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ARTICLES

STATE AND LOCAL TAXATION: WHEN WILL CONGRESS INTERVENE?

Kathryn L. Moore*

I. INTRODUCTION

Our current system of fiscal federalism grants each of the fifty states plus the District of Columbia autonomy to design its own taxing system. Although this system has its advantages, it imposes an extraordinary burden on the interstate taxpayer, and few outside academia dispute that more uniformity is needed in state and local taxation of interstate and foreign commerce.¹

In theory, uniformity could be achieved in one of three ways: (1) by the United States Supreme Court’s interpretation of the dormant Commerce Clause; (2) by the voluntary, joint action of the states; or (3) by congressional action. The Supreme Court, however, has made it clear that it is neither willing nor able to mandate uniformity in state and local taxation.² Thus, if uniformity is to be achieved, it must be through the voluntary, joint action of the states or congressional action.³

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1. See infra Section II D.
3. There is little doubt but that Congress has the power both to expand and to restrict state power to tax in the affirmative exercise of its Commerce Clause power. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946). See also Walter Hellerstein, State Taxation of Corporate Income from Intangibles: Allied-Signal and Beyond, 48 TAX L. REV. 739, 744 n.11 (1993). There is some question, however, whether Congress has the power to authorize state taxation that violates the due process limitations of the fourteenth amendment. Compare Quill Corp. v. North Dakota, 504 U.S. 298, 305, 318 (1992); ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 349 (1982) (O'Connor, J., dissenting), with William Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma, 35 STAN. L. REV. 387 (1983). Thus, to the extent that uniform legislation would require that Congress override due process limitations, there may be limitations on Congress’ power. Such limitations, however, should not totally prohibit Congressional legislation providing for more uniformity in state and local taxation. See also DANIEL SHAVIRO, FEDERALISM IN TAXATION: THE
Over the years, the states have made some limited progress toward voluntary uniformity. In addition, Congress has enacted legislation regulating specific, well-defined aspects of state and local taxation. Neither Congress nor the states, however, have provided for sufficient uniformity in state and local taxation.

This article examines congressional activity in the state and local tax area to determine when, if ever, Congress will enact legislation mandating uniformity in state and local taxation. The article begins by briefly describing our current system of state and local taxation and explaining why we need more uniformity therein.

The article then provides an empirical study of congressional activity in the state and local tax area between January, 1971 and May, 1996. Specifically, it focuses first on four discrete but representative areas in which Congress has enacted legislation regulating state and local taxation, and, second, on four discrete but representative areas in which Congress has repeatedly introduced bills but has not yet enacted legislation to determine when Congress will act in the state and local tax area. The empirical evidence shows that narrow self-interest plays a very important role in determining when Congress will legislate in this area. It suggests that Congress will legislate in the state and local tax area if the legislation (1) personally benefits members of Congress; (2) benefits a specific, well-defined interest group that orchestrates an extensive campaign with limited opposition; or (3) represents a compromise between the states and taxpayers and is part of a much larger legislative package. The evidence further indicates that Congress will not enact legislation regulating state and local taxation if the legislation offers diffuse benefits unless the interested parties are willing and able to reach a compromise on the subject.

The article then analyzes the empirical evidence in light of the public choice theory of legislation. That theory, which applies economic theory to analyze the po-
political process, predicts that Congress is unlikely ever to enact legislation mandating uniformity in state and local taxation. The article shows that the empirical evidence is fairly, but not completely, consistent with the public choice theory.

Finally, the article concludes by noting that the empirical evidence and the public choice theory cast doubt on the likelihood of Congress ever enacting legislation mandating uniformity in state and local taxation. The article contends, however, that relational feminist theory offers some hope that such legislation may someday be enacted.15

II. THE CURRENT SYSTEM OF STATE AND LOCAL TAXATION

Our current system of state and local taxation is exceedingly complicated. First, the mere number of jurisdictions that may impose taxes is almost mind numbing. Not only may each of the fifty states plus the District of Columbia impose its own set of taxes, but each of the states may authorize its local governmental units, such as counties, municipalities, townships, and special districts, to assess and collect taxes. In fact, in 1994, more than 6,500 local jurisdictions had the power to impose sales taxes.16

Second, the states may impose a wide variety of taxes and may authorize their local jurisdictions to impose them. Such taxes include individual income taxes, corporation income taxes, general sales taxes, property taxes, estate taxes, and a wide variety of excise taxes, such as gasoline taxes, cigarette taxes, and alcoholic beverage taxes. Each taxing jurisdiction has the power to define independently each tax base and rate and specify the other rules applicable to each tax.

To illustrate the need for uniformity in state and local taxation, this section begins by briefly describing our current system of state and local taxation in three specific areas: (1) individual income taxation; (2) corporate income taxation; and (3) sales and use taxation. The section concludes by explaining in more detail why we need more uniformity in state and local taxation.

A. Individual Income Taxation

States have the power to tax the income of individuals under two different theories: (1) the residence-based theory and (2) the source-based theory. Under the residence-based theory, states have the power to tax 100% of the income earned by a resident.17 Under the source-based theory, a state has the power to tax the income of nonresidents if the income is derived from sources within the state.18 As a result of these two overlapping theories, an individual's income may be subject to multiple taxation if the individual earns income in a state in which the individual does not reside.

15. See infra Section V.
16. ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM, Table 27, at 95-96 (1995) [hereinafter FISCAL FEDERALISM]. Indeed, that number reached a high of almost 9,000 in 1989. Id.
Although the Supreme Court has never interpreted the Constitution to prohibit multiple taxation of individual income, the states have voluntarily acted to eliminate much of the risk of multiple taxation by granting credits against their income taxes for income taxes paid to other states. All of the states with a broad-based personal income tax grant their residents a credit for taxes paid to other states. Some states also grant nonresidents a credit for taxes paid to their home states on income derived from sources within the state of nonresidence if, but only if, the home state also grants a similar credit. The states, however, do not apply identical rules and thus complexities and inequities may result.

The income of professional athletes presents a particularly stark example of the complexity of and inequities in our current system of state and local taxation of individuals. A professional athlete who resides in one state, plays his home games in another state, and plays away games in still other states may be subject to taxation by each of these states. The athlete's home state may tax 100% of his income, and each of the states in which he plays may also tax him on the income earned in that state. Not only may the athlete be required to file a tax return in each of those states, but the athlete may be subject to multiple taxation. Although the home state may grant a credit for taxes paid to other states, it may limit the credit to taxes paid on income earned in the other states, and each of the states may use a different method to determine how much income is earned in each state. For example, the home state may use one method of allocation, such as the duty days method, to determine that the athlete earned $x dollars in State Y. State Y, in contrast, may use a different method of allocation, such as the games played method, to determine that the athlete earned more than $x dollars in the State and tax the athlete on that greater amount of income. The home state may limit its credit to the tax paid to State Y on $x dollars and thus the athlete may be subject to multiple taxation on the excess income that State Y taxes. If, however, the states used uniform apportionment and credit rules, the athlete would only be subject to taxation once on income earned in State Y.
B. Corporation Income Taxes

Much of the complexity in state taxation of corporation income arises from two factors: (1) the entity subject to corporate income tax varies from state to state; and (2) the states use different rules to divide corporate income among the states. With respect to the first factor, some states tax each corporate entity separately while others permit all members of a "unitary business" to be combined for tax purposes. Moreover, the states do not define the term "unitary business" in a uniform manner and use a variety of rules to determine when combined reporting may or must be used.

With respect to the second factor, states typically use two basic methods to determine the amount of income a corporate taxpayer engaged in multistate business has earned within its borders: (1) specific accounting and (2) formula apportionment. Generally, states specifically allocate, that is attribute to one state, income such as rents and royalties from real and tangible personal property that is relatively easy to trace to a particular state. States then apportion or divide the remainder of the taxpayer's income on the basis of a ratio of the taxpayer's economic activities or values within the taxing state to the same values or activities outside the state.

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Although the states generally use the same basic methods for dividing corporate income among the states, they do not apply identical rules in their application of those methods. For example, most states apportion income if it is "business income," that is, "income arising from transactions and activity in the regular course of the taxpayer's trade or business," and allocate "nonbusiness income," that is, "all income other than business income." The states, however, do not interpret these terms in a uniform manner. Likewise, most states use a three factor formula, consisting of property, payroll, and receipts, to allocate business income among the states, but do not give the same weight to each factor in the formula and do not define all of the factors in the same manner. These variations create extraordinary compliance burdens for the multistate business and create the risk of multiple taxation or undertaxation of corporate income. Were the states to follow uniform rules in identifying the taxpayer subject to tax and dividing corporate income among the states, compliance burdens would be drastically reduced and the risk of multiple taxation and undertaxation would be reduced, if not eliminated.

C. Sales and Use Taxation

Most individuals are familiar with the retail sales tax, a tax imposed on the sale of tangible personal property sold at retail. The retail sales tax is collected by the

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HELLERSTEIN & HELLERSTEIN]. For a more detailed discussion of apportionment formulae, see e.g., State Taxation of Interstate Commerce, 27 TEnN. L. Rev. 239, 251-57 (1960); Donald K. Barnes, Pre-requisites of a Federal Statute Regulating State Taxation of Interstate Commerce, 46 VA. L. Rev. 1269, 1276-82 (1960).

40. UNIF. DIV. OF INCOME FOR TAX PURPOSES ACT § 9, 7A U.L.A. 348 (1985); I State Tax Guide (CCH) ¶ 10-110 (1996). Iowa and Nebraska, however, use a one-factor sales/receipts formula. Id.
41. For example, Tennessee gives equal weight to each factor of the formula while Kentucky gives twice as much weight to the sales factor as to the property and payroll factors.
42. For example, some states allocate sales to the state of origin while other states allocate sales to the state of destination.
43. For example, states in which financial institutions are headquartered tend to define the receipts factor of their apportionment formula to include loans from banks located in the state regardless of where the borrower is located. Market states, in contrast, tend to define the receipts factor of their apportionment formula to include loans to borrowers located in the state regardless of where the lender is located. Ranjana G. Madhusudhan, Fiscal Federalism Limits the Bank Tax Uniformity Debate, 5 ST. TAX NOTES 460 (1993). If a bank based in a headquarters state were to lend money to a borrower located in a market state and the states were to adopt these divergent rules, the bank could be subject to multiple taxation on such a loan as both states would attribute the loan to their respective state. In contrast, if the bank were based in a market state and were to lend money to a borrower located in a headquarters state, it could escape taxation on such a loan as neither state would attribute the loan to their state.
45. For a general discussion of more specific definitions of sales taxes, see HELLERSTEIN & HELLERSTEIN, supra note 36, at 660-61. As of November 1994, forty-five states plus the District of Columbia imposed a state sales tax. FISCAL FEDERALISM, supra note 16, at 8-9. Alaska, Delaware, Montana, New Hampshire, and Oregon did not impose a sales tax. Id.
seller at the time of the sale and is imposed by the state and local jurisdiction in which the retail seller is located. Many individuals, however, are less familiar with the use tax, a tax imposed on "the privilege of using, consuming, distributing or storing tangible personal property after it is brought into [the] State from without [the] State." The use tax is designed to ensure that residents who purchase goods in or from another state pay the equivalent of a sales tax on the purchase in their state of residence. Thus, the use tax is generally imposed at the same rate and on the same base as the sales tax. Hence, a credit is generally granted against the use tax for any sales tax paid at the time of the sale.

Theoretically, the sales tax and the use tax are functionally equivalent; that is, they impose identical burdens on identical transactions. From the seller's standpoint, however, the use tax may impose a significantly higher collection burden than the sales tax. For a local retailer, collecting the sales tax is relatively easy. The sales tax is simply added to the sales price and collected at the register at the time of the sale. There should be little confusion regarding the applicable tax rate or tax base because the law of the state and local jurisdiction in which the seller is located determines the sales tax rate and base, and the seller need only know that law to calculate the sales tax.

