Vanderbilt Journal of Transnational Law

Volume 20
Issue 2 *March 1987*

Article 8

1987

Recent Decision

Barbara K. Caldwell

RECENT DECISION

CONSTITUTIONAL LAW—Commerce Clause—State Taxation of Aviation Fuel Used Exclusively in Foreign Commerce is Not Preempted by the Federal Aviation Act and is Not Invalid Under the *Japan Line* Doctrine of the Foreign Commerce Clause. *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S. Ct. 2369 (1986).

I. FACTS AND HOLDING

Appellant, Wardair Canada, Inc. (Wardair),[1] brought a Florida state action[2] for the refund of sales tax authorized by the state of Florida against aviation fuel purchased within the state by foreign airlines.[3] The Florida Department of Revenue assessed a tax for the total amount of the fuel purchased regardless of whether the airline used the fuel for flight within or without the state and regardless of whether the airline engaged in a significant or trivial amount of business within Florida.[4] All Wardair flights were charter flights between the United States and Canada; thus, Florida taxed fuel used exclusively in foreign commerce by a foreign airline.[5] Wardair alleged that the Florida statute violated the dormant Foreign Commerce Clause of the Federal Constitution by conflicting with an agreement regulating air charter service between the United States and Canada.[6]

---

1. The appellant is a Canadian corporation operating charter flights to and from the United States. Wardair Can., Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369, 2370 .(1986), *aff'g*, 455 So. 2d 326 (Fla. 1984).

2. Wardair filed suit in the Circuit Court for Leon County, Florida. 455 So. 2d 326, 327 (Fla. 1984).

3. FLA. STAT. § 212.08(4)(a)(2) (1985).

4. Before April 1, 1983, the fuel tax was prorated on a mileage basis so that liability existed only for the portion of the tax equal to the ratio of its Florida mileage to its total mileage for the previous fiscal year. FLA. STAT. § 212.08(4) (1975). Beginning April 1, 1983, the Florida law was amended to repeal the proration aspect for airlines. FLA. STAT. § 212.08(4)(2) (1985). The fuel tax was established at a rate of five percent on a deemed price of $1.48 per gallon. *Id.* Effective July 1, 1985, Florida significantly amended its fuel tax statute, FLA. STAT. § 212.08(6)(2) (Supp. 1987), and as a result, the instant case relates only to Wardair's tax liability between April 1, 1983 and July 1, 1985. *Wardair*, 106 S. Ct. at 2371 n.2.

5. *Wardair*, 106 S. Ct. 2369.

6. *Id.* at 2371.

Although the United States-Canadian agreement expressed a federal policy to exempt foreign airlines from fuel taxes exclusive of contrary state action, the Circuit Court of Leon County, Florida found that the tax was not invalid under the dormant Foreign Commerce Clause.[7] The court concluded that federal policy precluded the states from regulating foreign airlines in order to enable the United States to speak with one voice when regulating commercial relations with foreign governments.[8]

The Florida Supreme Court reversed in part, holding that the United States-Canadian agreement protected carriers only from national taxes and, therefore, did not preempt the state from imposing the fuel tax.[9] The Florida Supreme Court also noted that the agreement exempted only national taxes and concluded that the United States and Canada intentionally omitted the exemption of state taxes.[10] After concluding that the agreement did not exempt state taxes, the Florida Supreme Court then found that the fuel tax did not interfere with the federal government's attempt to speak with one voice and, therefore, was valid under the Commerce Clause.[11] On appeal, the United States Supreme Court, *affirmed. Held*: The Federal Aviation Act does not preempt state taxation of airline fuel used by foreign airlines exclusively in foreign commerce, and the state taxation is not invalid under the dormant Foreign Commerce Clause. *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S. Ct. 2369 (1986).

