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STATE TAXATION OF FOREIGN FLAG AIR CARRIERS

Barry Berger†

Professor Berger asks whether a state can properly levy a property tax on a foreign flag air carrier engaged solely in foreign commerce. He finds no definitive answer to this question on a national level and suggests that the Supreme Court or Congress supply one.

I. INTRODUCTION

In 1961, the Supreme Court of California, implicitly reversing a stand taken three years earlier,1 held in Scandinavian Airlines System, Inc. v. County of Los Angeles2 that local taxing authorities could not levy an apportioned ad valorem personal property tax on foreign owned and based aircraft engaged in foreign commerce. The court relied on the "home-port" doctrine which precludes the levy of a property tax on ocean-going vessels by a jurisdiction other than that of its domicile.3 The decision by the United States Supreme Court denying certiorari in Scandinavian let the California decision stand; as a consequence, it left unanswered for the remaining states an important question: Can a state properly levy a property tax on a foreign flag air carrier engaged solely in foreign commerce?4

The United States Supreme Court decisions involving state taxation of aircraft, notably Northwest Airlines, Inc. v. Minnesota,5 and Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,6 dealt with American owned and based aircraft engaged in interstate commerce7 rather than foreign owned and based aircraft.

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1. Where a nondomiciliary state has acquired the power to impose an apportioned tax, the domicile must also impose an apportioned tax, even though there is no showing that the aircraft has actually been taxed elsewhere. Flying Tiger Line, Inc., v. County of Los Angeles, 51 Cal. 2d 314, 316, 333 P.2d 323, 325 (1958).


3. For a good discussion of the "home-port" doctrine see Comment, State Taxation of International Air Carriers, 57 Nw. U. L. Rev. 92 (1962).

4. This question has been answered in the affirmative by the United States Supreme Court as far as domestic carriers in interstate commerce is concerned. Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590 (1954).

5. 322 U.S. 292 (1944).


7. In Northwest the Court, while not making clear upon what "settled legal principles" its decision was based, sustained an unapportioned tax levied by the domiciliary state.
engaged in foreign commerce. Although the rules announced in these cases are helpful in forecasting the position of the Supreme Court, the cases themselves have a less than overpowering value as precedent for deciding the instant issue inasmuch as they evolved from a line of cases which did not deal with aircraft specifically, but with interstate transportation generally.

Because of the peculiar nature of air travel, state taxation of aircraft raises not only constitutional questions but also important international questions. Such taxation could impose trade barriers neither contemplated nor controlled by the Federal Government. The multiple taxation implications of such a state tax could cause international repercussions and affect the United States foreign trade policy.

Justice Frankfurter, writing the conclusion and judgment of the Court, expressed a belief that since the taxpayer could not show that any of the aircraft was out of the domiciliary state for this whole year, they had not acquired a taxable situs elsewhere and thus could be taxed of their full value. Justice Black, concurring, favored congressional resolution of this problem. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 301-02 (1944) and Justice Jackson, concurring, favored the "home-port" rule. Id. at 308-26. For a good discussion of Northwest see generally, Powell, Northwest Airlines, Inc. v. Minnesota, 57 HARV. L. REV. 1097 (1944).

The Court in Braniff distinguished Northwest as a burden of proof problem stating that if the taxpayer had established that the aircraft had acquired a permanent situs elsewhere, the tax would not have been sustained. Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 602 (1954). This distinction is perhaps borne out by the Court's decision in Central R.R. v. Pennsylvania, 370 U.S. 607 (1961), which based its decision affecting railroad rolling stock on the same distinction while upholding an unapportioned tax levied by the domicile state. However, in Braniff an apportioned tax was levied by a non-domicile state so the cases, though not inappropriate, are not entirely parallel. Thus, in essence, the Court in Braniff reversed itself. The Northwest dissenters, who favored application of the apportionment doctrine to aircraft, were in the majority in Braniff.

Though the Court in Braniff quoted from Justice Frankfurter's opinion in Northwest indicating that he recognized the apportionment principle, Northwest Airlines, Inc. v. Minnesota, supra at 602, Frankfurter in Braniff indicated that he believed it should not be applied to air transportation. Supra at 604. See Comment, State Taxation of International Air Transportation, 11 STAN. L. REV. 518, 525 n.27 (1959).

