Comment

Congress Gives Intercity Busing a Free Pass: A Comment on Jefferson Lines v. Oklahoma Tax Commission

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I. INTRODUCTION

In April of 1995, the U.S. Supreme Court decided Jefferson Lines v. Oklahoma Tax Commission.[1] In a 7-2 decision, the Court held that a state could impose a sales tax on the full fare price of bus tickets sold for

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1. Jefferson Lines v. Oklahoma Tax Comm'n, 115 S.Ct. 1331 (1995).

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interstate travel, as long as the trip began within the taxing state.[2] In so doing, the Court distinguished the 1948 decision of Central Greyhound Lines v. Mealey[3] which generally had been interpreted to mean that such taxes violated the dormant Commerce Clause of the U.S. Constitution.[4]

While Oklahoma was the only state at the time of the decision that had attempted to impose such a sales tax on interstate commerce,[5] the decision opened the possibility of a wave of similar new state taxes.[6] As a result of the potentially onerous nature of such new taxes on a financially unsettled intercity busing industry, the American Bus Association (ABA) immediately pressured Congress for legislative protection.[7] On December 29, 1995, President Clinton signed the Interstate Commerce Commission Termination Act.[8] This legislation provided the protection the ABA sought.[9] This Comment will begin with a review of the *Jefferson Lines* decision. It will then discuss the financial health of the interstate busing industry and the likely effect such new taxes might have had. It will conclude with a look at the new legislation and its likely interpretation.

II. Summary of *Jefferson Lines v. Oklahoma Tax Commission*

Jefferson Lines v. Oklahoma Tax Commission arose as a result of Jefferson Lines' failure to collect an Oklahoma tax on bus tickets sold within Oklahoma for interstate travel originating there.[10] Jefferson Lines violated the following Oklahoma statutory provision: "[T]here is hereby levied upon all sales . . . an excise tax of four percent of the gross receipts . . . of each sale of the following: . . . (C) Transportation for hire to persons by common carriers, including . . . motor transportation companies . . . and other means of transportation for hire."[11] After Jefferson Lines filed for Chapter 11 bankruptcy protection on October 27, 1989,[12] the Oklahoma Tax Commission conducted an audit of Jefferson Lines. Sales

2. *Id.* at 1334. Oklahoma Tax Comm'n, v. Greyhound Lines, Inc., 50 F.3d 317 (5th Cir. 1995) involved the identical issue and the holding of Jefferson Lines controlled that decision. *Id.* Note that Greyhound Lines also involved an interstate busing company which filed for Chapter 11 bankruptcy protection. *Id.*

3. 334 U.S. 653 (1947).

4. *Supreme Court— States Can Tax Interstate Bus Routes*, Facts on File World News Digest, April 20, 1995, at 284.

5. *See* Oklahoma Tax Comm'n, v. Greyhound Lines, *supra* note 2.

6. *Supreme Court— States Can Tax Interstate Bus Routes*, *supra* note 4, at 284.

7. Telephone Interview with Susan Perry, Vice-President, American Bus Association (January 16, 1995).

8. ICC Termination Act of 1995, 109 Stat. 803 (1995) (codified at 49 U.S.C.A. §101 *et seq.* (West 1995)).

9. Telephone Interview with Susan Perry, *supra* note 7.

10. *Jefferson Lines, supra* note 1, at 1333.

11. *Id.* at 1334 (fn. 1) (citing Oklahoma Statute Title 68, § 1354(1)).

12. *Jefferson Lines, supra* note 1, at 1335.

tax returns revealed a deficiency of $46,659[13] for which the Oklahoma Tax Commission subsequently filed a proof of claim.[14] Jefferson Lines objected to the claims and the U.S. Bankruptcy Court[15] agreed that the tax imposed an undue burden on interstate commerce and presented the danger of multiple taxation in violation of the dormant Commerce Clause.[16] The District Court for Minnesota[17] and the Eighth Circuit Court of Appeals[18] affirmed the Bankruptcy Court's ruling, the latter holding that the tax was not fairly apportioned as required by the decision in Central Greyhound Lines, Inc. v. Mealey.[19] The U.S. Supreme Court reversed holding that the tax on the sale of transportation services was consistent with the Commerce Clause. Justice Souter authored the majority opinion. Justice Scalia, joined by Justice Thomas, concurred in the judgment. Justice Breyer was joined by Justice O'Connor in the dissent.