For a mail order seller, in contrast, collecting the use tax may be much more onerous. First, the simple mechanics of collecting the tax may be much more burdensome. Unlike the retail buyer, the mail order buyer is not physically present at the time of the sale. Thus, if the mail order buyer pays for the purchase by check and miscalculates the use tax due, it may cost the seller more to contact the buyer and ask the buyer to tender the remainder due than the amount of the unpaid tax itself. More importantly, there may be significant confusion regarding the applicable use tax rate and base. The law of the state and local jurisdiction in which the product is used, rather than the seller's location, determines the use tax rate and base in a mail order sale. Thus, the seller must know the law of every state and local jurisdiction to which it ships goods to calculate the applicable use tax.

Currently 45 states and the District of Columbia, impose sales and compensating use taxes. The rates range from a low of 3% to a high of 7%, and the bases vary considerably from state to state. For example, clothing that costs less than $50 is tax-exempt in Connecticut while Massachusetts exempts clothing that costs less than

46. Without the use tax, residents could escape taxation by (1) purchasing goods in neighboring jurisdictions that did not impose sales taxes or (2) having goods shipped into the state from outside the state because many such purchases were viewed as immune from sales taxation under the Commerce Clause. Hellerstein & Hellerstein, supra, note 36, at 770.
47. See II Hellerstein & Hellerstein, supra note 20, at ¶ 16.02-16.03.
49. There may be some confusion in determining whether a particular sale is taxable if the sale involves the rendition of some services in addition to tangible personal property. See generally, II Hellerstein & Hellerstein, supra note 20, at ¶¶ 12.05-12.07.
51. See, e.g., id. at 51.
52. Fiscal Federalism, supra note 16, at 89-90, Table 31.
53. Id.
$175 but does not extend its exemption to sports and specialty ware.\(^{54}\) Moreover, well over 6,000 local jurisdictions have the power to impose such taxes, and their rates range between .25% and 4.25%.\(^{55}\)

In a hearing before the Senate Small Business Committee, Rudolph F. Regez, Vice President and General Counsel of Swiss Colony, a Wisconsin-based mail order company, described the difficulties these variations can create:

Aunt Millie, who lives in Chicago, decides to send the same Christmas gift package, a box containing cheese and sausage and a Santa Claus Christmas plate, to each of her two nephews, one in Indianapolis and the other in Cleveland. In Indiana, food is exempt, but Indiana takes the position that the item is a gift and as such is fully taxable, even if it's a sack of flour. In to any Ohio, [sic] food is also exempt, but if over one-half of the value the package [sic] is other than food, then the whole package is taxed. If one-half or more is food, then the whole package is exempt. The tax rates differ in each one of those states. Aunt Millie is confronted with a daunting task. After a quick look at the order form, she probably decides not to buy from our company; maybe this year Christmas cards alone will be sufficient.\(^{56}\)

Recognizing the extraordinary burden that the collection of a use tax may impose on an out-of-state seller, the United States Supreme Court, in National Bellas Hess, Inc. v. Department of Revenue,\(^ {57}\) struck down a state statute that imposed use tax collection responsibility on an out-of-state mail order house that had neither outlets nor sales representatives in the state. Twenty-five years later, in Quill Corp. v. North Dakota,\(^ {58}\) the Court reaffirmed the Bellas Hess rule.\(^{59}\) In these cases, the Court did not strike down the use tax statute itself, but simply relieved certain sellers of the burden of collecting such taxes. Thus, buyers remain responsible for the payment of such taxes but sellers may not be required to collect them.

Although buyers remain liable for such taxes even if the seller does not collect them, buyers frequently do not pay the taxes. Buyers may be unaware of their liability,\(^{60}\) or may simply choose not pay the taxes because of the difficulty and costs states

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54. Id. at 89-92.
55. Id. at 97-98.
59. Prior to Quill, there was a debate as to whether Bellas Hess was based on the Commerce Clause, the Due Process Clause, or both. Walter Hellerstein, The Quill Case: What States Can Do to Undo the Effects of the Decision, 8 ST. TAX NOTES 31-37 (1993); Timothy H. Gillis, Note, Collecting the Use Tax on Mail-Order Sales, 79 GEO. L. J. 535, 536 n.10 (1991). Accordingly, there was some question as to whether Congress had the power to overrule the decision. Compare Cohen, supra note 3, at 400 (arguing that Congress has the power to authorize state legislation that would otherwise violate the due process clause) with ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 331 (1982) (O'Connor, J., dissenting) ("Far more dismaying, however, is that the Court's reliance on the Due Process Clause may deprive Congress of the authority necessary to rationalize the joint taxation of interstate commerce by the 50 States."). In Quill, however, the Court eliminated any uncertainty regarding Congress' ability to overrule the Bellas Hess rule. The Court announced that Bellas Hess had been based on both the Due Process and Commerce Clauses and overruled the due process holding while reaffirming the Commerce Clause basis for its decision. In reaffirming the Commerce Clause holding, the Court expressly noted that Congress had the power to overrule Quill in an affirmative exercise of its Commerce Clause power. Quill, 504 U.S. at 318.
60. See, e.g., Interstate Use Tax Collection: Hearing Before the Senate Comm. on Small Business,
face in trying to collect the taxes directly from the buyers.\textsuperscript{61} A study by the United States Advisory Commission on Intergovernmental Relations indicates that as much $3 billion in use taxes may go uncollected each year.\textsuperscript{62} If there were more uniformity in state and local use taxation, such as uniform tax bases across the states and uniform tax rates within each state, requiring out-of-state sellers to collect use taxes would not be as much of a burden and the current use tax evasion could be reduced, if not eliminated.

D. The Need for Uniformity

Although our current system of state and local taxation has its advantages,\textsuperscript{63} the preceding description alone should illustrate why we need more uniformity in state and local taxation. As one commentator put it, "[the] multitude of tax systems amounts to a drag on interstate trade almost as debilitating as the border restrictions our federal system was originally designed to prevent."\textsuperscript{64}

More uniformity in state and local taxation would benefit our economy and society at large in a number of ways. First, it would reduce the states’ administrative costs\textsuperscript{65} and taxpayers’ compliance costs.\textsuperscript{66} In addition, it would eliminate the risk of
multiple taxation and undertaxation that exists under our current system of state taxation. Moreover, to the extent that taxpayers take state taxes into account in locating their businesses and planning their affairs, more uniformity would promote efficiency and decrease planning costs. Finally, more uniformity might decrease litigation and lobbying costs.

Although more uniformity would benefit society at large, it would impose particular costs on particular states and taxpayers. Our current system enables states to structure their tax systems so as to shift costs to some extent to out-of-state taxpayers and to compete for businesses. In addition, the system permits taxpayers to...

75. See also SHAIVRO, supra note 3, at 20, 29 (describing opportunistic behavior in which corporations can engage). Barton Massey, International Firms Wrestle with State Tax Liabilities, Says KPMG Manager, 11 ST. TAX NOTES 235, 235 (July 22, 1996) ("Corporations play jurisdictional chess where certain states have more favorable rules than others and tax rates are usually the least important.").

76. Whether such behavior is simply limited or totally eliminated depends on the degree of uniformity achieved. Total uniformity would eliminate the opportunity to engage in such behavior while partial uniformity, such as uniformity in all substantive and administrative rules other than tax rates, would permit some degree of tax competition by states and tax avoidance by taxpayers.

77. The extent to which states benefit from interstate tax competition is subject to debate. See, e.g., DAPHNE A. KENYON & JOHN KINCAD, COMPETITION AMONG STATE AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM (1991); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, INTERJURISDICTIONAL TAX AND POLICY COMPETITION: GOOD OR BAD FOR THE FEDERAL SYSTEM? (1991).

78. Uniform administrative rules would impose few costs and offer many benefits. See AICPA, REPORT ON CORPORATE STATE TAX ADMINISTRATIVE UNIFORMITY 1 (1995) ("With the exception of changes to penalties and interest rates, administrative uniformity is revenue neutral."). Some, if not all, uniform substantive rules, on the other hand, would necessarily benefit some taxpayers and states while disadvantaging others. For example, as discussed infra in note 43, states currently tend to define the receipts factor of their apportionment formulae as applied to financial institutions in the manner most advantageous to the state. Thus, headquarters states tend to attribute receipts from loans to the location of the bank that processed or provided the loan. Market states, in contrast, tend to attribute the receipts from loans to the location of the borrower. Selection of a uniform rule attributing receipts from loans to the state in which the borrower is located would necessarily benefit headquarters states to the detriment of market states while selection of a uniform rule attributing such receipts to the state in which the borrower is located would necessarily do the reverse. For a more detailed discussion of apportionment formulae in general, see infra Section II B.


80. For statistics on the growth of state and local taxes, see HELLERSTEIN & HELLERSTEIN, supra note 36, at 5, 9. See also Barton Massey, International Firms Wrestle with State Tax Liabilities, Says KPMG Manager, 11 ST. TAX NOTES 235, 235 (1996) (noting that 50% or more of a company's tax liability is usually attributable to state taxes).

81. National Conference of State Legislatures, National Governors' Association, Financing State Government in the 1990s; James W. Wetzler, We Need State Taxes, 7 ST. TAX NOTES 48, 49 (1994) (James W. Wetzler, Commissioner of New York State's Department of Taxation and Finance, says "My judgment is that we need greater uniformity than presently exists."). See also News Stories, State Tax System Should Be Restructured, Says MTC's Bucks, 93 STN 197-10 (Oct. 13, 1993) ("To compete in the modern world of interstate and international commerce, state governments must work together to
have all become increasingly sensitive to this need. Indeed, a leading state tax scholar has noted that "the desirability of achieving uniformity in state taxation is one of the rare matters on which state taxpayers, state tax administrators, and the adjudicative bodies that resolve their disputes can agree." The following section presents an empirical study of congressional activity in state and local taxation designed to determine when, if ever, Congress will enact legislation mandating more uniformity in state and local taxation.

III. EMPIRICAL STUDY OF CONGRESSIONAL ACTIVITY IN THE STATE AND LOCAL TAX AREA

Congress has introduced bills regulating state and local taxation as far back as 1934 yet did not actually enact any legislation limiting the States' power to tax interstate commerce until 1959. This section presents an empirical study of congressional activity in the state and local area to determine when, if ever, Congress will enact legislation mandating uniformity in state and local taxation. The study focuses on Congressional activity during the time period of January, 1971 through May, 1996.

I began the empirical research for this section by going through the Congressional Record Index for each year from 1971 through May, 1996 to identify any bills introduced in Congress to regulate substantively state and local taxation. I sought bills that focused primarily, or exclusively, on state and local taxation of interstate commerce and disregarded bills that indirectly regulated such taxation, such as by granting or denying a deduction against federal income tax for state taxes. I found well over 200 bills that could be divided into 11 different categories: (1) state taxation of nonresident individuals; (2) state taxation of members of Congress; (3) state taxation of federal benefits; (4) state taxation of banks; (5) state taxation of pension income; (6) sales and use taxation; (7) worldwide unitary taxation; (8) severance taxes; (9) property taxation; (10) Interstate Tax Acts regulating multiple areas of state taxation; and (11) miscellaneous bills. From these categories, I selected for more in depth study two areas in which Congress has enacted legislation: (1) state taxation of members of Congress and (2) state taxation of nonresident pension income, and four areas in which Congress has repeatedly introduced bills but has not yet enacted legislation: (1) Interstate Tax Acts regulating multiple areas of state taxation; (2) worldwide unitary taxation; (3) state taxation of nonresident individuals; and (4) sales and use taxation. To round out develop uniform tax laws that are both 'equitable and effective,' said Dan Bucks, executive director of the Multi state Tax Commission.

85. S. 2897, 73d Cong. (1934).
87. I looked under the States and Taxation headings in each index.
88. In addition, I disregarded bills that involved federal payments in lieu of state taxes and bills that regulated the collection of state taxes.
the study, I selected for further study two additional categories frequently cited in lists of when Congress has legislated in the state and local tax area: (1) discriminatory state taxation of interstate transportation; and (2) head taxes on airline passengers.89

This section begins by discussing in some detail the legislative histories of the four areas in which Congress has enacted legislation. The section then discusses in some detail the legislative activity in the four areas in which Congress has repeatedly introduced new bills but has not yet enacted legislation. Finally, the section concludes by summarizing the empirical evidence.