8. Even though there has been no litigation since Scandinavian, the problem is certain to surface because of the states' ever increasing need to find new sources of revenue. At least 30 states make some assessment of commercial aircraft for property taxes. Welch, Allocation of Airline Flight Equipment, a brief presented before California Assembly Committee on Revenue and Taxation, Sept. 6, 1967, accompanying cover letter of Dec. 20, 1967, from Air Transport Association and its Public Affairs Committee Memorandum No. 67-28 of Oct. 3, 1967 [hereinafter cited as ATA Brief]. In 1945 there were at least eleven such states. Welch, The Taxation of Air Carriers, 11 LAW & CONTEMP. PROB. 584, 586 n.7 (1946).


11. See Comment, supra note 7 at 519 nn.4, 10, 11, 520 n.12 (1959) in which responses from foreign flag air carriers voice concern and possible reciprocity by levying a property tax on foreign aircraft based on a mutual equity principle.

Of the eight countries responding to inquiries sent out by the Stanford Law Review in 1959 only three countries, Japan, Germany and India, had a tax comparable to a property tax on even domestic airlines. Id. at 519 n.11.
the state's viewpoint, however, each legislature should have the power
to tax any instrumentality which derives a benefit, protection, or
privilege from that state and, because the Constitution does not
explicitly deny the right of the state to tax such instrumentalities,
the rejection of that right would have serious state-federal sovereignty
implications.

The California court in Scandinavian was forced to balance these
issues and chose to do so in favor of the federal preemption. Whether
this was the proper course is the subject of this article.

II. COMMERCE AND DUE PROCESS CLAUSES

A discussion of the power of a state to levy a tax on instrumentalities
engaged in interstate commerce must necessarily involve a discussion of
both the due process and commerce clauses of the Constitution. The
distinction between the two concepts as they affect the state's power to
tax is not entirely clear because discussion of one in turn involves a
discussion of the other; however, an attempt will be made to delineate
each concept as it affects the topics of this paper.

A. DUE PROCESS CLAUSE

The due process clause affects a state's inherent power to tax, i.e.,
the actual authority of a state to tax is limited to its geographical
territory and any concomitant power it may have over its citizens
whether within or without the territory. Therefore, under the

12. In Braniff the majority relied on the "benefit and protection" test as a basis for upholding
the state's jurisdiction to tax. "When we speak of the jurisdiction to tax...we mean
no more than the benefit and protection of laws enabling the owner to enjoy the fruits of
his ownership and the power to reach effectively the interests protected..." Braniff
13. Most, if not all, of the foreign flag airlines are owned outright or controlled by the coun-
tries in which they are based. Thus, it is not only a question of the power of a state to
tax foreign domiciliaries, but the power to tax an international sovereign entity.
14. See notes 7 and 10 supra. See also Comment, supra note 8, at 520, which points out that
the language in Braniff supports a due process concept as well as commerce concepts.
15. The "home-port" doctrine and the apportionment-of-tax principle, although having due
process connections, will be considered in conjunction with the commerce clause. Early
decisions dealing with the "home-port" doctrine appear to be based on the commerce
clause, see Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1854); but subse-
quent decisions base the doctrine on the due process clause. Still later opinions dealing
with the "home-port" doctrine talk in terms of both the commerce clause and the due
process clause. See Comment, supra note 7, at 520. Because Hays was decided before the
enactment of the fourteenth amendment, it is a dubious notion that the "home-port"
doctrine was originally based on the due process clause. Although it likewise cannot
necessarily be said that the Hays line of cases grew out of considerations expressed in
Cooley, as seemed to be intimidated by the California Court in Scandinavian (see Com-
ment, supra note 3, at 96-98), the "home-port" doctrine is definitely related to the com-
merce clause principles of undue discrimination, multiple burden, and regulation of com-
merce between the states and foreign nations.
fourteenth amendment, a state or division thereof cannot tax persons, property or events outside its sphere of influence. In order to be taxed, an instrumentality must have a "situs" within the state. Situs is the actual tangible and/or intangible being within the jurisdiction. Under present concepts, an instrumentality has situs within a state when the state has a certain minimum contact or "nexus" with the instrumentality. A tax on something having no situs within the taxing state, i.e., over which the state has no "nexus", would constitute a denial of due process under the fourteenth amendment.

