Florida State University Law Review

Volume 1 | Issue 2 Article 6

1973

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

signals the judicial recognition in Florida of a valuable scientific device which will aid in identifying the guilty while protecting the innocent.[32]

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**Constitutional Law** — STATE TAXATION—AIRPORT USE TAXES IMPOSED ON DEPARTING COMMERCIAL AIRLINE PASSENGERS ONLY AS COMPENSATION FOR USE OF FACILITIES VIOLATE NO FEDERAL CONSTITUTIONAL PROVISIONS.—*Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

The rapid increase in private and commercial aviation operations[1] has necessitated concomitant airport development and expansion. One method of generating funds for these purposes is the so-called airport use tax. Prior to 1972, only Montana, New Hampshire, New Jersey and an Indiana airport authority district had actually imposed such taxes.[2] With slight variations, the tax in each instance took the

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printed. In such a situation the voiceprint could be excluded as the "fruit" of a constitutionally impermissible seizure. *See* Davis v. Mississippi, 394 U.S. 721 (1969); Wong Sun v. United States, 371 U.S. 471 (1963).

One possible result of *Dionisio* on the practice of voiceprinting may be that prosecutors will resort to grand jury process to compel the voiceprinting of a suspect in situations where there is no probable cause to arrest the suspect. Thus a prosecutor could obtain a desired voiceprint without running the risk of having the results excluded. *See* United States v. Mara, 93 S. Ct. 781, 789 (1973) (Marshall, J., dissenting in *Dionisio* and *Mara*).

31. No statutory violations were at issue in the principal case. But in the case of a surreptitious voiceprinting, obtained without the consent of the parties involved, FLA. STAT. § 934.01(4) (1971) may be relevant. It provides in part: "To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction . . . ." *See generally* Alea v. State, 265 So. 2d 96 (Fla. 3d Dist. Ct. App. 1972).

32. In his concurring opinion, Judge Mager elaborated on the social policies favoring the admission of voiceprints as direct evidence: "Protecting society from those who have violated the law as well as protecting the one who has been unjustly accused serves to heighten the need for more sophisticated methods of crime prevention and crime detection." 263 So. 2d at 616.

1. An "operation" is defined as either a take-off or a landing. Commercial operations at airports with Federal Aviation Administration (FAA) control towers increased by approximately 33%, from 7,819,114 in 1965 to 10,393,294 in 1970. *See* AIR TRANSPORT ASS'N OF AMERICA, ANNUAL REPORT OF U.S. SCHEDULED AIRLINE INDUSTRY 21 (1971). In 1965, there were 26,572,650 general aviation operations and in 1970, 41,384,006—an increase of approximately 55%. *See id.*

2. Several other localities—for example, Los Angeles, California; Raleigh-Durham, North Carolina; Spokane County, Washington; and Hawaii—had proposed but had declined to adopt similar taxes. Four of the proposed taxes were rejected after legal

form of a one-dollar levy imposed on each passenger departing aboard a commercial air carrier. Passengers on private planes, nonpassengers and various other classes of users were exempt. Several of the commercial carriers challenged the constitutionality of these taxes in the respective state courts. The Indiana, Montana and New Jersey taxes were struck down; New Hampshire's tax was sustained.[3] In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,[4] the Supreme Court consolidated the Indiana and New Hampshire cases and upheld the constitutionality of these taxes against the claims that they impermissibly infringed the right to travel, imposed an unreasonable burden on interstate commerce and denied some air travelers equal protection of law.

In upholding the constitutionality of the taxes, the Court dismissed, in almost summary fashion, the attack based on the right to travel.[5] In rejecting the challenges based on the commerce and equal protection clauses, the Court characterized the taxes as "not wholly

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opinions were rendered declaring that such taxes would unconstitutionally burden the right to travel. *See* Note, *Airport "Service Charges" and the Constitutional Barriers to State Taxations of Airport Users*, 43 U. COLO. L. REV. 79 (1971).

3. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 265 N.E.2d 27 (Ind. 1970), *rev'd*, 405 U.S. 707 (1972); Northwest Airlines, Inc. v. Joint City-County Airport Bd., 463 P.2d 470 (Mont. 1970); Northeast Airlines, Inc. v. New Hampshire Aeronautics Comm'n, 273 A.2d 676 (N.H. 1971), *aff'd sub nom.* Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); Allegheny Airlines, Inc. v. Sills, 264 A.2d 268 (N.J. Super. Ct. 1970).

4. 405 U.S. 707 (1972). Mr. Justice Brennan wrote the majority opinion. Mr. Justice Powell took no part in the consideration or decision of the case; Mr. Justice Douglas dissented.

