SUPREME COURT OF THE UNITED STATES

No. 92–74

DEPARTMENT OF REVENUE OF OREGON, PETITIONER
v. ACF INDUSTRIES, INC., ET AL.
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
[January 24, 1994]

JUSTICE STEVENS, dissenting.

Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4–R Act), 90 Stat. 54, codified as amended at 49 U. S. C. § 11503(b)(4) ("subsection (b)(4)"), prohibits States from imposing taxes that discriminate against railroads.[1] In my view, a State tax that fell upon railroad property, but from which comparable non-railroad property was exempt, would clearly implicate that prohibition. The Court errs in holding that such arrangements are not even subject to challenge under subsection (b)(4).

Because subsection (b)(4) by its terms bars any tax that "discriminates" against rail carriers, it is not surprising that the Courts of Appeals have held that the provision applies to revenue measures that discriminate by imposing taxes on railroad property and exempting similar property owned by others.[2]

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[1]As originally enacted, subsection (b)(4) prohibited the States from imposing "any other tax which results in discriminatory treatment of a common carrier by railroad[.]" 4–R Act, §306(1)(d), 90 Stat., at 54. Pursuant to a recodification in 1978, the current version of subsection (b)(4) speaks of "*another tax* that discriminates against" a rail carrier. Congress specifically provided that the 1978 recodification "may not be construed as making a subsequent change in the laws replaced." 92 Stat., at 1466.

[2]In addition to the Ninth Circuit's decision in this case, 961 F.2d 813, 818–820 (1992), see *Department of Revenue* v.

While those courts (and the District Court and Court of Appeals in this case) have differed on precisely how to decide whether a wholesale exemption unlawfully "discriminates" and thus gives rise to *liability*, none has taken the position accepted by the Court today that a claim predicated on discriminatory exemptions is not *cognizable* under subsection (b)(4).

Trailer Train Co., 830 F. 2d 1567, 1573 (CA11 Cir. 1987) (provision targets "discrimination *in all its guises*" and "requires consideration of tax exemptions in determining whether there has been discriminatory treatment") (citation and internal quotation omitted); *Oglivie* v. *State Bd. of Equalization*, 657 F. 2d 204, 209–210 (CA8) (history of provision demonstrates that "its purpose was to prevent tax discrimination against railroads in any form whatsoever," including exemption of non-railroad property), cert. denied, 454 U. S. 1086 (1981). Only the Virginia Supreme Court has reached the contrary conclusion, see *Richmond, F. & P. R.R.* v. *State Corp. Comm'n*, 336 S.E.2d 896, 897 (Va. 1985), and it did so on a basis that I do not understand the Court to accept today—that because ad valorem property taxes are treated in the first three subsections, an ad valorem property tax may never be attacked as discriminatory under the subsection (b)(4).

As the Court explains, *ante* at 10, subsection (b)(4) does not contain a specific prohibition against imposing on railroads an ad valorem tax from which other property owners are exempt. That omission, of course, does not answer the question before us: whether the *tax* that Oregon has imposed "discriminates against a rail carrier" within the meaning of subsection (b)(4). A State might discriminate against a disfavored class of taxpayers in a variety of ways. The absence in the 4–R Act of a provision specifically addressing exemptions is no more significant than the absence of a provision addressing deductions, credits, methods of collecting or protesting state taxes, or penalties. Surely a state tax law that allowed a substantial tax deduction for all taxpayers except rail carriers would readily be recognized as discriminatory. That conclusion would not be affected by the fact that the anti-discrimination statute does not speak specifically to deductions. Indeed, the Court suggests that an exemption for all taxpayers except rail carriers would make the tax discriminatory. See *ante*, at 13.

Rather than addressing every means that might be devised to accord discriminatory tax treatment to rail carriers, Congress specified two familiar methods (differential rates and assessments) and then included a general provision designed to block other routes to the same end. In my opinion, it is anomalous to read § 11503(b) to prohibit even minor deviations in rates or assessments, but then to allow States to put manifestly disproportionate tax burdens on railroads by exempting most comparable property. Both the text of subsection (b)(4) and its evident purposes convince me that Congress intended to bar discrimination by any means, including exemptions.

