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Constitutional Limitations on State Taxation of Foreign Commerce: *Japan Line, Ltd. v. County of Los Angeles*, 99 S. Ct. 1813 (1979)

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NOTE

Constitutional Limitations on State Taxation of Foreign Commerce

Japan Line, Ltd. v. County of Los Angeles
99 S. Ct. 1813 (1979)

Six Japanese shipping firms (hereinafter appellants) paid, under protest, an ad valorem property tax levied by the City and County of Los Angeles upon shipping containers [1] hired for exclusive use in foreign commerce. Appellants were incorporated under the laws of Japan, had their commercial domiciles and principal places of business in Japan, and paid taxes levied by the government of Japan on the full value of the containers. Suit was brought in the Superior Court of Los Angeles seeking a refund of the taxes collected.[2] The trial court awarded judgment for the plaintiffs-appellants upon the basis of the "home port" doctrine [3] and on the additional ground that the California

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1. The term "shipping containers" has been defined as follows:

> 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, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package.

Simon, *The Law of Shipping Containers*, 5 J. MARITIME L. & COMM. 507, 513 (1974), *quoted in* Japan Line, Ltd. v. County of Los Angeles, 99 S. Ct. 1813, 1815 n.1 (1979) (hereinafter Japan Line).

2. The Superior Court's opinion is not officially reported.

3. The "home port" doctrine was first introduced in Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1855) (hereinafter Hays), which held that only the state wherein a vessel had its home port could validly tax that vessel. The term home port was defined as "the domicile of a vessel . . . at which she is registered" and which, by New York law, had to be "nearest to the place where the owner or owners reside." *Id.* at 598. Although the wording used in *Hays* appears clearly to equate home port with port of registry, later cases have interpreted the term differently. If a vessel has not acquired a tax situs in another state, "the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment . . . ." Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 421 (1906). "The solution of the question where her home port is, when it arises, depends wholly upon the locality of her owner's residence and not upon the place of her enrollment." *Id.* at 422. *See generally* Page, *Jurisdiction to Tax Tangible Movables*, 1945 WIS. L. REV. 125.

tax contravened the U.S. Constitution's Commerce Clause.[4] The Court of Appeals reversed, concluding that the home port doctrine was anachronistic and that an apportioned, nondiscriminatory State property tax was constitutionally valid.[5] The California Supreme Court affirmed the Court of Appeals decision.[6] Having jurisdiction under 28 U.S.C. § 1257(2),[7] the United States Supreme Court, *held* reversed: when a state seeks to tax the instrumentalities of foreign commerce, a more elaborate inquiry is required than that which is necessary when interstate commerce is involved. In addition to inquiries of tax situs, apportionment, and nondiscrimination,[8] when international commerce is involved, one must further consider whether a tax creates a substantial risk of international multiple taxation or prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments." Because California's ad valorem property tax failed these additional tests, it was found unconstitutional under the Commerce Clause.[9]

The Court did not rely on the home port doctrine in striking down California's ad valorem property tax. Although finding it unnecessary to examine this doctrine, the Court strongly implied that

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4. U.S. CONST. art. I, § 8, cl. 3: "Congress shall have power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

5. Japan Line, Ltd. v. County of Los Angeles, 132 Cal. Rptr. 531 (1976), *aff'd*, 20 Cal. 3d 180 (1977).

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

7. 28 U.S.C. § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> . . .
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> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The requirements are clearly met here because California's tax statutes were challenged as being unconstitutional and the California Supreme Court upheld them. Therefore, the Court's jurisdiction is assumed.

8. These Commerce Clause inquiries have been formulated as follows: if a state tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate (foreign) commerce, and is fairly related to the services provided by the state, it will not be deemed to be an impermissible burden on interstate (foreign) commerce. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

9. Japan Line, Ltd. v. County of Los Angeles, 99 S. Ct. at 1823, 1824 (1979).

the rehabilitation of the rule as a tool of Commerce Clause analysis was unlikely. The Court assumed that Commerce Clause considerations would be satisfied if interstate commerce were involved, therefore making the tax constitutionally valid. However, when foreign commerce is involved, the constitutional inquiries which must be made are more extensive than those necessary when only domestic commerce is being considered. The Court further reasoned that the apportionment rule of taxation, which has permitted interstate commerce to be taxed by several jurisdictions, was inapplicable. The foundation for the Court's prior acceptance of this rule was its ability to ensure that all potential taxing jurisdictions would apportion their taxes. In an international context, however, this ability is absent. Since an apportioned state tax might still result in double taxation, the Commerce Clause would be violated. The Court also reasoned that because international trade is a matter of special national concern, national uniformity in the area must be unimpaired by state action. Any other conclusion would prevent the nation from "speaking with one voice" in the regulation of foreign commerce. For these reasons, prior case law analysis in the area of taxation of interstate commerce is inadequate when applied to foreign commerce.

The tension existing between the Commerce Clause and a state's right to regulate certain aspects of commerce has resulted in extensive litigation. Although taxation is not regulation *per se,* it is incidental regulation, and a state may not regulate interstate commerce.[10] The United States Supreme Court initially drew a distinction between subjects of a "local" nature, and those requiring "national uniformity."[11] In later cases, the Court established more refined guidelines to determine whether constitutional limitations were being violated by state taxation. The lines drawn have often been fine ones because commerce is, in and of itself, both a national and a local concern. Although the manner and extent to which states may tax interstate commerce has been relatively well-defined, the extent to which these

10. If a tax meets certain criteria (*see* note 8 *supra*), then it will not be deemed to be a regulation of interstate commerce. However, the burden which is imposed by a tax may have the effect of regulating commerce since it may tend to restrict the flow of goods among the various states. A state's right to tax property within its boundaries may only be exercised within constitutional bounds. When these limits are exceeded, the regulatory aspects of the tax are deemed to be dominant and no longer merely incidental, thus rendering the tax unconstitutional. *See* Case of the State Freight Tax, (15 Wall.) 232 (1872), wherein a state tax was held to be a regulation of interstate commerce.

11. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851).

principles apply to foreign commerce had never before been presented to the Supreme Court.[12] In this respect, *Japan Line* is a case of first impression and establishes the criteria by which state taxation of foreign commerce is to be constitutionally judged. It establishes two further Commerce Clause tests, in addition to those applicable to interstate commerce, which must be met in order for a state tax upon foreign commerce to be upheld.

This case may be best understood within an historical perspective, which approach this Note will follow.

I. Historical Background

A. The Home Port Doctrine

The home port doctrine was first enunciated in *Hays v. Pacific Mail S.S. Co.*,[13] where the United States Supreme Court struck down a California ad valorem property tax which had been levied upon a New York company's twelve steamships. The steamships were engaged in interstate commerce between New York and California via Panama. The vessels were regularly, but only temporarily, within California's jurisdiction. The company was incorporated under the laws of New York, where all stockholders resided, and where the vessels were registered and taxed. The vessels remained in California only long enough to unload their cargo and undergo repairs for the next voyage. The Court held the tax invalid because the ships were found not to have acquired a tax situs in California. The only state which could levy a tax upon the vessels was New York, where the ships were registered and, therefore, had their home port. Underlying the Court's opinion was the belief that the vessels did not have sufficient contacts with the state of California to outweigh the interests of the state of New York and the nation as a whole:

> They [the vessels] are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand . . . . And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board,

12. The confusion which has plagued this area is evident among the California decisions leading up to *Japan Line*. *See* Scandinavian Airlines Sys. v. County of Los Angeles, 56 Cal. 2d 11, 14 Cal. Rptr. 25, 363 P.2d 25, *cert. denied*, 368 U.S. 899 (1961); *contra* Sea-Land Service, Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal. Rptr. 448, 528 P.2d 56 (1974).

13. Hays, 58 U.S. at 596.

> independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states.[14]

Emphasizing the lack of a sufficient jurisdictional nexus between the vessels and the state of California, the Court noted that admiralty law draws a distinction between vessels lying at their home port and vessels lying at some other port.[15] The vessels were said to often be subjected to a "different set of principles" when lying at a "foreign" port; [16] admiralty law governed at a foreign port, whereas state law governed at the home port.[17]

This emphasis upon the lack of a taxable situs in California indicates the Court's concern with due process considerations.[18] The Court, however, also addressed commerce clause considerations, and found that the regulation of foreign and interstate commerce belongs to the federal government.[19] Thus, once an instrumentality of commerce left its home port for international waters, it fell within this category and became subject solely to federal jurisdiction.

B. The Apportionment Rule

Early Applications to Land-Based Instrumentalities of Commerce

With the advent of the "apportionment rule" [20] of taxation, the possibility arose of numerous states taxing the same instrumentalities

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14. *Id.* at 597-98.

15. It has been suggested that the *Hays* Court mentioned this fact in order to show that the vessel had become "so peculiarly imbued with international characteristics" that the exercise of state sovereignty by any state other than that of domicile would be unwise. Scandinavian Airlines Sys. v. County of Los Angeles, 56 Cal. 2d 11, 14 Cal. Rptr. 25, 33, 363 P.2d 25, 33, *cert. denied,* 368 U.S. 899 (1961).

16. Hays, 58 U.S. at 598-99.

17. Peyroux v. Howard and Varion, 32 U.S. (7 Pet.) 324, 341 (1833).

18. Due process requires that the taxing state have a substantial nexus with the property sought to be taxed. The test depends on whether the tax has, in practical operation, a relation to the opportunities, benefits, or protection afforded by the taxing state. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

19. "Whatever subjects of this power (to regulate commerce) 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." Cooley v. Bd. of Wardens, 53 U.S. (12 How.) at 319.

20. The "apportionment rule" requires that any methods which a state uses to determine its tax upon a given property must bear a reasonable relationship to

of commerce. The theory under which a taxable situs was created shifted from the ancient maxim *mobilia sequuntur personam* [21] to that of *lex situs*.[22] Personal property was held taxable within the state in which it was physically present (although the owner was neither domiciled in nor a citizen of that state), as well as within the domiciliary state. Thus, in *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania*,[23] the rolling stock of a railroad was found to have at least two tax situses. The legal fiction that movable property had only one tax situs in the domiciliary state was abandoned when justice required that the actual situs be examined. The apportionment rule required that the maxim *cessante ratione legis, cessat et ipsa lex* be applied.[24] Thus, the railroad cars were found to "continuously and permanently" [25] travel upon fixed routes in Pennsylvania. The Supreme Court reasoned that if the cars never physically left Pennsylvania, they would have been taxable; the mere fact that they crossed the state's boundaries could not therefore affect the state's power to levy a tax upon property once found within its jurisdiction. The fact that the cars were involved in interstate commerce could not free them from state taxation because "[i]t is equally well settled that there is nothing in the Constitution or laws of the United States which

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the time that the property is physically present within the state, in order that the sum total of all apportioned taxes do not exceed one full ad valorem assessment. *See* Standard Oil Co. v. Peck, 342 U.S. 382 (1952). The apportionment rule seems to be a refinement of due process requirements in that the tax must be proportionately related to the property being taxed; this relationship is defined in terms of the time spent within the taxing state.

21. *Mobilia sequuntur personam* means "movables follow the (law of the) person." STORY, CONFLICT OF LAWS § 378, *cited in* BLACK'S LAW DICTIONARY 1154 (4th ed. 1968). This doctrine originated in the Middle Ages when movable property consisted chiefly of gold and jewels which could easily be carried from place to place, or hidden, by the owner.

22. *Lex situs* means "the law of the place where property is situated. The general rule is that lands and other immovables are governed by the lex situs; i.e., by the law of the country where they are situated." BLACK'S LAW DICTIONARY 1058 (4th ed. 1968). As more and more personal property became disconnected from its owner, i.e., it could no longer be easily carried on one's person from place to place, this rule became dominant. *See* Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18, 22 (1891) (hereinafter Pullman).

23. 141 U.S. 18 (1891).

24. "The reason of the law ceasing, the law itself also ceases." BLACK'S LAW DICTIONARY 288 (4th ed. 1968). The ability to proportion state taxes eliminated the possibility that property would be taxed beyond its full value if more than one state could validly levy a tax.