5. The argument that the taxes violated the taxpayers' right to travel, as established in Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), had prevailed in two of the state courts. Northwest Airlines, Inc. v. Joint City-County Airport Bd., 463 P.2d 470 (Mont. 1970); Allegheny Airlines, Inc. v. Sills, 264 A.2d 268 (N.J. Super. Ct. 1970). In *Crandall* the Court struck down a Nevada capitation tax levied upon the privilege of leaving the state aboard common carriers. Subsequent decisions have effectively qualified and distinguished *Crandall's* broad proscription by upholding state use taxes which compel the interstate traveler to pay fair compensation for the cost of the state facilities he uses. *See* Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940); Hendrick v. Maryland, 235 U.S. 610 (1915). The Court easily distinguished the tax in *Evansville* from the Nevada privilege tax since the latter was not a use tax levied as compensation for facilities used by the traveler. 405 U.S. at 712.

The Court found no room for application of the compelling state interest test of Dunn v. Blumstein, 405 U.S. 330 (1972), or Shapiro v. Thompson, 394 U.S. 618 (1969), which Mr. Justice Douglas argued in dissent was triggered by any classification penalizing exercise of the right to travel. 405 U.S. at 724 n.3 (dissenting opinion). The Court stated:

> The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.

*Id.* at 714.

unreasonable" and as a "fair approximation" and "rational measure" of the commercial passengers' use of airport facilities. The levies, the Court concluded, thus lay within the area of permissible state discretion.

*Evansville* is the first constitutional challenge to a state tax imposed as compensation for the use of facilities to be heard by the Court since *Capitol Greyhound Lines v. Brice*.[6] The decision is significant in the range of freedom it leaves the states in devising and imposing constitutionally valid use taxes.[7] Here, as in *Ferguson v. Skrupa*[8] in the area of substantive economic due process,[9] the Court seems to have exhumed for brief examination and then to have reinterred the notion that the judiciary has any very substantial role to play as arbiter of the propriety of state use taxation. The case suggests that for all practical purposes that function will be left to the legislatures of the states.

The single most striking feature of the taxing schemes involved in *Evansville* was that users who were not taxed outnumbered those who were. The Court was candid in its acknowledgement of this fact:

> We recognize that in imposing a fee on the boarding of commercial flights, both the Indiana and New Hampshire measures exempt in whole or part a majority of the actual number of persons who use facilities of the airports involved.[10]

Such a scheme, the carriers argued, could not meet the standard of *National Bellas Hess v. Department of Revenue*,[11] under which the

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6. 339 U.S. 542 (1950).

7. Within five months after the Court's decision in *Evansville*, seventeen other airports had already imposed or were about to impose such taxes. *See* AVIATION WEEK AND SPACE TECHNOLOGY, Aug. 14, 1972, at 23.

8. 372 U.S. 726 (1963).

9. *See generally* McCloskey, *Economic Due Process and the Supreme Court*, in 1962 SUPREME COURT REVIEW 34 (P. Kurland ed.).

10. 405 U.S. at 717-18. At the Evansville Airport, for example, there were, in 1967, 84,598 take-offs and landings by exempt aircraft but only 14,834 such operations by commercial, nonexempt carriers. Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 265 N.E.2d 27, 29 (Ind. 1970). Again in 1967, slightly less than 147,000 commercial *passengers* enplaned at Evansville, while approximately 85,000 private *flights* were recorded. *Id.* These figures are not atypical. FAA statistics show that in 1971 private aircraft operations accounted for 75% of all operations at FAA facilities in the United States. FEDERAL AVIATION ADMINISTRATION, FAA AIR TRAFFIC ACTIVITY 4 (1971).

11. 386 U.S. 753 (1967). *Bellas Hess* involved a tax imposed by Illinois on a Missouri mail order house. The company collected the tax from its Illinois customers for its "use" of the state's legal protection and economic markets in conducting its business.

validity of a state tax on interstate commerce was said to turn on the extent to which it compelled such commerce to shoulder a "fair share" of the cost of using local privileges.[12] Nor could these taxes be squared with the long-established standard first imposed in *Hendrick v. Maryland*[13] that fees collected as compensation for use of state facilities be levied according to a "uniform, fair, and practical standard."[14] Finally it was urged that under *McCarroll v. Dixie Greyhound Lines*[15] the taxes must bear some reasonable relation to the taxpayers' use of state facilities, and that these did not.[16]

The claimed failure of the present taxes to meet these standards was implicitly focused by the Indiana Supreme Court in its opinion striking down the Evansville tax:

