services performed as a duly ordained, commissioned, or licensed minister of a church. The duly ordained minister must file an application together with a statement that he or she is conscientiously or religiously opposed to the acceptance of

91. *Id.* at 4-243.

92. 708 F.2d at 1567. "Certainly the New Mexico court could readily ascertain the meaning of the governing words here." *Cf.* Rev. Rul. 76-502, 1976-2 C.B. 273.

93. R. STEPHENS, *supra* note 76, ¶ 4.13(3) at 4-243. Local characterization of the invasion power is not controlling. Morgan v. Commissioner, 309 U.S. 78, *as amended in denial of reh'g*, 309 U.S. 626 (1940).

94. 26 U.S.C. § 2041(b)(1)(A) (1982).

95. 708 F.2d at 1566.

96. *See* 26 U.S.C. § 2041(b)(1)(B). In deliniating the abilities of the decedent to invade the trust, Judge Doyle concluded "the term 'emergency' is a limiting word and would not tolerate any excuse. Accordingly, mental depression requiring a trip around the world would not be a proper occasion for invading the trust." *Id.* at 1567.

97. Pub. L. No. 90-248, 81 Stat. 821 (1967) (codified as amended in scattered sections of 26 U.S.C.).

98. Ballinger v. Commissioner, 78 T.C. 752, 756 n.2 (1982).

99. 26 U.S.C. § 1402(e) (1982).

public insurance.[100] Section 1402(e)(2) provides that the minister must file the application not later than the due date of the tax return for the second taxable year for which he or she has net earnings of $400 or more, any part of which is derived from the performance of services as a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry.[101]

In *Ballinger v. Commissioner*,[102] a minister was issued a certificate of ordination by the First Missionary Baptist Church of St. Louis, Missouri in 1969. While pursuing his duties as a minister of *this* church he did not oppose the acceptance of public insurance and never sought exemption from self-employment taxes. In September, 1973, he became an unordained minister of the Maranatha Church in Oklahoma City, Oklahoma. As a result of "evolving beliefs"[103] he became opposed to the acceptance of public insurance. On May 2, 1978, he was formally issued a certificate of ordination by the Maranatha Church and in July of 1978, filed an application for exemption. After an initial approval, the IRS revoked his exemption.

In an opinion by Judge McKay, the Tenth Circuit affirmed the IRS revocation. Judge McKay found no statutory exemption for a minister who belatedly acquires a belief which opposes public insurance.[104] The court found that Ballinger's informal assumption of ministerial duties satisfied the statutory requirement that the individual seeking the exemption be a duly ordained, commissioned or licensed minister. Judge McKay found the two-year statutory time period was triggered by the assumption of ministerial duties and functions. Thus, Ballinger's subsequent ordination was irrelevant as the two-year period had already lapsed.[105]

By this construction the court rewrote the statute. Section 1402(e)(1) establishes the exemption and Section 1402(e)(2) sets forth the time for filing the exemption application. But the court's analysis combines the two subsections, leaving a messy melange which fails to implement fully the directives of each subsection.

Section 1402(e)(1) provides an exemption for individuals duly ordained, commissioned or licensed as a minister of a church. *Ballinger*, however, indicates that a formal ordination is not required. Merely assuming ministerial duties satisfies the congressional prescription.[106]

100. *Id.* § 1402(e)(1).
101. *Id.* § 1402(e)(2).
102. 728 F.2d 1287 (10th Cir. 1984).
103. *Id.* at 1289; 78 T.C. at 755.
104. 728 F.2d at 1290.
105. *Id.*
106. The court's adoption of its quasi-ordination test violates a basic maxim of statutory construction that "in construing a statute, the court is obliged to give effect, if possible, to every word Congress used." Reiter v. Sontone Corp., 442 U.S. 330, 339 (1979). *See also* FCC v. Pacifica Found., 438 U.S. 726, 739-40 (1978) ("Normally, a statute must if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless."); Allen Oil Co. v. Commissioner, 614 F.2d 336, 339 (2d Cir. 1980); FTC v. Manager, Retail Credit Co., 515 F.2d

Hence, Ballinger had two years from the informal assumption of duties at the second church to file for the exemption. Section 1402(e)(1) also requires the applicant to include a statement that he or she is either conscientiously or religiously opposed to the acceptance of public insurance. Ballinger did not acquire his religiously based opposition to public insurance until 1977,[107] four years after he assumed the functions of a minister at his new church. Under the court's interpretation, Ballinger could never qualify for the section 1402 exemption because he lacked a condition precedent for exemption (opposition, conscientiously or religiously based) which he did not develop until after the statutory period had lapsed.