_Braniff_ should dispose of the contention that a foreign flag air carrier would be denied due process if the aircraft was, in fact, physically present in the jurisdiction at the time of the levy. In _Braniff_, the Court apparently based its decision on a due process concept alone.
while upholding an apportioned ad valorem property tax levied by Nebraska on Braniff's aircraft which were not domiciled in Nebraska. The Court applied the "benefits, protection, and opportunities" test, and ruled in favor of the tax despite any multiple-burden arguments raised by the taxpayer.\textsuperscript{2,3}

Thus, if state taxation of foreign flag air carriers involved only due process considerations, the question of the power to levy apparently would be answered in favor of the state; surely foreign flag aircraft would have as much contact with the state as the interstate aircraft had in Braniff. However, because the commerce clause problems raised by state taxation of aircraft were left unanswered by Braniff, much speculation remains as to this area of controversy. The California Supreme Court in Scandinavian relied on the commerce clause to invalidate the tax in question, thereby answering, for California at least, some of the commerce clause problems. Because the United States Supreme Court denied certiorari in Scandinavian, the commerce clause concepts need further examination.

B. COMMERCE CLAUSE

Under the Constitution, only Congress has the power to regulate interstate and foreign commerce.\textsuperscript{2,4} However, power to tax is concurrent,\textsuperscript{2,5} and a state can, under certain circumstances, tax businesses engaged in interstate and foreign commerce even though it, in a sense, thereby "regulates" interstate and foreign commerce. Because Congress has been reluctant to enter the arena, the state's power to tax is limited only by the negative implication in the commerce clause and by due process standards as interpreted by the Supreme Court.

Questions left unanswered by McCulloch v. Maryland\textsuperscript{2,6} and compounded by Cooley v. Board of Wardens of Port of Philadelphia\textsuperscript{2,7} have perplexed legal scholars and haunted the Supreme Court ever since their decisions. McCulloch, of course, stands for the proposition that the commerce clause is a self-executing restraint on the state's power to interfere with interstate or foreign commerce and its incidents.\textsuperscript{2,8} Cooley adds the proposition that the commerce clause does not prohibit a state from regulating commerce except in those fields

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23. Id. at 609.
25. This power is reserved to the states through the "police power" of the tenth amendment.
27. 53 U.S. (12 How.) 299 (1851).
preempted by or those fields admitting of "one uniform system". Thus, the McCulloch-Cooley doctrine takes essentially a middle-of-the-road position between absolute federal power and some state power. From this approach flows many questions: Is a state interfering with interstate and foreign commerce by taxing it in order to receive income? How much of a tax can a state impose without it being a restraint? What constitutes an undue or discriminatory burden?

The earliest Supreme Court cases attempting to answer the question of state taxation of instrumentalities engaged in interstate and foreign commerce involved vessels plying the high seas; and this led to the development of the "home-port" doctrine.

As first enunciated in Hays v. Pacific Mail Streamship Co., the "home-port" doctrine allowed full taxation by the domiciliary state of ocean-going vessels. This doctrine was extended in 1871 to include vessels engaged in interstate commerce exclusively plying inland waters; however, this extension was overruled in 1949. A further restriction of the doctrine came in Pullman's Palace Car Co. v. Pennsylvania, which distinguished railroad rolling stock from ocean-going vessels when the Supreme Court held that because of its transitory nature, rolling stock had no fixed situs and therefore must be, for the purpose of taxation, treated differently from vessels which...
travel international waterways, have a home port, and touch land only incidentally. The Court explained that because the two operations were so dissimilar in reference to the countervailing state-federal constitutional duties and powers, the "home-port" doctrine should not be applied. Pullman led to the formulation of the apportionment-of-taxation doctrine, whereby a taxing jurisdiction can only tax an instrumentality moving in interstate commerce on a basis apportioned by an accepted formula to the actual presence of the instrumentality in the jurisdiction. This apportionment doctrine partially relieved any multiple taxation burden caused by each jurisdiction levying on the full value of the instrumentality.

