THE IMPLICATION OF LEHNHAUSEN V. LAKE SHORE AUTO PARTS CO.: WEAKENING OR ELIMINATING EQUAL PROTECTION FOR CORPORATIONS AS A CLASS

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At first glance the United States Supreme Court decision in *Lehnhausen v. Lake Shore Auto Parts Co.*[1] may appear straightforward and conceptually sound. In a unanimous decision written by Mr. Justice Douglas the Court held that Illinois did not violate the equal protection clause of the fourteenth amendment by ceasing to impose an ad valorem personal property tax on individuals as a class while continuing to impose the tax on corporations and other nonindividuals. First glances, however, often can be misleading. *Lehnhausen* opens for reconsideration the issue of the appropriate position of corporations with respect to the equal protection clause.

This discussion first will place *Lehnhausen* in its historic perspective and then analyze the case to discern the present status of corporations in relation to the equal protection clause. It is asserted that the Court made the decision unnecessarily confusing by purporting to apply traditional equal protection analysis to the facts of the case when in reality the Court abandoned any meaningful attempt to accord corporations such protection. Finally, it is suggested that the Court implicitly has adopted a per se rule that, because corporations are sufficiently different from individuals by virtue of their unique characteristics, they will not be afforded equal protection against discriminatory treatment in tax classification and other business related fields.

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1. 410 U.S. 356 (1973).

THE JUDICIAL DISPOSITION OF LEHNHAUSEN

Article 9, section 1 of the Illinois Constitution of 1870 provided for the levy of "a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."[2] Under authority of this provision, Illinois levied an ad valorem personal property tax on both individuals and corporations. In November, 1970, the voters of Illinois approved an amendment to article 9, section 1 to prohibit assessment of the ad valorem personal property tax on individuals while retaining it as applied to corporations and other nonindividuals.[3]

Subsequent to the approval of the amendment, a class action was initiated in state court on behalf of all corporations and other nonindividuals having taxable personal property in Cook County, Illinois. At the trial court level, the complaining class successfully contended that the tax violated the equal protection clause of the fourteenth amendment. Thereafter, the case was appealed to the Supreme Court of Illinois. Relying on its interpretation of previous decisions of the Supreme Court of the United States, and noting that tax classifications violate the equal protection clause if they have no rational basis, the Illinois high court sustained the decision of the trial court. The court found the distinction between corporations and individuals resulting from the amendment palpably arbitrary because the only basis for the classification was a desire to free one set of property owners from the burden of a tax imposed upon another.[4] The court explained that in order to be considered rational, the classification at issue should have been based on the character or use of the property taxed, rather than on the legal status of the party who owned it. The Illinois court expressed the belief that "[a]ll of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others."[5] Then, in order to preserve consistency in treatment between individuals and corporations, the court re-

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2. ILL. CONST. art. 9, § 1 (1870).

3. The following explanation of the proposed amendment appeared on the ballot submitted to the electorate.

> The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.

Lake Shore Auto Parts Co. v. Korzen, 49 Ill. 2d 137, 140, 273 N.E.2d 592, 593 (1971).

4. *Id.* at 151, 273 N.E.2d at 599.

5. *Id.*

imposed the ad valorem personal property tax on individuals, although it could have accomplished the same result by abolishing the tax altogether.[6]

Pointing out that the Supreme Court of Illinois had previously upheld state income taxation which imposed unequal and discriminatory tax rates on individuals and corporations, Justice Davis, in a dissenting opinion, argued that the rationale supporting this earlier disparity in establishing income tax rates should be extended to govern differences in assessing the ad valorem tax involved in *Lehnhausen.* Davis also discussed two considerations which were subsequently addressed by the United States Supreme Court. First, while stating that the majority had relied on *Quaker City Cab Co. v. Pennsylvania,*[7] he indicated that the dissenters in that case (including Justices Brandeis and Holmes) had dealt more adequately with a state tax classification which discriminated against corporations and in favor of individuals.[8] The dissenters in *Quaker City* had argued that such a classification distinction did not violate the equal protection clause because corporations as such received obvious advantages in being allowed to operate in corporate form. Second, Davis pointed to the evils and inequalities which had existed in trying to administer the tax in the past. He then alluded to the possibility that the purpose of the amendment was to decrease these evils and inequalities as a step in eliminating the ad valorem tax completely,[9] which purpose could be contended to be a rational basis justifying disparity in treatment.

