Property Taxation of Foreign Goods and Enterprises - A Study in Inconsistency

James Dexter Clark

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by JAMES DEXTER CLARK*

INTRODUCTION

Foreign commerce, subject to so many jurisdictions, has presented many complexities to practitioner and scholar alike. Within the United States the subject is made even more complicated by the existence of the states themselves, which exercise a certain amount of authority over aliens, their property, and their enterprises by the very fact that those aliens do business within the states. In addition, the relationship of the state vis-a-vis the federal government in dealing with foreign enterprises and property has undergone a quiet revolution since the writing of the Constitution. Our bicentennial year is an appropriate milestone to review what has happened.

One of the most important areas from the local taxing jurisdic-

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tion's standpoint is that of the effect of the federal-state relationship on property taxation. This relationship in both foreign and interstate commerce has been the subject of many cases throughout our history. It is an area of the law which has engendered what can only be called "legal myths," doctrines whose origins and meanings were once clear but which, since their original enunciations, have become verbal dogma which are applied in response to factual stimuli which logically bear no more relationship to the original concepts than Pavlov's bell does to dog food.

Had the courts been directed to arguments showing the original constitutional purpose and distinguished that purpose from later day events, most of these doctrines could have been applied appropriately and half-truths eliminated. For the lack of any better term, this method of viewing cases may be labeled an "historical analysis" of the law.

This article deals with a specific area of law from the standpoint of historical analysis. But because property taxation of foreign enterprises and goods affects many areas of the law, it is more than merely historical. Consideration must be given to the expectations of those foreigners who may or may not be subject to those taxes, as well as to the responsibilities of the local jurisdictions not only to their citizens but to all of the people who do business within their borders. The backdrop for all of this investigation is, of course, the import-export and commerce clauses of the United States Constitution. But as one delves further into this area it becomes increasingly apparent that of almost overriding importance are the equal protection requirements of the federal and state constitutions.

Three principal avenues of inquiry reveal themselves almost immediately. The first concerns the import-export clause's effect on property taxation of imports and exports. The United States Supreme Court in its recent landmark decision of *Michelin Tire Corp. v. Wages*[1] refused to continue the application of the original package doctrine to a fact situation to which that doctrine was never meant to apply. At the same time, the Court made statements which affect the other two areas of inquiry.

The second of the three avenues is property taxation of instrumentalities of foreign commerce. The "doctrine" which is involved in this factual situation is the home-port doctrine first enunciated in *Hays v. Pacific Mail Steamship Lines*.[2] This doctrine was most recently applied by the California Supreme Court

1. Michelin v. Wages, 423 U.S. 276 (1976).
2. 58 U.S. (17 How.) 596 (1855).

in *Scandinavian Airlines Systems v. County of Los Angeles.*[3]

The third line of inquiry involves an incipient "doctrine" which appears to be based on the idea that by the act of placing goods in bond a taxpayer may, under certain circumstances, avoid any state taxation whatsoever. Perhaps the basic case in this area is *McGoldrick v. Gulf Oil Corp.*[4] which holds, without a substantial consideration of the problem, that Congress may prohibit state taxes in its regulation of foreign commerce.

THE ORIGINAL PACKAGE "DOCTRINE"

As every student of constitutional law knows, in *Brown v. Maryland*[5] Justice Marshall enunciated the idea that a state could not tax imports which were in their "original packages". The point which was lost sight of after that decision, however, was that the tax in that case was actually found to be an impost.[6]

During the period of the framing of our Constitution it was clear that imposts, duties and taxes did not mean the same thing at all. Probably the most impressive proof of this is fully developed by the late Professor William Crosskey in his book *Politics and the Constitution in the History of the United States.*[7] Professor Crosskey, using evidence of the writings of the period, confirms what one is led to believe from a reading of the Constitution itself, that "tax" is a general term while "impost" and "duty" are specific. The Constitution uses these terms in a way which makes clear that they are not synonymous.[8]

The Constitution does not help one determine exactly what was meant by impost or duty, but Professor Crossksy does. The author exhaustively identifies the most likely sources of defini-

3. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961).
4. 309 U.S. 414 (1940).
5. 25 U.S. (12 Wheat.) 419 (1827).
6. U. S. CONST. art. I, § 10, cl. 2 reads,

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the revision and Control of the Congress.

7. W. Crosskey; *Politics and the Constitution; The History of the United States*, Vol. 2 (1953).
8. See especially U. S. CONST. art. I, § 8, cl. 1 which gives the federal government the power to lay "taxes, duties, imposts, and excises." At the same time, U. S. CONST. art. I, § 10, cl. 2 prohibits only imposts and duties.

tional information and traces the meanings of the words. He concludes that an impost is a levy on imported goods, commonly associated with today's term "customs duty," and that duties are excises upon the sale of an article. He emphasizes that neither of these terms includes property taxes.[9]

It is also clear that the framers of the Constitution chose to prohibit discriminatory taxation. Not only is this conclusion clear from Professor Crosskey's work,[10] but it is also apparent from the constitutional debates themselves.[11] Despite this, the original package concept became a full-fledged doctrine and was applied almost irrationally to fact situations involving the taxation of imported goods still in the boxes in which they were imported.[12]

How did the courts lose sight of the original concepts and definitions? Perhaps the first problem was in the *Brown v. Maryland* decision itself. At the time of that decision, property taxation of goods held for sale was not common.[13] The license tax at issue in that case, imposing a tax on a profession, was more typical. It is clear that a tax upon an importer while he was acting solely in that capacity would act as a levy on imports *qua* imports.[14] But that was not emphasized at the point where the most concise language of the opinion is located. The court states: ". . . while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition

9. Crosskey, *supra* n.8, at 296.

10. *Id.* at 296-97.

11. Michelin Tire Corp. v. Wages, 423 U.S. 276, 281-94 (1976).

12. The situation became so unreasonable that a court held that foreign bales of cotton stored in the same warehouse as domestic bales for the same purposes were not taxable although the domestic cotton was (Imperial Development Co. v. Calixico, 47 Cal. App. 666, 191 P. 50 (1920)). The argument was also waged on the battleground of the word "package." The courts engaged in discussions of the nature of the thing having nothing to do with the purposes of the constitutional provision (e.g., Commissioner v. Garment Corporation of America, 32 Mich. App. 715, 189 N.W.2d 72, *cert. den.* 404 U.S. 992 (1971), and Mexican Petroleum Co. v. City of Portland, 121 Me. 128, 115 A. 900 (1922).

13. Ely, Taxation in American States and Cities (1888) p. 41; Digest of Pennsylvania Laws 1700-1830; Maine Revised Statutes 1841; Maryland Laws 1692-1839; Laws of Vermont 1824; Massachusetts Laws 1823, Laws of Massachusetts 1822-1835; Revised Statutes of New York 1829; Rhode Island Public Laws 1822-1842; Statutes at Large (Virginia) 1831-1832; North Carolina Laws 1829-1832; North Carolina Laws 1818-1827; New Hampshire Laws 1822-1827; Georgia Laws 1827-1828; Delaware Laws 1827-1829; and Statutes of Connecticut 1821.

14. It is clear that Justice Marshall's objection was to this particular aspect of the tax. He said,

> Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448 (1827).

in the constitution."[15] As long as the taxing structure remained the same, this was a valid statement.[16] When the property tax became a more important part of the states' taxing structure, however, a re-examination was in order. An opportunity for that re-examination occurred in 1869 when *Woodruff v. Parham*[17] came before the Supreme Court.

There, the Court was faced with property taxation of goods which had moved into the taxing state from another state. Regrettably, the Court virtually ignored the possibility which the difference in the tax provided and focused on other language from *Brown v. Maryland* to serve as the basis for distinguishing the fact situation before it.

Specifically, the Court emphasized that the original package concept did not apply to goods shipped interstate. This distinction took advantage of Justice Marshall's *supposition* that the rule for determining the end of the import status would be the same for interstate imports as for foreign imports.[18]

Professor Crosskey makes it abundantly clear that no such distinction was ever intended by the framers of the Constitution. The word "import" applied to both interstate and international shipments,[19] and no distinction between the two was ever meant to be implied from either the import-export clause[20] or from the commerce clause.[21] Despite this lack of consistency, the Court's

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15. *Id.* at 441.

16. Actually, the sort of tax prohibited by *Brown v. Maryland* would probably be prohibited by the equal protection clause of the fourteenth amendment as discriminating against importers. That provision, of course, was not available to the courts until it became effective on July 28, 1868.

17. 75 U.S. (8 Wall.) 123 (1869).

18. "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state." Brown v. Maryland, 25 U.S. at 449.

19. Crosskey, *supra* n.9 at 293 *et seq.*

20. See *supra* n.7.

The purpose of the clause was, according to the Youngstown Court,

> ". . . to prevent '[t]he great importing states [from laying' a tax on the nonimporting states, ' . . . which would not only discriminate against them but also 'would necessarily produce countervailing measures on the part of those states whose situation was less favorable. . ." Youngstown Sheet and Tube Co. v. Bowers, 358 U.S. 534, 545 (1959).

21. U. S. CONST. art. I, § 8, cl. 3 reads:

> The Congress shall have Power . . .to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

action was logical from the standpoint of a practical Court dealing with the information before it. Although the brief of the taxing authorities did point out that a nondiscriminatory tax was imposed in that case, and although the Court did mention this as one basis for its opinion, it concentrated on the idea that "imports" were goods coming from other nations rather than from other states. The Court seized upon the only part of the *Brown v. Maryland* opinion which was vague, Justice Marshall's "we suppose . . ." language.

Woodruff, by implication, increased the validity of the original package concept (as applied to a nondiscriminatory property tax which was never meant to be prohibited), as long as it involved foreign goods. Further, *Woodruff* directly asserted that there was something different about foreign commerce which required a different set of rules.[22]

In a sense, then, *Woodruff v. Parham* is the basis for *Low v. Austin*,[23] *Scandanavian Airlines Systems v. County of Los Angeles*,[24] and *McGoldrick v. Gulf Oil Corp.*,[25] three of the primary cases which perpetuate and expand the "legal myths" surrounding property taxation of foreign goods and enterprises.

Low v. Austin dealt with a property tax on goods imported from abroad which were held for sale in the boxes in which they had been imported. Those goods were even in the warehouse of the importer and thus qualified in every respect for the cloak of protection afforded by *Brown v. Maryland*. The California Supreme Court, however, held that the tax was valid and saw that the difference between the taxes was critical.[26]

The Court in Welton v. Missouri, 91 U.S. 275, 280, 282 (1876) stated that

> . . . investing this power in General Government was [meant] to insure this uniformity against discriminating state legislation . . . . It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

22. This is not consistent with the general trend of cases holding that Congress' power to regulate foreign and interstate commerce is the same. License Cases, 46 U.S. (5 How.) 504 (1847). Although the Stanford Law Review commentary discussed later in this article concludes, on the basis of dicta, that congressional power over foreign commerce is somehow greater than that over interstate commerce, the author agrees that the federal power over regulation of each area is complete (*infra* n.91). This appears to be the conclusion of the editors of the U.S. Government Printing Office annotated version of the Constitution S. DOC. NO. 170, 82d Cong., Sess. 21. The *Constitution of the United States of America, Analysis and Interpretation*, Lester S. Jayson, Supervising Editor (1973) at pp. 149-50.

23. 80 U.S. (13 Wall.) 29 (1871).

24. 56 Cal. 2d 11, 363 P.2d 26, 14 Cal. Rptr. 25 (1961).

25. 309 U.S. 414 (1940).

