

THE CONSTITUTIONALITY OF THE WORLDWIDE COMBINED REPORTING METHOD OF TAXATION OF MULTINATIONAL CORPORATIONS: *BARCLAYS BANK V. FRANCHISE TAX BOARD*

INTRODUCTION

The imposition of taxes by the states has raised constitutional concerns for as long as the United States Constitution has been in effect.¹ With the increasingly global economy, however, complex tax issues have arisen that the Framers could not have contemplated.² As such, in recent years both Congress and the Supreme Court have struggled to delineate the restrictions of the United States Constitution on internationally imposed state taxes.³

One especially controversial area of state taxation has been California's unitary method of taxation of international corporations.⁴ Since its adoption in the early 1970's, international corporations and foreign countries have attacked the unitary method as unconstitutional.⁵ Protesters have argued that the unitary tax violates both the Commerce and the Due Process Clauses of the United States Constitution because it is likely to have the effect of taxing income earned

¹ See, e.g., *Austin v. New Hampshire*, 420 U.S. 656 (1975) (holding state tax having effect of taxing only income of non-resident taxpayers invalid under Article IV, § 2 of the Constitution); *Shaffer v. Carter*, 252 U.S. 37 (1920) (concluding state tax assessed on income accruing to non-residents from property or business within state comported with due process requirements of Constitution); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872) (invalidating state tax as violating unexercised power of Congress to regulate commerce).

² See, e.g., *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 114 S. Ct. 2268 (1994) (constitutionality of California method of taxing in-state earnings of foreign multinational corporation); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (constitutionality of Florida method of taxing in-state airline fuel purchases by foreign airlines); *ASARCO v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982) (constitutionality of inclusion in Idaho tax imposed on in-state parent corporation of intangible income earned by out-of-state subsidiary).

³ See, e.g., *Barclays*, 114 S. Ct. at 2268; *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Japan Line Ltd. v. County of L.A.*, 441 U.S. 434 (1979).

⁴ See, e.g., *Barclays*, 114 S. Ct. at 2268; *Container*, 463 U.S. at 159 (both contesting constitutional validity of California's unitary tax).

⁵ See *Barclays Bank Int'l Ltd. v. Franchise Tax Board*, 275 Cal. Rptr. 626, 638 (Ct. App. 1990) ("Every single nation in the industrialized western world has sent letters to the United States government protesting the use of WWCR by American states.")

outside the state, and as such, affect both interstate and international commerce.⁶

Such litigation has forced the United States Supreme Court to give a modern interpretation to the words of the Constitution and their applicability to the complex economy of today.⁷ In 1994, in *Barclays Bank PLC v. Franchise Tax Board*, the Court rendered a decision that has the practical effect of relaxing the constitutional restrictions on internationally imposed state taxes.⁸ In that decision, the Court held that the unitary method of taxation was constitutionally valid as applied to a foreign-parent, multinational corporation.⁹

This Note discusses the unitary method, its effect on internationally earned income of multinational corporations, and the development of the Court's analysis of its constitutional validity. Part I defines the various methods of allocating income for taxation purposes.¹⁰ Part II describes in more detail California's unitary tax provisions.¹¹ Part III provides an overview of the constitutional requirements of all state taxes, and more specifically, the various constitutional issues raised by the unitary tax.¹² Part IV discusses the 1983 United States Supreme Court decision upholding the unitary tax as applied to a domestic multinational corporation, *Container Corp. v. Franchise Tax Board*.¹³ Part V focuses on the 1986 United States Supreme Court decision *Wardair Canada, Inc. v. Florida Department of Revenue*, and its limiting effect on the restrictions of the Foreign Commerce Clause.¹⁴ Part VI sets forth a detailed discussion of the *Barclays* decision.¹⁵ Finally, Part VII argues that the *Barclays* Court did not apply the correct analysis in determining that the unitary method is constitutional as applied to foreign corporations and concludes that the unitary tax, as applied to foreign-parent multinational corporations, violates the Commerce Clause of the United States Constitution.¹⁶

I. METHODS OF ALLOCATING INCOME FOR TAXATION

When a corporation conducts business in more than one state, the proper allocation of income for tax purposes becomes an issue

⁶ See *Barclays*, 114 S. Ct. at 2272; *Container*, 463 U.S. at 162.

⁷ See *Barclays*, 114 S. Ct. at 2268; *Container*, 463 U.S. at 159.

⁸ 114 S. Ct. at 2268.

⁹ *Id.* at 2270.

¹⁰ See *infra* notes 17-53 and accompanying text.

¹¹ See *infra* notes 54-67 and accompanying text.

¹² See *infra* notes 68-133 and accompanying text.

¹³ See *infra* notes 134-235 and accompanying text.

¹⁴ See *infra* notes 236-66 and accompanying text.

¹⁵ See *infra* notes 267-342 and accompanying text.

¹⁶ See *infra* notes 343-85 and accompanying text.

because both the Commerce and the Due Process Clauses of the United States Constitution prohibit states from taxing value earned outside their borders.¹⁷ The constitutional restrictions are even stricter when a state taxes the income of a multinational corporation because such a tax must also meet the requirements of the Foreign Commerce Clause.¹⁸ As a result, a state that imposes a tax on a multistate or multinational corporation must determine a method of fairly allocating the corporation's taxable income earned within the state.¹⁹ Where the taxpayer corporation is part of an integrated enterprise that does business in more than one state, it is difficult, if not impossible, to precisely apportion the corporation's income among the several jurisdictions in which it does business.²⁰ As a result, a jurisdiction must use an acceptable method of reasonably allocating the corporation's approximate income earned inside the jurisdiction.²¹ There are two generally accepted methods of apportionment in the United States—the separate accounting method and formulary apportionment.²²

A. *Separate Accounting*

The separate accounting method of apportionment, also known as the arm's length method, is based on geographical or transactional accounting.²³ Under this method, each subsidiary of a corporation is treated as an independent entity that deals at arm's length with affiliated corporations.²⁴ A jurisdiction using the separate accounting method taxes only the profits of each affiliated corporation that the corporation recognizes in its internal accounting records as earned within that taxing jurisdiction.²⁵ Consequently, a corporation using the separate accounting method must maintain accounting records that enable it to determine with some degree of accuracy the net income earned in each of the jurisdictions in which it operates.²⁶

Historically, the separate accounting method was the preferred method of allocating the income of multistate corporations among the states, but it generally has been abandoned both by taxpayers and the

¹⁷ U.S. CONST. art. I, § 8, cl. 3; *id.* amend. XIV; see also *ASARCO, Inc. v. Idaho State Tax Comm'n.*, 458 U.S. 307, 315 (1982).

¹⁸ *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 446 (1979).

¹⁹ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

²⁰ *Id.* at 164.

²¹ *Id.* at 169.

²² JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE & LOCAL TAXATION* 417-18 (5th ed. 1988).

²³ *Id.* at 417.

²⁴ *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 114 S. Cl. 2268, 2273 (1994).

²⁵ *Id.*

²⁶ HELLERSTEIN & HELLERSTEIN, *supra* note 22, at 446.

states.²⁷ Taxpaying corporations have found the separate accounting method expensive and unworkable in practice because it requires a corporation to establish fair arm's length prices for all goods transferred or services rendered between affiliated corporations.²⁸ The states have rejected the method because it assumes (unrealistically, they contend) that the income of integrated business operations can be separated and allocated among the various affiliated businesses.²⁹ Use of the separate accounting method also poses the risk that a conglomerate will shift income among its subsidiaries in order to minimize its total tax burden.³⁰ To avoid such manipulation, the taxing sovereign must scrutinize all transactions between related corporations to ensure that they are reported at a price reflecting their true value.³¹ This method is further complicated by the fact that it is sometimes impossible to establish accurate arm's length prices for goods transferred or services rendered between affiliated corporations.³²

Although the states have rejected the separate accounting method of apportionment, the United States Federal Government and the international community favor this method for allocating income of multinational corporations for taxation purposes.³³

B. *Formulary Apportionment and the Unitary Method*

The method of apportionment by formula assumes that affiliated corporations are interdependent and that the income of any one corporation is a product of the integrated functions of all affiliated corporations.³⁴ Consequently, the theory behind formulary apportionment is that it is realistically impossible to accurately allocate income produced by affiliated corporations among the various affiliates on a geographical or transactional basis.³⁵ The United States Supreme Court approved formulary apportionment as a constitutional method of allocating income in 1920.³⁶ Due to the aforementioned difficulties in applying the separate accounting method, all of the states use some

²⁷ *Id.* at 446-47.

²⁸ *Id.*

²⁹ *Id.* at 467.

³⁰ *Barclays*, 114 S. Ct. at 2273.

³¹ *Id.*

³² HELLERSTEIN & HELLERSTEIN, *supra* note 22, at 467.

³³ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 187 (1983).

³⁴ See HELLERSTEIN & HELLERSTEIN, *supra* note 22, at 467.

