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Determining State Power to Tax Foreign Commerce Under the Commerce Clause: *Wardair Canada, Inc. v. Florida Department of Revenue*

Traditionally, the federal government has had a generous breadth of power in foreign affairs. Limited state advances into the foreign commerce domain have, however, been permitted. Although Congress delegates much federal commerce power through express statutes, there also exists a variety of international agreements intended to proscribe the law in specific areas of foreign commerce. Furthermore, states may challenge federal commerce power in areas not specifically regulated by statutes. When the extent of state power in this domain is unclear, the U.S. Supreme Court must discern whether federal law or policy pre-empts state regulation. The Court addressed this issue in *Wardair Canada, Inc. v. Florida Department of Revenue.*[1]

In *Wardair*, a foreign air carrier challenged the state's power to tax its purchases of aviation fuel within the state. The state of Florida had enacted a statute[2] which imposed a sales tax on the purchase of aviation fuel[3] by both national and foreign air carriers. This tax was imposed regardless of the amount of business conducted in the state or whether the purchaser engaged exclusively in interstate or foreign commerce.[4]

Wardair Canada, the foreign carrier, filed suit in Florida Circuit Court against the Florida Department of Revenue,[5] claiming the sales tax was unconstitutional and inconsistent with the Nonscheduled Air Services Agreement (Air Agreement), a bilateral treaty to

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[1] 106 S. Ct. 2369 (1986) (No. 84-902).

[2] 1983 Fla. Laws 88-3, § 212.70.

[3] The value of the tax assessed was approximately 5% of the retail price per gallon of fuel. *Wardair*, 106 S. Ct. at 2371.

[4] Section 212.70, 1983 Fla. Laws 88-3 provides:

> Tax imposed on sale of motor fuel and special fuel; tax on ultimate consumer;
>
> (1) A tax shall be imposed for the privilege of the sale at retail in this state of motor fuel and special fuel.
>
> (2)(a) This levy of tax is upon the ultimate retail consumer.

The sales tax replaced a use tax on national and foreign carriers, prorated according to the mileage the carrier traveled in Florida airspace. Brief for Appellant at 6, Wardair Can., Inc. v. Florida Dept. of Revenue, 106 S. Ct. 2369 (1986) (No. 84-902).

[5] Wardair Can., Ltd. v. State of Fla. Dept. of Revenue, No. 83-1106 (Fla. Cir. Ct. July 19, 1983).

which both the United States and Canada are signatories.[6] The constitutional attack was two-fold. First, Wardair alleged the tax violated the commerce clause[7] of the U.S. Constitution as an undue burden on foreign commerce, and pursuant to the supremacy clause,[8] federal policy pre-empted the state statute.[9] In addition, Wardair claimed that in light of the Air Agreement, the state sales tax deprived the federal government of its ability to "speak with one voice"[10] when regulating foreign commerce.[11]

The Florida Circuit Court held that although the tax did not violate the commerce clause, it was inconsistent with both the Air Agreement and a federal policy exempting foreign air carriers from fuel taxes.[12] The circuit court consequently enjoined the state revenue department from collecting the tax on all foreign air carriers engaged exclusively in foreign commerce.[13]

On appeal, the Florida Supreme Court upheld the constitutionality of the tax and vacated the injunction.[14] The court reasoned that although the Air Agreement expressly prohibited *national* taxes, Congress did not intend "to preclude the state's power to tax [foreign commerce]."[15]

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[6] Nonscheduled Air Services Agreement, May 8, 1974, United States-Canada, 25 U.S.T. 787, T.I.A.S. No. 7826 [hereinafter Air Agreement]. Specifically, appellant Wardair cited the language of article XII:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, and other national duties and charges on fuel,. . . .
>
> The exemptions granted by this paragraph shall apply to items: . . .
>
> (c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services; whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

Air Agreement, *supra*, art. XII.

[7] Article I, section 8 of the United States Constitution states that "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes,. . . ." U.S. CONST. art. I, § 8.

[8] U.S. CONST. art. VI.