> [P]ersons who may make very extensive use of the facilities are not subject to the tax unless they actually board one of the appellees' flights. For example, a commercial passenger carrying only a briefcase may be driven to the airport by his wife, immediately buy a ticket and board the airplane. He is subject to the so-called "use" tax. Another person may drive to the airport and park his car at the facility provided, get a haircut, eat dinner, use the washroom, and then get in his own private jet and take off. He does not pay the $1 tax.[17]

The Court rejoined that "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."[18] The taxes also reflected "rational distinctions among different classes of passengers and aircraft" because "[c]ommer-

12. Brief for Respondents, at 27, Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972).

13. 235 U.S. 610 (1915). *Hendrick* sustained a state automobile registration tax based on the horsepower of the vehicle, the Court defining the area of state discretion in computing the tax by holding, first, that when a state furnishes special facilities utilized in commerce, it may exact compensation from the users and, secondly, that the amount and method of collection are "primarily for determination by the State," provided only that the charge be reasonable and computed according to a "uniform, fair and practical standard." *Id.* at 624.

14. Brief for Respondents, *supra* note 12, at 27.

15. 309 U.S. 176 (1940). *McCarroll* struck down an Arkansas highway tax imposed on the amount of gasoline in excess of twenty gallons in a vehicle's fuel tank when it entered the state. Because the amount of gasoline in the tanks bore no reasonable relation to the amount of travel, hence use, within the state and because a "fair charge" for use "could not even be roughly computed" by reference to the gasoline carried, the levy was invalidated. *Id.* at 180.

16. Brief for Respondents, *supra* note 12, at 27-28.

17. 265 N.E.2d at 30.

18. 405 U.S. at 718.

cial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes."[19] These factors, according to the Court, meant that the taxes reflected a "fair if imperfect approximation of the use of facilities for whose benefit they are imposed"[20] and thus made the present case consistent with the standards of *Capitol Greyhound Lines v. Brice*:[21]

> [I]t is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound*, 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.[22]

Reference to *Capitol Greyhound* only serves to underscore the large discretion which *Evansville* has left the states in imposing use taxes. That case involved a challenge to a flat two percent toll on the fair market value of motor vehicles used in interstate commerce; the tax was thus virtually unrelated to use. The Court stressed that the tax "should be judged by its result, not its formula."[23] If not excessive, the tax should be sustained.[24] The variety of factors capable of affecting use were "so countless that we must be content with 'rough approximation rather than precision.'"[25] But the flat tax in *Capitol Greyhound* was also coupled with a mileage tax, so that the actual

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19. *Id.* Moreover, the parties stipulated in the case of the Evansville tax
> that "[m]ost of the facilities constituting the Terminal Building at Dress Memorial Airport would not be essential for the operation of a noncommercial airport except for the required use thereof by persons traveling on commercial airline [sic]," that "runway lengths, approach areas, taxiways, and ramp areas of said Dress Memorial Airport would not be so extensive except for the requirement that the same be sufficiently extensive in order to accommodate commercial airline carriers and their passengers," and that "Dress Memorial Airport operates and maintains an instrument lighting system and an approach lighting system for use by commercial airlines, both of which are costly to maintain and operate and would not be necessary in connection with use by private, noncommercial aircraft."

*Id.* at 718 n.12.

20. *Id.* at 717.

21. 339 U.S. at 547.

22. 405 U.S. at 716-17.

23. 339 U.S. at 545.

24. *Id.*

25. *Id.* at 546, *quoting from* International Harvester Co. v. Evatt, 329 U.S. 416, 422 (1947).

amount paid did reflect actual use[26]—something obviously not true in *Evansville*, where substantial users paid no tax at all. The "rough" approximations referred to in *Capitol Greyhound* and applied in *Evansville* would seem to be rough indeed.[27]

*Evansville* thus stands as an indication—or perhaps a reaffirmation—of an important judicial attitude. State use taxation, like substantive economic due process, is an area in which state legislatures are virtually free to go their own way. The Court's cursory disposition of the equal protection argument emphasizes this fact.[28] It is possible, of course, if

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26. 339 U.S. at 546.

27. The Court simply avoided the "fair share" language of *Bellas Hess*, possibly regarding that decision as irrelevant since it involved an entirely different type of use taxation. The use in *Bellas Hess*, being a "use" of a state's legal protection and economic markets, did not constitute a highly tangible, direct and physical utilization of state facilities as is present in the use of highways and runways, for example.

28. The taxes were attacked on the ground that exemption of private users denies commercial passengers equal protection of the law under the fourteenth amendment.

