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Japan Lines Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)

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Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

In *Japan Line, Ltd. v. County of Los Angeles*,[1] the Supreme Court elucidates a new standard to determine whether a state tax on international commerce is valid under the Commerce Clause. Briefly, the criteria are as follows:

1. the tax must be applied to an activity with a substantial nexus to the taxing state;
2. be fairly apportioned;
3. not discriminate against interstate commerce, and
4. be fairly related to the services provided by the state.[2]

Further, a court must consider the possibility of multiple tax burdens and the impairment of federal uniformity. If either of the last two precepts is present, the state tax is unconstitutional under the Commerce Clause.[3]

In formulating this standard, the *Japan Line* Court abandoned the "Home Port" rule. This was done in order to develop a more unified approach to determining the constitutionality of the exercise of state taxing power under the Commerce Clause. The ruling in *Japan Line* reflects an awareness of the need to examine the practical economic effects of state taxation on the open international market. The new standard is one consistent with that in the area of interstate commerce, of constitutional adjudication designed to restrain state tax powers and to protect certain federal interests without creating an excessively broad zone of tax immunity in the area of foreign commerce. In the instant case, the state tax was held to be unconstitutional. The new standard does not, however, require this result in all cases involving international commerce. The Court is free to find a different result should any of the factors significant to the decision change.

In 1970, 1971 and 1972, Japan Line, Ltd. and five other Japanese corporations,[4] engaged in the operation of vessels used exclusively in foreign commerce between the United States and Japan, were notified of tax assessments based upon a California statute levying an ad valorem personal

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1. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).
2. *Id.* at 444–45, *citing*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
3. 441 U.S. at 451 (1979).
4. Other appellants are Kawasaki Kisen Kaisha, Ltd., Mitsui O. S. K. Lines, Ltd., Nippon Yusen Kaisha, Showa Line, Ltd., and Yamashita Shinnihon Steamship Co., Ltd.

property tax[5] on the corporations' shipping containers.[6] The six Japanese companies were incorporated under the laws of Japan, having their principal places of business and commercial domiciles in that country. The corporations' vessels were registered in Japan and had their home ports there; they were specifically designed to accommodate large shipping containers. The containers, like the ships, were owned, based and registered in Japan and were used exclusively for hire in the transportation of cargo in foreign commerce.[7] All containers were subject to property tax in Japan and were, in fact, taxed there.[8]

A number of the corporations' containers were present in the County of Los Angeles and the City of Los Angeles on dates used by the municipalities for tax computation purposes.[9] The containers passed through the municipali-

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5. CAL. REV. & TAX CODE, § 201 (West) states: "All property in this state, not exempt under the laws of the United States or of this state, is subject to taxation under this code." CAL. REV. & TAX. CODE § 205 (West) states:

> (a) General Movable Property is all property which is intended to be, and is moved from time to time from one location to another . . . Movable property has situs where located on the lien date if it has been in the country for more than six of the twelve months immediately preceding the lien date and if it is to remain in or be returned to the country for any substantial period during the twelve months immediately succeeding the lien date . . . Property which does not have a situs where located on the lien date pursuant to the previous paragraph has situs at the location where it is normally returned between uses or, if there is no such location, at the principle place of business of the owner.

6. A container is a permanent reusable article of transport equipment . . . durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, storage aboard ship, carriage, discharge from ship, movement and transfer of large numbers of packages simultaneously by mechanical means to minimize the costs and risks of manually processing each package.

Simon, *The Law of Shipping Containers*, 5 J. MARITIME L. & COMM. 507, 513 (1974). *See* Customs Convention on Containers, Art. 1(b), May 18, 1957 (1969), 20 U.S.T. 301, 304, T.I.A.S. No. 6634. Although containers may be as small as 1 cubic meter (35.3 cubic feet), 49 C.F.R. § 420.3(c)(5) (1977), they are typically eight feet high, eight feet wide, and between eight and 40 feet long. Simon at 510. *See also* 441 U.S. at 436.

7. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, App. 31 (1979). In general, all containers carried by plaintiff's vessels, including the subject containers, upon arriving from Japan are discharged from said vessel in the Port of Los Angeles and either (a) transported by truck or fail to the ultimate inland destination of the imported cargo contained therein; or (b) unloaded in Los Angeles harbor.

8. *Id.*

9. Under California law, a property tax year commences on the first day of July of each year. The tax is however applicable to all property within the jurisdiction on the preceding first day of March, which is commonly referred to as the "lien date." CAL. REV. & TAX CODE § 401.3, § 219. 441 U.S. at 437.

ties' jurisdictions intermittently. Some of the containers were in California at any given time. A container's average stay was less than three weeks.[10]

The municipalities levied property taxes in excess of $550,000 on the assessed value of the containers present on March 1 of the three years in question.[11] The Japanese companies paid the taxes under protest and sued for a refund in the Superior Court for the County of Los Angeles.[12] The trial court awarded judgment in the corporations' favor, holding that the containers were instrumentalities of foreign commerce and therefore, under the "Home Port" doctrine of *Hays v. Pacific Mail Steamship Company,* 58 U.S. (17 How.) 596 (1855), were immune from property taxation except in Japan.[13] The court concluded that the application of appellee's taxes in derogation of the "Home Port" doctrine subjected international commerce to multiple taxation, and thus, was unconstitutional under the Commerce Clause.[14] The court also held that imposition of a property tax by the municipalities was inconsistent with the provisions of the Treaty of Friendship, Commerce & Navigation between the United States and Japan.[15]

The court of appeals, following its decision in *Sealand Service Inc. v. County of Alemeda,*[16] rejected the "Home Port" rule as anachronistic and held

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10. The number of containers present in California on any arbitrarily selected date is approximately 3/52 of the total number of containers that enter California at any time during the tax year. The number of containers physically present in Los Angeles County was representative of the number of containers present in Los Angeles County on other dates throughout the tax year. Brief for U.S. as Amicus Curiae at 3.