[9] *Wardair*, No. 83-116 at A-21-A-22.

[10] The pervasive theme in the foreign commerce clause cases is the Court's concern for preserving federal uniformity and the federal government's ability to speak with one voice when regulating foreign commerce. Indeed, the Court in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), embodied this theme in its foreign commerce clause analysis. *Id.* at 451. *See infra* note 48 and accompanying text. The Court also recognized that federal uniformity has constitutional origins. "[I]n discussing the Import-Export Clause, this Court, in Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.' " *Japan Line*, 441 U.S. at 449.

[11] *Wardair*, No. 83-116 at A-22.

[12] *Id.* at A-23.

[13] *Id.* at A-24.

[14] Wardair Can., Ltd. v. Florida Dept. of Revenue, 455 So. 2d. 326, 329 (Fla. 1984).

[15] *Id.*

In affirming the state supreme court's decision, the U.S. Supreme Court held that neither the Federal Aviation Act,[16] nor its legislative history,[17] revealed a congressional intent to prohibit state taxation of this kind on foreign carriers.[18] The Court reasoned that "rather than prohibit[ing] state regulation in the area, Congress invited it."[19] In reaching its decision, the Court found little merit in the foreign carrier's contention that there existed a "clear national policy of exempting aviation fuel from state sales taxes."[20]

Justice Blackmun, the lone dissenter, relied on the rationale of the Court's decision in *Japan Line, Ltd. v. County of Los Angeles*.[21] He argued that the sales tax would seriously impair the federal government's ability to "speak with one voice"[22] in regulating commercial relations with foreign governments, thus jeopardizing federal uniformity in foreign commerce regulation.[23] Responding to this argument, the Court explained that foreign commerce clause analysis[24] required a court to "ask whether a state tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments,' [b]ut . . . we never suggested . . . that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice."[25] Thus, something more than the existence of an "indisputable *pattern*"[26] of federal foreign policy is required before the Court will strike down a state tax.

The Supreme Court has not yet directly addressed the constitutional distinction between foreign and interstate commerce and the extent to which the federal government may regulate commerce in

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[16] 49 U.S.C. § 1301 (1982).

[17] "[N]ot only is there no indication that Congress wished to preclude state sales taxation of airline fuel, but to the contrary, the Act expressly permits States to impose such taxes." *Wardair*, 106 S. Ct. at 2372.

[18] *Id.* at 2376.

[19] *Id.* at 2372.

[20] *Id.* at 2374. The Court also concluded that in light of the seventy-odd aviation agreements it entered into, the United States "has at least acquiesced in state taxation of fuel used by foreign carriers in international travel." *Id.* at 2375.

[21] 441 U.S. 434 (1979). In fact, Justice Blackmun wrote the majority opinion in several other recent commerce clause decisions. *See also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[22] *See supra* note 10 and accompanying text.

[23] *Wardair*, 106 S. Ct. at 2378 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)) (Blackmun, J., dissenting).

[24] The Court's foreign commerce clause analysis refers to the test the Court will apply to determine the constitutionality of state regulation of foreign commerce. For the Court's development of this analysis, see *infra* notes 46-48 and accompanying text. The Court made an important distinction that "[a]lthough 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 foreign commerce power to be the greater." *Japan Line*, 441 U.S. at 448. This difference is the basis for the Court applying an extended analysis of state regulation of foreign commerce, as opposed to interstate commerce.

[25] *Wardair*, 106 S. Ct. at 2375-76.

[26] *Id.* at 2379 (emphasis added).

this area.[27] Foreign commerce clause analysis focuses on the practical effects of state taxation of commerce.[28] The analysis does not, however, attempt to define the limits of state interference in the foreign commerce domain. Instead of creating a uniform doctrine, the Court has addressed the constitutionality of state regulation of foreign commerce on a case-by-case basis. To understand the significance of the Court's more recent foreign commerce decisions, it is necessary to examine briefly the development of commerce clause analysis.