The *Jefferson Lines* majority opinion began with a discussion of broad policy issues. It noted that the dormant Commerce Clause "prohibit(s) certain state taxation even when Congress has failed to legislate on the subject."[20]

> We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the nation as a whole as it would do if it were free to place impermissible burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.[21]

The Court, in demonstrating the consistency of the opinion in the instant case with prior precedents, proceeded to set out in detail the 1938 decision of Western Live Stock v. Bureau of Revenue.[22] *Western Live Stock* involved a gross receipts tax on revenues received from "out-of-state advertisers."[23] The *Jefferson Lines* court stated that the *Western*

13. Brief for Petitioner at 5, Jefferson Lines, 115 S. Ct. 1331 (No. 93-1677).
14. *Jefferson Lines, supra* note 1, at 1335.
15. Jefferson Lines v. Oklahoma Tax Comm'n, No. 3-89 BKY 4137 (Bankr. D. Minn. June 9, 1994).
16. *Jefferson Lines, supra* note 1, at 1335.
17. Jefferson Lines v. Oklahoma Tax Comm'n, No. 3-92-467 (D. Minn. December 22, 1992).
18. 15 F.3d 90 (8th Cir. 1994).
19. *Id.* at 1335 (citing Central Greyhound v. Mealey, 334 U.S. 653 (1948)).
20. *Jefferson Lines, supra* note 1, at 1335 (citations omitted).
21. *Id.* at 1336.
22. 303 U.S. 250 (1938).
23. *Jefferson Lines, supra* note 1, at 1336.

Live Stock court had no constitutional qualms with a tax on interstate commerce.[24] The difficult question, however, was whether the tax could reach the full amount of revenues generated through interstate commerce or whether only a portion of these revenues could be taxed by New Mexico (leaving another portion for the other state(s) involved in the transactions). In other words, was apportionment of the tax required.[25] The decision in *Western Live Stock* determined no apportionment was necessary because the value derived from interstate commerce could not be taxed elsewhere. Finally, the Court in *Jefferson Lines* quoted *Western Livestock's* statement that "it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden."[26]

The Court also noted that *Western Livestock* marked the point at which the "old formalism" proscribing all taxation on interstate commerce "began to give way."[27] The Court went on to explain that its 1977 Supreme Court decision in Complete Auto Transit Inc. v. Brady[28] inaugurated the beginning of the current approach to taxation of interstate commerce.[29]

Complete Auto set forth the test which the majority applied in *Jefferson Lines.* The test includes four separate prongs. The first prong asks whether the activity taxed has a substantial nexus with the taxing State.[30] The second prong determines whether the tax is fairly apportioned so that "each State taxes only its fair share of an interstate transaction."[31] The third prong assures the tax does not discriminate against interstate commerce for the benefit of intrastate commerce.[32] The fourth prong determines whether the tax is "fairly related to the services provided by the [taxing] state."[33]

The Court proceeded to apply the *Complete Auto* test to the *Jefferson Lines* case. The Court held the first prong of the test, the substantial nexus test, easily satisfied. Following McGoldrick v. Berwind-White Coal Mining Co.[34] and Goldberg v. Sweet[35] the court found that the sale of

24. *Id.*
25. *Id.* at 1337.
26. *Id.* (citing *Western Livestock*, 303 U.S. at 254).
27. *Jefferson Lines, supra* note 1, at 1336.
28. 430 U.S. 274 (1977). Complete Auto sustained a "franchise tax assessed equally on all gross income derived from transportation for hire within the State." Jefferson, *supra* note 1, at 1337.
29. *Id.*
30. *Id.* (quoting Complete Auto, 430 U.S. at 279).
31. *Id.* at 1338 (citing Goldberg v. Sweet, 488 U.S. 252 (1989)).
32. *Id.* at 1344-1345 (citations omitted).
33. *Id.* at 1337 (quoting Complete Auto, 430 U.S. at 279).
34. 309 U.S. 33 (1940)
35. 488 U.S. 252 (1989).

tangible goods and services as recognized by *Goldberg* provides "a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State."[36]

The second prong of the *Complete Auto* test guards against multiple taxation.[37] Two subtests, internal and external consistency, are employed.[38] "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear."[39] "External consistency . . . looks . . . to the economic justification for the State's claim upon the value taxed."[40] The Court found the Oklahoma tax met the internal consistency subtest because if every state were to impose an identical tax, "that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax."[41]