26. 1 Calif. Unreported Cases 642. The California court was unprepared to deal with the problem of the proper application of the original package concept

The United States Supreme Court reversed the California decision, however, focusing on the paragraph involving the original package. With a minimum of reasoning the Court simply restated Justice Marshall's language and ascertained that the facts of the case before it fit that statement.[27]

The result of this dogmatic approach in *Low v. Austin* was the subsequent blind application of Justice Marshall's original package language on the one hand and of contorted reasoning to avoid that application on the other.[28] Possibly the most well-

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and criticized the doctrine itself. This may have been one of the unwritten reasons for the Supreme Court's reversal. For another view, see Early & Weitzman: *A Century of Dissent: The Immunity of Goods Imported for Resale from Nondiscriminatory State Personal Property Taxes*, 7 SW. UNIV. L. REV. 247, 256 n.41 (1975).

Whatever the case, the *Low* Court was obliged to consider *Brown v. Maryland*, and the *Woodruff* opinion left very little room for maneuvering. The California Attorney General failed to deal fully with the "right to sell" argument put forward by Justice Marshall and the court took advantage of the opportunity.

27. 80 U.S. (13 Wall.) 29, 33 (1871). The Court then discussed the right of the importer to sell his goods. It gave the importer the absolute right to sell his goods without the imposition of any tax. The obvious difficulty with this argument is that such a right is not superior to the right of a trader in domestic goods to sell them, and actually makes very little difference in the burdens imposed on the imports if taxes may be imposed on them after sale or after the opening of the packages.

It is important to understand that the *Low v. Austin* logic was a development of the territorial concept of the late nineteenth century. This concept and its effects are described later in this article. But it is sufficient to say that a concept of the rights of states to exclusive control of activity within their borders caused the Court to view the right to tax as existing only when federal control ceased and state control began. This concept although not valid according to Professor Crosskey's study, could be applied to regulations. But when applied to nonregulatory taxation, it leads to hair-splitting as to when goods are sufficiently under state control to tax. That hair-splitting is completely unnecessary when considering a nonregulatory tax because such a tax can have no regulatory effect on commerce.

28. Light is shed on this controversy by the cases involving the importation of goods with no packaging at all. Some courts chose to apply the package reasoning to the greatest extent, holding that since there was no package, the single imported article constituted the "unit" of importation. Since that unit could not be broken down further, the only alternative offered by Mr. Justice Marshall's language was to wait until it left the possession of the importer, usually by sale. The leading example of this thinking, and a respectable reply to it is found in the opinion and dissent in Florida Greenheart Corp. v. Gautier, 172 So. 2d 589 (Fla.) *cert. den.* 382 U.S. 825 (1965).

The California courts struggled with the concept that the original package test was meant to determine the end of the "import process." Application of the original package concept as dogma precluded much of this analysis, but when the courts had the opportunity they attempted to take advantage of it. The best effort in this regard is found in the "unit of shipment" approach of E. J. Stanton & Sons known opinion avoiding strict application is *Youngstown Sheet & Tube Co. v. Bowers*.[29] There, the Court seized upon a technicality and virtually reversed the previous "strict application" approach taken in *Hooven & Allison v. Evatt*.[30]

Hooven left open the possibility that goods imported for the importer's "use" and part of his "current operational needs" might not be immune, again citing language from *Brown v. Maryland*.[31] The *Youngstown* Court leaped into the breach and held that goods used in the importer's manufacturing process, even though in the "original package," were not immune if they had been irrevocably committed to that process and were part of the importer's current operational needs.[32]

From the standpoint of establishing the end of the import process, this reasoning may be sound. It is equally clear, however, that the *Youngstown* decision created further inconsistencies. A property tax on the goods before "use" would be no less burdensome than would a property tax on goods held for sale. Assuming that the goods are meant for eventual sale, possibly to a customer in another state, the tax on goods imported for use would impose the same burden objected to in the case of goods for sale.[33]

Only recently has the Court addressed itself to the question of

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v. County of Los Angeles, 78 Cal. App. 2d 181, 177 P.2d 804, *cert. den.* 323 U.S. 766 (1947).

29. 358 U.S. 534 (1959).

30. 324 U.S. 652 (1946).

31. "He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer." 25 U.S. (12 Wheat.) at 443.

32. The *Youngstown* Court, in reviewing *Hooven*, said:

> But the record . . . [in *Hooven*] did not present, and this Court did not reach or decide, the question we have here. Indeed the [*Hooven*] Court expressly reserved it. It said: '[I]t is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibres in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages: 358 U.S. at 544.

California courts interpreted current operational need to the broadest extent. *See* Virtue Bros. v. County of Los Angeles, 239 Cal. App. 2d 233, 48 Cal. Rptr. 631 (1966). Other states developed various formulae for computing current operational needs based on shipping time, frequency of shipping, and the like. *E.g.*, City and County of Denver v. Denver Publishing Co., 153 Colo. 539, 387 P.2d 48 (1963).

33. Justice Frankfurter recognized these problems and suggested, in his dissent, that the.opinion actually nullified the property tax immunity for all classes of imported goods. 358 U.S. at 551-75.

Although Justice Black's dissent in *Hooven and Allison v. Evatt* rationalized the tax on the basis that the goods had come to their "final" destination, 324 U.S. at 686-91, Justice Frankfurter's view is undoubtedly the more logical one.

whether applying the original package test to nondiscriminatory property taxation actually fulfilled the purposes of the constitutional immunity. [34] That question was raised in conjunction with a fact situation involving unpackaged tires, sorted and stored, awaiting sale to the importer's franchises.[35] The *Michelin* opinion fully recognizes the difference between discriminatory and nondiscriminatory taxation and properly concludes that *Brown v. Maryland* was never meant to prohibit the nondiscriminatory variety. The opinion goes further:

> It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation.[36]

The Court also emphasized the long-forgotten fact that taxes, imposts and duties are indeed different things and that prohibiting one does not prohibit the others.

Perhaps the greatest impetus for the *Michelin* opinion was not the absurdity engaged in as a result of *Low v. Austin* but rather the relatively short time the members of the Court had served in that capacity. Early and Weitzman, in their article on the import-export clause, suggest the absence of much of the *Hooven* Court allowed Justice Black's views to prevail.[37] The virtually complete turnover of the Court between the time of the last major decision

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34. Actually, the argument was previously brought before the Court in Richfield Oil Co. v. State Board of Equalization, 329 U.S. 69 (1946), but without sufficiently addressing the fact that taxes and imposts are not the same thing. The Court was able to assume that they were identical, 329 U.S. at 76.

35. The fact situation was virtually identical to E. J. Stanton and Sons, 78 Cal. App. 2d 181. The acceptance of *Michelin* by the high court constituted a very real threat to the California taxing authorities as well as to those of other jurisdictions which had accepted the *E. J. Stanton* rationale. If *Florida Greenheart*, 172 So. 2d 589, was held to be the appropriate test for bulk goods, the California authorities would be unable to continue to collect monies they had been receiving since 1947. It is little wonder, then, that the western counties and cities were prepared to go further in their amicus curiae brief than the *E. J. Stanton* approach taken by the Gwinnet County attorneys. *See* the Amici Curiae brief filed on behalf of Los Angeles County and other western cities and counties *and* the brief of the Respondents in *Michelin*. Other amicus curiae briefs argued the logic of applying *Youngstown's* current operational needs test to imported goods held for sale.

36. 423 U.S. at 286-87.

37. Early and Weitzman, *supra* n.27 at 263.

and *Michelin* increased the Court's willingness to re-examine old doctrines.[38] The views and arguments presented to the Court required this change.

THE "HOME-PORT DOCTRINE"

The "Tests" of Constitutionality

The taxation of movable property, whether in foreign or in interstate commerce, has always presented difficult questions of fair treatment by taxing authorities. Such taxation, in the constitutional sense, must satisfy three overlapping and often confused requirements: (1) it must not "burden interstate or foreign commerce";[39] (2) it must be imposed on goods which have acquired a situs in the taxing jurisdiction;[40] and (3) the tax must bear a sufficient relationship to the benefits and protections conferred by the taxing jurisdiction so as not to violate the due process clause of the fourteenth amendment.[41]

It has been suggested that at least some instrumentalities of foreign commerce should be taxed only at the ports where their owners reside.[42] Any such rule, however, should be viewed in light of the purposes of the commerce, due process and equal protection clauses.

The "burden" test has engendered the most difficulty. It has often been interpreted to mean that no tax or regulation may be

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38. Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) examined a discriminatory tax levied on "imports" from other states. The Court therein cited *Low v. Austin* although reliance on the latter case was unnecessary because of the tax's discriminatory nature. In fact, using *Low v. Austin* without more would subject the goods to a discriminatory tax after the "original package" had been broken. Of those Justices sitting on the *Beam* Court, four heard *Michelin*: Douglas, Brennan, Stewart and White. Justice Douglas did not consider the *Michelin* case; Justice Brennan (who wrote the *Michelin* opinion) did not consider the *Beam* case. Interestingly, Justice Stewart wrote the *Beam* opinion.

Although property taxation of exports was considered between 1964 and 1976, it had not previously been considered to be subject to the same rationale as property taxation of imports. See Carson Petroleum Co. v. Vial, 279 U.S. 95 (1928) and Kosydar v. National Cash Register Co., 417 U.S. 62 (1974). This inconsistency was another wrinkle in the *Low v. Austin* fabric. The sweeping rationale of the *Michelin* opinion affects exports as well as imports, although to a lesser extent, since *Carson* and *Kosydar* basically relied on commerce clause logic to determine when goods destined for export were protected by the import-export clause.

39. This text is usually applied pursuant to the commerce clause, U.S. CONST. art. I, § 8, cl.3.

40. This is the rationale relied on by the court in Hays v. Pacific Mail Steamship Lines, 58 U.S. (17 How.) 596 (1855).

41. Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590 (1954).

42. This was the holding in Scandanavian Airlines System v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961).

imposed on goods "in" interstate commerce because only the federal government has authority to regulate interstate commerce.

The situs test is the oldest of the three tests and originally was unrelated to any provision of the Constitution. This test was used by courts to determine which of two or more competing jurisdictions would be allowed to impose a full ad valorem tax on movable property.[43] It was not until later that the situs test was utilized as a means of determining when goods "in" commerce no longer enjoyed that status and became taxable, usually under the commerce clause. The general rule is that goods which have come to rest in the taxing jurisdiction for a purpose other than the circumstances of transportation are taxable.[44]

The third test is fundamentally a due process test.[45] The convoluted reasoning used in connection with the "burden" on commerce concept could have been avoided by resorting to the principle that the taxing jurisdiction must provide benefits and protections consistent with the tax in order for the tax to not result in a deprivation of property without due process. This due process concept appears to have arisen from the advent of the apportioned tax, especially as regards instrumentalities of commerce, but the concept has been applied elsewhere.[46] There is seldom a close judicial examination of the relationship between the tax and the benefits and protections the taxing jurisdiction has provided. Most property taxes which make some effort to reduce the assessment (*e.g.* by calculating the amount of time the property is not actually in the taxing jurisdiction or by determining when it has actually obtained a situs elsewhere) are upheld.[47]

43. New York & H. R. Co. v. Lyon, 16 Barb. 651 (N.Y. Sup. Ct. 1853); Catlin v. Hull, 21 Vt. 152 (1849).

44. Generally, whenever the owner stops the goods for his own purposes rather than the carrier's, the goods are deemed to have situs. *See* Minnesota v. Blasium, 290 U.S. 1 (1933) *and* Bacon v. Illinois, 227 U.S. 504 (1913).

45. The fourteenth amendment reads:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

46. *See* Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935), involving a port fee for all ships using the harbor.

47. *See* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).

