

NEBRASKA'S TAX BASED BUSINESS INCENTIVES: A CONSTITUTIONAL REVIEW

BRUCE ROHDE AND NICHOLAS K. NIEMANN†

	<i>Page</i>
I. COMPETITION BETWEEN THE STATES	440
II. NEBRASKA'S LEGISLATIVE PURPOSES	441
III. A SUMMARY OF NEBRASKA'S ECONOMIC REMEDIES	442
A. LB 775—THE EMPLOYMENT AND INVESTMENT GROWTH ACT	442
B. LB 270—EMPLOYMENT EXPANSION AND INVESTMENT INCENTIVE ACT	446
C. LB 772—SINGLE-FACTOR SALES FORMULA.....	447
IV. A CONSTITUTIONAL REVIEW	448
A. LB 775: EQUAL PROTECTION	449
1. <i>Business Classifications</i>	450
2. <i>Property Classifications</i>	453
B. LB 775 AND LB 270 ARE NOT APPROPRIATIONS	456
C. THE LB 775 AGREEMENT	458
1. <i>LB 775 Agreement Provisions</i>	458
2. <i>The Contract Clause of the United States</i> <i>Constitution</i>	459
3. <i>The Contract Clause of the Nebraska Constitution</i>	461
4. <i>The Contract Clauses in Tax Matters</i>	462
D. LB 775 MEETS THE "ONE SUBJECT" RESTRICTION IN THE NEBRASKA CONSTITUTION	467
E. RESTRICTIONS ON PUBLIC DISCLOSURE OF THE LB 775 APPLICATION AND AGREEMENT	468
F. CONSTITUTIONALITY OF SINGLE-FACTOR APPORTIONMENT FORMULA	470
V. CONCLUSION	473

† Bruce Rohde is a member of the law firm McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska; B.S.B.A. 1971, Creighton University; J.D. 1973, Creighton University School of Law; member, Nebraska Society of C.P.A.'s. Nicholas K. Niemann is a member of the law firm McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska; B.S.B.A. 1978, Creighton University; J.D. 1981, Creighton University School of Law; member, Nebraska Society of C.P.A.'s. The authors gratefully acknowledge the editing assistance of Sandra D. Morar, Creighton University School of Law, Class of 1988.

I. COMPETITION BETWEEN THE STATES

States, more than any other level of government, probably have the strongest tradition of working with private businesses.¹ This tradition has, of late, "spawned a broad range of state economic development programs."² These include programs designed to reach outside the state and bring in investment, and those that focus on developing existing in-state resources.³ The scope of such programs hinge on state resources, which vary widely. In 1984, state economic development budgets ranged from \$491,852 to \$61,300,000, with staffs from 8 to over 600 employees.⁴

Nebraska has experienced its share of out-migration of jobs and has had difficulty in attracting and retaining new businesses.⁵ To complicate the economic situation facing the state, the degree of competition amongst other states for new business development and new jobs has risen sharply.⁶ In response to this new level of competition between the states, the Nebraska Legislature enacted four laws for the purpose of enhancing Nebraska's business and tax climate.⁷ These four laws are:

1. LB 775, The Employment and Investment Growth Act.⁸
2. LB 270, The Employment Expansion and Investment Incentive Act.⁹
3. LB 772, The Single-Factor Unitary Formula.¹⁰
4. LB 773, Restructuring of Nebraska's individual income tax.¹¹

1. NATIONAL ASSOCIATION OF STATE DEVELOPMENT AGENCIES, DIRECTORY OF INCENTIVES FOR BUSINESS INVESTMENT AND DEVELOPMENT IN THE UNITED STATES — A STATE-BY-STATE GUIDE 3 (2d ed. 1986) [hereinafter DIRECTORY OF INCENTIVES].

2. *Id.* See also SITE SELECTION HANDBOOK, 21ST ANNUAL SURVEY: THE FIFTY LEGISLATIVE CLIMATES 992-1007 (1986) [hereinafter SITE SELECTION HANDBOOK].

3. DIRECTORY OF INCENTIVES, *supra* note 1, at 3.

4. *Id.* at 4 (citing NASDA, STATE DEVELOPMENT EXPENDITURE SURVEY (1984)).

5. NEB. REV. STAT. § 77-4102(1)(a) (Supp. 1987).

6. See SITE SELECTION HANDBOOK, *supra* note 2, at 992-1007; DIRECTORY OF INCENTIVES, *supra* note 1, at 3-4.

7. See NEB. REV. STAT. § 77-4102(1)(b) (1987 Supp.).

8. LB 775, Neb. Unicameral, 90th Leg., 1st Sess. (1987); NEB. REV. STAT. §§ 77-4101 to -4110 (Supp. 1987).

9. LB 270, Neb. Unicameral, 90th Leg., 1st Sess. (1987); NEB. REV. STAT. §§ 77-27,187 to -27,193 (Supp. 1987) (amending NEB. REV. STAT. §§ 77-27,187 to -196 (Reissue 1986)).

10. LB 772, Neb. Unicameral, 90th Leg., 1st Sess. (1987); NEB. REV. STAT. §§ 77-2701, -2734.05, -2734.07, -2734.16, -2734.16 (Supp. 1987).

11. LB 773, Neb. Unicameral, 90th Leg., 1st Sess. (1987); NEB. REV. STAT. §§ 77-2701, -2701.01, -2714 to -2715.01, -2716, -2724, -2725, -2729, -2730, -2732, -2733, -2734.01, -2734.02, -2734.04, -2765, -2775, -2781, -2786, -2793, -27,119.01, -2753 (Supp. 1987). LB 773 in essence decoupled Nebraska's individual income tax system from the federal income tax system. Previously, Nebraska's individual income tax was determined by multiplying the federal income tax by a fixed percentage. After LB 773, various tax rates are applied to Nebraska taxable income (federal adjusted gross income with certain Ne-

II. NEBRASKA'S LEGISLATIVE PURPOSES

In order for a legislature to enact law, a legitimate purpose must exist. In matters of tax legislation, when a legitimate purpose is present, and the laws enacted bear some reasonable relationship to that purpose, the granting of exemptions or other special tax treatment is generally deemed not to be unconstitutionally unreasonable.¹²

The 1987 Nebraska Legislative session found itself well provided with legitimate legislative purposes. At the beginning of the session, the Nebraska Department of Economic Development completed a report entitled "Building Prosperity, Nebraska Economic Development Strategy" ("Report")¹³ which constituted the state's initial attempt to reach a general agreement on the economic situation facing Nebraska and to arrive at a consensus on the strategies for building a stronger economy. This Report reached a number of conclusions regarding the status of Nebraska's economic growth and business climate. The Report concluded that Nebraska's population has been growing at an increasingly slower rate and that projections demonstrate a continuation of this trend.¹⁴ Of the 93 counties in Nebraska, only 38 were projected to grow by 1990.¹⁵ During the period from 1975 through 1980, Nebraska experienced a net out-migration of 12,360 persons from the population over age 20.¹⁶

With regard to Nebraska's business formation activity, the Report concluded that in 1985 only four other states experienced a greater relative decrease in the number of new incorporations than did Nebraska. The 2,617 new Nebraska incorporations in 1985 were 9.4% less than those occurring in 1980.¹⁷ Citing Nebraska's dependence on a faltering agricultural economy, the barely perceptible growth in manufacturing, the boom in services with their certain but undefined power to initiate growth, and the below average rate of business formation in Nebraska, the Report concluded that without additional intervention in Nebraska's economy, the state's economic

braska modifications). For the reasons that employee taxes and other costs directly impact the attractiveness of any given locality to business and because LB 773 reduced the top individual tax rate to 5.9%, this bill was an important part of Governor Orr's economic development package. However, this article concerns only the three bills which directly affect business taxes and, therefore, LB 773 will not be discussed further.

12. See *infra* notes 68-72 and accompanying text.

13. NEBRASKA DEP'T. OF ECON. DEV., BUILDING PROSPERITY, NEBRASKA ECONOMIC DEVELOPMENT STRATEGY 1-17 (1987) [hereinafter ECONOMIC DEVELOPMENT REPORT] prepared in compliance with NEB. REV. STAT. §§ 81-1201.09 to -1201.10 (Cum. Supp. 1986).

14. ECONOMIC DEVELOPMENT REPORT, *supra* note 13, at 15.

15. *Id.*

16. *Id.*

17. *Id.* at 53.

growth will likely continue below the national averages.¹⁸

In assessing Nebraska's tax climate, the Report stated that when ranking all states by the total amount of state and local tax bills for high income earners, Nebraska ranked among the top ten in payments for 1985. For example, Nebraska ranked eighth nationally for families earning \$60,000 and families earning \$120,000.¹⁹

In terms of tax incentives offered by Nebraska in 1985, the state offered fewer tax incentives than the average for other states. Citing a survey of states conducted by *Site Selection Handbook*,²⁰ the Report concluded that Nebraska offered only four of the fourteen tax incentives included in the survey, compared to an average of 8.1 for the nation.²¹

The Report also recognized that other states had increased their efforts to attract and retain businesses through incentives, thereby increasing their competitive edge over Nebraska.²² In 1986 alone, forty-two state legislatures enacted over one hundred new tax and economic development incentives designed specifically to attract new businesses to their states.²³ The various types of tax incentives offered by the states include corporate income tax exemptions, personal income tax exemptions, excise tax exemptions, property tax exemptions, sales and use tax exemptions on equipment, tax exemptions on manufacturer's inventories, tax exemptions on raw materials used in manufacturing, tax incentives for creation of jobs, tax incentives for investment, tax credits for use of specified state products, tax incentives for research and development, enterprise zones and various targeted industry tax incentives.²⁴

The foregoing facts indicated to the Nebraska Legislature the need for major revisions in Nebraska's tax structure in order to promote economic revitalization in Nebraska.²⁵ Consequently LB 775, LB 270, and LB 772 were introduced and eventually passed.

III. A SUMMARY OF NEBRASKA'S ECONOMIC REMEDIES

A. LB 775—THE EMPLOYMENT AND INVESTMENT GROWTH ACT.

Legislative bill 775 ("LB 775") is the cornerstone of Nebraska's economic development program. Under this law, a business qualifies

18. *Id.* at 55.

