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Recommended Citation

Linda E. Laufer, *Pay Now Fly Later Head Taxes-a New Phenomenon in Airport Finance*, 58 Cornell L. Rev. 759 (1973)
Available at: <http://scholarship.law.cornell.edu/clr/vol58/iss4/4>

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PAY NOW, FLY LATER: HEAD TAXES—A NEW PHENOMENON IN AIRPORT FINANCE

The rapid growth of air travel has necessitated a corresponding increase in expenditures for airport facilities throughout the United States.¹ To help meet this need, Congress enacted the Airport and Airway Development and Revenue Acts of 1970² for the "expansion and improvement"³ of the air transportation system. A trust fund was created to finance federal participation in eligible airport projects.⁴ Prior to the enactment of the 1970 legislation, several states and one local community attempted to finance construction, maintenance, and operation of their airport facilities by levying charges on enplaning airline passengers.⁵ All but one of these fees were held unconstitutional in the state courts.⁶ The Supreme Court reversed this trend, however, in a 1972 landmark decision approving the imposition of such user charges provided they bear a reasonable relationship to the use of the airport facilities.⁷ In reaction to the Court's ruling and to the subsequent burgeoning of various forms of local "head taxes,"⁸ Congress

¹ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 415, 552-53, 555-56 (1971).

² Pub. L. No. 91-258, 84 Stat. 219 (codified in 49 U.S.C. §§ 1701-27, 1741-42 (1970), and in scattered sections of the Internal Revenue Code of 1954) [hereinafter cited as "1970 Act"].

³ 49 U.S.C. § 1701 (1970). In its declaration of policy, Congress found "[t]hat the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation" and "[t]hat substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense." *Id.*

⁴ *Id.* § 1742. This section provides for the creation and operation of the Airport and Airway Trust Fund. Section 1717 indicates the allowable federal share of project costs.

⁵ See N.H. REV. STAT. ANN. § 422:43 (Supp. 1972); Act of March 10, 1969, ch. 281, [1969] Mont. Laws 689-91; Act of Dec. 1, 1969, ch. 200, [1969] N.J. Laws 557-58; Evansville-Vanderburgh Airport Authority Dist., Ind., Ordinance 33, § 1, Feb. 26, 1968.

⁶ See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) (constitutional); Northwest Airlines, Inc. v. Joint City-County Airport Bd., 154 Mont. 352, 463 P.2d 470 (1970) (unconstitutional); Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n, 111 N.H. 5, 273 A.2d 676 (1971), *prob. juris. noted*, 404 U.S. 819 (1971), *aff'd* 405 U.S. 707 (1972) (constitutional); Allegheny Airlines, Inc. v. Sills, 110 N.J. Super. 54, 264 A.2d 268 (Ch. 1970) (unconstitutional).

⁷ Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17 (1972).

⁸ A distinction can be drawn between taxes and charges:

[A]irport charges are imposed by governmental airport sponsors in their proprietary capacity, only on those who use the facilities provided, in amounts proportional to their use, for the purpose of recouping the proprietors' costs. Taxes, on the other hand, generally are levies imposed for the purpose of raising revenue for general

passed a bill⁹ entitled the Airport Development Acceleration Act, which would have prohibited state taxation of airplane passengers and increased the federal share of allowable project costs. The President, however, vetoed the measure after Congress had adjourned.¹⁰ Since the veto, additional communities have imposed passenger fees.¹¹ The nation's airports face a financial crisis which mandates an examination of approaches designed to produce the increased resources necessary for an adequate air transportation system.

I

THE 1970 ACT

The 1970 Act established various levels of federal assistance for financing airport capital improvements, but provided that the federal share may not exceed fifty percent for allowable project costs¹² in any approved airport development¹³ project and may not exceed eighty-

governmental expenditure and in amounts not necessarily related to the actual use of services or facilities provided.

Hearings on S. 2397, S. 3302, S. 3611, and S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 151 (1972) (statement of J. Reilly, Executive Vice President, Airport Operators Council International) [hereinafter cited as *1972 Senate Hearings*]. The term "head tax" apparently has been adopted as a shorthand form for referring to air passenger user charges.

After the Supreme Court decision, a large number of communities enacted passenger fees, ranging from \$.50 to \$3.00. *See* H.R. REP. No. 1279, 92d Cong., 2d Sess. 4 (1972); N.Y. Times, Nov. 2, 1972, at 44, col. 1. As of February 6, 1973, 31 jurisdictions imposed head taxes. *See id.*, Feb. 6, 1973, at 61, col. 2.

⁹ S. 3755, 92d Cong., 2d Sess. (1972).

¹⁰ N.Y. Times, Oct. 28, 1972, at 1, col. 1.

¹¹ *See id.*, Nov. 2, 1972, at 44, col. 1.

¹² 49 U.S.C. § 1717(a) (1970). For projects in

any State containing unappropriated and unreserved public lands and nontaxable Indian lands (individual and tribal) exceeding 5 per centum of the total area of all lands therein, the United States share under [§ 1717](a) shall be increased by whichever is the smaller of the following percentages thereof: (1) 25 per centum, or (2) a percentage equal to one-half of the percentage that the area of all such lands in that State is of its total area.

Id. § 1717(b). The maximum federal share for projects in the Virgin Islands is 75%. *Id.* § 1717(c).

¹³ The 1970 Act defines "airport development" as

(A) any work involved in construction, improving, or repairing a public airport or portion thereof, including the removal, lowering, relocation, and marking and lighting of airport hazards, and including navigation aids used by aircraft landing at, or taking off from, a public airport, and including safety equipment required by rule or regulation for certification of the airport under [Federal Aviation Act of 1958, § 612, 49 U.S.C. § 1432 (1970)], and (B) any acquisition of land or of any interest therein, or of any easement through or other interest in airspace, including land for future airport development, which is necessary to permit any such

two percent for costs of landing aids in any such project.¹⁴ These programs are financed by the Airport and Airway Trust Fund,¹⁵ which derives its resources from various user charges: (1) taxes on fuel used in noncommercial aviation,¹⁶ (2) an eight percent passenger tax on the amount paid for taxable transportation,¹⁷ (3) a three dollar passenger tax on the amount paid for an international journey commencing in the United States,¹⁸ (4) a five percent tax on the amount paid for do-

work or to remove or mitigate or prevent or limit the establishment of, airport hazards.

49 U.S.C. § 1711(2) (1970).

There is a total minimum annual authorization of \$280 million for airport development grants. *Id.* §§ 1714(a)(1), (2). Airports served by aircraft certificated by the Civil Aeronautics Board are eligible for a minimum of \$250 million for each fiscal year from 1971 until 1975 (*id.* § 1714(a)(1)), and airports served by segments of aviation other than certificated aircraft are eligible for a minimum of \$30 million for each fiscal year from 1971 until 1975. *Id.* § 1714(a)(2). Included in this statutory scheme are airports in the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, as well as in the "several States." *Id.* § 1714(a). Long-term obligations, not to exceed \$840 million, are also available, although none can extend for more than three fiscal years or beyond June 30, 1975. *Id.* § 1714(b).

For the acquisition, creation, and improvement of air navigation facilities, full federal participation is available with a minimum annual authorization of \$250 million. *Id.* § 1714(c). The annual appropriations are to be granted for each fiscal year from 1971 until 1975. *Id.*

An "air navigation facility" is defined as

any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft.

Id. § 1301(8).

¹⁴ *Id.* § 1717(d). These landing aids consist of "(1) land required for the installation of approach light systems, (2) touchdown zone and centerline runway lighting, or (3) high intensity runway lighting." *Id.*

¹⁵ *Id.* § 1742.