The Court then addressed the external consistency subtest. After citing to several cases (including Central Greyhound v. Mealey[42] relied upon by the lower courts[43]) which required apportionment of income tax revenue between different states, the Court stated:

> In reviewing sales taxes for fair share, however, we have had to set a different course. A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.[44]

The Court noted that it remains permissible for a good to be taxed more than once while in the stream of commerce. A sales tax could be imposed on the buyer and an income tax could be imposed on the seller.[45] Nonetheless, "because the taxable event of the consummated sale of goods has been found to be properly treated as unique, an internally consistent, conventional sales tax has long been held to be exter-

36. *Jefferson Lines, supra* note 1, at 1338.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1339 (citing Central Greyhound v. Mealey, *supra* note 3, at 1266).
43. *Jefferson Lines, supra* note 18, at 92.
44. *Jefferson Lines, supra* note 1, at 1339.
45. *Id.* at 1339-1340.

nally consistent as well."[46]

The Court noted that the entire gross receipts from services performed wholly within the taxing state may be taxed. It further explained that if services are performed partially in other states, then a gross receipts or income tax must be apportioned. Here, however, cases dealing with gross receipts did not apply because the Oklahoma tax was not a gross receipts tax, but was instead a sales tax. Unlike a gross receipts tax, the possibility of multiple taxation does not exist with sales taxes.[47] A sales tax

> falls on the buyer of the services, who is no more subject to double taxation on the sale of these services than the buyer of goods would be. The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination.[48]

The Court equated the delivery of goods with "the combined events of payment for a ticket and its delivery for present commencement of a trip."[49]

The *Jefferson Lines* Court continued by rebutting the argument that, although the identical tax could not be levied by other states, a similar tax could be levied which would amount to multiple taxation. A gross receipts tax imposed by a neighboring state, or a "use tax" levied by other states of passage for that portion of the trip within that state in conjunction with the Oklahoma tax would not constitute multiple taxation.[50] The Court concluded the discussion of the external consistency test by stating that simply because apportionment was feasible it was not required.[51]

The Court next addressed the third prong of *Complete Auto's* test "requir[ing] the tax must not discriminate against interstate commerce, and must be fairly related to the services provided by the state."[52] The Court reasoned that the tax did not discriminate against interstate activity because both interstate and intrastate bus trips were taxed equally.[53] Jefferson Lines argued the tax was identical to that invalidated in American Trucking Association v. Scheiner.[54] There, Pennsylvania imposed a flat tax on all trucks traveling in and through the state.[55] The Court dis-

46. *Id.* at 1340.
47. *Id.* at 1340-1341.
48. *Id.* at 1341.
49. *Id.*
50. *Id.* at 1341-1343.
51. *Id.* at 1343-1344.
52. *Id.* at 1346 (citations omitted).
53. *Id.* at 1345.
54. American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266 (1987).
55. *Jefferson Lines, supra* note 1, at 1345.

agreed with *Jefferson Lines,* reasoning that *Scheiner* was not on point because the Oklahoma tax was a sales tax whereas the Pennsylvania tax was a use tax.[56]

Lastly, the Court addressed the fourth prong of the *Complete Auto* test requiring that there be "a fair relation between a tax and the benefits conferred upon the taxpayer by the State."[57] This test does not require a "detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity," said the Court.[58] Tax revenues can be used for other indirectly beneficial governmental purposes.[59] The tax must only be reasonably related to the taxpayer's presence or activities in the state.[60] By virtue of the tax being imposed on a sale occurring wholly within the state of Oklahoma and measured by the amount of the sale, this prong is satisfied.[61]

Justice Scalia concurred. He and Justice Thomas agreed with the Court's holding for the reason that the "sales tax does not facially discriminate against interstate commerce."[62] Justice Scalia went on to call for the abolition of the "eminently unhelpful, so-called 'four-part test' of *Complete Auto.*"[63] Justice Scalia further stated that the dormant Commerce Clause does not appear in the Constitution and only Congress possesses the power to immunize interstate commerce from nondiscriminatory state action.[64]

Justice Breyer dissented. He viewed the Oklahoma tax as identical to the one held unconstitutional in *Central Greyhound.*[65] Justice Breyer noted that the tax in *Jefferson Lines*