The Supreme Court has also abandoned the "home-port" doctrine in

37. Id. at 23.
38. The Court in Pullman intimated that the basis for the failure of the Court to reverse the Hays line of cases as it applied to vessels was that vessels travelling the high seas, as opposed to railroad rolling stock, are instruments of communication with other nations and are thus assured to be federally regulated, "[a]nd that since vehicles of commerce by water are instrumentalities of communication with other nations, the regulation of them is assured by the National Legislature." Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 23-24 (1891). But see Canadian Pacific Ry. v. King County, 90 Wash. 38, 155 P. 416 (1916), in which the Washington Supreme Court upheld an apportioned tax levied on railroad cars owned by a Canadian corporation. The Washington court, applying the general rule that taxable property is subject to taxation in the state in which it is located, felt that there was nothing in the Constitution which prevented a state from taxing tangible property engaged in foreign commerce. "It 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." Id. at 43, 155 P. at 418.
40. Although the Supreme Court has never put its stamp of approval on the use of any specific formula, earlier decisions seemed to uphold any formula used to apportion which was reasonably related to the use of property in the state or the benefits derived from its use in the state. See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905). Later decisions seemed to base the validity of the formulae on a time-use factor. See Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590 (1954); Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Present formulae used by states for interstate allocation of aircraft include: (1) those which allocate value only to states in which landings and take-offs are made; (2) those which allocate solely on the basis of route miles or plane miles, inclusive of overflight miles. ATA Brief at 4-5. The formula used by Nebraska which was approved in Braniff allocates all value to states with clearly established taxing jurisdictions; whereas California uses a formula which segregates an air carriers' fleet by types of plane and allocates the value of each group in the fleet in the proportion that the total plane time in California bears to total plane time both within and without the state. ATA Brief at 6.
41. Ideally the apportionment doctrine would relieve any chance of taxing the property on more than its full value. See Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1961). The Supreme Court has stated that "... the rule which permits taxation by two or more states on an apportioned basis precluded taxation of all property by the state of domicile." Standard Oil Co. v. Peck, 342 U.S. 382 (1952). But cf. Central R.R. v. Pennsylvania, 370 U.S. 607 (1962), which upheld an unapportioned tax levied on railroad rolling stock by the domicile state even when it was shown that other states could have gained jurisdiction to tax the rolling stock on an apportioned basis but had not done so.
favor of the apportionment doctrine in regard to motor carriers, although in Central R.R. v. Pennsylvania the Court upheld an unapportioned tax levied by the domicile on railroad rolling stock even though the taxpayer showed that some fraction of the property was absent from the state for part of the tax year.

The status of the "home-port" doctrine is best determined by reference to Ott v. Mississippi Valley Barge Line Co., which first applied the apportionment doctrine to inland water vessels while pointing out that the "home-port" doctrine is still applicable to ocean-going vessels. This contradiction would seem to indicate that the basis for the original application of the "home-port" doctrine was not to establish a limitation on the state's power to tax interstate commerce, but primarily to establish a limitation on the state's power to tax an instrumentality (ocean-going vessel) imbued with international flavor and associated with foreign commerce, thus admitting of "one uniform system". Analysis of Scandinavian indicates that the California Supreme Court rested its decision to follow the "home-port" doctrine on this interpretation of Ott (and consequently Hays) when it invalidated the California tax on foreign flag air carriers.

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43. At first instance, the Court seemed to apply the "home-port" doctrine. See Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944). The Court in Braniff implicitly reversed Northwest and applied the apportionment doctrine.
44. 370 U.S. 607 (1962).
45. Analysis of Central indicates that the case turned on a burden of proof point rather than the "home-port" doctrine:

In short...this record shows only that a determinable number of appellant's cars were employed outside the Commonwealth of Pennsylvania during the relevant tax year. But as this leaves at large the possibility of their having a nondomiciliary tax situs elsewhere, that showing does not suffice under our cases to exclude Pennsylvania from taxing such cars to their full value... Accordingly we conclude that...appellant has failed to sustain its burden of proving that a tax situs has been acquired elsewhere.

Id. at 616, 618. But the holding did rely on cases which utilized "home-port" language, establishing that the home port had the power to tax the full value of the property except where the property acquired an actual situs elsewhere. In Central, the taxpayer simply failed to prove that the property acquired an actual situs elsewhere.

Central relied on New York Central R.R. v. Miller, 202 U.S. 584 (1906) which held that the taxpayer could not escape imposition of its domicile's property tax on the full value of its assets merely by showing that some determinable fraction of the property was absent from the state during part of the new year. New York Central, in turn, implicitly rested on Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905) (a vessel case) which modified the strict "home-port" rule.
47. "We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters." Id. at 173-74.
48. In other words, the court [Ott] held (without specifically stating) that an instrumentality of commerce which leaves the nation's shores becomes so peculiarly imbued with international characteristics that it would be unwise to allow any state but that of domicile to exercise sovereignty beyond that necessary under ordinary police powers.
56 Cal. 2d at 25, 363 P.2d at 33, 14 Cal. Rptr. at 33.
A question that remains to be answered by the United States Supreme Court is whether or not a state's power to tax or regulate instrumentalities engaged solely in foreign commerce is greater or lesser than its power with respect to interstate commerce. Although the commerce clause contains no apparent distinction between regulation of interstate and foreign commerce, there is an argument in favor of the proposition that the negative implications of Congress' power over foreign commerce is broader than that over interstate commerce. Although there is nothing definite in the records of the Constitutional Convention regarding the broader aspects of the foreign commerce provision other than an expressed concern for regulation of foreign commerce, contemporary writings and debates indicate the superior position of the foreign commerce provision as opposed to the negative and supplemental position afforded the interstate commerce provision. Although the Supreme Court has yet to rule, there are dicta and concurring opinions in several cases suggesting that the foreign commerce prohibition is broader than the interstate commerce prohibition.