¹⁶ There is a seven-cent-per-gallon tax on aviation fuel (INT. REV. CODE OF 1954 §§ 4041(c), (d), *added by* 84 Stat. 1743 (1970) [hereinafter cited as CODE]), and on gasoline used in aircraft. *Id.* § 4081. The gasoline tax consists of a four-cent-per-gallon manufacturers' tax (*id.* § 4081(a)), and an added three-cent-per-gallon retailers' tax on gasoline used in noncommercial aviation. *Id.* §§ 4041(c)(2), (3), *added by* 84 Stat. 237 (1970). Commercial aviation not only is free from the seven-cent-per-gallon aviation fuel tax and the three-cent-per-gallon retailers' tax (*id.* §§ 4041(c), (d)), but also is entitled to a refund of the four-cent-per-gallon manufacturers' tax. *Id.* § 6421(a), *added by* 84 Stat. 241 (1970).

¹⁷ *Id.* § 4261(a), *amended by* 84 Stat. 238 (1970).

"Taxable transportation" is "transportation by air which begins . . . and ends in the United States or in the 225-mile zone," and "that portion of such transportation which is directly or indirectly from one port or station in the United States to another . . . but only if such portion is not a part of uninterrupted international air transportation." *Id.* § 4262(a). The "225-mile zone" is that part of Canada and Mexico "not more than 225 miles from the nearest point in the continental United States." *Id.* § 4262(c)(2).

¹⁸ *Id.* § 4261(c), *added by* 84 Stat. 238 (1970).

mestic air transportation of property,¹⁹ (5) an annual registration tax on the use of civil aircraft,²⁰ and (6) taxes on aircraft tires and tubes.²¹

Although the 1970 Act furnished increased federal support for the development and improvement of municipal airport facilities, the need for local funding remains. Operation and maintenance costs must be borne by state and local governments.²² Because the Airport Development Aid Program (ADAP), implemented by the 1970 Act,²³ is designed to promote only those capital improvements contributing to passenger safety, certain projects—for example, airport public parking facilities for passenger automobiles, and hangars and airport buildings, except for those containing facilities or activities directly related to the safety of persons at the airport—are ineligible for federal funds.²⁴ Furthermore, numerous communities are unable to raise sufficient funds to provide their share of project costs²⁵ or to comply with federal regulations for certification and security.²⁶

¹⁹ *Id.* § 4271, added by 84 Stat. 239 (1970).

²⁰ *Id.* § 4491(a), added by 84 Stat. 243 (1970). The fee is \$25, plus an amount determined by the aircraft weight. *Id.*

²¹ *Id.* §§ 4071(a)(2), (3). The tax is five cents per pound on tires and ten cents per pound on inner tubes for tires.

²² *Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 88 (1972)* (statement of J. Nammack, Executive Vice President, National Association of State Aviation Officials) [hereinafter cited as *1972 House Hearings*].

²³ 49 U.S.C. § 1714 (1970).

²⁴ *Id.* § 1720(b). For a full description of allowable project costs, see *id.* § 1720(a).

²⁵ *1972 Senate Hearings 24* (statement of J. Shaffer, Administrator, Federal Aviation Administration (FAA)). According to the testimony of Mr. Shaffer, approximately \$200 million in airport sponsor requests for eligible projects were returned or withdrawn in fiscal year 1971 because of inability to furnish the local share. *Id.* In that year, \$170 million were obligated, which means that less than one-half of the applications were approved. *Id.* at 19. Non-hub; small hub, and general aviation facilities, rather than the larger airports, have the most difficulty in raising their share of costs. *Id.* at 24. A list of 18 small communities having such problems was placed in the record. *Id.* at 23.

Since the inception of ADAP "approximately \$215 million in requests have never generated because of a lack of local funds." *Id.* at 30 (statement of C. Bowers, Director, FAA Airport Services).

²⁶ *Id.* at 108 (statement of G. Bean, Director, Hillsborough County Airport Authority, Florida, Operator, Tampa International Airport, and President, American Association of Airport Executives). This inability to produce matching funds has not affected the overall operation of ADAP, however, since the FAA fully obligated the minimum amount of allocated federal money for projects in fiscal year 1971. *Id.* at 19 (statement of J. Shaffer, Administrator, FAA). Mr. Shaffer indicated that the FAA obligated "all but 4 cents of the Airport Development Aid Program (ADAP) funds set at \$170 million." *Id.* In fiscal year 1972, the FAA forecasts that it will obligate the entire \$280 million allotted under ADAP. *Id.* at 23 (statement of C. Bowers, Director, FAA Airport Services).

Only \$170 million, rather than \$280 million, was obligated for fiscal year 1971 because

II

HEAD TAXES, THE COURT, AND CONGRESS

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,²⁷ and its companion case, *Northeast Airlines, Inc. v. New Hampshire Aeronautics Commission*,²⁸ the Supreme Court held that the imposition of fees on enplaning passengers is a constitutionally valid exercise of the states' power to tax,²⁹ since there is no discrimina-

the Department of Transportation budget requests for fiscal 1971 were submitted prior to enactment of the [1970 Act]. Accordingly, the Department first asked for spending authority under the Act in a supplemental request. This request, transmitted almost 6 months after the law was enacted, programmed only \$100 million for airport development, not the \$280 million minimum specified in the Act. The Department concurrently requested \$226 million for air navigation facilities and equipment (airways) rather than the \$250 million minimum. The Supplemental Appropriations Act of 1971 increased appropriations for airports and airways to amounts in excess of those requested to \$170 million and \$238 million, respectively.

S. REP. No. 1005, 92d Cong., 2d Sess. 8 (1972).

By restricting its expenditures to the minimum level in order to accumulate a surplus in the trust fund, the FAA has acquired a substantial backlog of funding applications. The backlog for fiscal year 1973 is estimated at approximately \$200 million. 1972 Senate Hearings 19 (statement of J. Shaffer). An accumulation of surplus in the trust fund is expected. *Id.* at 29 (statement of C. Bowers). Beginning in fiscal year 1974, the trust fund will have a surplus (*id.*), and by fiscal year 1975, it may contain as much as \$1 billion that is not obligated. *Id.* at 28 (statement of J. Shaffer). As Mr. Shaffer explained:

This surplus will result from maintaining today's level of commitments or obligations, against the growth in revenues from user charges due entirely to the expansion of demand in the system, not rate charges. There will be more cargo shipped through the system, more fuel burned, more passengers enplaned [*sic*] and more revenues earned and collected.

Id. at 31.

²⁷ 405 U.S. 707 (1972).

²⁸ *Id.*

²⁹ The Indiana ordinance, enacted by the Evansville-Vanderburgh Airport Authority District, levied a "use and service charge of One Dollar (\$1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport." Evansville-Vanderburgh Airport Authority Dist., Ind., Ordinance 33, § 1, Feb. 26, 1968. Revenues collected from these charges are kept by the Airport Authority

in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Id. § 5. Similarly, the New Hampshire statute provided for an enplaning passenger service charge based on aircraft weight. N.H. REV. STAT. ANN. § 422:43 (Supp. 1972). This act permits the air carrier to collect the fees either directly or indirectly from each passenger. *Id.* Fifty percent of the money is placed in the state's aeronautical fund. The remainder is allocated "to the municipalities or the airport authorities owning the public landing areas at which the fees . . . were imposed." *Id.* Both the Indiana and New Hampshire provisions apply to domestic and interstate travelers.

Delta, Eastern, and Allegheny Airlines succeeded in challenging the constitutionality

tion against or undue burden on interstate commerce, no congressional preemption of the field, no interference with the right to travel, and no violation of equal protection.