In a unanimous decision the United States Supreme Court reversed the state court and upheld the Illinois constitutional amendment. After quoting from a number of earlier equal protection cases the Court justified the admittedly discriminatory tax classification by using roughly the same kind of arguments as did Justice Davis. The first justification was that corporations and similar enterprises were sufficiently distinguishable from individuals so that it did not transcend the requirements of equal protection to charge corporations and other like entities an ad valorem tax on personal property while not imposing the same tax on individuals. Through quotations from a dissent in an earlier case and dictum from another the Court referred to two possible bases for this distinction between corporations and individuals. One of these was that corporations generally operate on a larger scale than individuals.[10] The other (and more serious basis) was that cor-

6. *Id.*
7. 277 U.S. 389 (1928).
8. 49 Ill. 2d at 159-60, 273 N.E.2d at 603-604. *See also* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 360-62 (1973).
9. *Id.* at 153, 156, 273 N.E.2d at 601, 604. *See also* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973).
10. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 361 (1973).

porations have a unique status and enjoy special privileges not available to individuals. These special privileges include continuity of business without interruption despite death, flexibility in transferring ownership interests and limited personal liability.[11] The second justification for the classification discrimination was based on the state's administrative needs.

In the process of reaching its decision the Court explicitly overruled its earlier holding in *Quaker City*.[12] In that case the state of Pennsylvania had subjected foreign and domestic corporations to a gross receipts tax on the operation of taxicabs, while excluding individuals and partnerships. A majority of the *Quaker City* Court expressed a belief that, unlike a capital stock or franchise tax, the gross receipts tax at issue could be levied upon the receipts of natural persons just as conveniently as upon the receipts of corporations. Consequently, since the classification was based solely upon the ownership of taxicabs rather than upon a real and substantial difference having a reasonable relation to the subject matter of the legislation, it was arbitrary and a violation of the equal protection clause. Thus, whereas *Quaker City* could have been viewed as prohibiting a state from establishing tax classifications based solely upon whether property was owned by individuals or corporations, arguably *Lehnhausen* now permits such a distinction.

While explicitly overruling *Quaker City,* the *Lehnhausen* Court claimed that it was not acting suddenly.[13] The Court indicated that there had been a general trend away from *Quaker City* in favor of permitting states the greatest possible leeway in creating taxation distinctions without violating the equal protection clause. Thus, the Court appeared to suggest that by upholding the Illinois constitutional amendment it was acting more consistently with recent precedent than it would have been had it followed *Quaker City.*

Indeed, this view appears correct. An examination of the history of state discrimination against corporations and in favor of individuals suggests that *Quaker City* stands as an anomaly in its determination that the discrimination constituted an equal protection violation. Before *Quaker City* the Court had held in *Flint v. Stone Tracy Co.*[14] that a federal excise tax imposed on corporations and not on individuals was constitutional. Since the tax involved was federal and the Court had not yet held that the due process clause of the fifth amend-

11. *Id.* at 361-62.
12. *Id.* at 365.
13. *Id.* at 362.
14. 220 U.S. 107 (1911).

ment carried a mandate of equal protection, the equal protection clause did not apply. But the Court stated in dictum that there was no equal protection violation because corporations were being taxed, not for what they did in common with individuals but for the privileges which accrued to them by virtue of their corporate status.

Thus, the analysis in *Quaker City* appears on its face to be opposed to the dictum in *Flint*. Further, in several cases decided shortly after *Quaker City* the Court again faced the issue of state discrimination against corporations as a class and held back from asserting that such discrimination violated the equal protection clause. The year following *Quaker City* the Court found in *White River Lumber Co. v. Arkansas*[15] that a state statute which provided for retroactive taxation of previously undervalued or underassessed lands of corporations but not of similar lands held by individuals did not deny equal protection. And in *Phillips Petroleum Co. v. Jenkins*[16] another state statute which discriminated against corporations was upheld against an equal protection challenge. The statute provided that corporations were to be liable for any personal injury sustained by an employee due to the negligence of another employee whereas the common law rule (providing that a servant assumed the risk of any injury due to the negligence of a fellow servant) would continue to apply to individual employers.[17] Also, in *Nashville, Chattanooga & St. Louis Railway v. Browning*[18] the Court sustained a state statute providing for assessment of the property of public service corporations (for an ad valorem property tax) by the state commissioner, while the property of others was to be assessed by local officials at an allegedly lower rate. Thus, the determination in these and other cases leads to the conclusion that the *Lehnhausen* overruling of *Quaker City* is not a surprising departure from precedent.