Generally, this test has been restricted to taxes involving actual devices for carrying goods from place to place, but this restriction does not appear to be based on any foundation other than judicial habit. It is logical, for instance, to apply this test to inventory which, like railroad cars, has a continuing presence in the taxing jurisdiction on a rotational basis. In actuality, the imposition of a tax as of a single lien date on a constantly revolving inventory is an apportioned tax. Such a tax ignores the fact that other goods will come into the taxing jurisdiction, replace those actually taxed, and obtain a situs there.[48] The apportionment concept is, then, founded upon the due process idea.

Whether the application of the "benefits and protections" test will be applied to inventory is not clear, but its use when instrumentalities of commerce are considered is beyond question.[49]

Courts, however, have not always chosen the appropriate test with ease, and their applications of the tests selected have often left much to be desired. The "burden on commerce" test has presented opportunities for abuse because it was often enmeshed with the idea that interstate commerce somehow stopped at a state's borders. This "territorial" view was used to determine when a state regulation "burdened" commerce. The ambuiguities in the territorial concept led to its eventual collapse. Applications of the situs test to goods having a continuing but rotating presence in the jurisdiction actually failed to recognize the fact that presence calls for the taxing jurisdiction to render as much police and fire protection as that rendered to goods which remain there all year long.[50]

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48. *See* Cal. Rev. and Tax Code §§ 2192 (West 1970) and 401.3 (West Supp. 1976) which appear to restrict taxation to goods present in the jurisdiction on March 1 of each year.

Some assessors actually review the books of companies to see if inventory in stock on lien day is significantly lower or higher than the average. If such a fluctuation exists, an adjustment may be made. Authority for this practice under the situs theory is based on the escape assessment provisions of Cal. Rev. and Tax Code §§ 531 *et seq*. (West Supp. 1976).

49. *See* Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Ott v. Mississippi Barge Line, 336 U.S. 169 (1949); Braniff Airways v. Nebraska St. Bd. of Equalization, 347 U.S. 590 (1954). The apportionment concept has been applied to goods. Ice Capades Inc. v. County of Los Angeles, 56 Cal. App. 3d 745, — Cal. Rptr. — (1976).

50. It must be emphasized that application of the benefits and protections test to inventory is only valid when there is continuing and regular presence in the taxing jurisdiction. Goods with continuous presence require personnel to handle them (perhaps more so than slower moving inventories), who by working and being in the area, place a burden on local facilities.

It should also be apparent that the benefits and protections test leads to

The Origins of the Home-Port Doctrine

In *Hays v. Pacific Mail Steamship Line*[51] the Court was presented with the problem of a full ad valorem property tax imposed on a ship which regularly traveled to San Francisco but whose owner was a New York domiciliary who was taxed in New York as well as in other ports. The *Hays* Court did not have the fourteenth amendment to guide it.[52] The commerce clause did not provide the foundation for the decision since it was recognized both before and after *Hays* that nondiscriminatory property taxation was simply not a regulation of commerce.[53] Perhaps the most convincing proof of this fact is that, although this theory was argued to the Court, it was rebutted and the Court failed to mention the commerce clause in connection with taxation.[54]

The Court was faced, in reality, with a question of situs, and it decided the case in those terms. It based its ruling on the federal statute requiring that a vessel's federal documentation show the port nearest the domicile of the vessel's owner as the port of registration. This was a logical rule for situs purposes. That more than one port should not impose a full value property tax was clear because of the temporary nature of the vessel's stay and the

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different conclusions when considering sales and other taxes whose basis is not presence in the taxing jurisdiction but some sort of "incident," usually a change of ownership. It may be that the jurisdiction of the buyer should be allowed to collect a tax when such an incident occurs because it nurtures the "market," i.e., the center of population. But the relationship between the tax and the burden placed upon the jurisdiction by the goods being taxed (or the "sale" being taxed, etc.) is far clearer in the case of a property tax than in the case of other levies.

In addition, sales and excise taxes are not "apportioned" in the sense outlined above but are based upon the full value of the goods upon each occurrence of a taxable event. There is some question whether the taxing of each event on a full value basis constitutes discrimination in favor of large businesses which own both wholesale and retail facilities and against smaller, separately owned operations which may create more taxable events simply because of their ownership rather than because a greater burden has been placed upon the taxing jurisdiction.

Such distinctions have not been relied upon by the courts, although cases involving the commerce clause and property taxes have more readily been decided in favor of the "goods paying their way" than have other kinds of levies.

51. 58 U.S. (17 How.) 596 (1855).

52. *Supra* n.17. The amendment became effective in 1868, some thirteen years after the *Hays* decision was rendered.

53. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202-03 (1824); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 138-39 (1869).

54. 58 U.S. (17 How.) at 598-99 where the Court referred to the effect of the clause on regulations. *See also* 15 L. Ed. at 254.

prospect of multiple taxation on a full value basis. This rule was further supported by two cases cited by the Court which distinguished between vessels in the ports of their own state and those in foreign or out-of-state ports.[55]

Later, in *Morgan v. Parham*[56] the Court was again presented with the question of the taxability of a vessel which traveled between ports of different states. The Court seized upon language in *Hays* which referred to "municipal and sanitary regulations" and applied it to the discriminatory property tax before it. Going further, the Court utilized a mixture of situs and burden-on-commerce logic:

> This vessel, The Frances, remained the property of the plaintiff, with her home port at New York, and had never become blended with the commerce and property of the state . . . . Her right to trade at each of those ports, without molestation by either of these states is secured by the Constitution of the United States.[57]

Of course, the due process test would have easily disposed of this case without the necessity of resorting to the commerce clause. The due process clause was not originally seen as a prohibition of state taxation, however, and its use was not prevalent until just before the turn of the century.[58]

The *Morgan v. Parham* language, although accurate in light of the discriminatory character of the tax, expanded the home-port doctrine beyond the situs rule it was meant to be. It became a test in and of itself, for determining when commerce was "burdened."[59] At the same time the unequivocal language of prohibi-

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55. 58 U.S. (17 How.) at 599. *See also* the two cases relied on, The General Smith, 17 U.S. (4 Wheat.) 438 (1819) *and* Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833).

There is an important sentence which the *Hays* Court offers which appears to refer to the commerce clause but which cannot be said to decide its applicability to that case:

> These ships are engaged in the transportation of passengers, merchandise, etc. between the City of New York and San Francisco . . . . And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged, or laden on board independently of any control over them, except as it respects municipal and sanitary regulations of the local authorities, such 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. 58 U.S. (7 How.) at 598-99.

56. 83 U.S. (16 Wall.) 471 (1872).

57. *Id.* at 478. Possibly more striking than the unsupported extrapolation of the *Hays* language is the similarity between this logic and that expressed by the same Court the year before in *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871). Chief Justice Chase, and Justices Clifford, Strong, Bradley, Swayne, Davis, Miller and Field were on both Courts.

58. See Tonawanda v. Lyon, 181 U.S. 389 (1901).

59. Morgan v. Parham, 83 U.S. (16 Wall.) 471 at 479, concludes with the following language: "Within the authorities it is an interference with the commerce of the country not permitted to the states."

tion regarding state action, as applicable to state regulations, opened the door to the same views being applied to state taxation.

The Apportionment Concept

In 1888 the Court sustained the imposition of a tax on Western Union capital stock apportioned on the basis of the ratio between the number of telegraph lines in the state and the total number in the country.[60] The Pennsylvania taxing authorities, showing creative zeal, applied this rationale to property taxation of railroad cars belonging to an out-of-state corporation doing business in Pennsylvania.[61] The *Pullman* Court distinguished between instrumentalities traveling over water and those traveling on land. But the basis for the Court's distinction was that " . . . [vessels] . . . are not in any proper sense abiding within [the state's] . . . limits and have no continuous presence or actual *situs* within its jurisdiction . . . ."[62] The Court also emphasized that "[i]t is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."[63] The result of this opinion is that a "continuous presence" in the taxing jurisdiction is sufficient to overcome any objection based upon *Hays* as long as the tax bears some relationship to the "amount" of presence.

It was not until 1949 that the Court considered vessels which, by repeated contacts with the state, had established some sort of continuous presence there in the same way as had the railroad cars in *Pullman*. In *Ott v. Mississippi Barge Lines*[64] the Court ruled that the commerce clause required a consideration of "what portion of an interstate organism may be appropriately attributed to each of the various states . . .", while the due process clause called for a review of "whether the tax in practical operation has relation to opportunities, benefits, or protections conferred or afforded by the taxing State." The thrust of these two tests is the same and a regulation of commerce does not occur when a single state imposes a nondiscriminatory tax.

60. Western Union Tel. Co. v. Massachusetts, 125 U.S. 530 (1888).
61. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).
62. *Id.* at 23.
63. *Id.*
64. 366 U.S. at 174.

Nevertheless, fears have been expressed regarding the possibility that an interstate or foreign carrier will face more than a full ad valorem tax. Although other taxes may be subject to imperfections in calculations, a property tax looks to the value of the goods taxed. A ratio based upon the presence of those goods in the taxing jurisdiction is easily calculated and would end any fear of multiple taxation.[65] *Ott v. Mississippi*, therefore, actually ends the controversy which was based on the character of the instrumentality. [66] It impliedly ends any commerce clause consideration whatsoever. As long as the property tax is apportioned so as to comply with due process requirements there is no danger of a state's encouraging or discouraging commerce.[67]

The Resurgence of the Home-Port Doctrine

One might have naturally concluded that the home-port doctrine was restricted to its proper role of determining the situs of individual vessels not engaged in commerce.[68] In light of the fact that the Court has generally acknowledged that the federal government's control over foreign commerce is the same as its control over interstate commerce, the presumption must be that the *Ott* rule would apply to both.[69]

This expectation appeared to be borne out in California by *Flying Tiger Lines v. County of Los Angeles*.[70] There, the California Supreme Court held that the County of Los Angeles could not tax airplanes engaged in interstate and foreign commerce on a full ad valorem basis but that it was restricted to only an apportioned amount.[71] The way was paved for equal treat-

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65. *See* Sea-Land Services, Inc. v. County of Alameda, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974). Examples of the problems involved in the apportioned taxes are Adams Express Co. v. Ohio, 165 U.S. 194 (1897), *rehearing denied*, 166 U.S. 185 (1897), and Central R. Co. v. Pennsylvania, 370 U.S. 607 (1962).

66. The Court did, however, reserve judgment on vessels in international trade. 366 U.S. at 173. Perhaps this is understandable in light of the increasing complexity of foreign affairs.

67. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 139-40 (1869).

68. It must be pointed out that traditionally cases have accepted without considering the basis for the notion that commercial vessels should be treated in the same way as pleasure craft. But the apportionment logic may not and should not apply to single boats any more than it should apply to single pieces of property which are not replaced as is inventory. Principles of situs still apply. But since federal documentation can often be misleading, a consideration of which jurisdiction or jurisdictions confer the benefits and protections should be considered. *See* Brock & Co. v. Bd. of Supervisors, 8 Cal. 2d 286, 65 P.2d 791 (1937).

69. See *supra* n.22.

70. 51 Cal. 2d 314, 333 P.2d 323 (1958).