A. *The Commerce Clause*

The Court denied that the fees in *Evansville-Vanderburgh* violated the commerce clause,³⁰ emphasizing that charges for the use of airport facilities apply to interstate and intrastate passengers alike.³¹ Although superficially the decision appears to present an obstacle to free movement among the states, in reality it is merely an extension of the principles governing water, railroad, and highway carrier taxation cases³² into the field of air transportation. In these land and water cases, the Court applied the commerce clause to invalidate state levies on interstate carriers only when it found that the taxes: (1) were imposed on the privilege of conducting an interstate business rather than on the privilege of utilizing state-provided facilities, (2) discriminated against interstate commerce in favor of intrastate commerce, or (3) exceeded the amount that would be fair compensation to the state.³³ As the Court maintained in *Capitol Greyhound Lines v. Brice*,³⁴ the tax

of the Indiana ordinance in the state courts. The Superior Court of Vanderburgh County, Indiana, granted a permanent injunction against the enforcement of the ordinance, asserting that the fees imposed an unreasonable burden on interstate commerce. *See* 405 U.S. 707, 709 (1972). This decision was affirmed by the Indiana Supreme Court, 255 Ind. 436, 265 N.E.2d 27 (1970). The court maintained that "the tax . . . is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the commerce clause]." *Id.* at 443, 265 N.E.2d at 31. In New Hampshire, however, the airlines failed in their attempt to obtain a declaratory judgment pronouncing the statute invalid. After transfer of the action from the Superior Court of Merrimack County, New Hampshire, the state supreme court reversed, maintaining that the charge placed a minimal burden on the carrier (111 N.H. 5, 9, 273 A.2d 676, 679 (1971)), and expressly rejected the views expressed in the Indiana Supreme Court opinion. *Id.* at 8, 273 A.2d at 678. The United States Supreme Court reversed the Indiana judgment and affirmed the New Hampshire judgment. 405 U.S. 707 (1972).

³⁰ 405 U.S. at 717.

³¹ *Id.*

³² *See, e.g., Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) (highway carrier); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (railroad); *Helson v. Kentucky* 279 U.S. 245 (1929) (water carrier).

³³ *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 544 (1950).

The state can determine the amount of the fees and the means of collection provided "they are reasonable and are fixed according to some uniform, fair and practical standard" which will not impose a burden on interstate commerce. *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915) (citations omitted).

³⁴ 339 U.S. 542 (1950). In *Brice*, the Court upheld a Maryland toll of 2% on the fair market value of vehicles utilized in interstate commerce, which supplemented the state standard mileage charge.

“should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted.”³⁵ The fees upheld in *Evansville-Vanderburgh* are part of a natural evolutionary process, not a radical departure from precedent. None of the conditions for invalidation enumerated in the earlier transportation cases were met.

Originally, states were confined to taxing matters which would not affect the other states.³⁶ As various modes of transportation developed and states created facilities to accommodate this development, the states acquired the authority to tax interstate carriers.³⁷

Provision of adequate transportation facilities has consistently been regarded as a matter for local regulation, despite the presence of interstate commerce, since “police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests.”³⁸ In exercising its power over transportation facilities, the state can require monetary compensation when “at its own expense [it] furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic.”³⁹

B. Federal Preemption

The *Evansville-Vanderburgh* Court found that Congress had evidenced no intent to exclude “state and local power to levy charges designed to help defray the costs of airport construction and maintenance.”⁴⁰ The Court concluded that the 1970 Act manifested a contrary purpose by providing that

³⁵ *Id.* at 545.

³⁶ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

³⁷ With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.

South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 187-88 (1938) (footnotes omitted). Highway taxes conforming to these criteria were upheld as valid exercises of the states' police power. The general principle asserted in *Freeman v. Hewit*, 329 U.S. 249, 253 (1946), that “[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys,” also pertains to charges imposed on airport use.

³⁸ *Freeman v. Hewit*, 329 U.S. 249, 253 (1946). See also *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938); *Morris v. Duby*, 274 U.S. 135 (1927); *Kane v. New Jersey*, 242 U.S. 160 (1916); *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882).

³⁹ *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915).

⁴⁰ *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S.

[a]s a condition precedent to his approval of an air development project, the Secretary [of Transportation] shall receive assurances in writing, satisfactory to him, that . . . the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection⁴¹

Despite the congressional mandate for federal user charges to support the Airport and Airway Trust Fund, this subsection reserves for public and private airport proprietors the power to impose their own user fees. The imposition of head taxes is a legitimate exercise of this power and was held by the Supreme Court in *Evansville-Vanderburgh* not to "conflict with any federal policies furthering uniform national regulation of air transportation."⁴²

Within one week of the *Evansville-Vanderburgh* decision, during Senate hearings on bills to amend the 1970 Act,⁴³ members of Congress asserted that Congress had intended to preempt the field.⁴⁴ Shortly thereafter, in an attempt to clarify this intention, both houses of Congress focused on legislation which would ban air passenger fees while increasing federal assistance under the 1970 Act.⁴⁵ Whether Congress

707, 721 (1972). The 1970 Act contains no provision specifically prohibiting these owners from instituting any type of fees, including passenger charges.

⁴¹ 49 U.S.C. § 1718(8) (1970).

⁴² 405 U.S. at 720-21.

⁴³ The case was decided on April 19, 1972. On April 25-26, 1972, the Senate conducted hearings on S. 2397, 92d Cong., 1st Sess. (1971), which would amend the 1970 Act by increasing the maximum federal share to 75% of allowable project costs except with respect to landing aids, and on S. 3302, 92d Cong., 2d Sess. (1972), which would amend the 1970 Act by "making certain airports where the landing area is owned by the United States or an agency thereof eligible for assistance." Portions of these bills were incorporated into S. 3755, 92d Cong., 2d Sess. (1972), which was vetoed by President Nixon.

⁴⁴ Senator Howard W. Cannon of Nevada, Chairman of the Senate Subcommittee on Aviation of the Committee on Commerce, stated: "Despite what the Supreme Court said, I am sure it was the intention of this committee that we preempt the field." *1972 Senate Hearings* 98.

Expressing his dissatisfaction with the *Evansville-Vanderburgh* decision, Senator Marlow Cook of Kentucky foreshadowed future congressional action: "It looks to me like [the Court] opened the barn door wide open. . . . That may require some legislative action on our part in the future." *Id.* at 27.

⁴⁵ The House "revived" H.R. 2337, 92d Cong., 1st Sess. (1971), originally introduced on January 26, 1971, which would "amend the Federal Aviation Act of 1958 to prohibit State taxation of the carriage of persons in air transportation." On June 19 and 23, 1972, hearings were conducted on H.R. 2337, as well as on H.R. 14847, 92d Cong., 2d Sess. (1972), on H.R. 10326, 92d Cong., 1st Sess. (1971), and on similar bills involving state taxation and the federal share of funds to be used for airport construction, maintenance, and improvements. Introduced on May 9, 1972, H.R. 14847 included provisions concerning the ban on

intended to preclude the states from levying these charges in 1970 is irrelevant. It clearly possessed the power to do so⁴⁶ in 1972 and 1973.

In 1972, Congress attempted to accommodate state and national interests by passing the Airport Development Acceleration bill.⁴⁷ Although this bill would have banned all air passenger charges with two short term exceptions,⁴⁸ it would have increased the federal share in allowable project costs to a maximum of seventy-five percent for medium hub, small hub, non-hub, and general aviation airports.⁴⁹ Federal participation in financing the nation's large hubs would have continued at the present level—not to exceed fifty percent.⁵⁰ Passage of this legislation would have preempted the field.⁵¹

head taxes and the increase in federal funding. The hearings centered around these provisions of the bill.

On May 16, 1972, S. 3611, 92d Cong., 2d Sess. (1972), was introduced to amend the Federal Aviation Act of 1958 by banning charges on air passengers. In modified form, this bill became part of S. 3755. Hearings on S. 3611 were held on June 12, 1972.

⁴⁶ The development of an adequate air transportation system may be designated a matter to be regulated solely by Congress. *See Freeman v. Hewit*, 329 U.S. 249 (1946). As the Court in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851), declared:

Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

According to a memorandum from the Senate Office of the Legislative Council to Senator Warren G. Maguuson, Chairman of the Committee on Commerce, "Congress does have authority to pre-empt State and local taxation of passengers engaged in air transportation. The Court in the *Evansville-Vanderburgh Airport* case found a contrary purpose to be evident in the [1970 Act], but if faced with a clear intent on the part of Congress to pre-empt would agree to it." *1972 Senate Hearings* 208.