As mentioned above, apart from finding that the state's discrimination against corporations was justified because corporations differed from individuals, the Court also referred to an administrative basis for the tax discrimination. It noted that while as a practical matter Illinois could not fairly administer the personal property tax as to individuals, the tax could be applied more easily to corporations.[19] Because it would have been financially disastrous to do away entirely with the personal property tax at that time, the Court apparently felt that Illinois solved this problem in a rational manner by retaining the tax

15. 279 U.S. 692 (1929).
16. 297 U.S. 629 (1936).
17. *Id.* at 631-32.
18. 310 U.S. 362 (1940).
19. 410 U.S. at 365.

as to corporations until 1979 while immediately terminating the tax on the personal property of individuals.[20]

These alternative reasons for the Court's holding, however, are not altogether consistent. If the characteristics of corporations make them sufficiently different from other economic entities so that a tax discrimination against them is reasonable, any argument based on the administrative reasonableness of the particular Illinois constitutional amendment would be irrelevant. Perhaps the Court only desired to buttress what it regarded as an already strong case or was setting forth dictum when discussing an administrative reason to justify legislative action. The argument that this finding as to the administrative basis is dictum is strengthened by the fact that the Court felt compelled to overrule *Quaker City* in reaching its decision. In *Quaker City* the Court found that the tax in question could have been administered with equal ease as to both corporations and individuals. In *Lehnhausen,* however, the state presented evidence that the tax was easily administered as to corporations but not as to individuals. Therefore, the Court in *Lehnhausen* did not have to overrule *Quaker City*; that case could have been distinguished from *Lehnhausen* on the issue of the state's ability to fairly administer the tax. That the Court went out of its way to overrule *Quaker City* when it could have distinguished it suggests that the administrative ease argument was irrelevant dictum and that the actual holding was that which provided the basis for the overruling, namely, the unique nature of corporations as justifying tax discrimination against them.

APPARENT TERMINATION OF EQUAL PROTECTION FOR CORPORATIONS AS A CLASS IN THE ECONOMIC SPHERE

The primary confusion of *Lehnhausen* is that, while the Court implied that corporations were sufficiently distinguishable from individuals that *no* tax or economic discrimination against them as a class would violate the equal protection clause, the decision was rendered in the language of traditional equal protection analysis. Such analysis suggests an ad hoc examination of the facts of the particular case and a determination that in this case there was no violation. But, if the Court was asserting by implication that corporations as a class always could be discriminated against because their inherent differences provided a rational basis for such treatment, then there would no meaningful protection left for corporations in the economic sphere. All that would be required to render state economic discrimination against corporations impervious to attack on equal protection grounds

20. *Id.*

would be a showing that the action was directed against corporations as a class and that the action was in the economic sphere.[21] This per se determination would make meaningless the Court's discussion of the traditional equal protection analysis with its suggestion that the Court was determining in the particular case whether the tax in question provided invidious discrimination or was palpably arbitrary.

A number of aspects of the Court's decision suggest that the Court implicitly was laying down a per se rule rather than rendering an ad hoc determination on the particular set of facts. One such indicium is the Court's lengthy and apparently approving quotation of two earlier judicial remarks (one a dictum and the other a dissent) supporting the per se position. The dictum came from the pre-*Quaker City* case of *Flint v. Stone Tracy Co.* where the Court stated:

> "[E]ven if the principles of the Fourteenth Amendment were applicable to the present case, [it could not be said] that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. . . . It is [the] . . . distinctive privilege [which inheres in the corporate capacity and is not enjoyed by private firms or individuals] which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals."[22]

The Court also quoted from Justice Holmes' dissent in *Quaker City* which again supported the per se rule (though it offered a different and less satisfactory justification for it): " '[I]f the State desired to discourage [bigness] . . . in corporate form and expressed its desire by a special tax I think that there is nothing in the Fourteenth Amendment to prevent it.' "[23] An endorsement of these statements would indicate that any state tax discrimination against corporations as a class would be justified against an equal protection attack either as a tax on the privilege of engaging in corporate activity or as a tax on bigness.

Another aspect suggesting implicit adoption of a per se rule was the overruling of *Quaker City*, apparently in favor of the position taken by the dissent. *Quaker City* could be read as saying (1) that it was possible for a state tax discrimination against corporations to violate the equal protection clause, and (2) that the specific tax discrimination involved in the case was a violation of equal protection.

21. The state's action, of course, may violate another constitutional provision such as the due process clause or the commerce clause but that is not at issue in the present discussion.

22. 410 U.S. at 361-62, *quoting* Flint v. Stone Tracy Co., 220 U.S. 107, 161-62 (1911).

23. 410 U.S. at 361.