II. LEGAL BACKGROUND

In recent years, United States courts have given great attention to the field of state taxation. Many state courts have written well-reasoned opinions addressing state taxation issues.[12] In addition, the United States Supreme Court has decided a number of significant cases analyzing the constitutional restraints on state taxation.[13]

Court decisions rather than congressional regulation have imposed

---

7. Department of Revenue v. Wardair Can., Ltd., 455 So. 2d 326, 327 (Fla. 1984).
8. *Id.*
9. *Id.* at 329.
10. *Id.*
11. *Id.*
12. Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on Mobil, Exxon, and H.R. 5076*, 79 MICH. L. REV. 113 (1980). *See, e.g.*, R. L. Qualls v. Montgomery Ward & Co., 266 Ark. 207, 585 S.W.2d 18 (1979); Budget Rent-A-Car of Wash.-Or., Inc. v. Multnomah County, 287 Or. 93, 597 P.2d 1232 (1979).
13. *See, e.g.*, Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

most of the existing restrictions on state taxing power.[14] In early state taxation cases dealing with oceangoing vessels, the courts emphasized the exclusive fiscal jurisdiction of the instrumentality's home port.[15] The "home port" doctrine permitted the taxation of interstate and foreign commerce only by the jurisdiction of domicile of the instrumentality's owner.[16]

In 1979 the Supreme Court declined to apply the "home port" doctrine in *Japan Line, Ltd. v. County of Los Angeles.*[17] In *Japan Line* the Court labelled the "home port" doctrine anachronistic and further noted that the doctrine "may indeed be said to have been 'abandoned'."[18] Consequently, courts now avoid the home port doctrine and generally use the apportionment formula. The doctrine of apportionment permits nondomiciliary jurisdictions to tax instrumentalities passing through their jurisdictions if the tax is fairly apportioned among all the jurisdictions affected.[19] Theoretically, the formula avoids the possibility of multiple taxation. The concept of apportionment grew from the belief that states have a right to recover costs from those who benefit from the services of a state.[20]

The Supreme Court began using apportionment with respect to inter-

---

14. Hellerstein, *supra* note 12, at 115. Congress passed its first legislation limiting the state tax power in 1959. *Id.* at 113 n.3.

15. *See, e.g.*, Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911); Ayer & Lord Co. v. Kentucky, 202 U.S. 409 (1906); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1872); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1870); Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1854).

16. *Hays*, 58 U.S. (17 How.) 596. The Court first applied the doctrine in *Hays* when it stated that the federal government, holding exclusive jurisdiction over foreign and interstate commerce, had the power to regulate ships entering the ports of other states. In later decisions clarifying the rationale behind the doctrine, the Court stated that the necessity for national uniformity provided the conceptual foundation for the doctrine. Moreover, the "home port" doctrine protected the Commerce Clause concern of avoiding unfair treatment of interstate and foreign commerce by preventing the multiple taxation of interstate and foreign commerce. *See, e.g., Southern Pac. Co.*, 222 U.S. 63; *Ayer & Lord Co.*, 202 U.S. 409.

17. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 443 (1979).

18. *Id.* (quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 320 (1944)).

19. Recent Decision, *State Taxation of Foreign-Owned Instrumentalities Used Exclusively in Foreign Commerce is Forbidden by the Commerce Clause When Multiple Taxation or Impairment of Uniform Federal Regulation of Foreign Commerce Would Result*, 19 VA. J. INT'L L. 915, 920 (1979).

20. *See, e.g.*, Postal Tel.-Cable Co. v. Richmond, 249 U.S. 252, 259 (1919). *See also* Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 719 (1972); Western Livestock v. Bureau of Revenue, 303 U.S. 250, 256-57 (1937).

state commerce on land in *Pullman's Car Co. v. Pennsylvania.*[21] Years later, after finding no substantive difference between barges and railroads, the Court extended the applicability of apportionment to inland water channels.[22] In *Braniff Airways v. Nebraska Board*[23] the Supreme Court again extended the apportionment doctrine to airplanes participating in interstate commerce. The Court concluded that airplanes exclusively using interstate routes more closely resembled inland barges than oceangoing vessels.[24] The Supreme Court had not yet applied the apportionment doctrine to the state taxation of oceangoing vessels.[25]

The original approach to state taxation of interstate and foreign commerce was restrictive. Later cases, however, suggest that states may tax many activities, subject to particular constitutional requirements as set forth by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*[26] and in *Japan Line, Ltd. v. County of Los Angeles.*[27] In *Complete Auto Transit*[28] the Supreme Court held that state taxation of interstate commerce is valid if the tax is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[29]

In 1979 the Supreme Court addressed the need for a constitutional

---

21. 141 U.S. 18 (1890). The *Pullman* Court found an apportioned tax on the rolling stock of an interstate rail company not unconstitutional. The Court noted that maritime commerce required forms of communication with other countries and was therefore suited only for congressional regulation. The Court stated that interstate commerce by land did not require this communication, thus distinguishing the two forms of commerce. *Id.* at 23-24.

22. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174-75 (1949).

23. 347 U.S. 590 (1954).

24. *Id.* at 599-600.

25. Apportionment cases regularly distinguished traffic on the oceans, arguably leaving the "home port" doctrine applicable in this area. *See Japan Line*, 441 U.S. at 441-43.

26. 430 U.S. 274 (1977).

27. 441 U.S. at 434.

28. 430 U.S. 274.

29. *Id.* at 279. In *Complete Auto*, Mississippi levied a tax against a corporation on the privilege of doing business in the state. The corporation, from another state, carried goods manufactured outside the state to dealers in Mississippi. The measure of the tax was the gross proceeds of the transportation charge. The taxable portion of the transportation began at a rail head in Mississippi and ended at a dealer within the state. In addition to upholding the state tax, the Court overruled *Spector Motor Service v. O'Connor* and *Freeman v. Hewit* which held that any tax applied to the privilege of engaging in interstate commerce was per se unconstitutional under the Commerce Clause. *Id.* at 288.

standard concerning state taxation of foreign commerce under the Commerce Clause.[30] In *Japan Line* the Court first applied the *Complete Auto* test for interstate commerce to the foreign commerce situation and then announced the need for a more thorough constitutional inquiry when a state desires to tax foreign commerce.[31] The Supreme Court added two tests to the *Complete Auto Transit* analysis when the tax in question involved foreign commerce. Specifically, the *Japan Line* court struck down the California property tax and stated that in addition to the *Complete Auto* considerations, a state tax on foreign commerce first must not create a significant risk of international tax multiplication, and second must not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments.[32]

In *Japan Line* the Court followed the concepts of avoiding multiple taxation and achieving federal uniformity—concepts enunciated by courts dealing with state attempts to tax instrumentalities of foreign commerce.[33] The Court had noted on numerous occasions that multiple taxation not borne by local business can violate the Commerce Clause.[34] The need for the federal government to speak with one voice is a common concern expressed in the international relations field[35] and in United States conventions and treaties.[36] The Court found that the California tax prevented the United States from uniformly regulating commercial relations with foreign governments. The Court further determined that the United States-Japan Customs Conventions on Containers "evidenced" the federal government's desire for uniform treatment of

---

30. *Japan Line*, 441 U.S. 434. The Court dealt with the narrow issue of whether foreign owned instrumentalities of exclusively foreign commerce were subject to a state property tax where the country of domicile had already levied a tax on the property. P. J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 2:17, at 95 (1981) [hereinafter HARTMAN].

31. *Japan Line*, 441 U.S. at 444-46.

32. *Id.* at 447-49. *See also* HARTMAN, *supra* note 30, § 2:17, at 94-101.

33. *See generally* Recent Decision, *State Tax on Instrumentalities of Foreign Commerce Invalid When Tax Results in Multiple Taxation and Impairs Federal Uniformity in Regulation of Foreign Trade*, 12 VAND. J. TRANSNAT'L L. 999, 1002-04 (1979).

34. *See, e.g.*, Evco v. Jones, 409 U.S. 91, 94 (1972); Central R.R. Co. v. Pennsylvania, 370 U.S. 607, 617-18 (1962); *Ott*, 336 U.S. at 174-75.

35. *See, e.g.*, Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875) (stating that a regulation must be national in character if it affects a topic which concerns international relations); Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48, 59 (1933).

36. *See, e.g.*, Convention for the Avoidance of Double Taxation, Mar. 8, 1971, United States-Japan, 23 U.S.T. 967, 1084-85, T.I.A.S. No. 7365.

cargo containers used solely in foreign commerce.[37] The California tax, the Court believed, would frustrate the national policy designed to remove the obstacles to instruments of foreign commerce.[38] The Court also provided examples of other ways in which a state tax on instrumentalities of foreign commerce could prevent national uniformity in foreign relations, such as international disputes or retaliation by foreign nations in reaction to taxes they perceive as unfair.[39]

The *Japan Line* Court balanced the interest of domestic commerce and the need for state revenue against the concern for unobstructed international trade. Considering these needs, the Court concluded that the interests of international trade were of greater importance.[40] Consequently, the Court found the *Japan Line* tax to be unconstitutional.