> 'imposes an 'excise tax' of 4% on 'the gross receipts or gross proceeds of each sale' made in Oklahoma' . . . [whereas] . . . '[t]he [*Central Greyhound* tax] imposed a 2% tax on the 'receipts received . . . by reason of any sale . . . made' [within the state].' Oklahoma imposes its tax on the total value of trips of which a large portion may take place in other States. [*Central Greyhound*] imposed its tax on the total value of trips of which a large portion took place in other States. New York made no effort to apportion the tax to reflect the comparative cost or value of the in-state and out-of-state portions of the trips. Neither does Oklahoma. Where, then, can one find a critical

56. *Id.* at 1344.
57. *Id.* at 1345.
58. *Id.*
59. *Id.* at 1346.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 1346-1347 (dissenting opinion).

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difference?[66]

The dissent also characterized as form over substance the majority's distinction based on the payor of the tax. "The upshot is that, as a practical matter, in respect to both taxes, the State will calculate the tax bill by multiplying the rate times the gross receipts from sales; the bus company will pay the tax bill; and, the company will pass the tax along to the consumer."[67]

Justice Breyer found further fault with the Oklahoma tax because it attempted to tax more than the portion of revenue from interstate commerce "which reasonably reflects the in-state component."[68]

A. Critical Summary

Jefferson Lines validates sales taxes on the full price of interstate services. At its foundation, the decision distinguishes a sales tax from an income or gross receipts tax. The decision makes clear that income or gross receipts taxes must be apportioned, while sales taxes do not. State legislatures should realize that a tax on interstate commerce which reaches the full amount of the purchase price must be imposed on the buyer of the goods, not the seller.

Justice Breyer criticized the distinction between a sales tax and a gross receipts or income tax as an arbitrary line in the sand. He recognized the practical value of such a line in that it provides a simple rule for taxes imposed on the buyer of goods. However, he stated that "I would reaffirm the *Central Greyhound* principle, even if doing so requires different treatment for the inherently interstate service of interstate transportation, and denies the possibility of having a single, formal constitutional rule for all self-described 'sales taxes'."[69]

Despite the dissent's view, any holding to the contrary would be difficult to reconcile with Goldberg v. Sweet[70] which involved a telecommunications excise tax "on the gross charge of interstate telecommunications (1) originated or terminated in Illinois, . . . and (2) charged to an Illinois service address, regardless of where a the telephone call is billed or paid."[71] The case mirrors *Jefferson Lines* as the *Goldberg* tax "has many of the characteristics of a sales tax . . . ."[72] Analytically, the cases differ only in the administrative feasibility of apportioning a tax on the basis of

66. *Id.* at 1347 (citations omitted).
67. *Id.*
68. *Id.* at 1349 (citing *Goldberg, supra* note 35, 488 U.S. at 262).
69. *Id.* at 1349.
70. *Goldberg, supra* note 35, 488 U.S. at 252.
71. *Id.* at 256.
72. *Id.* at 262.

the use of state infrastructure. It is virtually impossible to do so with the electronic impulses which comprise a long-distance telephone call,[73] however, it is rather easy to track the route of a bus. The *Jefferson Lines* majority opinion makes clear that the feasibility of apportionment does not weigh on the outcome.[74]

B. Implications

The implications of this case appear quite broad. "Beyond transportation services, [the] ruling could encourage state governments to explore ways to tax professional services such as advertising, accounting and legal representation."[75] Author Christopher C. Faille argues in a recent article that *Jefferson Lines* "foreshadows a gradual movement toward a view long associated with Justice Scalia, that the commerce clause imposes no restraints on the taxing powers of the several states beyond such limits as Congress specifically enacts; in other words, that there is no 'dormant' meaning to this clause at all."[76] He terms this trend "devolution" and states that it will come "at the expense of the unity and productivity of the continental marketplace."[77]

III. The Averted Financial Impact

The need for shielding the intercity busing industry from a wave of new sales taxes on interstate bus tickets is not overstated. The interstate bus industry has faced difficult times for many years.[78] Greyhound, by far the largest carrier accounting for over 75% of the revenues generated by the nation's 21 largest bus companies,[79] is no exception.[80] Therefore, for the sake of brevity and simplicity, this analysis will focus primarily on Greyhound.

In 1987 Greyhound, the largest national busing concern, bought out financially strapped Trailways rescuing it from bankruptcy. However, less than three years later, Greyhound itself filed for bankruptcy, leaving the U.S. without any "economically viable nationwide bus company."[81]

73. *Id.* at 254-255.