³⁵ See *id.*

³⁶ *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 120-21 (1920).

type of formulary apportionment to determine the in-state taxable income of multistate corporations.³⁷

One type of formulary apportionment method, known as the "unitary tax," treats affiliated companies as a unitary business and applies a formula to determine the portion of a corporation's total income that is allocable to a particular state.³⁸ To determine the proper amount of taxable income within a state, the state defines the scope of the corporation's unitary business and then apportions the total income of that unitary business between the taxing jurisdiction and other jurisdictions on the basis of a formula.³⁹ The most common formula used to calculate the local tax base involves three factors that determine the percentage of total payroll, property and sales located within the state.⁴⁰ The state averages these percentage figures and then uses the averaged percentage to tax the total income of a corporation.⁴¹

The principle drawback to the unitary tax results from the fact that wages and costs of resources may not be uniform among the several jurisdictions in which a corporation operates.⁴² Corporations are likely to earn more profits in jurisdictions with low wages and costs of production.⁴³ Thus, when a jurisdiction with high wages and costs imposes a flat percentage tax on a corporation's total income, that tax will likely cover profits actually earned by affiliated corporations in other jurisdictions.⁴⁴

A state may impose a unitary tax only on a corporation whose operations constitute a unitary business.⁴⁵ No universal definition of "unitary business" exists; instead, the definition varies among the states.⁴⁶ At a minimum, however, the definition requires some common bond of ownership or control between the affiliated entities and a concrete relationship between the in-state and out-of-state activities of the unitary business.⁴⁷ The United States Supreme Court has approved a

³⁷ HELLERSTEIN & HELLERSTEIN, *supra* note 22, at 473, 506. See *supra* notes 27-32 and accompanying text for a discussion of the difficulties in applying the separate accounting method.

³⁸ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983).

³⁹ *Id.*

⁴⁰ See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 114 S. Ct. 2268, 2273 (1994).

⁴¹ See *id.* For example, if a corporation has three percent of its property, eight percent of its payroll, and four percent of its sales within the state, its allocation percentage will be five. *Id.* The state will then tax the corporation on five percent of its total income. *Id.*

⁴² See *Container*, 463 U.S. at 199 (Powell, J., dissenting).

⁴³ See *id.* (Powell, J., dissenting).

⁴⁴ See *id.* (Powell, J., dissenting). See *infra* notes 213-16 and accompanying text for discussion of this problem.

⁴⁵ See HELLERSTEIN & HELLERSTEIN, *supra* note 22, at 512.

⁴⁶ See *Container*, 463 U.S. at 178-79.

⁴⁷ *Container*, 463 U.S. at 166.

three-prong test for determining whether related entities comprise a unitary business.⁴⁸ Under the Court's test, a unitary business exists among affiliated entities with: (1) unity of ownership; (2) unity of use; and (3) unity of operation.⁴⁹ Unity of ownership generally exists when one taxpayer owns at least fifty percent of the voting stock of the corporations.⁵⁰ Unity of use is present where the corporations share common executive control and general operational systems.⁵¹ Unity of operation is found where the affiliated entities use the same purchasing, accounting, advertising or management divisions.⁵² The Court, however, does not consider this to be the only test for determining whether a unitary business exists and instead generally defers to state court definitions of unitary business, so long as they are "within the realm of possible judgment."⁵³

II. CALIFORNIA'S UNITARY TAX PROVISIONS

A. *Worldwide Combined Reporting*

California uses the worldwide combined reporting method of apportionment ("WWCR"), a variant of the unitary business method, to determine the portion of income of a multijurisdictional enterprise that is attributable to California.⁵⁴ Under WWCR, all affiliated corporations of an enterprise are treated as a unitary group regardless of the location of the affiliates.⁵⁵ If a corporation doing business in California is a member of a unitary group, then the total income for that group will be apportioned to California for the purposes of applying the aforementioned three-factor formula.⁵⁶ The total income for this unitary group will thus include the income of affiliated corporations

⁴⁸ *Butler Bros. v. McCollgan*, 111 P.2d 334, 341 (Cal. 1941), *aff'd*, 315 U.S. 501, 508 (1942).

⁴⁹ *Id.*

⁵⁰ See Elizabeth Harris, *Desperate for Revenue: The States' Unconstitutional Use of the Unitary Method to Apportion the Taxable Income of Foreign Parent Corporations*, 19 HASTINGS CONST. L.Q. 1077, 1083 (1992).

⁵¹ See *id.*

⁵² See *id.*

⁵³ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 176 (1983). The Court has only rejected a state court's finding of a unitary business twice. See *ASARCO, Inc. v. Idaho Tax Comm'n.*, 458 U.S. 307, 330 (1982); *F.W. Woolworth, Co. v. Taxation & Revenue Dept.*, 458 U.S. 354, 372-73 (1982).

⁵⁴ CAL. REV. & TAX. CODE, § 25101 (West 1992); *Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 275 Cal. Rptr. 626, 627 (Cal. Ct. App. 1990).

⁵⁵ *Barclays*, 275 Cal. Rptr. at 627.

⁵⁶ *Id.*

operating entirely outside of California or even outside of the United States.⁵⁷

Both domestic and foreign multinational corporations oppose WWCR as imposing double taxation on profits earned through foreign operations.⁵⁸ Foreign countries have also opposed WWCR as imposing a tax on profits that they alone are entitled to tax.⁵⁹ Some countries, such as Great Britain, have approved legislation permitting retaliatory measures against U.S. companies operating both in their country and in states using WWCR, and have threatened to implement such legislation if those states fail to enact a satisfactory solution to the problems created by WWCR.⁶⁰

B. *Water's-edge Election*

In 1986, California modified its state corporate franchise income tax provisions to include a water's-edge election for multinational corporate taxpayers.⁶¹ Under the water's-edge alternative to WWCR, a corporation may limit its combined reporting group to affiliates in the unitary business whose individual presence in the United States surpasses a certain threshold.⁶² In practice, application of the water's-edge election works as a separate accounting method with the United States as the jurisdictional boundary.⁶³

The original version of the water's-edge election conditioned a corporation's election on payment of a substantial fee and allowed the California Franchise Tax Board (the "Board") to disregard a water's-edge election under certain circumstances.⁶⁴ Foreign governments were not satisfied with this version of the water's-edge election as a solution to the burden created by WWCR, however, and in 1993, the United Kingdom threatened retaliatory measures against U.S. interests operating in its jurisdiction if WWCR states did not alleviate such burden by the year's end.⁶⁵ As a result, in 1993 California modified the water's-edge election to remove the fee requirement and the threat of

⁵⁷ *Id.*

⁵⁸ See *Barclays Bank PLC v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2289-90 (1994) (O'Connor, J., concurring in part and dissenting in part).

⁵⁹ *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 451-52 (1979).

⁶⁰ See *Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 275 Cal. Rptr. 626, 638 (Cal. Ct. App. 1990).

⁶¹ CAL. REV. & TAX. CODE §§ 25110-25115 (West 1992).

⁶² *Id.*

⁶³ *Barclays*, 275 Cal. Rptr. at 628 n.2.

⁶⁴ CAL. REV. & TAX. CODE § 25110 (West 1992).

⁶⁵ Marlis L. Carson, *Barclays, Colgate & WWCR Get Their Day in Court*, TAX NOTES, Apr. 4, 1994, at 7-8.

disregard by the Board.⁶⁶ Foreign governments, however, remain dissatisfied with the prospective nature of the provision because it offers them no relief for excessive taxes paid in the past and have continued to seek a ruling that the WWCR method is unconstitutional.⁶⁷

III. CONSTITUTIONAL ISSUES RAISED BY THE UNITARY TAX

A. *Requirements of the Due Process Clause*

1. Fair Apportionment

The Fourteenth Amendment to the United States Constitution requires that in order to comport with substantive due process, the amount of income taxed by a state must be fairly related to the taxpayer's activities within that state.⁶⁸ The United States Supreme Court has stated that for an apportionment formula to be fair, it must be both internally and externally consistent.⁶⁹ An apportionment formula is internally consistent, if, when applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed.⁷⁰ An apportionment formula is externally consistent if it reflects a reasonable sense of how income is generated among the several jurisdictions.⁷¹ Although the Court has set forth these guidelines as due process requirements of apportionment formulas, it still has given fairly wide discretion to the states in allocating income for taxation purposes.⁷²

2. Reasonableness of Administrative Compliance

Corporations have attacked the constitutionality of WWCR by claiming that the additional compliance burden it places on corpora-

⁶⁶ CAL. REV. & TAX. CODE § 25110 (West 1995).

⁶⁷ Carson, *supra* note 65, at 8. For example, in *Barclays*, Barclays Bank was seeking a refund of taxes assessed in 1977. 114 S. Ct. at 2272.

⁶⁸ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 129, 134 (1931).