⁴⁷ S. 3755, 92d Cong., 2d Sess. (1972); *see* note 9 and accompanying text *supra*.

⁴⁸ There were two narrowly drawn exceptions for all New Hampshire airports (S. 3755, 92d Cong., 2d Sess. § 1113(a) (1972)), and for Bradenton-Sarasota Airport in Florida. *Id.* § 1113(c). The exemptions were to continue until July 1973. For a discussion of the reasons for these two temporary exemptions, *see* 118 CONG. REC. S 13,300-04 (daily ed. Aug. 10, 1972).

⁴⁹ S. 3755, 92d Cong., 2d Sess. § 5(a)(2) (1972).

⁵⁰ *Id.* § 5(a)(1).

The 1972 bill would have increased the minimum annual authorization and the long term obligational authority for airport development grants. *Id.* § 3. For fiscal years 1974 and 1975, minimum annual authorization for airport development grants to air carrier and reliever airports would have been increased from \$250 million to \$312.5 million per year. *Id.* § 3(a). The authority to incur obligations to make airport development grants would have been increased from \$840 million to \$1.54 billion, and extended until 1975. *Id.* § 3(b).

The bill further provided that the federal share could not exceed 82% of that portion of allowable project costs for safety equipment required for airport certification and for security equipment required by regulation by the Secretary of Transportation. *Id.* § 5(e). Under the 1970 Act, such costs are governed by the general provision for a maximum of 50% federal participation. 49 U.S.C. § 1717(a) (1970).

⁵¹ The President, in vetoing the entire measure, noted that it was a "breach [of] the budget." *N.Y. Times*, Oct. 28, 1972, at 1, col. 1. The bill was sent from Congress to the White House on October 13, 1972. *Id.* It was vetoed on October 27, 1972. *Id.*

C. *The Right To Travel and Equal Protection*

State and local governmental imposition of head taxes does not impinge upon the right to interstate travel.⁵² Although it is of indefinite origin,⁵³ this right is today firmly entrenched and can be abridged only where there is "a compelling governmental interest."⁵⁴ The *Evansville-Vanderburgh* Court asserted that publicly provided airport facilities assist rather than obstruct interstate travel.⁵⁵ States benefit both interstate and intrastate travelers by providing adequate airports through a reasonable and nondiscriminatory tax. The right to unhampered travel, whatever its constitutional basis, is not abridged by this type of state action.

As a service charge related to the use of airport facilities, air passenger fees are distinguishable from the capitation tax struck down in *Crandall v. Nevada*.⁵⁶ The tax imposed in that case⁵⁷ was held uncon-

⁵² This right was recognized as early as 1849 by Mr. Chief Justice Taney: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

⁵³ The right to travel has not been linked definitely to any specific clause of the Constitution, and was described recently as a "nebulous judicial construct." *Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (Harlan, J., concurring in part and dissenting in part). At various times its foundation has been recognized in the commerce clause (*see United States v. Guest*, 383 U.S. 745 (1966)), the privileges and immunities of national citizenship clause (*see Oregon v. Mitchell*, 400 U.S. 112, 281 (1970) (Stewart, J., concurring in part and dissenting in part)), and the fourteenth amendment. *See Williams v. Fears*, 179 U.S. 270 (1900). In several cases the Court has pointed out that this right has no definite source. *See Oregon v. Mitchell, supra*, at 229 (Brennan, J., concurring in part and dissenting in part); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁵⁴ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

⁵⁵ *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 714 (1972).

⁵⁶ 73 U.S. (6 Wall.) 35 (1867).

⁵⁷ In 1865, the Nevada legislature imposed a one dollar capitation tax on "every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." *Id.* at 36. Those engaged in such business must pay the tax for each "person so conveyed or transported from the State." *Id.* The lone dissenter in *Evansville-Vanderburgh*, Mr. Justice Douglas, argued that *Crandall* must be overruled if the air carrier taxes were to be upheld. 405 U.S. at 722. Emphasizing that a charge on passengers substantially interfered with the fundamental constitutional right to interstate travel, he rejected the notion that such exactions were designed as compensation for the use of airport facilities. *Id.* at 726. He declared:

Heretofore, we have held that a tax imposed on a carrier but measured by the number of passengers is no different from a direct exaction upon the passengers themselves, whether or not the carrier is authorized to collect the tax from the passengers.

Id. at 725. Mr. Justice Douglas has consistently upheld the right to travel. *See Aptheker v. Secretary of State*, 378 U.S. 500, 519 (1964) (Douglas, J., concurring); *Bell v. Maryland*, 378 U.S. 226, 250, 255 (1964); *New York v. O'Neill*, 359 U.S. 1, 12 (1959) (Douglas, J., dissenting); *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring).

Similar sentiment had been expressed in several state court decisions prior to the

stitutional as a direct charge on the passenger "for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel."⁵⁸ In its analysis, the *Crandall* Court refused to "concede that the question . . . [should] be determined by the [Commerce Clause]."⁵⁹

Supreme Court's approval of air fees. The state courts in Montana, New Jersey, and Indiana held that passenger charges were unconstitutional; the New Hampshire court, however, found otherwise. See note 6 *supra*.

Discussing the fundamental right of the "free movement of persons," the Montana Supreme Court said:

Unlike the movement of goods, where a balance often is struck (in the absence of federal legislation) between the Commerce Clause's demand for untrammelled commercial intercourse, and the states' needs for reasonable police regulation and revenue collection, the constitutional protection is treated as absolute.

Northwest Airlines, Inc. v. Joint City-County Airport Bd., 154 Mont. 352, 357, 463 P.2d 470, 473 (1970). The ban on state exaction of head taxes must be absolute. *Id.* Furthermore, the court maintained that the fees cannot be regarded as user charges because "the imposition of a charge based on the number of enplaning passengers bears no reasonable relationship to use of the airport facilities by the carrier." *Id.* at 360, 463 P.2d at 475. As in *Crandall v. Nevada*, the Montana act violated the right to interstate travel by imposing an exaction on the "act of emplanement, which is equivalent to the act of departure and therefore is an integral aspect of interstate travel." *Id.* at 356, 463 P.2d at 473.

The New Jersey Superior Court expressly adopted the Montana court's reasoning. Fees on enplaning passengers "cannot be justified as service charges for the use of municipal facilities or the furnishing of municipal services. Nor can these amounts be justified as a tax on interstate commerce." *Allegheny Airlines, Inc. v. Sills*, 110 N.J. Super. 54, 58, 264 A.2d 268, 270 (Ch. 1970). The court characterized the New Jersey statute as "nothing but a modern version" of the act in *Crandall v. Nevada* which was held "an unlawful attempt to interfere with the constitutional right of citizens to travel freely." *Id.*

Congressional reaction to *Evansville-Vanderburgh* was similar. The Senate reported that "[t]he head tax . . . cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes." S. REP. No. 1005, 92d Cong., 2d Sess. 20-21 (1972). Throughout the hearings, senators and representatives referred to the state and local fees as "head taxes," while designating the federal fees as "user charges." The tone of the hearings indicates that Congress regarded the head taxes as a direct exaction on the passenger, constituting infringement of the right to interstate travel. See, e.g., 1972 Senate Hearings 42 (remarks of Senator M. Cook); *id.* at 77, 98 (remarks of Senator H. Cannon).

⁵⁸ 73 U.S. (6 Wall.) at 40.

⁵⁹ *Id.* at 43. Despite the *Crandall* Court's refusal to base its decision on the commerce clause, it is arguable that the Nevada tax violated this constitutional provision as it was interpreted in 1867. The *Crandall* Court stated:

It may be that under the power to regulate commerce among the States, Congress has authority to pass laws, the operation of which would be inconsistent with the tax imposed by the State of Nevada, but we know of no such statute now in existence. Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which those cases were decided, that it violates the [commerce clause].