19. *Id.* at 68-69.

20. *Site Selection Handbook*, *supra* note 2.

21. Economic Development Report, *supra* note 13 at 69 (citing *SITE SELECTION HANDBOOK*, *supra* note 2).

22. *See id.* at 95.

23. *See SITE SELECTION HANDBOOK*, *supra* note 2, at 992-1024.

24. *See id.* at 1013; *see also* *DIRECTORY OF INCENTIVES*, *supra* note 1, at 10.

25. NEB. REV. STAT. § 77-4102(1)(b) (Supp. 1987)

for various tax benefits if it meets certain new job and new investment thresholds in Nebraska.

To qualify under LB 775, a business needs to develop a project plan which meets thresholds of employment, investment, or both, in Nebraska.²⁶ This project plan is submitted to the state for approval by the Nebraska Tax Commissioner. Upon approval, the state enters into a contract with the business, pursuant to which the State of Nebraska agrees to allow the specified tax benefits for the taxpayer's qualifying project.²⁷

This contractual commitment by the State of Nebraska represents perhaps the most unique and important economic development aspect of LB 775.²⁸ The contract is important because the most critical uncertainty which businesses face when deciding where to locate is whether the tax climate will materially change after completion of the new project.²⁹ By contractually committing the tax incentives for approved projects pursuant to LB 775, the State of Nebraska demonstrates to businesses a stable tax climate and, therefore, encourages reciprocal long-term commitments by businesses to the State of Nebraska.

Prior to the tax benefits being utilized, LB 775 generally requires that the new jobs and new investment actually be committed or actually occur.³⁰ Due to these requirements, LB 775 is a performance based package of incentives which has been designed to generate its own cash flow.³¹

The following tax benefits apply if the business creates at least 30 new jobs and invests at least \$3 million within the state:³²

26. NEB. REV. STAT. § 77-4104 (Supp. 1987).

27. *Id.* The law states:

After approval, the taxpayer and the Tax Commissioner shall enter into a written agreement. The taxpayer shall agree to complete the project, and the Tax Commissioner, on behalf of the State of Nebraska, shall designate the approved plans of the taxpayer as a project and, in consideration of the taxpayer's agreement, agree to allow the taxpayer to use the incentives contained in the Employment and Investment Growth Act.

Id. § 77-4104(4).

28. See *infra* notes 130-89 and accompanying text.

29. See *infra* notes 130-89 and accompanying text.

30. NEB. REV. STAT. § 77-4105(2) (Supp. 1987).

31. Nebraska receives the actual increased tax revenues from the project before the company receives the tax benefits. Compare Nebraska's incentives to other economic development incentives which take the form of grants that are awarded before the development occurs. See DIRECTORY OF INCENTIVES, *supra* note 1, at 5; 29 INDUSTRIAL DEVELOPMENT 1331 (Nov./Dec. 1986) (regarding \$50 million in grants and loans for Chrysler's \$1 billion project in Detroit); 29 INDUSTRIAL DEVELOPMENT 961 (Sept./Oct. 1985) (regarding \$5 million in grants and loans for the RCA/Sharp project in Washington).

32. These thresholds need to be met by the end of the sixth year after the end of the year the application was submitted. NEB. REV. STAT. § 77-4107(1) (Supp. 1987).

- Nebraska corporate income tax for multi-state companies may be computed (for fifteen years) based solely on its sales in Nebraska (the single-factor sales formula), rather than its sales, payroll and property located in Nebraska.³³
- Sales and use taxes are refunded if paid for tangible depreciable property purchased for the project, including equipment and building materials.³⁴
- Each year for seven years starting with the year the thresholds are met, a jobs credit is allowed equal to five percent of the increases in compensation since the base year.³⁵
- A ten percent investment credit is allowed on various project investments, including buildings and equipment, over a seven year period.³⁶

If the project will result in at least one hundred new jobs and at least \$10 million in new investment, the business will also receive a fifteen year personal property tax exemption on turbine-powered aircraft and mainframe business computers.³⁷ "Turbine-powered aircraft" is defined by the statute to include turboprop, turbojet, and turbofan aircraft.³⁸ Mainframe business computers are defined as "computers used for business information processing which require environmental controls . . . and which are capable of . . . supporting more than one transaction and more than one user plus all peripheral components connected to such computers."³⁹

Similarly, if the threshold of one hundred jobs is achieved, and the project involves \$10 million of new investment in business equipment utilized in the manufacturing or processing of agricultural products, then this equipment is also exempt from personal property tax for fifteen years.⁴⁰

If the project will not create a minimum of at least thirty new jobs, the business can still qualify for the following incentives under LB 775 if it invests at least \$20 million in the state:

- The company may use the single-factor sales formula for

33. NEB. REV. STAT. § 77-4105(1) (Supp. 1987). See *infra* text accompanying note 67 (explaining the single factor sales formula).

34. NEB. REV. STAT. § 77-4105(3) (Supp. 1987).

35. *Id.* § 77-4105(4)(a). The "base year" is the tax year immediately preceding the tax year during which the application was submitted. *Id.* § 77-4103(2).

36. *Id.* § 77-4105(4)(b).

37. *Id.* § 77-4105(2).

38. *Id.* § 77-4105(2)(a). However, the exemption does not apply if "any such aircraft is used for fundraising for or for the transportation of an elected official." *Id.*

39. *Id.* § 77-4105(2)(b).

40. *Id.* § 77-4105(2)(c). A certification procedure also must be met for this exemption to apply. *Id.*

computing its Nebraska corporate income tax.⁴¹

- Sales and use taxes paid on tangible depreciable property for the project will be refunded.⁴²

A business qualifies under LB 775 only if the business is subject to Nebraska sales and use taxes, and either Nebraska's income tax imposed by the Nebraska Revenue Act of 1967 or Nebraska's franchise tax under Chapter 77, Article 38.⁴³ Members of a taxpayers' unitary group⁴⁴ will generally be considered part of the taxpayer for purposes of computing benefits under LB 775.⁴⁵

A broad range of businesses qualify under LB 775.⁴⁶ However, retail businesses generally will not qualify, although the headquarters of retail businesses do qualify.⁴⁷

LB 775 allows the taxpayer seven years to meet the job and investment thresholds.⁴⁸ The job and investment credits earned under LB 775 can be applied against either the full amount of income tax liability, or the sales and use tax liability on purchases used at the project.⁴⁹ Unused credits can be carried over and used for fifteen years.⁵⁰ The jobs and investment thresholds, once achieved, must be maintained for at least seven years thereafter in order to avoid full or partial recapture of certain tax benefits.⁵¹

Taxpayers may enter into contracts with the state for more than one project and a single contract may include more than one project. The projects may be either sequential or concurrent. A project may

41. *Id.* § 77-4105(1).

42. *Id.* § 77-4105(3)(a).

43. *Id.* § 77-3801 to -3807 (Reissue 1986) (regarding financial institution taxation).

44. *Id.* § 77-4103(1) (Supp. 1987). The statute indicates that the definition of unitary group in Chapter 77, Article 27 applies. A unitary group generally includes a parent corporation and all 50% or more owned subsidiaries which are part of the unitary business.

45. *Id.* § 77-4103(12).

46. Businesses which can take advantage of the incentives include businesses engaged in: (i) the storage, warehousing, distribution, transportation or sale of tangible personal property; (ii) the conducting of research, development or testing for scientific, agricultural, animal husbandry, food products or industrial purposes; (iii) the performance of data processing, telecommunication, insurance or financial services; (iv) the assembly, fabrication, manufacture or processing of tangible personal property; (v) the administrative management of any activities, including headquarter facilities relating to such activities; or (vi) any combination of the activities listed above. *Id.* § 77-4103(10).

47. *Id.* § 77-4103(10). A business will not qualify if 80% or more of its total sales are to the ultimate consumer of tangible personal property which is not assembled, fabricated, manufactured or processed by the taxpayer or used by the purchaser in any of the activities in (ii) through (v) above. *Id.*

48. *Id.* § 77-4107(1).

49. *Id.* § 77-4106.

50. *Id.*

51. *Id.* § 77-4107.

involve the same location as another project,⁵² or a single project may involve more than one location.⁵³

Finally, LB 775 also contains a capital gains tax exclusion for individuals on the sale of capital stock in certain corporations. To qualify the following requirements must be met:

- (i) the corporation must have been operating in Nebraska for at least three years;
- (ii) the company must have at least five shareholders;
- (iii) at least ten percent of the stock must be held by one or more shareholders not related to the other ninety percent; and
- (iv) the individual must have received the stock either while employed by the company or on account of employment.

The corporation does not need to meet any job and investment thresholds for its stock to qualify.⁵⁴

The rationale for this capital gains exclusion is to encourage taxpayers to remain residents of Nebraska when they liquidate or sell the stock in their businesses.⁵⁵ Over the past several years, Nebraska has experienced a general out-migration of such residents to low- or no-tax states, where the gain on such sales would not be subject to the Nebraska tax. The purpose of this provision is to stem the flow of such residents from the state.⁵⁶

B. LB 270—EMPLOYMENT EXPANSION AND INVESTMENT INCENTIVE ACT.

Legislative Bill 270 ("LB 270") provides two types of tax credits to those businesses unable to achieve the thresholds of LB 775, but nevertheless create at least two new jobs and make an average net investment of at least \$100,000 during a taxable year. Such a business will be allowed a \$1,000 tax credit for each new employee and a \$1,000 tax credit for each \$100,000 of new investment.⁵⁷ These credits can be applied to reduce income tax up to fifty percent or to obtain a

52. *Id.* § 77-4104(6).

53. *Id.* § 77-4104(2)(c).

54. *Id.* §§ 77-2715.08 and -2715.09.

55. See Floor Debate on L.B. 775, Neb. Unicameral, 90th Leg., 1st Sess. 4120-31 (Apr. 28, 1987).

56. *Id.* This exemption should withstand constitutional analysis based on the state's inherent power to grant exemptions. See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (stating that "[t]his Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation"). See also *United Cigar-Whelan Stores Corp. v. District of Columbia*, 176 F.2d 952, 952 (D.C. Cir. 1949) (illustrating an allowable capital gain exclusion).