71. Justice Traynor's dissent emphasizes the idea that actual taxability, if not actual taxation, must be shown in another state to prevent taxation in the state of the owner's domicile. He relies on New York Central & H. R. Co. v. Miller,

ment of foreign and domestic enterprises by the taxing jurisdiction, a procedure which would allow each jurisdiction to collect a tax which relates in some reasonable form to the benefits and protections it confers.[72]

This hope was frustrated by the peculiar opinion of the California Supreme Court in *Scandanavian Airlines Systems v. County of Los Angeles*.[73] The court had before it a case of an apportioned property tax on foreign-owned airplanes which flew exclusively in foreign commerce. Logically, the court should have upheld the tax, but instead it resuscitated the home-port doctrine and applied it by means of some rather unusual logic.[74] The result of the

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202 U.S. 584 (1906). It may be argued that if an instrumentality of commerce is on the high seas or in the air, it is not creating burdens on the taxing jurisdiction. However, both the port of departure and that of destination are offering opportunities for business for the carrier. That fact is sufficient to allocate flying or sailing time between the ports. Such an allocation should not be on the basis of actual time spent in each taxing jurisdiction since the business opportunities probably bear no relationship to the length of time at a single airport or harbor.

72. It is important, in understanding the ramifications of the Supreme Court's opinion in *Michelin Tire Corp. v. Wages*, to note that throughout the opinion the Court emphasizes this test. The conferring of benefits and protections by the taxing jurisdiction is the justification for taxation, not just a test to pass in order to sustain the tax. It may be that the conferring of those services by the government creates the duty of the taxpayer to reimburse the government for them, unless that duty is reduced or postponed due to the peculiar circumstance of the taxpayer and a public policy in favor of singling out for special treatment by way of exemption or loan. This should not encourage legislatures to grant wholesale exemptions. Both the practicalities of reducing their tax bases as well as the necessity for providing all of their citizens the equal protection of the law should provide some curb upon favoritism which burdens other taxpayers with the duty to subsidize the favored, exempted ones.

73. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961).

74. The basis for the opinion is its construction of *Hays v. Pacific Mail Steamship Line*. The Court found that the instrumentalities of foreign commerce were unique in that they only "touched" at the ports to which they came. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961). Canadian Pacific Ry. v. County of Kings, 90 Wash. 38, 155 P. 416 (1916) involved railroad cars as such instrumentalities. They did more than stop at a single port. The same thing could be said of the commercial vessels which sail up the Sacramento River to load cargo for foreign ports. *See* Farmer's Rice Cooperative v. County of Yolo, 14 Cal. 3d 16, 536 P.2d 465, 122 Cal. Rptr. 65 (1975).

Once "establishing" that instrumentalities of foreign commerce were thus distinguishable from those of interstate commerce, the Court construed *Hays* so as to make this same distinction. It did so, first, by reading *Hays* as saying that the commerce clause prohibited the tax in question; and, secondly, by reading it as saying that the ground for the prohibition was the fact that the ship in *Hays* was an ocean-going vessel. Having arrived at these conclusions, the Court said that had the *Hays* Court been functioning in 1961 it would have revised the distinction to one based upon the nature of the ports where the ship "touched" as foreign rather than domestic.

Scandanavian Airlines and *Flying Tiger* cases is that foreign enterprises are now treated not only differently but better than are domestic operations of the same character.[75]

There is some superficial support for making the distinction on this ground. Pullman's Palace Car. Co. v. Pennsylvania, 141 U.S. 18 (1891), suggests a distinction between vessels and railroad cars. Although travel throughout the state is mentioned, the most decisive language is the following:

> Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, *and have no continuous presence* or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs, their home port and the domicil of their owners. *Id.* at 23. (Emphasis added.)

The implication is clear. When vessels do establish a continuous presence and the tax is based upon that presence rather than upon full situs the tax is valid.

As has been demonstrated, the *Hays* opinion did not utilize the commerce clause to arrive at its conclusions, nor did it make a distinction between ocean-going vessels and others. The only language the *Scandanavian Airlines* court could have been reading when it made the latter assertion is the following:

> *The distinction between a vessel in her* home port and when lying at a *foreign one or* in the port of another State is familiar in the admiralty law. She is subjected, in many cases, to the application of a different set of principles. 58 U.S. (17 How.) at 599. (Emphasis added.)

Hays supplies two citations to reinforce the fact that the *Scandanavian Airlines* interpretation was erroneous. They are The General Smith, 17 U.S. (4 Wheat.) 438 (1819) and Peyroux v. Howard, 32 U.S. (7 Pet.), 324 (1833). Both cases involved the question of whether a materialman's lien on ships in a harbor was valid and both stand for the rule that ships from out of state are given liens under admiralty rules while those from within the state rely on state law. *Peyroux* goes further, holding that a state-allowed lien may be enforced in admiralty if in a harbor subject to admiralty law, i.e., "touched" by the ocean. That would be true even if the vessel went through inland waterways to reach that harbor. Thus, there is no basis which allowed the *Scandanavian Airlines* court to reach those conclusions.

There is little support for the assumption that these conclusions buttress the distinction between U.S.-owned vessels and foreign-owned vessels traveling to foreign ports. The *Scandanavian Airlines* court relied on the idea that foreign vessels could be taxed on a full ad valorem basis abroad, but this is equally true of U.S.-owned vessels.

What remains of the *Scandanavian Airlines* decision is the fear that foreign governments can take umbrage at the fact that their airplanes were taxed by the U.S. locality and must be viewed in the context of international expectations. Those expectations are reviewed later in this article.

The *Scandanavian Airlines* decision cites for support the Swedish-American treaty dealing with multiple taxation and Justice Traynor's dissent at 56 Cal. 2d 43, 363 P.2d 44, 14 Cal. Rptr. 44, satisfactorily deals with this point.

75. However, the total effect may be the same if the foreign owner's country taxes its instrumentalities on a full ad valorem basis. But there are difficulties with this approach.

First, because of the federal system, the individual states impose property taxes. No state's taxes may violate the due process clause and therefore no state may tax beyond some apportioned amount. The total of those apportioned amounts cannot be a full ad valorem tax since much of the carrier's time, either on the basis of the instrumentalities collectively or individually, will be spent in transit or abroad.

Although some Justices of the United States Supreme Court are currently of the opinion that a state may, in some circumstances, discriminate against aliens on the basis of their national origin alone, it is the general rule that the equal protection clause of the fourteenth amendment is applicable to them.[76] In fact, it has been held that a state law requiring local governments to levy domestically produced goods rather than foreign goods is unconstitutional.[77] It would thus be illogical to suppose that United States residents may not claim the same equal protection provisions on their own behalf. Such a claim would then require a showing of some rational basis for the distinction between them and their foreign counterparts before they could be discriminated against.[78]

The *Scandinavian Airlines* court does attempt to rationalize its decision but places its emphasis on other than equal protection grounds.[79] The court refers to the danger of reprisals against domestically-owned airplanes should the local jurisdictions attempt to tax those belonging to foreign companies. There are three reasons why the distinction between domestically-owned and foreign-owned instrumentalities is not rational.[80]

The first is that various charges on foreign instrumentalities are presently considered quite legal[81] and taxes have been up-

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Second, if a rule is developed allowing the owner's domicile to impose a full ad valorem tax, it would mean, because of the federal system, that a single state chosen for the taxpayer's advantage would impose a full tax. Such a state may never see the instrumentalities, or may have them in its jurisdiction for only a short period of time. Assuming that due process requirements can be met by such a test, the anomaly is that a jurisdiction having few contacts with the property may tax it, while a jurisdiction which supports a majority of the property's operations may not.

76. Sugarland v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973). *See also* Hines v. Davidowitz, 312 U.S. 52 (1941).

77. Bethlehem Steel Corp. v. Department of Water & Power, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

78. *See* Lubin v. Panish, 415 U.S. 709 (1974) and Bullock v. Carter, 405 U.S. 134 (1972).

79. 56 Cal. 2d at 32, 363 P.2d at 38, 14 Cal. Rptr. at 38.

80. Any consideration of a pre-existing tax on foreign-owned property in support of the concept that United States taxes are prohibited entails the recognition of the validity of the foreign tax. Such a recognition appears to be contrary to the general rule which states:

> The courts of one independent government will not sit in judgment upon the validity of acts of another done within its own territory . . . M. Salimoff v. Standard Oil Co., 262 N.Y. 220, 224, 186 N.E. 679, 681 (1933).

81. Clyde Mallory Line v. Alabama, 296 U.S. 261 (1935).

held on foreign imports which could have the same effect as the *Scandanavian Airlines* tax—temporarily changing the competitive status quo and thereby incurring a foreign government's wrath.[82]

The second reason is that the expectations of the international community do not include the preferential treatment of foreigners. This is supported not only by the language of various treaties and agreements to which this country is a party,[83] but also by the opinions of various scholars in the field of international law. While admitting that aliens must be allowed certain basic human rights, Elihu Root clearly enunciated the general rule: "Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less . . . ."[84]

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82. Prior to *Michelin Tire Corp. v. Wages*, it was possible to tax imports at certain points. *See* Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959). Such taxes have the effect of the position of diminishing the imported goods vis-a-vis those which are domestically produced in the same way that a tax on foreign-owned instrumentalities would initially diminish the position of the foreign owner vis-a-vis the U.S. owner.

83. Late nineteenth century treaties entered into by this country and apparently negotiated from a position of strength, extend national treatment to Americans abroad. *See* Snow, *Treaties and Topics in American Diplomacy*. It was normal to allow the host nation to discriminate against foreign persons and enterprises and it was only with the advent of the use of the most-favored-nation clause that the practice of discriminating between aliens was reduced. The claim for humane treatment of aliens is usually and properly made pursuant to international law. For a description of the purposes of these clauses from the vantage point of the early 1930's, *see* Cutler, *The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929*, 27 AM. J. INT'L L. 225.

84. Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 PROCEEDINGS, AM. SOC'Y INT'L L. 16. It should be noted that many nations assert that there is a positive duty to prevent the imposition of "unjust treatment" to aliens even though it means giving them rights beyond that given to the country's own citizens. But in general, a person who voluntarily enters the territory of a foreign state must accept the institutions as he finds them.

Many of the apposite authorities are concerned with individual rights that are criminally prosecuted by the host nation.

Assuming that the fifth amendment prohibits discrimination against United States nationals on the same basis as the fourteenth amendment, then no treaty should be interpreted as giving foreign enterprises rights superior to those of U.S. nationals. That amendment has recently been utilized to guarantee aliens some equal protection rights in Hampton v. Mow Sun Wong, 44 L.W. 4737 (June 1, 1976). In view of the international expectations noted above, it would appear likely that a United States national could claim equal rights with foreign enterprises under that amendment.

Subsequent discussion in this article is directed toward the proposition that Congress has no authority to prohibit nonregulatory state taxes. If this is true, then the treaty question becomes moot. In any case, no treaty can be construed as automatically conferring superior rights on aliens, although *Scandanavian Airlines* actually reached this result in the name of "equality". 56 Cal. 2d 11, 14 Cal. Rptr. 25, 363 P.2d 25. *See also* Clyde Mallory Line v. Alabama, 296 U.S. 261 (1935).

The third reason which refutes the notion that discriminating against domestic enterprises is rational is that the "reprisals" which have historically been applied would lead to the adoption of the apportioned property tax by the international community, a result which would tie the tax logically to the benefits and protections conferred.[85] It should also be noted that, pursuant to many treaties, foreign governments have the right to reduce the taxes they impose on their own businesses in order to make up for the imposition of taxes abroad.[86]

All of this leads to the conclusion that the *Scandanavian Airlines* court allowed the local jurisdictions to discriminate in favor of foreign business without any substantial legal or logical authority.[87]

To give the *Scandinavian Airlines* court some credit, it should be noted that the court did rely on more than the logic which has been criticized thus far. The court, proceeding from its assumptions involving *Hays v. Pacific Mail Steamship Lines*,[88] concluded that foreign commerce admits of only federal or domiciliary taxation.[89] Such an interpretation, however, must assume that the authority of Congress in the realm of foreign commerce is different than that conferred on it with regard to commerce. However, there is absolutely no prohibition against state taxes on goods or instrumentalities which are in the process

85. *See State Taxation of International Air Transportation*, 11 STAN. L. REV. 518. The Law Review staff mailed questionnaires to various foreign airlines to determine what effect they felt the success of the local tax would have. The *Scandanavian Airlines* case was before the superior court as that article went to press. The replies were uniformly to the effect that the companies believed governments would impose a similar tax, that is, an apportioned tax, on United States-owned airplanes.