⁶⁹ *Container*, 463 U.S. at 169.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 169-70. For example, in *Container*, the Court held that a unitary tax that resulted in a 14% increase in the corporation's taxable income attributable to California met Due Process requirements. *Id.* at 184. The Court reasoned that the tax was fair because the percentage increase was "within the substantial margin of error inherent in any method of attributing income among the components of a unitary business." *Id.*; cf. *Hans Rees' Sons*, 283 U.S. at 135-36 (apportionment formula resulting in 250% increase in state tax found to violate Due Process requirements).

tions violates procedural due process.⁷³ Specifically, corporations have claimed that: (1) the administration costs of compliance with the requirements of WWCR are unreasonable, undue and arbitrary; and (2) the WWCR compliance process lacks reasonable standards to guide enforcement.⁷⁴ The United States Supreme Court, however, has not accepted these arguments.⁷⁵ First, the Court has determined that the compliance burdens can be alleviated by relief provisions contained in the California regulations themselves.⁷⁶ Second, the Court has determined that the WWCR compliance process is guided by the standard of reasonableness, a standard long used in taxing systems.⁷⁷

B. *Commerce Clause Scrutiny: The Test of Complete Auto Transit, Inc. v. Brady*

In 1977, in *Complete Auto Transit, Inc. v. Brady*, the United States Supreme Court held that a Mississippi tax on the privilege of conducting business within the state did not violate the Commerce Clause when applied to an interstate activity.⁷⁸ The Mississippi State Tax Commission imposed a "privilege of doing business" tax on Complete Auto Transit, Inc. ("Complete Auto"), a Michigan corporation engaged in the business of transporting motor vehicles for the General Motors Corporation.⁷⁹ Complete Auto's business activities within Mississippi consisted of transporting vehicles from a railhead in Jackson, Mississippi, to Mississippi General Motors dealers.⁸⁰ The Mississippi Tax Commission assessed taxes in excess of \$165,000 against Complete Auto for sales of transportation services during the period from August 1, 1968, through July 31, 1972.⁸¹ Complete Auto paid the assessments under protest and filed a refund suit in the Chancery Court of the First Judicial District of Hinds County, arguing that its operations were one part of a continuous interstate movement and that the taxes thus assessed were unconstitutional as applied to instrumentalities of interstate commerce.⁸² The Chancery Court upheld the assessments in an

⁷³ *Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 14 Cal. Rptr. 2d 537, 545 (Cal. Ct. App. 1992).

⁷⁴ *Id.*

⁷⁵ See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 114 S. Ct. 2268, 2278-79 (1994).

⁷⁶ *Id.* at 2278.

⁷⁷ *Id.* See *infra* note 297 and accompanying text for examples of this standard.

⁷⁸ 430 U.S. 274, 289 (1977).

⁷⁹ *Id.* at 275-76. The tax was imposed pursuant to Miss. CODE ANN. §§ 10105, 10109(2), 10117, as amended.

⁸⁰ *Complete Auto*, 430 U.S. at 276.

⁸¹ *Id.* at 276-77.

⁸² *Id.* at 277.

unreported opinion.⁸³ The Mississippi Supreme Court affirmed the decision of the Chancery Court, concluding that the extensive operations of Complete Auto within Mississippi demanded the same services from the state as other taxpaying citizens.⁸⁴ The court further determined that the tax did not discriminate against interstate commerce and did not pose a risk of duplication in another state.⁸⁵ The United States Supreme Court noted probable jurisdiction to determine the constitutional issues raised by the tax and affirmed the findings of the Mississippi courts.⁸⁶

In sustaining the Mississippi tax, the Court employed a dormant Commerce Clause analysis for determining the constitutional validity of a tax imposed on interstate commerce.⁸⁷ Under the *Complete Auto* test, a state tax imposed on an instrumentality of interstate commerce will survive Commerce Clause scrutiny if: (1) the business activities have a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the state.⁸⁸ Subsequent courts that have applied the *Complete Auto* test to interstate and international taxes have further interpreted and clarified the guidelines of this four-prong test.⁸⁹

First, a substantial nexus will be found when there is a minimal connection between the business activities of the corporation and the taxing state and clearly exists when a corporation actually conducts business within the state.⁹⁰ Second, a tax is fairly apportioned if the income attributed to the state bears a rational relationship to the value of the business activities conducted by the corporation within the state.⁹¹ Courts will find apportionment formulas unfair as applied only where the resulting income allocation is completely out of proportion to the in-state activities of the corporate taxpayer.⁹² A tax may violate the nondiscrimination requirement of the Commerce Clause if it is so different from methods applied by other jurisdictions that it would

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Complete Auto*, 430 U.S. at 277.

⁸⁶ *Id.* at 275, 289.

⁸⁷ *See id.* at 279.

⁸⁸ *Id.*

⁸⁹ *See, e.g.,* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 114 S. Ct. 2268 (1994); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983); ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982).

⁹⁰ *See Barclays*, 114 S. Ct. at 2276.

⁹¹ *Container Corp.*, 463 U.S. at 180-81.

⁹² *Id.*

necessarily result in multiple taxation in different jurisdictions.⁹³ Additionally, an apportionment formula may discriminate against interstate commerce if it results in a higher tax burden than the taxpayer would incur if its operations were conducted in only one jurisdiction.⁹⁴ In practice, the nondiscrimination requirement in the interstate context has not required much more than fair apportionment, but the Supreme Court has noted that a more searching inquiry is required in the international context.⁹⁵ Finally, a tax will be considered fairly related to the services provided by the state if the amount of the tax bears a reasonable fiscal relation to the protection, opportunities and benefits provided by the state.⁹⁶

*C. Foreign Commerce Clause Implications: The Requirements of
Japan Line, Ltd. v. County of Los Angeles*

In 1979, in *Japan Line, Ltd. v. County of Los Angeles*, the United States Supreme Court held that California's imposition of an ad valorem property tax on Japan Line, Ltd.'s ("Japan Line") shipping containers violated the Foreign Commerce Clause because it resulted in multiple taxation of instrumentalities of foreign commerce.⁹⁷ Japan Line consisted of six Japanese shipping companies incorporated and domiciled in Japan.⁹⁸ The ships were specifically designed to accommodate large shipping containers and were used exclusively for hire in the international transportation of cargo.⁹⁹ Both the ships and the containers had their home ports in Japan and were subject to property tax there.¹⁰⁰ Japan Line's containers passed through California periodically during the course of their international journeys, generally remaining in the state less than three weeks.¹⁰¹

California imposed an ad valorem property tax on any property present in California on March 1, the "lien date" set under California law.¹⁰² In the years 1970, 1971 and 1972, Japan Line had a number of containers present in California on the lien date, and California im-

⁹³ See *id.* at 170-71.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).

⁹⁷ 441 U.S. 434, 456-57 (1979).

⁹⁸ *Id.* at 436.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 436-37. The ships remained in California ports only for the time necessary to pick up cargo or return containers. See *Japan Line Ltd. v. County of L.A.*, 571 P.2d 254, 256 (Cal. 1977).

¹⁰² CAL. REV. & TAX. CODE §§ 117, 405, 2192 (West 1989).

posed property taxes in excess of \$550,000 for the three years.¹⁰³ During that time, Japan refrained from imposing property taxes on similar containers of United States shipping companies present in Japan during the course of international commerce, in accordance with the Customs Convention on Containers, signed by both the United States and Japan.¹⁰⁴ Japan Line paid the taxes under protest and sued for a refund in the Superior Court for the County of Los Angeles.¹⁰⁵

The California Superior Court held the assessment of taxes unconstitutional as a violation of the "home port doctrine."¹⁰⁶ The home port doctrine, an effort to avoid multiple taxation of international commerce, states that instrumentalities of foreign commerce can be taxed only in their home ports.¹⁰⁷ The court further stated that apportionment of taxes is not practical when one of the taxing entities is a foreign sovereign because of the absence of an effective tribunal that can adjudicate the competing rights of the sovereigns to the taxes.¹⁰⁸

The California Court of Appeal reversed and concluded that the Supreme Court of California previously had rejected the home port doctrine and upheld apportioned property taxation.¹⁰⁹ The court rejected the argument that *Japan Line* warranted a different result because the containers in *Japan Line* were foreign-owned and used exclusively in international commerce.¹¹⁰ The court further rejected the risk of multiple taxation as a limit on the state's power to levy the property tax.¹¹¹ The Supreme Court of California similarly sustained the validity of the tax.¹¹² The court deemed the container's foreign ownership and use irrelevant to the constitutional analysis and rejected Japan Line's Commerce Clause challenge to the tax.¹¹³ Japan Line

¹⁰³ *Japan Line*, 441 U.S. at 437.

¹⁰⁴ See *id.* at 452-53. This Convention grants containers "temporary admission free of import duties and import taxes and free of import prohibitions or restrictions" so long as they are used exclusively in foreign commerce and are subject to re-exportation. Customs Convention on Containers, May 18, 1956, Art. 2, 20 U.S.T. 301, 304, 338 U.N.T.S. 103.

¹⁰⁵ *Japan Line*, 441 U.S. at 437.

¹⁰⁶ *Id.* at 437-38.

¹⁰⁷ *Id.* at 438.

¹⁰⁸ *Id.* The Court further states that the International Court is not a satisfactory tribunal because all parties must consent to its jurisdiction. *Id.*

¹⁰⁹ *Japan Line*, 441 U.S. at 438; see also *Sea-Land Serv., Inc. v. County of Alameda*, 528 P.2d 56 (Cal. 1974) (rejecting home port doctrine as "anachronistic" and upheld apportioned property taxation of containers owned by domestic corporation used both in intercoastal and foreign commerce).

¹¹⁰ *Japan Line*, 441 U.S. at 438. In contrast, the taxpayer in *Sea-Land* was a domestic corporation involved in both intercoastal and foreign commerce. See 528 P.2d at 58.