57. NEB. REV. STAT. § 77-27,188(2) (Supp. 1987).

refund of sales and use taxes.⁵⁸ Credits not used in a given year can be carried forward and used over five years.⁵⁹ As with LB 775, only certain types of businesses can qualify. However, unlike LB 775, no application with the Nebraska Tax Commissioner or contract with the state is needed.⁶⁰

Once the new jobs and new investment requirements are met in a given year, future increases in employment of two employees in any of the next five years qualify for an additional \$1,000 credit without the need for a second \$100,000 investment.⁶¹ Full or partial recapture of the tax credits apply if the new jobs and new investment levels are not maintained for at least two years.⁶²

C. LB 772—SINGLE-FACTOR SALES FORMULA.

Until the enactment of Legislative Bill 772 ("LB 772"), multi-state businesses operating in Nebraska have computed their portion of total taxable income allocable to the state by means of a three-factor formula. This formula was derived by averaging property in the state, payroll in the state and sales made in the state.⁶³ This three-factor formula, or some variation, is utilized by most states in the country.⁶⁴

LB 772 eliminates the multi-factor formula for all Nebraska businesses and replaces it with a single-factor formula using sales as the only factor.⁶⁵ Commencing in 1988, this new formula is phased in and becomes fully effective in 1992.⁶⁶ The LB 772 phase-in period should be contrasted with the single-factor formula under LB 775 which requires no phase-in period.⁶⁷

The underlying purpose of LB 772 is to encourage businesses to locate in Nebraska. By removing the factors of payroll and property from the tax computation, Nebraska based businesses are not jeopardized by having large payrolls and substantial property in the state.

The following illustrates the significant inducement offered by

58. *Id.* § 77-27,188.01.

59. *Id.*

60. *Id.* § 77-27,189.

61. *Id.* § 77-27,188.

62. *Id.* § 77-27,188.02.

63. *See id.* § 77-2734.05 (Reissue 1986) amended by NEB. REV. STAT. § 77-2734.05 (Supp. 1987).

64. *See* PRENTICE-HALL, ALL STATES TAX HANDBOOK ¶ 223, at 142 (1985) (charting income apportionment elements); J. HELLERSTEIN, STATE TAXATION ¶ 8.6, at 335 n.125 (1983). Iowa and Missouri are two states which use a single factor sales formula for apportionment of income. *See supra* notes 215-16 and accompanying text.

65. NEB. REV. STAT. § 77-2734.05, -2734.16 (Supp. 1987).

66. *Id.* LB 772 also shortens the net operating loss and capital loss carryover period to five years. *Id.* § 77-2734.07.

67. *Id.* § 77-4105(1).

the single-factor formula: Assume that a company has none of its property or payroll in Nebraska, but that its sales in Nebraska are 75% of its total sales. Prior to LB 772, 25% $([0\% \text{ Property} + 0\% \text{ Payroll} + 75\% \text{ sales}] \div 3)$ of its income is apportioned to Nebraska and 75% is apportioned to the other states (assuming the other states use the three-factor formula). After LB 772, 75% of its income is apportioned to Nebraska and 75% $[100\% \text{ Property} + 100\% \text{ Payroll} + 25\% \text{ Sales}] \div 3$ is apportioned to the other states (assuming again the other states use the three-factor formula). If the Company moves to Nebraska (i.e. 100% of its property and payroll are moved to Nebraska) 75% of its income remains apportioned to Nebraska, but only 8% $([0\% \text{ Property} + 0\% \text{ Payroll} + 25\% \text{ Sales}] \div 3)$ is apportioned to the other states. In essence, by locating in Nebraska, the property and payroll factors are removed from the calculation in other states and placed in Nebraska, which, by ignoring payroll and property, becomes a haven for the location of business.

IV. A CONSTITUTIONAL REVIEW

The United States Supreme Court has consistently held that a state may constitutionally encourage the location within the state of certain industries by granting those industries certain specialized tax benefits or exemptions.⁶⁸ For example, in *Allied Stores of Ohio, Inc. v. Bowers*,⁶⁹ the United States Supreme Court found that "a statute which encourages the location within the State of needed and useful industries, by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment" to the United States Constitution.⁷⁰ In *Allied*, the Ohio statute at issue provided a property tax exemption on merchandise and agricultural products of non-residents who stored their goods in warehouses in the state.⁷¹ The Court stated that the equal protection "clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."⁷² Consequently, and as the following

68. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959).

69. *Id.* at 528.

70. *Id.*

71. *Id.* at 523.

72. *Id.* at 526. The Court cited numerous cases to support this notion. See, e.g., *Bell's Gap R. Co. v. Commonwealth*, 134 U.S. 232, 237 (1890) (holding that a tax on certain securities was constitutional even though not all securities were so taxed).

The Court in *Bell's Gap* based its finding that the "Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation" on the fact that the state has broad discretion in enacting legislation pursuant to its police power. *Id.* "Police power" was defined as "regulations to promote health, peace, morals, edu-

discussion demonstrates, Nebraska's new enactment does not violate the United States Constitution or the Nebraska Constitution.

A. LB 775: EQUAL PROTECTION

Legislative bill 775 contains a number of classifications delineating which taxpayers qualify for tax benefits. For example, industries such as manufacturing, insurance, financial, research and development, data processing, and all headquarter facilities generally qualify under LB 775, while retail businesses, contractors and most types of service businesses generally do not qualify.⁷³ Within the qualifying industries, only taxpayers which meet the prescribed thresholds of new jobs and new investment qualify for the tax benefits.⁷⁴ Further, different tax benefits apply based on the applicable job and/or investment thresholds.⁷⁵ In addition, with regard to the personal property tax exemptions, only the three designated types of personal property qualify for the exemption.⁷⁶ Therefore, because LB 775 classifies businesses and personal property, constitutional requirements must be satisfied.

The fourteenth amendment to the United States Constitution provides, *inter alia*, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law."⁷⁷ Although incapable of definition, "equal protection" basically assumes that individuals similarly situated will be treated the same. The law "does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals."⁷⁸ However, law promulgated under the state's power to tax must be rationally related to a legitimate governmental purpose in order to pass judicial scrutiny.⁷⁹ Consequently, each classification created by the economic development package must be scrutinized to determine if it is constitutionally valid. Legislative bill 775 creates two such classifications:

cation . . . and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." *Id.* at 238.

73. NEB. REV. STAT. § 77-4103(10) (Supp. 1987).

74. See *supra* notes 32, 40-53 and accompanying text.

75. NEB. REV. STAT. § 77-4105 (Supp. 1987).

76. *Id.* § 77-4105(2).

77. U.S. CONST. amend. XIV, § 1. See NEB. CONST. art. 1, § 1 (containing Nebraska's equal protection provision).

78. NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 586 (2d ed. 1983) [hereinafter NOWAK]. See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (stating that the "State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary").

79. See, e.g., *Allied*, 358 U.S. at 527. See NOWAK *supra* note 78, at 586-90.

(1) classifying businesses which may take advantage of the law, and (2) classifying types of property exempt from taxation. The constitutionality of these classifications is discussed below.

1. *Business Classifications*

The tax benefits of LB 775 are available only to a specified class of businesses and then only if they meet certain specific new job and new investment thresholds. The United States Supreme Court analyzed the constitutional validity of such classifications in *Carmichael v. Southern Coal & Coke Co.*⁸⁰ In this case an Unemployment Compensation Act exempted from certain taxes employers with less than eight employees and employers in certain specified types of businesses.⁸¹

The Court, in concluding that these classifications did not violate the equal protection clause, stated:

It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.⁸²

As to the taxpayer's contention that no reason existed for distinguishing between those employers having only seven employees and those having eight, the Court responded:

[T]his is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and that status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.⁸³

The Court similarly dismissed the taxpayer's contention that the exemption of certain industries was unreasonable. Stating that the legislature is free to withhold the burden of tax so as to aid what it perceives as a worthy enterprise, the Court noted that it had often

80. 301 U.S. 495, 504-31 (1937).

81. *Id.* at 505. The exclusion included those employing agricultural labor, domestic servants, seamen, and insurance agents. *Id.* at 505 n.1.

82. *Id.* at 509. See *Allied Stores Inc. v. Bowers*, 358 U.S. at 528 (providing that a classification will be upheld if any set of facts can reasonably be conceived to sustain it).

83. *Carmichael*, 301 U.S. at 510-11.

sustained the exemption of certain industries.⁸⁴ According to the Court, a legislature is permitted to legislate remedies for the problems it perceives.⁸⁵

In addition to federal and Nebraska equal protection concerns with business classifications, article III, section 18 of the Nebraska Constitution provides that the legislature shall not pass any local or special laws granting any corporation, association or individual any special or exclusive privileges, immunity or franchise.⁸⁶ At first blush, LB 775 appears to grant tax privileges to certain corporations in violation of article III, section 18 because only specific types of companies can take advantage of the law, whereas other types are excluded.⁸⁷

Upon a closer look, however, LB 775 is not a special law and therefore does not come under the prohibition of article III, section 18. The Nebraska Supreme Court has held that:

An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the legislature has a basis in reason, and is not purely arbitrary. . . . If a law affects equally all persons who come within its operation it cannot be local or special within the meaning of the Constitution.⁸⁸

In *State of Nebraska v. Nebraska Mortgage Finance Fund*, the court upheld the Mortgage Finance Fund Act ("Act"), the purpose of which was to create a system to provide mortgages for low income housing.⁸⁹ The State of Nebraska argued the Act was unconstitutional for a number of reasons, including allegations that the Act violated article III, section 18 prohibiting grants of special privileges to a certain class of persons.⁹⁰ In this case, the class consisted of lenders providing special mortgages to purchase low income housing. The Nebraska Supreme Court restated its position:

[T]he power of classification rests with the Legislature and

84. *Id.* at 512 (citing exemptions for agriculture and charitable institutions). See *INDEPENDENT WAREHOUSES, INC. v. SCHEELE*, 331 U.S. 70, 89 (1947) (sustaining tax on commercial but not private warehouses); *Dixie Ohio Express Co. v. State Rev. Comm.*, 306 U.S. 72, 79 (1938) (sustaining higher taxes on truckers for hire than on those who hauled their own goods).

85. *Carmichael*, 301 U.S. at 525.