Id. In a separate opinion, Mr. Justice Clifford agreed that the statute was unconstitutional, but preferred to base his decision on the commerce clause. He maintained:

[T]he act of the State legislature is inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I think the judgment of the court should have been placed exclusively upon that ground. Strong doubts

It grounded its decision on the notion that all persons have the right to travel "to the seat of government" and that the states cannot "impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it."⁶⁰ Unlike the charges in *Evansville-Vanderburgh*, the *Crandall* capitation tax bore no reasonable relationship to state-provided highways or other facilities.⁶¹ Additionally, the tax discriminated against interstate travel because it operated only on those who were leaving or passing through the state.⁶² Such an exaction would violate the commerce clause as it is interpreted today.⁶³ Nevertheless, whatever conceptual framework is applied to the *Crandall* case, the capitation tax (unlike the present air passenger head tax) clearly constituted an infringement on the right to interstate travel.

A related difficulty recognized by the *Evansville-Vanderburgh* Court is the possibility that air passenger user charges violate the equal protection clause.⁶⁴ Statutory classification of those subject to the fees must not operate as an invidious discrimination, but must have a rational basis.⁶⁵ Furthermore, a fair enactment administered in an unequal manner denies the equal justice required by this clause of the Constitution.⁶⁶ Although the acts in *Evansville-Vanderburgh* apply equally to domestic and interstate travelers, they also exempt a number of passengers from paying the charges.⁶⁷ Nonpassenger users are also excepted. The Court held that this is not an unreasonable classification:

are entertained by me whether Congress possesses the power to levy any such tax, but whether so or not, I am clear that the State legislature cannot impose any such burden upon commerce among the several States. Such commerce is secured against such legislation in the States by the Constitution, irrespective of any Congressional action.

Id. at 49.

⁶⁰ *Id.* at 44-45.

[The citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

Id. at 44.

⁶¹ *Id.* at 40. The tax was not levied as a service charge, but as a charge for the privilege of leaving or traveling through the state. *Id.*

⁶² Intrastate travelers were not subject to the tax. *Id.*

⁶³ See notes 34-39 and accompanying text *supra*.

⁶⁴ 405 U.S. at 719 n.13.

⁶⁵ *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁶⁶ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁶⁷ Deplaning commercial passengers and passengers on noncommercial flights are not

Certainly passengers as a class may be distinguished from other airport users, if only because the boarding of flights requires the use of runways and navigational facilities not occasioned by nonflight activities. Furthermore, business users, like shops, restaurants, and private parking concessions do contribute to airport upkeep through rent, a cost that is passed on in part at least to their patrons.⁶⁸

Although the fee falls on only enplaning passengers, there is no violation of the equal protection clause.⁶⁹ The presence of other tax formulas is irrelevant⁷⁰ when, as in this case, the existing statutes provide a rational system of classification.

III

POLICY CONSIDERATIONS

The validity of air passenger fees rests on firm precedent. Policy considerations, however, may dictate an unfavorable response to their imposition. The essential issue is whether these state-imposed taxes are an appropriate means of financing municipal facilities.

As more governmental airport proprietors apply their own distinct variety of passenger service charges, there is an increased likelihood

subject to the fee. The Indiana ordinance specifically exempts active members of the military and temporary layovers. Evansville-Vanderburgh Airport Authority Dist., Ind., Ordinance 33, § 4, Feb. 6, 1968. However, there is no such provision in the New Hampshire act. In addition, New Hampshire does not impose a charge on nonscheduled flights on airplanes weighing less than 12,500 pounds, but does place a one dollar fee on heavier aircraft. N.H. REV. STAT. ANN. § 422:44 (Supp. 1972). Indiana does not distinguish between scheduled and nonscheduled commercial flights.

⁶⁸ 405 U.S. at 718. In addition, the distinction between commercial and noncommercial flights reflects a reasonable categorization. Commercial flights need "more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes." *Id.* (footnote omitted).

The Court indicated that it is fair for commercial aviation to assume "a larger share of the cost of facilities built primarily to meet its special needs, whether that additional charge is levied on a per-flight basis in the form of higher takeoff and landing fees, or as a toll per passenger-use in the form of a boarding fee." *Id.* at 719.

⁶⁹ A charge on enplaning passengers is not an irrational "measure of the relative use of the facilities for whose benefit they are levied." *Id.* The Court asserted that "[i]t is not unreasonable to presume that passengers enplaning at an airport also deplane at the same airport approximately the same number of times." *Id.*

⁷⁰ No tax is absolutely precise:

At least so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.

Id. at 716-17.

that air transportation will be subject to multiple taxation.⁷¹ A plethora of dissimilar statutes, taxing the same incident of commerce, would unreasonably burden interstate commerce. Without uniformity, varying statutory schemes for head taxes would engender multiple taxation in at least two ways: (1) when one airport charged enplaning passengers while another charged enplaning and deplaning passengers,⁷² and (2) when each airport en route charged passengers who used connecting air service.⁷³

Fear of burdensome exactions interfering with movement among the states was manifested in *Crandall v. Nevada*:

[I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.⁷⁴

71 In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Supreme Court indicated that local taxes measured by gross receipts from interstate commerce could be imposed by every state which that commerce touched. Apportionment of the tax to the amount of commerce conducted within the state was regarded as an acceptable solution to the problem. *Accord*, *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944) (Jackson, J., concurring) (unapportioned personal property tax on fleet of airplanes operated in interstate commerce upheld).

An analogous situation exists in the area of passenger fees although a system of apportionment has not yet been proposed.

72 Such a situation existed among the Philadelphia, Richmond, and Allentown airports. Serving these three cities, Altair Airlines, Inc., was confronted with the following circumstances at the time of the congressional hearings: (1) Philadelphia was about to impose a \$2.00 enplaning and \$2.00 deplaning fee, effective July 1, 1972, (2) Richmond would impose a \$1.00 enplaning fee at the same time, and (3) Allentown had proposed a \$2.00 enplaning fee. Consequently, the round-trip passenger would pay a total of \$6.00 in traveling between Philadelphia and Allentown and a total of \$5.00 in traveling between Philadelphia and Richmond. 1972 *House Hearings* 163 (statement of T. Colket, Jr., President, Altair Airlines, Inc.).

Imposition of the Philadelphia "two-way" charge caused considerable controversy. See S. REP. No. 1005, 92d Cong., 2d Sess. 21-23 (1972) (Philadelphia newspaper articles). Throughout the congressional hearings, the Philadelphia fee was the target of criticism. See, e.g., 1972 *House Hearings* 146 (remarks of Representative J. Harvey). Philadelphia subsequently eliminated this multiple taxation situation in favor of a \$3.00 enplanement charge.

73 1972 *Senate Hearings* 137 (statement of W. Gilliland, Vice Chairman, Civil Aeronautics Board). Mr. Gilliland explained:

[I]t appears that head taxes can be constitutionally imposed which would double penalize those passengers in our smaller cities who must use connecting air service to reach their destination. Such passengers might have to pay the tax each time they enplane, forcing double or treble taxes while their big city cousins would pay only once.

Id.

74 73 U.S. (6 Wall.) 35, 46 (1867).

More than one hundred years later, recognizing the potential dangers of multiple taxation on aircraft passengers, the Montana Supreme Court observed:

If the state is empowered to tax the act of departure no inherent limits exist as to the amount of charge. The right of the airport to tax the act of enplanement cannot logically be distinguished from the right of the airport to tax the act of deplanement. By the same token, arrival and departure taxes could be levied by airports at each point of intermediate stopover or transfer on a passenger's route. Since no rational basis exists for apportioning the right to tax arrival and departure among the various airports through which a traveler might pass, there is nothing to prevent the accumulation of crippling burdens on interstate air travel. Clearly the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling cumulative burdens on interstate travel.⁷⁵

Although it inaccurately compared the air passenger user charge to the capitation tax in *Grandall*, the Montana court did illustrate the dangers of multiple taxation.