In response to such challenges the Court has evolved a deferential and now institutionalized "rational basis" approach to the constitutionality of state tax classifications under the equal protection clause. Probably the most quoted language in this evolution appears in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), where the equal protection clause was interpreted to require that "all persons similarly circumstanced shall be treated alike." *Id.* at 415.

Although it appears in *Evansville* that both private and commercial passengers were similarly circumstanced by virtue of their comparable use of the airport facilities, the Court dispensed with the equal protection issue in a footnote. 405 U.S. at 719 n.13. In that note the Court seemed to apply the same rationale it employed to reject the commerce clause argument, finding that the classification scheme reflected a "rational measure of relative use." *Id.* As in its treatment of the commerce clause challenge, the Court relied upon the "but for" approach in discerning a rational distinction between classes of passengers—namely, that commercial use alone necessitated longer runways, more elaborate navigational equipment and so forth. But the Court has said that in order to establish a rational basis for treating classes of persons differently, "the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation"—here the defrayal of all the airport's operating costs, not just the cost of the longer runways and other expanded facilities necessitated by commercial use. *See* Evansville-Vanderburgh Airport Authority Dist., Ind., Ordinance No. 33, Feb. 26, 1968.

The tenuous character of the relation between exemption of private users and the defrayal of the cost of airport facilities is accentuated by other charges which help finance airport construction and are borne by the commercial user only. First, commercial passengers already pay for those areas which commercial carriers use through a collateral fee. For example, Delta Airlines argued that, in addition to having their passengers pay the one-dollar Evansville use tax, the airlines are required to pay $4.31 per square foot per annum ($4,749.62 total yearly) for ticket counter and back office space, plus eight to ten cents per 1,000 pounds per month in the form of landing fees, plus various other collateral fees. Brief for Respondents, *supra* note 12, at 55-57. Secondly, differential use of runways and elaborate navigational systems is at least partially offset by the fact that commercial carriers pay for the use of runways through a graduated landing fee based upon the weight of the aircraft. Heavier commercial aircraft thus pay a proportionately greater fee for their use of the extended runway length. *See*

somewhat unlikely, that a tax so unrelated to use could be devised as to be "wholly unreasonable." But after *Evansville*, the point at which this could occur is apparently only slightly short of the bounds of the taxing authority's imagination.

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**Constitutional Law** — STATE CONSTITUTIONS—CITY OF MIAMI BEACH LACKS POWER UNDER HOME RULE PROVISIONS OF 1968 FLORIDA CONSTITUTION TO ENACT RENT CONTROL ORDINANCE. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972).

In 1969 the city council of Miami Beach determined that an emergency situation had been created in the city by a shortage of low-cost housing, a large proportion of retired citizens living on pensions and an inflationary price spiral. For the purpose of protecting its residents from exorbitant rents, the city council enacted a rent control ordinance providing for the regulation of rents for housing with four or more rental units.[1] A city rent agency consisting of an advisory committee and an administrator was created to administer the controls. Several affected lessors brought an action against the city, seeking injunctive relief and a judgment declaring the ordinance void for violating article VIII, section 2, of the 1968 Florida constitution. The Circuit Court for Dade County granted summary judgment for the plaintiffs.[2] The Florida Supreme Court affirmed, holding that the city of Miami Beach did not have the power to enact a rent control ordinance, that the ordinance was an unlawful delegation of legislative authority to the city rent agency and that the ordinance conflicted with state law.[3]

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*generally* Levine, *Landing Fees and the Airport Congestion Problems*, 12 J. LAW & ECON. 79 (1969). Thirdly, commercial passengers pay a federal excise tax of 8% of the price of their airline ticket, which amount is used by the federal government in financing airport construction and maintenance. *See* INT. REV. CODE OF 1954, §§ 4261-63.

1. Miami Beach, Fla., Ordinance 1791, Oct. 1969. As quoted in the *Fleetwood* opinion, the ordinance exempted from control "hospitals, nursing homes, retirement homes, asylums or public institutions, college or school dormitories or any charitable or educational or non-profit institutions, hotels, motels, public housing, condominiums and cooperative apartments, and any housing accommodations completed after December 1, 1969." 261 So. 2d at 802.

2. Fleetwood Hotel, Inc. v. City of Miami Beach, 33 Fla. Supp. 192 (Dade County Cir. Ct. 1970).

3. Emphasis in this comment is placed on the court's interpretation of the constitutional provision for municipal home rule. As an additional ground for its holding the court stated that the ordinance failed to provide objective guidelines and standards for its enforcement by the city rent agency and thus was an unlawful delegation of power to the agency. Though maximum rents were specified by the ordinance