11. The property tax rate applied to the containers during the years involved in this case was approximately 11% of the assessed value, and the assessed value of the property ordinarily is 25% of fair market value. 441 U.S. 434, J.S. App. A, § 16a. The taxes levied by the county and city of Los Angeles for 1970 through 1972 are as follows: Japan Line, Ltd. $100,632.85; Kawasaki Kisen Kaisha, Ltd., $117,616.44; Mitsui O. S. K. Lines, Ltd., $111,255.25; Nippon Yusen Kaisha, $110,175.04; Showa Shipping Co., Ltd. $50,640.69; Yamashita Shinnihon Steamship Co., Ltd., $69,416.39 (excluding interest). 441 U.S. at App. 34 (1979).

12. 441 U.S. at 437.

13. The opinion of the Superior Court was not officially reported. 441 U.S. at 437. *See* 441 U.S. at App. 39 (1979).

14. "In so holding, the Superior Court followed Scandinavian Airlines System 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) (ruling that ad valorum property tax levied by California upon aircraft owned, based and registered abroad and used exclusively in international commerce, was unconstitutional under the Commerce Clause)." 441 U.S. at 438.

15. 441 U.S. at App. 39 (1979).

16. 12 Cal. 3d 772, 528 P.2d 56 (1974). In *Sea Land,* the California Supreme Court held that the state could levy an apportioned ad valorem property tax on cargo shipping containers used mainly in foreign commerce but owned by a shipping company domiciled in another state.

that instrumentalities of foreign commerce were subject to apportioned property taxation.[17] In reversing the judgment of the trial court, the Court of Appeals rejected the argument that a different result was required because of the containers' foreign ownership and exclusively international use, dismissed any argument as to multiple taxation,[18] and concluded that the treaty provisions had no application to state or local property taxation of instruments of foreign commerce.[19]

The Supreme Court of California affirmed the decision of the Court of Appeals with some expansion and editorial emendations as its own opinion.[20] The Court stated "the threat of double taxation from foreign taxing authorities has no role in Commerce Clause considerations of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement."[21] Deeming the containers foreign ownership and use irrelevant for purposes of constitutional analysis,[22] the Court rejected appellant's Commerce Clause challenge and sustained the validity of the tax as applied.[23]

The U.S. Supreme Court noted jurisdiction under 28 U.S.C. 1257(2)[24] and reversed the ruling of the Supreme Court of California, striking down state

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17. Japan Line, Ltd. v. County of Los Angeles, 61 Cal. App. 3d 562, 563, 132 Cal. Rptr. 531, 533 (1976).

18. *See* note 98 *infra* and accompanying text.

19. Japan Line, Ltd. v. County of Los Angeles, 132 Cal. Rptr. at 534–35.

20. Japan Line, Ltd. v. County of Los Angeles, 141 Cal. Rptr. 905, 571 P.2d 254 (1977). It is important to note that Justice Rehnquist dissented from the Supreme Court's opinion in *Japan Line* "substantially for the reasons set forth by Justice Manuel in his opinion for the unanimous Supreme Court of California", 441 U.S. at 457.

21. 141 Cal. Rptr. at 908, 571, P.2d at 257.

22. *Id.* at 908–09, 571 P.2d at 257–58.

23. *Id.* at 911. 571 P.2d at 288–59.

24. 441 U.S. at 441. Decisions of "the highest court of a state" which involve "the validity of a statute of any state on the ground of its being repugnant to the Constitution" are reviewable "by appeal" in the U.S. Supreme Court when the state court "decision [was] in favor of [the statute's] validity." 28 U.S.C. § 1257 (2) (1970). In *Japan Line*, "appellants drew in question the validity of California's ad valorem property tax, contending the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax." Id. at 440. "Under these circumstances, [the Supreme] Courts appellate jurisdiction would seem manifest." *Id.* at 440." "[A] state statute is sustained within the meaning of § 1257 (2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Id.* at 441.

taxation of the instrumentalities of foreign commerce[25] as unconstitutional under the Commerce Clause. In so doing, the Court declined to rest its decision upon the "Home Port" doctrine,[26] focusing instead upon the practical effects of such a tax. The Court perceived the issue in *Japan Line* as "whether instrumentalities of commerce that are owned, based and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorum property taxation by a state."[27] The Court announced that in order to answer this question not only is a consideration of the *Complete Auto Transit*[28] test necessary — *i.e.*, the tax must be applied to an activity with a substantial nexus to the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the state[29] — but the possibility of multiple tax burdens and of the impairment of federal uniformity must also be considered.[30] If the state tax contravenes either of the last two criteria, it is unconstitutional under the Commerce Clause.[31]

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25. *Id.* at 454. The court held shipping containers constituted instrumentalities of foreign commerce both "as a matter of fact and as a matter of law." *Id.* at 446. Appellants' containers entered the United States pursuant to the Customs Convention on Containers, Customs Convention on Containers Art. I(b) May 18, 1956 1969 20 U.S.T. 301, T.I.A.S. No. 6634, which grants containers "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions," provided they are used solely in foreign commerce and are subject to re-exportation. 20 U.S.T. at 304. Similarly, 19 CFR § 10.41a(a)(3) (1978) designates containers "instruments of international traffic," with the result that they "may be released without entry or the payment of duty" under 19 U.S.C. § 1322(a). *See* 19 CFR § 10.41a(a)(1) (1978). A bilateral tax Convention between Japan and the United States associates containers with the vehicles that carry them, and provides that income "derived by a resident of a Contracting State . . . from the use, maintenance, and lease of containers and related equipment . . . in connection with the operation in international traffic of ships or aircraft . . . is exempt from tax in the other Contracting State." Convention Between the United States of America and Japan for the Avoidance of Double Taxation, [1971,] 23 U.S.T. 967, 1084–1085, T.I.A.S. No. 7365. 441 U.S. at 446 n.10.

26. 441 U.S. at 443. *See* discussion of "Home Port" doctrine at 325 *Infra.*

27. *Id.* at 444.

28. Complete Auto Transit v. Brady, 430 U.S. 374 (1977).

29. 441 U.S. at 445.

30. *Id.* at 451. The questions to be asked are: (a) whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation; and (b) whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments."