86. NEB. CONST. art. III, § 18.

87. See *supra* note 46 and accompanying text.

88. *State of Neb. v. Nebraska Mort. Fin. Fund*, 204 Neb. 445, 454, 283 N.W.2d 12, 19 (1979) (quoting *Bauer v. State Game, Forestation and Parks Comm.*, 138 Neb. 436, 441, 293 N.W. 282, 285 (1940) (quoting *Waterman v. Chicago Bridge & Iron Works*, 328 Mo. 688, 695, 41 S.W.2d 575, 577 (1981))).

89. *Nebraska Mort. Fin. Fund*, 204 Neb. at 447, 283 N.W.2d at 16.

90. *Id.* at 451, 253 N.W.2d at 18.

. . . [s]tatutes which are reasonably designed to protect the health, morals and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not the private benefit of the grantees but the promotion of the public interest.⁹¹

Because the Act met this criteria, the court held that it was constitutional.⁹²

The Nebraska Attorney General has determined that the classifications in LB 775 affect equally all the persons falling within its parameters and thus is not a "special law" within the meaning of the constitution.⁹³ The Attorney General has stated:

Classification for tax purposes may be based on the manner of conducting business, and business conducted in one manner may be taxed differently from business conducted in another manner.⁹⁴

Based on this reasoning, the Attorney General found the business classifications in LB 775 to be reasonable and were, therefore, constitutional.

In addition to an article III, section 18 challenge, an argument can be made that LB 775 violates article I, section 16 of the Nebraska Constitution, which prohibits the promulgation of a law which creates an irrevocable grant of special privileges or immunities.⁹⁵ Because the contracted tax benefits obtained by certain businesses might appear to be "irrevocable grants of special privileges," the law conferring those benefits requires further analysis to determine if it is unconstitutional under article I, section 16.

For this purpose, the Nebraska Supreme Court has provided a standard of review for analyzing statutes under article I, section 16. In *Wittler v. Baumgartner*,⁹⁶ the court stated:

[A]lthough it is competent for the Legislature to classify for

91. *Id.* at 466, 283 N.W.2d at 25.

92. *Id.* See *Shear v. County Bd. of Comm'r*, 187 Neb. 849, 195 N.W.2d 151 (1972). *Shear* held constitutional a statute requiring county assessors to be certified with the state, even though the statute created a suspect classification. The court stated that a classification will be upheld so long as it "rests on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the object to be classified." *Id.* at 853, 195 N.W.2d at 154 (citing *Tom and Jerry, Inc. v. Nebraska Liquor Control Comm'n*, 183 Neb. 410, 160 N.W.2d 232 (1968)).

93. Op. Att'y Gen. No. 87051 (Apr. 15, 1987); Op. Att'y Gen. No. 87075 (May 15, 1987).

94. Op. Att'y Gen. No. 87051 (April 15, 1987). See *supra* notes 46-47 and accompanying text.

95. NEB. CONST. art. 1, § 16.

96. 180 Neb. 446, 144 N.W.2d 62 (1966).

purposes of legislation, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest that justice or expediency of diverse legislation with respect to the objects classified. . . . "The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dis severed fractions of the original unit as two classes, and enact different rules for the government of each."⁹⁷

This standard is remarkably similar to the reasonableness standard so often applied in article III, section 18 cases. As previously indicated, the Nebraska Attorney General determined the classifications contained in LB 775 are constitutional under article III, section 18. The Attorney General reached this conclusion because LB 775 classifies businesses by the manner in which they conduct business (i.e. manufacturing vs. retail). Such a distinction, according to the Attorney General and the case law,⁹⁸ is reasonable and therefore permissible.

The restriction of LB 775 to only certain industries undoubtedly achieves the legislature's purpose of targeting the tax incentives on an efficient basis to those basic industries likely to improve Nebraska's economy both directly through their own presence as well as indirectly through additional jobs and investments typically spawned by such industry. Likewise, the jobs and investment threshold classifications of LB 775 enable the legislature to package incentives of a substantial nature in an effort to influence the site selection criteria for companies capable of expanding in various localities.

In light of these purposes and the great deference to legislative classifications permitted by the courts, the classifications included in LB 775 should withstand constitutional challenge.⁹⁹

2. *Property Classifications*

An analysis of applicable Nebraska law demonstrates that the property classifications contained in LB 775 are firmly supported. While article VIII, section 1 of the Nebraska Constitution requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property. . . ." Section 2 of that same article

97. *Id.* at 456-57, 144 N.W.2d at 70 (quoting *State of Nebraska v. Hall*, 129 Neb. 669, 683, 262 N.W. 835, 842 (1935)).

98. See *supra* notes 78-98 and accompanying text.

99. Likewise, the classifications contained in LB 270 should be sustained on the basis of this analysis.

goes on to more specifically address the issue of property classification. The 1970 Amendment of article VIII, section 2 provides:

The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation.¹⁰⁰

The Nebraska Supreme Court in *Stahmer v. State of Nebraska*¹⁰¹ found that this particular provision "specifically confers broad authority on the Legislature to classify and exempt personal property from taxation."¹⁰² As a general matter of constitutional construction and interpretation, special provisions of the constitution such as article VIII, section 2 take precedence over the general provisions, such as article VIII, section 1.¹⁰³

The "broad authority" is of course not without parameters, and the use of the authority is subject to a reasonableness standard.¹⁰⁴ For example, in *Stahmer*, the plaintiffs challenged exemptions pertaining to personal property used in agricultural production on the grounds that the statutes violated article III, section 18 and article VIII, section 1.¹⁰⁵ The *Stahmer* court relied in large part on the 1970 amendment to article VIII, section 2 of the constitution granting the legislature the power to classify property. Moreover, the court stated that regardless of this section, it did not find the classifications set forth in the subject statute to be unreasonable.¹⁰⁶

In support, the court stated:

The view has also been taken that reasonable discrimination with respect to tax matters to promote fair competitive conditions, equalize economic advantages, or encourage particular industries from consideration of public policy is lawful.¹⁰⁷

The court went on to hold that exempting property used in agricultural production, the products thereof, and business inventories was not unreasonable given a legislative desire to equalize the tax burden with taxpayers holding investments in untaxed intangible personal property.¹⁰⁸

The Nebraska Supreme Court has stated many times that the power of classification rests with the legislature and cannot be inter-

100. NEB. CONST. art. VIII, § 2.

101. 192 Neb. 63, 218 N.W.2d 893 (1974).

102. *Id.* at 67, 218 N.W.2d at 896.

103. *Id.* at 67-68, 218 N.W.2d at 896 (quoting *Swanson v. State*, 132 Neb. 82, 94, 271 N.W. 264, 271 (1937)).

104. *Id.* at 69, 218 N.W.2d 896-97 (quoting *Rehkopf v. Board of Equal.*, 189 Neb. 90, 141 N.W.2d 462 (1966)).

105. *Id.* at 67, 218 N.W.2d at 895.

106. *Id.* at 68, 218 N.W.2d at 896.

107. *Id.* at 68, 218 N.W.2d at 896 (quoting 51 AM. JUR. 2D *Taxation* § 182, at 242).

108. *Id.* at 69, 218 N.W.2d at 897.

ferred with by the courts unless the legislature has clearly, by artificial and baseless classification, attempted to evade and violate the Nebraska constitutional provisions prohibiting local and special legislation.¹⁰⁹

The Nebraska Attorney General has also had the opportunity to review the constitutionality of some of the property classifications contained in LB 775 regarding the aircraft and business computer exemptions contained in the bill.¹¹⁰ The Attorney General found that under the circumstances of LB 775 the personal property tax exemption would not be considered a special law as defined in article III, section 18, because the bill applies equally to and operates uniformly upon all members of the class which it establishes.¹¹¹ The Attorney General went on to conclude that a reasonable basis existed to support these personal property tax classifications.¹¹²

The Attorney General relied to a large extent on the rationale in *Stahmer* for legal support and the legislative purpose of LB 775 for factual support. As discussed above, the legislative purpose of LB 775 is to attract and retain in Nebraska businesses which will contribute to the economic growth through substantial capital investment and employment creation. In reaching his conclusion, the Attorney General recognized the great deference which must be given to legislative judgments in this area.¹¹³

The legislature, by passing LB 775, considered and determined that Nebraska's economic growth would be enhanced by targeting companies which depend on aircraft and mainframe business computers and those which utilize equipment in manufacturing agricul-

109. See *Dwyer v. Omaha-Douglas Public Bldg. Comm'n*, 188 Neb. 30, 48-49, 195 N.W.2d 236, 247 (1972); *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 266-67, 175 N.W.2d 74, 81 (1970).

110. Op. Att'y Gen. No. 87075, at 1-2 (May 15, 1987).

111. *Id.*

112. *Id.* at 2-5.

113. *Id.* at 2-4. In addition to Nebraska case authority, the Attorney General noted *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 303 P.2d 920 (1956). The court in *Hosdreg* stated:

Any movement reasonably calculated to improve the economic welfare of the people as a whole through furnishing employment, promoting industry and trade, and inspiring new hope, seems well worthwhile. Whether the present enactment will achieve these aims, none can tell. Only trial, effort and actual experience can give the answer.

While operation of a given project, in the field of competition, may hurt some, if the overall picture shows a comfortable balance of advantages over disadvantages to the many, none can doubt that the measure authorizing it has justified its enactment. After all, the question is one of policy and, within constitutional bounds, that is for the legislature. Even though we may question the wisdom of a given enactment, as a matter of policy, that gives us no right to strike it down, if it violates no provision of the fundamental law.

Id. at —, 303 P.2d at 931.

tural products.¹¹⁴ The aircraft, business computer, and agricultural equipment property tax exemptions undoubtedly help achieve Nebraska's economic development purposes by providing such businesses with an important incentive to invest and expand in Nebraska.¹¹⁵

B. LB 775 AND LB 270 ARE NOT APPROPRIATIONS

Article III, section 22 of the Nebraska Constitution, prior to its amendment in 1972, gave each legislature the power and duty to make appropriations for governmental expenses until the expiration of the first fiscal quarter after the adjournment of the next regular session, at which time all appropriations should end. This provision was amended in 1972 so that it now states simply that "[e]ach Legislature shall make appropriations for the expenses of the Government."¹¹⁶ Although the Attorney General has suggested that the amended article III, section 22 still prohibits continuing appropriations,¹¹⁷ the Nebraska Supreme Court chose not to resolve the issue when it was presented.¹¹⁸

Assuming that article III, section 22 in its present form does prohibit continuing appropriations, a question arises as to whether LB 775, by virtue of the long-term contractual commitment made by the state, violates this constitutional provision.