III. THE INSTANT OPINION

A. *The Majority Opinion*

In the instant opinion, the Supreme Court addressed the two issues of preemption and the dormant Foreign Commerce Clause with regard to the state taxation of foreign instrumentalities of commerce.

1. Preemption

The majority opinion, written by Justice Brennan, first considered whether the Federal Aviation Act (the "Act") preempted the Florida tax.[41] Initially the Court commented that while the Act regulates aviation extensively,[42] state regulation in an area "is not preempted whenever there is any federal regulation of an activity or industry or area of law."[43] As the majority in *Wardair* stated, the fundamental inquiry in a preemption analysis is whether Congress intended to displace the state law at issue.[44] The *Wardair* Court also stated that when a congressional statute does not expressly preempt a state law, evidence of congressional intent to preempt the state law is required.[45]

---

37. *Japan Line*, 441 U.S. at 452.

38. *Id.* at 452-53.

39. *Id.* at 450. *See generally* HARTMAN, *supra* note 30, at 98-99.

40. *See* HARTMAN, *supra* note 30, at 100.

41. 49 U.S.C. § 1301 et seq. (1982 & Supp. II 1986).

42. Congress gave foreign air travel agencies power over such items as licensing, routes, rates, tariffs and safety. *Wardair*, 106 S. Ct. at 2342.

43. *Id.*

44. *Id.*

45. *Id.* (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983); Silkwood v. Kerr-McGee Corp., 464 U.S. 238

In the instant case, the Supreme Court found no evidence that Congress intended to preclude state sales taxation of airplane fuel used in foreign commerce. Rather, the Court found that the Act expressly allowed this type of taxation.[46] The Court, examining section 1513 of the Act, determined that Congress had addressed the issue of state taxation of air commerce.[47] The Court found that Congress had considered the issue of state taxation of air commerce in the Act and had expressly allowed the states to levy taxes in that area.[48] The Act, therefore, did not preempt the state tax. The instant court, however, considered the possibility that Congress did not intend to include foreign commerce within the scope of section 1513[49] and consequently refused to rely on that section of the Act to resolve the Commerce Clause issue.[50]

2. Dormant Foreign Commerce Clause

Wardair further argued that the Florida tax violated the Foreign Commerce Clause of the Constitution because it presented an obstacle to the goal of federal uniformity in foreign relations. The majority, however, rejected Wardair's dormant Foreign Commerce Clause argument. When the federal government is silent, an analysis of the dormant Commerce Clause is necessary. In the instant case, the Supreme Court found that Congress had indeed spoken, thus allowing Florida to tax the fuel used in international aviation.

The majority's Commerce Clause analysis began with the *Complete Auto* test[51] and the two additional *Japan Line* concerns relating to foreign commerce.[52] The Court noted that these combined tests were dispositive of the Commerce Clause issue.[53] Wardair relied solely on the

---

(1984)).

46. *Wardair*, 106 S. Ct. at 2342.

47. *Id.* The Court's analysis found that section 1513(a) of the Act described the types of taxes that states cannot impose upon commercial aviation. Section 1513(a) precludes states from levying taxes directly or indirectly on passengers or on the sale of air transportation. 49 U.S.C. § 1513(a) (1982). Section 1513(b) allows the states to levy taxes in all areas not covered by section 1513(a) and permits the states to levy sales or use taxes on the sales of goods or services. 49 U.S.C. § 1513(b) (1982).

48. Among the permissible state taxes enunciated in § 1513(b) are "sales and use taxes on the sale of goods or services." 49 U.S.C. § 1513(b) (1982); *Wardair*, 106 S. Ct. at 2372.

49. Chief Justice Burger criticizes the majority for taking this position. *See infra* note 69 and accompanying text.

50. *Wardair*, 106 S. Ct. at 2342.

51. *See supra* note 29 and accompanying text.