31. *Id.*

THE SUPREME COURT'S ANALYSIS

The Supreme Court's analysis focused first upon the inappropriateness of application of the "Home Port" Doctrine established in *Hays v. Pacific Mail Steamship Co.*[32] In *Hays,* the state of California assessed an ad valorem personal property tax upon a New York company's steamships used to transport passengers and cargo between Central America and ports in California and Oregon. The steamships remained in California for short periods of time. The Court declared the tax invalid and announced the rule that the "home port" of a vessel was its "situs" for taxation purposes; thus, no state other than New York, where the vessels were registered, had "jurisdiction" to tax them.[33]

It must be noted that this decision was rendered before the fourteenth amendment to the U.S. Constitution took effect, and that the court did not discuss any question in terms of constitutional principles. The statute involved was the statute of California for the taxation of property generally. The case was decided upon what the Supreme Court assumed to be the law of California as to common law jurisdiction to tax tangible movable property and as to the scope and effect of the California taxation statute.

As a corollary, the Court assumed that only New York had the power to tax the vessels.[34] The grounds for this assumption are obscure; whether the taxing power resides in the state of the port of registry or in the owner's domicile was left unresolved, as the two coincided in New York.

Prior to the decision in *Japan Line,* at least one court[35] interpreted the "Home Port" rule of *Hays* as having a constitutional basis; reference to the lack of a taxable situs[36] giving credence to the claim that the doctrine was placed, in part, upon due process considerations;[37] a statement in *Hays*[38] "to

32. 58 U.S. (17 How.) 596 (1855).

33. *Id.* at 599–600. "We are satisfied that the State of California, had no jurisdiction over these vessels for the purpose of taxation . . . 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." This ruling was termed the "Home Port" doctrine. *See Limitations on State Taxation of Foreign Commerce: The Contemporary Validity of the Home Port Doctrine,* 127 U. PA. L. REV. 817 (1979).

34. Page, *Jurisdiction to Tax Tangible Movables,* 1945 WIS. L. REV. 125, 144 (1945).

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

36. Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596, 598 (1854).

37. *See supra* note 35.

38. U.S. (17 How.) 596, 599 (1854).

the effect that regulation of foreign and interstate commerce belongs to the [national] government, indicat[ing] that the Court also predicated the doctrine, in part, upon the commerce clause, even in the absence of any federal enactment on the subject."[39] Rejection of this interpretation of the "Home Port" rule by the *Japan Line* Court apparently rests on the erosion of the "Home Port" doctrine in cases after *Hays*.[40] The *Japan Line* Court recognized that in the area of interstate commerce "the 'Home Port doctrine' as a rule for taxation of moving equipment has yielded to a rule of fair apportionment among the states."[41] Consistent application of apportionment taxation to the instrumentalities of interstate commerce did not, however, necessarily require the Court in *Japan Line* to abandon the "Home Port" rule with regard to the instrumentalities of foreign commerce.

THE HOME PORT RULE AND FOREIGN COMMERCE

The *Hays* opinion stated that a vessel operating on the high seas in interstate commerce is subject to admiralty law, even when lying in domestic port, other than her port of registry, and as such differs from vessels which remain wholly within national waters.[42] The concept appears to have been that vessels operating upon international waters were subject to a completely different set of rules than vessels operating in national waters. Thus, it was argued

> the earliest statement of the "Home Port" doctrine granted the state of domicile the power to tax in full, denied to all other jurisdictions any power or right to tax, except as might arise under the police power, when a vessel engaged in either interstate or foreign commerce used the open seas as a highway between ports.[43]

Prior to *Japan Line*, the court never specifically addressed the issue of state property taxation of ocean going vessels and their instrumentalities engaged solely in foreign commerce. The Court, however, has been careful to distinguish the case of ocean going vessels engaged in foreign commerce in dicta. These statements are found in the interstate commerce cases establishing the apportioned taxation rule.[44]

39. *See supra* note 35.
40. 441 U.S. at 443.
41. *Id.* at 442.
42. 58 U.S. (17 How.) 596, 598 (1855).
43. *See supra* note 35.
44. Pullmans Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Ott v. Mississippi Valley Barge Line, 336 U.S. 169 (1949); Braniff v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1954).

In *Pullman Palace Car Co. v. Pennsylvania,*[45] the Court recognized a non-domicilary state's power to tax land-based instrumentalities of interstate commerce in a decision involving railroad rolling stock. The Court distinguished railroad rolling stock from ocean going vessels: whereas ships travel on navigable waters, have a home port and touch land only incidentally, rolling stock has no fixed situs and continually traverses the various states.[46] The *Pullman* court differentiated between federal interests in interstate and foreign commerce: "the vehicles of commerce by water are instrumentalities of communication with other nations, the regulation of them is assumed by the national legislature."[47]

The Supreme Court next addressed the issue of state apportioned-taxation at each port of call versus full taxation at the home port in a decision involving taxation of water carriers engaged in interstate commerce.[48] In *Ott v. Mississippi Valley Barge Line,*[49] the Court permitted imposition of an apportioned tax upon vessels engaged in inland river traffic.[50] The line of decisions which had established that vessels are taxable solely by the domiciliary state[51] was distinguished on the ground that when the "Home Port" rule was formulated, there had yet to be developed the concept of taxation on an apportioned basis.[52]

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45. 141 U.S. 18 (1891).

46. *Id.* at 23.

47. *Id.* at 24. The court permitted Pennsylvania an apportionment method of taxation.

48. *Ott, see supra* note 44. Prior to *Ott* the Court decided Northwest Airlines v. Minnesota, 322 U.S. 292 (1944), a case involving a fleet of airplanes owned and operated by a Minnesota corporation, registered in that city as the home port, and operating from that base in interstate commerce. The Court held that the Minnesota property tax levied on a full ad valorem basis did not violate either the commerce clause or the due process clause. *Id.* at 295. Although the result suggests adherence to the "Home Port" doctrine, the Court did not expressly address the issue of apportionment taxation by other states and was so divided that no majority opinion could be written.

49. 336 U.S. 169 (1949).

50. *Id.* at 174–75.