25. When the Court established this standard of continuity and permanency, it was deciding the due process question of whether the railroad cars had a sufficiently close nexus with the State of Pennsylvania in order to validly permit the tax to be imposed. *Id.* at 26-27.

prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction." [26]

The ability of states to levy taxes upon interstate commerce was predicated upon the Court's finding that the apportionment rule was a just and equitable method of assessment "because, [i]f it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." [27] Although particular cars left the state, the assessment was valid because substantially the same number of cars were within the state at all times.[28] This new-found ability to apportion taxes removed a major obstacle to nondomiciliary state taxation of foreign and interstate commerce.[29] The Court found that the home port rule still applied to vessels because they only "incidentally and temporarily" enter a state's port and, therefore, cannot be said, in any real sense, to enter its jurisdiction; their legal situs remains their only tax situs.

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26. For a general discussion of a state's ability to tax interstate commerce, *see generally Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962).

27. Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. at 26.

28. In other words, the average number of cars which could be found within Pennsylvania on any given day did not vary. For example, in one six-month period there may have been 200 railroad cars within the state. For the other six months, there may have been only 100 railroad cars present, but the average number of railroad cars which would continuously and permanently be within the state would be 150 cars. The state could validly tax this average number of cars.

It should be noted that the basis of assessment is not connected with the average number of cars found to continuously be within the state. Therefore, it appears that the Court was concerned with this average number only in regard to due process considerations.

29. The *Pullman* Court was careful to distinguish between land-based instrumentalities and those that traveled upon the high seas:

> Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well . . . . [V]ehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.

Pullman's Palace Car Co., *citing* Railroad Co. v. Maryland, 21 Wall 456, 470.

This major distinction between the two types of commerce, land and sea, was destined to have a lasting effect on future Court decisions.

In *Northwest Airlines Inc. v. Minnesota*,[30] the Supreme Court was presented with a situation analogous to that presented by vessels. Northwest Airlines was incorporated under the laws of Minnesota, where it also established its principal place of business. Its aircraft were registered in Minnesota and were continuously engaged in interstate commerce. Minnesota levied an ad valorem property tax upon Northwest's entire fleet of aircraft, although under apportionment methods of assessment, only fourteen percent of Northwest's total scheduled route mileage and sixteen percent of its total scheduled plane mileage was actually within Minnesota. In upholding the constitutional validity of the tax, the Court noted that the unique relationship between Northwest and Minnesota and "the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted." [31]

A key factor in the Court's decision to allow the domiciliary state to tax the entire fleet was the belief that no tax situs had been established in any nondomiciliary state.[32] In order for the aircraft to have acquired a nondomiciliary tax situs, it would have had to acquire a permanent location elsewhere continuously throughout the year.[33]

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30. 322 U.S. 292 (1974) (5-4 decision).

31. *Id.* at 294. Rather than apportion the tax to more accurately reflect the degree to which the aircraft partook of Minnesota's afforded benefits, the Court stopped its analysis after finding the existence of some nexus. The fact that the Court had gone beyond these mere preliminaries in *Pullman* leads one to conjecture that the Court's actual reasons for upholding the tax lie elsewhere.

32. "Not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere . . . . [N]either the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity." *Id.* at 300. For recent discussions of the Court's struggle to harmonize taxation of interstate commerce and constitutional mandates, *see generally* 7 CAP. U.L. REV. 143 (1977); 127 U. PA. L. REV. 817 (1979).

33. Northwest Airlines, Inc. v. Minnesota, 322 U.S. at 298. The Court in essence reaffirmed its strict standards for due process considerations, i.e., whether a "substantial nexus" exists. The standards enunciated and applied by the Court are the threads of consistency which may govern one's actions or judge the probable actions of others. But the taxing sword is two-edged. A domiciliary state is presumed to be able to tax all of the property, which need not be continuously and permanently within the domiciliary state. In order for any nondomiciliary state to acquire the jurisdiction necessary to tax such property, the property must be continuously and permanently present within it. The tax must then be fairly apportioned to the benefits afforded the property. In this manner, the domiciliary state's taxing power is derived from its status as such, rather than from the property's presence within its boundaries.

The *Northwest Airlines* Court did not apply the apportionment rule, and stated that such a method of assessment was inappropriate for property found within a state for only fractional periods of time.[34] It is worth noting that the Court, while finding the power to tax aircraft belonging only to the domiciliary state, did not even mention the home port doctrine. Justice Jackson, however, in his concurring opinion, still found it to be a viable doctrine.[35]

The majority opinion appears to be based upon poor reasoning, although for arguably valid motives. The apportionment rule was designed to enable states to levy proportioned taxes upon property which was not permanently within the taxing state. The Court, however, then established a requirement that the property have a "permanent" location within a nondomiciliary state before such state could levy a tax upon it. The majority's finding that the aircraft had not acquired any nondomiciliary tax situses thus contravened the spirit, if not the letter, of the apportionment rule. The fact that nondomiciliary states had not levied any property taxes upon the aircraft seems to have weighed heavily with the Court. It apparently feared that the aircraft might escape taxation on their full value if the domiciliary state was not permitted to levy such a tax. In deciding whether a domiciliary state has the constitutional ability to levy this tax, the Court focused on whether or not nondomiciliary states had exercised their taxing power.[36] The result of this case was that the

34. The fact that the apportionment rule was first applied to land commerce does not seem to be a convincing rationale for keeping it so restricted. Logically, there would appear to be no real difficulty in extending this tax rule to other forms of commerce. One gets the distinct impression that the Court was really concerned with the fact that no nondomiciliary tax situses had been affirmatively shown to exist. If this were the case, the aircraft might indeed "escape" taxation. But this would be attributable to nondomiciliary states' decision not to exercise their constitutional rights of taxation. Rather than risk this, the Court simply finds the apportionment rule to be inapplicable here.