The early cases primarily considered the impact of state regulation on interstate commerce.[29] As the means of interstate and foreign commerce became more sophisticated, so did the state challenges to federal commerce power. Since its decision in *Gibbons v. Ogden*,[30] the Supreme Court has tried to reconcile the conflicting interests of state protectionism and federal uniformity.[31] Although state interference with interstate commerce can take many forms, one of the more frequently used methods by which states sought to protect their own economies was the taxing power.

Early in this century, the doctrine of constitutional or "per se" immunity from state taxation was frequently invoked to protect interstate commerce.[32] More recently, per se immunity has been re-

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[27] *See supra* note 24. As one commentator suggests, "[a]lthough there is some evidence that the constitutional grant of power to the federal government was intended to be greater with respect to foreign commerce than with respect to interstate commerce, the juxtaposition of the two provisions in the Commerce Clause argues for their equation." Comment, *State Taxation of International Air Carriers*, 57 NW. U.L. REV. 94, 101 (1962).

[28] *See infra* notes 46-48 and accompanying text.

[29] *See infra* note 32.

[30] 22 U.S. 1 (1824). Chief Justice Marshall ensured that Congress received a generous grant of discretion in describing its regulatory role:

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

Id. at 197.

[31] One of the early cases to emphasize a federal uniform system of regulation was Cooley v. Board of Wardens, 53 U.S. 299 (1851).

[32] For a more detailed background of state taxation of interstate commerce, see Golden, *The Constitutionality of State Taxation of Energy Resources*, 46 ALB. L. REV. 805 (1982). Regarding the doctrine of per se immunity, "[t]he Constitution was viewed as giving Congress exclusive power over interstate commerce and the absence of federal legislation was interpreted to evidence a congressional intention that there be no state interference." *Id.* at 821.

In the years following the Depression up until the late seventies, the Supreme Court increasingly upheld state taxes on interstate commerce, yet struggled to devise a practical standard to apply to all cases in which state taxes were challenged as unconstitutional. A significant number of challenges came in the area of energy resource taxes. States taxed the movement of natural resources in interstate commerce to curb depletion by interstate consumers. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (resource extraction tax); Maryland v. Louisiana, 452 U.S. 725 (1981) (processing tax); Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 (1949) (transport tax).

placed by a more pragmatic approach which states that "interstate commerce must bear its fair share of the state tax burden."[33] In *Spector Motor Service, Inc. v. O'Connor*[34] the Supreme Court struck down a Connecticut tax imposed for the privilege of doing business in the state.[35] The tax was challenged by an out-of-state corporation whose only contact with the state was the use of its highways.[36] Defeating the tax was significant because the tax was fairly apportioned, did not discriminate against interstate commerce, and the burden on the taxpayer did not outweigh the benefits accrued by the state.[37] As a result, other enterprises which could show their operations were exclusively interstate were now granted constitutional immunity from state taxation.[38]

The immunity afforded interstate enterprises was cut short in the case of *Complete Auto Transit v. Brady*.[39] In unanimously overruling *Spector*, the Court for the first time formulated a test to analyze the effects of a state tax on interstate commerce. The Court held that a state tax will withstand a constitutional challenge when four basic requirements are met: "[t]he 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."[40]

Given the Court's newly created standard for state taxation of *interstate* commerce, the issue arises as to how the test would apply to state taxation of *foreign* commerce. The Supreme Court addressed this issue in *Japan Line, Ltd. v. County of Los Angeles*.[41] A Japanese shipping line challenged the constitutionality of a California prop-

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[33] Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 750 (1978).

Limits on state regulation remained in force, nonetheless, the most notable of which was "the fundamental principle that . . . [n]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1976) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)).

[34] 340 U.S. 602 (1951).

[35] *Id.* at 610.

[36] The constitutional challenge came from a Missouri trucking company. *Id.* at 603.

[37] *Id.* at 606-608.

[38] The crucial distinction in *Spector* was that the taxed business was *exclusively* interstate. The Court reasoned that the states could not tax an exclusively interstate business because the states had, in the commerce clause, "delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce. . . ." *Id.* at 608. This interpretation could logically be applied to foreign commerce as well. Thus, if the *Spector* Court had decided *Wardair*, it probably would have struck down the Florida sales tax as applied to air carriers engaging *exclusively* in foreign commerce.