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

53. *Id.* Wardair conceded that the Florida tax satisfied the *Complete Auto* test.

second *Japan Line* concern to form its case, arguing that the Florida levy is invalid under the Foreign Commerce Clause because it frustrates the ability of the federal government to speak with one voice when regulating commercial relations with foreign governments. The majority determined that the evidence presented did not reveal an explicit or implicit federal policy of reciprocal tax exemptions for instrumentalities of foreign air traffic.[54] Rather, through various conventions and international agreements, the Court perceived the actions of the federal government as at least acquiescing to the state's power to levy the type of tax at issue.[55]

The majority examined the Chicago Convention on International Civil Aviation and the bilateral agreements involving the United States and other countries and concluded that the federal government's silence as to whether states may levy taxes on aviation fuel used by foreign carriers in international travel provided evidence indicating Congress intended no preemption.[56] While the majority found that these documents exhibit an international aspiration to remove all obstacles to foreign air travel, including the taxation of fuel, they found that the law presently permits

---

Wardair also conceded that there is no risk of multiple international taxation as the tax is levied only upon the sale of fuel, which can occur only within one jurisdiction. *Id.*

54. *Id.* at 2373-74. The evidence presented by Wardair included 1) the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 [hereinafter the Chicago Convention] (an international convention of 157 countries including the United States and Canada); 2) a resolution adopted on Nov. 14, 1966, by the International Civil Aviation Organization (ICAO) [hereinafter the Resolution]; and 3) over 70 bilateral agreements dealing with international aviation to which the United States is a party. *Id.*

55. *Id.* at 2374. The majority did note, however, that it perceived an "international aspiration" to remove all obstacles to foreign air commerce. *Id.*

56. The Court concluded that the Chicago Convention forbids local taxes on fuel only when the fuel is aboard the airplane on arrival and kept on board after departure. The Chicago Convention does not forbid taxation of fuel purchased in that country. *Id.* The Court continued by examining the Resolution and noting that although the document expressly supports an international plan to exempt fuel from all taxes, the Resolution is merely the product of an organization to which the United States belongs. The federal government has not acted to give the Resolution the force of law. The Court concluded that the Resolution merely represents the policy of an organization to which the United States is one of many members, not the policy of the United States. *Id.* Next, the Court examined the 70 bilateral aviation agreements. Taxation by political subdivisions, the Court noted, is not mentioned in any of the agreements. The Court viewed this omission as a policy choice by the parties to the agreements to allow this form of taxation. That some states and Canadian provinces have levied taxes on aviation fuel used by American and Canadian carriers the Court viewed by as suggesting that the parties to the United States-Canadian Agreement understood it to allow the tax. *Id.* at 2375.

the taxation of this fuel by the states.[57] The Court, therefore, concluded that Congress had affirmatively acted and Congress' actions did not prohibit the tax in question.[58] The majority reached this conclusion by a "negative implication arising out of more than 70 agreements entered into since the Chicago Convention."[59] According to the Court, the "negative implication" displayed a federal policy permitting the type of tax at issue.[60] After concluding that the federal government has affirmatively acted to permit state taxation of fuel exclusively used in foreign commerce, the Court refused to apply a dormant Commerce Clause analysis.[61] The Court stated that "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it . . . in such a way as to *reverse* the policy that the Federal Government has elected to follow."[62] The majority explained that in both its interstate and international workings the dormant Commerce Clause only operates in situations where the federal government has remained silent.[63] When the government is silent, the dormant Commerce Clause ensures that "the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors."[64] However, as the Court found in the instant case, Congress may act to allow states certain regulatory authority.[65] Congressional grants of regulatory authority answer the dormant Foreign Commerce Clause inquiry for the courts.[66] Consequently, the Court concluded that in the instant case a dormant Commerce Clause analysis is unnecessary as Congress had considered the question of whether Florida may impose this type of tax and had answered the question in the affirmative.[67]

B. *Dissenting Opinions*

Chief Justice Burger wrote a separate opinion concurring in part and concurring in the judgment. While Justice Brennan's majority opinion