35. Justice Jackson's concurring opinion alludes to the possibility that states may seek to tax the aircraft for merely passing through their airspace, and that this lack of physical contact with a state removes this case from others in which apportionment was applied. He felt the landing and taking-off of aircraft to be similar to a ship's port of call. But the crux of his opinion, and its strict adherence to the home port doctrine, is that the apportionment rule cannot actually prevent duplicative state taxation. The fear of duplicative state taxation is not wholly unfounded. There exist numerous apportionment formula from which the states may choose. If every state chooses the most advantageous formula for itself, it is possible that property could end up being taxed beyond its full value.

36. Perhaps the Court was unwilling, for other important reasons, to find that nondomiciliary tax situses had been established, absent an affirmative showing of such by the plaintiffs. If other tax situses were presumed to have been

apportionment rule was restricted to land-based commerce, which is less transitory in nature than other forms of commerce.[37]

Extension of the Rule to Nonland-based Instrumentalities of Commerce

Fifty-eight years after the *Hays* decision, the Supreme Court finally reexamined the strong distinction it had drawn between ocean-going and land-based instrumentalities. In *Ott v. Mississippi Barge Line*,[38] the Court upheld the constitutional validity of an apportioned ad valorem property tax which the City of New Orleans and the

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created, as is most likely the reality, then other questions, which the Court was not yet prepared to confront, may have arisen: 1) Is the length of time spent within a nondomiciliary state the only factor in determining tax situs? If so, then what of aircraft, receiving the benefit of a state's facilities and services, which merely land, refuel, and leave again? 2) What length of time would engender a substantial nexus, i.e., tax situs, so as to permit nondomiciliary state taxation of property? 3) What if one state's determination of a "substantial nexus" differed significantly from another state's practice, resulting in the attraction of a greater amount of interstate and foreign commerce? Should this practice be allowed to free property from taxation altogether? Although the Court could have reached its decision without deciding these questions, it is suggested that any other decision would have invited further litigation on these issues.

37. In a strong dissent, Mr. Chief Justice Stone found Minnesota's tax unconstitutional because, if other states could levy a tax upon the aircraft, a prohibited burden on interstate commerce would result; the property would be taxed on its full value by Minnesota as well as being subject to nondomiciliary state taxation. The dissent argued that nondomiciliary state taxes would only be constitutionally permissible if fairly apportioned to the property's presence in the state:

> To refuse now to apply the rule of apportionment to petitioner's airplanes, after a half century of its application by this Court as the means of avoiding prohibited multiple state tax burdens on vehicles of interstate transportation . . . [s]ubjects a new and important industry to state tax burdens, essentially discriminatory in their effect on interstate commerce . . . [w]hich it was the very purpose of the commerce clause to avoid.

Such "essential discrimination" upon interstate commerce could occur because the majority opinion recognized the nondomiciliary state's constitutional right to tax property which enjoyed the state's benefits and protection, while also upholding the domiciliary state's constitutional right to levy a full ad valorem property tax upon the same property. The dissent also considered the Minnesota tax so disproportionate to the protection and benefits afforded the instrumentalities by it, that it constituted an intolerable burden on interstate commerce. The tax could be set aside only if palpably excessive, but such action could be avoided by the use of apportionment principles "which it (was) the constitutional duty of the State of Minnesota to apply." Northwest Airlines, Inc. v. Minnesota, 322 U.S. at 325. Further, the extent to which a state might tax interstate commerce was based upon the constitutionality of its actions, and not upon whether or not other states levied taxes.

38. 336 U.S. 169 (1949).

nondomiciliary State of Louisiana had levied upon certain vessels engaged in interstate commerce. These vessels operated according to no fixed schedule, and remained within Louisiana only long enough to unload, load, and make any necessary repairs. The vessels traveled upon inland waters only and did not traverse international waterways.

While noting that the "element of apportionment" had not been considered in previous decisions concerning vessels employed upon the high seas or inland waters, the Court declined to extend its judgment to ocean carriage.[39] At the same time, the Court stated: "We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises."[40] The Court's sudden reversal in extending the apportionment rule to vessels was not further explained. The Court simply stated:

> We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions."[41]

In short, the problem was reduced to that of proper apportionment, intertwined with the due process question. The due process test related to the commerce clause test because if the tax is proportionate to the commerce carried on within a state, then due process requirements are also satisfied.[42]

Concerning the unanswered question of apportionment, the taxpayers argued that their vessels were not continuously within Louisiana, but were present for only fractional periods of the tax year, and were, therefore, not proper subjects for taxation. Regarding this contention, the Court implied that a fixed proportion of the taxed property had to be present within the state for the whole taxable year before the state could tax such property.

Having decided that a nondomiciliary state could levy an apportioned ad valorem property tax on instrumentalities of commerce which were "permanently" within its jurisdiction, the *Ott* Court left unanswered the question whether a domiciliary state could levy an

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39. Only Justice Jackson dissented in this case.
40. *Id.* at 175.
41. *Id.* at 174, *citing* Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 365 (1939).
42. *See* note 18 *supra.*

unapportioned ad valorem property tax upon the same instrumentalities.[43] This question was soon presented in *Standard Oil v. Peck* by an Ohio corporate taxpayer whose vessels transported oil interstate via vessels traveling solely upon inland waters.[44] The vessels were registered in Ohio, but stopped there only occasionally for fuel or repairs. Ohio levied an unapportioned ad valorem property tax upon all of the taxpayer's vessels. The Court found that most of the vessels were continuously outside of Ohio, and therefore, the tax could be apportioned between several states: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the State of the domicile." [45] If this were not so, multiple taxation of interstate operations would otherwise occur, and the tax would not be related to the opportunities, benefits, or protection conferred or afforded by the taxing state to those operations.

The majority opinion in *Standard Oil* indicated an important shift in the Court's philosophy.[46] Whereas the Court had previously been strongly influenced by the possibility that property not affirmatively shown to have acquired nondomiciliary tax situses might escape full taxation if the domiciliary state was not allowed to fully tax the property, the Court in *Standard Oil* recognized that the constitutional ability of nondomiciliary states to levy a tax was sufficient, in and of itself, to require the invocation of the apportionment rule. The constitutional ability of a domiciliary state to tax property would no longer depend upon whether nondomiciliary states exercised their constitutional right to tax or not. Thus, sound constitutional reasoning overcame the fear that some property might escape taxation altogether.