[39] 430 U.S. 274, 289 (1976). In *Complete Auto*, a privilege-of-doing-business tax was assessed by the state of Mississippi on a Michigan trucking corporation which transported General Motors cars to Mississippi dealers. *Id.* at 276.

[40] *Id.* at 279.

[41] 441 U.S. 434 (1979).

erty tax imposed on the shipping line's cargo containers, apportioned for the period of time the containers were present in the state.[42] The shipping line based its argument on the common law "home port" doctrine, whereby personal property and instrumentalities associated with commerce are to be taxed in full at the domicile of the owner.[43] Because the home port doctrine lacked a source in the Constitution, the Court reasoned that it was inappropriate for it to "rehabilitate" the doctrine as a tool of commerce clause analysis.[44] The Court limited its inquiry to the narrower issue whether foreign based instrumentalities of commerce used exclusively in international commerce can be subject to a nondiscriminatory state property tax.[45]

In resolving this issue, the Court in *Japan Line* created a two part foreign commerce clause inquiry which reflected the potential burdens of a state tax on foreign commerce.[46] Applying this analysis, the

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[42] The apportionment principle states that taxes on one instrumentality may be apportioned among local taxing jurisdictions such that no single jurisdiction may tax in full. *Id.* at 447.

Difficulties with the apportionment principle arise where foreign sovereignties are involved. First, there is a problem where "an instrumentality of commerce is domiciled abroad, [then] the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value." *Id.* Thus, a state may attempt to impose an apportioned tax when the carrier has already been taxed in full in the country of domicile.

In addition, there is the problem of devising an international standard of apportionment in the absence of "an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value . . . ." *Id.* at 447-48. The effect of the multiple tax is clearly inequitable; both sovereigns have the right to tax, but there is no authoritative body to ensure apportionment will be honored. The Court recognized that this danger is unique to foreign commerce. "In interstate commerce, if the domiciliary State is 'to blame' for exacting an excessive tax, this Court is able to insist upon rationalization of the apportionment. As noted above, however, this Court is powerless to correct malapportionment of taxes imposed from abroad in *foreign commerce.*" *Id.* at 454 (emphasis added). "The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies." *Id.* at 447.

[43] *Id.* at 435-436. The "home port" doctrine was substantially eroded in favor of an apportionment system of tax. *See supra* note 42 and accompanying text. Where apportionment taxes were upheld, however, the Supreme Court consistently reserved application of the "home port" doctrine to oceangoing vessels. *Japan Line*, 441 U.S. at 442.

[44] *Id.* at 443. In *Wardair*, the Supreme Court never actually established whether the tax on the sale of fuel is a tax on an instrumentality of commerce, a point which the appellant emphasizes. *See* Brief for Appellant at 21-24, *Wardair*, 106 S. Ct. at 2369. Apparently, the instrumentality issue is not crucial in applying the constitutional standard. Nonetheless, the question arises whether a tax on the fuel of an instrumentality falls within the scope of the foreign commerce clause. The Air Agreement expressly prohibits direct taxation of fuel *already owned* and "retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party," but fails to mention state sales tax on fuel purchased. Air Agreement, *supra* note 6, art. XII(1)(b). *See also* Chicago Convention on International Civil Aviation, *opened for signature* December 7, 1944, art. 24, 61 Stat. 1180, 1186, T.I.A.S. No. 1591.

[45] *Japan Line*, 441 U.S. at 443.

[46] *Id.* at 446. This test is applied by the Court in addition to *Complete Auto* factors and represents what the Court considers the distinction between interstate and commerce clause analyses.