In *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), this Court held that a State's exemption of a limited class of residents violated a general statutory prohibition against discriminatory taxation

(4 U. S. C. §111) that made no specific reference to exemptions. While I disagreed with the Court's conclusion that the limited exemption at issue could fairly be characterized as discrimination against the protected class, *Davis* surely demonstrates that an exemption, even if not expressly prohibited, may support the conclusion that a tax is discriminatory. Indeed, tax exemptions may make a tax unconstitutionally discriminatory. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 273 (1984); *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642–646 (1984). I see no reason why they should be totally ignored when Congress has expressly prohibited "discrimination" against a particular kind of interstate enterprise.

The Court puts great stock in the difference between the specific and strict bar against discriminatory tax rates and assessments in subsections (b)(1)-(b)(3) and the open-ended language of subsection (b)(4), which speaks only tersely of "discriminat[ion]." As the Court explains, the definition of "commercial and industrial property" that is applicable to subsections (b)(1)–(b)(3) is best read to embrace only property that is taxed, rather than exempted. If we were to accept the Carlines' position, the Court reasons, subsection (b)(4) would render the earlier provisions redundant, and would "nullify" the limitations Congress placed on the rate and assessment provisions. *Ante*, at 9. I disagree.

The ban on discriminatory rates and assessments targets two patent and historically common forms of discrimination. In order to find discrimination in rates or assessment ratios, a court need only compare the rates and assessments applicable to railroads to the rates and assessments of other owners of comparable property. That inquiry would be complicated indeed if the courts were required to divine the "rates" and "assessments" governing property that is exempt from tax. It is not surprising,

then, that the strict bars against disparate rates and assessments exclude from the comparison class property that is not taxed at all.

Congress's exclusion of exempted property from the comparison class for purposes of subsections (b)(1)-(b)(3) does not determine the scope of subsection (b)(4), for that provision does not depend on the limited definition of "commercial and industrial property," that governs its neighbors. Reading subsection (b)(4) to require judicial scrutiny of state exemption schemes creates no disharmony with subsections (b)(1)-(b)(3) unless one assumes that the test of "discrimination" under subsection (b)(4), like the *per se* rules against differential rates and assessments, prohibits all but the most minor differentials in tax treatment between railroad property and owners of similar property. That assumption is unwarranted.

The statute before the Court today (like the statute it construed in *Davis*) does not contain a definition of the term "discrimination," but that familiar concept and the policies of the 4–R Act provide guidance. Like the statute at issue in *Davis*, the 4–R Act protects taxpayers who often have little voice in the policy decisions of the taxing State, and whose situation makes them likely targets for unfavorable treatment.[3] The prohibition of discrimination should be read to give effect to those concerns, but it need not be read more broadly. A sensible test for prohibited discrimination—focusing on whether the protected class is being treated substantially less favorably than most similarly situated persons—would leave

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[3]Railroads' high rates of fixed investment and their immobile assets leave them less able than other interstate enterprises to restrain State taxation by threatening to pull up their stakes and leave. See *Burlington Northern R.R.* v. *City of Superior*, 932 F. 2d 1185, 1186 (CA7 1991).

the States room to employ exemptions without falling afoul of subsection (b)(4).

As *amicus* the Solicitor General suggests, a discrimination standard allows the States to impose disparate tax burdens when the disparity is supported by some legitimate difference between the exempted non-railroad property and the taxed railroad property.[4] In my view, an exemption for a small minority of the resident taxpayers would not warrant a conclusion that prohibited "discrimination" has occurred. See *Davis*, 489 U. S., at 819–823 (STEVENS, J., dissenting). Because subsection (b)(4) merely protects railroads from discrimination, rather than conferring on them a right to be treated like the most favorably treated taxpayer, a violation would not be established when the tax paid on railroad property is not materially greater than the tax imposed on most comparable property.[5] But surely a tax imposed on rail carriers is not saved from discrimination merely because some other kind of enterprise (*e.g.*, motor carriers) is also subject to taxation.