In *Stahmer v. State*¹¹⁹ the Nebraska Supreme Court approached the issue by first analyzing whether a multi-year tax statute constituted an appropriation. In *Stahmer* the constitutionality of sections 77-202.25 to 77-202.33 were in issue.¹²⁰ These statutes directed the state treasurer each year to place sufficient revenue from sales and income taxes in a Personal Property Tax Relief Fund to reimburse tax agencies in all counties for tax revenues lost by reason of the exemptions.¹²¹ Because this mandate extended beyond the end of the first fiscal quarter after the adjournment of the next regular legislative session, the question was whether this statute constituted an unconstitutional appropriation under old article III, section 22.¹²²

The court stated that its duty was to give the statute an interpre-

114. See Floor Debate on L.B. 775, Neb. Unicameral, 90th Leg., 1st Sess. 4136-37 (April 28, 1987); *id.* at 5211-12 (May 12, 1987).

115. See Op. Att'y Gen. No. 87075, at 4 (May 15, 1987).

116. See NEB. CONST. art. III, § 22. See also *id.* art. III, § 25 (requiring a specific appropriation for the withdrawal of state funds).

117. See Op. Att'y Gen. No. 161 (Dec. 18, 1981).

118. *Ruge v. State*, 201 Neb. 391, 397-99, 267 N.W.2d 748, 752 (1978).

119. 192 Neb. 63, 218 N.W.2d 893 (1974).

120. *Id.* at 64, 218 N.W.2d at 894.

121. *Id.*

122. *Id.* at 65-66, 218 N.W.2d at 895.

tation which met constitutional requirements if that could reasonably be accomplished. However, the court recognized that legislative construction of a statutory or constitutional provision is not binding on the court, but is entitled to great weight.¹²³ Therefore, noting that legislation in subsequent years specifically appropriated the Personal Property Tax Relief Fund, the court stated that it was evident that the legislature did not intend or consider the tax exemption statute in question to be an appropriation measure.¹²⁴

The court also found that the personal property tax exemptions in *Stahmer*, discussed above,¹²⁵ did not constitute an appropriation and were upheld even though the statutory provisions were intended to remain in effect for several years.¹²⁶ For the same reason, the personal property tax exemptions in LB 775 would not result in unconstitutional appropriations.

In *State v. Moore*¹²⁷ the Nebraska Supreme Court defined the term "appropriation." The court stated that "to 'appropriate' is to set apart from the revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other."¹²⁸ In addressing whether a rebate on sugar processing in Nebraska constituted an appropriation, the court concluded that it did not because the number of pounds of sugar which would qualify for the rebate could not be determined.¹²⁹

LB 775 does not meet the definitional requirement of an appropriation as articulated in *Moore*; *i.e.*, no set aside of a certain sum of money occurs under LB 775. The statute does permit the use of the

123. *Id.* at 66, 218 N.W.2d at 895.

124. *Id.* (relying on *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947)). The *Stahmer* court in its syllabus stated that the exemption statutes do not constitute an appropriation of state funds. *Id.* at 63, 218 N.W.2d at 894.

125. See *supra* notes 101-09 and accompanying text.

126. *Stahmer*, 192 Neb. at 70, 218 N.W.2d at 897.

127. 50 Neb. 88, 69 N.W. 373 (1896).

128. *Id.* at 88, 69 N.W. at 373. See also *State v. Smith*, 217 Neb. 682, 353 N.W.2d 267, 271 (1984) (stating: "To appropriate means to get a part, or assign to a particular person or use in exclusion of others, to use or employ for a particular purpose, or in a particular case").

129. *Moore*, 50 Neb. at 97, 69 N.W. at 376. Tax refunds under the Nebraska Revenue Act of 1967 are paid from the Tax Refund Fund. Neb. Rev. Stat. § 77-27, 132. LB 775 provides for the refund of sales and use taxes under the Nebraska Revenue Act of 1967 (*e.g.*, Neb. Rev. Stat. § 77-4106(1)(a) and § 77-4105(3)). Therefore, the tax refunds under LB 775 should be paid from the Tax Refund Fund. Any statutory change which would diminish this funding approach for LB 775 projects for which an agreement has been signed could constitute an unconstitutional impairment of contract if the taxpayer's ability to obtain a refund is impaired. See *infra* notes 137 to 161; *Pfeifer v. Ableidinger*, 166 Neb. 464., 482-83, 89 N.W.2d 568, 577-8 (1958) (contracts between individuals and governments are made with reference to existing law, which becomes a part of the contract).

single factor sales formula and certain income tax credits; however, these provisions concern the method of tax computation rather than provide for a grant of specified funds from the state treasury.

C. THE LB 775 AGREEMENT

LB 775 provides that the State of Nebraska, through the Tax Commissioner, is to enter into an agreement with the taxpayer. The agreement is to provide that in consideration for the tax incentives from the state, the taxpayer agrees to complete the designated project.¹³⁰

Included in the legislature's findings for the enactment of LB 775 is the conclusion that Nebraska's tax structure needed to be revised in order to encourage new businesses to relocate to Nebraska and to retain existing businesses.¹³¹ The LB 775 agreement is intended to help carry out this legislative purpose by providing business with some planning certainty that the anticipated tax incentives committed by the state remain intact for the designated project for the years specified in LB 775.

The principal issue presented by LB 775 contracts relates to subsequent legislative modification or repeal of the LB 775. Based on the following analysis, such a modification or repeal without grandfathering existing contracts would be an unconstitutional impairment of contract.

1. *LB 775 Agreement Provisions*

Legislative bill 775 requires the taxpayer to file an application with the Tax Commissioner.¹³² Upon approval of the application, the taxpayer and the state enter into a written agreement. The taxpayer agrees to complete the project; the Tax Commissioner, on behalf of the State of Nebraska, approves the project and, in consideration of the taxpayer's agreement, the state agrees to the taxpayer's use of the incentives contained in the Act. The approved application and its supporting documentation are considered part of the agreement.¹³³ The agreement must state: (a) the levels of the employment and investment required for the project; (b) the time period in which the required levels must be met; (c) the documentation the taxpayer will need to supply when claiming an incentive under the Act; and (d) the date the application was filed.¹³⁴

130. NEB. REV. STAT. § 77-4104 (Supp. 1987).

131. *Id.* § 77-4102(2).

132. *Id.* § 77-4104(1).

133. *Id.* § 77-4104(4).

134. *Id.*

The incentives provided by the Act are available only if this agreement has been executed.¹³⁵ Further, if the taxpayer fails to meet the required levels of employment or investment or to maintain these required levels for a specified time period, as required by the agreement, then all or a portion of the incentives are recaptured or disallowed.¹³⁶

2. *The Contract Clause of the United States Constitution*

The United States Constitution provides that no state shall enter into any law impairing the obligation of contracts.¹³⁷ The contract clause has long been held to limit the power of the states to modify their own contracts as well as to regulate those between private parties.¹³⁸ However, the contract clause does not prohibit the states from repealing or amending statutes generally or from enacting laws which are retroactive.¹³⁹ Instead, such repeals or amendments are prohibited if they have the effect of impairing a contractual obligation.¹⁴⁰

*United States Trust Co. of New York v. New Jersey*¹⁴¹ is illustrative of the effect of the contract clause. In this case, a 1962 statutory covenant between New Jersey and New York had limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation from revenues and reserves pledged as security for consolidated bonds issued by the Port Authority.¹⁴² In 1974, New Jersey and New York attempted to retroactively repeal the 1962 covenant. The United States Trust Co., acting both as a trustee for, and as a holder of, Port Authority bonds, brought suit claiming that the 1974 New Jersey statute impaired the obligation of the states' contract with the bondholders in violation of the contract clause. The United States Supreme Court held that the contract clause did, in fact, prohibit the retroactive repeal of the 1962 covenant.¹⁴³

The Court stated that although the contract clause appears literally to prohibit "any" impairment, prohibition is not absolute.¹⁴⁴ In-

135. *Id.* § 77-4105.

136. *Id.* § 77-4107(1).

137. U.S. CONST. art. I, § 10.

138. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-39 (1810)).

139. *United States Trust Co.*, 431 U.S. at 17.

140. *Id.*

141. 431 U.S. 1 (1977).

142. *Id.*

143. *Id.*

144. *Id.* at 21 (relying on *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)).

stead, a finding that there has been a technical impairment is merely an initial step in resolving whether the impairment is constitutionally permitted.¹⁴⁵ The Court noted that while the contract clause limits otherwise legitimate exercises of state legislative authority, states must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired. Within this framework, the Court recognized that private contracts are not subject to unlimited modification under the police power.¹⁴⁶ Instead, legislation which impacts contractual rights must be reasonable and must be related to the public purpose for which it was enacted.¹⁴⁷

The first step in the analysis "concerns the ability of the State to enter into an agreement that limits its power to act in the future."¹⁴⁸ A legislature "cannot bargain away the police power of a State."¹⁴⁹ Therefore, the "Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."¹⁵⁰

In deciding whether a state's contract is invalid *ab initio*, the *United States Trust Co.* Court noted that earlier decisions relied on distinctions among the various powers of the state. "[T]he police power and the power of eminent domain were among those that could not be 'contracted away.'"¹⁵¹ However, the "State could bind itself in the future exercise of the taxing the spending powers."¹⁵² The Court acknowledged its previous holding in *New Jersey v. Wilson*,¹⁵³ upholding a state's permanent tax exemption grant and prohibiting any impairment of such an agreement. Although the Court noted that the *Wilson* holding has never been expressly overruled, courts have not viewed permanent tax exemption contracts with favor.¹⁵⁴

The Court found in *United States Trust Co.* that the covenant involved a financial obligation of the state and did not amount to a surrender of the state's reserved powers.¹⁵⁵ Therefore, the covenant was valid and any subsequent modification was subject to the contract clause. While the contract clause does not act as an automatic bar to

145. *Id.*

146. *Id.* at 21-22.