49. U.S. Const. art. 1, § 8. "The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States. . . ."

50. But cf. Comment, supra note 3, at 101. ("Although there is some evidence that the Constitutional grant of power to the federal government was intended to be greater with respect to foreign commerce than with respect to interstate commerce, the juxtaposition of the two provisions in the Commerce Clause argues for their equation.").

51. See Comment, supra note 7, at 521-22 n.29 for sample quotes, citations, and comments.

52. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 228-29 (1824) in which Justice Johnson, concurring, stated:

    Power to regulate foreign commerce, is given . . . in the same breath . . . with that over the commerce of the states . . . But the power to regulate foreign commerce is necessarily exclusive. The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government . . . [A]ll other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

and Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932), in which the Court stated:

    And, again in the Constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect to both foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce.

See also Board of Trustees v. United States, 289 U.S. 48, 59 (1933) (dictum); Buttfield v. Strahan, 192 U.S. 470, 492 (1904) (dictum); Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 482-83 (1888) (dictum).

A contrary conclusion may be read in the dictum of Justice Marshall in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827):

    It may be proper to add, that we suppose the principles laid down in this case, [affecting the commerce clause and the import-export clause] to apply equally to impositions from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

Although the doctrine as to the import-export clause has been repudiated by subsequent decisions, see Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), the Court has yet to
Because foreign commerce is clearly a matter of national concern, the coupling of the McCulloch-Cooley doctrine with this arguably broader foreign commerce prohibition would necessarily render nil the state's power to regulate in the foreign commerce area. And even though Congress has not legislated in this direction, the federal government has, by implication, plenary rights in the area.  

Assuming, arguendo, that a state's power to tax is a positive concurrent power granted in the Constitution apart from the negative power derived through the commerce clause, the negative implication of the more pervasive foreign commerce prohibition coupled with the McCulloch-Cooley doctrine must be deemed to override a state's concurrent power to tax even on a quid pro quo apportioned basis.  

When the carrier has a foreign domicile, the multiple taxation implications could be dangerous because the Supreme Court obviously has no power to control taxation by foreign countries. Even if the domestic tax is apportioned, the danger still exists inasmuch as a foreign country could tax the aircraft at full value. Multiple taxation would cause undue burdens and discrimination of air carriers, whether domestic or foreign, flying solely international routes.

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53. If these rights are not derived from the commerce clause, then they are at least derived from the import-export clause, the executive powers, etc.

54. See note 25 supra.


56. This is true even when the carrier is a domestic domiciliary but flies only international flights. See, e.g., Flying Tiger Line, Inc. v. County of Los Angeles, 51 Cal. 2d 314, 333 P.2d 323 (1958).

57. Conceivably a foreign country would have the power to tax aircraft at the full value even if the aircraft was of domestic origin. If a tax such as the apportioned one upheld in Flying Tiger was imposed on every aircraft flying in foreign commerce, it could create a multiple burden on that air company since every foreign country into which it flew could impose a tax at its full value. Only a sense of comity would protect these air companies from discrimination since the Supreme Court could not serve as a common arbiter as it has in the interstate taxation cases. Although it is doubtful that each foreign country would impose such a tax, it could in reciprocity to a state imposing even apportioned taxes on its flag carriers. See Comment, supra note 7.

58. Reports submitted by the Attorney General, the Civil Aeronautics Board, and the Senate Foreign Relations Committee have informed Congress of the danger of multiple taxation and direct regulation of international air carriers. The reports recommend the use of treaties to remedy the problem. See MULTIPLE TAXATION OF AIR COMMERCE, H.R. Doc. No. 141, 79th Cong., 1st Sess. (1945); INTERNATIONAL AIR TRANSPORT POLICY, H.R. Doc. No. 142, 79th Cong., 1st Sess. (1945); SENATE COMM. ON FOREIGN RELATIONS, 76TH CONG., 1ST SESS., EXEC. REPORT No. 18 (1939).