A. State Taxation of Nonresident Pension Income

On January 10, 1996, President Clinton signed into law legislation prohibiting states from imposing income tax on certain "retirement income" of nonresidents.90 Although states had long had the power to tax that income under the source tax principle,91 state taxation of nonresident pension income did not receive Congressional attention until 1988.92 That year, Representative Vucanovich and Senator Hecht, both of Nevada, introduced identical bills in the House and Senate prohibiting state taxation of nonresident pension income.93 The following year, Representative Vucanovich and Senator Hecht's replacement, Senator Reid, reintroduced these bills.94 In addition, Representative Unsoeld of Washington introduced a similar bill in that session of Congress.95 These first five bills died in committee without a hearing.

Interest in the subject, however, did not wane, and all three bills were reintro-
duced in the following session, the 102d Congress. In addition, momentum built as one of the bills, Senator Reid's bill, was considered for the first time at a subcommittee hearing. Both Senators from Nevada and Representative Vucanovich testified in favor of the bill. In addition, two public witnesses testified, one in favor and one against, and a representative from the Congressional Research Service advised the Subcommittee that Congress had the power to enact the legislation. The Subcommittee received well over a hundred statements and letters on the bill. Only one statement opposed the bill.

Although none of the three bills were reported out of committee in the 102d Congress, interest in the issue accelerated in the 103d Congress as Senator Reid and Representatives Vucanovich and Unsoeld reintroduced bills prohibiting source taxation of pension income in the 103d Congress. In addition, Representative Stump of Arizona and Representative Franks of Connecticut each introduced bills on the subject. On July 22, 1993, the Subcommittee on Economic and Commercial Law of the Committee of the Judiciary held a hearing on the five bills. Again, the testimony was predominantly favorable. The House Judiciary Committee recommended that the House pass an amended version of Representative Vucanovich's bill. The bill, as amended, passed on the House floor and was referred to the

97. Senator Reid's bill, S. 267, was one of six "miscellaneous tax bills" considered at that hearing. Miscellaneous Tax Bills-1991: Hearing before the Subcomm. on Taxation of the Comm. on Finance, 102d Cong. (1991) [hereinafter Miscellaneous Hearing].
98. For Senator Reid's testimony, see id. at 57 and 371. For Senator Bryan's testimony, see id. at 18 and 153.
99. See id. at 19, 380.
100. For testimony by Bill Hoffman, president of RESIST, see id. at 73 and 276.
101. For testimony by Harley Duncan, Executive Director of the Federation of Tax Administrators, see id. at 75, 263.
102. See id. at 74, 289.
103. See id. at 426-570.
104. James W. Wetzler, New York State Commissioner of Taxation & Finance, submitted a statement opposing the bill. Id. at 517.
108. These bills differed from the bills introduced in the preceding two Congresses because they precisely defined pension income for the first time.
111. Compare id. at 4, 13, 16 (statements of Sen. Reid and Reps. Unsoeld and Vucanovich) with id. at 21, 43, 62 (statements of three public witnesses: William Hoffman, president, RESIST of America; Joseph Perkins, member and board director, American Association of Retired Persons; and Chris Farrell, legislative representative, National Association of Retired Federal Employees) with id. at 68-69 (statement of James Smith, professor, University of Georgia School of Law. Professor Smith rejected the standard objectives given to state taxation of non-resident pension income, but noted that the practical difficulty of such taxation might justify the legislation.) and id. at 56 (statement of Harley Duncan, Federation of Tax Administrators. Mr. Duncan unequivocally opposed the bill.).
Senate Finance Committee but never made it to the Senate floor.\textsuperscript{114}

Interest in source taxation of pension income, however, did not die with the 103d Congress. Instead, early in the 104th Congress, five more bills were introduced on the subject\textsuperscript{115} and another hearing was held.\textsuperscript{116} Opponents appeared to accept legislation as inevitable and focused on the breadth of the exemption at the hearing.\textsuperscript{117} The House Judiciary Committee again recommended that the House pass an amended version of Representative Vucanovich's bill,\textsuperscript{118} and an amended version of the bill was finally passed by the House\textsuperscript{119} and Senate\textsuperscript{120} and signed by the President.\textsuperscript{121}

The pension tax legislation owes much to William Hoffman, a persistent and dedicated advocate from Nevada. Mr. Hoffman was an engineer with Hughes Aircraft in California until he retired in 1987 and moved to Nevada. As Nevada does not impose an income tax, Mr. Hoffman fully expected to enjoy his retirement years in Nevada free of any state income tax. Unexpectedly, he received a letter from California demanding that he pay tax on the retirement income he had earned in the state. Unable to settle the issue with the California Franchise Tax Board, Mr. Hoffman began an active crusade against the tax. In July 1988, he incorporated a grass roots organization, RESIST (Retirees to Eliminate State Income Source Tax), whose sole purpose was to eliminate the source tax as applied to retirement income. RESIST first asked the Attorney General of Nevada to challenge California's tax in court. Unable to persuade the Attorney General to pursue such a challenge, RESIST then began to lobby the Nevada legislators.\textsuperscript{122} Through RESIST Mr. Hoffman spearheaded a relentless and ultimately successful public and political campaign against source taxation of pension income.\textsuperscript{123}

The pension tax legislation also owes much to its unusual political appeal. Individual taxpayers uniformly objected to source taxation of pension income. They frequently decried it as "taxation without representation,"\textsuperscript{124} an anathema in our dem-


\textsuperscript{116} 1995 Pension Hearing, supra note 92.

\textsuperscript{117} See id. at 58 (prepared testimony of Harley T. Duncan, Executive Director Federation of Tax Administrators); id. at 74 (prepared statement of Gerald H. Goldberg, Executive Director, Cal. Franchise Tax Bd.).


\textsuperscript{119} 141 CONG. REC. H14,975 (daily ed. Dec. 18, 1995).

\textsuperscript{120} 141 CONG. REC. S19,273 (daily ed. Dec. 22, 1995).

\textsuperscript{121} 142 CONG. REC. D24 (daily ed. Jan. 22, 1996).

\textsuperscript{122} Rep. Vucanovich and Sen. Hecht introduced the first bills on the subject a few months after RESIST was incorporated. Throughout the hearings, the legislators from Nevada credited Mr. Hoffman with bringing the subject to their attention. See, e.g., 1995 Pension Hearing, supra note 92, at 13, 29 (testimony of Reps. Vucanovich and Reid); 1993 Pension Hearing, supra note 110, at 9 (testimony of Sen. Reid); Miscellaneous Hearing, supra note 97, at 19, 57-58 (testimony of Rep. Vucanovich and Sen. Reid).

\textsuperscript{123} Mr. Hoffman appeared at each of the three subcommittee hearings held on state taxation of pension income. See 1995 Pension Hearing, supra note 92, at 38; 1993 Pension Hearing, supra note 110, at 21; Miscellaneous Hearing, supra note 97, at 73-4. At those hearings, he described letters RESIST had received from individuals who had been affected by the tax.

\textsuperscript{124} See, e.g., 1995 Pension Hearing, supra note 92, at 40 (testimony of William C. Hoffman);
ocratic society, although dispassionate analysis illustrates that such taxation does not in fact violate the prohibition against "taxation without representation." In addition, a number of states, especially those that do not impose income taxes, objected to source taxation of pension income. Although source-based taxation has been a long-embedded principle of state taxation, it appears that states rarely attempted to collect such taxes on nonresident pension income prior to the late 1980s. States that do not impose income tax benefitted from that practice as individuals would retire and move to their states. What was once a tax deferral on pension income became a tax exemption and made retirement in the state more desirable. Then, in the late 1980s, California and a few other states began to collect source taxes on pension income. The collection of those taxes eliminated the benefit the retirees received from retiring to a state with no income tax, and those states objected to the elimination of that benefit. Of course, states that imposed source taxation on pension income objected to the legislation and argued that they had the power to impose such taxation.

B. State Taxation of Income of Members of Congress

In the summer of 1977, Congress enacted Public Law 95-67 which prohibits any state or political subdivision, other than the state or political subdivision which a member of Congress was elected to represent, from treating that member of Congress as a resident of the state or subdivision for income tax purposes. The statute further prohibits any state or political subdivision, other than the state or political subdivision which a member of Congress was elected to represent, from treating congressional compensation paid to that member as sourced within the state or political subdivision. The effect of the statute is to prohibit Maryland, Virginia, and the District of Columbia, the jurisdictions in which members of Congress typically reside while they serve in Congress, from taxing the compensation of members of Congress who do not represent their jurisdiction.

At the time that Congress enacted Public Law 95-67, neither Virginia nor the

125. See 1995 Pension Hearing, supra note 92, at 24 (statement of Professor James C. Smith, citing various Supreme Court decisions, which substantiate the claims that there is no principle more firmly established than power of sovereign to tax income on the basis of source).

126. The states also objected to the manner in which California imposed the tax. In the 1970's, California had sent letters to nonresident pensioners advising them that they did not have to pay taxes on their pension income. Then, in the late 1980's, California began to collect those taxes — retroactively — and imposed penalties and interest for late payment. See 1995 Pension Hearing, supra note 92, at 39 (statement of William C. Hoffman). Needless to say, former California residents found those taxes highly objectionable, and some states retaliated by prohibiting the use of their courts to collect those taxes.

127. See, e.g., 1993 Pension Hearing, supra note 110, at 248 (statement of Johan Klehs, Chair Revenue and Taxation Committee California Assembly).


131. Of course, under the source tax principle discussed infra in Section II A, these jurisdictions can tax income earned in the jurisdiction. Thus, for example, if a Senator ran an independent business in Virginia, in addition to his work as a Senator, Virginia could tax the independent business income. Cf. 123 CONG. REC. 22484, 22486 (daily ed. July 12, 1977).
District of Columbia taxed the income of members of Congress. Maryland, however, did. Maryland treated members of Congress who maintained a place of abode in the state as "residents" of the state for income tax purposes. As those members of Congress who represented states other than Maryland could also be treated as "residents" of the state which they represented, they were subject to the risk of multiple taxation; that is, taxation by both Maryland and the state they represented in Congress. Prior to February 11, 1975, Maryland eliminated that risk of multiple taxation by granting its residents a credit for income taxes paid to other states. On February 11, 1975, however, Maryland amended its law to provide that that credit could only operate to reduce state income taxes and could not be applied against local income taxes imposed under Maryland law. The effect of the amendment was to subject all individuals, including members of Congress, who could be treated as residents of more than one state to the risk of multiple taxation.

Within eight months of the amendment, three separate but identical bills were introduced in Congress to prohibit the practice as applied to members of Congress. Without holding a hearing, the Senate Judiciary Committee favorably reported out one of the bills, S. 2477, on February 6, 1976, and shortly thereafter, the Senate passed that bill. On June 16, 1976, again without holding a hearing, the House Judiciary Committee favorably reported out that bill with one dissenting vote. The House then passed the bill and presented the bill to President Gerald Ford, who vetoed it in the waning days of his Presidency. In the following Congress, an identical bill was introduced, sailed through Congress, and culminated in Public Law 95-67.

Public Law 95-67 clearly appears to have been driven by self-interest. The statute obviously personally benefitted most members of Congress: it prohibited Maryland, Virginia, and the District of Columbia from taxing their income. Maryland's
amendment of its credit provisions affected more than just members of Congress; it affected all individuals who could be considered residents of more than one state. Yet, Public Law 95-67 did not address the larger problem of the risk of multiple taxation of individuals who could be viewed as residents of more than one state. Instead, it simply eliminated the problem as it applied to members of Congress.\textsuperscript{145}

In debate, a few legislators who might have personally benefitted from the legislation and whose constituency would not have been directly affected by it objected to it.\textsuperscript{146} Nevertheless, the primary opponents of the legislation were legislators from Maryland who did not personally benefit from the legislation and whose constituency clearly was harmed by it.\textsuperscript{147} The bill’s proponents claimed that Maryland’s taxation of the Members of Congress’ compensation violated the Constitution and that enactment of the bill would avoid “needless litigation.”\textsuperscript{148} That justification, however, appears to be little more than a makeweight argument as Congress clearly could have left the issue for judicial resolution.\textsuperscript{149}

C. State and Local Taxation of Interstate Transportation Carriers

Although almost all State constitutions include provisions mandating uniform or equal taxes,\textsuperscript{150} a comprehensive study completed in 1944 showed that states taxed...
interstate transportation carriers more heavily than intercity transportation carriers.151 A comprehensive Senate Report on national transportation policy issued in 1961 found that the discriminatory taxation continued through that time. Accordingly, the Report recommended that Congress enact legislation exempting “the right-of-way of railroads and pipelines from ad valorem property taxation by the States,”152 or, in the alternative, enact legislation prohibiting discriminatory state taxation of interstate carriers.153 Following that Report, numerous bills were introduced in Congress to prohibit discriminatory state taxation of interstate carriers,154 and the issue was considered at a number of hearings.155 In some instances, the bills156 and hearings157 solely addressed the issue of state taxation. In others, discriminatory state taxation was just one of many issues addressed.158 Finally, in January of 1976, Congress enacted legislation prohibiting discriminatory state and local taxation of rail carriers as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).159 The prohibition was

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151. See S. REP. No. 445, at 449 (1961) (discussing the “Report on Carrier Taxation” transmitted by the Board of Investigation and Research”).