51. The "Home Port" doctrine was reaffirmed as to ocean going vessels, in Morgan v. Parham, 83 U.S. (16 Wall) 471, 476–77 (1873) (reliance on commerce clause by the Court to invalidate nondomiciliary state property taxation of coastal vessels). "[I]t is an interference with the commerce of the country not permitted to the states." *Id.* at 479. Similarly, the doctrine was applied in Southern Pacific Co. v. Kentucky, 222 U.S. 63, 69 (1911). It was applied to vessels moving in inland waters in St. Louis v. Ferry Co., 78 U.S. (11 Wall) 423 (1871), and in Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 421–23 (1906).

52. *See* notes 89–92 and accompanying text *infra*.

The limitation imposed by the due process clause was succinctly stated in *Ott*: "So far as due process is concerned, the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State."[53] The Court conceded that the Commerce Clause demands a proper apportionment of value among the various states in which the instrumentality has become susceptible to ad valorem taxation in order to mitigate the risk of multiple taxation.[54] In *Ott*, the court declared "[w]e do not reach the taxability of ocean carriage but confined our decision to transportation on inland waters."[55]

Then, in *Braniff Airways v. Nebraska State Board of Equalization and Assessment*,[56] the Court sustained an apportioned ad valorem property tax levied by a nondomiciliary state on airplanes of an interstate carrier making regularly scheduled stops within the state. Eighteen stops per day pursuant to a regular schedule over fixed routes constituted "sufficient contact" with the state to satisfy the due process requirement. The Court held that the Commerce Clause presented no bar because interstate commerce was not burdened. "[T]he commerce clause does not immunize interstate instrumentalities from all state taxation, . . . such commerce may be required to pay a non discriminatory share of the tax burden."[57]

In *Braniff*, the challengers of the apportioned tax analogized their position to cases involving ocean going vessels, relying on *Hays* in particular. The Court, however, found a closer analogy between planes flying interstate and boats that ply the inland waters.[58] While *Braniff* represents the culmination of the erosion of the "Home Port" rule with regard to interstate

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53. 336 U.S. 169, 174–75 (1949). The Court inferentially overruled the *St. Louis v. Ferry Co.* decision, *see supra* note 52, holding that there was no distinction in terms of the due process clause for the commerce clause between vessels and railroad cars when each moved between the States by exclusively inland routes. *Id.* at 174.

54. *Id.* at 174. Until *Ott*, the Commerce Clause problem of multiple taxation had not been expressly considered.

55. *Id.* at 173–74.

56. 347 U.S. 590 (1954). Prior to the decision in *Braniff*, the court decided Standard Oil v. Peck, 342 U.S. 382 (1952), holding that a defined part of the domiciliary corpus, an inland water fleet owned by an Ohio corporation, registered in Ohio and traversing in non domiciliary waters, had acquired a taxable situs elsewhere. Following *Ott*, the fleet could be taxed by the nondomiciliary states on an apportionment basis. The domiciliary state could not impose a full ad valorem personal property tax as such imposition would result in multiple taxation. 342 U.S. at 384–385. *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 983–4 (1962) (hereinafter cited as *Developments*).

57. 347 U.S. at 597–98.

58. *Id.* at 600. The latter was declared taxable in Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

commerce, by specifically rejecting the analogy to ocean going vessels, the *Braniff* court left the "Home Port" rule intact with regard to state taxation of the instrumentalities of foreign commerce.

Stating that "to rehabilitate the . . . doctrine . . . would be somewhat odd . . . and to hold . . . that [it] survives would be to prove too much,"[59] the Supreme Court in *Japan Line* declined to cast its analysis of the instant case in the mold of the "Home Port" rule. The Court refuted the viability of the "Home Port" doctrine with regard to instrumentalities of foreign commerce.[60]

> If an ocean going vessel could indeed be taxed only at its home port, taxation by a non-domicilary state would be barred, regardless of whether the vessel were domestically or foreign owned and regardless of whether it were engaged in domestic or foreign commerce.[61]

Application of the "Home Port" Doctrine would be both over-inclusive and under-inclusive — allowing the use of international routes to render an instrumentality of commerce immune from taxation in a nondomiciliary state,[62] while failing to address the issue of apportionment tax liability according to the protection and other benefits received from that state.[63] The court abandoned the rule, and in so doing, left itself free to formulate a new standard.

APPLICATION OF THE *COMPLETE AUTO TRANSIT v. BRADY* TEST[64]

Secondly, the Supreme Court focused upon application of *Complete Auto Transit* to the facts of *Japan Line.*

> Appellees contend that cargo shipping containers, like other vehicles of commercial transport, are subject to property taxation, and that the taxes imposed here meet Complete Auto's fourfold requirements. The containers, they argue, have a "substantial nexus" with California because some of them are present in that State at all times; jurisdiction to tax is based on "the habitual employment of the property within the State," *Braniff,* 347 U.S. at 601, and appellants' containers habitually

59. 441 U.S. at 443.
60. *Id.*
61. *Id.*
62. *Id.* at 443–44.
63. *State Taxation of International Air Transportation,* 11 STAN. L. REV. 518, 530 (1959).
64. 430 U.S. 274 (1977). *See* 9 SETON HALL L. REV. 910 (1978).

are so employed. The tax, moreover, is "fairly apportioned," since it is levied only on the containers' "average presence" in California. The tax "does not discriminate," thirdly, since it falls evenhandedly on all personal property in the State, indeed, as an ad valorem tax of general application it is of necessity nondiscriminatory. The tax, finally, is "fairly related to the services provided by" California, services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society.

These observations are not without force. We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, Complete Auto would apply and be satisfied, and our Commerce Clause inquiry would be at an end.[65]

Although the court in *Japan Line* did not emphasize the background of *Complete Auto Transit*, an analysis of the case is useful to show the Court's move toward a more uniform approach to the problems of state taxation of interstate and foreign commerce. *Complete Auto Transit* involved a Mississippi tax on the privilege of doing business within the state levied on every business transporting property for compensation. The tax was measured by the gross receipts from the business. The taxpayer, a Michigan corporation, hauled motor vehicles to dealers in Mississippi from a railroad depot in Jackson, Mississippi, where they had been shipped from out of state assembly plants. The vehicles were normally loaded on Complete's trucks and delivered to Mississippi dealers within forty-eight hours after arrival in Jackson. Complete alleged that its transportation services were an integral part of interstate movement, so that the imposition of the tax violated the commerce clause.[66] In light of the assumption made by both the Mississippi court and the Supreme Court that the transportation services under consideration constituted interstate rather than intrastate commerce, the taxpayer's contention — at least on its face — did not lack force.