74. *Jefferson Lines*, *supra* note 1, at 1343-1344.

75. Paul M. Barrett, *Supreme Court Allows State Tax on Interstate Bus Transportation*, Wall St. J., April 4, 1995, at B7.

76. Christopher C. Faille, *Is the Dormant Commerce Clause Doctrine Zigging or Zagging?* Fed. Law., August 1995, at 34.

77. *Id.* at 36.

78. Cliff Henke, *Motorcoach Outlook '94: Cautious Optimism*, Metro Mag., Jan./Feb. 1994, at 27.

79. Rolf Anderson, Atlas of the American Economy: An Illustrated Guide to Industries and Trends, 64 (Lise Sajewski ed., Elliott & Clark 1994).

80. Henke, *supra* note 78, at 19.

81. *Id.*

Greyhound emerged from bankruptcy in 1991 with a highly leveraged financial structure.[82] The following years continued to be difficult as Greyhound recorded net income after taxes of just $7,497,000 in 1993 and recorded a net loss of $77,421,000 in 1994.[83] Among other recent troubles: dissident bond-holders filed an involuntary petition for Chapter 11 bankruptcy in December 1994 and recently, Greyhound financially restructured.[84]

The nine largest regional carriers, including Greyhound, account for about 90% of the total intercity bus company revenues and have also faced lean times. These regional carriers split just $17,764,000 in after tax profits in 1993 and 1994 combined.[85] For the first half of 1995, the nine largest regional carriers posted profits of just $1,252,000.[86]

Industry financial ratios, which give further insight into the financial health of the industry, indicate slim profit margins for the busing industry as well. For 1992-93, the before tax profit margin for all intercity and rural bus transportation companies was just 2.6%. For the 1993-94 period, this ratio climbed slightly to 3.2%.[87]

Given these slim margins, any new tax arguably would be passed along to consumers in order for a company to stay afloat. However, while the balance sheet might demand it, the economic realities would not allow it. Susan Perry of the American Bus Association (ABA) states that any new tax would be "one more threat to the bus industry and one more tax or fee that could not be passed on to customers, particularly if it had snowballed and other states had passed the tax."[88] Charlie Zelle, President of Jefferson Partners (the successor company to Jefferson Lines), echoes this thought and adds that new taxes would have to be absorbed by the bus companies through reduced ticket prices.[89] Additional evidence supports these statements and indicates the inability of bus passengers to absorb any additional costs. The "intercity, regular-route passenger is almost twice as likely to be poor as an average person in the population."[90] Craig Lentzsch, Greyhound's Chief Executive Of-

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82. *Standard & Poor's Standard ASE Stock Reports*, Feb. 16, 1995 Vol. 30, No. 14, Sec. 8.

83. *Moody's Transportation Manual*, Moody's Investors Services, Dun & Bradstreet Corp., at 1355 (1995).

84. *Id.* at 8032.

85. 95 I.C.C.2d 47 (Apr. 17, 1995).

86. 95 I.C.C.2d 135 (Dec. 6, 1995).

87. Robert Morris Associates, Annual Statement Studies, 637 (1994).

88. Telephone Interview with Susan Perry, *supra* note 7.

89. Telephone Interview with Charlie Zelle, President, Jefferson Partners (February 1, 1996).

90. Henke, *supra* note 78, at 27.

ficer, confirms that bus passengers are extremely price sensitive.[91]

Higher prices could also cause bus passengers to turn to competing forms of transportation such as automobiles, discount airlines, and, in some markets, Amtrak.[92] Moody's Transportation Manual states:

> Recent trends in the travel market include a consistent increase in discounted airline pricing and the emergence of low-fare regional airlines. These regional airlines now compete in intermediate-haul markets (400 to 700) miles that formerly had little, if any, low-cost airline travel available. In response, the . . . bus industry generally has reduced prices in these markets in an attempt to compete. *Price is the primary method of meeting airline competition.*[93]

Out-of-pocket costs of driving are generally less than the cost of bus travel. While pricing is a primary method of meeting this competition, the bus industry is somewhat "protected from the incremental economics of auto travel since many of its customers travel alone. The lack of multiple, reliable cars within a family, and fear of driving alone for long distances, serves to offset the economic advantage of multi-person travel in a single car."[94] Hence, the threat of an additional tax deterring bus travel might not be realized if other factors besides price contribute significantly to the traveller's choice of transportation. Nevertheless, a general consensus exists among managers and analysts that bus passengers are extremely price sensitive.[95]