147. *Id.* at 23.

148. *Id.*

149. *Id.* (quoting *Stone v. Mississippi*, 101 U.S. 814, 817 (1879)).

150. *Id.*

151. *Id.* at 23-24.

152. *Id.* at 24.

153. 11 U.S. (7 Cranch) 164 (1812).

154. *United States Trust Co.*, 431 U.S. at 24 n.21.

155. *Id.* at 25.

subsequent modification, any impairment must be reasonable, necessary to serve an important public purpose, and be the least restrictive alternative. The Court concluded that the repeal of the covenant was not allowable because it was evident that a more moderate course was available.¹⁵⁶

3. *The Contract Clause of the Nebraska Constitution*

The Nebraska Constitution states that no law impairing the obligation of contracts shall be passed.¹⁵⁷ The most exhaustive analysis of the Nebraska contract clause was set forth in *First Trust Co. of Lincoln v. Smith*.¹⁵⁸ In addition to the general constitutional issues discussed above under the contract clause in the United States Constitution, the *First Trust Co.* case questioned whether the Nebraska Mortgage Moratorium Act¹⁵⁹ violated the contract clause of the Nebraska Constitution, notwithstanding the fact that the moratorium was enacted during the 1930's as a result of an economic emergency.¹⁶⁰

The Nebraska Supreme Court invalidated the Act due to the restrictions of the contract clause and by specifically finding that an

156. *Id.* at 29-30.

157. NEB. CONST. art. I, § 16.

158. 134 Neb. 84, 277 N.W. 762 (1938). See *Strehlow v. Krings*, 134 Neb. 82, 277 N.W. 784 (1938) (companion case to *First Trust Co. of Lincoln*). Cases concerning the Nebraska contract clause decided subsequent to this case do not add significantly to the discussion set forth in *First Trust Co.*

159. The Nebraska Mortgage Moratorium Act was set out by the court in *First Trust Co.* The Court quoted the pertinent part of the Act, which provides:

Notwithstanding any more general or special law respecting actions at law on notes secured by real estate mortgages, deeds of trust or land sale contracts, or on contracts secured by real estate mortgages, deeds of trust or land sale contracts, from and after the passage and approval of this act, the court shall, upon application of the owner or owners of such real estate or person or persons liable on such notes or contracts, secured as aforesaid, made within twenty days after the rendition of judgment on such actions at law, enter an order staying all sales under execution against the property of the judgment debtor or judgment debtors for a period of nine months from and after the rendition of such judgment, whenever the judgment debtor or judgment debtors shall, within twenty days after the rendition of such judgment, file with the clerk of the court a written request for the same: Provided, if the judgment debtor or judgment debtors make no such request within twenty days, the sale under execution shall immediately be had after the expiration thereof. The court shall, at the expiration of such stay, unless upon hearing, for good cause shown to the contrary, further order that all further proceedings in such actions at law shall be stayed until the first day of March, 1939, or so long as this act is in effect under such conditions, provisions and terms as the court may deem just and equitable.

First Trust Co., 134 Neb. 82, 90, 277 N.W. 762, 766 (quoting NEB. STAT. ch. 42 (1937)).

160. *First Trust Co.*, 134 Neb. at 105, 272 N.W. at 773. The Nebraska Supreme Court noted that the court in *Bell v. Niemann*, 127 Neb. 762, 257 N.W. 69 (1934), had not specifically addressed this issue with regard to the Nebraska Moratorium Act of 1933. *Id.* at 764, 257 N.W. at 70.

emergency does not create power to legislate in violation of the constitution.¹⁶¹ In fact, the Nebraska contract clause is a definite limitation on the power of the legislature and invalidates all legislative action that exceeds that limitation. Accordingly, the *First Trust Co.* court found that the Nebraska contract clause presented a binding limitation on the legislature's attempt to enact a moratorium on mortgages despite the presence of an economic emergency of the magnitude of the Great Depression.¹⁶²

Consequently, future legislatures are also bound by the restrictions of the Nebraska contract clause as interpreted by the *First Trust Co.* court and will be unable to legislate away the commitment made by the state to businesses contracting under LB 775 even if there is a future economic emergency.

4. *The Contract Clause in Tax Matters*

Contracts for tax exemptions and subsequent attempts to change such contracts are governed by the provisions of the contract clause.¹⁶³ Unless restricted by the state constitution, a state may execute a binding contract to exempt from taxation property which it could have exempted from tax by general legislative grant of immunity.¹⁶⁴

To create an exemption contract which is enforceable, the contract should contain clear and unambiguous language specifying the

161. *Bell*, 127 Neb. at 763, 257 N.W. at 69-70.

162. *Id.* at 763, 257 N.W. at 69-70. See also *Pfeifer v. Ableidinger*, 166 Neb. 464, 482-83, 89 N.W.2d 568, 578 (1958) (quoting *Ritter v. Drainage District No. 1*, 137 Neb. 866, 291 N.W. 718 (1940)). The *Ritter* court stated: "Where contractual and vested rights are created pursuant to statute, they cannot be destroyed by a subsequent act of the legislature. . . . It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the federal Constitution forbidding impairment of contractual obligations." *Ritter*, 137 Neb. at 866, 870, 291 N.W. at 718, 721 (citations omitted).

163. See *United States Trust Co.*, 431 U.S. at 23-25; *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 165-67 (1812).

164. See *Choate v. Trapp*, 224 U.S. 665, 679 (1912) (upholding contract for 21-year property tax exemption); *Central of Georgia Ry. v. Wright*, 248 U.S. 525, 527 (1919) (holding that charter of railroad, exempting certain property, prevented additional taxation attempted by constitutional amendment). See also 71 AM. JUR. 2D *State and Local Taxation* § 319 (1973) (providing that a state's power to tax specific property may be surrendered by one legislature so as to bind succeeding legislatures); *United States Trust Co.*, 431 U.S. at 24 (stating that "the State could bind itself in the future exercise of the taxing and spending powers"); *Indiana v. Brand*, 303 U.S. 95, 100 (1938) (stating that if the "people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the Legislature"); *State v. Smith*, 217 Neb. 682, 353 N.W.2d 267, 271 (1984) (stating, "unless there is some constitutional provision to the contrary . . . the state [has] the right to make contracts").

respective tax exemptions and incentives.¹⁶⁵ Express contractual language is important to invoke the protection of the contract clause.¹⁶⁶ As a corollary, the contract clause also acts to invalidate subsequent laws which purport to impose a tax on the class covered by such contracts.¹⁶⁷

In order to be binding upon the state and protected from impairment under the contract clause, the contract must contain the essential elements of contracts generally.¹⁶⁸ One of the primary elements of an enforceable contract is the existence of mutuality of obligation.¹⁶⁹ Mutuality of obligation is present where an act or promise by one party is given in exchange for the other party's act or promise. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.¹⁷⁰ The rule of mutuality does not apply to executory contracts or to contracts where the party who was not bound has performed its obligation.¹⁷¹

Mutuality is essentially another way of discussing consideration. However, the doctrine of promissory estoppel can act as a substitute for mutuality of consideration. Under this doctrine, a promise is binding provided the promisee has suffered some detriment in reliance on the promise.¹⁷² Further, acts done in reliance on the promise

165. See *Vicksburg, S. & P. R.R. v. Dennis*, 116 U.S. 665, 668 (1886).

166. See *id.*; *Reserve Mining Co. v. State*, 310 N.W.2d 487, 493 (Minn. 1981).

167. See *Murray v. Charleston*, 96 U.S. 432, 433-46 (1877) (holding that a tax on municipal bonds was unconstitutional because its effect was to reduce the contractual rate of interest); *Peterson v. Hancock*, 155 Neb. 801, 822, 54 N.W.2d 85, 96 (1952) (stating that the legislature "cannot do indirectly what the constitution prohibits it from doing directly"); *United States Trust Co.*, 431 U.S. at 24 n.22 (citing authority for the proposition that "a State may not authorize a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid"). See also 71 AM. JUR. 2D *State and Local Taxation* § 323 (1973).

168. See *United States Trust Co.*, 431 U.S. at 17 (stating that as a preliminary matter, a contractual obligation must be present); *Reserve Mining Co. v. State*, 310 N.W.2d 487, 493 (Minn. 1981) (contract, which may be the statute itself, must exist before it can be impaired). See also *Vicksburg*, 116 U.S. at 667 (providing that the contract may be the statute itself).

169. See *Garsick v. Dehner*, 145 Neb. 73, 79, 15 N.W.2d 235, 238 (1944); *Stanford Motor Co. v. Westman*, 151 Neb. 850, 855, 39 N.W.2d 841, 844 (1949) (providing that sufficient consideration was present in a contract which required purchaser of an automobile to give dealer first option to repurchase if owner decided to sell during six months following purchase of automobile).

170. See *Garsick*, 145 Neb. at 79, 15 N.W.2d at 238.

171. See *Weiner v. Hroch*, 188 Neb. 389, 391, 196 N.W.2d 907, 908 (1972) (citing 17 AM. JUR. 2D *Contracts* § 12 (1973)). Cf. *De Los Santo v. Great Western Sugar Co.*, 217 Neb. 282, 287, 348 N.W.2d 842, 846 (1984) (holding that contract for hauling beets was not enforceable because neither party intended that specific quantity of beets be hauled).