¹¹¹ *Japan Line*, 441 U.S. at 438-39.

¹¹² *Id.* at 439.

¹¹³ *Id.* at 439.

appealed the decision to the United States Supreme Court, which granted appellate jurisdiction in order to decide the constitutionality of the property tax.¹¹⁴

In reversing the lower court's opinion and holding California's ad valorem property tax unconstitutional, the United States Supreme Court concluded that where the taxpayer corporation is a foreign entity, a taxing method must meet additional requirements to those set forth in *Complete Auto* in order to pass Foreign Commerce Clause scrutiny.¹¹⁵ First, the tax must not create a substantial risk of international multiple taxation.¹¹⁶ Second, the tax must satisfy the "One Voice" doctrine, which states that such a tax must not impair federal uniformity in an area where federal uniformity is essential.¹¹⁷ Because the Court found that California's ad valorem tax created actual, not merely the risk of, multiple international taxation and prevented federal uniformity in regulating foreign commerce, the Court held the tax unconstitutional.¹¹⁸

1. Enhanced Risk of Multiple Taxation

In discussing the enhanced risk of multiple taxation, the Court restated the concern voiced by the California Superior Court that proper apportionment cannot be ensured where one of the taxing entities is a foreign sovereign.¹¹⁹ The Court emphasized that taxation of a foreign corporation is unlike taxation of a multistate domestic corporation, where the Court can require all taxing jurisdictions to apportion taxes to ensure that the taxpayer corporation is not subject to more than one tax on its full value.¹²⁰ Rather, due to the lack of an international tribunal capable of ensuring that the aggregation of taxes on an international corporation do not equal more than one full value, even a fairly apportioned state tax will likely subject foreign commerce to constitutionally forbidden multiple taxation.¹²¹

¹¹⁴ *Id.* at 440.

¹¹⁵ *Id.* at 446, 457. The Commerce Clause expressly gives Congress the power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. In addition, the Commerce Clause has long been interpreted to prohibit discrimination from interstate or foreign commerce even where Congress has not acted. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 768 (1945); *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185-86 (1938).

¹¹⁶ *Japan Line*, 441 U.S. at 448, 451.

¹¹⁷ *Id.* at 448-49.

¹¹⁸ *Id.* at 451.

¹¹⁹ *Id.* at 447.

¹²⁰ *Id.* at 447-48.

¹²¹ *Japan Line*, 441 U.S. 447-48.

The Court reasoned that California's ad valorem tax violated this requirement because the tax resulted in multiple taxation of instrumentalities of foreign commerce.¹²² The Court further reasoned that because the containers were owned, based and registered in Japan, used exclusively in international commerce and remained outside of Japan only for the duration of their international missions, Japan had the right and power to tax the containers in full.¹²³ The Court thus concluded that California's ad valorem property tax not only produced the risk of multiple taxation, but also produced multiple taxation in fact.¹²⁴

2. The Need for Federal Uniformity: The "One Voice" Doctrine

In analyzing the risk of impairment of federal uniformity, the Court recognized that foreign commerce is primarily a matter of national concern and an area demonstrating a strong need for the United States to speak with one voice via the federal government.¹²⁵ The Court stressed that a state tax on instrumentalities of foreign commerce can impair federal uniformity in several ways.¹²⁶ First, a state imposed apportionment tax could give rise to international disputes over reconciling overlapping apportionment formulae.¹²⁷ Additionally, if a state tax creates an asymmetry in the international tax structure, foreign nations might decide to retaliate against American-owned entities operating in their countries, and such retaliation would likely harm not only the taxing state, but also the nation as a whole.¹²⁸ Finally, if other states decided to apply their own apportioned taxes to foreign corporations, the resulting varying degrees of multiple taxation would clearly prevent the United States from "speaking with one voice" in regulating foreign commerce.¹²⁹

The Court therefore held that California's tax violated the "One Voice" doctrine.¹³⁰ In concluding that this was an area requiring federal uniformity, the Court noted the Customs Convention on Containers, signed both by the United States and Japan, as evidence of the existence of a national policy to remove impediments to the use of contain-

¹²² *Id.* at 451.

¹²³ *Id.*

¹²⁴ *Id.* at 452.

¹²⁵ *Id.* at 448-49.

¹²⁶ *Japan Line*, 441 U.S. at 450-51.

¹²⁷ *Id.* at 450.

¹²⁸ *Id.*

¹²⁹ *Id.* at 450-51.

¹³⁰ *Id.* at 452.

ers in foreign commerce.¹³¹ The Court further found that California's tax created an asymmetry in international taxation, because American-owned containers were not taxed in Japan, and that this asymmetry created a substantial risk of retaliation by Japan against American-owned interests in that country.¹³² Finally, the Court restated its position that, if other states applied their own apportionment taxes, the varying degrees of multiple taxation would make federal uniformity with respect to foreign trade impossible.¹³³

IV. CONSTITUTIONALITY OF THE UNITARY TAX AS APPLIED TO A DOMESTIC MULTINATIONAL CORPORATION: *CONTAINER CORP. OF AMERICA V. FRANCHISE TAX BOARD*

A. *Factual Background*

In 1983, in *Container Corp. of America v. Franchise Tax Board*, the Supreme Court upheld California's application of the unitary business principle to Container Corporation of America and its foreign subsidiaries as proper and concluded that California's use of the three-factor formula to apportion the income of that unitary business was fair.¹³⁴ Container Corporation of America ("Container") was a vertically integrated manufacturer of custom-ordered paperboard packaging.¹³⁵ Container was incorporated in Delaware, headquartered in Illinois and did business in California and elsewhere.¹³⁶

Container primarily had domestic operations, but during the years at issue in the case, Container had foreign operations consisting of twenty controlled subsidiaries located in four Latin American and four European countries, with its percentage ownership of the subsidiaries ranging between 66.7% and 100%.¹³⁷ Most of the subsidiaries were fully integrated, but a few did not purchase their material from Container, and sales of materials from Container to its subsidiaries accounted for only approximately one percent of the subsidiaries' total purchases.¹³⁸ The subsidiaries had relative autonomy in the matters of personnel and daily management; although Container had a number of its direc-

¹³¹ *Japan Line*, 441 U.S. at 452-53.

¹³² *Id.* at 453.

¹³³ *Id.* In so concluding, the Court noted that Oregon had already implemented such a tax. *Id.*

¹³⁴ 463 U.S. 159, 184 (1983).

¹³⁵ *Id.* at 171.

¹³⁶ *Id.* at 163.

¹³⁷ *Id.* at 171. The years in question were 1963, 1964 and 1965. *Id.*

¹³⁸ *Id.* at 172.

tors and officers on the boards of directors of the subsidiaries, the representatives generally assumed a passive role, leaving management decisions to local executives, who were citizens of the host country.¹³⁹ In other respects, Container and its subsidiaries enjoyed a close relationship.¹⁴⁰ For example, Container either held or guaranteed approximately half of the subsidiaries' long-term debt.¹⁴¹ Container provided technical advice and consultation to the subsidiaries.¹⁴² Container also assisted the subsidiaries in their acquisition of equipment, either by selling them its used equipment or by acting as a purchasing agent for them.¹⁴³

In 1969, after conducting an audit of Container's California Franchise tax returns for the years 1963-65, the Franchise Tax Board (the "Board") issued notices of additional assessments for each of the three years.¹⁴⁴ In calculating the total income of its unitary business, Container included its own corporate net earnings, but not the income of its subsidiaries.¹⁴⁵ Similarly, Container excluded the payroll, property and sales figures of its subsidiaries in calculating its share of net income apportionable to California under the three-factor formula.¹⁴⁶ The Board issued notice to Container in 1969 that it must include its overseas subsidiaries as part of its unitary business rather than as passive investments.¹⁴⁷ Although the inclusion of the subsidiaries had the effect of increasing the total income subject to apportionment and decreasing the percentage of that income apportionable to California, the inclusion of the subsidiaries in the unitary business resulted in an increase in Container's tax liability in each of the three years.¹⁴⁸

Container paid the additional assessments under protest, and filed suit in California Superior Court for a refund.¹⁴⁹ The Superior Court upheld the assessments of the Board, and the California Court of Appeal affirmed them.¹⁵⁰ The California Supreme Court refused to exercise discretionary review, and the United States Supreme Court noted probable jurisdiction.¹⁵¹

¹³⁹ *Container*, 463 U.S. at 172.

¹⁴⁰ *Id.* at 173.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Container*, 463 U.S. at 173.

¹⁴⁵ *Id.* at 174.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 174-75.