It stretches credulity to assume that the Court was overruling only (2); that 45 years later the Court was engaging in a second determination of the specific facts and concluding that (contrary to the first determination) the facts did not support the finding that the state had no reasonable fiscal purpose which justified the tax discrimination. It might be argued that the *Lehnhausen* Court was asserting that the facts of *Quaker City* did not support the finding of an equal protection violation and that any fairly similar set of facts (like those in *Lehnhausen*) would fail to support such a finding, but that the Court was not asserting that any tax discrimination against corporations as a class would be protected against an equal protection attack. The problem with this position is that *Quaker City* was the only Supreme Court case where there was a finding that a state's tax discrimination against corporations as a class violated the equal protection clause. At the least this suggests that it might be difficult to imagine a state tax discrimination against corporations that would violate equal protection. One might think that a tax discrimination against corporations which was meant to prevent them from functioning would be such a violation (and perhaps the Court would so decide), but the opposite result is suggested by the Court's quotation of Justice Holmes' remark that there would be no violation if the state sought to discourage corporations. Thus, it seems more reasonable to assume that in overruling *Quaker City* the Court was asserting that no state tax discrimination against corporations as a class would be subject to equal protection analysis.

Another reason for accepting the view that the Court implicitly adopted a per se rule is the manner in which it dealt with the traditional equal protection analysis to determine whether the particular discrimination involved was palpably arbitrary or capricious or had a rational basis. Justice Douglas consistently chose to set forth the traditional test by quoting from other cases rather than by asserting the test in his own language. There was one exception where Douglas stated:

> The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper v. Virginia Board of Elections.* . . . Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.[24]

24. *Id.* at 359 (footnote omitted).

An interesting feature of this quotation is that Justice Douglas' assertion of the test (whether the discrimination was invidious) could be applied to any equal protection case. He did not specifically indicate that this same test would be applied to cases involving tax discrimination against corporations. And he even was unwilling to support the general proposition that there could be an equal protection violation with a citation from a straightforward tax discrimination case. Rather, Douglas cited *Harper* which on the surface dealt with a poll tax, but most reasonably could be viewed as involving the legacy of racial discrimination and therefore was in an area where traditionally strict equal protection scrutiny has been provided. Although Douglas quoted from and cited other cases applying this test to tax discrimination, he himself never explicitly indicated in his own words that this test also was to be applied to tax discrimination against corporations. When Douglas turned specifically to tax discrimination (as he did in the sentence following the *Harper* citation) and particularly when he turned to tax discrimination against corporations, his emphasis was not on reasserting the test but rather on its limited use. For example, emphasizing that states have "large leeway," in the sentence following the *Harper* citation, he implied that it would be difficult to show that the discrimination would be invidious. A like effect is created by Douglas' quotation from *Allied Stores v. Bowers*:[25] " 'The State may impose different specific taxes upon different trades and professions . . . .' "[26] And this impression is reinforced by the assertion that state taxes which met constitutional standards would be upheld even if they had the collateral effect of destroying the corporations they taxed.[27]

In his analysis of the earlier cases Justice Douglas repeated this pattern of emphasizing that the equal protection clause would have limited effect in tax discrimination cases generally and apparently would have no effect (or virtually no effect) in tax cases involving discrimination against corporations specifically. For example, in *Lawrence v. State Tax Commission*,[28] the Court had upheld a state statute which imposed an income tax on individuals for income derived

25. 358 U.S. 522 (1959).
26. 410 U.S. at 359-60.
27. "State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution." 410 U.S. at 360. What the Court meant by the limits of the "federal-state regime" was not specified. Nevertheless, from this quotation as well as Justice Holmes' remark about the state's right to discourage corporations, see text accompanying note 23 *supra*, it follows that in state taxation matters the Court would not impose the requirements of equal protection even when the alternative would be the destruction of corporations as a class.
28. 286 U.S. 276 (1932).

from out-of-state activities while exempting domestic corporations from the same tax. In choosing a quotation from this case Douglas did not pick out a passage restating the equal protection test but rather one emphasizing how difficult it would be to show a violation:

> "We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment, demonstrates that there may be."[29]

The Court's treatment of several other cases demonstrates even more forcefully how difficult it would be to show that tax discrimination would violate the equal protection clause. One of these was *Madden v. Kentucky*[30] which the Court cited for the proposition that the burden of negating every conceivable rational basis for the classification challenged rests with the one attacking it.[31] In this regard the Court stated: "There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' "[32] If a tax is to be sustained unless the opposing party negates every conceivable rational basis which could be asserted to support it, any limiting effect of the equal protection clause on state tax classifications is seriously eroded, if not destroyed. Normally, it is very difficult to prove the negative of something. Providing the negative of every rational basis which might justify legislation would appear impossible. The proof required to overcome the presumption set forth in *Madden* amounts to showing that there could not have been any rational basis for the legislation. To accomplish this task, the challenging party would have to imagine all the possible reasons for the legislation and then show that every imaginable justification for the passage of the act was either irrational or did not exist.