172. See *Yankton Prod. Credit Ass'n v. Larsen*, 219 Neb. 610, 616, 365 N.W.2d 430, 434 (1985) (finding Larsen relied to his detriment on representations of PCA); *Leach v. Treber*, 164 Neb. 419, 423, 82 N.W.2d 544, 547 (1957) (discussing the Restatement of

must have been contemplated by the contract, either implicitly or explicitly.¹⁷³

The case of *Reserve Mining Co. v. State*¹⁷⁴ provides a vivid illustration of the problems created when a contract between a taxpayer and the state is the subject of legislative tampering. The Minnesota Legislature in 1963, and the citizens of Minnesota in 1964 approved legislation known as the Taconite Amendment ("Amendment"), which stated:

Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid until November 4, 1989. Laws may be enacted fixing or limiting for a period not extending beyond the year 1990, the tax to be imposed on persons engaged in (1) the mining, production or beneficiation of copper, (2) the mining, production or beneficiation of copper-nickel, or (3) the mining, production or beneficiation of nickel. Taxes imposed on the mining or quarrying of taconite or semi-taconite and the production of iron ore concentrates therefrom, which are in lieu of a tax on real or personal property, shall not be considered to be occupation, royalty or excise taxes within the meanings of this amendment.¹⁷⁵

Reserve Mining Co. ("Taxpayer") proceeded pursuant to the Amendment and constructed taconite facilities in the state with a capital investment exceeding \$350 million and over 3,300 employees. Subsequently, the state enacted the Minnesota Taconite Tailing Tax ("Tax"), which imposed a tax on the Taxpayer in violation of the Amendment.¹⁷⁶

The Taxpayer alleged that the Tax was unconstitutional for a

Contracts § 90 (1932) (regarding promissory estoppel)); *Scottsbluff Nat'l Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 77, 54 N.W.2d 392, 400 (1952) (holding that "in order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them").

173. *Scottsbluff Nat'l Bank*, 156 Neb. at 77, 54 N.W.2d at 400.

174. 310 N.W.2d 487 (Minn. 1981).

175. MINN. CONST. art. X § 6.

176. MINN. STAT. § 298.24(2) (Cum. Supp. 1988). This statute imposes a tax as follows:

There is hereby imposed upon taconite and iron sulphides, and upon the mining and quarrying thereof, and upon the production of iron ore concentrate therefrom, and upon the tailings so produced an additional tax of 10 cents per 2,000 pounds of tailings produced. For the purposes of this subdivision tailings mean the solid and liquid waste materials resulting from the beneficiation process.

The tax imposed by this subdivision shall only apply to those tailings from a taconite facility which are not deposited on land in accordance with

number of reasons, one of which was that the Tax was an impairment of the contract between the state and the Taxpayer created by the Amendment. Article I, section 10 of the U.S. Constitution (the contract clause) and article I, section 11 of the Minnesota Constitution, both arguably barred the impairment of this contract.¹⁷⁷

Reserve Mining is instructive in an LB 775 analysis because the Minnesota Supreme Court found that a contract existed between a taxpayer and the state.¹⁷⁸ The court found that the Amendment itself "meets the criteria necessary to create a viable contract."¹⁷⁹ In simple terms, it contained an offer, an acceptance and consideration. The offer was created by the bill's passage and approval by the citizens of Minnesota. The actions of the taxpayer manifested through the construction of facilities, the creation of jobs and the continued production of taconite established the acceptance.¹⁸⁰

Regarding consideration, the court found the state had received revenues, a strong economy, and jobs for its citizens.¹⁸¹ The Taxpayer had received a favorable tax status. In addition, both sides had performed their obligations under the "contract." The court concluded that "[w]hen people of this state make a bargain . . . companies . . . have a right to expect that the bargain would be kept."¹⁸² Due to the above factors, the court found a contract existed between the Taxpayer and the state.¹⁸³

Application of the principles espoused by the Minnesota Supreme Court in *Reserve Mining* are appropriate for analyzing Nebraska's LB 775 agreement. The enactment of LB 775 by the Nebraska Legislature constitutes the "offer" by the state to provide specific tax benefits over prescribed time periods if the taxpayer reaches the specified thresholds of employment and/or investment. "Acceptance" of the offer results from the taxpayer agreeing to meet these minimum thresholds. Legislative Bill 775 provides the extra protection of an actual written agreement between the taxpayer and

permits issued by the pollution control agency and the department of natural resources.

The proceeds of the tax imposed by this subdivision shall be deposited in the general fund of the state.

Id.

177. *Reserve Mining*, 310 N.W.2d at 489.

178. *Id.* at 494. The court, however, found that the subsequent enactment of the tax did not unconstitutionally impair the contract because under Minnesota's Constitution, the legislature was precluded from contracting away the right to tax. *Id.* at 494. The Nebraska Constitution contains no such limitation.

179. *Id.*

180. *Id.*

181. *Id.* at 494.

182. *Id.*

183. *Id.*

the state, which is more specific than the *Reserve Mining* situation where no such document existed.¹⁸⁴

Consideration also exists on both sides of the Nebraska agreement. In consideration of the taxpayer's agreement, the state agrees to allow the taxpayer to use the tax incentives.¹⁸⁵ Consideration to the taxpayer consists of the tax incentives. Consideration to the State of Nebraska, like the consideration received by the State of Minnesota, consists of the receipt of additional tax revenues, a stronger economy, and jobs for its citizens. In addition, failure to complete the project results in recapture of the tax incentives. Consequently, because there is an offer, an acceptance, consideration, and a written agreement, LB 775, to an even greater degree than the Amendment in *Reserve Mining*, creates a contract.

The doctrine of promissory estoppel provides an additional basis for the presence of consideration in the contract. The stated purpose of LB 775 is to cause business to act in reliance on the bill's tax incentives.¹⁸⁶ The revisions to Nebraska's tax structure embodied in LB 775 are intended "to encourage new business to relocate to Nebraska, retain existing businesses and aid in their expansion, promote the creation and retention of new jobs in Nebraska, and attract and retain investment capital in the State."¹⁸⁷ LB 775 states that the tax incentives are allowed based on the taxpayer's agreement to complete the project.¹⁸⁸ Therefore, the taxpayer's actions taken in reliance on the Act were contemplated and encouraged by the state and constitute justifiable reliance by the taxpayer on the state's promise to provide the tax incentives. Completion of the project by a taxpayer, therefore, should be sufficient to invoke the doctrine of promissory estoppel.¹⁸⁹

184. *Id.* at 493-94.

185. NEB. REV. STAT. § 77-4104(4) (Supp. 1987).

186. *Id.* § 77-4102(2).

187. *Id.*

188. *Id.* § 77-4104(4).

189. In addition to the matters affecting a contract with the state discussed in the text above, the following additional points are relevant to this analysis. A state's power to enter into contracts which advance its proprietary interests, absent constitutional restrictions, is absolute and unqualified. See *Butler v. Hatfield*, 277 Minn. 314, —, 152 N.W.2d 484, 491 (1967) (discussing that the state, acting through appropriate departments are powered to enter into contracts contemplating performance of professional services to be paid from public funds). The state, by entering into a contract, binds itself substantially the same as an individual does, and abandons its sovereignty attributes, to the extent of the state's power to contract. See *Todd v. Board of Ed. Lands and Funds*, 154 Neb. 606, 610, 48 N.W.2d 706, 710 (1951). Contractual rights between the state and private parties vest upon the execution and delivery of the contract. This right is not affected or lessened by any failure to exercise a vested right before a subsequent statute which modifies or repeals such a right. See *Pfeifer v. Ableidinger*, 166 Neb. 464, 482-83, 89 N.W.2d 568, 578 (1958) (stating that a state is not

Accordingly, the LB 775 agreement, drafted pursuant to the statute, constitutes a contract that is binding upon the state and protected from impairment under the contract clauses of the United States and Nebraska Constitutions.

D. LB 775 MEETS THE "ONE SUBJECT" RESTRICTION IN THE NEBRASKA CONSTITUTION

Article III, section 14 of the Nebraska Constitution states that no legislative bill may contain more than one subject, and that subject shall be clearly expressed in the title.¹⁹⁰ Legislative Bill 775 covers in a single legislative bill provisions relating to income taxes, sales and use taxes, and property taxes.¹⁹¹ Legislative Bill 270, in a single legislative bill, concerns income, sales, and use taxes.¹⁹² Therefore, the constitutionality of these tax combinations in one bill should be reviewed in light of article III, section 14 of Nebraska's Constitution.

In *Anderson v. Tiemann*¹⁹³ the Nebraska Supreme Court upheld the validity of the Nebraska Revenue Act of 1967, ("LB 377") in the face of an article III, section 14 challenge. LB 377 had provided for a sales tax, a use tax, an income tax and a franchise tax.¹⁹⁴ The *Anderson* court found that an Act does not violate article III, section 14 if: (1) the Act has but one general object, no matter how broad that object may be, (2) does not contain any unrelated subject not germane to that general object, and (3) the title expresses the object of the bill.¹⁹⁵

In upholding the Nebraska Revenue Act of 1967 the supreme court stated that the various taxes included in LB 377 were closely related and were all to be administered by the Tax Commissioner. The various taxes also were clearly stated in the title and the body of the Act and together constituted components of Nebraska's tax structure. Therefore, the court held that LB 377 contained "but one general subject, taxation, and that it does not violate the Constitution of

permitted to repeal a contract at will unless the contractual terms state or imply such a power). See *State v. Heppenheimer*, 58 N.J.L. 633, 633, 34 A. 1061, 1061 (1896). In order for a contract to be binding, the party entering into the contract on behalf of the state, must have the authority to bind the state. See *Scottsbluff County v. State*, 133 Neb. 508, 512, 276 N.W. 185, 188 (1937). The Tax Commissioner has clearly been given this authority pursuant to the express provisions of LB 775. NEB. REV. STAT. § 77-4104(4) (Supp. 1987).

190. NEB. CONST. art. III, § 14.

191. L.B. 775, Neb. Unicameral, 90th Leg., 1st Sess. (1987).

192. L.B. 270, Neb. Unicameral, 90th Leg., 1st Sess. (1987).

193. 182 Neb. 393, 409, 155 N.W.2d 322, 332 (1967), *appeal dismissed*, 390 U.S. 714 (1968).

194. *Id.* at 395, 155 N.W.2d at 325.

195. *Id.* at 408-09, 155 N.W.2d at 332.

Nebraska."¹⁹⁶

Like LB 377, LB 775 and LB 270 address multiple taxes. However, each of these bills contain only one general subject—taxation. Moreover, the title as well as the body of these bills state that they concern taxation. Accordingly, both LB 775 and LB 270 also meet the constitutional restriction imposed by article III, section 14.