---

57. *Id.* at 2374.
58. *Id.*
59. *Id.* at 2375. The Court noted that it did not consider whether in the absence of the international agreements examined, the Foreign Commerce Clause would invalidate the Florida tax. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

found a Commerce Clause analysis necessary, Chief Justice Burger found it unnecessary in light of legislative history of the Act.[68] Within the legislative history of section 1513, Justice Burger found it relevant that there existed no indication of an intent to limit section 1513(b) to interstate commerce.[69] In addition, Chief Justice Burger examined section 1513 and concluded that the plain language of the section expressly permits the Florida tax at issue.[70] Consequently, the Chief Justice stated that there was no need to examine the tax further.[71] Chief Justice Burger commented that the majority, in refusing to decide the case on the express language in section 1513, failed to respect the choice made by Congress in this area of state taxation.[72]

Justice Blackmun wrote a dissenting opinion expressing the view that the instant case is indistinguishable from *Japan Line* and that the Court should decide the case solely on Commerce Clause grounds.[73] The Justice believed that both the instant tax and the *Japan Line* tax prevented the federal government from speaking with one voice and, therefore, were unconstitutional.[74] Justice Blackmun disagreed with the majority's conclusion that the evidence did not exhibit the type of "governmental silence . . . that triggers dormant Commerce Clause analysis."[75] The

---

68. *Id.* at 2376.

69. *Id.* at 2377. Justice Burger pointed to pieces of legislative history to support his view of the language of section 1513. First, the State Department and the Senate Legislative Counsel advised Congress that, as it was used in the bill, air commerce included foreign air commerce. *Id. See* 49 U.S.C. § 1301(4) (1982); *Hearings on S.2397 et al. Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92nd Cong., 2d Sess. 129, 136 (1972) [hereinafter *Senate Hearings*] (letter of David M. Abshire, Department of State); *Senate Hearings, supra*, at 207 (Memorandum of Peter W. LeRoux, Senior Counsel, Office of Legislative Counsel).

70. *Wardair*, 106 S. Ct. at 2378. The Chief Justice noted that "air transportation" and "air commerce" are defined in the Act to include foreign commerce and transportation. *Id.* at 2377-78. *See* 49 U.S.C. § 1301(4), (10) (1982).

71. *Wardair*, 106 S. Ct. at 2378 (citing Aloha Airlines, Inc. v. Director of Taxation of Haw., 464 U.S. 7 (1983)). Chief Justice Burger relied on this quote from *Aloha* to support his conclusion:

> [W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted.

Aloha Airlines, 464 U.S. at 12 (footnote omitted), *quoted in Wardair*, 106 S. Ct. at 2376 (Burger, C.J., concurring).

72. *Wardair*, 106 S. Ct. at 2378.

73. *Id.* at 2378.

74. *Id.*

75. *Id.*

dissent further noted that the Court has never used a "negative implication" to validate a state burden on foreign commerce.[76] Justice Blackmun commented that in order to remove a state regulation from Commerce Clause scrutiny, the federal government's intent "must be unmistakably clear."[77] The dissenting Justice disregarded the "negative implication arising out of more than 70 agreements" relied on by the majority and considered that what is relevant is "the Federal Government has not provided the affirmative approval required to permit States to act."[78]

The majority opinion conceded that the international agreements, upon which the Court relied in order to avoid a dormant Commerce Clause analysis, displayed an international "aspiration" to avoid obstacles to foreign air travel—including fuel taxation.[79] Justice Blackmun, in his dissent, commented upon this concession by the majority and strengthened his argument by stating that this concession "is precisely the federal policy that renders the application of Florida's tax to the fuel here unconstitutional."[80]

Justice Blackman continued with an analysis of the international agreements in evidence. The Justice concluded that the agreements reveal a federal policy "directed at the creation of reciprocal tax exemptions in the area of foreign aviation."[81] The dissent noted the probable consequences of the *Wardair* majority's opinion: 1) the decision will hinder United States efforts to obtain reciprocal tax immunity with foreign governments; 2) foreign governments and their political subdivisions may impose retaliatory taxes; 3) because the nation is not speaking with one

---

76. *Id.*

77. *Id.* (quoting South-Central Timber Development, Inc. v. Wunnieke, 467 U.S. 82, 91 (1984).

78. *Wardair*, 106 S. Ct. at 2379.

79. *Id. See supra* note 55 and accompanying text.

80. *Wardair*, 106 S. Ct. at 2379. *See also* HARTMAN, *supra* note 30, at § 2:17 (1987 Supp.).

