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CONSTITUTIONAL LAW-STATE TAXATION OF FOREIGN COMMERCE-A State Tax, Although Consistent with Commerce Clause Requirements for Interstate Commerce, May Not Be Applied Unilaterally to Foreign Commerce. *Japan Line, Ltd. v. County of Los Angeles*, 47 U.S.L.W. 4477 (U.S. April 30, 1979) (No. 77-1378)

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Case Notes

CONSTITUTIONAL LAW—STATE TAXATION OF FOREIGN COMMERCE—A State Tax, Although Consistent with Commerce Clause Requirements for Interstate Commerce, May Not Be Applied Unilaterally to Foreign Commerce. *Japan Line, Ltd. v. County of Los Angeles*, 47 U.S.L.W. 4477 (U.S. April 30, 1979) (No. 77-1378).

In 1972, six Japanese shipping companies brought suit against the City and County of Los Angeles in the Superior Court for the County of Los Angeles[1] seeking a refund judgment for California ad valorem property taxes they had paid under protest. The tax had been levied on the companies' shipping containers which were physically present in the county's taxing jurisdiction on the March 1 lien date during 1970, 1971, and 1972.[2]

The shipping companies transport cargo by packing it into large metal shipping containers of uniform dimensions. These containers are then loaded onto specially designed ships for transportation over international waters to foreign ports. At these ports facilities exist to store and maintain the containers and, finally, unload them as necessary. They stand idle at these facilities until they are packed with cargo, loaded onto the ships and transported back to Japan. The taxpayers' containers were never permanently within the county's taxing jurisdiction, but were there for an average stay of less than three weeks awaiting either repair or the loading or unloading of cargo. Otherwise, they were in constant transit, and were

[1] The six shipping companies are incorporated under the laws of Japan, and they have their principal places of business and commercial domiciles in that country. These companies operate ocean shipping vessels designed to accommodate large shipping containers; the vessels and containers, owned by the appellants, have Japan as their home port, and are used exclusively as carriers to transport cargo in foreign commerce. Japan Line, Ltd. v. County of Los Angeles, 47 U.S.L.W. 4477, 4478 (U.S. April 30, 1979) (No. 77-1378).

[2] Under CAL. REV. & TAX CODE §§ 117, 405, 2192 (West 1970 & Supp. 1979), any property present in California on the "lien date" of March 1 is subject to an ad valorem property tax. During the three years in question, the county levied property taxes in an amount exceeding $550,000 based on the assessed value of the containers at each "lien date." 47 U.S.L.W at 4478.

exclusively involved in foreign commerce except for some intrastate and interstate transportation of cargo necessary as a continuation of international voyages.[3] All of the companies' shipping containers were subject to property taxes in Japan, while American commercial shippers who owned similar containers appearing intermittently in Japan during the course of international commerce were not subject to a property tax in that country.[4]

The trial court found that tax apportionment between a United States authority and a foreign sovereign was unworkable since no judicial body existed with the power to enforce the apportionment formula; the end result would be multiple taxation of the international carrier involved, a violation of the commerce clause.[5] The trial court adhered to the "home port" doctrine[6] and awarded judgment in the taxpayers' favor.[7] The California Court of Appeal reversed the trial court,[8] and the California Supreme Court affirmed the reversal,[9] rejecting the "home port" doctrine. After these adverse rulings, the taxpayers appealed to the United States Supreme Court, challenging the California tax law as unconstitutional. *Held*: A state tax, although consistent with commerce clause requirements for interstate commerce, may not be applied unilaterally to foreign commerce.

I. THE "HOME PORT" DOCTRINE V. APPORTIONED TAXATION

The Constitution, under the commerce clause,[10] affords a car-

[3] Japan Line, Ltd. v. County of Los Angeles, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977).

[4] 47 U.S.L.W. at 4478.

[5] *See* Scandinavian Airlines Sys., Inc. v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, *cert. denied*, 368 U.S. 899 (1961).

[6] A vessel's home port is the jurisdiction wherein the vessel maintains its registration, is in fact domiciled, and is actually subject to taxation. The "home port" doctrine describes the view held in the past by federal courts that "vessels which are instrumentalities of foreign commerce and engaged in foreign commerce can be taxed in their home port only." 47 U.S.L.W. at 4478. The vessel can be taxed in no other port where it docks temporarily. *Id.*

[7] The opinion of the Superior Court is not officially reported. 47 U.S.L.W. at 4478 n.2.