The question of the limits of state taxation of interstate commerce has been addressed by the Court from the earliest days of constitutional interpretation. Chief Justice Marshall recognized the pervasive nature of congressional control over interstate commerce in his landmark opinion in *Gibbons v. Ogden*.[67] The Court, however, soon acknowledged that states could

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65. 441 U.S. at 445.
66. 430 U.S. at 277 (1977).
67. 22 U.S. (9 Wheat.) 1 (1824). The Court in *Gibbons* held that the right of the plaintiff to navigate in the waters between New York and New Jersey in contravention of a New York statute which purported to confer exclusive navigation rights upon certain individuals, *Id.* at 2, was within the meaning of commerce as used in the Con-

exercise some authority over those aspects of interstate commerce which, while within the scope of Congressional power, were not in their nature "national."[68] In *Cooley v. Board of Wardens,*[69] the Court prescribed the inquiry into the subject matter of a regulation: whether the federal interest in the freedom of interstate commerce required uniformity.[70] If so, any state regulation was prohibited, even in the absence of express congressional action.[71] If, however, the subject matter was such that a state's regulations would not interfere with the federal interests protected by the commerce clause and the subject matter was not explicitly addressed in congressional legislation, the states were free to regulate.[72]

Because the Court first interpreted the commerce clause as a charter to maintain "free trade" in interstate and foreign commerce,[73] one of the fundamentals of the Commerce Clause doctrine was that an enterprise doing exclusively interstate business could not constitutionally be subjected to a state tax on the privilege of doing business in a particular state.[74]

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stitution. *Id.* at 189–93. Chief Justice Marshall asserted that when a state attempts "to regulate commerce . . . among the several states, it is exercising the very power . . . granted to Congress." *Id.* at 199. The Court found "great force in the argument" that the power "'to regulate' implies . . . full power over the thing to be regulated . . . excluding necessarily, the action of all others that would perform the same thing". *Id.* at 209. While it was acknowledged that, in regulating its internal affairs, a state might enact laws which appeared to regulate commerce it was concluded that any such law which conflicted with legislation enacted by Congress would be invalid. *Id.* at 209–10. *See* 9 SETON HALL L. REV. 910, 912 n.15; *See generally* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 445–47 (1827); P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 22–23 (1953).

68. Cooley v. Board of Wardens, 53 U.S. (12 How.) 298, 319 (1851). In *Cooley,* the Court was confronted with the validity of a state statute regulating navy pilotage. *Id.* at 311–312. In upholding the statute, the Court recognized a distinction between aspects of commerce more properly regulated by local authorities and those which require a "uniform system" of regulation. *Id.* at 319. The Court concluded that the regulation of pilots was "local" in nature and as such, was best provided for "by as many laws as the legislative discretion of the Several States should deem applicable." *Id.*

69. *See supra* note 68.

70. *Id.* at 318, 319.

71. *Id.*

72. *Id.* at 319–21.

73. Freeman v. Hewit, 329 U.S. 249, 256 (1946).

74. *See* Memphis Steam Laundry Cleaner v. Stone, 342 U.S. 389, 393 (1952); Nelson Randolf v. Kent, 279 U.S. 245 (1929); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1443 (1977) (hereinafter cited as *State Taxation*).

In later cases, the Court greatly narrowed the scope of this tax immunity and developed a multiple taxation doctrine.[75] The privilege concept was, however, never explicitly abandoned;[76] and this practice led to a distinction between cases that became increasingly gossamer.[77] In the light of these

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75. For example, in Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948), the Court revoked the privilege by identifying "local incidents" of interstate business which the states could properly tax. *Id.* at 86–96.

76. In Spector Motor Services, Inc. v. O'Connor, 340 U.S. 602 (1951), the Court invalidated a Connecticut tax assessed against a corporation found to be engaged in "exclusively interstate" business. The Court ruled that any tax upon the privilege of engaging in interstate commerce impinged upon the congressional taxing power and thereby rendered the tax unconstitutional. *Id.* at 608–610. In contrast, the Court appeared to sanction state taxation of exclusively interstate business in several decisions summarily affirming state court rulings. *See* Field Enterprises, Inc. v. State, 47 Wash. 2d 852, 289 P.2d 1010 (1955), *aff'd per curiam,* 352 U.S. 806 (1956); West Pub. Co. v. McCoglan, 28 Cal. 2d 705, 166 P.2d 861, *aff'd per curiam,* 328 U.S. 823 (1946). The inconsistency of these developments reached its climax in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

> "In *Northwestern,* the court held that the commerce clause did not preclude a state from imposing a fairly apportioned, non-discriminatory net income tax upon an out-of-state corporation engaged exclusively in interstate commerce in the taxing state. At the same time, however, the Court reaffirmed its decision in *Spector.* [The distinction appears to have been the formal subject of the tax.] In *Northwestern* the subject was the corporation's net income, in *Spector* it was the privilege of doing business. Since the measure of the taxes at issue in both cases was the corporations net income, the immunity that exclusively interstate commerce enjoyed from state taxation apparently depended upon whether [the taxing statute was properly labeled.]"

State Taxation, supra note 74 at 1444. Illustrative of this result was the Court's handling of the *Railway Express* cases. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954). In Railway Express Agency, Inc. v. Virginia I, 347 U.S. 359 (1954), the Court invalidated application of a tax levied for the privilege of doing business on a multistate corporation. 347 U.S. at 360–364. In Railway Express Agency, Inc. v. Virginia II, the Court upheld tax with the same economic effect where denominated as a franchise tax. 358 U.S. at 445.