Court first determined whether the tax created a substantial risk of multiple taxation,[47] and secondly, whether the tax prevented the federal government from "speak[ing] with one voice when regulating commercial relations with foreign governments."[48]

Having determined that these two requirements were not met, the Court struck down the property tax as unconstitutional under the foreign commerce clause.[49] Not only would the foreign-owned containers be subject to multiple taxation,[50] but the state tax would impair federal uniformity by violating an international agreement which prohibited such taxation.[51] By adding the two-pronged foreign commerce inquiry to the *Complete Auto* test, the Court recognized that (1) the effect of a state tax on foreign commerce could differ from its effect on interstate commerce and (2) there existed a danger that state regulation of foreign commerce could potentially conflict with federal foreign policy.

The foreign commerce analysis developed in *Japan Line* was still intact when *Wardair* came before the Supreme Court.[52] Wardair attempted to align itself with the *Japan Line* taxpayer's predicament while drawing the distinction that the *Wardair* case "is different in a very important particular: the violation by the state of Florida not only 'implicates' national foreign policy, but violates a clear, une-

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[47] The factors can be applied alternatively to the tax in question; the existence of either is sufficient to render the tax unconstitutional. *Id.* at 451.

[48] *Id.* at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

[49] *Japan Line*, 441 U.S. at 454.

[50] The containers were owned, based, and registered in Japan, which gives Japan "the right and the power to tax the containers in full." *Id.* at 452.

[51] The treaty to which the United States, Japan, and 150 other countries are parties, expressly grants containers "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions." Customs Convention on Containers, May 18, 1956, art. I(b), 20 U.S.T. 301, 304, T.I.A.S. No. 6634.

[52] Two other foreign commerce clause cases reached the Court prior to its *Wardair* decision. In Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1982), the Court upheld a state tax imposed on a domestic corporation's taxable income, including its income from interstate commerce. Absent the danger of multiple taxation, the Court only considered the foreign policy argument that the corporation's foreign trading partners would be offended and retaliate against the nation as a whole. The Court was not willing to interfere with foreign policy. The Court did, however, use this opportunity to define its limited role by acknowledging that

> [t]his Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please. The best that we can do, in the absence of explicit action by Congress, is to attempt to develop objective standards that reflect very general observations about the imperatives of international trade and international relations.

Id. at 194.

In Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7 (1983), the Court had a much easier case to resolve. The state of Hawaii imposed a tax on the annual gross income of all airlines, domestic and foreign, operating within the state. Such a tax was expressly invalidated by § 1513(a) of the Federal Aviation Act. In this instance, "courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted." *Aloha Airlines*, 464 U.S. at 12.

quivocal 'federal directive.' "[53]

In determining the validity of the tax under the commerce clause, the Court utilized a three step approach. It examined the language of the controlling federal statute, reviewed the statute's legislative history to discern whether Congress intended to pre-empt the sales tax, and, finally, addressed Wardair's claim that the tax violated a uniform federal policy.[54]

In reaching its decision, the Court in *Wardair* first examined the scope of congressional power to regulate air commerce as set forth in the Federal Aviation Act of 1958.[55] The Court concluded that the language of section 1513(b) of the Act[56] "expressly and unequivocally permitted the States" to levy the aviation fuel tax.[57] Furthermore, other provisions in the Act indicated that this permissive language applied to foreign as well as interstate air commerce.[58]

Next, the Court applied pre-emption analysis.[59] In the absence of an actual conflict, statutory or otherwise, between federal and state law, the Supreme Court will not find a state statute unconstitutional unless there is "evidence of a congressional intent to pre-empt the specific field covered by the state law."[60] The Court was satisfied that section 1513(b), which does not expressly prohibit state sales taxes, indicated congressional intent not to prohibit such taxes.[61]

Although the Court's conclusion that Congress intended for the states to be free to impose a fuel sales tax might have been sufficient

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[53] Brief for Appellant at 19, Wardair Can., Inc., v. Florida Dept. of Revenue, 106 S. Ct. 2369 (1986).

[54] *Wardair*, 106 S. Ct. at 2372-2376.

[55] 49 U.S.C. § 1301 (1982).

[56] Section 1513(b) states in part that "[n]othing in this section shall prohibit a State from the levy or collection of taxes . . . including . . . sales or use taxes on the sale of goods or services." 49 U.S.C. § 1301, § 1513(b) (1982).