[8] Japan Line, Ltd. v. County of Los Angeles, 61 Cal. App. 3d 562, 132 Cal. Rptr. 531 (1976).

[9] Japan Line, Ltd. v. County of Los Angeles, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977). For its official opinion, the California Supreme Court adopted a slightly revised version of the Court of Appeal opinion.

[10] "The Congress shall have power . . . to regulate Commerce with foreign

rier[11] who transports goods across state boundaries or between the United States and another country some protection from state taxation. A state does have an interest in deriving revenue from a foreign or interstate carrier that uses available services within that state's jurisdiction; the Supreme Court's gradual recognition of this interest has led to a loosening of exclusive federal control over the power to tax.[12] This loosening, however, has occurred primarily when the subject has been interstate commerce, with the Court saying little about a state's power to tax in connection with foreign commerce.[13] The distinction between foreign and interstate commerce and the state's right to tax each was unclear prior to *Japan Line*; previous case law sheds little light on why the Court chose to limit a state's power to tax foreign commerce while it allowed the state to tax interstate commerce.

A. *The Supreme Court's Development of the "Home Port" Doctrine*

The "home port" doctrine, as first enunciated by the Court in 1854 in *Hays v. Pacific Mail Steamship Co.*[14] originally granted to the domiciliary state, and denied to all other jurisdictions, the right to levy a property tax at full value on a vessel used in inter-

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Nations, and among the several States, and with the Indian tribes . . . ." U.S. CONST. art. I, § 8.

[11] As used in this casenote, the terms "carrier" and "instrumentalities of foreign commerce" generally refer to any foreign-owned and domiciled ocean-going vessel or aircraft that travels international routes exclusively during its course of business. Even though the decision in *Japan Line* deals with ocean-going cargo containers, the fact that the Supreme Court uses the above terms as well as citing cases with both aircraft and ocean-going vessels in issue points to the applicability of the *Japan Line* holding to both admiralty and aviation law.

[12] See text accompanying note 32 *infra*.

[13] See text accompanying note 33 *infra*.

[14] 58 U.S. (17 How.) 596 (1854) (California not allowed to levy a property tax on a New York-owned and registered vessel operating between New York ports and ports of other states, including California). In that case the Court said:

> [T]he domicile of a vessel . . . , or home port, is the port at which she is registered, . . . which must be the nearest to the place where the owners or operators reside. . . . We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

Id. at 596-600.

state or foreign commerce that used the open seas as a passageway between ports.[15] No specific constitutional basis for the doctrine was given in *Hays*.[16] Sixteen years later, in *St. Louis v. Wiggins Ferry Co.*, the doctrine was extended beyond ocean routes to include interstate commercial vessels that traveled exclusively on inland waters.[17] In *Morgan v. Parham*[18] the Court decided that the doctrine was not dependent upon actual taxation in the home port. At this point the purpose behind the doctrine was not the risk of multiple taxation, a burden upon commerce and a violation of the commerce clause, but a concept of exclusive federal jurisdiction once an instrumentality of commerce left its home port for international waters.[19]

Until 1890, the type of route traveled (interstate and international water routes as opposed to intrastate water routes) was the most important factor in determining the applicability of the "home port" doctrine. As technology provided new ways to move commerce, however, the mode of transportation used to move goods became a key factor in the Court's handling of the doctrine. *Pullman's Palace Car Co. v. Pennsylvania*[20] illuminated the distinction between railroad rolling stock and other vessels of interstate commerce. Travel over land, with repeated crossings over various states and no fixed situs,[21] is completely different

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[15] *Id.*

[16] The court relied neither on the commerce clause nor upon the due process clause (the case was decided in 1854). Instead, the doctrine arose from the common law jurisdiction to tax personal property, in full, at the domicile of the owner. 47 U.S.L.W. 4477, 4479.

[17] 78 U.S. (11 Wall.) 423 (1870).

[18] 83 U.S. 471 (1872).