As a result of the court's decision, "evolving beliefs" resulting in opposition to public insurance will be given effect only if the change occurs within a two-year period after the assumption of ministerial duties, regardless of when formal ordination occurs.[108]

IV. Railroad Property Tax

In 1976 Congress, in an attempt to restore the economic well-being of the nation's railroads, passed the Railroad Revitalization and Regulatory Reform Act of 1976.[109] One of the goals of this Act was "to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of common and contract carrier transportation property."[110] Section 306 of the Act prohibits both *de facto* and *de jure* discrimination in the assessment, levying and collection of taxes on rail property.[111] During the survey period, the Tenth Circuit heard two cases which presented difficult questions concerning burdens of proof, the proper role of the federal courts, and the prima facie showing necessary in suits brought under the anti-discriminatory provisions of section 306.

Under section 306(2)(c) a railroad can obtain relief when the assessment ratio for railroad property exceeds by five percent the assessment ratio of commercial and industrial property in the same assessment jurisdiction.[112] Pursuant to Kansas law, property subject to tax is assessed

988, 994 (D.C. Cir. 1975); United States v. Blasius, 397 F.2d 203, 207 (2d Cir. 1968), *cert. granted* 393 U.S. 950, *cert. dismissed*, 393 U.S. 1008 (1969).

107. 728 F.2d at 1289.

108. Spiritual growth and change, however, *will* be given effect upon assumption of duties and functions at a new church.

109. Pub. L. No. 94-210, 90 Stat. 31, 54 (section 306 of the Act was first codified at 49 U.S.C. § 26c (1982)). Later the language of section 306 was changed and the section was recodified as part of the Revised Interstate Commerce Act of 1978 (also known as the 4R Act), Pub. L. No. 95-473, 92 Stat. 1337 (1978) placing section 306 at 49 U.S.C. § 11503 (1982).

110. S. Rep. No. 630, 91st Cong., 1st Sess. 1 (1969). Congress used the commerce clause to effectuate the policy. Congress found that discriminatory taxing of rail property "constitute[s] an unreasonable and unjust discrimination against, and an undue burden on interstate commerce." *See* Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 785 (E.D.N.C. 1981), *aff'd on other grounds*, 700 F.2d 126 (4th Cir. 1983).

111. *See Clinchfield*, 527 F. Supp. at 785.

112. 732 F.2d at 1500.

at thirty percent of its fair market value.[113] In *Atchison, Topeka, and Santa Fe Railway v. Lennen*,[114] the Tenth Circuit determined whether sufficient evidence had been presented by the railroad to prove the assessment ratio for commercial and industrial property in the Kansas jurisdiction.[115]

The railroads computed the assessed value of their rail property by taking thirty percent of its true market value as determined by the Kansas director of property valuation.[116] Similarly, the railroads introduced the Kansas Real Estate Assessment/Sales Ratio for 1980 to prove the ratio of the assessed value to the true market value for commercial and industrial properties. Apparently, the railroads took cognizance of subsection 306(2)(e) of the Act which tacitly expresses a preference for establishing this assessment ratio by means of a sales assessment ratio study.[117] The Tenth Circuit, per Judge Logan, found that the district court erroneously permitted the railroads to prove the assessment ratio for commercial and industrial property by means of a sales assessment study based upon real estate only.[118] The court noted the Act's explicit reference to personal property in its definition of commercial and industrial property on which the sales assessment ratio study would be based.[119] The railroads offered no evidence as to the assessment ratio of personal property. Despite the railroad's contention that such could not be performed, Judge Logan held that the statute mandated at least a showing that such a study would be prohibitively expensive.[120]

In *Burlington Northern Railroad v. Lennen*,[121] the court, again per Judge Logan, defined the proper role of federal courts in section 306 actions and delineated the showing of overvaluation which is necessary to maintain a suit under section 306. In *Burlington*, various railroads sought an injunction against the Kansas taxing authorities to prohibit them from applying discriminatory assessments. The railroads alleged a form of *de facto* discrimination whereby the state authorities taxed both

113. KAN. STAT. ANN. § 79-1439 (1977), *amended by* KAN. STAT. ANN. § 79-1439 (Cum. Supp. 1983 Vol. 6A).

114. 732 F.2d 1495 (10th Cir. 1984).