77. The Court's analysis in Colonial Pipeline Co. v. Triangle, 421 U.S. 100 (1975), illustrates this development. In *Colonial,* an interstate pipeline taxpayer, conducting an exclusively interstate business in Louisiana, was held taxable for the privilege of doing business "in corporate form." 421 U.S. at 101. The case presented a particularly dramatic illustration of the illusory nature of the privilege concept because the same taxpayer had successfully resisted imposition of an earlier version of essentially the same tax that had been imposed on the privilege of doing business, rather than the privilege of doing business in a corporate form. Thus, with a minimum of legislative surgery, a state assembly was able to deprive the taxpayer of his tax immunity, thereby lending credence to Justice Blackmun's statement that to distinguish between "the conduct of business in interstate commerce" and "the conduct of business in interstate commerce in corporate form" as the incidence of a taxing statute was taxation by semantics. *Id.* at 115 (Blackmun, J., concurring). *See* 70 Nw.U.L. REV. 835 (1976).

inconsistent developments, the Court decided *Complete Auto Transit v. Brady*.[78]

Finding a trend "toward a standard of permissibility . . . based upon . . . actual effect,"[79] Justice Blackmun, for the Court, described the gradual erosion of the privilege doctrine in the face of the emerging principle that a tax would be sustained against a commerce clause challenge as long as it is "applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."[80] The Court offered no original modes of analysis for the evaluation of a given tax, substantially reaffirming a pragmatic approach developed in prior cases, but extending the approach to cases involving purely interstate business.[81] While *Complete Auto Transit* signaled a move away from formalism in addressing tax issues, nothing in the case was indicative of an approach intended to grant great latitude to the states in their taxation of interstate commerce. The Court was careful to note that taxes of this type present an "increased danger" of "forbidden effect" upon interstate commerce, requiring close judicial scrutiny.[82] Further, the Court indicated that privilege taxes were not unique in this regard and that property and income taxes could be used discriminatorily as well.[83] By focusing entirely upon the way in which a particular state or local action was thought likely to disrupt the open national market, the Court was, in fact, adopting a more unified coherent approach to the restraints imposed by the Commerce Clause on the state taxing power of interstate commerce. Thus, it can be argued that where state ad valorem property taxation contains certain inherent dangers requiring careful scrutiny by the Court to determine whether it produces a forbidden effect upon commerce, the *Complete Auto Transit* test must be applied. The application of *Complete Auto Transit* to the disposition of *Japan Line* exemplifies this argument. The Court, in stating that "assuming, *arguendo*, . . . the tax passes muster under *Complete Auto*",[84] appears to be applying the *Complete Auto Transit* considerations to *all* forms of state taxation of commerce. No other conclusion is justifiable in light of the application of a test formulated to determine whether a state doing business tax is validly imposed upon interstate commerce, to the question of whether a state ad valorum property tax is validly imposed upon instrumentalities of foreign commerce.

78. 430 U.S. 274 (1977).
79. *Id.* at 281.
80. *Id.* at 277-78, 287.
81. *Id.* at 277-78.
82. *Id.* at 288-89 n.15.
83. *Id.*
84. 441 U.S. at 451.

FURTHER CONSIDERATIONS NECESSARY IN THE AREA OF FOREIGN COMMERCE

The *Japan Line* court rejected the argument that Commerce Clause analysis is identical regardless of whether interstate or foreign commerce is involved.[85] Finding that the defendant's shipping "containers . . . were instrumentalities of foreign commerce, both as a matter of fact and as a matter of law,"[86] the Court held that when construing Congress' power to regulate commerce with foreign nations, a more extensive constitutional inquiry is required.[87]

The Fear of Multiple Taxation.

In considering state taxation of interstate and foreign commerce, particularly instrumentalities of such commerce, a primary focus of analysis under the Commerce Clause has been the problem of actual or potential taxation by several jurisdictions. Multiple taxation places interstate or foreign commerce at a disadvantage because intrastate activities do not bear the same burden.

Generally, the apportionment principle in the area of interstate commerce is that a non-domiciliary state may tax a percentage of the value of the transient personal property, under a formula which relates the tax to the use of the property within the state. Multiple taxation is avoided by requiring the domiciliary state to reduce the proportion of its tax base by the proportion of the tax base upon which the other states can constitutionally levy,[88] whether or not such other states have actually levied a tax.[89] The principle does not, however, resolve certain difficulties — various states levying a tax on an apportioned basis may utilize different formulae, each using the taxing method most advantageous to itself.[90] Nevertheless, the Court views the apportionment method of taxation as a satisfactory resolution to the states' desire to have instrumentalities of interstate commerce "pay their own way," and the principle that interstate commerce should not be burdened with multiple taxation.[91]

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85. *Id.* at 446.
86. *Id. See supra* note 26 and accompanying text.
87. *Id.*
88. This statement may require refinement. 57 NW. U.L. REV. 92, 94–94 n.17 (1962).
89. Northwest Airlines v. Minnesota, 322 U.S. 292, 326 (1944); Standard Oil Co. v. Peck, 342 U.S. 382 (1952).
90. R. POSNER, ECONOMIC ANALYSIS OF LAW 515–16 (2d ed. 1977).
91. Braniff Airways, Inc. v. Nebraska State Bd. of Equaliz. & Assess, 347 U.S. 590, 598 (1954).

Constitutional principles governing the tax liability of foreign-owned, registered and taxed shipping containers differ from the constitutional principles applicable to shipping containers operating solely in interstate commerce. In the context of foreign commerce, the *Japan Line* Court focused upon the fact that "neither this Court nor this nation can ensure full apportionment when one of the taxing entities is a foreign sovereign."[92]

> [T]he absence of any authoritative tribunal with the capacity to ensure that the aggregation of taxes is not computed on more than full value dictates that the interest of a state in taxing international [shipping containers] on a parity with purely national [carriers] be sacrificed, lest international shipping operations be substantially impaired.[93]

Inherent in this argument is a recognition of the court's inability to control taxation by foreign countries, and of a "risk of a double tax burden to which domestic commerce is not exposed and which the commerce clause forbids."[94]

Secondly, the Court, in considering the multiple tax issue, found certain facts to be controlling: the containers were owned, based and registered in Japan, they were used exclusively in foreign commerce, and California's imposition of the tax resulted in a multiple tax in fact.[95] "Appellant's containers not only 'are subject to property tax . . . in Japan', . . . but, . . . 'are, in fact, taxed in Japan'. Thus if appellee's levies were sustained, appellants 'would be paying a double tax'."[96]

The Supreme Court rejected appellee's contention that any multiple taxation in this case is attributable, not to California, but to Japan.[97] The

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92. 441 U.S. at 447.