[19] *See id.* at 478. The rule in *Cooley v. Board of Wardens*, 53 U.S. 299 (1851), states that the commerce clause does not prohibit the states from regulating commerce except in those fields wherein the federal Congress has acted or those fields which admit only of one uniform system. 53 U.S. at 299. The Court felt that commerce carried out over international routes and therefore the "home port" doctrine fell into the category of uniform federal regulation. Noting that up to this time there was a lack of congressional action on the subject, the Court in *Cooley* stated that "[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." 53 U.S. at 319. The Court felt that even though Congress had not legislated extensively on this subject, that body still was given the power to do so; it therefore should make use of it. *Id.*

[20] 141 U.S. 18 (1890).

[21] " 'Situs' . . . , for tax purposes . . . means no more than the state wherein

than travel in ships that have a home port and touch other ports only temporarily as they proceed along their international routes. The Court stated that the practical differences between the two modes of transportation gave rise to different constitutional powers of state and federal governments, with international carriers via water being regulated by Congress since these waterways were routes of communication and commerce with other nations.[22] It is at this point that the theory of taxation by "apportionment"[23] developed for the interstate railroads, but the "home port" doctrine remained intact and applied to all vessels using international and interstate water routes.[24]

In 1948, the Court further narrowed the applicability of the "home port" doctrine simultaneously with its growing acceptance of taxation by apportionment. In *Ott v. Mississippi Valley Barge Line Co.*[25] the Court extended a state's ability to tax interstate travel by including vessels traveling exclusively on inland water routes with the already taxed railroad cars, finding no difference between the two modes of transportation.[26] The tax in issue was a Louisiana apportioned tax on tugs, barges, and other river vessels that were domiciled in another state.[27] The court removed applicability of the "home port" doctrine from interstate water routes, while explicitly declining to apply its holding to international water routes.[28] As the Court explained in *Ott*, the "home port" doctrine had been upheld previously because the question of apportionment had never been raised.[29] Even though *St. Louis* had been overruled, the "home

the personal property is physically present must have a sufficient contact or relationship with the property in order to form in fairness a basis for taxing it." Cady v. Alexander Constr. Co., 12 Wis. 2d 236, 107 N.W.2d 267, 270 (1961). *See* Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905).

[22] 141 U.S. 18 (1890).

[23] The "apportionment" doctrine of taxation enables a jurisdiction through which an interstate carrier passes to levy some property tax on that carrier. Various formulae exist to ensure that the vehicle pays a tax that is apportioned among the taxing jurisdictions, theoretically never being taxed at more than full value. This avoids the possibility of multiple taxation and a per se commerce clause violation. *See* Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905); American Refrigerator Co. v. Hall, 174 U.S. 70 (1898).

[24] 141 U.S. 18 (1890).

[25] 336 U.S. 169 (1948).

[26] *Id.* at 174.

[27] *Id.* at 171-72 n.2.

[28] See note 30 *infra.*

[29] 336 U.S. at 173.

port" doctrine was still alive if the vessel traveled on international waters.[30] *Ott* was the last time that the Supreme Court considered the "home port" doctrine prior to *Japan Line.*

B. *The Commerce Clause and State Taxation*

Notwithstanding the contention that an international carrier should be taxed only at its home port, the question still remains whether a state via taxation has the power at all to regulate interstate or foreign commerce when the commerce clause on its face seems to delegate that power solely to the federal government. With *Complete Auto Transit, Inc. v. Brady*,[31] the Supreme Court had partially answered this question, allowing a state to tax interstate commerce provided that certain criteria were met.[32] *Complete Auto* represents the culmination of a more practical and unified approach by the Supreme Court under the commerce clause to determine the validity of a state's power to regulate interstate commerce.[33] Examining the history behind *Complete Auto's* affirmation of the state power to regulate interstate commerce allows some insight as to whether a state enjoys the same power over foreign commerce.

Prior to the drafting of the commerce clause, the framers of the Constitution expressed the notion that interstate and foreign commerce should be immune from state taxation.[34] In *Gibbons v. Ogden*,[35] Justice Marshall defined the premise from which all commerce clause analysis was to proceed:

> What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . [T]he power of

[30] *Id.* at 173-74. In *Ott* the Court stated: "We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters." *Id.* Therefore, the major factor determining the applicability of the "home port" doctrine again became the vessel's choice of route.

[31] 430 U.S. 274 (1977).

[32] *Id.*

[33] 21 How. L.J. 661 (1978).

[34] *See generally* W. Hellerstein, *State Taxation of Interstate Business and the Supreme Court. 1974 Term: Standard Pressed Steel and Colonial Pipeline*, 62 VA. L. REV. 149 (1976).