152. Id. at 463.

153. Id. at 465. This alternative proposal also included a recommendation that Congress provide common carriers with a federal remedy against such discrimination. Id. at 466.

154. The court in Atchinson, Topeka and Santa Fe Ry. Co. v. Lennen, 552 F. Supp. 1031, 1036 n.8 (1982), identified nine such bills introduced prior to the start of this study: H.R. 16245, 91st Cong. (1970); S. 2289, 91st Cong. (1969); S. 927, 90th Cong. (1968); H.R. 1480, 90th Cong. (1967); S. 2988, 89th Cong. (1966); H.R. 4972, 89th Cong. (1965); H.R. 736, 88th Cong. (1963); H.R. 7497, 87th Cong. (1961); and H. R. 7421, 87th Cong. (1961). In addition, the court identified three bills included within the time frame of this study: S. 1891, 93d Cong. (1973); S. 3945, 92d Cong. (1972); S. 2841, 92d Cong. (1971). Id.


156. See, e.g., S. 1891, 93d Cong. (1973); S. 3945, 92d Cong. (1972); S. 2841, 92d Cong. (1971) (state taxation was one of two issues addressed in bill).


a small part of the 4-R Act's comprehensive reform and its lengthy reports paid scant attention to the issue of state taxation.\footnote{160}

Congress extended the 4-R Act's prohibition against discriminatory state taxation to motor carriers in section 31 of the Motor Carrier Act of 1980.\footnote{161} Like the 4R Act, the Motor Carrier Act was an extensive Act of which the prohibition against discriminatory state taxation was a minute part that received little attention.\footnote{162} The Motor Carrier Act limited its protection against discriminatory state taxation to motor carriers of property. That protection was extended to motor carriers of passengers in the Bus Regulatory Reform Act of 1982.\footnote{163} Again, the extension was a small part of much more comprehensive reform.\footnote{164}

In 1982, Congress extended the protection against prohibitory state taxation to air carriers in Title V of the Tax Equity and Fiscal Responsibility Act of 1982.\footnote{165} Again, the provision was a small part of much larger legislation, and it received little notice.\footnote{166}


166. Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) was a major piece of legislation containing six separate titles. Title V of the Act was entitled the Airport and Airway Improvement. The state tax provision was a small part of the title that received little attention. S. Rep. No. 97-494,
Not surprisingly, to the extent that the issue was raised at hearings, the states expressed opposition to the provisions prohibiting discrimination in state taxation of interstate commerce while representatives of interstate carriers supported them. The states generally conceded that there had been discrimination against interstate carriers in the past but contended that they had eliminated, or were in the process of eliminating, such discrimination, and there was no need for federal intervention. In addition, the states were concerned that the bills unnecessarily restricted their powers. The carriers, in contrast, argued that the legislation was necessary since discrimination remained a problem, and under the current system, challenging a tax could be more expensive than the tax itself. The carriers contended that they only sought equity and fairness.

D. State and Local Head Taxes on Air Passengers

Prior to 1972, few states or local jurisdictions imposed head taxes on individuals travelling by air, and there was serious doubt as to the constitutionality of such taxes. In 1972, however, the Supreme Court held that such taxes do not violate the Constitution so long as they are based on a fair approximation of the use of state-provided facilities for whose benefit they are imposed and they are "neither discriminatory against interstate commerce nor excessive in comparison to the governmental benefit conferred." In upholding the taxes, the Court found that not only did no federal statute expressly preempt the taxes, but they were consistent with the purpose of the Airport and Airway Development Act of 1970.

Less than a month after the Court issued its decision, three bills were introduced in the House and Senate to overrule legislatively that decision. Less than a...
month after that, a Senate Subcommittee held a hearing on the Senate bill to prohibit state and local head taxes on air travellers. The hearing was part of a more comprehensive set of hearings begun earlier that year on bills to amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958. A week after the Senate Subcommittee hearings were concluded, a House Subcommittee began similar hearings.

The proposed federal statutory preemption of state and local head taxes on airline passengers was heatedly debated. Witnesses representing state and local jurisdictions and airports, which would receive the revenue from such taxes, strongly opposed such preemption while witnesses representing travellers, who would have to pay the taxes, and airlines, whose business could be adversely affected by the taxes, strongly supported federal preemption. Even federal administrative agencies could not agree on the proper approach. The Department of Transportation initially opposed any federal statutory preemption while the Civil Aeronautics Board advocated a twelve to eighteen month federal moratorium on state and local head taxes to afford the Board an opportunity to study the subject.

Despite the conflicting views presented at the hearings, the vast majority of Senators appeared throughout the hearings to strongly support legislation prohibiting state and local head taxes. Their support may be attributable to the fact that Senators are frequent fliers and thus personally benefit from a prohibition of state and local head taxes. Their support, however, is more likely attributable to the fact that they

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181. See, e.g., id. at 1 ("Judging from the recent hearings on the Senate side, this matter is quite controversial.").
182. See, e.g., Senate Aviation Hearings, supra note 178, at 145, 151, 179 (testimony by Thomas J. Billey, representing National League of Cities and U.S. Conference of Mayors; Donald Reilly, Executive Vice President Airport Operators Council International, John Nammack, representing National Association of State Aviation Officials); House Aeronautics Hearings, supra note 180, at 115, 133 (testimony of George Bean, representing American Assoc. of Airport Executives; Lennox Moak representing City of Philadelphia).
183. See, e.g., Senate Aviation Hearings, supra note 178, at 161, 163, 176, 189 (statement of Edward Driscoll, president of National Air Carrier Association; statement of Stuart Tipton, president of Air Transport Association of America; statement of Richard Sorlien, vice president of Altair Airlines, Inc.; statement of Thomas Miles, president of National Air Transportation Conferences); House Aeronautics Hearings, supra note 180, at 82, 152, 163 (statement of Edward Driscoll, president of National Air Carrier Association; statement of James Dunne, managing director of Airline Passengers Association Inc.; statement of Tristram Colket, Jr., president of Altair Airlines, Inc.).
184. Senate Aviation Hearings, supra note 178, at 140-41; House Aeronautics Hearings, supra note 180, at 34.
185. Senate Aviation Hearings, supra note 178, at 138; House Aeronautics Hearings, supra note 180, at 53.
186. Senate Aviation Hearings, supra note 178 passim.
thought that Congress intended the Airport and Airway Development Act of 1970 to preempt such taxes despite the Supreme Court’s finding to the contrary.

In the Airport and Airway Development Act of 1970, Congress committed the federal government to expanding and improving the nation’s air transportation system. Concomitant with that Act, Congress created the Airport and Airway Trust Fund to provide federal funds for local airport expansion and improvement projects. As originally enacted, the Trust Fund was supported by several federal aviation taxes, including an 8% tax on domestic airline tickets, a $3 head tax on international flights out of the United States, and 5% tax on air freight. Throughout the Senate hearings, the Senators consistently expressed their belief that Congress intended the Airport and Airway Development Act of 1970 to preempt state and local head taxes on airline passengers. Even proponents of head taxes conceded that the Court’s conclusion that the 1970 Act did not preempt state and local head taxes may have been contrary to expectations. Moreover, in the Senate Report issued following the hearings, the Senate Committee declared, “This committee never intended that air travellers would be subject to state and local head taxes as well as the national user charges.”

The Representatives seemed less certain that Congress intended to preempt state and local head taxes in the Airport and Airway Development Act of 1970. None of the Representatives expressly discussed the subject in the House hearings, and the House Report simply stated that state and local head taxes were “not considered in the congressional action which led to the Airport and Airway Development Act.” Nevertheless, the Representatives, like the Senators, seemed consistently opposed to state and local head taxes. Unlike the Senators, however, the Representatives seemed more willing to consider alternatives to federal preemption, such as a moratorium on or federal regulation of such taxes.

and compel the payment only once,” and Stuart Tipton, representing Air Transport Association of America, responds that he thinks that “a great many of them have.”).

189. Id. at § 208.
190. Id. at §§ 203-04.
191. See, e.g., Senate Aviation Hearings, supra note 178, at 51, 52, 98 (Sen. Cook stated that “I don’t think that there was anything other than an absolute understanding that on a 50-50 basis we were imposing taxes to preempt, and we now find that we don’t preempt.”; Sen. Tipton stated that “[t]his committee and the Congress reached a conclusion that a tax on passengers was justified at the national level, and levied a heavy one . . . .” Sen. Cannon stated that “Despite what the Supreme Court said, I am sure it was the intention of this committee that we preempt the field . . . .”).
192. Id. at 122, 131 (Stuart Paine, vice chairman of the Louisville and Jefferson County Air Board stated “I think that the possibility of head taxes makes this an entirely new ballgame because, quite frankly, I think that the aviation facilities of this country can expand at a much more rapid rate than we were thinking in terms of a week before Thursday.” After quoting the Court, Sen. Cotton from N.H. declares, “[t]he point is . . . that while we may not have anticipated the result which we now are confronted with . . . .”).
195. House Aeronautics Hearings, supra note 180 passim. Howard Trockman, attorney for Evansville-Vanderburgh Airport Authority District, argued that the Representatives endorsed the preemption legislation “because of the support, recommendation, and lobbying of the airline industry.” Id. at 195.
196. See, e.g., id. at 58, 76, 101.
Following the Senate hearings, the Senate Commerce Committee reported out a bill\textsuperscript{197} which prohibited states and local jurisdictions from imposing a head tax on air travellers and amended the Airport and Airway Development Act of 1970 to increase the federal share of funding for airport development throughout the country.\textsuperscript{198} Following the House hearings, the House Committee on Interstate and Foreign Commerce favorably reported out a bill\textsuperscript{199} that imposed a eighteen month moratorium on state and local head taxes.\textsuperscript{200} Ultimately, the House\textsuperscript{201} and Senate\textsuperscript{202} agreed to and passed an amended version of the Senate bill that prohibited state and local head taxes and amended the Airport and Airway Development Act of 1970 to increase the federal share of funding for airport projects. President Nixon pocket-vetoed the bill, but his veto message indicated that the veto was based on the bill's increase in federal funding, not its prohibition of state and local head taxes.\textsuperscript{203}

Early in the 93d Congress, bills were again introduced to prohibit state and local head taxes on air passengers,\textsuperscript{204} and a House Subcommittee held hearings on the subject.\textsuperscript{205} Much of the testimony in the hearings was similar to that in the 92d Congress; although, some of the opposition to the prohibition softened in the later hearings.\textsuperscript{206} The House Committee on Interstate and Foreign Commerce then favorably