[57] *Wardair*, 106 S. Ct. at 2372. "[N]owhere in that legislative history is there any indication that Congress intended to limit the applicability of § 1513(b) to state taxation of *interstate* air commerce while prohibiting taxation of *foreign* air commerce." *Id.* at 2377 (Burger, C.J., concurring in part and concurring in the judgment).

[58] *Id.* at 2377-2378. The definition of "air transportation" includes "interstate, overseas, or foreign air transportation." 49 U.S.C. § 1301(10) (1982).

This is not the first time a Florida sales tax has been challenged by a foreign carrier. In Air Jamaica, Ltd. v. State Dept. of Revenue, 374 So. 2d 575 (Fla. App. 1974), the foreign carrier was held liable for a 4% sales tax on food purchased in Florida to be consumed by passengers on international flights originating in Florida. The court held that state sales taxes were specifically exempted in § 1513 of the Aviation Act, which prohibits other state taxes on commerce or carriage of persons in commerce. *Air Jamaica*, 374 So. 2d at 578.

[59] The basis for pre-emption analysis is found in the supremacy clause in article VI of the United States Constitution. "The Supremacy Clause . . . confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law, and this Court has throughout the years employed various verbal formulations in identifying numerous varieties of pre-emption." *Wardair*, 106 S. Ct. at 2372.

[60] *Id.*

[61] *Id.*

to uphold the sales tax under supremacy clause analysis,[62] the Court went one step further in addressing Wardair's contention that the sales tax contravened a uniform federal policy.[63] If not for examination of this issue, the result in favor of the state tax would have been decided on strict statutory interpretation of the Federal Aviation Act.[64] In resolving this issue, the Court applied the two-part *Japan Line* foreign commerce clause analysis to determine the constitutionality of the tax.[65]

This next level of inquiry was guided by dormant commerce clause analysis, which gives the judiciary the authority, in areas in which the federal government has not affirmatively acted, to determine whether "action by state or local authorities unduly threatens the values the Commerce Clause was intended to serve."[66] The dormant commerce clause inquiry triggers the four factor test[67] formulated in *Complete Auto*[68] and the two additional components of the *Japan Line* foreign commerce test.[69]

The Court noted it was undisputed that the sales tax satisfied the *Complete Auto* test.[70] Applying the *Japan Line* test, the Court found that the danger of multiple taxation did not exist, "since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only."[71] The constitutional question therefore hinged entirely on whether the state sales tax contravened a particular uniform federal policy.[72]

Following its comprehensive pre-emption analysis, the Supreme Court noted that in the context of bilateral aviation agreements such as the U.S.-Canadian Air Agreement, the United States has yet to "deny States the [taxing] power asserted by Florida in this case."[73] The explicit language in the Federal Aviation Act, and the absence of a more compelling federal policy justification, precluded further

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62 *See infra* note 74.

63 The Court reasoned that it was "plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic carriers, and therefore we do not rely on the existence of this section [of the opinion] to answer the Commerce Clause issue raised here by [Wardair] and considered by us below." *Wardair*, 106 S. Ct. at 2372.

64 *See supra* notes 56-57 and accompanying text.

65 *Wardair*, 106 S. Ct. at 2373.

66 *Id.* at 2372-73. "[T]he concern in these Foreign Commerce Clause cases is not with an actual conflict between state and federal law but rather with the policy of uniformity, embodied in the Commerce Clause which presumptively prevails when the Federal Government has remained silent." *Id.* at 2373.

67 *Id.*

68 *See supra* notes 39-40 and accompanying text.

69 *See supra* notes 46-47 and accompanying text.

70 *Wardair*, 106 S. Ct. at 2373. Thus, the sales tax satisfied the constitutional requirements under the *Complete Auto* test in the context of interstate commerce. *Id.*

71 *Id.* For example, within a single national jurisdiction, taxes could be apportioned between local taxing jurisdictions.

72 *Id.* at 2373.