[35] 22 U.S. (9 Wheat.) 1 (1824).

> Congress to regulate over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[36]

The Supreme Court applied the principle that purely interstate commerce was immune from state taxation until 1938, when in *Western Live Stock v. Bureau of Revenue*[37] the Court decided that the commerce clause was intended to forbid multiple taxation or discrimination against interstate commerce, thereby removing the blanket prohibition of state taxation of interstate commerce.[38] The Court said that, "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."[39] The state tax was allowed for the additional reason that it did not involve a risk "of cumulative burdens not imposed on local commerce."[40]

The theory that a state tax should not create multiple tax burdens nor discrimination while otherwise allowing the state to tax interstate commerce was used by the Court to sustain several state taxes on some phase of interstate commerce.[41] In 1951, however, in *Spector Motor Service, Inc. v. O'Connor*,[42] a state tax on the privilege of doing business in the state was deemed unconstitutional per se even though the tax was non-discriminatory,

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[36] *Id.* at 196-97.

[37] 303 U.S. 250 (1938) (sales tax on the privilege of doing business in New Mexico).

[38] *Id.* at 254.

[39] *Id.*

[40] *Id.* at 256. In Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87-88 (1948), the Court upheld a Mississippi excise tax on the "privilege of exercising corporate functions within the State" because the tax was not discriminatory, the amount of the tax was reasonable, the tax was properly apportioned, and there was no possibility of multiple taxation. Justice Reed drew a distinction between a tax on "the privilege of exercising corporate functions within the State" and a tax on "the privilege of doing interstate business," the latter being unconstitutional under the commerce clause.

[41] Virginia v. Imperial Coal Sales Co., 293 U.S. 15 (1938) (state ad valorem property taxes); Atlantic Lumber Co. v. Commissioner of Corpus & Taxation, 298 U.S. 553 (1936) (franchise taxes); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (electrical generation excise tax); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (gas production excise tax).

[42] 340 U.S. 602 (1951).

fairly apportioned and did not result in multiple burdens on the taxpayer. The major objection to the tax was that "[the states] delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power '[to] regulate Commerce with foreign Nations, and among the several States . . .' "[43] As Justice Frankfurter stated in *Freeman v. Hewit*, "What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce."[44] It was felt that interstate commerce had a "free trade" immunity from state taxation.[45]

Complete Auto reversed *Spector*. In question was a Mississippi tax on the "privilege of engaging or continuing in business or doing business within this state. . . ."[46] The appellant auto company maintained that its business within Mississippi[47] was an integral part of interstate commerce, and this tax on the privilege of doing business was per se unconstitutional under *Spector*.[48] The Court in *Complete Auto*, however, said that even a tax on the privilege of doing business would be sustained against a commerce clause challenge as long as the activity taxed had a sufficient nexus with the state, and the tax itself did not discriminate against interstate commerce, was fairly apportioned, and related to services provided by the state.[49] The Court in *Complete Auto* reexamined all the prior doctrines regarding a state's power to tax interstate commerce and enunciated a basis for constitutional analysis under the commerce clause of a state tax on interstate commerce. Interstate commerce was protected without creating a blanket prohibition against taxation by a separate state.

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[43] *Id.* at 608.

[44] 329 U.S. 249, 256-57 (1946).

[45] 430 U.S. 274, 278 (1977).

[46] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 275 (1977), *quoting* from MISS. CODE ANN. § 27-65-13 (1972). The tax was measured by the gross receipts from the business.

[47] The company's trucks were in Mississippi for an average time of 48 hours. 430 U.S. at 279.

[48] 430 U.S. at 277-78. *See* Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

[49] 430 U.S. 274 (1977).

II. Japan Line, Ltd. v. County of Los Angeles[50]

The Supreme Court in *Japan Line* was faced with the problem of deciding whether a state unilaterally could secure tax revenue from an exclusively foreign carrier, when the Constitution on its face vests the power to govern foreign commerce solely with the federal government. This problem had never been posed directly to the Court before, and the parties' arguments reflected two rational lines of thought having historically strong legal backgrounds. There was little certainty as to exactly which path the Court would follow.