115. *Id.* at 1501.

116. *Id.* at 1499.

117. Subsection 306(2)(e) provides in part: "[I]n the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random sampling method known as a sales assessment ratio study . . . to the satisfaction of the court . . . ."

118. 732 F.2d at 1503.

119. *Id.* at 1501.

120. *Id.* at 1504. Upon a showing that a sales assessment ratio study for personal property would be prohibitively expensive, Judge Logan indicated that proof by appraisal studies or expert testimony may be permitted. *Id.*

121. 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 2690 (1984). *Burlington Northern* was cited in *Atchinson* for the proposition that, in the absence of a strong showing of purposeful overvaluation with discriminatory intent, Congress did not intend for federal courts to become involved in the challenges of a state official's determination of true market value. *Atchinson*, 732 F.2d at 1500 n.5.

rail and commercial property at the same rate but assessed the rail property at a value higher than its true market value.

Judge Logan determined that section 306 was not intended to protect rail carriers from every form of *de facto* discrimination. In particular, he found the discrimination alleged, termed valuation discrimination, to be outside the range of reprehensible discrimination which the federal courts have the power to remedy.[122] Additionally, in recognition of the coercive burdens federal courts place on the states by enjoining their tax collection process, Judge Logan placed a higher burden on railroads seeking relief under section 306. A prima facie case therefore will be recognized only when the plaintiff makes a strong showing of purposeful overvaluation of rail property with discriminatory intent.[123]

These cases serve to remove the Tenth Circuit from the orbit of other circuit and district courts which have considered section 306 discrimination suits. By requiring the assessment ratio study to be derived from both real and personal property, *Atchison* diametrically opposes the Fourth Circuit's *Clinchfield Railroad*[124] rationale. The district court in *Clinchfield* construed section 306(2)(e) as firmly establishing that a properly conducted sales assessment ratio study serves as a benchmark for assessing discrimination and federal relief, provided the study is accepted as satisfactory proof by the adjudicating court.[125] Furthermore, *Atchison* rejects legislative history showing that Congress understood sales assessment ratio surveys to be studies of real property.[126] Instead, Judge Logan endorsed the statements of an expert who testified before a Senate subcommittee that sales assessment ratio surveys *could* be undertaken for certain kinds of personal property.[127] It was this testimony that enabled Judge Logan to find, in the face of evidence to the contrary, that Congress intended a sales assessment ratio study for both real and personal property.[128]

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122. 715 F.2d at 497. A form of *de facto* discrimination which has been recognized as falling within the anti-discriminatory net is the imposition of the same rate of tax on both classes of property, but applying that rate to a property value below the true market value of commercial property while applying the rate to the true market value of rail property.

De facto discrimination should be distinguished from *de jure* discrimination. *De jure* is found when taxing authorities impose a higher percentage rate on rail than on commercial property. *See id.*

123. *Id.* at 498.

124. Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

125. Clinchfield R.R. v. Lynch, 527 F. Supp. 784, 787 (E.D.N.C. 1981), *aff'd on other grounds*, 700 F.2d 126 (4th Cir. 1983). (The Fourth Circuit did not approve of strict reliance on sales assessment ratio studies of real estate alone, opining that personal property should be considered. The Fourth Circuit fell far short of endorsing sales assessment ratio studies for personal property).

126. 732 F.2d at 1502.

127. *Id. See State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. 63 (1969) (Statement of Rolf Weil, President, Roosevelt Univ.).