73 *Id.* at 2375.

analysis.[74]

In his dissenting opinion, Justice Blackmun emphasized the federal policy of reciprocal tax exemptions on instrumentalities of foreign commerce.[75] The dissenting justice claimed that disregarding this policy in favor of the state statute would both subject the United States to retaliatory measures from foreign countries and undermine federal government efforts to achieve this reciprocity in future international commerce agreements.[76] Although Justice Blackmun conceded that the "United States has not fully succeeded. . .in transforming its policy [of reciprocity] into law,"[77] he nevertheless concluded that the Supreme Court and not Congress should give the effect of law to the policy of reciprocity.

Appellant Wardair also claimed that the Air Agreement was evidence of a federal policy to pre-empt the state sales tax.[78] The applicable provision is article XII, which states that each party shall exempt the carriers of the other party from "other national duties and charges on fuel, . . . and other items intended for use solely in connection with the operation, maintenance, or servicing of aircraft."[79] Clearly, the provision prohibits national taxation of fuel, but it makes no reference to state taxation.[80] On the basis of its judicial interpretation that the Federal Aviation Act and the Air Agreement did not expressly prohibit state sales taxes, the Court upheld the sales tax.[81]

The *Wardair* decision will have a limited impact on state taxation of foreign commerce. In upholding state taxing power, the decision makes it constitutionally permissible for a state to levy a sales tax on

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[74] *Id.* The Court was satisfied that "the facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel." *Id.*

In his concurring opinion, Chief Justice Burger criticized the circularity of the majority's analysis and argued that since the state tax is valid within the language of § 1513 of the Aviation Act, no further analysis is required. *Id.* at 2376 (Burger, C.J., concurring). The majority, however, considered the pre-emption argument and dormant commerce clause analysis before concluding "the evidence relied upon by appellant . . . shows also that in the context of this case we do not confront federal governmental silence of the sort that triggers dormant Commerce Clause analysis." *Id.* at 2373.

[75] *Id.* at 2379 (Blackmun, J., dissenting).

[76] *Id.* Twenty-five countries officially protested the Florida fuel tax. Brief for Appellant at 30, Wardair Can., Inc. v. Florida Dept. of Revenue, 106 S. Ct. 2369 (1986) (No. 84-902).

[77] *Wardair*, 106 S. Ct. at 2379 (Blackmun, J., dissenting).

[78] *Id.* at 2371.

[79] Air Agreement, *supra* note 6, art. XII. The Court in Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1982), observed that "the tax treaties into which the United States has entered do not generally cover the taxing activities of subnational governmental units as States," implying that there is another element to regulating state taxation. *Id.* at 196.

[80] *Wardair*, 106 S. Ct. at 2372.

[81] *Id.* at 2375. This represents a significant contrast to the earlier doctrine that the absence of federal legislation indicated state regulation would be prohibited. *See supra* note 32 and accompanying text.

aviation fuel, without regard to whether the carrier engages exclusively in foreign commerce. A mere *pattern* of federal policy (in this case, reciprocal tax exemptions) is not enough to compel the Supreme Court to intervene in an area where Congress has already acted, even in the unique context of foreign commerce. The Court requires more convincing evidence of a federal policy. The *Wardair* decision suggests a threshold requirement that the federal policy allegedly threatened by a state tax at least be explicitly embodied in an international agreement affecting commerce.

In the context of foreign commerce, the issue whether the Supreme Court should intervene in foreign policy beyond its policing role is not addressed. In *Wardair*, the Court was able to defer to Congress by determining that the federal government "has at least acquiesced in state taxation of fuel used by foreign carriers in international travel."[82] Because the federal statute affirmatively allows this type of state tax, the Court chose not to consider "whether, in the absence of those international agreements, the Foreign Commerce Clause would invalidate Florida's tax."[83] This statement implies the existence of a more troublesome issue, whether the Supreme Court has the authority to determine the scope of state power to tax foreign commerce. The situation could arise in which the federal statute is silent but the state regulation clearly conflicts with federal policy. The present Court is unwilling, however, to establish uniform rules for regulating foreign commerce. Rather, the Court will police state taxation, guided by the inquiries under the judicially created interstate and foreign commerce clause tests. Policy making in the realm of foreign commerce is likely to be left exclusively with Congress.