The Court also selected language from *Carmichael v. Southern Coal Co.*,[33] which, if taken seriously, probably would have an even more devastating effect on the possibility of applying the equal protection clause in tax discrimination cases: " 'In the nature of the case [a state legislature] cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence

29. 410 U.S. at 360, *quoting* Lawrence v. State Tax Comm'n, 286 U.S. 276, 283-84 (1932).
30. 309 U.S. 83 (1940).
31. 410 U.S. at 364.
32. *Id.*, *quoting* Madden v. Kentucky, 309 U.S. 83, 88 (1940).
33. 301 U.S. 495 (1937).

of such a record courts cannot assume that its action is capricious . . . .' "[34] Here, the *Carmichael* Court appeared to be asserting (a) that a complete catalogue of reasons which induced a legislature to pass a law is impossible, and (b) that short of such a catalogue (which is impossible) there can be no equal protection violation in the area involved. This area arguably includes all state tax cases involving discrimination against a class which was not chosen in a palpably arbitrary manner. And the *Lehnhausen* determination suggests that a state's singling out corporations for discriminatory treatment would not constitute the choosing of a palpably arbitrary class.

Thus, from this analysis of the Court's treatment of the earlier equal protection cases, the least one can conclude is that the Court directed its effort at demonstrating the futility of challenging state classifications which discriminated against corporations in the economic sphere rather than at arriving at a workable test to be used in future cases. But this analysis also suggests that the Court went beyond this purpose and implicitly rejected any genuine equal protection treatment for corporations as a class in the economic sphere. This conclusion also is indicated by the Court's most definitive statement of the holding of the case. This holding appeared in the context of the Court's discussion of *Nashville, Chattanooga & St. Louis Railway v. Browning*:[35]

> Approval of the treatment [in *Nashville*] "with that separateness" which distinguishes public service corporations from others . . . leads us to conclude in the present cases that making corporations and other like entities liable for ad valorem taxes on personal property but not individuals does not transcend the requirements of equal protection.[36]

In context the most appropriate reading of this language is that, at least in personal property tax classification cases, tax discrimination against corporations as a class always will be upheld against an equal protection challenge. Opponents of this view might argue that, by referring to "the present cases," the Court was limiting the effect of the language to the facts of the cases involved. To support such a reading, however, one must interpolate a "that" between the verb "conclude" and "in the present cases." Thus, the Court would be asserting that "[we] conclude *that* in the present cases" there could be discrimination against corporations. But the Court did not assert this. In fact, the Court indicated that "in the present cases" goes with the verb

34. 410 U.S. at 364, *quoting* Carmichael v. Southern Coal Co., 301 U.S. 495, 510 (1937).
35. 310 U.S. 362 (1940).
36. 410 U.S. at 364.

"conclude." Thus, the proper reading would be that "[we] conclude in the present cases that" in all similar cases there could be discrimination against corporations. Further, this interpretation is strengthened when the quotation is read in the context of a footnote provided by the *Lehnhausen* Court in support of its *Nashville* decision. There the Court quoted from *Carmichael* that: " 'This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation.' "[37] In this context the statement of the case appears universal in form, providing for no exceptions. And the Court then could be viewed as by implication taking an even broader position than the quoted statement of the case itself would indicate. Whereas in *Nashville*, public service corporations were found sufficiently distinguishable to justify state discrimination against them, by implication in *Lehnhausen* corporations generally were found sufficiently distinguishable from individuals to justify similar discrimination in all tax and business areas.

This interpretation of the Court's holding is consistent with its treatment of the earlier cases. It is consistent with the Court's lengthy quotation from *Flint*, which distinguished corporations from partnerships and individuals.[38] And it is consistent with the Court's overruling of *Quaker City*, which had found an equal protection violation when the state made a tax classification based solely on the property's being owned by a corporation rather than an individual. By overruling *Quaker City* and adopting Holmes' position that corporations are sufficiently different from individuals to justify separate tax treatment, the Court in *Lehnhausen* has abandoned any requirement that it search the particular facts of the case for a rational basis which would justify the state tax classification discrimination against corporations as a class. By implication *Lehnhausen* has adopted a per se rule that there can be no equal protection violation in such cases. Of course, this does not mean necessarily that the Court will apply this rule in the future—merely that the Court would be inconsistent if it did not do so.