The shipping companies claimed that even though the "home port" doctrine had been somewhat eroded over the years, it still remained applicable when the taxed property was foreign-owned, foreign-domiciled, and operated exclusively over international routes. The county, however, maintained that the "home port" doctrine had been abandoned,[51] and since apportioned taxation by states of interstate carriers had been affirmed by the United States Supreme Court, foreign instrumentalities could also be taxed using a non-discriminatory apportionment scheme.

Justice Blackmun in *Japan Line* chose not to follow exactly the courses offered in either the taxpayers' or the county's argument. Recognizing that the "home port" doctrine had no constitutional basis, and that the doctrine itself had lost its efficacy in the light of the Supreme Court cases which had been abandoning it, to reaffirm the questionable doctrine as a rule of law would be theoretically unsound. Following the "home port" doctrine as stated in *Hays*,[52] logically, would bar any taxation by a non-domiciliary state of a carrier that was using that state's services, allowing only the home port state to tax the carrier. It would not matter if the carrier were domestically or foreign-owned or engaged in domestic or international commerce.[53] Blackmun specifically limits the *Japan Line* holding to "instrumentalities of commerce that are owned, based, or registered abroad and that are

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[50] 47 U.S.L.W. 4477 (U.S. April 30, 1979) (No. 77-1378).

[51] See text accompanying note 18 *supra*.

[52] 58 U.S. (17 How.) 596 (1854).

[53] 47 U.S.L.W. at 4479.

used exclusively in international commerce,"[54] and summarily rejects the "home port" doctrine.[55]

The Court also rejected the contention that the California statute, since it met the four-fold *Complete Auto* test, should be upheld as constitutional.[56] The problem was that the taxed containers were not involved in purely interstate commerce, but were instrumentalities of foreign commerce. Since Congress' power to "regulate Commerce with foreign nations"[57] was the issue presented here, something more was required in the Court's estimation than the four-fold test for state taxation of interstate commerce presented in *Complete Auto*. The Court felt that the real and great risk of multiple taxation coupled with the necessity that the United States regulate foreign trade in a uniform manner was an important consideration when evaluating a state's power to tax foreign commerce.

It has long been held that multiple taxation of an instrumentality of interstate commerce may violate the commerce clause.[58] By not allowing the instrumentality to be subjected to a tax beyond its full value, and apportioning the tax among the various jurisdictions in a fair manner so as to not go above this full value, the risk of multiple taxation and any commerce clause objection on this point theoretically would have been eliminated.[59] The

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[54] The Court in *Japan Line* states:

> There is no need in this case to decide currently the broad proposition and whether mere use of international routes is enough, under the 'home port doctrine' to render an instrumentality immune from tax in a nondomiciliary State. . . . Accordingly, we do not reach questions as to the taxability of foreign-owned instrumentalities engaged in interstate commerce, or of domestically-owned instrumentalities engaged in foreign commerce.

47 U.S.L.W. at 4480.

[55] *Id.*

[56] *Id.*

[57] U.S. CONST. art I, § 8, cl. 3.

[58] Note this language in footnote 17 of *Japan Line*: "Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere *risk* of multiple taxation would invalidate a state tax, or whether the risk would be evaluated differently in foreign, as opposed to interstate commerce." 47 U.S.L.W. at 4482 n.17. *See* Evco v. Jones, 409 U.S. 91 (1972); Central R.R. v. Pennsylvania, 370 U.S. 607 (1962); Standard Oil Co. v. Peck, 342 U.S. 382 (1952); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1948); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 304 (1938).

[59] "The rule which permits taxation by two or more states on an apportion-

problems of multiple taxation can be avoided when the apportionment formulae can be enforced; this power of enforcement exists between taxing entities who must answer to the courts of the United States.[60] Such enforcement of apportionment cannot be guaranteed, however, when a foreign government is one of the parties levying a tax; these nations have by right and custom the power to tax carriers within their jurisdiction at full value.[61] Even the United States Supreme Court cannot ensure apportionment of taxation at not exceeding full value between the various taxing entities within the United States and its foreign trading partners.[62] No judicial mechanism exists that has this power. Even though a tax may be apportioned fairly to allow for services rendered by a state to a taxpayer who has established his presence there within that jurisdiction, a foreign taxpayer suffers the risk of multiple taxation between its foreign domicile and the state in which it does business, a burden the Court is clearly powerless to deal with, and one which is clearly repugnant to the commerce clause.[63]

Uniformity in federal policy is essential when dealing with foreign commerce,[64] a uniformity that can be achieved only by vesting the power to regulate foreign commerce exclusively with the federal government.[65] As the Court points out, this desire for

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ment basis precludes taxation of all of the property by the state of the domicile . . . otherwise there would be multiple taxation of interstate operation." Standard Oil Co. v. Peck, 342 U.S. 382, 384-85 (1952).