At this point, however, such reasoning prevailed only as to land-based instrumentalities of commerce and vessels traveling upon inland waters. In *Braniff Airways v. Nebraska State Board of Equalization*,[47]

43. Although one might assume that the domiciliary state could not do this, the strong protection formerly given to domiciliary states by the Court left this question open. If it could not be shown that nondomiciliary states could levy a tax, then the domiciliary state has a better chance of constitutionally levying an unapportioned tax.

44. 342 U.S. 382 (1952).

45. *Id.* at 384.

46. Justice Minton's dissent accurately reflects this sudden shift by the Court. The sudden abandonment of the necessity of showing a nondomiciliary tax situs having been established before the domiciliary state can be deprived of its right to fully tax property is decried as being an uncalled-for departure from precedent. The dissent seems to have a valid point. *Id.* at 387.

47. 347 U.S. 590 (1954).

the nondomiciliary State of Nebraska levied an apportioned ad valorem property tax upon aircraft engaged in interstate commerce which had fixed routes and regularly landed within Nebraska. The stops in Nebraska occurred only long enough for unloading and reloading. Braniff maintained no facilities in Nebraska.

Braniff relied on cases involving ocean-going vessels in alleging that its aircraft had not acquired a tax situs in Nebraska. The Court rejected the airline's argument finding that "a closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from power to impose taxes on river boats." [48] The Court found that a tax situs was created in Nebraska by the "'habitual employment of the property within the State.'" [49] As a result, the Court vastly reduced the requisite amount of contacts between property and a nondomiciliary state that were necessary before that state could tax. The requirement of a "permanent location" was reduced to a standard of mere "habitual employment." The *Braniff* Court interpreted *Northwest Airlines*, whose facts were almost identical, as having already sanctioned the apportionment rule as to aircraft but not having applied it because there was no showing that any portion of the property involved had acquired a tax situs elsewhere. In essence, the majority in *Braniff* pronounced *Northwest Airlines* dead, and relegated the issue to that of a mere burden of proof, i.e., simply demonstrating that the aircraft were habitually within the nondomiciliary state.[50] Rather than overrule *Northwest Airlines* outright, the Court revived the "habitual employment" standard as the standard by which the creation of a tax situs was to be judged.[51] The Court's reasoning indicates that nondomiciliary state taxation of instrumentalities of interstate commerce is

48. *Id.* at 600.

49. *Id.* at 601 *citing* Johnson Oil Refining Co. v. State of Oklahoma, 290 U.S. 158, 162 (1933).

50. In *Northwest Airlines*, a domiciliary state tax levied upon an entire fleet of aircraft was upheld because no other tax situses had been affirmatively shown. The distinction drawn is one of form rather than of substance, however. In *Northwest Airlines*, the aircraft were recognized to have flown regular, fixed routes and yet were said to have not established nondomiciliary tax situses. Indeed, they had not, under the totally different standard being applied by the Court. This major difference is overlooked by the Court in *Braniff*.

51. *Standard Oil* was said to have interpreted *Northwest Airlines* to mean that nondomiciliary states tax instrumentalities of "interstate commerce on the apportionment basis in accordance with their use in the (nondomiciliary) state." 347 U.S. at 602. It appears that Justice Minton's dissent in *Standard Oil* is more accurate as to what *Standard Oil* really meant, i.e., a departure from previous tax situs tests and the concomitant invocation of the apportionment rule.

sanctioned as long as it is in proportion to the time in which the instrumentality is found within the nondomiciliary state, regardless of whether or not the instrumentality was "permanently located" there.

Standard Oil simply states that "it was not shown that 'a defined part of the domiciliary corpus' has acquired a taxable situs elsewhere." [52] A tax situs created in accord with the *Northwest Airlines* decision was therefore a far cry from that extrapolated by the Court in *Braniff*.[53] After *Standard Oil*, a domiciliary state was required to apply the apportionment rule to property which had obviously acquired a tax situs elsewhere, despite the fact that no affirmative showing of the existence of another tax situs was made.[54] The fact that the property was not permanently and continuously within the domiciliary state prevented the state from fully taxing the property. Whether a domiciliary state need apply the apportionment rule to property which was not continuously within the state and which was unlikely to have acquired a viable nondomiciliary tax situs was left undecided.

C. *The California Decisions: Apportionment Rule v. Home Port Doctrine*

The Supreme Court of California, in *Flying Tiger Line v. County of Los Angeles*,[55] held that the domiciliary state must still use an apportioned tax related to the time during which the property was physically present within the state's jurisdiction.[56] In *Flying Tiger*

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52. 342 U.S. at 384. Here, the Court found a nondomiciliary tax situs to have been shown. The crucial point though is the test to be applied in making this finding. When the Court shifts its footing in this manner it can only be detrimental to judicial integrity. The refusal to recognize such a shift is what reflects poorly upon judicial logic and consistency. The mere absence from the domiciliary state was said to prove the existence of nondomiciliary tax situses.

53. In the Johnson Oil Refining Co. case, . . . this Court reaffirmed not less than three times that the State of domicile has jurisdiction to tax the personal property of its corporation unless such property has acquired an "actual situs" in another State. And by "actual situs" it meant . . . continuous presence in another State . . . personalty that has become a permanent part of the foreign State. Surely the situs . . . cannot be made to depend on some undefined concept of "permanence" short of a tax year . . . .

322 U.S. at 296 n.2.

54. 342 U.S. 382 (1952).

55. 51 Cal. 2d 314, 333 P.2d 323 (1958), *cert. denied*, 359 U.S. 1001 (1959) (hereinafter Flying Tiger).

56. The underlying principle is that of the apportionment rule, e.g., that property should only be subject to state taxation to the extent to which it

Line, a Delaware corporation, with its principal place of business in Los Angeles, owned aircraft which were used primarily overseas and yet were assessed by the County of Los Angeles at 100% of their value. The California Supreme Court struck down the assessment as unconstitutional under the Due Process Clause, relying upon *Standard Oil*. In so doing, the Court stated:

> A taxpayer resisting an ad valorem tax on personal property based on an unapportioned assessment does not have the burden of showing that other States have actually imposed a tax on such property. He is entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, receiving substantial benefits and protection in more than one state . . . .[57]

The Court reasoned that the fact that a large portion of the property might escape taxation altogether could not alter a state's constitutional power to tax. The conduct of other states was irrelevant to the question of constitutionality.