86. *See* the Treaty of Friendship, Commerce and Navagation between the United States and Japan, U.S. CONST. art. XI, § 5, 44 TS 4063.

87. A reading of the Stanford Law Review article reveals a similarity of reasoning between its rationale and that adopted by the court. Although the court cited the article only once, 56 Cal. 2d at 20, n.6, 363 P.2d at 30, n.6, 14 Cal. Rptr. at 30, n.6, the parallels seem obvious. The Law Review commentary indicates the tenuous character of the treaty interpretation which the majority accepted. 11 STAN. L. REV. 518, 536.

88. *See supra* n.74.

89. 56 Cal. 2d at 21, 363 P.2d at 30, 14 Cal. Rptr. at 30. This is a two-step analysis: (1) foreign commerce can only be regulated by Congress because it requires uniformity and (2) regulation includes all forms of taxation whether discriminatory or not. The substantial doubt inherent in the second proposition has previously been examined.

of interstate commerce as long as the three tests of the commerce and due process clauses have been met.[90] The federal-tax-only theory also disregards the existence of nondomiciliary fees which are imposed on instrumentalities of foreign commerce.[91]

Before leaving this aspect of the *Scandanavian Airlines* case it is important to direct attention to the Stanford Law Review commentary to which the court referred.[92] The article makes the point that the benefits and protections conferred on instrumentalities of commerce are not related to schools, the taxes to support which constitute over one-half of the California property tax bill. Of course, this same argument could be applied to any tax on a business having some sort of continuous presence in the taxing jurisdiction.

In reality, however, such an argument ignores the complexities of metropolitan society. As any specialist in land use planning knows, the establishment of businesses in an area creates a strain on all of the facilities of local government. The establishment of a repair facility by Scandanavian Airline Systems or even regular flights would create additional jobs. Not only do the passengers using the roads to the airport create an added strain on traffic, but the airline employees and their families create added burdens on schools and roads and on police and fire services. If the airline opens ticket offices elsewhere in the city the result is compounded. Any other business will create these same effects.[93] The property tax system which imposes a school tax on businesses tacitly recognizes such an impact and attempts to spread the burden for supporting the school system beyond the real property taxpayer.

Of course it should be recognized that the establishment of an airline service is predicated, not upon "geography" as the Stanford commentator suggests,[94] but upon the existence of a met-

90. *See* Bacon v. Illinois, 227 U.S. 504 (1913) *and* Ott v. Mississippi, 336 U.S. 169 (1949). Special rules for foreign commerce were specifically rejected by Justice Taney in the *License Cases*, where he said:

> The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it. 46 U.S. (5 How.) at 578.

91. Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935).

92. *State Taxation of International Air Transportation*, 11 STAN. L. REV. 518.

93. However, without some sort of regular or continuous presence, this result would be so occasional as not to provide a substantial or overall effect. A single flight into a city in a year may be put in this category. Utilizing the analogy set forth earlier, mere temporary storage of goods in the taxing jurisdiction without any supporting establishment and for a short period of time may well not create such a pervasive impact.

94. *Supra* n.92.

ropolitan area of sufficient size to support that service. The effect is cyclical, the businesses being drawn from a supporting community of a certain size and in turn attracting further population movements into the area. [95] The impact is not upon only one or two of the services provided by local governments but upon all of them. Any argument which fails to deal with this reality actually ignores the fundamental rationale behind taxation by government.

All of these difficulties emphasize the inadequacies of the *Scandanavian Airlines* logic and conclusions. Although there is more which can be said of the majority opinion, the court's fundamental misconception seems to be its application of the situs test to a tax not logically calling for it. In fact, as *Ott* recognizes, [96] the difference in the tax's basis calls for a difference in the test applied. Taxation of movables with a continuous presence in the jurisdiction by rotation cannot adequately be tested by the situs rules the *Scandanavian Airlines* court applied.

Second Thoughts

Scandanavian Airlines is remarkable, not only for its majority opinion, but also for the clarity and sound reasoning of its dissent.[97] There, the late Mr. Chief Justice Traynor pointed out that the only relevant test is one which determines whether the tax bears some rational relationship to the benefits and protections conferred by the taxing jurisdiction.[98] This approach at least tacitly recognizes the function of the commerce clause as prohibiting state regulation, not state taxation.[99]

The test Mr. Justice Traynor applied to the tax is fully suited to the due process clause of the fourteenth amendment, one purpose of which is to prohibit "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of . . . [the State's] subjects, [which] is not law whether manifest as the decree of a personal monarch or of an impersonal multitude."[100]

95. Perhaps one of the more spectacular examples of this movement is the expansion of west Orange County, California. This rather rapid development is the result of several factors, but the basic principles set forth above prevail in this area.
96. 336 U.S. at 174-75.
97. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25.
98. *Id.*
99. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, (1824), makes this clear.
100. Hurtado v. California, 110 U.S. 516, 532 (1884). It may be argued that the

This test is also suited to the equal protection clause of the fourteenth amendment. As we have seen, if the equal protection clause applies to aliens,[101] then domestic owners of instrumentalities may legitimately complain that they are being discriminated against when taxes are applied to them which are not imposed on foreign owners. If the equal protection clause applies to aliens the states have no choice but to disregard national origin in imposing their taxes. To discriminate either for or against a foreign enterprise constitutes a violation of the equal protection, commerce and treaty clauses.[102]

Mr. Justice Traynor's logic was soon accepted by a majority of the court. The California Supreme Court was confronted with an apportioned tax levied on domestically-owned instrumentalities of foreign commerce in *Sea-Land Services, Inc. v. County of Alameda.* [103] The court was obliged to deal with the situation it least expected: the apportioned taxation of instruments of foreign commerce which extensively utilized the roads, railways and other services of the taxing jurisdiction. The *Scandanavian*

Scandanavian Airlines court itself violated this rationale. The discrimination against domestically-owned instrumentalities of commerce is clear since they are being taxed. The idea that the possibility or certainty of taxation abroad of the foreign-owned instrumentalities can void a domestic tax without even a treaty saying as much, as the court suggests, requires the taxing authorities to predicate the establishment of a tax on the existence (not the amount) of a comparable tax abroad. This unusual approach is not mandated by a proper construction of the due process or equal protection clauses of the fourteenth amendment, nor by the commerce clause. In fact the latter leaves the regulation of foreign commerce in the hands of the federal government. Previous examination has shown that discriminatory taxation does constitute regulation. *See* Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869). It follows that discrimination in favor of foreign goods and enterprises is no less a regulation of commerce. In effect *Scandanavian Airlines* creates a treaty between California and the countries whose airlines fly only in foreign commerce to California airports. The terms of the treaty are that local entities will withhold the taxes originally imposed on airplanes on the promise that as of 1961 the foreign countries were not taxing any United States-owned airplanes. Note that by rigidly placing these terms in the commerce clause, the court ties itself, not to guarantees for the future by foreign nations, but only to the status quo. All of this appears to be contradicted by the federal government's exclusive authority to make treaties pursuant to U.S. CONST. art. II, § 2, cl. 2, and art. I, § 10, cl. 1.

101. *See* cases cited n.77 *supra.*

102. Both the majority and Justice Traynor refer to the tonnage clause, U.S. CONST. art. I, § 10, cl. 3. *See also* 11 STAN. L. REV. at 531. The difficulty with applying the tonnage clause beyond its original purpose is that fees for the use of harbor facilities which are reasonably related to the benefits conferred are valid. Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935). In addition, the tonnage clause has been frequently restricted to its most narrow terms. Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 205 (1885).

103. 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974). Some of the instrumentalities were in interstate commerce, while the majority were carrying goods between domestic and foreign ports and were thus engaged in foreign commerce.

Airlines court had already based its rationale on the idea that instrumentalities of foreign commerce utilized only the services of the "port of entry."[104]

The taxpayer in *Sea-Land* urged the applicability of *Scandanavian Airlines* to that case, pointing out that foreign governments were just as able to tax their cargo shipping containers as Norway was to tax Scandanavian's airplanes.[105] This was certainly a logical extention of *Scandanavian Airlines*, but the court utilized Mr. Justice Traynor's dissent in *Scandanavian Airlines* in dealing with the *Sea-Land* claims. In fact, the *Sea-Land* court went so far as to label the home-port doctrine "anachronistic" and discouraged future reliance on it.[106]

The home-port doctrine can be a useful tool in determining the taxability of a single vessel which has not obtained a more definitive situs in a single taxing jurisdiction. Applying the doctrine to a continuous presence fact situation does violence to the theories underlying property taxation as well as concepts of equal protection. Consideration of these points has led to other conclusions as well.

The federal system works in the international sphere when the states treat foreign and domestic enterprises in the same way, leaving preferential or detrimental treatment to the federal government. International expectations mandate equal treatment of aliens. The claim of a United States citizen for equal protection of the laws should be honored without regard for the national origin of the other party.

THE "IN BOND" DOCTRINE

The idea that the owner's act of placing his imported goods in bond protects them from all types of state taxation rests on a

104. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25.

105. 12 Cal. 3d at 787, 528 P.2d at 71, 117 Cal. Rptr. at 462.

106. The California courts are now faced with the interesting spectre of taxation of foreign-owned cargo shipping containers utilized solely in foreign commerce (at least in the sense that they carry goods only to and from foreign ports). Before the *Sea-Land* ruling, the results in these cases were uniformly for the taxpayer. *See* Japan Lines v. County of Los Angeles, Los Angeles Superior Court Nos. SOC 23482, SOC 27593, SOC 30557, and SOC 38911. Decision since then for the County include Japan Line v. County of Los Angeles, Los Angeles Superior Court No. SOC 38911 and Japan Lines, Ltd. v. County of Los Angeles, 61 Cal. App. 562, — Cal. Rptr. — 1976, where the court of appeal reversed the trial court.

concept that has only recently been relied upon: that the federal government can, by statute, prohibit state taxation in order to regulate commerce. This position has admittedly been taken only with regard to foreign commerce, but since it is the general rule that Congress' authority in the field of foreign commerce is the same as it is in regard to interstate commerce,[107] this proposition would mean that Congress would have the authority to prohibit any state taxation.[108]

This was not always thought to be the case. Professor Crosskey points out that the commerce clause was not meant to confer prohibitive powers upon Congress. When this consideration is combined with the import-export clause's prohibition against imposts (i.e. discriminatory taxation of both interstate and foreign imports)[109] it becomes clear that the original concept of state taxation was that only discriminatory or regulatory taxation and duties were prohibited.[110] This view explains the statements by many courts of the early nineteenth century to the effect that states had the absolute right to tax.[111]

Yet, today, even Mr. Chief Justice Traynor would give Congress the right to take away the states' ability to tax instrumentalities of foreign commerce: "It bears noting that Congress remains free to prohibit altogether state taxation of instrumentalities of foreign commerce."[112] This change in attitude does not appear to be the result of any changes in the necessity of the federal government to regulate foreign commerce. This necessity has always been acknowledged.[113]

Historical Background—The Commerce Clause

In order to trace the development of the law in this field it is necessary to turn initially to the Constitution itself. Professor

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107. *See* n.23 *supra*.

108. This idea is especially awe-inspiring when one remembers that commerce under the clause is quite broadly defined so as to include the regulation of businesses which are only casually affected by interstate commerce. A tax imposed on or concerning migratory property could be considered more closely related to interstate commerce.