This interpretation accords with the observation of Professors Tussman and tenBroek that "[t]here are broad areas in which the Court's use of the equal protection clause can only be described as an abandonment of it . . . . [p]ublic utilities and tax cases [being] the most striking examples."[39] Writing much more recently than Professors Tussman and tenBroek, but prior to *Lehnhausen*, Professor Gunther discerned a recent Court trend away from nominal or nonex-

37. *Id.* at 363 n.5.
38. *See id.* at 361-62.
39. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 368 (1949).

istent equal protection scrutiny of state business and economic legislation.[40] Professor Gunther's position is that during the Warren years the Court practiced a two-tiered equal protection analysis, subjecting certain kinds of cases to a more careful scrutiny than others. The cases subjected to strict scrutiny involved civil rights, voting, speech, travel, aliens, criminal appeals and, to an undetermined degree, other areas involving personal liberties. In other fields, particularly involving economic and business matters, the Court subjected state legislation to a considerably less strict standard in determining whether there was an equal protection violation. In these areas there was no violation of equal protection as long as there existed a conceivable rational basis to support the legislation. Normally, the Court would run through a ritual examination of the circumstances before concluding that this standard was not violated.

During the Burger years, however, Professor Gunther believes that the Court has been moving toward a narrowing of the gap between the different standards employed by the Warren Court in equal protection analysis.[41] Gunther states he favors this more recent trend and adds his own proposal. He would continue to apply a stricter standard in cases involving a fundamental interest or suspect classification but would make two changes to narrow the gap in scrutiny between these cases and cases involving economic or business matters. In cases involving the stricter standard, the Court's focus would shift from an examination of state legislative ends to an examination of the relationship between the state's legislative means and its ends or purposes. And in all cases, including those involving economic or business matters, the Court no longer would apply minimal scrutiny to the state's legislative means but would subject these means to intensified scrutiny to determine whether they were rationally related to the state's legislative ends or purposes. If the Court were to follow this suggestion it would subject *all* discrimination to intensive scrutiny to determine whether it was rationally related to the purpose the legislation was designed to serve. From what already has been indicated about the Court's reluctance in *Lehnhausen* to assert that the equal protection clause provides any meaningful limitations on state tax discrimination against corporations as a class, as well as its description of possible equal protection violations in the most negative terms, it seems quite clear that the Burger Court has not followed Professor Gunther's suggestions. Rather than subjecting the Illinois constitu-

40. Gunther, *The Supreme Court, 1971 Term; Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

41. *Id.* at 17.

tional amendment to an intensified scrutiny for rationality, the Court subjected the amendment to, at most, a minimal and logically irrelevant inspection.[42]

42. An interesting footnote to this case showing the Court's refusal to apply any intensified scrutiny of the Illinois amendment and its general indifference toward the applicability of equal protection in business matters is the Court's treatment of partnerships. In discussing the constitutionality of the discrimination in *Lehnhausen*, the Court seemed to have been guilty of a serious oversight because the Illinois tax provision discriminated not only against corporations but also other "non-individuals." "Non-individuals," are not equivalent to corporations. It could be argued that the Court recognized this when it stated that the Illinois supreme court construed individuals to mean natural persons or two or more natural persons as joint tenants or tenants in common. 410 U.S. at 358. If individuals are to be classified this way, there are other categories apart from corporations which presumably also are to be treated as non-individuals. Although not explicitly stating that they were to be treated as non-individuals, the Illinois supreme court specifically mentioned and thereby recognized the categories of partnerships, limited partnerships, professional service corporations and professional associations. Lake Shore Auto Parts Co. v. Korzen, 49 Ill. 2d 137, 151; 273 N.E.2d 593, 599 (1971).

The United States Supreme Court appeared to indicate that partnerships were to be classified as non-individuals by referring to the Illinois definition of individuals as natural persons. If partnerships were classified as non-individuals like corporations, this would mean that the Court allowed Illinois to discriminate against them and in favor of individuals. But the justifications provided for allowing discrimination against corporations (*e.g.*, privileges, bigness) appear very weak when applied to partnerships, which do not obtain any special privileges and often are not big. Thus, while the reasons for permitting Illinois to discriminate against corporations in favor of individuals do not apply to partnerships, the Court appeared willing to permit tax discrimination against partnerships on the basis of its justification of discrimination against corporations.