¹⁴⁹ *Container*, 463 U.S. at 175.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

B. *Supreme Court Opinion*

The United States Supreme Court affirmed the findings of the lower courts and held California's unitary tax constitutional.¹⁵² In so holding, the Court concluded that California's application of the unitary business concept to Container and its foreign subsidiaries was proper, and that California's use of the three-factor formula to apportion the income of that unitary group was fair.¹⁵³ The Court discussed three specific issues in reaching its conclusion: (1) whether Container and its subsidiaries constituted a "unitary business"; (2) whether California's tax was fairly apportioned; and (3) whether the Foreign Commerce Clause obligated California to use the arm's length method of allocation.¹⁵⁴

1. Application of the Unitary Business Principle

In discussing California's determination that Container and its subsidiaries constituted a unitary business, the Court restated the motivating factors and requirements for applying the unitary business approach to taxation.¹⁵⁵ First, the Court stated the requirement of some bond of ownership and control uniting the unitary business.¹⁵⁶ Second, the Court noted the requirement that the out-of-state activities have a substantial relation to the in-state activities.¹⁵⁷ Such relation must result in a flow of value between the affiliates that is incapable of exact measurement, thus rendering formulary apportionment a reasonable method of taxation.¹⁵⁸ The Court additionally noted that the unitary concept is not uniform, and any number of variations on the theme can be logically consistent with the aforementioned principles.¹⁵⁹ The Court further recognized that because the taxpayer bears the burden of showing that extraterritorial values are being taxed, state court definitions of unitary business will be overturned only when they lie outside the realm of reasonable judgment.¹⁶⁰

The Court determined that Container had not met its burden of showing that the state's determination was without reason.¹⁶¹ The

¹⁵² *Id.* at 197.

¹⁵³ *Id.* at 184.

¹⁵⁴ *Container*, 463 U.S. at 163.

¹⁵⁵ *Id.* at 165-69.

¹⁵⁶ *Id.* at 166.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Container*, 463 U.S. at 167.

¹⁶⁰ *Id.* at 175-76.

¹⁶¹ *Id.* at 177.

Court also upheld California's application of the unitary business method to Container and its affiliates as consistent with the underlying principles of the unitary business concept.¹⁶² In making the determination that a unitary business existed, the California courts found evidence that Container both had the power to review major policy decisions of its subsidiaries and gave them directions for compliance with its standards of professionalism, profitability and ethical practices; these factors demonstrated the close relationship between Container and its subsidiaries.¹⁶³ The California courts also found that Container gave sufficient assistance to its subsidiaries in the areas of technical operations, personnel and financing to provide the requisite integration for a unitary group.¹⁶⁴ The United States Supreme Court thus concluded that the aggregate factors considered by the California courts supported a reasonable finding that Container and its subsidiaries constituted a "unitary business."¹⁶⁵

2. Apportionment Formula

In its discussion of the apportionment formula used by California, the Court restated the requirement that the formula be fair under the Due Process and Commerce Clauses.¹⁶⁶ The Court recognized that an apportionment formula is not invalid merely because it *may* tax income earned outside of the state.¹⁶⁷ Rather, the Court reaffirmed that an apportionment formula is unacceptable only where the amount of income it allocates to the state is completely out of proportion to the amount of business conducted in the state.¹⁶⁸ The Court upheld California's apportionment formula, emphasizing that the three-factor formula utilized by California not only was acceptable, but also was the formula most widely used throughout the United States.¹⁶⁹

The Court rejected Container's argument that the formula utilized by California necessarily resulted in multiple taxation due to the lower wage costs in its foreign operations.¹⁷⁰ Although the Court accepted this assertion as true, it determined that such evidence did not impeach the reasonability of the three-factor formula.¹⁷¹ Rather, the

¹⁶² *Id.* at 179-80.

¹⁶³ *Id.* at 179.

¹⁶⁴ *Container*, 463 U.S. at 179.

¹⁶⁵ *Id.* at 180.

¹⁶⁶ *Id.* at 169.

¹⁶⁷ *Id.* at 169-70.

¹⁶⁸ *Id.* at 170.

¹⁶⁹ *Container*, 463 U.S. at 170.

¹⁷⁰ *See id.* at 181-82, 188.

¹⁷¹ *Id.* at 182.

Court emphasized that both the separate accounting method and formulary apportionment are necessarily imperfect means of allocating income that is impossible to allocate with exactness.¹⁷² Further, *Container* presented no evidence that the use of separate accounting to allocate its income would produce less distortion than formulary apportionment.¹⁷³

3. Foreign Commerce Clause Concerns

In concluding that California's unitary tax did not violate the Foreign Commerce Clause of the Constitution, the Court considered the issues raised by the decision in *Japan Line* concerning the likelihood that the tax will cause multiple taxation and whether the tax will impair federal uniformity.¹⁷⁴ The Court, however, although noticing the similarities between the two cases, distinguished *Container* from *Japan Line* because *Container* was a domestic corporation, and *Japan Line* was a foreign entity.¹⁷⁵ As such, the Court developed more lenient guidelines for the Foreign Commerce Clause requirements of the unitary tax in *Container* than those applied by the Court in *Japan Line*.¹⁷⁶

a. *Risk of Multiple Taxation*

Although the *Japan Line* Court suggested that even a slight overlapping of tax in the international context would be troublesome, the *Container* Court concluded that multiple taxation alone is not enough to strike down a tax.¹⁷⁷ Rather, the Court determined that two additional factors must be considered where multiple taxation exists: (1) whether the multiple tax is the inevitable result of the apportionment formula; and (2) whether there exist reasonable alternatives to the allocation method used.¹⁷⁸

The Court reasoned that although the unitary tax at issue resulted in actual multiple taxation of *Container's* profits, multiple taxation was not the *inevitable result* of the unitary taxing method applied.¹⁷⁹ The Court held up the situation in *Japan Line* as one where double taxation

¹⁷² *Id.*

¹⁷³ *Id.* at 183-84.

¹⁷⁴ *Container*, 463 U.S. at 185-86.

¹⁷⁵ *Id.* at 188-89.

¹⁷⁶ *Id.* at 189, 193-95. See *supra* notes 119-33 and accompanying text for a discussion of the *Japan Line* Foreign Commerce Clause guidelines.

¹⁷⁷ *Id.* at 189; see also *Japan Line Ltd. v. County of L.A.*, 441 U.S. 434, 456 (1979).

¹⁷⁸ See *Container*, 463 U.S. at 191-93.

¹⁷⁹ *Id.* at 188.

was inevitable because Japan had the right to tax the property in full, and thus any tax imposed by California would automatically create multiple taxation.¹⁸⁰ Conversely, the Court reasoned that the multiple taxation present in *Container* was the result of the overlap between California's allocation method and the methods used by other jurisdictions, a combination that could, but would not necessarily, result in multiple taxation.¹⁸¹

The Court further concluded that California could have implemented no reasonable alternative to its allocation method that would guarantee elimination of the possibility of multiple taxation.¹⁸² Although the separate accounting method is the accepted method in international practice, the Court found that it would serve no rational purpose to force California to convert to use of the separate accounting method because such conversion would not necessarily eliminate the occurrence of multiple taxation.¹⁸³ The Court specifically noted that even where the separate accounting method is used, section 482 of the United States Internal Revenue Code allows the Internal Revenue Service to reallocate income among businesses if it determines that they have not fairly recognized transfers of value on their books.¹⁸⁴ The Court further emphasized that many other countries have similar provisions, but that the precise manner in which income is reallocated differs substantially among nations.¹⁸⁵ Because the use of separate accounting could thus give rise to differing reallocations of income among the countries in which *Container* operates, the Court eliminated separate accounting as an alternative method that would prevent multiple taxation.¹⁸⁶

b. *Impairment of Federal Uniformity*

The *Container* Court similarly altered the strict guidelines of the *Japan Line* "One Voice" doctrine to make them more accommodating to the unitary tax.¹⁸⁷ The *Japan Line* court found a similar tax impermissible because it undermined federal uniformity, essential in the area of international commerce, and thus impeded the Federal Government's ability to speak with one voice regarding international

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 190.

¹⁸³ *Container*, 463 U.S. at 193.

¹⁸⁴ *Id.* at 190; see also 26 U.S.C. § 482.

¹⁸⁵ *Container*, 463 U.S. at 191.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 193-95. See *supra* notes 125-33 and accompanying text for a discussion of *Japan Line's* "One Voice" doctrine.

trade.¹⁸⁸ The *Container* Court, however, concluded that "foreign resonances" of a state tax alone are not enough to invalidate its application.¹⁸⁹ Rather, the *Container* Court stated that a state tax that differs from federal policy will violate the "One Voice" doctrine only if it either implicates foreign policy issues that must be left to the Federal Government or violates a clear federal directive.¹⁹⁰

The Court found that California's unitary tax, as applied to *Container*, did not threaten the foreign policy of the United States.¹⁹¹ The Court noted at the beginning of its discussion of this issue that the most obvious foreign policy implication of a controversial state tax is that it might lead to retaliation against the United States by dissatisfied foreign trading partners.¹⁹² The Court stated, however, that it is generally not the Court's province to determine federal policy or to balance the risk of retaliation against the states' right to develop their own taxing methods.¹⁹³ The Court thus concluded that because Congress had made no affirmative statement regarding the foreign policy implications of the tax, the Court could only develop objective standards reflecting very general observations about the requirements of international trade and foreign relations.¹⁹⁴

The Court then stated three distinct factors that weighed against a finding that the unitary tax might lead to significant foreign retaliation.¹⁹⁵ First, it concluded that the tax did not create an automatic asymmetry in international taxation.¹⁹⁶ Second, although the tax arguably included foreign income, the legal burden of the tax itself fell on a domestic corporation, thus reducing the international effects of the tax.¹⁹⁷ Third, the Court concluded that California had a clear right to impose some sort of tax and that the excessive burden felt by *Container* was caused more by California's tax rates than by its taxing method.¹⁹⁸ In regard to this third factor, the Court noted that California could

¹⁸⁸ *Japan Line Ltd. v. County of L.A.*, 441 U.S. 435, 452-53 (1979).