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200. H. REP. NO. 92-1279, at 3 (1972). Originally, H.R. 14847: (1) amended the Airport and Airway Development Act of 1970 to increase the federal share of funding for airport development throughout the United States; and (2) totally prohibited state and local head taxes on air travellers. The House subcommittee unanimously recommended that the bill be amended to delete the amendment to the Airport and Airway Development Act of 1970 and impose a moratorium on state and local head taxes rather than absolutely prohibiting them. Id.
203. 118 CONG. REC. 37,203 (1972). The President's veto message states, "[t]his bill would increase Federal expenditures and raise percentage participation in categorical grant programs with specific and limited purposes. I believe this would be inconsistent with sound fiscal policy. Airport development funds have been almost quadrupled since 1970 under this administration." Id.
206. See, e.g., id. at 115, 155-56, 254 (J. Donald Reilly, executive vice-president of Airport Operators Council International: AOCI would support the total legislation package, including the prohibition on head taxes, if the House otherwise approves an amendment to increase federal share in ADAP program; Arthur Fallon, president-elect to Am. Ass'n of Airport Executives: Not willing to fight too hard on head tax issue if federal share in ADAP program increased; John Nammack, executive vice-president Nat'l Ass'n of State Aviation Officials: "We make a gesture in favor of opposing prohibition of the head tax, although frankly we are not going to make an issue of it and have no intention of making an issue of it.").
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reported out a bill\textsuperscript{207} that was essentially the same as the bill which the Senate and House had agreed to the previous year.\textsuperscript{208} Although the Senate did not hold any hearings,\textsuperscript{209} it favorably reported out of committee a bill\textsuperscript{210} that was substantially similar to the bill passed by the House and Senate the preceding year.\textsuperscript{211} The Senate passed its bill,\textsuperscript{212} and following a joint conference,\textsuperscript{213} the House\textsuperscript{214} and Senate\textsuperscript{215} agreed to an amended version of the Senate bill.\textsuperscript{216} The President approved the amended bill on June 18, 1973.\textsuperscript{217}

Both the House and Senate Reports make it clear that the federal prohibition of state and local head taxes constitutes a federal preemption of the field. Congress wanted to ensure that there was a single, uniform, national tax on the carriage of persons in air transportation.\textsuperscript{218} In 1990, Congress amended the prohibition against state and local head taxes to authorize airport authorities to collect head taxes on departing passengers under certain circumstances.\textsuperscript{219} Extensive federal regulations now govern the collection and use of these taxes.\textsuperscript{220}

E. Interstate Tax Acts

Between 1971 and 1982, nineteen bills were introduced in Congress to regulate multiple areas of state taxation.\textsuperscript{221} The vast majority of the bills were to be cited as

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\item \textsuperscript{207} H.R. 6388, 93d Cong. (1973).
\item \textsuperscript{208} 119 CONG. REc. 13,910 (1973). The only major difference related to the portion of the bill concerning federal funding of airport projects. The bill also extended an exemption for certain airports imposing a head tax.
\item \textsuperscript{209} The Senate Report declared that hearings were unnecessary "because the issues were thoroughly discussed and considered in hearings and executive meetings of the [Senate Commerce] Committee during the 92d Congress," S. REP. No. 93-12 (1973), reprinted in 1973 U.S.C.A.A.N. 1434, 1437.
\item \textsuperscript{210} S. 38, 93d Cong. (1973).
\item \textsuperscript{211} S. REP. No. 93-12 (1973), reprinted in 1973 U.S.C.A.A.N. 1434, 1436.
\item \textsuperscript{212} 119 CONG. REc. 3360 (1973).
\item \textsuperscript{213} See H.R. REP. NO. 93-225 (1973).
\item \textsuperscript{214} 119 CONG. REc. 17,345 (1973).
\item \textsuperscript{215} 119 CONG. REc. 18,047 (1973).
\item \textsuperscript{216} The Senate bill contained two exemptions from its prohibition against head taxes. First, any state which levied such taxes before May 21, 1970 was exempted from the prohibition until July 1, 1973. Second, certain airport authorities were also exempted until July 1, 1973. The House extended the exemption until December 31, 1973 and only applied the exemption to jurisdictions which levied \textit{and collected}, not just levied those charges. The compromise bill extended the exemption until December 31, 1973 to jurisdictions which \textit{levied} the charges. The compromise bill also contained some compromises with respect to the federal funding portion of the bill.
\item \textsuperscript{217} 119 CONG. REc. 20,380 (1973).
\item \textsuperscript{218} S. REP. No. 93-12, at 2 (1973), reprinted in 1973 U.S.C.A.A.N. 1434, 1435 ("This 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."). H.R. REP. No. 93-157, at 3 (1973) ("This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate by the Federal Government, and will not be subject to the various user taxes being levied in a number of jurisdictions across the country.").
\item \textsuperscript{221} H.R. 6402, 97th Cong. (1982); H.R. 5, 96th Cong. (1979); H.R. 8277, 96th Cong. (1980); S. 983, 96th Cong. (1979); H.R. 669, 95th Cong. (1977); S. 2173, 95th Cong. (1977); H.R. 9, 94th
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the "Interstate Taxation Act" and contained provisions regulating state corporate income, gross receipts, and sales and use taxation. In addition, a number of the bills contained other provisions, such as provisions regulating state income taxation of individuals and provisions extending the jurisdiction of federal courts to cover state tax matters arising under the Act.

Each of the bills set forth uniform jurisdictional standards; that is, uniform limits on when states could tax the income or gross receipts of businesses engaged in interstate commerce and when states could impose use tax collection responsibility on multijurisdictional sellers. In addition, each of the bills limited the percentage of multistate business income or capital that states could tax. The bills, however, provided limited uniformity in substantive tax rules. For example, the bills did not contain uniform use tax bases, nor did they provide for mandatory uniform allocation formulae for the division of corporate income among the states. Thus, the bills did not resolve many of the problems created by the lack of uniformity in the states' substantive tax rules.

Three separate hearings were held on four of the bills, but none of the bills


222. All but five of the bills were to be cited as the "Interstate Taxation Act." One was to be cited as the State Taxation of Multistate Taxpayers Act. S. 1688, 93d Cong. (1973). The other four bills were entitled: S. 2173, 95th Cong. (1977); S. 2092, 93d Cong. (1973); S. 3333, 92d Cong. (1972); S. 4080, 92d Cong. (1972).


224. See, e.g., H.R. 8277, 96th Cong. § 401 (1980); S. 1245, 93d Cong. § 401 (1973).


226. See, e.g., H.R. 6402, 97th Cong. § 201 (1982); H. R. 8277, 96th Cong. § 301 (1980); H.R. 669, 95th Cong. § 201 (1977); S. 2080, 94th Cong. § 259 (1975); H.R. 977, 93d Cong. § 201 (1973); S. 317, 92d Cong. § 201 (1971). The bills also contained other provisions too numerous to mention.

227. Interstate Taxation, S. 2173: Hearings Before the Senate Comm. on the Judiciary, 95th Cong. 426 (1977) [hereinafter S. 2173 Hearing] (James Polk, Levi, Strauss and Company, argues that there is a need for standardization in both substantive tax rules and jurisdictional rules and notes that S. 2173 goes a long way with respect to the former of these two interests).

228. Each of the bills set forth an optional two- or three-factor formula for dividing corporate income among the states. The bills did not mandate that the states use that formula but simply prohibited states from taxing more than would be taxed under use of that optional formula. See generally supra note 226.

229. In apparent recognition of the bills' limitations, many of the bills contained a provision mandating that congressional committees evaluate the states' progress toward resolving the problems arising from state taxation and propose additional legislation if substantial progress had not been made within four years of the enactment of the Act. See, e.g., H.R. 6402 § 401, 97th Cong. (1982); H.R. 5, 96th Cong. (1979); H.R. 9 § 401, 94th Cong. (1975); H.R. 669 § 401, 95th Cong. (1977); S. 2092 § 524, 93d Cong. (1973); H.R. 977 § 401, 93d Cong. (1973); S. 3333 § 524, 92d Cong. (1972); S. 317 § 401, 92d Cong. (1971); H.R. 1538 § 401, 92d Cong. (1971).

was reported out of committee. The failure of the bills to progress beyond committee is hardly surprising given the tenor of the hearings. The states were almost unanimous in their opposition to the bills while interstate business representatives generally supported them.231

In lobbying for the bills, the business representatives repeatedly stressed the need for uniformity in state taxation.232 Yet the degree of uniformity they sought is subject to debate. The business representatives clearly sought uniform jurisdictional standards. Multijurisdictional enterprises could only benefit from those rules which limited the states’ power to impose taxes or tax collection responsibility on them. The multistate businesses, however, were much more ambivalent about uniform substantive regulation.233 Unlike uniform jurisdictional standards, uniform substantive regulation could harm them by eliminating the possibility of undertaxation.234

The states were generally sensitive to business’ asserted interest in uniformity but were jealous of their taxing power and objected to federal intervention.235 They argued that uniformity could and should be achieved by voluntary, cooperative state action and pointed to the Multistate Tax Compact236 and the Uniform Division of Income for Tax Purposes Act,237 among other things, as evidence that the states had already made substantial progress toward uniformity.238 The business representatives,

2092. 93d Cong. (1973), S. 282, 93d Cong. (1973) (dealing solely with sales and use taxation), and H.R. 2096, 93d Cong. (1973) (dealing with discriminatory taxation of wines)) [hereinafter 1973 State Taxation of Interstate Commerce Hearing].

In addition, one of the bills, S. 983, 96th Cong. (1979), was discussed at a hearing on international tax treaties. International Tax Treaties: Hearing Before the Senate Committee on Foreign Relations, 96th Cong. 3-22 (1979).


233. See, e.g., S. 2173 Hearing, supra note 227, at 75 (Richard Tveter, Council of State Taxation, “Uniformity is definitely a requirement but we are all faced with what is uniformity and what is uniformity to one is not uniformity to another.”).

234. See supra Section II.


236. See supra Section I.

237. See supra Section I.

in contrast, asserted that the limited success of the Multistate Tax Compact and similar measures\(^{239}\) demonstrated that the states were incapable of realizing uniformity through voluntary cooperation and that federal legislation was essential.\(^{240}\)

Since 1982, numerous bills have been introduced that address specific areas of state taxation of interstate commerce,\(^{241}\) but no bills regulating multiple areas of state taxation have been introduced.

**F. Worldwide Unitary Taxation**

Between 1979 and 1991, eighteen bills were introduced in Congress to prohibit the use of the “worldwide combined reporting” method to tax corporate income\(^{242}\) as well as limit state taxation of foreign source dividends.\(^{243}\) In 1980, a total of twelve states used the worldwide combined reporting method of taxation.\(^{244}\) By 1992, all of

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239. By 1982, only 21 states were members of the Multistate Tax Compact and only 23 States had adopted the Uniform Division of Income for Tax Purposes Act.


Ironically, business opposition played an important role in the limited success of the Multistate Tax Compact and UDITPA. See, e.g., 1980 Worldwide Hearing, supra note 230, at 474 (testimony of Eugene Corrigan, MTC); S. 2173 Hearing, supra note 227, at 76, 438, 442 (testimony of Richard Tveten, Committee on State Taxation; Ted DeLoose, Oregon; Sterling Gallagher, Alaska); 1973 State Taxation of Interstate Commerce Hearing, supra note 230, at 117, 232, 286 (testimony of Byron Dorgan, MTC; Burns Stanley, Committee on State Taxation; Bruce Walker, California); see also United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 454 (1977) (suit by interstate business challenging validity of Multistate Tax Compact).

241. See Section II *passim*.

Interestingly, of the three major areas consistently addressed in the bills discussed above, corporate income, gross receipts, and sales and use taxation, only sales and use taxation has been addressed in bills introduced since 1982. Bills were also introduced addressing one aspect of corporate income taxation, worldwide unitary taxation, but no bills setting forth uniform jurisdictional standards for corporate income taxation or limitations on the percentage of corporate income that may be attributed to each state have been introduced since 1982.

242. Under the worldwide combined reporting method, a state applies its apportionment formula to the combined income of all corporations in a unitary group, including foreign corporate entities. “This involves combining the income of (1) a foreign parent corporation with its U.S. subsidiary corporations doing business in the State; or (2) foreign subsidiary corporations with their U.S. parent corporation doing business in the state.” *Key Issues Affecting State Taxation of Multijurisdictional Corporate Income Need Resolving, GAO Report to the Chairman, House Comm. on Ways and Means* 31 (GAO/GGD-82-38 July 1, 1982) [hereinafter 1982 GAO Report].