E. RESTRICTIONS ON PUBLIC DISCLOSURE OF THE LB 775
APPLICATION AND AGREEMENT

In order to qualify under LB 775, a company must generally submit to the Nebraska Tax Commissioner certain information about the project and the company. Legislative bill 775 states that the application filed with the Tax Commissioner shall contain:

- (a) A written statement describing the plan of employment and investment for a qualified business in this state;
- (b) Sufficient documents, plans and specifications as required by the Tax Commissioner to support the plan;
- (c) If more than one location within this state is involved, sufficient documentation to show that the employment and investment at different locations are interdependent parts of the plan.¹⁹⁷

After approval of the application, the taxpayer and the State of Nebraska enter into a written contract. The application and all supporting documentation become a part of the contract.¹⁹⁸

Due to the fact that many companies interested in applying under LB 775 will be concerned with the confidentiality of the documentation which needs to be submitted to the Tax Commissioner, the public disclosure restrictions in LB 775 play an important role in the attractiveness of the bill to businesses considering locating and expanding within Nebraska.

Legislative Bill 775 states that the application and all supporting information shall be confidential except for the name of the taxpayer, the location of the project, and the amounts of increased employment and investment.¹⁹⁹ LB 775 also requires that the Tax Commissioner submit an annual report to the Legislature, which shall list the LB 775 agreements, along with the identity of the taxpayers, the location of the projects and the planned levels of employment and investment for the projects. This report must also state the aggregate amount of credits earned and used to offset income taxes,

196. *Id.* at 409, 155 N.W.2d at 332.

197. NEB. REV. STAT. § 77-4104(2) (Supp. 1987).

198. *Id.* § 77-4104(4).

199. *Id.* § 77-4104(2)(d).

and used to obtain sales tax refunds.²⁰⁰

The Tax Commissioner recently requested clarification of these disclosure restrictions from the Nebraska Attorney General. In particular, the Tax Commissioner asked whether he is permitted to release to the public copies of the LB 775 written agreements.²⁰¹

The Attorney General acknowledged that the right of access to, and inspection of, public records existed at common law. However, where such right is declared by statute, the right to access is governed by the terms of the statute.²⁰² The public access to records statute in Nebraska is found in Nebraska Revised Statutes sections 84-712 to -712.09. Section 84-712 provides:

Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in section 84-712.01, are hereby fully empowered and authorized to examine the same, and to make memoranda and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business.²⁰³

The term "public records" is defined in section 84-712.01 as follows:

(1) Except where any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, counsel, subunit, or committee of any of the foregoing.²⁰⁴

With this background, the Nebraska Attorney General interpreted the disclosure provisions of LB 775 to read that all applications and supporting information submitted under the Act shall, with the exceptions noted, be confidential. Therefore, the Attorney General concluded that these specific materials are not available as public records since they were expressly excepted by statute from disclosure.²⁰⁵

However, the LB 775 agreement itself does fall within the broad definition of "public record." Because there is no specific language in LB 775 prohibiting disclosure of the agreement, the actual agreement

200. *Id.* § 77-4110. However, no such report is to be made if there are less than ten taxpayers receiving the benefits under LB 775. *Id.*

201. Op. Att'y Gen. No. 87093 (July 28, 1987).

202. Op. Att'y Gen. No. 87093 (July 28, 1987) (*citing* 76 C.J.S. *Records* § 35 (1952)).

203. NEB. REV. STAT. § 84-712 (Reissue 1981).

204. *Id.* § 84-712.01.

205. Op. Att'y Gen. No. 87093 (July 28, 1987).

may be disclosed to the public. However, consistent with the provisions regarding the application, all information about the taxpayer and documentation submitted by the taxpayer as part of the application must be purged from the agreement, thereby meeting the legislative intent that such information be kept confidential.²⁰⁶

The disclosure requirements discussed above are not inconsistent with any constitutional right, such as the right to privacy. Privacy in financial matters is largely undefined²⁰⁷ and courts have not generally placed constitutional limits on legislation requiring public disclosure of financial information.²⁰⁸ However, there are other compelling reasons for not allowing such disclosure. For example, the Nebraska Attorney General has noted that even without the specific confidentiality provisions in LB 775, certain other statutory restrictions to public disclosure of documents submitted to the Tax Commissioner under LB 775 could apply. These include Nebraska Revised Statutes section 84-712.05(3) ("proprietary or commercial information which if released would give advantage to business competitors"); section 77-2711(7) (information in possession of Tax Commissioner pertaining to sales and use tax records, reports and returns).

Accordingly, given the disclosure restrictions in LB 775 in addition to the other statutory exceptions to public disclosure, the confidentiality of proprietary, commercial and other information pertaining to taxpayers applying under LB 775 is assured and such documents are exempt from disclosure.

F. CONSTITUTIONALITY OF SINGLE-FACTOR APPORTIONMENT FORMULA

Both LB 775 and LB 772 permit taxpayers to take advantage of the single-factor formula for computing Nebraska income taxes.²⁰⁹ Although the single-factor method itself is essentially the same under both bills, its use varies. In LB 775, the single-factor formula is provided as a matter of contract for those companies that have signed an agreement to meet the designated new job and new investment thresholds.²¹⁰ Further, under LB 775 the formula is elective rather than mandatory as it is under LB 772.²¹¹ Under LB 775, the formula is fully effective beginning with the year in which the tax-

206. *Id.*

207. *See Plante v. Gonzalez*, 575 F.2d 1119, 1127 (5th Cir. 1978).

208. *See id.* at 1130-31; *Duplantier v. United States*, 606 F.2d 654, 671-72 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

209. NEB. REV. STAT. §§ 77-4105(1), 77-2734.05 (Supp. 1987).

210. *Id.* § 77-4105.

211. *Id.* § 77-4105(1).

payer files its application with the Tax Commissioner,²¹² whereas under LB 772 the formula is phased in over five years.²¹³ Under LB 775, the single-factor formula is available for anywhere from fifteen to twenty-two years, depending on when the taxpayer meets the thresholds.²¹⁴ Under LB 772, the single factor formula is only available for years during which the law remains effective.

Nebraska is not the first state to enact a single-factor sales formula for income tax purposes. The bordering states of Missouri²¹⁵ and Iowa²¹⁶ have previously adopted some version of a single-factor sales formula for business income taxation purposes. The constitutionality of the Iowa single-factor sales formula was squarely tested during 1978 in *Moorman Manufacturing Co. v. Bair*.²¹⁷ In *Moorman* the taxpayer was an Illinois corporation engaged in the manufacture and sale of animal feeds in various states. Its sales in Iowa accounted for approximately twenty percent of its total sales. The taxpayers sought to invalidate Iowa's single-factor sales formula under the due process and commerce clauses of the United States Constitution.²¹⁸

Moorman's contention that the single-factor formula violated the due process clause was based on the premise that Moorman's Illinois operations were responsible for some of the profits generated by its Iowa's sales. Therefore, Moorman argued that a formula which reaches any income not in fact earned within the borders of the taxing state violates the due process clause.²¹⁹

In rejecting this argument, the Court stated that while the due process clause places restrictions on a state's power to tax income generated through interstate business activities, it does not preclude all such taxation. First, a tax may not be imposed unless there is some minimal connection between those activities and the taxing state. Second, the income attributable to the state must be rationally related to the "values connected with the taxing state."²²⁰ The *Moorman* court held that the Iowa law satisfied both of these requirements and did not violate the restrictions of the due process clause.²²¹

The Court noted that it had "repeatedly held that a single-factor

212. *Id.*

213. *Id.* § 77-2734.05.

214. *Id.* § 77-4105(1).

215. MO. ANN. STAT. § 143.451 (Vernon 1973).

216. IOWA CODE ANN. § 422.33.2.b(4) (West 1986).

217. 437 U.S. 267 (1978).

218. *Id.* at 269.

219. *Id.* at 271-72.

220. *Id.* at 273 (quoting *Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968)).

221. *Moorman*, 437 U.S. at 281.

formula is presumptively valid."²²² The Court reiterated the basic principles on this issue; i.e. "the States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proven by clear and cogent evidence that the income attributed to the State is in fact 'out of all appropriate proportion to the business transaction . . . in that State,' or has 'lead to a grossly distorted result.' "²²³

The Iowa statute gave Moorman the opportunity to demonstrate that the single-factor formula produced an arbitrary result in Moorman's case. However, the record contained no such showing and, therefore, the assessment was not found to violate due process.²²⁴

Moorman also contended that the single-factor formula violated the commerce clause.²²⁵ He argued that because most states use the three-factor formula, Iowa's single-factor formula created a duplication in income taxes, and, therefore, was unconstitutional.²²⁶

According to the Court, the essential premise of illegal duplicative taxation was absent from the record.²²⁷ The taxpayer asserted that the commerce clause *required* Iowa to compute corporate net income under Illinois' equally weighted, three-factor formula.²²⁸ The Court refused to find such a requirement. The Court noted that some risk of duplicative taxation exists whenever the states in which a corporation does business do not follow identical rules for the division of income. The prevention of duplicative taxation, according to the Court, would require national uniform rules for the division of income. The Court declined to engage in such extensive judicial lawmaking.²²⁹

The Court reasoned that it would be an exercise in formalism to hold Iowa's single-factor income tax unconstitutional based on Moorman's speculative concerns with multiple taxation. It was evident that Moorman would have had no basis for complaint, if, instead of the income tax based on the single-factor formula, Iowa had simply imposed a higher gross-receipts tax on sales to Iowa customers.²³⁰

Accordingly, the Court held, over a number of dissenting opin-

222. *Id.* at 273 (*citing* Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920)).

223. *Id.* at 274 (*quoting* Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 135 (1931); *Norfolk & Western Ry.*, 390 U.S. at 326).

224. *Id.* at 275.

225. *Id.* at 276.

226. *Id.*

227. *Id.*

228. *Id.* at 278.

229. *Id.* at 280.

230. *Id.*

ions,²³¹ that the Iowa single-factor apportionment formula was constitutionally valid.²³² Therefore, the case provides significant authority for the constitutional validity of the single-factor sales formulas present in LB 775 and LB 772.

CONCLUSION

The purpose of LB 775, LB 270, and LB 772, recently enacted by the Nebraska Legislature, is to help promote and encourage new economic development within the State of Nebraska. Since these bills by their very nature target certain tax benefits to only certain groups of taxpayers, certain constitutional and legal questions are presented. However, based on the above analysis, all three legislative bills stand on very firm constitutional grounds.

231. *Id.* at 281-97 (Brennan, J., Blackmun, J., Powell, J., dissenting). Each dissent was grounded on a different theory.

232. *Id.* at 281.