Although the facts are not at hand, a similar assertion probably can be made with respect to the administrative ease argument. There is no reason to believe that it was significantly easier for the state to collect personal property taxes from partnerships than from individuals. Still, the Court appeared willing to permit the same tax discrimination against partnerships as it permitted against corporations even though the administrative ease argument, which justified the tax discrimination, appeared to apply only to corporations. Thus, while the Court regarded corporate differences from individuals as justifying dissimilar taxing policies against an equal protection attack, it seemed to adopt a similar rationale in regard to partnerships even though they appear to be more similar to individuals than to corporations. If the Court had been sensitive to such issues, it could have remanded the case to the Illinois supreme court for a more complete expression of the definition of "individuals" so as to determine whether the Illinois supreme court really meant for partnerships to be treated like corporations or whether partnerships could be regarded as individuals. Since the state policy towards partnerships was irrelevant in the judicial scrutiny of legislative treatment of corporations, the Court may have regarded the issue as unnecessary to resolve. It is also possible that the Court accepted the view enunciated by Mr. Justice Holmes in his dissent in *Quaker City* that a few exceptions were immaterial and it did not matter if state legislation discriminated unreasonably against some less financially important groups providing discrimination against the major group was not unreasonable. *See* 410 U.S. at 361. Even so, where the state appeared to be discriminating against partnerships as well as corporations and the Court justified discrimination against corporations with arguments which probably would not have permitted similar discrimination against partnerships, a lacuna existed in the Court's position from which one reasonably could conclude that the Court was indifferent to possible business or economic violations of the equal protection clause.

Lehnhausen was remanded to the Illinois supreme court, but not for the purpose of obtaining additional information. Lake Shore Auto Parts Co. v. Korzen, 54 Ill. 2d 237, 296 N.E.2d 342 (1973). The Illinois supreme court, on remand, took the position that the Supreme Court of the United States understood the Illinois definition of individuals to be limited to natural persons and natural persons as joint tenants and tenants in common. Thus, partnerships, limited partnerships, joint ventures, professional associations, professional service corporations, trustees and other fiduciaries were considered to be non-individuals subject to the personal property tax. *Id.* at 239, 296 N.E.2d at 343.

Areas of Continued Vitality of Equal Protection for Corporations

This limiting interpretation of the equal protection clause, however, does not mean that a state can do whatever it pleases to a corporation without violating the Constitution. One such equal protection limitation noted by the Court is that corporations must be treated uniformly as a class.[43] In addition, a corporation is entitled to procedural due process. Moreover, if a state's regulation of a corporation could be classified as fitting into some fundamental interest or suspect category, the corporation might be entitled to equal protection of the law on this ground. For example, if a state were to decide that corporations could not defend themselves in a court of law, this presumably would be a denial of equal protection of the law as well as a denial of due process. In this instance, however, judicial protection would arise because the state's action transcended business and economic discrimination and brought into play the fundamental right of every litigant to his day in court. Even in the economic sphere, however, it may be that corporations retain some constitutional protection through the supremacy clause. The interstate commerce clause or federal statutes regulating corporate activities, such as the *Internal Revenue Code* or the *Securities Exchange Act*, might preempt some state legislation which otherwise would have a drastic effect on corporations. Of course, this does not assure corporations of safety from oppressive federal enactments.

Ruminations on the Judicial Strategy of Lehnhausen

Thus far, it has been suggested that a convincing argument can be made that *Lehnhausen* impliedly rejected the proposition that there can be an equal protection violation in state economic discrimination against corporations as a class. But if this is so, why was the Court so inexplicit in its holding? There are several possible answers. One of these, and this is not meant disrespectfully, is that the Court is a busy institution with a large number of cases to decide, many of which are more interesting to the Court than *Lehnhausen*. By quoting from a number of former decisions to reach the desired conclusion, the Court simply failed to consider the resulting implication that in taxation and other economic legislation the equal protection clause no longer would be applicable to disparities in the treatment of corporations and individuals. Another possible reason for the Court's failure to render an explicit holding is that *Lehnhausen* was meant to be a bridge case. *Quaker City Cab Co. v. Pennsylvania* was soundly laid to rest, but for one reason or another the Court did not

43. *See* 410 U.S. at 363.

consider *Lehnhausen* to be an appropriate vehicle for a definitive statement. A later case or series of cases now may be necessary to explain the Court's position.