In addition, three bills were introduced that prohibited unitary taxation but did not address state taxation of foreign source dividends. H.R. 4049, 99th Cong. (1986); H.R. 4940, 98th Cong. (1984); H.R. 6146, 98th Cong. (1984).

the states had voluntarily eliminated or severely restricted their use of this method of taxation. Not surprisingly, no bills have been introduced on the subject since 1991.

Between 1980 and 1986, four separate hearings were held on the bills prohibiting worldwide combined reporting and limiting state taxation of foreign dividends. Throughout the hearings, the states uniformly opposed the proposed legislation while the business representatives strongly endorsed it. Moreover, the business representatives were not alone in their opposition to the worldwide combined reporting method. Foreign governments also strongly opposed this method of taxation.

Article 9(4) of the United States-United Kingdom Tax Treaty was originally drafted in 1975 to prohibit this method of taxation. Although the prohibition was deleted before final ratification of the Treaty in 1980, the House of Commons only agreed to the treaty without the clause based on the understanding and expectation that Congress would address the problem. By 1980, the British government, the Dutch government, and all nine members of the E.E.C. had officially criticized the unitary tax. In fact, when Prime Minister Thatcher visited the United States in September of 1983, unitary taxation was at the top of her agenda in a discussion with President Reagan and others. Not only did foreign governments criticize the worldwide unitary tax, but foreign-based enterprises also vehemently objected to this form of taxation. In fact, a delegation from the London Chamber of Commerce cancelled a trip to Florida solely because Florida had just passed a unitary tax. In addition, a number of Japanese corporations located operations outside of California because of its unitary tax, and Japan’s Federation of Economic Organizations announced that Japanese companies would not locate operations in states with worldwide unitary taxation.

As a result of the pressure by foreign governments and a Supreme Court decision upholding the constitutionality of California’s use of the worldwide combined reporting
method against a Delaware corporation and its foreign subsidiaries. President Reagan appointed a commission, the Worldwide Unitary Tax Working Group, to study the matter in 1983. After a year of study, the Working Group, composed of representatives from federal and state government as well as business, issued a final report in August of 1994. In that report, the Working Group agreed that states should limit unitary combination for both U.S. and foreign based companies to the water's edge.

In his transmittal letter, the Secretary of the Treasury Donald T. Regan stated that he would recommend federal legislation giving effect to a water's edge limitation on state unitary taxation if there were not "sufficient signs of appreciable progress by the states" in adopting the agreed principles by July 31, 1995. The following year, the Secretary followed through on that threat.

In 1984, Florida repealed the worldwide apportionment legislation it had enacted the preceding year. In 1985, Arizona limited apportionment to U.S. water's edge income. Similarly, by 1987, Oregon, Colorado, Idaho, Indiana, Montana, New Hampshire, North Dakota, and Utah had all limited combined reporting to water's edge. California granted taxpayers the option to limit apportionment to the U.S. water's edge in 1988, and Alaska enacted water's edge legislation in 1991. Thus, by 1992, no state applied worldwide combination without a water's edge or domestic corporation limitation.

G. Individual Income Taxation

Between 1971 and 1989, more than fifty bills were introduced in Congress to

256. For a list of the twenty members of the Working Group see FINAL REPORT OF THE WORLDWIDE UNITARY TAXATION WORKING GROUP, CHAIRMAN'S REPORT AND SUPPLEMENTAL VIEWS, app. A (Aug. 1984) [hereinafter FINAL REPORT].
257. Id. at ii.
258. Id. at ii.
259. Id. at iii.
260. 1986 Unitary Hearing, supra note 246, at 45 ("On November 8th of last year, Reagan directed the Secretary of Treasury to submit proposed legislation to Congress, and that legislation is embodied in S. 1974, one of the bills Congress consider[ed] at [the] hearing.").
261. 1984 Fla. Laws ch. 84-549.
264. I HELLERSTEIN & HELLERSTEIN, supra note 32, at ¶ 8.16.
265. CAL. REV. & TAX CODE § 25110 (West 1997).
266. ALASKA STAT. § 43.20.073 (Michie 1996).
267. I HELLERSTEIN & HELLERSTEIN, supra note 32, at ¶ 8.16(1).
regulate state taxation of nonresident individuals. Fifteen of the bills limited the states' authority to tax nonresidents on income derived from services performed in federal areas or from federal employment, while fifteen of the bills prohibited the states from taxing the income of nonresidents earned in the state. Fourteen of the bills limited the states' tax rate on nonresidents to 50 or 33 1/3% of the rate imposed on residents. Six of the bills either codified the source tax principle or prohibited against discriminatory taxation of nonresident income.

Interestingly, the vast majority of the bills were introduced early in the first session of Congress, and all but four of the bills were introduced in the House. Nevertheless, despite the extraordinary number of bills and their early introduction, not only did no bill make it to the floor of the House or Senate, but not a single hearing was held on any of the bills.
Since 1989, only one bill has been introduced in Congress to regulate state taxation of nonresident individuals. That bill was a very limited bill that prohibits Oregon from taxing compensation paid to a Washington resident for service as a federal employee at a federal hydroelectric facility located on the Columbia River.  

H. Sales and Use Taxation

Members of Congress have repeatedly introduced bills regulating sales and use taxation, but Congress has yet to enact any such legislation. Between 1971 and 1982, twenty-three bills were introduced in Congress to limit the states' power to impose use tax collection responsibility on out-of-state mail order sellers, and the issue was considered at two separate sets of hearings. Not only were the bills consistent with the Court's decision in *National Bellas Hess, Inc. v. Department of Revenue,* prohibiting states from imposing use tax collection responsibility on an out-of-state mail order house with no physical presence in the state, but the bills imposed additional limitations on use taxation. Only one bill was introduced during that time period to expand the states' power to impose use tax collection responsibility and overrule legislatively the *Bellas Hess* decision.

By 1985, however, the tide began to turn, and members of Congress began to introduce bills to overrule the *Bellas Hess* decision. In fact, between 1985 and 1996, seventeen such bills were introduced, and five separate sets of hearings were held on the issue. No bills were introduced to limit the states' jurisdiction to impose use tax on out-of-state vendors.

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State Taxation of Interstate Commerce: Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the S. Comm. on Finance, 93d Cong. 139 (1973).


278. All but four of those bills addressed multiple areas of state taxation as discussed infra at Section III F. The four bills that solely addressed sales and use taxation were: S. 282, 93d Cong. (1973); H.R. 1453, 93d Cong. (1973); S. 1210, 92d Cong. (1971); and H.R. 4267, 92d Cong. (1971).

279. S. 2173 Hearing, supra note 227; 1973 State Taxation of Interstate Commerce Hearing, supra note 230. Those hearings also covered other aspects of state taxation such as corporate income taxes, gross receipts taxes, and federal judicial review of state taxation.


281. For example, many of the bills prohibited states from imposing use taxes on motor vehicles brought into the state by new residents.

282. S. 2811, 93d Cong. (1973). Whether Congress had the power to overrule legislatively the *Bellas Hess* decision prior to 1992 was subject to debate.


Congress' failure to enact legislation in the use tax area appears to be due, in large part, to the lack of agreement between the states and the business community. In the 1970's, the business community generally supported the legislation that was introduced at the time to limit the states' jurisdiction to impose use tax collection responsibility while the state governments unanimously opposed it. Contrariwise, when legislation was later introduced to expand the states' jurisdiction, the states and retail sellers supported the legislation while the mail order companies opposed it.

The interested parties' positions seem to have been driven in large part by narrow self-interest. In the 1970's, when pending legislation imposed uniform jurisdictional rules limiting the states' power to impose use tax collection responsibility, mail order sellers argued that they needed a uniform nexus rule in order to stay in business. They expressed little interest in uniform substantive law, such as uniform tax bases, which would simplify their collection responsibilities. Instead, they simply sought to evade use tax collection responsibility. In contrast, when bills overruling Bellas Hess and expanding the states' jurisdiction to impose use tax collection responsibility became the norm, the mail order sellers began to cry for uniform substantive law. Similarly, the states argued that federal intervention was unnecessary when pending legislation benefitted the mail order industry but argued that federal legislation was not only appropriate, but imperative, when the tide turned in the 1980's and pending legislation began to expand their jurisdiction. Yet, despite the cry for legislative intervention, the states were completely unwilling to relinquish any sovereignty and agree to uniform tax bases which would simplify use tax collection and provide for the greater good.

285. Two resolutions, however, were introduced that resolved that any proposed legislation requiring mail-order companies to collect out-of-state sales taxes be rejected. S. Res. 123, 102d Cong. (1991); S. Res. 80, 101st Cong. (1989).

286. See S. 2173 Hearing, supra note 227, at 99-100 ("The reason we've been at this so long is because up until now the gap between what state and local governments could tolerate and what the businesses could live with in an interstate tax reform bill seemed to be unbridgeable."); 1973 State Taxation of Interstate Commerce Hearing, supra note 230, at 1 ("Staff work in preparation for subcommittee action has made clear that the reason for the failure of Congress to act, among other things, has been the almost total lack of agreement among the interested parties — the States, their tax administrators, and the principal business interests involved.").

287. S. 2173 Interstate Taxation Hearings, supra note 227 passim; 1973 State Taxation of Interstate Commerce Hearings, supra note 230 passim.


289. In fact, at one of the hearings, a state representative declared, "For at least 15 years I have been on the observation that each side operates at least to some extent in a position of enlightened self-interest; that is, each side seeks the best economic position possible." S. 2173 Hearing, supra note 227, at 438 (comment by Ted DeLooze, Chief Counsel, Tax Division, Dep't of Justice, State of Oregon).

290. See supra Section II C.
I. Summary

The empirical evidence suggests that Congress may enact legislation regulating discrete instances of state and local taxation of interstate commerce if the legislation (1) will personally benefit members of Congress;\(^291\) (2) will benefit a specific, well-defined interest group that orchestrates an extensive campaign with limited opposition;\(^292\) or (3) represents a compromise between the states and taxpayers and is part of a much larger legislative package.\(^293\) The empirical evidence further suggests that Congress generally will not enact legislation regulating state and local taxation if the legislation offers diffuse benefits unless the states and taxpayers are able or willing to reach a compromise on the subject.\(^294\) Finally, the empirical evidence suggests states may voluntarily enact legislation preempting the need for federal legislation if federal intervention appears likely.\(^295\)

\(^291\) See, e.g., Pub. L. No. 95-67, 91 Stat. 271 (1977); see also discussion supra Section II B.

Of course, not all bills specially benefitting Members of Congress have been enacted. In 1985, a bill was introduced that would have prevented any state, other than the state which a Member of Congress was elected to represent, from taxing income sourced in the state. Neither bill was expanded the protection of Pub. L. No. 95-67 to the spouses and children of Members of Congress. H.R. 1293, 99th Cong. (1985). In 1987, a bill was introduced that would have extended preferential income tax treatment of Pub. L. No. 95-67 to the spouses and children of Members of Congress. H.R. 2555, 100th Cong. (1987). In addition, the bill would have expanded the protection of Pub. L. No. 95-67 by prohibiting any state, other than the state which a Member of Congress is elected to represent, from taxing income sourced in the state. Neither bill was reported out of committee.

\(^292\) See supra Section II A. See also Pub. L. No. 86-272, 73 Stat. 555 (1959), which prohibits states from taxing the income of a corporation whose only business activity within the state is the solicitation of orders for tangible goods if the orders are sent outside the state for approval and the goods are delivered from outside the state, would seem to fall within this category. One scholar noted that "somewhat truncated congressional hearings were held [on Pub. L. No. 86-272]. At these hearings the fears and apprehensions of business rang like a forte anvil chorus, in comparison with only a pianissimo refrain from the tax collectors and others in counseling congressional caution." Hartman, Public Law 86-272, supra note 340, at 359. Another commentator described the legislation as "a piece of hasty, hysterical legislation . . . pressured through . . . Congress by a highly organized and certainly skillfully handled group of trade organizations." Robert L. Roland, State Taxation of Interstate Income: A State Tax Administrator's Viewpoint, 12 Tax Exec. 35, 35 (1959). See also Paul Studenski, The Need for Federal Curbs on state Taxes on Interstate Commerce: An Economist's Viewpoint, 46 Va. L. Rev. 1121 (1960).