93. *Id.* at 448. *See supra, Developments* note 56, at 986.

94. 441 U.S. at 448.

95. *Id.* at 451, 452.

96. *Id.* at 452. The Court stated "we have no occasion here to decide under what circumstances the mere risk of taxation would invalidate a state tax or whether this risk would be evaluated differently in foreign, as opposed to interstate commerce." *Id.* n.17.

97. *Id.* at 454. Prior to the decision in *Japan Line*, it was argued that the problem of unapportioned taxation by foreign countries is better viewed as the question of "whether there is discrimination against foreign commerce." Scandinavian Airlines Sys. Inc. v. County of Los Angeles, 14 Cal. Rptr. 25, 45, 363 P.2d 25, 45, 14 Cal. Rptr. 25, 45, *cert. denied*, 368 U.S. 899 (1961) (Traynor, J., dissenting). Justice Traynor, dismissed the problem as

> erroneously attribut[ing] to such taxation the risk of discrimination. Actually it is attributable to the freedom of foreign countries, not permitted to our own states, to adopt rules of their own that can result in multiple tax burdens. The court cannot prevent foreign countries from taxing instrumentalities of foreign commerce own-

Court found that California's tax must be evaluated "in the realistic framework of the custom of nations."[98] Appellees argued that even if California's tax results in multiple taxation, that fact is insufficient to condemn a state tax under the Commerce Clause.[99] In rejecting this argument, the Supreme Court found that the instant case involved a situation where true apportionment did not exist and could not be policed by the Court at all. "Even a slight overlapping of tax — a problem that might be deemed *de minimus* in a domestic context — assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."[100]

Other arguments support the Supreme Court's position. It has been stated that:

> even if there are no local competitors and so no discrimination in the ordinary sense, duplicative taxation remains inimical to the open economy because it places a final premium on confining operations to one or a few states, thus discouraging multistate operations.[101]

This argument is equally applicable to encumbrances in foreign commerce. Duplicative taxation in foreign commerce would discourage full trade among nations and disrupt the open international market. Secondly, unique considerations are present when vessels or their instrumentalities engage in international commerce. International carriers spend a considerable amount

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> ed by their domicilaries even if those instrumentalities are permanently located here, just as it cannot prevent foreign countries from taxing American aircraft temporarily abroad even though they have been taxed at full value at the domicile of their owners here . . . It does not follow that the states must forego the power to impose taxes that are not in themselves discriminatory . . . Congress remains free to prohibit altogether state taxation of instrumentalities of foreign commerce.

Id. at 45, 363 P.2d at 45.

The logic of Justice Traynor's dissent was eventually adopted in *Sea Land Service*. *See supra* note 16 and accompanying text. It was also adopted by the California court in *Japan Line*, *see supra* note 20, and by Justice Rehnquist in *Japan Line*, 441 U.S. at 457. *See supra* note 25 and accompanying text. While the argument constitutes a challenging attack upon the entire framework for analyzing multiple burdens in foreign commerce, the Court in *Japan Line* found Justice Traynor's focus to be too narrow, application of the *Complete Auto* criteria by the Court refutes Traynor's argument. 441 U.S. at 445.

98. 441 U.S. at 454.

99. *Id.* at 455.

100. *Id.* at 456.

101. *See supra Developments*, note 56, at 964.

of time beyond the territorial limits of all taxing states, and there is at present, no established rule for apportioning time spent on the high seas.[102]

These considerations, and those articulated by the Supreme Court, indicate the federal interest in avoiding multiple taxation in the area of foreign commerce. After consideration of the fourfold requirements of *Complete Auto Transit,* the presence of multiple tax burdens is enough to render any state tax upon instrumentalities of foreign commerce unconstitutional under the Commerce Clause.[103]

Federal Uniformity

Alternatively, after an examination of *Complete Auto Transit's* fourfold requirements, impairment of federal uniformity will similarly render such a state tax unconstitutional under the Commerce Clause.[104] The Court in *Japan Line* based its argument for the need of federal uniformity in the area of taxation of foreign commerce upon an argument that the probative reach of the Commerce Clause is greater in the area of foreign commerce. "Although the Constitution, Art. I § 8, cl. 3, grants Congress power to regulate commerce 'with foreign nations' and among 'the several states' in parallel phrases, there is evidence that the founders intended the scope of the foreign commerce power to be greater."[105] Constitutional and judicial support for this proposition is not strong.[106] There is, however, authority for the proposition that the exercise of Congress' authority to regulate commerce with foreign nations may not be limited, qualified, or impeded to any extent by state action.[107] The regulation of "vehicles of commerce by water" is "assumed by the national legislature."[108] The Court, relying on *Micheline Tire Corp. v. Wages,*[109] phrased

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102. *Id.* at 986.

103. 441 U.S. at 451.

104. *Id.*

105. *Id.* at 448.

106. *See* Note, 11 STAN. L. REV. 518, 525–526 (1959).

107. Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 56, 57 (1933).

108. Pullmans Palace Car Co. v. Pennsylvania, 141 U.S. 18, 24 (1891). *See supra* notes 45–48, and accompanying text.

109. 423 U.S. 276 (1976). In *Michelin,* the Court examined the policies animating the Import Export Clause: "The federal government must speak with one voice when regulating commercial relations with foreign governments . . ., import revenues were to be the major source of revenue of the Federal government and should not be diverted to the state; and harmony among the states might be disturbed unless seaboard states" . . . were prohibited from trying tax on goods in transit. *Id.* at 285–286 (footnotes omitted). The *Japan Line* court noted that policies animating the Commerce Clause and the Import Export Clause are much the same. 441 U.S. at 449, n.14.

the standard as "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."[110]

Pertinent to the determination that federal uniformity is required is the possibility of international disputes, the creation of assymetry in the international tax structure and tax rataliation by foreign countries.[111]

> California's tax . . . creates an assymetry in international maritime taxation operating to Japan's disadvantage[112] . . . The risk of retaliation by Japan . . . is acute . . .[113] Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing state, so that the nation as a whole would suffer.[114]

The Court found that California, by its unilateral act, could not be permittedly to place these impediments before the nation's conduct of its foreign relations and its foreign trade.[115]

Furthermore, the presence of treaties indicating federal executive and congressional regulation of foreign trade[116] requires the need for federal

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110. 441 U.S. at 449.