[60] 336 U.S. 169 (1948).

[61] Scandinavian Airlines Sys., Inc. v. County of Los Angeles, 56 Cal. 3d 11, 17, 17 n.3, 363 P.2d 25, 28, 28 n.3, 14 Cal. Rptr. 25, 28, 28 n.3, *cert. denied*, 368 U.S. 899 (1961). Foreign aircraft engaged in international commerce are subject to taxation in their country of origin, and this taxation is on an unapportioned basis.

[62] 47 U.S.L.W. at 4481.

[63] *Id.*

[64] *Id.* "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." Board of Trustees v. United States, 289 U.S. 48, 59 (1933).

[65] The Court notes at this point that even though the federal government draws its power to regulate commerce with other nations and between the States from the same phrase within the commerce clause, the federal government is given more latitude in regulating foreign commerce. "Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation." Bowman v. Chicago & Northwestern Ry., 125 U.S. 465, 482 (1888). Power of Congress over foreign commerce is "exclusive and abso-

uniformity has been evidenced by international agreements,[66] and consistently distinguishes ocean-going traffic and aviation from other methods of interstate commerce.[67] The California tax would defeat this federal uniformity in a variety of ways which the Court feels are real and probable hazards that must be avoided. For instance, there are few methods to avoid disputes over apportionment formulae between a foreign government and a state which has levied an apportioned tax on a foreign carrier.[68] Retaliation against American-owned international carriers doing business with foreign governments is a very real threat, one that would be avoided by invalidating the tax.[69] In addition, the Court notes that the Cali-

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lute." Butterfield v. Stranahan, 192 U.S. 470, 492-93 (1904); regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected." Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875).

[66] As one commentator has stated: "The Customs Convention on Containers, signed by both Japan and the United States, is an attempt to streamline handling procedures for the shipping containers in an effort to promote its more efficient use." Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507 (1974).

[67] "Vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature." Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 24 (1841) (*quoting* Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 470 (1874)).

[68] There is a strong risk of multiple taxation that would result from overlapping formulae for appointment. *See generally* Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962).

[69] In its brief, Appellant argues that:

> On February 17, 1978, representatives of the Government of Japan conferred with the United States Department of State . . . to express concern over the imposition by California of property taxes upon the containers of the Taxpayer. An *aide memoire* confirming such concern was delivered by the Government of Japan to the State Department on March 27, 1978.

In addition, the governments of Denmark, France, Finland, the United Kingdom, Germany, Norway and the Netherlands jointly communicated with the Department of State that "they shared the concern expressed by the Government of Japan regarding the imposition of personal property tax upon foreign owned containers" and that this act was viewed "with considerable apprehension." This apprehension by foreign governments was not only directed at the property tax on containers, but also at the proposed personal property tax upon aircraft owned by foreign persons and used exclusively in foreign commerce. A letter filed by the Government of Mexico with the Department of State on June 15, 1978, related extreme protest over the proposed aircraft tax, citing that the United States' treaty obligations would be contravened because Article 24 of the Convention on International Civil Aviation, I.C.A.O. Doc. 8632-C/968, allows foreign aircraft to enter the country temporarily free of duty. Canada, Denmark, France, Germany, Japan, the Netherlands, New Zealand, Norway, Sweden and fornia tax would thwart efforts by the governments of the United States, Japan, and its other trading partners to handle containers specifically in a uniform manner.[70] The Court eventually states that when other states follow California's example, the foreign instrumentalities will be subject to varying degrees of taxation depending on which port they enter.[71] This would destroy any possibility of uniformity, preventing the federal government from "speaking with one voice."