¹⁸⁹ *Container*, 463 U.S. at 194. The *Container* Court explained that the mere fact that a tax affects foreign income is not enough to conclude that it impairs federal uniformity. *See id.* Rather, the tax must rise to the level of implicating foreign affairs or violate an explicit congressional directive to violate the federal uniformity doctrine. *See id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 196.

¹⁹² *Id.* at 194.

¹⁹³ *Id.*

¹⁹⁴ *Container*, 463 U.S. at 194.

¹⁹⁵ *Id.* at 194-95.

¹⁹⁶ *Id.* An "automatic asymmetry" would be found where a tax necessarily leads to multiple taxation, as in *Japan Line*. *See supra* notes 122-24 and accompanying text for a discussion of the Court's finding of automatic asymmetry in that case.

¹⁹⁷ *Id.* at 195.

¹⁹⁸ *Id.*

have achieved the same tax result with a more orthodox taxing method simply by raising its tax rates.¹⁹⁹ In addition to the three central factors that led to the Court's conclusion that the unitary tax did not violate federal policy, the Court also noted that the failure of the Executive Branch to file an amicus curiae brief in opposition to the unitary tax provided additional support for its conclusion that California's application of the unitary method did not seriously threaten foreign policy.²⁰⁰

The Court likewise determined that California's application of the unitary tax violated no clear federal directive.²⁰¹ In reaching this conclusion, the Court first reasoned that the federal tax statutes did not preempt California's state tax law.²⁰² The Court then stated that although the United States was a party to a number of tax treaties that require the Federal Government to use certain taxing methods, these treaties do not bind the states.²⁰³ In this regard, the Court emphasized that in considering a proposed treaty in the past, the Senate has at least once declined to give its consent to a treaty provision that would have extended its restrictions to the states.²⁰⁴ Finally, the Court noted that Congress has debated, but never enacted, legislation regulating state taxation of income.²⁰⁵ Given the lack of concrete evidence to the contrary, the Court thus concluded that California's unitary tax violated no clear federal directive.²⁰⁶

C. *Dissenting Opinion*

Justice Powell filed a dissenting opinion in *Container*, in which Chief Justice Burger and Justice O'Connor joined.²⁰⁷ The dissent disagreed with the majority's analysis of the foreign policy implications of the tax and concluded that California's unitary tax clearly violated the Foreign Commerce Clause.²⁰⁸ As a result of this ruling, the dissenting opinion did not reach the issues of whether *Container* and its subsidiaries constituted a unitary business or whether the apportionment formula was fair.²⁰⁹

¹⁹⁹ *Container*, 463 U.S. at 195.

²⁰⁰ *Id.* at 195-96.

²⁰¹ *See id.* at 197.

²⁰² *Id.* at 196.

²⁰³ *Id.*

²⁰⁴ *Container*, 463 U.S. at 196.

²⁰⁵ *Id.* at 196-97.

²⁰⁶ *Id.* at 197.

²⁰⁷ *Id.* (Powell, J., dissenting).

²⁰⁸ *Id.* at 197-98 (Powell, J., dissenting).

²⁰⁹ *Container*, 463 U.S. at 197 (Powell, J., dissenting).

Specifically, the dissent rejected the diluted Foreign Commerce Clause analysis applied by the majority and argued that regardless of any factual differences between *Japan Line* and *Container*, the principles of *Japan Line* should control the analysis in *Container*.²¹⁰ Under the original *Japan Line* analysis, the dissent argued, a state tax is unconstitutional if it either creates a substantial risk of multiple taxation or violates the "One Voice" doctrine.²¹¹ The dissent concluded that California's unitary tax brought about both of these unconstitutional results.²¹²

1. Risk of Multiple Taxation

Justice Powell first stated that California's allocation method not only differs from the methods used by all of the other countries in which *Container* operates, but also has no necessary relationship to the amount of income earned in any given jurisdiction.²¹³ As such, the generally applied three-factor formula inevitably allocates more income to a jurisdiction in which wage rates, property values and sales prices exceed those of other jurisdictions in which a corporation operates.²¹⁴ Because California is a jurisdiction in which wage rates, property values and sales prices are higher than the other jurisdictions in which *Container* operates, application of the formulary apportionment method to *Container*'s worldwide income necessarily led to multiple taxation of *Container*'s foreign income.²¹⁵ Justice Powell thus concluded that California's application of the unitary tax to *Container* inevitably leads to multiple taxation.²¹⁶

Justice Powell conceded that multiple taxation also might occur with use of the separate accounting method because different jurisdictions might apply different accounting principles to transactions.²¹⁷ He argued, however, that unlike the multiple taxation caused by the unitary tax, such multiple taxation would not be inherent in the separate accounting method, because multiple taxation would arise by differing applications of the method and not as a result of the method itself.²¹⁸ Justice Powell further stated that the multiple taxation problems created by differing applications of the separate accounting method could

²¹⁰ *Id.* at 198 (Powell, J., dissenting).

²¹¹ *Id.* (Powell, J., dissenting).

²¹² *Id.* at 205 (Powell, J., dissenting).

²¹³ *Id.* at 199 (Powell, J., dissenting).

²¹⁴ *Container*, 463 U.S. at 199 (Powell, J., dissenting).

²¹⁵ *Id.* (Powell, J., dissenting).

²¹⁶ *Id.* (Powell, J., dissenting).

²¹⁷ *Id.* at 200 (Powell, J., dissenting).

²¹⁸ *Id.* at 200-01 (Powell, J., dissenting).

be resolved by international agreement on how to apply the method, and as such, could probably be avoided.²¹⁹ Thus, Justice Powell determined that the separate accounting method was a reasonable alternative to formulary apportionment.²²⁰

Justice Powell also rejected the majority's conclusion that the unitary tax is valid because an increase in the California tax rates could achieve the same tax burden as the unitary tax method.²²¹ He conceded that theoretically, higher tax rates could achieve the same effect.²²² He argued, however, that if California raised the corporate tax rate, the political process required of such a change would at least provide Container and other corporations the opportunity to voice their objections.²²³

2. Impairment of Federal Uniformity

Justice Powell also found that California's unitary tax implicated foreign policy issues that must be left to the federal government.²²⁴ Justice Powell first restated that California's unitary tax inevitably leads to multiple taxation and that the *Japan Line* Court declared international multiple taxation a sensitive and important matter, even where the amounts involved are de minimis.²²⁵ Justice Powell also rejected the majority's reliance on the fact that Container is a domestic corporation in applying its constitutional analysis to the tax.²²⁶ First, he pointed out that regardless of the fact that a domestic corporation is technically the taxpayer, California still taxes a portion of the income of Container's foreign subsidiaries.²²⁷ Because a heavier tax burden is calculated on the basis of income in those foreign countries, it is not unreasonable to expect that the governments of those countries will find fault with the tax, leading to retaliation or discouragement of American investment in those countries.²²⁸

²¹⁹ *Container*, 463 U.S. at 201 (Powell, J., dissenting).

²²⁰ *See id.* (Powell, J., dissenting).

²²¹ *Id.* at 203 (Powell, J., dissenting).

²²² *Id.* (Powell, J., dissenting).

²²³ *Id.* at 203-04 (Powell, J., dissenting).

²²⁴ *Container*, 463 U.S. at 202 (Powell, J., dissenting).

²²⁵ *Id.* (Powell, J., dissenting).

²²⁶ *Id.* at 202-03 (Powell, J., dissenting). The Majority specifically noted that it reserved judgment on the application of its reasoning to a foreign or foreign parent corporation. *Id.* at 189, n.26.

²²⁷ *Id.* at 202 (Powell, J., dissenting).

²²⁸ *Id.* at 202-03 (Powell, J., dissenting).

Justice Powell also noted the inapplicability of the majority's reasoning to an American subsidiary of a foreign corporation, because in such a case foreign disputes and retaliation would inevitably occur, and the resulting tax would be found unconstitutional.²²⁹ Continuing the analysis to its logical conclusion, Justice Powell further recognized that it would be unacceptable to invalidate the tax only as applied to foreign multinational corporations and not as applied to domestic multinational corporations, because such a result would permit California to discriminate against a domestic corporation in favor of a foreign corporation.²³⁰

Justice Powell also attacked the majority's reliance on the failure of the Executive Branch to file an amicus curiae brief in opposition to the tax as evidence that the tax does not implicate foreign policy.²³¹ He noted that the majority dismissed the Solicitor General's memorandum filed as amicus curiae in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.* despite the fact that the case was directly on point and pending before the Court.²³² This memorandum clearly stated the executive branch's position that the worldwide combined reporting method impairs federal uniformity in an area in which federal uniformity was essential.²³³ Although the Solicitor General did not file such a memorandum in conjunction with *Container*, Justice Powell noted that because *Chicago Bridge & Iron* was still pending before the Court, and the Solicitor General had not withdrawn his memorandum, it would be reasonable to conclude that the memorandum accurately stated the executive branch's position on the constitutionality of worldwide combined reporting.²³⁴ In sum, Justice Powell concluded that the California unitary tax, as applied to *Container*, violated the Foreign Commerce Clause of the Constitution because it was inconsistent with federal policy and impaired the federal government's ability to speak with one voice regarding foreign affairs.²³⁵

²²⁹ *Container*, 463 U.S. at 202-03 (Powell, J., dissenting).