Head taxes pose other difficulties for air passengers. First, multiple taxation is a problem not only among state and local governmental airport proprietors, but also between those proprietors and the federal government. Because the 1970 Act imposed federal excise taxes on passengers, head tax critics contend that additional local and state charges are "burdensome and discriminatory,"⁷⁶ as well as federally preempted.⁷⁷ Second, flat rate air passenger fees are basically regressive.⁷⁸ When such charges are applied to small air fares, there is a substantial percentage increase in the fare.⁷⁹ As a result, the short haul air passenger who formerly enjoyed relatively inexpensive rates may seek other forms of transportation. The development of feeder service into large airports and commuter service between small communities may

⁷⁵ *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, 154 Mont. 352, 356-57, 463 P.2d 470, 473 (1970); see notes 6 & 57 and accompanying text *supra*.

⁷⁶ See 1972 Senate Hearings 229 (letter from the Transportation Association of America to Senator Cannon, Chairman, Subcomm. on Aviation of the Senate Comm. on Commerce):

[C]ommercial airline users are paying over 90% of the revenues going into the [Airport and Airway Trust Fund] . . . Additional state and local taxes on them would be burdensome and discriminatory. Let us use the funds we now have and can expect under present programs before permitting additional financial burden on our commercial air travelers.

⁷⁷ See notes 40-51 and accompanying text *supra*.

⁷⁸ 1972 Senate Hearings 175 (statement of R. Sorlien, Vice President, Altair Airlines, Inc.).

⁷⁹ *Id.* See also *id.* at 177 (analysis of effect of head tax on fare structure of Altair Airlines, Inc.).

thus be inhibited.⁸⁰ Multiple exactions on passengers using feeder airlines also may tend to discourage their continued use.⁸¹ Third, the collection of head taxes entails delay for passengers⁸² and administrative expense for the airlines.⁸³ Lack of uniformity in the amount and method of collection may cause chaos and discourage business travelers.⁸⁴ Fourth, the imposition of air passenger charges may have further adverse effects on the development of air transportation by discouraging the use of airports having such fees⁸⁵ and by reducing air travel between cities where railroad service is competitive.⁸⁶ And fifth, the entire community economic structure may suffer in municipalities exacting service charges. Corporations and associations will avoid using those cities as the sites for meetings or conventions.⁸⁷ Corporations also will avoid locating businesses in areas with high transportation costs.⁸⁸

Because of the current financial crisis confronting municipal airports, there are equally strong policy reasons for maintaining the local head tax as a revenue source for airport costs. Although the 1970 Act provided for fifty percent federal participation in capital improvement projects, the actual total contribution to the public airport system is only twenty-five to thirty percent.⁸⁹ State and local airport owners must provide one hundred percent of the costs of maintenance and opera-

⁸⁰ *Id.* at 176-77 (statement of T. Colket, Jr., President Altair Airlines, Inc.).

⁸¹ *Id.* at 216 (statement of T. Keesling, President, American Society of Travel Agents, Inc.).

⁸² *Id.* at 164 (statement of S. Tipton, President, Air Transport Association of America). For example, in Mobile, Alabama, it required 45 seconds per passenger for the airlines to complete the collection procedures. This delay angered passengers. *Id.*

⁸³ *Id.* at 170. Administration of head taxes places considerable burden on the airlines: In addition to the problem of dealing with increasing numbers of irate passengers, airlines are concerned with the difficult and costly burden of administration and accounting for such taxes. Though we don't know precisely what these costs would be, we anticipate that the cost of administration to the airline may, in some cases, exceed \$1 per passenger.

Id.

⁸⁴ *Id.* at 195 (statement of E. Halenza, President, National Passenger Traffic Association).

⁸⁵ *Id.* at 195-96.

⁸⁶ *Id.* at 196.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 1972 *House Hearings* 88 (statement of J. Nammack, Executive Vice President, National Association of State Aviation Officials). During the Senate hearings, Senator Cannon observed:

I don't think there is any airport in the country that has been a 50-50 partner in terms of financing, because there are so many things that do not qualify under the act for assistance. . . .

So I would say that if you have got Federal assistance to the extent of 25 per cent of your total capital plan, that is probably a pretty good figure.

1972 *Senate Hearings* 114.

tion,⁹⁰ as well as one hundred percent capitalization for terminal areas, hangars, and parking facilities.⁹¹ Furthermore, numerous airports, particularly small hub and general aviation facilities, are precluded from participating in the program because they are unable to raise the requisite matching funds.⁹²

Since state and local governments remain the primary financial contributors to airport development,⁹³ alternative methods of funding are needed.⁹⁴ Even with the proposed increase in the federal share to seventy-five percent of capital improvement costs, it is not clear that the financial pressures would be eased sufficiently⁹⁵ or that head taxes would be unnecessary.⁹⁶

⁹⁰ 1972 Senate Hearings 114.

Originally, the 1970 Act provided that operation and maintenance costs for air navigation facilities could be financed from money remaining in the trust fund after the minimum authorizations had been met; however, in 1971, Congress eliminated this provision from the 1970 Act. Act of Nov. 27, 1971, Pub. L. No. 92-174, § 2, 85 Stat. 491, amending 49 U.S.C. § 1714(d) (1970). Congress clarified its intention that the trust fund be used for "priority modernization" of the aviation network through capital improvements. H.R. REP. NO. 459, 92d Cong., 2d Sess. 2 (1971).

⁹¹ See 1972 House Hearings 88 (statement of J. Nammack, Executive Vice President, National Association of State Aviation Officials).

⁹² Small hub airports, with only token airline service, and general aviation airports with no airline traffic, are at a tremendous disadvantage in revenues produced compared to busy air carrier airports where the airlines contribute hundreds of thousands of dollars each year. The smaller airports simply do not have the budget capability of providing large amounts of matching funds for capital improvements.

1972 Senate Hearings 116 (statement of H. Manget, Jr., Manager, DeKalb-Peachtree Airport, Atlanta, Ga., and Director, American Association of Airport Executives).

⁹³ *Id.* at 180 (statement of J. Nammack, Executive Vice-President, National Association of State Aviation Officials).

⁹⁴ "[T]he States and local sponsors are without adequate revenue sources to provide matching funds for airport development while sustaining the full costs of operating and maintaining their airports." *Id.* at 179. During the first 18 months of ADAP, airport sponsors were either unable to submit or subsequently withdrew project applications with a combined value of approximately \$500 million. *Id.*

⁹⁵ 1972 House Hearings 88 (statement of J. Nammack, Executive Vice President, National Association of State Aviation Officials). The Airport and Airway Trust Fund cannot solve the severe financial problems:

Despite the substantial impetus given to airport development during the past two years by the Airport and Airway Development Act of 1970, financial assistance provided by the Act has not been sufficient and will not be sufficient to satisfy the urgent need for additional airport capacity and facilities. Increasing the level of Federal participation beyond 50 percent will ease, but will not erase, the financial deficiencies of airport sponsors.

Id.

⁹⁶ Inquiries concerning airport financing were sent to officials connected with each airport levying passenger service charges as of October 26, 1972 (one day prior to the presidential veto of the 1972 bill). The following is a sample of responses to a question

The two basic sources for funds are (1) the municipalities and (2) the airlines and other airport users. The majority of commercial airports operate at a deficit, with local governments raising revenues through ad valorem taxes on property in the county in which the airport is located.⁹⁷ Although communities derive benefit from the airports in the form of increased employment and stimulated local business,⁹⁸ in many cases property owners are subject to an unfair tax burden, since a large proportion of the actual airport users reside outside the county and contribute nothing toward the operation and maintenance of the airport facilities.⁹⁹ Because of statutory limitations on

about the effect of the increase in federal participation and the possible continued need for head taxes:

An increase of 25% in Federal Air projects, unquestionably, would be quite helpful to the [Dress Memorial] Airport in financing capital improvements. However, no aid has yet been made available for additions to the terminal building for great maintenance expenses which all airports incur in connection with their facilities, and other related expenses. Thus, the increase of ADAP aid would not assist the municipalities in this particular area.