The California Supreme Court in Scandinavian partly based its decision on multiple tax treaties and executive agreements enacted with Sweden, Denmark, and Norway. See Income Tax Treaty with Sweden, March 23, 1939, 54 Stat. 1759, 1760-61 (1939-
The California court in *Scandinavian*, although overtly basing its decision on the "home-port" doctrine, by implication, appeared to have the broader foreign commerce prohibition and the multiple tax danger in mind when deciding the case.\(^9\) The court's apparent purpose in distinguishing *Braniff* by choosing to follow the previously restricted "home-port" doctrine was to resolve a problem having international implications, while at the same time refraining from going out on a constitutional limb by answering sticky constitutional questions which the United States Supreme Court and Congress have not yet attempted to answer.

### III. IMPORT-EXPORT AND DUTY OF TONNAGE CLAUSES

Other clauses in the Constitution which support the stronger federal power position include the Import-Export and Duty of Tonnage clauses. Under the Constitution no state, without consent of Congress, may lay "any imposts or duties on Imports or Exports" or "any duty of tonnage."\(^6\)

One of the primary purposes of the import-export clause and the commerce clause was to prevent the practice which flourished during the Confederation period whereby a state in an advantageous position exacted "tolls" on goods, including foreign goods, which had to pass through that state in order to reach their destination. The duty-of-tonnage clause was added to supplement the import-export clause so that the purpose of the clause would not be defeated by the effect of taxes levied on their transportation.\(^6\)

Although aircraft flying in commerce are not exports or imports, a tax levied upon aircraft can be said to be closely related to the imported or exported cargo so as to fall within the constitutional prohibition.\(^6\)

It can be argued that the import-export clause, although literally not applying to ad valorem property taxes, might still be extended to prohibit state taxation of foreign owned air carriers if

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There is some question whether these treaties truly encompassed ad valorem property taxes on aircraft. The Swedish treaty, if it does encompass ad valorem property taxes, does so only on a non-reciprocal basis. See Comment, supra note 7, at 536.

59. 56 Cal. 2d at 33, 363 P.2d at 38, 14 Cal. Rptr. at 38.

In our opinion the basic reasoning behind the controlling principles is that any instrumentality which engages in commerce between two or more sovereign nations must have but one taxable situs. Common sense requires that such situs be the port where the instrumentality is in good faith domiciled.

60. U.S. CONST. art I, § 10.


62. See Comment, supra note 7, at 531.
international air transportation could be deemed an activity "clearly and directly related" to the process of exporting and importing.\textsuperscript{6,3}

Likewise, ad valorem property taxes would not literally fall within the province of the tonnage clause because that clause would only apply to duties measured by the capacity of the vessel. However, because the clause has been interpreted in a manner broader than its literal meaning,\textsuperscript{6,4} it is conceivable that a state could levy an ad valorem personal property tax based on passenger-miles, a formula intimately related to the capacity of the aircraft. Although a property tax levied on a vessel owned by a citizen of a state and based upon the valuation of the vessel as property (which could be levied on the basis of capacity and therefore tonnage) is not invalidated by the tonnage clause,\textsuperscript{6,5} an argument could be made for the proposition that an apportioned property tax levied on a foreign owned vessel would fall within the prohibition of the clause.\textsuperscript{6,6}

**IV. INTERNATIONAL CONSIDERATIONS**

The effect of international law on the question of taxation of air carriers in foreign commerce is even less clear than the constitutional implications. There seems to be no international common law principle to the effect that a state must apportion taxes levied on foreign instrumentalities.\textsuperscript{6,7} A country could conceivably tax anything in its jurisdiction in any manner not violative of its organic law. Thus, if there is any international prohibition on a country's right to tax, it must be by treaty.

The majority of the California Supreme Court in *Scandinavian* relied on treaties\textsuperscript{6,8} between the United States and the Scandinavian countries making up the consortium airline. These treaties encompass provisions covering duplication of taxation by the signatory powers or political subdivisions thereof.\textsuperscript{6,9} Although these treaties are not congressional

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\textsuperscript{63.} Though this extension is stretching the meaning of the clause a great deal, Justice Douglas' concurrence in *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947), basing an overturning of a tax levied on gross receipts of a stevedoring company on the import-export clause, suggests that it is not untenable. Under the "clearly and directly related" concept, the Supreme Court has invalidated such taxes as a fixed license tax on importers; *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); and a stamp tax on foreign bills of lading, *Almy v. California*, 65 U.S. (24 How.) 169 (1860).