\(^294\) See, e.g., supra Section III E (discussing the legislative experience with respect to the Interstate Tax Acts and Section III H (discussing legislation regarding sales and use taxation).

\(^295\) See, e.g., supra Section III F (discussing the legislative experience with respect to worldwide unitary taxation).
IV. LIKELIHOOD OF FEDERAL LEGISLATION MANDATING MORE UNIFORMITY IN STATE AND LOCAL TAXATION

The empirical evidence casts serious doubt on the likelihood of Congress enacting legislation mandating more uniformity in state and local taxation. More uniformity would not personally benefit members of Congress nor would it benefit a specific, well-defined interest group. Instead, it would offer diffuse benefits to society at large by eliminating many of the drags imposed on our economy by the current system. Given that more uniformity would offer diffuse benefits, the empirical evidence suggests that Congress is only likely to enact legislation mandating more uniformity if the states and taxpayers are willing to reach an agreement on the subject.

As more uniformity would impose specific costs on particular taxpayers and states and benefit society at large, a compromise would require that the states and taxpayers look beyond their narrow self-interest to reach a compromise and try to further the greater good. The empirical evidence, however, indicates that the states and taxpayers usually take positions in hearings on state and local tax legislation that are driven in large part by narrow self-interest and rarely reflect the greater good. Thus, the empirical evidence suggests that Congress is unlikely to enact legislation mandating more uniformity in state and local taxation in the near future.

The public choice theory of legislation gives additional support to this pessimistic view. The Public Choice School applies economic theory to analyze the political process. It assumes that "all political participants are rational, egoistic utility maximizers, and there is no basis for general consensus with respect to these problems." See supra Section II D. Indeed, due to its interdisciplinary nature, there appears to be no single universally accepted definition of the theory. The theory has two separate strands: social choice theory and interest group theory. The former addresses how decisions are made while the latter looks at the incidence and influence of interest groups. 

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See supra Section III C-H passim. See also 1973 State Taxation of Interstate Commerce Hearing, supra note 244, at 1 (In opening the subcommittee hearings, Senator Mondale counsels that "the reason for the failure of Congress to act, among other things, has been the almost total lack of agreement among the interested parties. . . . If, therefore, the subcommittee's hearings are to be productive, and if these hearings are to lead to a legislative proposal, there should, if possible, be agreement among the interested parties on the principal points of that proposal.").

See supra Section III C-H passim. See supra Section III A-H passim. In fact, at one of the hearings, Ted DeLooze, an attorney representing the Department of Revenue for the State of Oregon declared, "For at least 15 years I have been on the scene in this struggle between the divergent views of business and the States. It is my observation that each side operates at least to some extent in a position of enlightened self-interest; that is, each side seeks the best economic position possible." S. 2173 Hearing, supra note 227, at 438 (comment by Ted DeLooze, Chief Counsel, Tax Division, Dep't of Justice, State of Oregon).
maximizers" who "allocate their limited means among alternative pursuits to maximize their personal satisfaction." Proponents of the interest group strand of the theory believe that interest groups play a central role in determining when Congress will legislate. They view legislation as an economic transaction in which legislation is supplied to interest groups who demand it and contend that the market for legislation is a badly functioning one.

Public choice scholars believe that the formation of interest groups is highly selective. Applying free rider analysis, they contend that interest groups will most often form to represent the interests of small groups and will rarely form to represent diffuse interests, such as the interests of consumers or other ordinary citizens. As Professor Rubin has explained:

According to the free-rider analysis, a rational egoist is willing to pay $10 to a lobbying organization to secure $50 of benefit from the legislation that results. If everyone with the same interests is contributing $10, however, the egoist can withdraw the contribution, while the legislature, once it acts, cannot deny the benefit. Since everyone is an egoist in the world of public choice, everyone prefers to "free ride;" but if this occurs, interest groups will never achieve their aims. The groups can only circumvent this problem if they are able to police their members and sanction those who refuse to contribute. This is relatively easy to do when a group is small, when its members have ongoing personal or business relationships, and when each member has a relatively large stake in the outcome. It is more difficult for the general public and "public interest" groups, whose members are generally strangers. Thus, the free-riding tendencies of rational egoists seem to provide an economic explanation for the dominance of small special interest groups over the "public interest."

Due to the unequal formation of interest groups, public choice scholars view the de-
mand side of the market for legislation as highly biased.

On the supply side, public choice scholars contend that legislators, as "rational, egoistic utility maximizers," are motivated solely by self-interest, and that self-interest is often identified as the "desire to maximize their chance of reelection." Public choice scholars may tie legislators' desire for reelection to interest groups by asserting that voters lack perfect information about a legislator's conduct, and thus "elections may turn on financial backing, publicity, and endorsements," which organized interest groups are ready and able to provide. In analyzing the supply side of the legislative equation, some public choice scholars also factor in the "ungrateful electorate" phenomenon in predicting legislative behavior. That phenomenon reflects the curiosity that interest groups give less weight to a vote in favor of their preferences than to a vote against their wishes.

Combining these diverse elements, public choice scholarship predicts that legislators will generally enact legislation that favors cohesive special interest groups which have clearly defined objectives and will accrue large potential benefits from the legislation. Public choice scholarship further predicts that legislators will tend to avoid legislating or delegating responsibility to an administrative agency if a policy imposes concentrated costs, that is, costs on select individuals or groups. Finally, public choice scholarship predicts that legislators will tend to ignore or favor symbolic laws in matters involving diffuse benefits and diffuse costs because they will not be

308. Some scholars contend that legislators supply the legislation while others contend that the public supplies the legislation with the legislators only acting as brokers. See Macey, supra note 300, at 228.

309. Rubin, supra note 301, at 5.

310. FARBER & FRICKEY, supra note 300, at 22; Farber & Frickey, supra note 301, at 890. But see Geoffrey Brennan & James M. Buchanan, Is Public Choice Immoral? The Case for the "Nobel" Lie, 74 VA. L. REV. 179, 181 (1988) (contending that narrow self-interest is not the sole motive of legislators but conceding that it is a significant motive).

311. Rubin, supra note 301, at 14 (footnote added). See also WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 55-56 (2d ed. 1995). See, e.g., Barry Weingast, Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships, 44 LAW & CONTEMP. PROBS. 147, 155 (1981) ("Representatives are assumed to maximize the probability of reelection based on their influence over legislative policy decisions on behalf of their constituents"); MORRIS FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES 38 (1974) ("[T]he primary goal of the typical congressman is reelection."); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (1974) (legislation can be understood by "simple abstract assumption" that Congressmen are "single-minded seekers of reelection."). Of course, not all public choice scholars believe that Congressmen are motivated solely by the desire to seek reelection. See, e.g., RICHARD PENNO, CONGRESSMEN IN COMMITTEES 1 (1973) (behavior of members of Congress dictated by three basic goals: achieving reelection, gaining influence with the House, and making good public policy); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 51 (1957) (candidates and legislators seek primarily to be elected or to receive other private benefits). Indeed, Mayhew, himself, admitted that his model's assumption that legislators only act so as to be reelected did "violence to the facts." MAYHEW, supra, at 13. Nevertheless, he argued that legislative activity could be understood by using the "simple abstraction" that Congressmen are "single-minded seekers of reelection." Id. at 5.

312. FARBER & FRICKEY, supra note 300, at 23.

313. Interest groups may also affect legislation by "controlling the flow of information to legislators on particular issues... [and thus] 'distort[ing] congressmen's thinking on an issue-normally all an interest group needs to achieve its ends.'" Macey, supra note 300, at 230-31(citation omitted).

314. ESKRIDGE & FRICKEY, supra note 311, at 55.


316. ESKRIDGE & FRICKEY, supra note 311, at 55; see also JAMES Q. WILSON, POLITICAL ORGANIZATIONS 334-36 (1973).
subject to any great pressure either way with respect to those measures.\textsuperscript{317}

As discussed in Section II above, legislation mandating more uniformity in state and local taxation generally would provide diffuse benefits and concentrated costs; that is, it would benefit society at large but would impose particular costs on particular taxpayers.\textsuperscript{318} Thus, public choice scholarship generally predicts that Congress is unlikely to enact such legislation. A closer look at congressional activity in the state and local tax area described in Section III above illustrates that the activity is fairly, but not completely, consistent with public choice theory.

First, the formation of interest groups appears to be consistent with public choice theory. As discussed above, public choice scholars predict that interest groups will most often form to represent the interests of small groups and will rarely form to represent diffuse interests, such as the interests of consumers or other ordinary citizens. As public choice theory would predict, the state and local tax hearings are replete with submissions from organizations representing discrete groups of taxpayers while submissions from groups representing taxpayers as a whole are rare.\textsuperscript{319}

One might argue, however, that the diffuse interests of the general public are in fact represented in the state and local tax hearings by the states and the interest groups representing the states.\textsuperscript{320} To the extent that the general public shares the same interests as the states, the states probably do adequately represent the general public's interests. For example, federal legislation granting a break on state taxes to a particular group of taxpayers imposes a diffuse cost on all other taxpayers in the state. Those taxpayers must either pay higher taxes for the same services or receive fewer benefits from the state. The legislation imposes an identical cost on the states: they must either demand more revenue from other taxpayers or make due with less tax revenue. In such cases, the states probably adequately represent the harmed taxpayers.

To the extent, however, that the interest of a large group of taxpayers diverges from that of the state, the taxpayers cannot rely on the states to represent their interest.\textsuperscript{321} For example, as discussed above,\textsuperscript{322} between 1971 and 1989, more than fifty

\textsuperscript{317} ESKRIDGE & FRICKEY, supra note 311, at 55. See also WILSON, supra note 316, at 332-33.

\textsuperscript{318} More uniformity would also provide some concentrated benefits. See generally supra note 78.

\textsuperscript{319} For example, 11 different organizations representing particular business interests (the American Apparel Manufacturers Association, the American Chamber of Commerce, the United Kingdom, the Committee on State Taxation, the State Chambers of Commerce, the Confederation of British Industry, the Tax Committee of the National Foreign Trade Council, Inc., the Emergency Committee for American Trade, the German-American Chamber of Commerce, the International Chamber of Commerce, the Tax Executives Institute, and the National Association of Wholesalers-Distributors) testified at a 1980 Senate hearing on unitary taxation. In contrast, only one organization, Citizens for Tax Justice, represented the interests of ordinary citizens at that hearing. See 1980 Worldwide Hearing, supra note 230, at III-IV.

Similarly, business interests were represented by six different organizations while individuals were only represented by one organization, the National Taxpayers Union, at a 1987 House hearing on use tax collection. Moreover, five additional witnesses represented particular businesses at that hearing while no individual testified on behalf of consumers at the hearing. See generally Interstate Sales Tax Collection Act of 1987 Hearing, supra note 284.

\textsuperscript{320} The state and local tax hearings were overflowing with testimony from representatives of individual states and groups of states. For example, the hearings on S. 2173 contain testimony from more than 20 different states. S. 2173 Hearing, supra note 227 passim. For a general discussion of state and local governments as interest groups, see ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM (1995).

\textsuperscript{321} See CAMMISA, supra note 320, at 23 (noting that governmental groups are "representative by
bills were introduced in Congress to regulate state taxation of nonresidents. Yet, not a single bill made it to hearing. The absence of hearings on the subject indicates that neither the states nor any other interest group forcefully represented the interests of the nonresidents who would have benefitted from the legislation. In fact, had hearings been held on any of the bills, there is little doubt but that the states would have lobbied against the bills and the nonresidents’ interests.

In addition, the legislative experience in the individual income tax area appears reasonably, but not completely, consistent with public choice theory. As noted above, the model predicts that Congress will enact laws that provide concentrated benefits and diffuse costs but will not enact bills that provide diffuse benefits and concentrated costs. The two laws that Congress enacted that affected state taxation of individuals, Public Law 104-95 and Public Law 95-67, clearly provided concentrated benefits. Specifically, Public Law 104-95, which prohibits states from taxing certain “pension income” of nonresidents, benefitted the select group of individuals who earned pension income in a state that taxed nonresidents on such income and then retired to a state that does not tax such income. Similarly, Public Law 95-67, which prohibits certain state taxation of members of Congress, benefitted the members of Congress who must reside in a state other than the state that they represent in Congress while Congress is in session. In contrast, the fifty plus bills generally regulating state taxation of nonresidents which Congress did not enact benefitted much larger groups of individuals and thus provided much more diffuse benefits.