Letter from Howard P. Trockman, attorney for Evansville-Vanderburgh Airport Authority District, to the author, Nov. 6, 1972 (on file at the *Cornell Law Review*).

Congress only reduced the problem of local matching funds. They did not solve it. There is a need for local matching funds to be derived from airport tax revenues. . . . Therefore, the head tax [at Raleigh-Durham Airport] would probably be continued, though reduced in amount, even with the 75% Federal participation, provided it remains legal for this tax to be collected.

Letter from Henry E. Boyd, Jr., Airport Manager, Raleigh-Durham Airport Authority, to the author, Nov. 1, 1972 (on file at the *Cornell Law Review*).

The proposed 75% federal aid will not eliminate the need for the head tax. The tax is required to fund [the] recent improvement program [at R. E. Byrd International Airport in Richmond, Virginia] and not all of our future needs will be eligible for the grants, even if Congress appropriates sufficient funds for all eligible projects.

Letter from Hon. T. Bliley, Jr., Mayor of Richmond, Va., to the author, Nov. 3, 1972 (on file at the *Cornell Law Review*).

⁹⁷ 1972 *House Hearings* 194 (statement of H. Trockman, attorney for Evansville-Vanderburgh Airport Authority). This was the method used by Evansville until the Supreme Court sanctioned head taxes.

⁹⁸ *Id.* at 70 (statement of S. Tipton, President, Air Transport Association of America).

⁹⁹ For example, in Evansville, 40% of those using the airport facilities reside outside the county. *Id.* at 194 (statement of H. Trockman, attorney for Evansville-Vanderburgh Airport Authority).

A similar situation exists at the Rochester-Monroe County Airport in New York State, where only 15% of the people of Monroe County use the airport facilities. Telephone conversation with Lucien Morin, Rochester-Monroe County Airport Manager, Nov. 3, 1972.

This disproportion also exists at R.E. Byrd International Airport in Richmond, Virginia:

Cities as regional hubs cannot deny these services, despite the fact that returns to cities are often disproportionate to the larger sums which we must spend for airport development, operation, and maintenance. Airport facilities are prime examples of municipal services with regional benefit. It is unreasonable and unfair to expect taxpayers of jurisdictions which own and operate airports, like my

property taxes¹⁰⁰ and the competition of other public projects for local funding,¹⁰¹ municipalities are generally unable to raise adequate revenue.

Revenue-raising capacity is limited, either legally or practically. City property taxes have approached or reached maximum legal limits imposed by state law or constitutions, or else are caught in a squeeze with rising property taxes levied by independent school districts. Sales tax and income tax powers must be granted by state [*sic*], usually with restrictive ceilings imposed by the state upon the city.¹⁰²

The second source of funds is the airlines and other airport users.¹⁰³ Landing fees based on aircraft tonnage are a primary funding measure; however, in many cases these are not fully compensatory.¹⁰⁴ Having negotiated long term, unchangeable landing fee contracts with

city of Richmond, to pay for new, expanded, and improved facilities when the beneficiaries of airports are not paying their fair share of the costs.

1972 *House Hearings* 96 (statement of Hon. T. Bliley, Jr., Mayor of Richmond, Va.).

¹⁰⁰ See, e.g., N.C. CONST. art. V, § 4(2). This provision has restricted the ability to raise funds at the Raleigh-Durham Airport in North Carolina:

This airport has been developed, expanded and maintained to date without the use of local ad valorem tax money; the use of such money without a vote of the people is prohibited by our constitution; and the voters of the two countries [*sic*] supporting the airport have indicated in a vote on a General Obligation Bond Referendum that they believe the airport user should provide the money for the development of the airport.

1972 *House Hearings* 172 (letter from H. Boyd, Jr., Airport Manager, Raleigh-Durham Airport Authority, N.C., to Representative Jarman, Chairman of the Subcomm. on Transportation and Aeronautics of the House Comm. on Commerce, June 2, 1972).

The Bradenton-Sarasota Airport in Florida "has no real property taxing authority, and the only source of money it has to repay the cost of those facilities is the head tax itself." 118 CONG. REC. S 13,302 (daily ed. Aug. 10, 1972) (remarks of Senator Chiles).

¹⁰¹ 1972 *House Hearings* 97 (statement of Hon. T. Bliley, Jr., Mayor of Richmond, Va.).

¹⁰² *Id.* Airports may also be financed from general revenues or by general obligation bonds. *Id.*; see 1972 *Senate Hearings* 116 (statement of H. Manget, Jr., Manager, DeKalb-Peachtree Airport, Atlanta, Ga., and Director, American Association of Airport Executives). Several airports, however, have no bonding powers, e.g., Lebanon Regional Airport Authority in New Hampshire and Raleigh-Durham Airport in North Carolina. See *id.* at 228 (letter from R. Poland, Jr., Chairman, Lebanon Regional Airport Authority, N.H., to Senator Cotton, June 12, 1972).

¹⁰³ Raleigh-Durham Airport, for example, proposed to finance its improvements by, *inter alia*, revenue bonds. One type would be supported by passenger airport use fees, aircraft landing fees, and fixed base operation revenues. The other type would be supported by rentals from terminal buildings, the terminal area, and warehouse and other building rentals. See 1972 *House Hearings* 174 (statement of H. Boyd, Jr., Airport Manager, Raleigh-Durham Airport Authority, N.C.).

¹⁰⁴ Telephone conversation with J. Corbett, Vice President of Federal Affairs, Airport Operators Council International, Inc., Nov. 6, 1972.

airport sponsors, airlines refuse to pay increased fee rates.¹⁰⁵ To supplement landing fees, other financial resources are available: (1) charges for operation of parking facilities;¹⁰⁶ (2) space rentals by concessionaires, such as gift shops and restaurants, within the airport complex;¹⁰⁷ (3) airline rentals of office and ticket counterspace;¹⁰⁸ (4) "fuel thru-put" charges or gasoline taxes;¹⁰⁹ (5) annual field permits for general aviation aircraft;¹¹⁰ and (6) tie-down fees for keeping aircraft in place.¹¹¹ Any combination of these charges may be imposed by airport sponsors, but they, too, are usually inadequate.

State governments furnish "only 2-3% of total airport system costs."¹¹² Airlines are subject to several forms of state taxation, including general corporation and income taxes,¹¹³ ad valorem property

¹⁰⁵ 1972 House Hearings 113 (statement of J. Corbett, Vice President of Federal Affairs, Airport Operators Council International, Inc.).

Imposition of head taxes is related to the insufficiency of landing fees:

The airlines in any event say that their 30-year contracts cannot be changed. That is one of the reasons for not obtaining compensatory fees. If the airport is charging a fully compensatory landing fee, it has no basis for imposing another charge directly on the passenger. If an airport is self-sufficient and has a reasonable reserve for future development, he [sic] has no basis for imposing a "head tax."

Id.

Inability to bargain effectively with the airlines has been a major obstacle to obtaining compensatory landing fees. Letter from J.E. Mitchell, Jr., Executive Director, Huntsville-Madison County Airport Authority, Ala., to the author, Nov. 6, 1972; Letter from William H. Grigham, Senior Assistant City Attorney for Mobile, Ala., to the author, Nov. 3, 1972; Letter from Henry E. Boyd, Jr., Airport Manager, Raleigh-Durham Airport Authority, N.C., to the author, Nov. 1, 1972 (all on file at the *Cornell Law Review*).

¹⁰⁶ Telephone conversation with Lucien Morin, Manager, Rochester-Monroe County Airport, Nov. 3, 1972. At Rochester-Monroe County Airport, private firms submit contract bids for the operation of parking facilities which accommodate airport users for either short- or long-term parking. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; telephone conversation with J. Corbett, Vice President of Federal Affairs, Airport Operators Council International, Inc., Nov. 6, 1972. Labelling the gasoline tax as a "fuel thru-put charge," Mr. Corbett explained that it is levied on general aviation in lieu of landing fees. The fixed-wing base operator who sells the gasoline must pay the tax.