\textsuperscript{64.} See Comment, *supra* note 7, at 531.


\textsuperscript{66.} See Comment, *supra* note 7, at 532.

\textsuperscript{67.} Metzger, Lecture on the Effects of Articles Dealing with Taxation in the General Agreement on Tariffs and Trade, for a course in International Trade Regulations, George-town Law School, Fall Term, 1967.

\textsuperscript{68.} The word "treaties" for the sake of simplification is used to refer to either treaties, protocols or executive agreements.

\textsuperscript{69.} See Comment, *supra* note 7, at 531.
action as contemplated by the commerce clause, they are binding upon the states as the supreme law of the land,\textsuperscript{70} and any tax repugnant to the agreements would be invalid.

The Scandinavian court liberally interpreted the agreements to encompass the prohibition of taxation of personal property. Although they would seem to cover shipping and air traffic, it is not entirely clear what types of taxes they would encompass.\textsuperscript{71} The California court reasoned that the Swedish agreement encompassed ad valorem property taxes since: (1) nothing in the Swedish agreement negated or limited its coverage; (2) there is broad language in the agreement as to the types of taxes encompassed; and (3) there is language in the agreement indicating specific references to property and profit taxes to be levied on air transport facilities.\textsuperscript{72} As to the agreements with Norway and Denmark, the court felt that although the agreements contained no specific ban on property taxes, they did so by implication.\textsuperscript{73} These agreements do talk in terms of taxable situs\textsuperscript{74} and imposition of burdensome taxes,\textsuperscript{75} and thus, it is feasible that they do resolve the very problems raised by this paper.

On the other hand it can be said that these agreements do not encompass ad valorem personal property taxes imposed by states. Article I of the Swedish agreement excluded local property taxation in the United States from the province of the agreement and makes it clear that the United States did not wish to make an agreement respecting any state or local taxes.\textsuperscript{76} As pointed out by Justice Traynor in his dissent in Scandinavian, such vital things as failure to mention specifically personal property taxes in both the Norwegian and Danish agreements, and failure to restrict specifically the taxing power of the states and their subdivisions in the Swedish agreement would not have been left to implication and supposition.\textsuperscript{77} If each country truly has absolute power to tax that over which it has jurisdiction under international law, then restrictions placed on that power should be specifically included in such an agreement.\textsuperscript{78}

\textsuperscript{71} Id. at 38, 363 P.2d at 41, 14 Cal. Rptr. at 41.
\textsuperscript{72} Id. at 38-40, 353 P.2d at 41-42, 14 Cal. Rptr. at 41-42.
\textsuperscript{73} Id. at 39, 363 P.2d at 42, 14 Cal. Rptr. at 42. \textit{But see} Traynor's dissent in Scandinavian. "A matter so vital as restrictions on the taxing power of the states and their subdivisions would hardly have been left to implication from the provisions of Article XIII, which are directly referable to Swedish property taxes and the United States capital stock tax."
\textsuperscript{74} Id. at 48, 363 P.2d at 47, 14 Cal. Rptr. at 47.
\textsuperscript{75} Id., Preamble.
\textsuperscript{76} Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 Cal. 2d 11, 48, 363 P.2d 25, 47, 14 Cal. Rptr. 25, 47 (1961).
\textsuperscript{77} Id.
\textsuperscript{78} For a good discussion on the interpretation of treaties see generally \textit{Law of Treaties}, 29 Am. J. Int'l L. 937 (Supp. 1935).
What may be learned from these agreements and later agreements (such as the General Agreement of Tariffs and Trade\textsuperscript{7,9} and the Treaty of Friendship, Commerce, and Navigation between the United States and Japan\textsuperscript{8,0}) is that there is concern over problems of taxation among countries having foreign investments and engaging in international trade and transportation.\textsuperscript{8,1} Although the taxation provisions in GATT and the Friendship, Commerce and Navigation Treaty do not seem to focus on problems of multiple personal property taxation, it is certain that the United States in joining with the signatory powers in these agreements recognizes the need for the protection of the parties from discriminatory taxation. Since these agreements have been approved by the Senate, they do bear some congressional sanction of federal participation in the area and thus suggest the proposition that the field has been federally preempted. No one individual state should be allowed, without some congressional sanction, to create problems involving foreign trade and foreign relations by establishing a system of taxation discriminatory by its very nature.