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actually is benefited by the state. This may have little relation to the actual benefits received. For example, during 1957-58 in the County of Los Angeles, fifty-five percent of the total revenue obtained from general property taxes was allocated to school funds, and as such, conferred no direct benefits upon commercial transportation. Only thirty-five percent of the receipts were allocated to general county funds, and more than two-thirds of that amount was devoted to such expenditures as charities, hospitals, and corrections. Thus, while it is difficult to estimate the amount that is spent upon benefits and protection for which the county could legitimately claim compensation from transient carriers, it would seem that such expenditures are probably less than the taxes collected from such carriers. *See* 11 STAN. L. REV. 518, 535 (1959).

The counter-argument is that the carrier benefits indirectly from all expenditures made by the state: paved roads, police and fire protection, etc. Without these indirect benefits, the carrier might very well have to forego doing any business altogether. The process of apportionment bears directly upon commerce clause considerations as evidenced by *Complete Auto Transit*. However, in the past, it has been said:

> Although a tax sometimes purports to be a *quid pro quo*—as, for example, a highway-use tax—so that the cost to the state might be ascertainable, this is not true of most taxes; they can be regarded only as exactions by the State for the general benefits of living under an organized government. Since it is impossible to allocate the benefits and thus their costs, to individual taxpayers, the congruence or lack thereof between a particular tax affecting (foreign) commerce and the benefit conferred on the person taxed can furnish no useful test of constitutionality.

75 HARV. L. REV. 953, 957 (1962). This position is no longer tenable.

57. *See* Flying Tiger, 333 P.2d at 323. The Court went on to say: "It is obvious that to permit Los Angeles County to tax the full value of the property here involved, would impose a tax beyond that justified by its physical contacts with the county, a tax that the county has no power to impose, and thus, violate due process." *Id.* at 330 (Carter, J., concurring).

In *Scandinavian Airlines Sys. v. County of Los Angeles*,[58] a case of first impression, a taxpayer's airplanes were foreign-owned, foreign-based and registered, and used exclusively in foreign commerce. Each plane averaged eight round-trip flights per year and remained at the Los Angeles Airport for less than thirty-four hours per stop. The aircraft were taxed at their full value at their "home port."[59] However, the County of Los Angeles levied an apportioned tax upon them as well.

Analogizing between aircraft flying the international skyways and vessels plying the international waterways, the California Supreme Court held the home port doctrine applicable. Because United States courts could not exercise control over foreign taxing authorities, the apportionment rule was unworkable, and the problem thereby became one of federal jurisdiction. Insofar as the aircraft did not differ from other instrumentalities of commerce with foreign nations, the home port rule was held to be on point. "[Because] State taxation of the planes of foreign air carriers involves international political and economic problems . . . ,"[60] the area was held to be one of an exclusively federal nature. The states therefore had to abstain from this field because:

> A state cannot deal directly with a foreign nation, by treaty or otherwise. This it must leave to federal government. If its attempted actions in a given field would result in discriminatory practices as between two foreign nations, then it must eschew that field in its entirety. [T]axation of foreign owned and based instruments of commerce represents a field that is peculiarly

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58. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961), *cert. denied*, 368 U.S. 899 (1961).

59. This appears to have been a significant factor in aiding the Court's decision in *Japan Line:*

> We are informed by the Department of State that after inquiry of its posts abroad, it determined that only one nation, Afghanistan, imposes property taxes on foreign containers or other instruments of foreign commerce entering its jurisdiction. All other nations have adhered to the international custom of allowing containers, as well as vessels and other instruments of foreign commerce, to be introduced for the exclusive purpose of conducting such commerce free of all customs duties and general taxes, including property taxes.

Brief for the United States as *amicus curiae*, at 15. This does not mean that the State goes uncompensated for services rendered: "'Fees' that are related to the value of specific services provided to vessels and containers, as opposed to general taxes to support the operation of government . . . are, however, permissibly charged under the custom of nations." *Id.* at 15 n.7.

60. 363 P.2d at 38.

> federal in nature, without regard to such specific constitutional considerations as the commerce clause or the due process clause, and which must be left to the administration of the federal government, even in the absence of any present federal legislation thereon.[61]

Justice Traynor and Chief Justice Gibson joined in a vigorous dissent. Both Justices believed that the state has a broader constitutional power to tax than the majority was willing to recognize.[62]

II. THE *Japan Line* OPINION

The Supreme Court of California denied six Japanese shipping firms any refund of the $553,200 in taxes which had been levied by the City and County of Los Angeles upon their shipping containers. The firms were incorporated under Japanese law, and their commercial domiciles and principal places of business were located in Japan. The containers were registered in Japan, had an average stay in California of less than three weeks, were used exclusively in foreign com-

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61. *Id.* at 43.

62. The dissent argued that since aircraft flying from California in foreign commerce could be taxed by California only on an apportioned basis if the aircraft had acquired a taxable situs elsewhere, then the converse should also hold true, i.e., aircraft engaged in foreign commerce flying *into* California should also be taxed upon an apportioned basis. If the home port doctrine was inapplicable in the first instance, it should be inapplicable in the second as well. A tax situs having been created in California, an apportioned state tax was therefore constitutionally permissible. In addition, the Due Process Clause was no barrier because the foreign aircraft partook of the "opportunities, benefits or protection" provided by the state to the same extent as aircraft flying in interstate commerce.