128. *See* National Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819, 828 (D.C. Cir. 1980):

> Courts in the past have been able to rely on legislative history for important insights into congressional intent. Without implying that this is no longer the case, we note that interest groups who fail to persuade a majority of Congress to accept particular statutory language often are able to have inserted, in the legislative

It is the *Burlington Northern* opinion that places the Tenth Circuit far outside the purview of mainstream 306 construction. The Eighth Circuit, in *Ogilvie v. State Board of Equalization*,[129] stated that the purpose of section 306 is to prevent tax discrimination against railroads "in any form whatsoever."[130] Yet, in *Burlington Northern*, the Tenth Circuit bifurcated *de facto* discrimination into protected and unprotected classes.[131] By recognizing that the statute fails to prescribe a proper method for valuing rail property, the Tenth Circuit excuses the discriminatory tactics of overvaluating rail property as unprotected.

Burlington Northern is anomalous in another facet. Despite the express exception in section 306(2) to the Tax Injunction Act,[132] Judge Logan found that Congress never intended for the courts to sidestep the general noninterference rule of the Tax Injunction Act.[133] This view is directly opposite the Eleventh Circuit's perception of the availability of a federal forum for section 306 discrimination suits. In *Southern Railway v. State Board of Equalization*,[134] the Eleventh Circuit recognized a section 306 exception "not only to the Tax Injunction Act, but also to the underlying doctrine of equitable restraint in the narrow area of discriminatory taxation of railroads."[135] Viewing Congress as acting unconditionally to ensure federal forums, the Eleventh Circuit found section 306 to go beyond exemption from the Tax Injunction Act and all its forms and prohibit "*Burford* abstention"[136] in cases of either *de jure* or *de facto* discrimination against railroads.[137] The Eleventh Circuit's position was buttressed by the Supreme Court's mandate in *Patsy v. Board of*

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history of the statute, statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative intent.

129. 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

130. *Id.* at 210.

131. 715 F.2d at 497.

132. 28 U.S.C. § 1341 (1982). The Tax Injunction Act provides that: "[T]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

133. 715 F.2d at 498.

134. 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1593 (1984).

135. *Id.* at 529.

136. As recognized by the *Southern Ry.* court, *Burford* abstention is generally invoked where the "exercise of federal review of the [state law] question in a case or similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (from which *Burford* abstention derives its name); *see also* BT Inv. Managers, Inc. v. Lewis, 559 F.2d 950, 954-55 (5th Cir. 1977).

Burford abstention is separate from two other forms of abstention. *Pullman* abstention may be appropriate in order to avoid unnecessary friction in federal-state relations by abstaining on federal constitutional questions which "depend upon, or may be altered by, the determination of an uncertain issue of state law." *Southern Ry.*, 715 F.2d at 527 n.10 (quoting Harman v. Forssenius, 380 U.S. 528, 534 (1965) (citing Railroad Comm'n v. Pullman Co., 213 U.S. 496 (1942)). In *Younger* abstention, the federal courts withhold their intervention in state criminal or quasi-criminal proceedings. Younger v. Harris, 401 U.S. 37 (1971).

137. 715 F.2d at 527.

Regents[138] that "[a] court should not defer the exercise of its jurisdiction under a Federal statute unless it is consistent with [the statute's] intent."[139] Federal courts, therefore, should be required to evaluate whether a state has assessed rail property at a value higher than its true value. In the Tenth Circuit, however, a federal forum is not available for railroads alleging that a state has discriminated against it by overassessing the fair value of its rail property.

Finally, both *Atchison* and *Burlington Northern* are inconsistent as to section 306 construction. *Atchison* stated that a railroad "may easily determine the true market value of its railroad property."[140] *Burlington Northern* found "complex problems associated with the valuation of rail property."[141] This alleged complexity lead the *Burlington Northern* court to find certain state discriminatory tactics unreviewable. The two cases are also unreconcilable when assessing the burden of proof necessary to make a prima facie showing under section 306. *Atchison* adopted the section 306(2)(c) provision which provides relief when the assessment ratio for railroad property exceeds the assessment ratio for other commercial and industrial property by five percent.[142] Conversely, under *Burlington Northern*, a prima facie case exists whenever a railroad can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent.[143]

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138. 457 U.S. 496 (1982).
139. *Id.* at 501-02.
140. 732 F.2d at 1500.
141. 715 F.2d at 497.
142. 732 F.2d at 1500.
143. 715 F.2d at 498.