The Court's interpretation of the commerce clause and its application to instrumentalities of foreign commerce is consistent with recent precedent set for evaluating state and local regulations. As set out in *Michelin Tire Corp. v. Wages*[72] and *Department of Revenue v. Association of Washington Stevedoring Cos.*,[73] the validity of state or local regulation must be considered within the context of the purposes sought to be achieved through the commerce clause:

> The Framers of the Constitution thus sought to alleviate three main concerns. . . . The Federal Government must speak with one voice when regulating commercial relations, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of another State by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.[74]

the United Kingdom, all parties to the Convention, filed similar letters. Specifically threatened is the agreed-upon notion of "reciprocal exemption from duties" for temporarily entering another country party to the convention. Brief for Appellant at 10-11, Japan Line, Ltd. v. County of Los Angeles, 47 U.S.L.W. 4477 (U.S. April 30, 1979) (No. 77-1378).

[70] The Customs Convention on Containers allows any shipping container temporarily imported from a foreign country to be admitted into all signing countries free of all duties and taxes whatsoever chargeable by reason of importation. 47 U.S.L.W. 4477, 4482 (U.S. April 30, 1979) (No. 77-1378).

[71] *Id.*

[72] 423 U.S. 276 (1976).

[73] 435 U.S. 734 (1978).

[74] Although 62.4% of passengers between the United States and foreign countries are U.S. citizens, domestic airlines enjoyed only 51.8% of the market in 1960 (compared with 74.7% of the market in 1950). It is claimed that "[o]ne foreign airline operating from the U.S. west coast to Europe. . . . diverts more than $3,000,000 annually from U.S. transcontinental airlines—an amount greater

As *Japan Line* states, the commerce clause's purpose was to eliminate the possibility of multiple taxation and ensure uniformity in the regulation of commerce. Even if these concerns do not arise in the interstate context, they certainly do when the California tax is applied to foreign commerce.

III. CONCLUSION

In *Japan Line, Ltd. v. County of Los Angeles* the United States Supreme Court addressed the issue of whether or not a state has the right to levy a property tax unilaterally on an instrumentality of foreign commerce, and it found the basis for denying this power in the commerce clause. In finding a constitutional basis for denying this power, the Court put an outer limit on the ability of a state to tax on an "apportionment" and "nondiscriminatory" theory of taxation. The foreign owners of ships or airplanes that travel international routes exclusively and which are taxed in their foreign domicile have a defensible position against multiple taxation by states, no longer having to rely on the "home port" doctrine. Most importantly, the federal government can act in determining foreign commercial policy in a uniform manner without the threat of a state unilaterally intervening. The various trade agreements entered into by the United States with its trading partners have been strengthened since neither party need fear encroachment from a state taxing authority.

Japan Line does nothing to weaken the *Complete Auto* analysis for state taxation; it simply sets out a second test, the major criterion being what type of commerce a state is attempting to tax. *Complete Auto* refers to a state's power to tax *interstate* commerce, while *Japan Line* expands the test to include secured uniformity and elimination of the risk of multiple taxation when the subject is the state's power to tax *foreign* commerce. The type of tax levied could be a major criterion, but neither *Complete Auto* nor *Japan Line* indicated that it is. At issue in *Complete Auto* was a use and sales tax on the "privilege of doing business," while California in *Japan Line* was levying an ad valorem property tax. However, the Court indicates that if the California property

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than the entire net profit of the domestic trunklines in 1960." AV. WEEK & SPACE TECH., May 1, 1961, at 69-70.

tax had been tested in the interstate commerce area rather than the foreign commerce area, the statute would have been held constitutional. It is what is being taxed that is in issue, not the type of tax, property, use, sales, income, or otherwise.

An important question still remains, however, in regards to a state's participation in international commerce. The foreign instrumentalities do partake of services from the state, be it at the airport or dock, and the states must be paid for these services in some manner.[75] Domestic carriers pay their own way.[76] Since *Japan Line*, a state's only recourse is to the United States government for reimbursement. The constitutional demands of the commerce clause have been elevated over the necessity of a state obtaining revenue for services rendered to a foreign commercial carrier; the Court has created an area of tax immunity for foreign carriers that *Complete Auto* denied to interstate carriers. It seems unfair to a domestic carrier that it must pay for the services it uses, while the foreign carrier does not; *Japan Line* necessarily puts Congress in the position of removing this seeming burden on domestic commerce.

Robert B. Luther

[75] Brief for Appellant at 8, Japan Line, Ltd. v. County of Los Angeles, 47 U.S.L.W. 4477 (U.S. April 30, 1979) (No. 77-1378).

[76] *Id.* at 9.

Current Literature