²³⁰ *Id.* at 203 (Powell, J., dissenting).

²³¹ *Id.* at 204 (Powell, J., dissenting).

²³² *Id.* (Powell, J., dissenting).

²³³ *Id.* (Powell, J., dissenting).

²³⁴ *Container*, 463 U.S. at 204 (Powell, J., dissenting).

²³⁵ *Id.* at 205 (Powell, J., dissenting).

V. RECENT INTERPRETATION OF THE "ONE VOICE" DOCTRINE:
WARDAIR CANADA, INC. v. FLORIDA DEPARTMENT OF REVENUE

A. *Factual Background*

In 1986, in *Wardair Canada, Inc. v. Florida Department of Revenue*, the United States Supreme Court held that a Florida tax imposed on all purchases of airline fuel, regardless of whether the fuel was used within or without the state, did not violate the dormant Commerce Clause.²³⁶ *Wardair Canada* ("Wardair"), a Canadian airline, operated charter flights to and from the United States.²³⁷ Prior to 1983, Florida prorated its airline fuel tax on a mileage basis, so that a carrier paid a tax equal to the proportion of its Florida mileage to its worldwide mileage for the year.²³⁸ On April 1, 1983, the Florida legislature amended the law to replace the proration formula with a flat tax on all purchases of airline fuel within the state, regardless of whether the fuel was to be consumed within the state or whether the carrier operated substantial business within the state.²³⁹

Shortly after the new law became effective, Wardair filed suit in state court attacking the constitutionality of the tax.²⁴⁰ Wardair argued that the law violated the Foreign Commerce Clause because it authorized the collection of a tax on fuel used by foreign airlines exclusively in foreign commerce, and because it was inconsistent with a U.S.-Canadian agreement reflecting a federal policy to exempt foreign airlines from fuel taxes.²⁴¹ The trial court found that the federal policy to exempt foreign airlines from fuel taxes expressed in the U.S.-Canadian agreement precluded the individual states from acting in that area in a way that would impair the nation's ability to speak with "one voice" regarding foreign commerce.²⁴² The court thus granted Wardair a permanent injunction against the Florida Department of Revenue from assessing and collecting the fuel tax.²⁴³

²³⁶ 477 U.S. 1, 3 (1986).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 3-4.

²⁴⁰ *Id.* at 4.

²⁴¹ *Wardair*, 477 U.S. at 4. Wardair argued that the tax was inconsistent with the Non-Scheduled Air Services Agreement, May 8, 1974, U.S.-Can., art. XII, 25 U.S.T. 787, 794.

²⁴² *Wardair*, 477 U.S. at 4-5. For a discussion of the "One Voice" doctrine, see *supra* notes 125-33 and accompanying text. Wardair did not argue that the law was unconstitutional under the general Commerce Clause *Complete Auto* test, and conceded that the tax met the four requirements of that test. See *Wardair*, 477 U.S. at 8-9.

²⁴³ *Wardair*, 477 U.S. at 5.

The Supreme Court of Florida reversed the decision of the trial court, concluding that the Florida tax neither violated the Commerce Clause nor violated the federal uniformity requirements of the Foreign Commerce Clause.²⁴⁴ In reaching this conclusion, the Florida Supreme Court first noted that the U.S.-Canadian agreement exempted carriers only from national, and not state or local, taxes and other charges, and thus did not preempt state sales taxes.²⁴⁵ The court additionally reasoned that because the U.S.-Canadian agreement applied only to national charges, the federal government had adopted no policy of exempting foreign airlines from *all* fuel taxes, and thus, the tax did not violate the "One Voice" requirement of the Foreign Commerce Clause.²⁴⁶

B. *Supreme Court Opinion*

The United States Supreme Court noted probable jurisdiction and affirmed the decision of the Supreme Court of Florida.²⁴⁷ The Court first found that the Federal Aviation Act (the "Act") did not preempt the tax and, additionally, that the tax did not violate the "One Voice" requirement of the Foreign Commerce Clause.²⁴⁸ In determining that the Act did not preempt the sales tax, the Court reasoned that although the Act regulated aviation extensively, it expressly permitted states to impose taxes on airline fuel.²⁴⁹ As such, the Court found unreasonable and erroneous Wardair's argument that Congress enacted the Act with the intention of preempting all state regulation of international aviation.²⁵⁰

The Court found it plausible that in drafting the Act, Congress never considered whether states should be allowed to impose such taxes on foreign carriers, and thus the Court considered whether a dormant Foreign Commerce Clause analysis would render the Florida

²⁴⁴ *Id.*

²⁴⁵ *Id.* The Supremacy Clause of the United States Constitution confirms that when Congress acts within the scope of its constitutionally granted powers, such legislation may preempt state law. U.S. CONST. art. VI, cl. 2.

²⁴⁶ *Wardair*, 477 U.S. at 5.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 6, 9.

²⁴⁹ *Id.* at 6. See § 1113 of the Act, as added, 87 Stat. 90, and as amended, 49 U.S.C. App. § 1513 (1988 & Supp. V 1993), which addresses the issue of "State taxation of air commerce." Section 1113(a) lists the kinds of taxes that are prohibited, and § 1113(b) lists those that are permitted, among which are "sales or use taxes on the sale of goods or services." Noting this section of the Act, the Court stated, "[I]n other words, rather than prohibit state regulation in the area, Congress invited it." *Wardair*, 477 U.S. at 7.

²⁵⁰ *Wardair*, 477 U.S. at 5-6.

tax constitutionally invalid.²⁵¹ The Court, however, rejected Wardair's argument that the sales tax violated the "One Voice" doctrine of the Foreign Commerce Clause in the absence of a federal policy of reciprocal exemptions for instrumentalities of international air traffic.²⁵² Rather, the Court reasoned that the exclusion of state taxes from the U.S.-Canadian agreement acted as an affirmative action on the part of Congress to exclude the states from the restrictions of the agreement, thus removing any need for a dormant Foreign Commerce Clause analysis.²⁵³ The Court also rejected Wardair's argument that other international conventions and resolutions dealing with international aviation precluded the Florida tax.²⁵⁴ The Court concluded that although these agreements showed an international aspiration toward eliminating impediments to foreign air travel, the current law (as evidenced by the Act) acquiesced to state taxation of fuel purchases.²⁵⁵

In sum, the Court concluded that the omission of the states from the U.S.-Canadian agreement did not constitute silence, but rather constituted affirmative action by the federal government to permit state taxation of fuel purchased by international airlines.²⁵⁶ As such, the Court recognized the agreement as evidencing a federal government decision not to speak with one voice, thus rendering a Foreign Commerce Clause federal uniformity analysis unnecessary.²⁵⁷ The Court therefore rejected Wardair's contentions that the Act preempted the tax and that the tax violated the Foreign Commerce Clause and upheld the constitutionality of the Florida sales tax on aviation fuel purchases.²⁵⁸

²⁵¹ *Id.* at 7.

²⁵² *Id.* at 9.

²⁵³ *Id.*

²⁵⁴ *Id.* at 10. Specifically, Wardair pointed to the Chicago Convention on International Civil Aviation, 61 Stat. 1180, and a Resolution adopted November 14, 1966, by the International Civil Aviation Organization (an organization of which the United States is a member due to its status as a party to the Chicago Convention). See *Wardair*, 477 U.S. at 9-10. In rejecting these documents as evidence of a clear federal policy, the Court noted that the Chicago Convention did not prohibit taxation of local fuel purchases, and that the Resolution was never endorsed or signed by the executive or legislative branches of the Federal Government. See *id.* at 10-11. The Court further noted that the United States has entered into more than 70 bilateral aviation agreements, none of which restricted the states' power to tax local fuel purchases. *Id.* at 11.

²⁵⁵ *Wardair*, 477 U.S. at 10.

²⁵⁶ *Id.* at 9.

²⁵⁷ *Id.* at 12-13.

²⁵⁸ *Id.*

C. Concurring Opinion

Chief Justice Burger filed an opinion concurring in part and concurring in the judgment of the decision.²⁵⁹ The Chief Justice concluded that the Federal Aviation Act clearly approved of state taxation of aviation fuel, and thus found the majority's discussion of the applicability of the Foreign Commerce Clause unnecessary.²⁶⁰ As such, Chief Justice Burger agreed with the majority decision, but rejected the Foreign Commerce Clause discussion as unwarranted.²⁶¹

D. Dissenting Opinion

Justice Blackmun filed a dissenting opinion to the decision in *Wardair*.²⁶² Justice Blackmun concluded that the "One Voice" doctrine precluded the application of Florida's tax.²⁶³ Justice Blackmun noted that foreign commerce is recognized as an area in which federal uniformity is necessary and reasoned that the dormant Foreign Commerce Clause "One Voice" analysis applies unless the federal government has unmistakably permitted the state activity.²⁶⁴ Justice Blackmun disagreed with the majority's reliance on negative implication arising out of agreements as constituting the type of clear affirmative approval by the federal government which would remove the tax from a Foreign Commerce Clause analysis.²⁶⁵ Because Justice Blackmun concluded that the Foreign Commerce Clause analysis applied to the Florida aviation fuel tax, and because he found that the tax would impair the nation's ability to speak with one voice regarding air travel, he would hold that the Florida tax violated the Foreign Commerce Clause.²⁶⁶

²⁵⁹ *Id.* (Burger, C.J., concurring in part and concurring in the judgment).