V. CONCLUSION

Whether a state can properly levy a property tax on a foreign flag air carrier engaged solely in foreign commerce remains unanswered, and extremely thorny constitutional and international issues permeate the area. To date, neither the United States Supreme Court nor Congress has attempted to answer the question.\textsuperscript{8,2} Scandinavian, which is the latest word to be rendered by any court, indicates that a state cannot levy even an apportioned personal property tax on foreign carriers engaged in foreign commerce.\textsuperscript{8,3} Is this the last word or is it just a restatement of doctrine never thought to be questioned? If it is true, as stated in Scandinavian, that it has been assumed for the last 185 years that property owned and based in a foreign country engaged solely in foreign trade is nontaxable, then it truly makes no difference whether

\textsuperscript{79.} The General Agreement of Tariffs and Trade was not signed as a separate document but was attached to the Final Act of the United Nations Conference on Trade and Employment, October 30, 1947. See T.I.A.S. No. 1700 for text.
\textsuperscript{81.} See id. Art. XI.
\textsuperscript{82.} The Supreme Court has held in Braniff that a state other than the domicile can levy personal property taxes on air carriers if it apportions its levy; however, the holding is of little precedential value since the case pertained to domestic carriers flying only in interstate commerce. Although it cannot be said that the framers of the Constitution could have fathomed the complexities of modern business, transportation, and communication, as well as the problem of gathering revenue to finance state and local governments, the Court has not hesitated to interpret the Constitution most befitting the economic and social needs in this century. Surely the Court recognizes the problem, yet it refuses to do anything determinatively about it. Thus, Congress should enter this area.
the doctrine stemmed from constitutional prohibition or from policy.\textsuperscript{8, 4}

Why then did taxing authorities in California attempt the very thing assumed to be impossible? The answer is clear, to raise more revenue. This penchant need for revenue will not diminish; and because there is no definitive statement by an authority higher than the California Supreme Court, other jurisdictions may try to make such a levy in return for the benefits, opportunities and protection afforded by the State.\textsuperscript{8, 5}

As long as the question remains unanswered, the problem it creates prevails.\textsuperscript{8, 6} Although no attempt has been made by any state to levy a property tax on foreign carriers since the decision in \textit{Scandinavian}, the continued concern among international air carriers\textsuperscript{8, 7} and the executive concern over the problem of multiple taxation indicate the need for a definitive answer either by the United States Supreme Court, or preferably by Congress.\textsuperscript{8, 8}

\textsuperscript{84} Id. at 42, 363 P.2d at 44, 14 Cal. Rptr. at 44.
\textsuperscript{85} There are at least 30 states which make some assessment of commercial aircraft for \textit{ad valorem} property taxes. See note 8 supra. If these states chose to do so, why could they not levy on foreign carriers engaged in foreign commerce?
\textsuperscript{86} Although \textit{Scandinavian} answered the question of whether a state can tax a foreign flag carrier engaged in foreign commerce in the negative, the case did not answer the questions of whether a state can tax (1) a domestic, non-domiciled air carrier engaged solely in foreign commerce, but having terminal facilities in the taxing state; (2) a domestic air carrier flying only international routes, but domiciled in the taxing state (since the present status of \textit{Flying Tiger} is unclear); (3) a foreign flag carrier flying routes which cause it to touch down in more than one state; and (4) a foreign flag carrier having equipment which has acquired a permanent situs in the United States.
\textsuperscript{87} See note 11 supra.
\textsuperscript{88} Cf. Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc., 404 U.S. 819 (1972), in which a "service charge" of one dollar levied by Evansville, Indiana and the State of New Hampshire on persons enplaning American owned and based commercial airliners engaged in domestic and \textit{interstate} flight was held constitutional. The question of such a charge on persons using airliners engaged solely in foreign commerce was not discussed.

For Congressional reaction calling for a moratorium on such charges, see H.R. 14847, 92d Cong., 2d Sess. (1972). For a case in which the Supreme Court may answer some of the questions presented by this article, see also United Air Lines, Inc. v. Mahin, 49 Ill. 2d 45, 273 N.E.2d 585 (1971), \textit{prob. juris. noted}, 40 U.S.L.W. 3455 (U.S. Mar. 20, 1972), \textit{argued}, 41 U.S.L.W. 3271 (U.S. Nov. 8, 1972), which held that imposition of a use tax on aviation fuel loaded at a Chicago airport on planes in interstate and foreign flight does not offend the commerce clause.