Because new taxes could not be passed along to bus passengers, new state sales taxes would negatively impact the bottom line of intercity bus companies.[96] In 1990, twenty-three billion intercity bus passenger miles were logged. Revenues totalled over $750 million dollars for the intercity busing industry in 1994.[97] The Oklahoma Tax Commission estimated that the tax had generated about $400,000 a year in revenue for the state and Utah estimated that such a tax would raise about $150,000 in revenue annually.[98]

Other than the potential fiscal impact, additional taxes could exacerbate the overall decline in the number of intercity bus routes and the

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91. *Greyhound Making a Go of Turnaround Company's 3Q Profit Presages Profitable '96*, CINN. ENQ. Dec. 26, 1995, at B7.

92. MOODY'S TRANSPORTATION MANUAL, *supra* note 83, at 1355.

93. *Id.* (emphasis added).

94. *Id.*

95. *See e.g.* Moody's Transportation Manual, *supra* note 83, at 1355; Telephone Interview with Susan Perry, *supra* note 7; Telephone Interview with Charlie Zelle, *supra* note 89; *Greyhound Making a Turnaround Company's 3Q Profit Presages Profitable '96, supra* note 91, at B7.

96. Telephone Interview with Charlie Zelle, *supra* note 89.

97. Anderson, *supra* note 74, at 64.

98. COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, INTERSTATE COMMERCE COMMISSION SUNSET ACT OF 1995, S. REP. NO. 176, 104th Cong., 1st Sess. 16 (1995).

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number of bus industry jobs. Since 1972, the number of towns with regular route intercity bus service has declined from over 14,000 to just 5,000.[99] One author notes that "since bus service provides a crucial link for many rural communities, the demise of the long-distance, scheduled-route bus industry is an especially unfortunate trend."[100] The reduction in routes has been accompanied by a reduction in employment. In 1960, the industry employed 41,000 people while in 1990 this number shrank to 20,000 people.[101]

Despite the beleaguered state of the intercity bus industry, recent news from Greyhound reveals that, in fact, prosperous times may be just around the corner. Recently, Greyhound modified its pricing strategy by "scrapping discount promotions and replacing them with everyday low prices. Greyhound's core customers are last-minute buyers - 70 percent buy their tickets within three hours of departure . . . . To have deep discounts only for advance purchases meant those core customers couldn't afford to ride Greyhound."[102] Consequently, after posting a loss of $30,175,000 in the first half of 1995,[103] the first quarterly profit in over two years was recorded during the third quarter with net income of $15.3 million.[104] Greyhound forecast a profit of $16.7 million for 1996 and while this number may not be reached "executives are confident that the company will be profitable."[105] Despite these encouraging numbers, at least one analyst warns that "Greyhound is in a tough business, and a turnaround is not easy - especially after the company's . . . troubles in the early 1990s."[106]

The financially turbulent intercity busing industry would have difficulty shouldering an additional sales tax burden. Charlie Zelle, President of Jefferson Lines, states that the passage of new sales taxes "probably would have led to cutbacks. [New taxes] would have eroded profitability and would have made some runs unaffordable."[107] Mr. Zelle adds that "communities would lose service, jobs would be lost, and the viability of scheduled service intercity bus transportation would be threatened."[108] These cutbacks could impact the poorest segments of the population through higher prices, reduced routes, and fewer jobs. From this perspec-

99. Henke, *supra* note 78, at 27.

100. Anderson, *supra* note 79, at 139.

101. *Id.* at 64.

102. *Greyhound Making a Go of Turnaround, supra* note 91, at B7.

103. 95 I.C.C.2d 135 (Dec. 6, 1995).

104. Robert Tomsho, *Greyhound Posts Its First Quarterly Profit in 2 Years*, WALL ST. J., Oct. 26, 1995, at A8.

105. *Greyhound Making a Go of Turnaround, supra* note 91, at B7.