81. *Wardair*, 106 S. Ct. at 2379. Justice Blackmun stated:

> Although these provisions stop short of explicitly banning state levies on aircraft fuel used in foreign travel, the indisputable pattern that emerges is one of a policy of reciprocal tax exemptions for instrumentalities of international commerce, like the containers in *Japan Line* and the fuel at issue here. The Government's inability to date to achieve full international consent to reciprocal tax exclusions neither negates nor demonstrates the absence of a federal policy; it simply means that the United States has not fully succeeded, as yet, in transforming its policy into law. Indeed, the "aspiration . . . to eliminate all impediments to foreign air travel" . . . recognized by the Court, . . . is precisely the federal policy that renders the application of Florida's tax to the fuel here constitutional.

Id. (Blackmun, J., dissenting).

voice, the United States position in negotiations designed to achieve the federal policy of reciprocity will suffer; and 4) other states would have the ability to impose similar taxes on goods and services.[82] Justice Blackmun closed by stating that because the majority's opinion allows Florida through its unilateral act to obstruct United States foreign relations and trade, the fuel tax is unconstitutional under the Commerce Clause according to the Court's *Japan Line* decision.[83]

IV. COMMENT

The Reagan administration, during the 1980s, has introduced and supported a plan of new federalism. One consequence of this new federalism is that states have received fewer federal funds to support programs formerly administered by the federal government. As the federal government continues to reduce the amount of federal aid to the states, the states will have to resort to other means in order to meet their fiscal needs. States most likely will impose new taxes and increase other taxes.[84] Consequently, as the states need more revenues and become more creative, the Supreme Court will hear more cases, such as *Wardair*, dealing with the federal limitations on state and local taxation. In drafting new state taxes, state legislators will look to cases such as *Wardair* for guidance to keep the tax within constitutional boundaries.

The Supreme Court, in cases preceding *Wardair*, consistently required that the federal government's intent to permit state action "be unmistakably clear" in order to remove a state regulation from the reach of the dormant Commerce Clause.[85] Moreover, the Court has stated that in cases where foreign policy concerns exist, the need for the federal government's "affirmative approval" is increased.[86] However, in *Wardair*, a case with many foreign policy concerns, the Court appears to have taken a new approach to dormant Commerce Clause analysis through its use of a "negative implication" to discern the federal government's intent.[87] According to the instant opinion, a state can now act in an area if the federal government's approval can be "negatively implied," rather than "be unmistakably clear."

---

82. *Id.* at 2379.

83. *Id.*

84. *See* HARTMAN, *supra* note 30, at § 2:17 (1987 Supp.).

85. 106 S. Ct. at 2378 (quoting *South-Central*, 467 U.S. at 91).

86. *Wardair*, 106 S. Ct. at 2378 (quoting *South-Central*, 467 U.S. at 92). The heightened need in these situations arises from the fact that the United States foreign policy is the exclusive responsibility of the federal government. *Id.*

87. *See supra* notes 59-67 and accompanying text.

The instant Court's "negative implication" standard in comparison to the "unmistakably clear" standard appears, in this case, to provide states with an easier burden in proving that Congress permits state regulation in an area.[88] In future cases, however, application of the "negative implication" test may find that legislative history or international agreements negatively imply that Congress does not permit a state to act in an area. Consequently, the "negative implication" standard may create additional uncertainty for litigants attempting to interpret federal agreements in dormant Commerce Clause related cases. The *Wardair* Court's new standard seems to allow the Court greater leeway in interpreting federal documents and actions than the "affirmative approval" standard used in earlier cases.

The *Wardair* decision, allowing Florida to tax this type of foreign commerce, seems sensitive to the state's increased revenue needs. The Court chose to subordinate the federal goal of removing obstacles to international air traffic, by treating the goal as just an aspiration. This result may lead to other states passing similar taxes or even bolder levies on foreign commerce, hoping that, once again, local interests will overcome national interests. The *Wardair* decision, or the additional state levies in response to it, may also trigger responses from foreign nationals allowing their countries and states to levy additional obstacles to air traffic. The final result of the *Wardair* decision may achieve additional revenue for the states, but only while hindering international air traffic to a greater extent.

Barbara Keelty Caldwell

88. *Wardair*, 106 S. Ct. at 2378-79.