At Rochester-Monroe County Airport, the fixed-wing base operator is charged two cents per gallon for gasoline sold to the airlines and this revenue is remitted to the local government. Telephone conversation with Lucien Morin, Manager Rochester-Monroe County Airport, Nov. 3, 1972.

¹¹¹ Telephone conversation with Lucien Morin, Manager, Rochester-Monroe County Airport, Nov. 3, 1972.

¹¹² S. REP. NO. 1005, 92d Cong., 2d Sess. 11 (1972); see 1972 House Hearings 105 (statement of J. Corbett, Vice President of Federal Affairs, Airport Operators Council International, Inc.).

¹¹³ See Ternes, *Aviation Taxation*, 25 MICH. ST. B.J. 23 (1946).

taxes,¹¹⁴ and gasoline taxes.¹¹⁵ Because these taxes are part of the states' general funds, a large percentage does not return directly to the airports.

IV

FORECAST FOR THE FUTURE

Despite the President's recent veto of the Airport Development Acceleration Act of 1972, Congress will probably re-enact substantially the same form of legislation in the near future.¹¹⁶ In the absence of congressional action, the courts must serve as "final arbiters"¹¹⁷ in

¹¹⁴ The Supreme Court has upheld an apportioned ad valorem tax on the flight equipment of an interstate air carrier (*see* *Braniff Airways v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954)), and an unapportioned personal property tax on a fleet of airplanes operated in interstate commerce. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944). *See* Brabson, *Multi-state Taxation of the Transportation Industry*, 18 OHIO ST. L.J. 22 (1957); Powell, *Northwest Airlines v. Minnesota: State Taxation of Airplanes*, 57 HARV. L. REV. 1097 (1944); Snell, *Northwest Airlines Revisited*, 33 TAXES 659 (1955); Sutherland & Vinciguerra, *The Octroi and the Airplane*, 32 CORNELL L.Q. 161 (1946); Comment, *State Taxation of International Air Carriers*, 57 NW. U.L. REV. 92 (1962); Comment, *Application of the "Home Port Doctrine" and the Due Process Clause to State Taxation*, 35 S. CAL. L. REV. 316 (1962).

¹¹⁵ A state sales tax on gasoline used by aircraft engaged in interstate commerce was sustained by the Supreme Court. *See* *Eastern Air Transp., Inc. v. South Carolina Tax Comm'n*, 285 U.S. 147 (1932).

Nearly all states have an aviation fuel tax. Letter from J.E. Mitchell, Jr., Executive Director, Huntsville-Madison County Airport Authority, Ala., to the author, Nov. 6, 1972. The Huntsville-Madison Airport "generate[s] for the state approximately \$100 thousand annually [in aviation fuel taxes] but [the] return amounts to something considerably less than 10%." *Id.*

In Michigan, however, a state tax on aviation fuel is the principal source of funds provided by the Michigan Aeronautics Commission for local communities to use in airport development. 1972 *House Hearings* 180 (Michigan Aeronautics Commission Position Paper).

¹¹⁶ "Congress will pass at least the head tax ban, if not the whole bill as vetoed." Telephone conversation with J. Corbett, Vice President of Federal Affairs, Airport Operators Council International, Inc., Nov. 6, 1972.

This prediction has been partially realized. On February 5, 1973, the Senate approved a measure (S. 38, 93d Cong., 1st Sess. (1973)) similar to the vetoed 1972 bill. *See* notes 9 & 10 and accompanying text *supra*. This bill provides for a ban on head taxes and an increase in the federal share in airport development projects at all but the large hubs. *N.Y. Times*, Feb. 6, 1973, at 61, col. 1.

¹¹⁷ In *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), the Court said that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of a state and national interests.

Id. at 769.

disputes concerning state taxation of facilities used in interstate commerce; however, they can deal with particular statutes only on a case-by-case basis.¹¹⁸ The judiciary has no power to create a national taxation policy.¹¹⁹ Thus, it is appropriate for Congress to formulate an integrated and uniform policy regulating state passenger service charges and federal airport development programs.

In addition to the 1972 bill proposal, several other schemes have been advanced for increasing the federal share in airport development projects while banning the exaction of air passenger service charges. The most progressive proposal calls for ninety percent federal contribution and ten percent airport sponsor matching funds. This is the method used for financing the interstate highway system.¹²⁰ Another alternative involves eighty percent federal participation and twenty percent sponsor participation, with an increase of the federal air passenger ticket tax from eight percent to ten percent.¹²¹ Under this plan, forty percent of the ticket tax would be returned directly to the airport from which it was collected, and would be used for capital improvements or major maintenance requirements.¹²² A third possible solution calls for seventy-five percent federal and twenty-five percent air-

¹¹⁸ Judicial inability to deal with the entire scope of the problem was recognized by Mr. Justice Jackson:

It is, I know, difficult to judge and dangerous to foreclose claims of other states that are not before us. That is the weakness of the judicial process in these tax questions where the total problem that faces an industry reaches us only in installments.

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 307 (1944) (Jackson, J., concurring).

¹¹⁹ Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution.

McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting) (Arkansas gasoline tax held unconstitutional).

Justice Black stressed that "in the exercise of its plenary constitutional control over interstate commerce," only Congress can consider whether a tax "is consistent with the best interests of our national economy," and "can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships But the remedy, if any is called for, we think is within the ample reach of Congress." *Id.* at 189 (citations omitted).

¹²⁰ 1972 *Senate Hearings* 125 (statement of J. O'Donnell, President, Air Line Pilots Association); *id.* at 210 (statement of H. Boyd, Jr., Airport Manager, Raleigh-Durham Airport Authority, N.C.).

¹²¹ *Id.* at 210 (statement of H. Boyd, Jr., Airport Manager, Raleigh-Durham Airport Authority, N.C.).

¹²² *Id.*

port sponsor participation in eligible airport development projects, supplemented by federal contribution of eighty-two percent for safety certification and security equipment, one hundred percent for land acquisition for future airport development, and fifty percent for acquisition, construction, or repair of public areas in terminal facilities.¹²³ The 90:10 and the 80:20 ratio proposals are the most attractive alternatives for relieving the airport financial crisis; however, federal budgetary problems and airport sponsors' fear of federalization may preclude these two solutions. With the 75:25 ratio proposal, head taxes would remain necessary to satisfy airport needs.

CONCLUSION

The complexities of adequate airport financing suggest that Congress conduct an in-depth study of the entire problem with a view towards adopting a more comprehensive program which could include federal regulation of local head taxes.

To eliminate the dangers inherent in the proliferation of varying air passenger fees, Congress could formulate uniform standards, maintaining the following safeguards: (1) charges, which must apply to interstate and intrastate travelers alike, must operate only on the incidence of enplanement, (2) charges must bear a reasonable relationship to use of the facilities, (3) charges must be used only for airport and airway purposes, such as acquisition, construction, operation, and maintenance costs, and (4) exemptions from charges must be uniform and should include at least temporary layovers. Congress should re-examine federal participation in the capital improvements eligible under the 1970 Act, and consider expanding federal assistance to include costs of operation and maintenance, and additional capital improvements—safety and security equipment, airport land acquisition, and construction and maintenance of public areas in terminal buildings. Prohibition of head taxes, with only moderate increases in federal aid, is too simplistic a solution for the current crisis. It is only by welding together features from various proposals that Congress will create a viable program for development of the national air transportation system.

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¹²³ This proposal is substantially the same as S. 3755, 92d Cong., 2d Sess. (1972), as adopted by the Senate prior to the conference report in which it was modified into the 1972 bill. Large hub airports were to be funded on a 50:50 basis, rather than on a 75:25 basis.