Concerning possible discrimination against foreign commerce, the dissent stated: "Obviously there is no discrimination if a state taxes migratory property used in such commerce in the same way it taxes migratory property used in interstate commerce. Moreover, it precludes discrimination against interstate commerce." 363 P.2d at 45. (Traynor, J., dissenting). The dissent believed that any risk of multiple taxation could only arise from foreign nations levying ad valorem taxes upon the instrumentalities' full value, and such a situation could not detract from the states' power to levy apportioned taxes. Therefore, it was the foreign nations' actions that were burdening and discriminating against foreign commerce and not the state tax. State taxation was thus consonant with Commerce Clause requirements. If relief from such burdensome taxation was to be granted, however, it could not emanate from the courts via one's constitutional rights. Instead, action would have to be taken by Congress through either: 1) a prohibition against state taxation of foreign instrumentalities of commerce; or 2) treaties which would reciprocally preclude such discrimination from being placed upon foreign commerce. In conclusion, the dissent stated that the home port doctrine should rationally be applied either to *all* aircraft employed in foreign commerce, or to *none*.

merce, and were fully taxed by the Japanese government. The United States Supreme Court (in an 8-1 decision),[63] in reversing the Supreme Court of California, rejected California's contention that a state has the constitutional power to tax all commerce and its instrumentalities which are found within its jurisdiction on the "lien date." The Supreme Court of California had relied upon a recent California case, *Sea-Land Service Inc. v. County of Alameda*,[64] which found the home port doctrine "anachronistic" and which upheld an apportioned property tax levied upon domestically-owned containers used in both intercoastal and foreign commerce.[65] The United States Supreme Court, however, drew a vital distinction between foreign and interstate commerce, and concluded that when foreign commerce is involved, special considerations must be recognized. The involvement of foreign-owned instrumentalities of commerce differentiates this situation from those already considered by the Court, and requires a different rationale and result.

When the Supreme Court followed its previous trend and reversed the California Supreme Court, it implied that *Scandinavian Airlines Sys. v. County of Los Angeles*[66] was correct in its result, although mistaken in its rationale. By refusing to follow the *Scandinavian Airlines* rationale, the Court further implied that *Sea-Land* was correct in rejecting the home port doctrine as being outmoded.[67] The U.S. Supreme Court's refusal to adopt the home port doctrine as its decisional basis implies a rejection of the "foreign-owned" versus "domestically-owned" distinction upon which state taxing power has hinged.[68] The California decision in *Flying Tiger Line*,[69] i.e., that a domiciliary state may apportionately tax instrumentalities engaged in foreign commerce, when contrasted with *Scandinavian Airlines*, seems to advocate such a distinction. In *Scandinavian Airlines*, a

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63. Rehnquist, J., dissenting.

64. 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974) (hereinafter Sea-Land).

65. The California Supreme Court in *Japan Line* believed that this decision had overruled *Scandinavian Airlines*.

66. *See* text accompanying note 58 *supra*.

67. "Given its origins, the doctrine could be said to be 'anachronistic', given its underpinnings, it may indeed be said to have been 'abandoned'." Northwest Airlines, *cited in* Japan Line, 99 S. Ct. at 1818-19.

68. Further support for the belief that the home port rule is conducive to this type of distinction is found in the *amicus curiae* brief. *See* Brief for the United States as *amicus curiae* at 8, 10.

69. *See* text accompanying note 55 *supra*.

nondomiciliary state's apportioned tax on foreign-owned instrumentalities of commerce was struck down, and the instrumentalities' ownership was a major factor in the decision.

The U.S. Supreme Court's refusal to draw this type of distinction avoids possible future problems when foreign-owned instrumentalities might be partly engaged in interstate commerce. Would they be exempt from state taxation due to their foreign domicile or would they be subject to the same taxation as U.S. interstate transportation? Case law holding that "interstate commerce must bear its fair share of the state tax burden" [70] would seem to demand proper state taxation:

> If the state tax '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,' no impermissible burden on interstate commerce will be found.[71]

Although this statement was made regarding interstate commerce, it would seem to be equally true for foreign commerce as well. Nowhere in the formula does a domiciliary factor come into play. Yet, in a footnote, the U.S. Supreme Court reserves judgment on this question for a later time.[72] The distinction drawn between foreign and interstate commerce avoids such possible problems. However, it also ignores the fact that domestic versus foreign ownership is an important factor to be considered. It is clear that instrumentalities of foreign commerce which are domestically-owned are subject to proper state taxation regardless of whether another nation is taxing the instrumentality to such a degree that the multiple taxation exceeds the instrumentalities' full value. The domiciliary state will still have the constitutional right to levy a proportioned tax upon the property. When foreign ownership of commercial instrumentalities is involved, however, the issues are thus elevated from a domestic sphere, where the taxpayer is represented within one political system, to the international sphere, where conflicting interests cannot be voiced on a national level alone.

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70. *See* note 37 *supra*.
71. 430 U.S. at 279.
72. *See* 99 S. Ct. 1819 n.7. *But see id.* at 1820. (That *Complete Auto* would apply and be satisfied if purely interstate commerce, lends support to taxation of partly interstate commerce. This is especially so in view of *Western Livestock*).

The Supreme Court's opinion, however, does not draw clear distinctions between the interplay of foreign commerce and international relations. It would seem that international relations will become relevant only when foreign owners of commercial instrumentalities are involved. The Court is unclear in its definition of "foreign commerce," but appears to be thinking solely in terms of foreign-owned instrumentalities which are entering the United States.[73] If *Flying Tiger Line* is consistent with constitutional precepts, then, clearly, domestically-owned instrumentalities of foreign commerce are properly subject to apportioned state taxes. Therefore, when the Court speaks in broad terms of foreign commerce, it is actually addressing itself to foreign commerce in which the instrumentalities are domiciled abroad. This view, however, has overtones of the home port doctrine, which the Court carefully avoids.

A. *New Constitutional Tests*

The *Japan Line* decision is important because it adds two constitutional tests which must be applied in determining whether foreign commerce is susceptible to apportioned state taxation. In addition to the constitutional tests of nexus, nondiscrimination, and apportionment,[74] one must ask: first, whether the tax creates "a substantial risk of international multiple taxation; and second, whether the tax prevents the federal government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause."[75] In the instant case, the containers were fully taxed by Japan, and international multiple taxation was an actuality, not just a mere risk.