Still another possibility for the lack of clarity is that the Court might have split badly if Justice Douglas had elaborated in depth on this issue. Professor Gunther has noted[44] that Justice Douglas has a history of being less responsive to state activities challenged on equal protection grounds by business and property interests as distinct from challenges reflecting personal liberties. Indeed, in his dissent in *Wheeling Steel Corp. v. Glander*,[45] Justice Douglas stated that he did not consider corporations to be persons entitled to equal protection of the law. Professor Gunther also suggested that the Nixon appointees to the Supreme Court would have a higher regard for business and property interests.[46] From this analysis one can conjecture that, had Douglas attempted a frontal assault on the applicability of equal protection guarantees to state tax and economic discriminations against corporations as a class, he might have had trouble persuading a majority. Nonetheless, the entire Court joined in the approach taken in *Lehnhausen*, and the unquestionable implication produced by the Court's holding now must be considered to be the present state of the law.

CONCLUSION

The opinion in *Lehnhausen* is unclear because the Court attempted to fit its result into the traditional mold of equal protection analysis. This confusion could have been avoided if the Court had adopted a more straightforward approach and had stated clearly that it no longer would apply the equal protection clause to corporations as a class in the economic sphere. Such a pronouncement would have produced greater clarity and has firm conceptual support.

Although written in broad terms, the equal protection clause was developed out of the Civil War and the subsequent struggle to provide black Americans with equal protection of the law.[47] More generally, it is best understood as providing persons equal protection of the law. If the equal protection clause covers property interests, it most appropriately does so because these are interests of persons. Just because corporations are treated by the law as persons does not make

44. Gunther, *supra* note 40, at 38.
45. 337 U.S. 562, 576-81 (1949) (Douglas, J., dissenting).
46. Gunther, *supra* note 40, at 30.
47. Some of the arguments hereinafter presented also are set forth by Mr. Justice Douglas in his dissent in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-81 (1948).

them persons in fact. They are not created like natural persons, do not enjoy the pleasures and suffer the pains of life like persons and do not die like persons. Corporations are created by and can be extinguished by the state. Since the concept of equal protection means that similar entities are to be treated similarly,[48] there appears to be no logical reason for the Court to concern itself with whether corporations should be treated like humans in respect to economic and business matters. Corporations are not humans and no amount of judicial legerdemain will make them such. Nor are they relevantly similar with respect to the way they are constructed for business purposes. That they have privileges which humans do not have is not so much the basis for their separate treatment as a manifestation of the inescapable fact that in their organization for business purposes they simply are not similar to humans. This is particularly true in the tax classification area. Unlike the taxing of individuals, corporate taxation in general can be viewed as an additional means of levying a flexible franchise tax for the privilege of doing business with the advantages that corporations have. Human beings are not similarly situated either with respect to their taxes specifically, or with respect to their business organization generally. Thus, there is no reason for applying the equal protection clause to economic discrimination in favor of individuals and against corporations as a class.[49]

While an explicit holding to this effect could not be expected to please corporate executives, it would have the virtue of honestly informing them (as well as state legislatures) where they stand. An argument can be made that corporate executives would be better served by being given the bad news in a straightforward and honest way rather than by being misled to believe that corporations were being afforded some kind of inarticulated equal protection which never seemed to materialize in fact. Corporations, then, no longer would need to apply their economic resources to pay for expensive but fruitless legal expertise in litigating this issue.

48. *See* Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928) (Brandeis, J., dissenting); Tussman & tenBroek, *supra* note 39, at 344.

49. Of course, this position justifies a per se rule that corporations as a class will not be afforded equal protection in economic or business matters. It would not justify a position that there never could be a state equal protection violation in the tax and economic fields. One specific unresolved issue deserving mention is the possibility of a state tax or economic discrimination against individuals as a class and in favor of corporations. *See* Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932). There are several positions which can be taken on this issue. It can be argued that if corporations as a class are not entitled to equal protection when a state discriminates against them and in favor of individuals, then as a matter of symmetry and logic individuals should not be protected. But if, as argued here, the purpose of the equal protection clause was to protect natural persons, then asymmetrical treatment between natural persons and corporations should not be regarded as logically troubling. Under this view the Court would not apply a per se rule when there was discrimination against individuals and in favor of corporations but would provide equal protection scrutiny.

A further virtue of an explicit holding is that it would free the Court from further unsatisfying analyses of the kind it undertook in *Lehnhausen*. To continue to attempt to apply some kind of equal protection guarantees to economic discrimination against corporations as a class acting in their corporate capacity is an illogical misfocusing of judicial concern and resources. Judicial energy could be spent better elsewhere. If *Lehnhausen* proves to be a step toward increased judicial clarity in regard to the application of equal protection guarantees to tax classifications and other business discriminations against corporations as a class, then the confusion caused along the way will have been a price worth paying.