106. *Id.*

107. Telephone Interview with Charlie Zelle, *supra* note 89.

108. *Id.*

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tive, a tax like that at issue in *Jefferson Lines* contravenes the purpose of the dormant Commerce Clause because it burdens interstate commerce and thereby "jeopardiz[es] the welfare of the nation as a whole."[109]

IV. THE CONGRESSIONAL RESPONSE

Through Congressional lobbying efforts, the American Bus Association moved quickly to blunt the impact of the decision. Concurrently, states eager for a new source of revenue moved quickly to pass tax legislation. For example, Utah had already approved a tax effective January 1, 1996 on interstate bus service.[110] Susan Perry, Vice-President of the American Bus Association (ABA) states "we knew as soon as the Supreme Court ruled that the only place to get it fixed was Congress. So we went immediately with two goals: 1) Getting it done using aviation precedent; and 2) Before the 1996 state legislatures convened-and we did it!"[111]

The aviation precedent Ms. Perry refers to is Title 49 of the United States Code § 40116 which "specifically prohibits non-Federal taxes on the sale of air transportation or on passengers, or their transportation of gross receipts from transportation."[112] The air travel exemption, originally passed in 1972 states:

> (b) Prohibitions. . . a state or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on—
> (1) an individual traveling in air commerce;
> (2) the transportation of an individual traveling in air commerce;
> (3) the sale of air transportation; or
> (4) the gross receipts from that air commerce or transportation.[113]

As a consequence of the furious lobbying effort, Congress passed, and President Clinton signed into law, a very similar tax exemption statute for busing.[114] Buried in the Interstate Commerce Commission Termination Act of 1995[115] is the following:

> A state or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on—
> (1) a passenger traveling in interstate commerce by motor carrier;

109. *Jefferson Lines, supra* note 1, at 1336.

110. S. REP. No. 176, *supra* note 98, at 16.

111. Telephone Interview with Susan Perry, *supra* note 76.

112. *Carriers Free of One Tax Worry, Even if Fuel-tax Exemption Doubtful,* AIRLINE FIN. NEWS, Vol. 10, Issue 17, May 1, 1995.

113. 49 U.S.C.A. § 40116 (West 1995).

114. Interstate Commerce Commission Termination Act of 1995 PUB. L. No. 104-88, 109 Stat 803.

115. *Id.*

(2) the transportation of a passenger traveling in interstate commerce by motor carrier;
(3) the sale of passenger transportation in interstate commerce by motor carrier; or
(4) the gross receipts derived from such transportation.[116]

The legislative history for the bus travel tax exemption obliquely recognizes the Jefferson Lines[117] decision. It states that "[n]ew 49 U.S.C. § 14504 (State tax) is a new provision that would prohibit State and local governments from imposing a tax on the sale of intercity bus tickets. This provision is intended to override a recent court decision permitting such a tax."[118] Additional explanation of the new provision is extraordinarily brief adding only that the bill "preempt[s] a state's ability to collect taxes or fees on interstate bus travel."[119] Ms. Perry, of the ABA, states that the exemption faced little opposition from Congress.[120]

The airline travel tax exemption and the bus travel tax exemption employ very similar language. Furthermore, the bus travel exemption was modeled on the air travel exemption.[121] Thus, the air travel exemption's legislative history provides some additional insight into the bus travel exemption. The air travel tax exemption was part of the Airport Development Acceleration Act of 1973.[122] The Senate Conference report accompanying this legislation states that "[t]his prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local 'head' taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation."[123]

Similar to the recent bus travel tax exemption, the airport travel tax exemption was in response to a U.S. Supreme Court decision.[124] Evansville-Vanderburgh Airport Auth. Dist. et al. v. Delta Airlines, Inc.[125] upheld "passenger head taxes enacted by New Hampshire and by Evansville, Indiana for 'aviation related purposes.'"[126] The Committee report states:

the Court decision does not provide adequate safeguards to prevent undue

116. 49 U.S.C.A. § 14505 (West 1995)
117. *Jefferson Lines, supra* note 1.
118. S. REP. No. 176, *supra* note 98, at 48.
119. *Id.* at 16.
120. Telephone Interview with Susan Perry, *supra* note 7.
121. *Id.*
122. 49 U.S.C.A §§ 1711 *et seq.* (West 1995).
123. COMMERCE COMMITTEE, AIRPORT DEVELOPMENT ACCELERATION ACT OF 1973, S. REP. No. 12, 93rd Cong., 1st Sess. 2 (1973) *reprinted in* U.S.S.C.A.N. 1434, 1435.
124. *Id.* at 1446.
125. 405 U.S. 707 (1972).
126. S. REP. No. 12, *supra* note 123, at 1446.