The second basis for the Court's decision in *Japan Line* was that the California tax prevents the United States from "speaking with one voice" in regulating foreign trade.[76] State taxation would interfere with the Commerce Clause's grant of power to the federal government. International disputes might arise over apportionment formulas, retaliatory taxation would be likely to occur,[77] and consequently,

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73. *Id.* at 1819 n.7.

74. *See* note 8 *supra.*

75. 99 S. Ct. at 1823.

76. *See* Board of Trustees v. United States, 289 U.S. 48 (1933) *cited in* Japan Line, 99 S. Ct. at 1823.

77. This is far from mere speculation:

> We are informed by the Department of State that six foreign governments, including some of our most important trading partners, have

the nation's international relations would be disrupted.[78] If California were allowed to levy this property tax, it would, in effect, be indirectly influencing and forming our national foreign relations. It would amount to a regulation of foreign commerce *contra* to the Commerce Clause. This is necessarily so because even a *de minimus* duplication of taxation assumes unbearable proportions in the field of foreign commerce. Lastly, although the prohibition against state taxation of foreign-owned instrumentalities of foreign commerce may deprive states of earned revenue, the proper forum to litigate such questions is in the legislature.[79] The Court thus seems to feel that these questions are of such a political nature so as to be nonjusticiable. However, some possible justiciable questions were left unanswered: (1) whether such a state tax constitutes an "import or duty" in contravention of the Constitution;[80] (2) the states' ability to tax foreign-owned instrumentalities of foreign commerce which are involved in interstate commerce as well;[81] and (3) when a risk of international multiple taxation is to be deemed to be "substantial" and what criteria are to be used.[82] The Court found it unnecessary to discuss due process requirements. The refusal to use a due process rationale may be explained by a sound judicial hesitancy to answer questions which are not absolutely necessary to the Court's decision and which may not be presently ripe so as to be passed upon.

> written the Department expressing concern about the effect on foreign commerce of the California container tax . . . . In addition, twelve countries have sent diplomatic notes concerning the stated intention of the State of California . . . .

Brief for the United States as *amicus curiae* at 20-21. At the time of the *Scandinavian Airlines* case, it was proven that retaliatory action was sure to follow from at least one major nation should the airline's aircraft have been held taxable by California:

> In fact, the Japanese taxation authorities are now studying the assessment of property tax on foreign aircraft, strictly based on the mutual equity principle, and, it will be effective when all of our efforts to reach a reasonable solution on the U.S. property tax are proved to be of no avail.

11 STAN. L. REV. 518, 520 n.12 (1959). *See* 99 S. Ct. at 1824 n.18 (1979).

78. The Customs Convention on Containers is an example of the "desirability of uniform treatment of containers used exclusively in foreign commerce . . . ." It also reflects a national policy of promoting the use of containers in international trade. Any state action which would tend to decrease their use would be *contra* to this national policy. Brief for the United States as *amicus curiae* at 19a.

79. 99 S. Ct. at 1826.

80. U.S. CONST., art. I, § 10, cl. 2 provides: "No state shall . . . lay any Imposts or Duties on Imports or Exports . . . ." *See id.* at 1817 n.4.

81. 99 S. Ct. at 1819 n.7.

82. *Id.* at 1823 n.17.

B. Japan Line in Perspective

Japan Line's divergence from the due process rationale, however, appears inconsistent with prior case law. Throughout the earlier cases, there flows a persistent concern with due process and commerce clause considerations, albeit called by various names and examined under differing standards. In *Hays v. Pacific Mail, S.S.*, the lack of any notion of tax apportionment was the determinative factor in disallowing the nondomiciliary state's tax. Allowing the tax on the basis that the vessels had merely entered the local port would have violated the nexus and other due process requirements, since such contacts were insufficient to give rise to a tax situs.[83]

The advent of the apportionment rule obviated the need for the home port doctrine as enunciated in *Hays*. Rather, the Supreme Court, in *Northwest Airlines*, shifted its analysis to a stringent "permanency" standard when applying due process tests.[84] Due process was considered satisfied only when the property sought to be taxed had a year-long contact with the taxing state. However, the growing acceptance and trust in the apportionment rule's constitutional viability, and the legitimate desire of a state to tax those objects upon which benefits had been conferred, led to a relaxation of the permanency standard to that of mere "habitual employment." [85] This shift reflected the realization that a large segment of migratory property, having substantial contacts with a state, might otherwise escape taxation merely because its contacts were only for brief periods of time. To not require such property to pay for the benefits and opportunities afforded to it by the nondomiciliary state appears manifestly unjust. The apportionment rule, at least in theory, permits "fractional" taxation, no matter how small.

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83. The Court's comment that admiralty law applied to a vessel outside of its home port may very well have been another indication that the contacts between the instrumentality and the state were so attenuated that the vessel could not be said to have received any benefits or protection from the nondomiciliary state. In this respect, the nexus test is intertwined with the due process test.

84. *See* Northwest Airlines, *supra* note 30.

85. *See generally* Johnson Oil Refining Co. v. State of Oklahoma, 240 U.S. 158 (1933); Pullman's Palace-Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18 (1891); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949). *See also* Braniff Airways v. Nebraska State Bd. of Eq., 347 U.S. at 601 n.19. This "habitual employment" standard had been used years earlier in *Johnson Oil*. Since that time, it had been all but forgotten, as exemplified by the 1974 decision in *Northwest Airlines* which applied a "permanent and continuous" standard. *Pullman's Palace-Car* had also applied a "continuous" standard, as did *Ott*. The Court failed to mention this oversight.

In this increasingly liberal atmosphere favoring nondomiciliary state taxation of the instrumentalities of commerce, *Japan Line* confronted the Supreme Court with the problem initially posed by *Hays*: the inability to apportion taxes. Could this inability detract from a state's constitutional power to levy taxes? United States courts, unable to dictate to foreign nations the extent to which they may tax foreign-owned and registered property, cannot assure that such property will not be taxed beyond its full value as a consequence of a foreign imposed tax. It is this question of whether a state's constitutional powers can be altered by the actions of foreign nations which led to *Japan Line*'s two newly established constitutional criteria. *Japan Line* is an attempt to apply constitutional principles of state taxation, as developed in earlier case law, to international activities.

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