The *Wardair* decision sheds little light on the extent to which the Court will go to strike down a state statute which allegedly conflicts with federal policy. It appears that in lieu of creating a uniform rule for state taxation of foreign commerce, the Court will continue to apply its judicially created commerce clause analysis. *Japan Line* suggests that even if state regulation of foreign commerce is not statutorily precluded, the federal government's interest in preserving federal uniformity in foreign affairs is sufficient to render the regulation unconstitutional.[84] By implication, the Court has the power to decide, in the absence of a controlling federal statute, whether a federal policy exists which renders the state regulation unconstitutional. This question is left open by the Court in *Wardair*.[85]

If the Court had struck down the sales tax as unconstitutional,

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[82] *Wardair*, 106 S. Ct at 2375.

[83] *Id.*

[84] *Japan Line*, 441 U.S. at 448.

[85] *See supra* note 82 and accompanying text.

there would be several important implications for interstate commerce. A condition of the *Complete Auto* test is that the state tax must not discriminate against interstate commerce.[86] Exempting foreign carriers from the sales tax would discriminate against interstate carriers. The immunity rationale that the foreign carrier engages exclusively in non-intrastate commerce is applicable to interstate carriers as well.[87] Both types of carriers benefit equally from "services that include not only police and fire protection, but also the benefits of a trained work force and the advantages of a civilized society."[88] The absence of an authoritative tribunal is a strong argument against recognizing a federal policy of reciprocal tax exemptions.[89] Absent an express provision in the bilateral agreement, no authoritative body can ensure that both nations honor an implicit policy of reciprocity. A different result by the *Wardair* Court would have constitutionally prohibited state sales taxes while permitting foreign governments to impose such taxes freely.

Finally, if the Court had applied the policy of reciprocal tax exemptions to sales taxes, notwithstanding the absence of a congressional mandate, the effect would be to open the door to constitutional state tax immunity for all instrumentalities of foreign commerce.[90] This result would disregard the well established doctrine that interstate and foreign commerce should "pay its own way."[91] In light of the recent commerce clause decisions by nearly unanimous courts,[92] such a reversal of the present commerce clause doctrine, which reserves some taxing power over foreign commerce to the states, seems unlikely.

A shift in foreign commerce clause analysis is not entirely unforeseeable, as history has shown.[93] As increases in international agreements cause the means and methods of commerce to become more complicated, domestic and international pressure may convince Congress to take affirmative legislative action to establish a

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[86] *Complete Auto*, 430 U.S. at 279.

[87] *Id.* Thus, whether a carrier fueling in the state would have to pay a sales tax would depend on its ultimate destination. A carrier engaging exclusively in interstate commerce could argue its ultimate destination was outside Florida and thus it should not be subject to the tax.

[88] *Japan Line*, 441 U.S. at 445.

[89] Interestingly, the absence of an authoritative tribunal was an issue in *Japan Line*. The Court felt an international tribunal would be needed to ensure that taxes on instrumentalities of foreign commerce would be duly apportioned between the taxing nations. Without the tribunal, the danger of multiple taxation exists. *Japan Line*, 441 U.S. at 447.

[90] This could result in tax avoidance justified in the interests of a federal policy. Also, there are numerous problems in defining what constitutes an "instrumentality" of foreign commerce. *See supra* notes 42-43 and accompanying text.

[91] *See supra* note 33 and accompanying text.

[92] *See, e.g.*, Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7 (1983); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Complete Auto Transit v. Brady, 430 U.S. 274 (1977).

[93] *See supra* notes 30-34 and accompanying text.

more uniform foreign commerce regulation which might pre-empt state regulation. The Court has acknowledged that in such a case, Congress, and not the Supreme Court, is in the better constitutional position to enact uniform federal rules.[94]

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[94] In an earlier case, the Supreme Court described the role of Congress in directing future foreign commerce regulation:

> While the freedom of the States to formulate an independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected states. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body and not this Court, that the Constitution has committed such policy decisions.

Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978).