Public Law 95-67, however, is not necessarily entirely consistent with public choice theory. To the extent that proponents of public choice scholarship contend that legislative behavior is driven by the rank self-interest of legislators, enactment of their very nature” but that they “represent subnational governments themselves in addition to (and sometimes instead of) their citizens”.

322. See supra Section III H.
323. The states’ unwillingness to represent the nonresidents’ interest is hardly surprising in light of the fact that the nonresidents are unlikely to be voters in the state.
324. Tellingly, in one of the two instances in which Congress did enact legislation limiting state taxation of nonresident income, Pub. L. No. 104-95, 109 Stat. 979 (1996), a grass roots organization, RESIST, formed to represent the interest of the discrete group of individuals who benefitted from the legislation. In the other instance in which Congress acted, Pub. L. No. 95-67, 91 Stat. 271 (1977), the legislation personally benefitted members of Congress and they did not need the states to represent their interest.
325. Whether those laws involved concentrated costs or distributive costs depends on whether the states as an entity are taken into account. Each of the statutes imposed a distributive cost on all of the taxpayers in the states that would otherwise have received tax revenue from the individuals who escaped taxation as a result of the legislation. The statutes also imposed a concentrated cost on the states that were prohibited from taxing the individuals who benefitted from the statutes.
326. A 1992 Congressional Research Service Report identified three states, California, Idaho, and Oregon, that were known to tax nonresidents on pension income earned in the state. 1995 Pension Hearing, supra note 92, at 51. Individuals who earned pension income in those three states and then retired to a state that does not tax pension income clearly benefitted from Public Law 104-95. The Report also identified 19 other states whose tax laws authorized the taxation of nonresident pension income, but had not promulgated explicit guidance with respect to whether they would enforce such provisions. Id. Individuals who earned pension income in those 19 states and then retired to a state that does not tax such income might have also benefitted from the legislation.

The law also benefitted the states, such as Nevada, that did not tax individuals on pension income and sought to recruit individuals to the state on that basis.
327. See, e.g., Brennan & Buchanan, supra note 310, at 181 n.7 (contending that amendment to Black Lung Benefits Revenue Act of 1981, which substantially reduced income tax liability of
Public Law 95-67 appears consistent with that theory. Members of Congress obviously personally benefitted from Public Law 95-67 as it prohibits certain states from taxing their income.\textsuperscript{328} To the extent, however, that public choice scholars contend that legislative behavior is driven by the legislator's primary goal of reelection,\textsuperscript{329} Public Law 95-67 appears to contradict that theory. The risk of multiple taxation that led to enactment of Public Law 95-67 was not limited to members of Congress. Indeed, "tens of thousands"\textsuperscript{330} of other individuals faced the same risk of multiple taxation. Nevertheless, Public Law 95-67 only addressed the problem as applied to members of Congress, and members of Congress risked alienating voters by passing special legislation designed solely to benefit themselves.\textsuperscript{331}

Enactment of the statutes prohibiting discriminatory state and local taxation of interstate transportation carriers\textsuperscript{332} also appear reasonably consistent with public choice theory. Just as Public Law 104-95 and Public Law 95-67 clearly provided concentrated benefits, so too did the statutes prohibiting discriminatory state and local taxation of interstate carriers.\textsuperscript{333} The statutes benefitted interstate rail, motor, and air carriers by protecting them from the risk of discriminatory state taxation.\textsuperscript{334}

Congress' failure to enact legislation prohibiting worldwide unitary taxation\textsuperscript{335} appears less consistent with public choice theory. Such legislation clearly would have provided concentrated benefits. Specifically, it would have benefitted the international businesses which were subject to the worldwide combined reporting method and which lobbied heavily in favor of the legislation.\textsuperscript{336} Of course, the states' voluntarily enactment of legislation eliminating worldwide unitary taxation appears reasonably consistent with public choice theory.\textsuperscript{337}

To the extent that public choice scholarship predicts that legislators will tend to avoid legislating if a policy imposes concentrated costs or will try to persuade conflicting groups to reach a compromise in the case of conflicting demand patterns, Congress' enactment of legislation prohibiting state and local head taxes on airline passengers and its failure to enact any of the bills regulating multiple areas of state and

members of Congress, was consistent with public choice theory).  
\textsuperscript{328} See 122 CONG. REC. 22,873 (1976) (Rep. Bauman of Maryland notes that approximately 100 members of Congress would personally benefit from the legislation).  
\textsuperscript{329} See supra note 311.  
\textsuperscript{330} See supra note 311.  
\textsuperscript{331} See supra note 311.  
\textsuperscript{332} See infra Section III(C).  
\textsuperscript{333} Similarly, whether those laws involved concentrated costs or diffuse costs depends on whether the states as an entity are taken into account. See generally supra note 325 and accompanying text.  
\textsuperscript{334} One might also argue that the statutes imposed concentrated costs on the intrastate transportation carriers by removing a competitive advantage they received through the otherwise permissible discriminatory taxation.  
\textsuperscript{335} See infra Section III F.  
\textsuperscript{336} Id. On the other hand, one might argue that Congress' failure to enact legislation prohibiting worldwide unitary taxation was in fact consistent with public choice scholarship. Arguably, such legislation would have imposed concentrated costs as well as concentrated benefits. Specifically, it would have hurt the businesses which competed with the international businesses subject to worldwide unitary taxation. As noted above, public choice scholarship predicts that legislators will tend to avoid legislating if a policy imposes concentrated costs.  
\textsuperscript{337} But see supra note 336.
local taxation and sales and use taxation appears reasonably consistent with that scholarship. Most of that legislation provided relatively concentrated costs and benefits. Specifically, the bills prohibiting state and local head taxes on airline passengers benefitted both the airlines and the airline passengers while they imposed costs on airports. The early bills regulating sales and use taxation benefitted interstate mail order sellers and imposed costs on their competitors while the later bills benefitted the mail order sellers’ intrastate competitors and imposed costs on the interstate mail order sellers. The bills regulating multiple areas of state and local taxation benefitted interstate businesses by imposing uniform limits on when states could tax the income or gross receipts of businesses engaged in interstate commerce and limiting the percentage of multistate business income or capital that states could tax. The bills imposed costs on the intrastate competitors of the interstate businesses by granting the interstate businesses a competitive tax advantage vis-a-vis the intrastate businesses. Congress enacted the prohibition on state and local head taxes on airline passengers as part of a much larger legislative package, and that legislation represented a series of compromises. In fact, Senate Report 93-12 expressly states:

[T]he Committee views S. 38 as an aviation development package—the components of which cannot be separated. We believe that if the prohibition on local head taxes was not part of the total new program, there would be need to re-evaluate the increased Federal funding for airport development projects called for in S. 38. If local taxes on passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program. If local head taxes become a significant airport funding mechanism the public interest may well require a reduction in Federal user taxes and diminution of Federal participation in airport development projects.

In contrast, the interested parties were never able to reach a compromise with respect to the bills regulating multiple areas of state and local taxation and sales and use taxation, and thus no such legislation was enacted.

338. Of course, all of the bills also imposed costs on the states by limiting their ability to tax. Whether that is viewed as a concentrated or diffuse cost depends on whether states are viewed as a separate entity. See generally supra note 325 and accompanying text.

339. S. REP. NO. 93-12, at 1455 (1975). Public Law 105-95 also involved a compromise on the breadth of coverage. Although the first bills introduced on the subject did not define the term “pension income,” by the 1995 hearing on the subject, the testimony focused primarily on the definition of that term. Compare, e.g., S. 2820, 100th Cong. (1988); H.R. 5276, 100th Cong. (1988); S. 434, 101st Cong. (1989) with 1995 Pension Hearing, supra note 92. See also Harriet Hanlon, The Federal Source Tax Law: Gauging the Impact, 10 ST. TAX NOTES 880, 881 (1996) (“Lynn Dudley, vice president of retirement policy with the Association of Private Pensions and Welfare Plans, said the new federal law is a good one and represents a compromise between businesses and the states. The real compromises were made over what constituted a nonqualified plan.”).

340. See generally, S. 2173 Hearing, supra note 227, at 39, 99-100 (1977 & 1978) (Steven Mannear, La. Dep’t of Revenue, expressly acknowledges that a compromise is required for effective legislation; Senator Mathias declares, “The reason we’ve been at this so long is because until now the gap between what state and local governments could tolerate and what the businesses could live with in an interstate tax reform bill seemed to be unbridgeable.”); 1973 State Taxation of Interstate Commerce Hearing, supra note 230, at 1 (In opening the subcommittee hearings, Senator Mondale counsels, “the reason for the failure of Congress to act, among other things, has been the almost total lack of agreement among the interested parties . . . . If, therefore, the subcommittee’s hearings are to be productive, and if these hearings are to lead to a legislative proposal, there should, if possible, be
Overall, the empirical evidence appears reasonably consistent with the public choice theory of legislation. As public choice theory would predict, Congress has enacted legislation in the state and local tax area when such legislation favors cohesive special interest groups and has tended to avoid legislating when legislation would offer diffuse benefits and diffuse costs. Of course, the empirical evidence has not been entirely consistent with public choice theory. For example, Congress has enacted legislation that could harm the legislators' chance of reelection, contrary to at least some public choice scholarship.

V. CONCLUSION

Although few outside academia dispute that we need more uniformity in state and local taxation, it does not appear that Congress is likely to enact legislation mandating more uniformity in state and local taxation in the near future. An empirical study of congressional activity in the state and local tax area suggests that Congress is unlikely to enact legislation mandating more uniformity unless and until states and taxpayers are willing and able to reach a compromise and that such a compromise is unlikely to occur in the near future. Moreover, this empirical evidence is fairly consistent with the public choice theory of legislation which offers little hope that Congress will soon enact legislation mandating more uniformity in state and local taxation.

All, however, is not lost. Relational feminist theory offers some hope that legislation providing for more uniformity in state and local taxation may ultimately be enacted. Relational feminist theory teaches that men and women tend to be profoundly different in their outlook and approach to problems. Men tend to be individualistic and address problems with the "logic of the ladder." They apply abstracted, universalistic principles to problematic situations to create an "ethic of justice." Women, in contrast, tend to be more relational, focus on the "web," and follow an "ethic of care." Their reasoning tends to be grounded in a relational, connected, contextual form that focuses on people as well as problems.

Relationalist feminist theory thus suggests that as women gain power, the female "ethic of care" should gain ascendancy and political decisionmaking should become less self-interested. Accordingly, the theory offers the hope that if someday women gain sufficient power for the ethic of care to balance the ethic of justice, state and

agreement among the interested parties on the principal points of that proposal.

341. Relational feminist theory is "one of the most prominent and widely accepted varieties of feminist and feminist legal thought." Pamela Karlan and Daniel Ortiz, In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Agenda, 87 NW. U. L. REV. 858, 858 (1993). It is not, however, without its critics. See, e.g., id.; CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 38-39 (1987); Joan Williams, Deconstructing Gender, 87 MICH. L. REV. 797, 802-22 (1989).


taxpayer representatives may become sufficiently concerned with the greater good to reach the compromises necessary for legislation providing for more uniformity in state and local taxation." As Suzanne Lebsock has said, "as women come to power[, chances are] a more humane social order will indeed come with them." 345

344. Such legislation may take the form of federal legislation mandating more uniformity in state and local taxation or of voluntary cooperation among the states in enacting uniform legislation.

345. SUZANNE LEBSOCK, THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN 144 (1984). See also 'ABDU'L-BAHA, THE PROMULGATION OF UNIVERSAL PEACE: TALKS DELIVERED BY 'ABDU'L-BAHA DURING HIS VISIT TO THE UNITED STATES AND CANADA IN 1912 182 (2d ed. 1982) ("The world of humanity has two wings—one is women and the other men. Not until both wings are equally developed can the bird fly. Should one wing remain weak, flight is impossible.").