> or discriminatory taxation. . . . It is significant that revenues which would be derived from some of these local or state head taxes would not be earmarked for airport development, but would be used to gain financial windfalls. . . . Recent experience . . . is indicative of the chaos which such local taxation works on the national air transportation system. The head tax brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the states unburdened by travel taxes.[127]

The long term implications of the bus travel tax exemption can only be imagined. Nonetheless, it is clear that while the bus travel tax exemption occurred in response to the decision in *Jefferson Lines*, the bus travel tax umbrella covers more than just the stipulated facts of that decision. *Jefferson Lines* did not "speak to sales taxes levied on tickets for travel wholly outside of Oklahoma or on routes originating in other states."[128] The recent legislation does speak to these taxes by enacting a flat ban on the taxation of interstate bus passengers.[129]

Taxation of the gross receipts derived from interstate commerce are banned by § 14505(4). Hence, states will apparently not be able to impose an income tax on interstate bus companies for income derived from interstate ticket sales regardless of whether such a tax is apportioned. A tax such as the unapportioned income tax at issue in *Central Greyhound* is likely preempted.[130]

It is not clear, however, whether the bus travel exemption could be used to challenge an ad valorem tax imposed on interstate bus companies.[131] Cases dealing with the airline tax exemption may provide some guidance. Aloha Airlines, Inc. v. Director of Taxation[132] held that the airline tax exemption prevented Hawaii from imposing a gross receipts tax on the personal property of airlines operating within the state. In so doing, the Supreme Court rejected the reasoning of the Hawaii Supreme Court. The Hawaii Supreme Court felt the state tax stood outside the scope of the airline tax exemption because it was imposed upon air carriers rather than air passengers.[133] At the very least, a plausible challenge could be raised by the intercity busing industry to ad valorem taxes.

Congressional authority to enact such legislation is well-established. The Court in *Evansville-Vanderburgh*[134] wrote that Congress has the

127. *Id.* at 1446.
128. *Greyhound Lines, supra* note 2, at 318.
129. 49 U.S.C.A. §14505 (West 1995).
130. *See supra*, note 3.
131. Telephone interview with Charlie Zelle, *supra* note 89.
132. 464 U.S. 7 (1983)
133. Louisa A. Barash, *State Airline Tax Grounded: Aloha Airlines, Inc. v. Director of Taxation*, 38 TAX LAW. 545, 545 (1985).
134. *See supra* note 126, 405 U.S. at 707.

power to preempt state taxation, noting that

> [n]o federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance. A contrary purpose is evident in the Airport and Airway Act of 1970. . . . '[A]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s]'.[135]

Note also, Justice Scalia in his concurrence in *Jefferson Lines* stated that "it is for Congress to make the judgment that interstate commerce must immunized from certain sorts of nondiscriminatory state action (i.e. taxation)."[136]

Other Congressional action in response to the *Jefferson Lines* decision is present in the proposed Amtrak Reform and Privatization Act of 1995. An accompanying Senate Report explicitly recognizes the decision and states that "this ruling could be used to justify state taxes on Amtrak's interstate passenger tickets and possibly on its interstate mail or freight transportation services."[137] If passed, the bill would preempt such taxation authority. The report recognizes the potential fiscal impact by noting that Amtrak "collected about $830 million from ticket sales and about $60 million from mail and express services."[138]

In sum, while the Supreme Court may be submerging the dormant Commerce Clause, Congress appears ready to exercise its power to reduce the adverse fiscal impact on interstate commerce.

V. Conclusion

The U.S. Supreme Court decision in Jefferson Lines v. Oklahoma Tax Commission paved the way for states to enact sales taxes on the full price of interstate transportation tickets and may have opened the door for taxation of other services, as well. This decision signals an erosion of the dormant Commerce Clause doctrine and hence an augmentation of state taxing power. Congress, spurred by special interest groups such as the American Bus Association, stands prepared to preempt additional state taxation of interstate transportation. Such relief will be required to preserve the integrity of industries directly involved in interstate commerce such as intercity busing.

135. *Evansville-Vanderburgh, supra* note 125, at 721 (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1946)).

136. *Jefferson Lines, supra* note 1, at 1346 (concurring opinion).

137. Committee on Commerce, Science, and Transportation, Amtrak and Local Rail Revitalization Act of 1995, S. Rep. No. 157, 104th Cong., 1st Sess., at 13 (1995).

138. *Id.*