109. Crosskey, *supra*, n.7 at 319 *et seq*.

110. Professor Crosskey makes a sound argument for the idea that sales taxes and the like were barred as being duties. Even under this extremely narrow view of a state's ability to tax, however, property taxes were neither prohibited nor "prohibitable."

111. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

112. Scandanavian Airlines System v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961).

113. *See* n.22 *supra*.

Crosskey's theory regarding the absence of any congressional commerce clause power to prohibit state taxes is supported by the language of the import-export clause. That clause, first, prohibits state levies of imposts or duties. That prohibition by itself indicates that, without any other express limitations on the states' taxing power, that power is as sacred as Mr. Justice Marshall indicated.[114]

The Constitution goes further, however. After prohibiting imposts and duties without the consent of Congress the language continues: ". . . and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."[115]

By the same logic, Congress' power does not extend beyond the power to prohibit imposts and duties in the area of state taxation. This concept is based on the idea that the Constitution addresses itself to different areas when it deals with taxation and regulation. There is very little doubt that this was completely understood in the early nineteenth century. In *Gibbons v. Ogden*[116] Mr. Chief Justice Marshall considered the power of taxation reposed in the states and in the federal government as compared with state power to regulate commerce:

> But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.[117]

Mr. Chief Justice Marshall referred to the distinct characters of taxation and regulation, but was also confronted with the argument that duties and imposts were regulations, and that since duties and imposts were specifically prohibited other state regulations could not be prohibited by congressional action.[118]

114. 25 U.S. (12 Wheat.) 419.
115. U.S. CONST. art. 1, § 10, cl. 2.
116. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 1824.
117. *Id.* at 202-03.
118. *Id.*

It should be emphasized again that property taxation, based upon the property's presence, appears to be the only form of taxation which clearly avoids regulatory effects. Although the Supreme Court has sanctioned income taxes which are based in part upon the amount of real property in the taxing jurisdiction, it would seem that such a basis actually constitutes double taxation and may

The Chief Justice admitted that the prohibitions implied that the acts not prohibited were guaranteed, but asserted that duties and imposts were part of the *taxing* power. The implication is clear —Congress may not prohibit state taxation unless it is either an impost or duty or a de facto regulation. In *Brown v. Maryland* the Court was confronted with a tax which was discriminatory as it was both an impost and a regulation. Only late nineteenth century cases confuse regulation with taxation and serve as the foundation for the logic of *McGoldrick*.

A review of the *License Cases*[119] is also instructive. There, Chief Justice Taney directly confronted the issue of the power of Congress to void State taxation:

> Upon examining the [*Gibbons v. Ogden*] opinion, it will be seen that the court, when it uses the expressions which are supposed to countenance the doctrine of exclusive power in Congress, is commenting upon the argument of counsel in favor of equal power on this subject in the States and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for State purposes, although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the State power is concurrent with that of the general government—*is equal to it, and is not bound to yield.*[120]

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not be related at all to the "market" provided by the taxing jurisdiction. *See* Butler Bros. v. McColgan, 315 U.S. 501 (1942) *and supra* n.50. If the state imposes both an income tax of this nature and a real property tax, a business having all sales outside the state would nevertheless theoretically face both a property tax and at least some income tax solely by reason of its presence in the state. If the state also imposes a business license tax or other levy for doing business in the taxing jurisdiction then it should not be said that the property factor of the income tax is in essence a "fee" for conducting operations there. The business community, mistakenly treating the Supreme Court's decisions as static, has actively sought to reduce the effect of these income taxes (i.e., those based on the unit concept) by means of treaties. *See* the draft of the treaty between the United States and the United Kingdom presently being considered by the Senate Foreign Relations Committee. Such an approach would prohibit the use of this unit concept in computing the income tax of foreign businesses having subsidiaries in the taxing jurisdiction and would, therefore, favor those businesses over businesses conducting solely interstate operations. The treaty also directly asserts that Congress has the authority to prohibit this sort of taxation. By its failure to address itself to the underlying question of the appropriateness of the Supreme Court's ruling in McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1941), this approach may well cause more confusion and discrimination than it may cure.

119. License Cases, 46 U.S. (5 How.) 504.

120. *Id.* at 581-82 (emphasis added). The many decisions involved in the *License Cases* have, in the opinion of some writers, made it a more difficult case upon which to rely. But those justices actually expressing views on the subject agree with Chief Justice Taney's opinion regarding the state's power of taxation.

It appears that Justices McLean, Catron and Nelson considered the taxation issue in essentially the same manner as did the Chief Justice. Justice McLean said:

The Federalist Papers point to this same concept explicitly. Although duties are confused with other kinds of taxes, the view of the states' power to tax is clearly enunciated.

> The State cannot, with a view to encourage its local manufacturers, prohibit the use of foreign articles, or impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the State . . . . *Id.* at 592.

Justice McLean continued:

> . . . [There, this] court. . . [said]: 'It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is in general a sufficient surety against erroneous and oppressive taxation.' *Id.* at 593.

Earlier Justice McLean said:

> The power to tax is common to the federal and State governments, and it may be exercised by each in taxing the same property; but this produces no conflict of jurisdiction. (*Id.* at 588.)

Justice Catron, after reviewing *Gibbons v. Ogden* actually moved along the lines espoused by Professor Crosskey:

> To a true understanding of the power conferred on Congress to regulate commerce among the States, it may be proper briefly to refer to their condition and acts before the Constitution was adopted in this respect. The prominent evil was, that they taxed the commerce of each other directly and indirectly; and to secure themselves from undue and opposing taxes the Constitution first provides, that Congress shall lay no tax on articles exported from any State; second, that no State shall lay any imposts or duties on imports or exports . . . . (*Id.* at 605.)

Later, in quoting the Federalist Papers, he said:

> That, notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. (*Id.* at 606.)

This is put in perspective by the paragraph immediately preceding Justice Catron's first quote and clarifies his interpretation of *Brown v. Maryland* in which he states:

> In this proposition [i.e., the direct regulation of commerce by states] it is not intended to involve the consideration, that where Congress regulates a particular commerce by general laws, as where a tax is levied on some articles on being introduced from abroad, and others permitted to come in free, that all are regulated . . . . (*Id.* at 605.)

Justice Nelson concurred with Justices Taney and Catron. Justices Daniel and Woodbury interpreted *Brown v. Maryland* in essentially the same way as *Low v. Austin* and became entangled in the inconsistencies which that interpretation creates. Although Justice Daniel suggests that goods in bond may be immune, he does not refer to nondiscriminatory taxation as such and later runs afoul of the problem of equal treatment for goods from other states or produced in the state. Neither of those two jurists was able to resolve this conflict and each spent most of his time trying to deal with the difficulties posed by approaching the issue as a question of determining where federal regulation ends. Actually, these last opinions can logically stand for nothing more than the proposition that, once they're out of the hands of the importer or otherwise in domestic commerce, goods may be regulated by the states.

[Article I, § 10, Cl.2] only says, that [the States] shall not, WITHOUT THE CONSENT OF CONGRESS, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, WITH THE CONSENT of the national legislature, might tax imports and exports; and that they might tax every other article, UNLESS CONTROLLED by the same body. If this was the intention, why not leave it, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

The change from this well understood dichotomy between regulation and taxation and the concept of state taxing authority as being absolute began perhaps with the sort of logic expressed in *Woodruff v. Parham*[121] and its interpretation of *Brown v. Maryland* (set forth above). Despite the fact that *Brown* dealt with a discriminatory tax, despite the fact that the majority of Justices in the *License Cases* understood that a discriminatory tax is a regulation, [122] and even though *McCulloch v. Maryland* approved nondiscriminatory taxation under the commerce clause, Mr. Justice Miller in *Woodruff v. Parham* nevertheless dealt with the nondiscriminatory levy by means of a commerce clause analysis.[123] Although this was completely unnecessary, it was consistent with the interpretation of *Brown v. Maryland* calling for the scrutiny of "a tax" under the commerce clause.[124]

But the consideration of one tax under the commerce clause was not enough by itself to create the confusion, especially since the *Woodruff* Court did point out the nondiscriminatory character of the tax and relied heavily on the import-export clause.

Late Nineteenth Century Developments

As in the case of the previously analyzed departures from

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121. 75 U.S. (8 Wall.) 123 (1869).

122. This is further supported by the early colonial debates regarding the extent to which the colonies were prepared to allow British regulation of commerce. Professor Crosskey's research makes the separation of these two things quite clear. W. Crosskey, *supra* n.8, at 157, 161 *et seq.* One should also note that favoring importers over interstate shippers and domestic producers is likewise a regulation, prohibited to the states, in Professor Crosskey's view, by the import-export clause.

123. 75 U.S. (8 Wall.) 123, 139 (1869). Although not going into details regarding the commerce clause, the opinion refers to the second part of Brown v. Maryland, 25 U.S. (12 Wheat.) at 445-49, which holds that the license tax there was contrary to the clause.

124. Professor Crosskey, *supra* n.8 at 315 *et seq.*, suggests that this was the result of a southern desire to reduce the effectiveness of that clause and to create an area of non-interstate commerce in which the federal sphere could not encroach. If so, the Court actually allowed unintended interference with state taxation in the long run.

original constitutional purposes, the root of the problem can be found in dicta from cases decided during the last half of the nineteenth century. Basically, it was language from these cases which led to the later confusion between regulation and non-regulatory taxation, a confusion which obviously was not present in the earlier opinions.

The beginnings of this problem lie in cases such as *Sinnot v. Davenport*[125] which was actually decided before *Woodruff*. *Sinnot* involved the validity of a state license or registration requirement which was a prerequisite for ships to engage in the coasting trade in the state's waters. The license requirement could easily have been invalidated by the commerce clause rules set forth in *Gibbons v. Ogden* as it was clearly a regulation of trade and Congress had previously enacted the same sort of licensing requirement for the right to engage in the coasting trade nation-wide. The Court properly concluded that the regulation was invalid on these grounds but it commented further, discussing the dividing line where federal powers of regulation end and those of the states begin:

> These questions have arisen under the quarantine and health laws of the states—laws imposing a tax upon imports and passengers admitted to have been passsd under the police power of the states, and which had not been surrendered to the general government. The laws of the states have been upheld by the court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the act of Congress.[126]

The citations earlier in the *Sinnot* opinion lead one to believe that the cases referred to in the above paragraph are *Brown v. Maryland*,[127] *The License Cases*,[128] *Wilson v. The Black Bird Creek Marsh Co.*[129] and *McCulloch v. Maryland*.[130] We have already seen that the actual effect of the license and fee in *Brown* was an impost, a discriminatory levy on imports as such. A reading of the other cases reveals that they all involved actual regulations of commerce by the states. The *Sinnot* dicta, then, is directed not at taxes but rather at discriminatory or regulatory levies.[131]

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125. 63 U.S. (22 How.) 227 (1859).
126. *Id.* at 244.
127. 25 U.S. (12 Wheat.) 419 (1822).
128. 46 U.S. (5 How.) 504 (1847).
129. 27 U.S. (2 Pet.) 245 (1829).
130. 17 U.S. (4 Wheat.) 316 (1819).
131. Actually, the language in each of those cases supports the fact that

The basis for this misunderstanding is the use of the territorial thinking referred to earlier in connection with *Woodruff v. Parham*. The Court, apparently anxious to reserve some area to the states into which Congress could not intrude, developed this rationale. This thinking led the courts to consider taxes and regulations in the same, territorial way.