The evident purpose of this part of the 4–R Act, as the Court recognizes, is to protect a class of interstate enterprises that has traditionally been subject to disproportionately heavy state and local tax burdens. This is an area in which State authority has always been circumscribed, most prominently by

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[4]A State might, for example, be able to defend an exemption by showing that the exempted class was subject to an equivalent tax to which railroads were not.

[5]For similar reasons, the Court of Appeals erred when it held that the remedy for a discriminatory exemption scheme is a refund of the *entire tax* paid by the railroad. See 961 F.2d, at 823. To remedy unlawful discrimination under subsection (b)(4), a State need refund only the difference between the tax collected from the railroad and the average tax imposed on owners of comparable property.

the Commerce Clause itself. Subsection (b)(4) plainly requires States to readjust their tax arrangements to the extent those arrangements "discriminate." I cannot agree that federalism "compels" us to read subsection (b)(4) as inapplicable to exemption arrangements. See *ante*, at 11.

Federalism concerns would weigh more heavily in favor of Oregon's position if, as the Court suggests, *ante*, at 10–12, reading subsection (b)(4) to apply to exemption schemes would require States to choose between exempting railroads or eliminating tax exemptions across the board. But as I have explained, such a reading is by no means required. Because the statutory term "discrimination" permits the States greater flexibility to employ exemptions than do the bans on disparate rates and assessments, the Court's concerns about imposing onerous choices on States are overstated.[6] Moreover, an exemption that is meaningfully available to railroads—as in the Court's example of an exemption for funds spent on environmental clean-up—would not make a tax "discriminatory" merely because the exemption may be more useful for some other businesses than it is for railroads. Cf. *Burlington Northern, Inc.* v. *City of Superior*, 932 F.2d 1185, 1187 (CA7 1991) (invalidating tax "imposed on an activity in which only a railroad or railroads engage").

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[6]The cases in which exemption schemes have been found unlawful under subparagraph (b)(4) certainly do not suggest any undue incursions into State fiscal policy. See, *e.g.*, *Trailer Train Co.* v. *Leuenberger*, 885 F. 2d 415, 416 (CA8 1988) (violation found because state imposed ad valorem tax on railroad personal property but exempted over 75 percent of comparable property), cert. denied, 490 U. S. 1066 (1989); *Burlington Northern R.R. Co.* v. *Bair*, 766 F. 2d 1222, 1223–1224 (CA8 1985) (tax on railroad personal property coupled with exemption for 95 percent of other personal property violated statute).

The Court appears to hedge against its position that subparagraph (b)(4) flatly does not apply to taxes and exemption schemes that operate to burden railroads disproportionately. Thus, the Court intimates that the State ad valorem tax must, in order to escape scrutiny under subsection (b)(4), be "generally applicable," *ante*, at 1, 6, and that a scheme that taxed railroad property but exempted *all* non-railroad property might be unlawful because it would not be a *bona fide* "exemption." See *ante*, at 13–14. If I were convinced that Oregon's ad valorem property taxes were generally applicable, I would agree with the Court's disposition of this case. The narrowness or breadth of the exemptions, and correspondingly the even-handed or discriminatory nature of the tax on railroads, goes to whether a subsection (b)(4) claim has merit, not to whether it is cognizable. The statute provides no basis for prohibiting the exemption of one-hundred percent of non-railroad property but allowing the exemption of, for example, ninety percent.

I recognize that application of the statutory "discrimination" standard will sometimes involve problems of line-drawing, and that discriminatory exemptions raise special difficulties. But, in my view, the statute requires courts to grapple with those difficulties. I would remand the case to the Court of Appeals to give it an opportunity to resolve the parties' disputes about the extent of any disparate burdens imposed on rail carriers by Oregon's ad valorem tax and to review the discrimination issue in accordence with the considerations set forth in this opinion.

Accordingly, I respectfully dissent.