111. *Id.* at 450.

"Retaliation by some nations could be automatic. West Germany's wealth tax statute, for example, provides an exemption for foreign-owned instrumentalities of commerce, but only if the owner's country grants a reciprocal exemption for German-owned instrumentalities. Vermogensteuergesetz (VStG), Art. 1, § 2(3), reprinted in I Bundesgesetzblatt (BGBl) 950 (Apr. 23, 1974). The European Economic Community (EEC), when apprised of California's tax on foreign-owned containers, apparently determined to consider "suitable counter-measures." Press Release, Council of the European Communities, 521st Council Meeting — Transport (Luxembourg, June 12, 1978), p. 21."

Id. at 453, n.21.

112. *Id.* at 453.

113. *Id.*

114. *Id.* at 450. *Cf.* Chy Lung v. Freeman, 92 U.S. 275, 279 (1876) (invalidating California's bond requirement for Chinese immigrants):

> [I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?

Id. at 450–51 n.16.

115. *Id.* at 453.

116. *Id.* at 452.

uniformity to be considered in the instant case. Under the Customs Convention on Containers, which the United States and Japan have signed, containers temporarily imported are admitted free of all duties and taxes chargeable by importation.[117] "The Convention reflects a national policy to remove impediments to the use of containers as 'instruments of international traffic.' "[118] Were the court to sustain appellees imposition of the tax, other states would follow California's example. Foreign containers would be subjected to various degrees of multiple taxation, depending upon which American ports they enter. The *Japan Line* court found that this result would make "speaking with one voice" impossible.[119]

Appellees argument that any multiple taxation created by the California tax is capable of being cured by Congressional action or international agreement[120] was found by the Court to defeat the cause it aimed to promote.[121] "For to say that California has created a problem susceptible only of congressional — indeed, only of international — solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential."[122]

The Supreme Court also dismissed several policy arguments presented by appellees.[123] These arguments included California's loss of revenue, non-compensation for services the state undeniably renders the containers and the resulting discrimination to domestic commerce.[124] The Court, citing *Cooley v. Board of Wardens*,[125] essentially referred the state to Congress for resolution of these issues.[126] Perhaps the federal uniformity criteria of *Japan Line* is application of the rule of *Cooley* — whether a commerce problem is one "admitting of only one uniform system of regulation."[127] Apparently the Supreme Court is able to elucidate a new standard in the area of state taxation of the instrumentalities of foreign commerce, but is unable to provide a federal remedy to appellees commensurate with the issues they present.

Because either the presence of multiple tax burdens or the need for federal uniformity could always invalidate a tax levied on instrumentalities

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117. See *supra* note 25.
118. 441 U.S. at 453. *See* 19 U.S.C. § 1322(2).
119. 441 U.S. at 453.
120. *Id.* at 454.
121. *Id.* at 455.
122. *Id.*
123. *Id.* at 456–7.
124. *Id.* at 456–7.
125. 53 U.S. (12 How.) 299 (1851).
126. 441 U.S. at 457. *See supra* notes 69–73 and accompanying text.
127. *See supra* note 125.

of foreign commerce, the two criteria are applied alternatively by the Court where the entire combination of *Japan Line* factors are present: foreign-owned *and* foreign-based *and* foreign-registered *and* engaged solely in foreign commerce *and* taxed by the foreign country.[128] In the instant case, the shipping containers of *Japan Line* are completely exempt from state taxation in the United States. The California tax could not withstand scrutiny under either of the additional criteria that a tax on foreign commerce must satisfy.[129] The Court's decision is significant because of the articulation of a new standard and because the new standard allows the Court to find a different result wherever the factors are changed — for example, domestically-owned and based shipping containers engaged in foreign commerce need be exempt from state taxation only to the extent of taxes actually assessed in foreign countries.[130]

CONCLUSION

Abandonment of the "Home Port" rule reduces the confusion which previously prevailed in the area of taxation of international shipping transportation. This move was necessary if, in fact, the Court is developing a more unified approach to determining the constitutionality of the exercise of state taxing power under the commerce clause. The disposition of *Japan Line* reflects this intent and reflects the Court's awareness of the need to examine the practical economic effects of state taxation on the open market. Requiring application of the *Complete Auto* test to the area of state ad valorem property taxation suggests the standard will be applied to any form of state taxation of commerce. The tax must

1. be applied to an activity with a substantial nexus to the taxing state,
2. be fairly apportioned;
3. not discriminate against interstate commerce; and
4. be fairly related to the services provided by the taxing state.

This standard is both a restraint upon state taxing power and a guarantee of non-discriminatory treatment to the instrumentalities of

128. 441 U.S. at 444, 451–452.

129. *Id.* at 451.

130. Thus, courts could avoid a result such as that in Flying Tiger Lines Inc. v. County of Los Angeles, 51 Cal. 2d 314, 333 P.2d 323 (1958), wherein it was held that Los Angeles County must forego taxing its domiciliary aircraft to the extent that a foreign country may do so, even if no tax has in fact been levied by such foreign country. *See generally supra* note 88, at 92, 105–106.

interstate and foreign commerce. Consideration of multiple tax burdens and of the impairment of federal uniformity — either of which is sufficient to render a state tax unconstitutional — protects federal interests in the area of foreign commerce. *Japan Line* is essentially an examination of the practical effects of state taxation of international commerce. In the instant case, such taxation was held to be unconstitutional under the Commerce Clause. The decision, however, should not be construed as creating an excessively broad zone of tax immunity. The new standard elucidated in *Japan Line* leaves the Court free to find a different result should any factors change.

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