In 1883 the Court dealt with another discriminatory fee in *People v. Compagnie Generale Transatlantique*.[132] There, a state imposed a "head tax" on all foreigners arriving from foreign ports. The Court saw that this tax was a regulation. Congress had passed a similar tax which the Court said ". . . covers the same ground as the New York Statute, and they cannot co-exist."[133]

Such language should not cause a court to conclude that Con-

Congress has no authority to prohibit state nonregulatory taxation.

The *License Cases, id.* have already been pointed out as containing direct language on this point.

McCulloch v. Maryland repeats the maxim that the laws of the general government are supreme. But two tests must be met: (1) Congress must be acting within its powers in prohibiting nonregulatory taxation and, as pointed out below, *Gibbons v. Ogden* provides ample support to conclude that such a prohibition is not within Congress' power, and (2) there must be opposition, or conflict between the federal law and the state tax and (*Michelin v. Wages* states that nondiscriminatory taxation does not burden commerce).

At 17 U.S. (4 Wheat.) 436, the Court rules that

> . . . states have no power by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

But the Court continues:

> This opinion does not deprive the states of . . . a tax paid by the real property of a bank, in common with the other real property within the state, nor . . . a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.

In short, nonregulatory taxes cannot conflict with Congressional acts because of their nondiscriminatory nature, and are not subject to the general rule of supremacy because Congress does not have authority to prohibit them. Nonregulatory taxes do not "retard, impede, burden, or in any manner control . . ." federal operations even though the bank may be affected by such a tax.

This case did seek to draw limits on the states' authority to tax under the commerce clause including a prohibition of taxes on goods "in transit" through the state. This is currently the law, although the apportionment concept as applied to goods having a constant presence by means of rotation provides for a non-situs test to determine what is "in transit," looking toward a collective presence throughout the year.

Wilson v. The Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829), involves the repugnancy of authorizing a dam on a navigable stream to the commerce clause without Congressional action. The dam is a state regulation of commerce. In any case at pp. 251-52 the Court actually lays out the same two-fold test indicated in *McCulloch v. Maryland*.

132. 107 U.S. (17 Otto.) 59 (1883).

133. *Id.* at 63.

gress has the authority to prohibit state taxation. When considering a property tax later the Court did not even consider whether the congressional legislation conflicted with that of the state. *Wheeling Transportation Co. v. Wheeling*[134] treated nondiscriminatory property taxes apart from regulations. On that basis alone, the *Wheeling* Court felt that there was no conflict with congressional regulation.[135] But the dicta remained, and the resulting confusion between non-regulatory taxation and regulation combined with the "territorial" view formed the bases for *McGoldrick*.

Federal Supremacy Phase

One can detect in the Court's opinions of the twentieth century an emphasis upon the supremacy of the general government. This is in keeping with the increasingly larger scope of business affairs and the almost overwhelming speed of communications with other people. However, as we have seen, the taxation of property is one area in which all authorities appear to agree that the states' rights are equal with the federal government's. Nevertheless, this once clear attitude has now been eroded. The "last straw" was *Board of Trustses v. United States*.[136]

The case involved a claim by the University of Illinois that goods imported for its use should not be subject to federal customs duties because the University was a state institution. The Court did not rule on the status of the university as a governmental institution, but it denied the immunity sought because the state did not have any jurisdiction over the importa-

134. 99 U.S. 273 (1879).

135. *Id.* at 285. It bears noting that this case upheld the imposition of a full value ad valorem tax on a vessel pursuant to the home-port doctrine. That fact does not change the basic character of the case as clearly demonstrating that when a regulatory property tax is under scrutiny it should not be judged in the same way as a regulation. Just six years later the Court rendered dicta to the contrary in Brown v. Houston, 114 U.S. 622 (1885). There the Court, apparently concerned by the prospect of property taxation of the same goods elsewhere, opined that Congress could prohibit state taxes. This same fear was rejected in Michelin v. Wages, 423 U.S. 276 (1976). When one views the property tax of inventory as an apportioned tax reflecting a continuing presence, this fear of "double taxation" evaporates. Although the language at *Brown v. Houston*, is strong no cases are cited as authority for the dicta [and the case was not mentioned in *McGoldrick*].

136. 289 U.S. 48 (1933).

tion process which is a federal function. It is clear that Mr. Justice Taney's comments regarding the ability of the states and the general government to tax would have produced the same result. In effect, he ruled that neither a state nor federal tax ". . . is . . . bound to yield."[137]

The *Board of Trustees* Court felt obliged to explore the argument concerning the nature of duties as taxes since the state authorities had argued they were exempt from taxation[138] and Customs had argued they were regulating. The Court held that duties are both taxes and regulations and that it would not decide on a section-by-section basis. But the Court also expounded upon the state's power and said, in speaking of the commerce clause, "It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercize may not be limited, qualified, or impeded to any extent by state action."[139] A nondiscriminatory, nonregulatory tax does not impede congressional regulation since its effect can be only neutral. Nevertheless, the Court later seized upon this language from *Board of Trustees* in rendering its opinion in *McGoldrick v. Gulf Oil.*[140] This opinion and its interesting California offspring, *National Distillers Corp. v. City and County of San Francisco*,[141] were decided in the middle of the twentieth century. Perhaps the emphasis on "bigness" and centralization, prevalent during that period, led to these opinions, but in the last analysis they are the product of the historical developments preceding them.

The *McGoldrick* briefs did not include any substantial arguments regarding the power of Congress to prohibit state taxation pursuant to the commerce clause. Of course, Professor Crosskey would say that since the clause itself contained no prohibitive language, Congress could not give it any. Even if Congress has prohibitive powers under the clause, that body had the power to prohibit only state regulation, not state taxation.[142]

In light of the developments during the preceding century and of the dicta in *Board of Trustees* it is little wonder that the Court, aware of the need for unified action in the international arena,

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137. *See* n.120 *supra*.
138. 289 U.S. at 57-58.
139. *Id.* at 56-57.
140. 309 U.S. 414 (1940).
141. 141 Cal. App. 2d 651, 297 P.2d 61 (1956), *cert. den.* 352 U.S. 928 (1956).
142. It should be mentioned that the summary of arguments does suggest that the state authorities did argue that their tax was nondiscriminatory and therefore was not an illegal burden on foreign commerce. *See* McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940).

ruled as it did. But there are difficulties with the *McGoldrick* opinion which cast doubts upon the Court's reasoning and cloud the effects of the opinion.

The primary difficulty is that the opinion gave new life to the old dicta which placed taxation on the same footing as regulation. A nondiscriminatory tax does not differentiate between imported or domestic goods and therefore cannot defeat the purpose of any reduction in duties. It may in fact raise the price of all goods alike, reflecting the cost of doing business in this country as would any fee. The difficulty is that a sales tax supports the operations of the state while a duty is meant to regulate. The prohibition of one in order to accomplish the purposes of the other fails to consider this distinction.[143]

Prohibiting property taxation is particularly troublesome in that the taxing jurisdiction must render services to protect the goods and to supply the supporting services which are used as a result of the goods' presence in the locality. Customs officials may make the determination that they will forego the customs revenue in return for achieving a competitive advantage for domestic companies, but it seems inappropriate for them to decide that other property taxpayers should supply the supporting services for the bonded goods.

In addition, there are more serious considerations involved in *McGoldrick*'s reasoning. We have already seen that Congress' authority to regulate interstate commerce is no less than its powers over foreign commerce and that the *McGoldrick* rationale could be applied to taxes affecting interstate commerce.

It is also clear that *McGoldrick* allows the prohibition of any tax which raises the price of goods Congress seeks to benefit. Although it was the imposition of the duty which caused the adverse effect on commerce which Congress sought to alleviate by removing that imposition, the Court allowed the prohibition

143. The difference in purposes also calls into question the logic of the decision by the customs authorities to exempt property by regulation. Today, especially in light of the rise of multi-national companies, it is arguable that no benefit to the United States is achieved by the continuation of this tax-free status. One is particularly confronted by the fact that domestic oil products are currently less expensive than foreign ones. These arguments are disputable. However it may be time to reassess the value of the class 6 prohibition.

because "it is evident that the purpose of the congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress . . ."[144] But *any* tax, *any* fee, *any* law requiring the dealer in goods to spend any money will have exactly this same effect.[145]

The danger of this sort of thinking lies in the fact that the very basis for the states' operations is threatened. There is no stopping point suggested by *McGoldrick*, and the case does not recognize any area in which the states may operate without being subject to a possible "veto" by Congress. We know that historically the states were left with some areas of action. We also know that early cases recognized this fact. But the *McGoldrick* logic, for the first time in constitutional history, denies the states their "sacred" power to tax.

One may believe that, although the states were guaranteed some area of absolute autonomy, the time has come for total national supervision. The short answer to this contention is that the people should be making the decision regarding changes in fundamental state-federal relationships, not the courts. Beyond that, however, is the fact that centralization has both advantages and disadvantages. The fedeal system, if it is a true federal system, does not give complete power to the central government. The fact that some local agency, somewhat independent of the central government, is better able to meet local needs is a fundamental basis for a federal system.

McGoldrick totally fails to come to grips with these problems, principally because taxes had so many times previously been lumped together with regulation. The key cases upon which the Court relied in rendering its opinion never involved the supposed

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144. 309 U.S. at 429.

145. The sudden influx of Supreme Court opinions regarding this tax, enacted in 1934, suggests that the imposition of this particular tax was new. McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33 (1940); McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940); and McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940).

The Court appears to have been impressed by the fact that the new tax would obviate the advantage given by the lack of duty. It did not consider the idea that the goods may previously have enjoyed a tax-free status, not conferred upon U.S. goods abroad, and it restricted its approach to a restricted view which led it to the conclusions set forth. The Court's concern with the impact of the tax as a new tax seems to be the real reason it ruled as it did, combined, of course, with the *Low v. Austin* rationale. That impact provides little support for expanding the *McGoldrick* decision beyond its own facts. But since the Court was obliged by logic and prior law to rest its decision on other grounds, the holding is in far more general terms.

conflict between a regulation and a nonregulatory tax.[146] The Court, without realizing the overwhelming step it was taking, relied on regulation cases without considering either the difference between those cases and the one before it or the ultimate impact its decision would have on the federal system.

Holding the Line

McGoldrick can and should be limited to the sort of taxation with which it dealt. The sales tax, although considered not to violate the commerce clause,[147] was based upon the happening of an *event* in the state, namely the sale. Although sales taxes, as "privilege" taxes on the retailer, theoretically affect the seller, the immediate and demonstrable effect is upon the buyer who pays the tax at the time of purchase. The buyer in the *McGoldrick* case did not use the goods in the state but, for the most part, used them outside the country. There may be some question as to whether such a tax would comply with the due process test discussed earlier in this article.

A property tax is not founded upon the same principles or concepts. It is fundamentally a fee for the services rendered because of the goods' very presence in the taxing jurisdiction. The fact of further manufacture in this country adds to the burden on the taxing jurisdiction whether or not the manufacturer is regulated by the general government. Instead of dealing with a sales tax "fiction" (which is not quite realized in *McGoldrick*) the property tax case deals with the reality of that burden and with the necessity of performing the supporting services whether paid for by the owner of the goods imported or by the owners of goods which are not imported or bonded.[148]

But in the final analysis *McGoldrick* may not be factually inconsistent with the line of cases preceding it after all. If the

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146. *See* Board of Trustees v. United States, 289 U.S. 48 (1933), cited at 309 U.S. 427; New York v. Compagnie Generale Transatlantique, 107 U.S. 59 (1882), cited at 309 U.S. 429; Sinnot v. Davenport, 27 U.S. (2 Pet.) 245 (1829), cited at 309 U.S. 429; *and* Kelly v. Washington, 302 U.S. 1 (1937), cited at 309 U.S. 429.

147. McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33 (1940).

148. This distinction presents another reason why Congress should not have authority to prohibit nondiscriminatory state taxes. Under the fifth amendment Congress is given wider latitude than are the states in discriminating for or against various classes of persons. Perhaps by obliging a state to so discriminate by prohibiting some if not all of its taxes is contrary to the fourteenth amendment.

taxable event is a "use" by the taxpayer in the taxing jurisdiction, the New York sales tax when applied to one who was not going to so use the goods, is perhaps itself discriminatory, lumping these shippers together with residents of the state.

In any case, *National Distillers v. City and County of San Francisco*[149] clearly extends *McGoldrick* further than the logic of the latter case will support.[150] Perhaps the most substantial error in *National Distillers* is its reliance on *McGoldrick* without considering the actual congressional action. There is no mention in *National Distillers* of any regulation or statute which specifically prohibited state taxation at the time the goods were being held in San Francisco. The theory of the case is that any federal control precludes state taxation.[151] The court actually said that the goods ". . . derive their immunity from local taxation under the commerce clause by reason of the fact that the federal government has regulated their manufacture, transportation, storage, and exportation in furtherance of commerce, and that such taxes would constitute an interference with that regulation."[152] It should be apparent that almost any business is regulated at least in part by the general government. Predicating a prohibition of a tax on this ground hardly resolves the problems which *McGoldrick* poses.

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149. 141 Cal. App. 2d 651, 297 P.2d 61 (1956).

150. The bonding was clearly not of the same nature, and therefore the goods were not controlled by the same law that *McGoldrick* applied. Some of the goods, in fact, were sold to "dealers" who did business in the city by selling them again to ship owners. Additionally, some of the goods were sent to other countries rather than being used on board ships. 141 Cal. App. 2d at 652-53, 297 P.2d at 62-63.

151. However, in both Gooderham & Worts, Ltd. v. Collins, 50 Cal. App. 2d 716, 123 P.2d 922 (1942) and Rathjen Bros. v. Collins, 50 Cal. App. 2d 774, 123 P.2d 930 (1942), the court seems to base its decision on the fact that the federal control had ceased when the tax was imposed. In the instant case that control was still in force when the personal property tax was imposed. 141 Cal. App. 2d at 658-59, 297 P.2d at 68-69.

152. *Id.* It is also interesting to note the implicit reliance placed by both *McGoldrick* and *National Distillers* on the *Low v. Austin* logic. *McGoldrick* insists repeatedly that the goods were "segregated" from the mass of property in the state. *Minnesota v. Blasius* holds that goods are "mingled with the mass of property in the state" when they are at rest for the purposes of their owner. Without *Low*, *McGoldrick* makes little sense, since the former case is the only support for the privileged position of foreign goods.

National Distillers focuses upon the trial court's determination that the movement of the goods in that case constituted "integrated steps in a movement of goods in interstate and foreign commerce." 141 Cal. App. 2d at 654. However, the general rule is that an interruption in the journey to sell goods eventually bound for export gives them the proper situs in the state. For an excellent . summary of the law regarding exports before *Michelin v. Wages*, see Farmers' Rice Corp. Coop. v. County of Yolo, 14 Cal. 3d 616, 536 P.2d 465, 122 Cal. Rptr. 465 (1975).

These "tests" of situs would be unnecessary if the courts applied the due process test to revolving inventory.

Although they perpetuate the legal myth, two recent California cases have at least cut off much of *National Distillers'* extension of *McGoldrick*. Both *American Smelting Corp. v. County of Contra Costa* and *Shell Oil Co. v. State Board of Equalization*[153] appear to restrict congressional prohibitions to specific language by statute. But relying on *McGoldrick*, the California Supreme Court in dictum in *Shell Oil* stated that ". . . under its power over interstate commerce, Congress can fix the bounds of state taxation of that commerce."[154]

153. 271 Cal. App. 2d 437, 77 Cal. Rptr. 570 (1969); 64 Cal. 2d 713, 414 P.2d 820, 51 Cal. Rptr. 524 (1966).

154. 64 Cal. 2d at 726, 414 P.2d at 829, 51 Cal. Rptr. at 533. The court also cites Hartman, *State Taxation of Corporate Income*, 13 VAND. L. REV. 21, 122 and Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 165-66 (1954). However, these citations do not support the statement. *McGoldrick*, then, is the foundation upon which the theory of congressional power to prohibit rests. It would be unfortunate if this theory were formulated on the basis of such slim reasoning.

Professor Hartman does go further, basing the assumption of congressional ability to prohibit state taxation on the ground of congressional authority to allow the states to regulate interstate commerce. Such an analogy in light of the statements of earlier courts does not appear to be appropriate.

But Professor Hartman alludes to International Shoe Co. v. Cocreham, 246 La. 244, 164 So. 2d 314, *cert. den.* 379 U.S. 902 (1964) which holds that when Congress determines that a tax is regulatory it may prohibit it. Perhaps if the case went no further it would remain consistent with the theories developed here. But there is language in *Cocreham* to the effect that Congress may prohibit any state tax which "burdens" commerce. The Louisiana Supreme Court refers to the sort of dicta outlined above (without, incidentally, even citing *McGoldrick v. Gulf Oil*) and virtually concludes that taxation is the same as regulation.

Such conclusions are the logical consequences of employing tests involving "direct" and "indirect" burdens on commerce and the "nexus" of the taxpayer to the taxing jurisdiction. These guidelines, nothing more than verbal scales upon which the Court's prior unenlightening opinions can be measured, do nothing to determine whether the tax is truly related to the burdens placed upon the local jurisdiction and only vaguely provide a test for the future.

The *Cocreham* opinion, like most opinions dealing with constitutional issues involving state taxes, fails to distinguish between the various sorts of taxes. But Congress' difficulty with the income tax involved in that case and its passage of P.L. 86-272 point out the difference: the income tax could result in double taxation (taxing the same products on the basis of the same economic burden imposed on the taxing jurisdiction at full value by more than one jurisdiction). The opinion actually implies a two-fold test, one for judicial prohibition of the tax and one for Congressional action. But those tests are vague, calling for action if there is a "burden" on commerce. Such language, derived from the late nineteenth century opinions, is applicable to regulatory taxes but is not a test to determine when regulation takes place. If that were true, then any tax could be prohibited because all taxes impose some "burden" on commerce.

Like *McGoldrick v. Gulf Oil*, *Cocreham* fails to realize the implications of its conclusions. It does so by not specifically stating its assumption that taxation is

Shell Oil calls for a direct conflict between federal and state law before the latter must give way. This appears to be the standard today, requiring at least some specific language supporting a finding of a Congressional intent to prohibit state taxation.

Perhaps holding the line is not enough. The door has been opened by *McGoldrick* and it is only a matter of time until Congress will intentionally prohibit a state nonregulatory tax.[155] The "In Bond Doctrine," created without foundation and perpetuated by dicta, may yet be expanded to become a "Congressional Prohibition of State Tax Doctrine" with no additional justifications.

CONCLUSION

Michelin itself recognizes the concern which was only touched on in previous cases: that there is a duty to treat taxpayers uniformly. The nondiscriminatory ad valorem property tax should be applied without regard to the nationality or destination of the object of the tax; it does not regulate foreign commerce when it is applied to foreign goods in the same way as to domestic goods.

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the same as regulation while citing *Gibbons v. Ogden* for the proposition that Congress may prohibit state regulation. But *Cocreham's* direct holding is probably valid; Congress may prohibit those forms of state taxation which are truly regulatory. Unfortunately, many of the tests developed by the Supreme Court to determine the validity of state taxes are not suited to actually determining which state taxes fit this mold. For the purposes of this article it is clear that nondiscriminatory ad valorem property taxes do not.

Congress' role in preventing regulatory taxation can only be determined when the Supreme Court adequately defines what is regulatory and what is not. It is apparent that late nineteenth century dicta prevented this process from taking place until *Michelin Tire Corp. v. Wages*.

The due process clause has been used to test the validity of taxes other than property taxes, but the analyses have failed to inquire into either the nature of the burden imposed by the transaction or the use being taxed and therefore cannot adequately relate that burden to the tax. Nevertheless, the Court is moving toward such an analysis. *See* National Bellas Hess v. Dept. of Revenue, 386 U.S. 753 (1967). Once it arrives at these considerations, many state taxes may face a more critical scrutiny than they presently do.

155. It may be that by creating tests for the validity of state taxation of income derived from interstate commerce, Congress has already done this. *See* Hartman, *supra* n.154 at 117-18. But Congress may prohibit state regulation of commerce, setting guidelines on the imposition of taxes which seek to prevent such regulation.

As has previously been demonstrated, however, a nondiscriminatory property tax does not regulate and is therefore beyond the purview of such legislation. Congress is considering effecitvely prohibiting income and sales taxes under certain circumstances, (95 Cong. 1st Sess. H.R. 669). Although Congress' rule may be closer to the appropriate one regarding these taxes than the Court's, this sort of legislation is the type which the authors of the Federalist Papers feared.

The federal system calls for "neutral" treatment by states and localities; foreign and domestic goods must be taxed in the same way. The federal government, then, may provide whatever credits it deems appropriate to insure fair treatment of United States nationals abroad. To attempt to interpret the United States Constitution on the basis of the current status of one form of taxation abroad is to negate that document's permanence, and to discriminate against some United States citizens in favor of foreign citizens, even so that other United States enterprises might receive benefits abroad, is to support persons who are not a part of the constitutional contract while penalizing those who are. International equality cannot be achieved by interpreting our Constitution on the basis of other countries' laws.

Gibbons v. Ogden established that there is a difference between taxation and regulation, a difference which has been ignored. The failure to recognize that difference has led the courts to conclude that Congress may regulate commerce by prohibiting state taxes, and the tests promulgated to determine when states may apply taxes have resulted in further confusion. Tests which are based on a reasonable relationship between the tax and the burden imposed by the thing being taxed and which embody traditional due process concepts may resolve both problems. Property taxation of inventoried goods cannot properly be tested by the situs concept; it is more properly treated in light of due process concerns.

One cannot adequately measure the exact dollar cost of the presence of goods and enterprises in the taxing jurisdiction, but historical analysis can lead to the formulation of tests which call for some relationship between the burden and the tax. That relationship is the same whether the enterprise doing business in the taxing jurisdiction is a foreign one or not, or whether it utilizes foreign commerce or not. In short, the due process test of a tax's validity should be applied to all state taxation. Such an applicatin would serve the purposes inconsistently served by other tests and blanket prohibitions.

In the last analysis, however, no test is "universal in its application"[156] to the extent that it may be applied blindly without regard to the fundamental sense of equity which the Constitution in

156. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 at 441 (1827).

particular and the Judaeo-Christian traditions of justice in general impose upon us. As a nation, we are finding it increasingly important to treat others as we would be treated, and a system of laws which is based upon contrary assumptions is finding growing resistance from the international community.[157] We must, then, set out to resolve the complex problems of the future while building on the foundations of the past. To ignore those foundations by means of shallow reasoning, or "assumed" rules, is to ignore the very faith upon which this country was built.

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157. *See, e.g.*, *Universal Declaration of Human Rights*, approved by Resolution 217A of the United Nations General Assembly, 10 December 1948, 3 U.N. GAOR 1, Resolutions (A/810) 71-77, esp. articles 2 and 7; *and* the *International Covenant on Civil and Political Rights*, adopted by Resolution 2200 (XI) of the General Assembly, 16 December 1966, 31 U.N. GAOR Supp. (No. 16) (A/6316) 52-58, esp. Part II, art. 2-1, and part III, art. 26.