²⁶⁰ *Wardair*, 477 U.S. at 13 (Burger, C.J., concurring in part and concurring in the judgment).

²⁶¹ *Id.* at 13-14, 17 (Burger, C.J., concurring in part and concurring in the judgment).

²⁶² *Id.* at 18 (Blackmun, J., dissenting).

²⁶³ *Id.* (Blackmun, J., dissenting).

²⁶⁴ *Id.* at 18-19 (Blackmun, J., dissenting).

²⁶⁵ *Wardair*, 477 U.S. at 19 (Blackmun, J., dissenting).

²⁶⁶ *Id.* at 19-20 (Blackmun, J., dissenting).

VI. CONSTITUTIONALITY OF THE UNITARY TAX
AS APPLIED TO A FOREIGN CORPORATION:
BARCLAYS BANK PLC v. FRANCHISE TAX BOARD

A. *Factual Background and Procedural History*

In 1994, in *Barclays Bank PLC v. Franchise Tax Board*, the United States Supreme Court held the worldwide combined reporting method of taxation ("WWCR") to be constitutional as applied to a foreign-parent multinational corporation.²⁶⁷ The case involved the taxpayer corporations Barclays Bank International Limited ("BBI") and its wholly owned subsidiary, Barclays Bank of California ("Barcal"), both members of the Barclays Group, a multinational enterprise (hereinafter collectively referred to as "Barclays").²⁶⁸ The Barclays Group was based in the United Kingdom and consisted of more than 220 corporations that operated in approximately sixty nations.²⁶⁹ Both Barcal and BBI²⁷⁰ conducted business in California and were thus subject to California's franchise tax.²⁷¹

In determining its franchise tax for 1977, Barcal reported only the income from its own operations.²⁷² BBI applied the unitary business concept in reporting its income, but included only the income of itself and its subsidiaries, excluding its parent and its parent's other subsidiaries from the scope of its unitary business.²⁷³ Upon auditing both Barcal's and BBI's franchise tax returns for 1977, the Franchise Tax Board (the "Board"), concluded that both entities were part of the worldwide unitary business of the Barclays Group, and assessed additional tax liabilities of \$1678 for BBI and \$152,420 for Barcal.²⁷⁴ Both Barcal and BBI paid the additional assessments under protest and sued in the California Superior Court for refunds.²⁷⁵

²⁶⁷ 114 S. Ct. 2268, 2286 (1994). *Barclays* was consolidated at the Supreme Court level with *Colgate-Palmolive Co. v. Franchise Tax Board of California*, 13 Cal. Rptr. 2d 761 (1992), for the purpose of determining the constitutionality of WWCR. Because *Colgate-Palmolive* presented a similar fact pattern to *Container*, and the Court's decision in *Colgate* thus merely affirmed its holding in *Container*, this Note will not discuss the *Colgate* decision:

²⁶⁸ *Id.* at 2274.

²⁶⁹ *Id.*

²⁷⁰ *Id.* BBI is a United Kingdom corporation which does business in more than 33 nations.
Id.

²⁷¹ *Id.*

²⁷² *Barclays*, 114 S. Ct. at 2274.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

The Superior Court of Sacramento County found that the state's use of WWCR violated the Foreign Commerce Clause by impairing federal uniformity in an area where federal uniformity was essential, a finding that the California Court of Appeal for the Third District affirmed.²⁷⁶ Upon review, the Supreme Court of California reversed the findings of the lower courts, determining that the *Japan Line* dormant Foreign Commerce Clause analysis was unnecessary because Congress had effectively decided against prohibiting the states from applying the WWCR unitary tax method to foreign corporations.²⁷⁷ The Supreme Court of California also determined that the lower courts did not address the nondiscrimination requirements of both the Commerce Clause and the Due Process Clause and thus remanded the case to the Court of Appeal to determine whether the administrative burden for a foreign-based unitary corporate group to comply with WWCR violated the nondiscrimination components of the Commerce or Due Process Clauses.²⁷⁸ On remand, the Court of Appeal for the Third District held that WWCR did not violate either the nondiscrimination component of the Commerce Clause analysis or Due Process requirements.²⁷⁹ The Supreme Court of California denied Barclays's petition for review of the Court of Appeal's decision, and Barclays petitioned for writ of certiorari to the United States Supreme Court.²⁸⁰

B. Supreme Court Opinion

The United States Supreme Court granted certiorari and affirmed the decision of the California Court of Appeal, holding that WWCR violated neither the Due Process nor the Commerce Clause.²⁸¹ In reaching this decision, the Court first decided that WWCR passed constitutional muster under the requirements set forth in *Complete Auto*.²⁸² The Court further concluded that complying with WWCR did not create an inordinate burden for foreign corporations that would violate the Due Process Clause.²⁸³ Lastly, the Court determined that California's use of WWCR did not create intolerable multiple taxation of foreign multinational corporations and did not prevent the federal government from speaking with one voice in international trade.²⁸⁴

²⁷⁶ *Barclays*, 275 Cal. Rptr. 626, 640, 645-46 (Ct. App. 1990).

²⁷⁷ *Barclays*, 829 P.2d 279, 300 (Cal. 1992).

²⁷⁸ *Id.*

²⁷⁹ *Barclays*, 14 Cal. Rptr. 2d 537, 552 (Ct. App. 1992).

²⁸⁰ *Barclays*, 114 S. Ct. at 2274.

²⁸¹ *Id.* at 2274, 2279, 2286.

²⁸² *Id.* at 2276-78; see also *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977).

²⁸³ *Barclays*, 114 S. Ct. at 2278-79.

²⁸⁴ See *id.* at 2286.

1. The *Complete Auto* Analysis

The Court held that California's application of WWCR easily met three of the four *Complete Auto* criteria.²⁸⁵ It ruled that the nexus requirement had been met because both Barcal and BBI conducted business in California during the three years in which the additional taxes were assessed.²⁸⁶ The Court further decided that the tax also met the requirement of fair apportionment because Barclays failed to demonstrate that the resulting income attributed to California was completely out of proportion to the actual amount of business conducted by Barclays within the state.²⁸⁷ The Court additionally determined that California's tax clearly met the requirement of being fairly related to the services the state provided to Barclays.²⁸⁸

The Court further held that California's use of WWCR did not violate the antidiscrimination component of the *Complete Auto* test, but that holding required a more probing analysis than did the other components.²⁸⁹ Specifically, the Court considered Barclays's argument that the prohibitive expense created by the need for foreign taxpayers to convert financial and accounting records into the language, currency and accounting principles of the United States, an administrative burden not imposed on domestic taxpayers who already maintained records in compliance with American standards, resulted in discrimination against foreign corporations.²⁹⁰ The Court conceded that compliance burdens disproportionately imposed on out-of-jurisdiction enterprises may violate the Commerce Clause, but concluded that such discrimination did not exist in this case.²⁹¹ Specifically, the Court determined that California's regulations provided relief from such a burden by allowing taxpayers to use reasonable approximations where the necessary financial information could not be developed from the financial records maintained in the regular course of business.²⁹² The Court noted that Barclays had indeed used these provisions in determining its 1977 worldwide income, and thus avoided the excessive compliance costs that formed the basis of its complaint.²⁹³ Because

²⁸⁵ *Id.* at 2276. See *supra* notes 87-96 and accompanying text for discussion of the *Complete Auto* criteria.

²⁸⁶ *Barclays*, 114 S. Ct. at 2276.

²⁸⁷ *Id.* at 2276-77.

²⁸⁸ See *id.* at 2277.

²⁸⁹ *Id.* at 2277-78.

²⁹⁰ *Id.* at 2277.

²⁹¹ *Barclays*, 114 S. Ct. at 2277-78.

²⁹² *Id.*

²⁹³ *Id.* at 2278.

Barclays also failed to show that the use of approximations would systematically overtax its income or the income of other foreign corporations, the Court concluded that the tax did not unconstitutionally discriminate against foreign commerce.²⁹⁴

2. Due Process Analysis

The Court also rejected Barclays's argument that California's provisions for the use of reasonable approximations in determining income violate procedural Due Process by failing to enunciate a clear standard of what constitute acceptable approximations.²⁹⁵ The Court concluded that the failure to articulate a bright-line standard for acceptance did not result in a grant of standardless discretion to the Board because the standard of reasonableness constrained the Board in making its determinations.²⁹⁶ The Court further noted that reasonableness is a common standard under federal income tax laws.²⁹⁷ In sum, the Court determined that the standard of reasonableness, as well as the power of the judiciary to curtail the discretion of the Board, were sufficient to limit the discretion of California tax officials and bring the provisions within the parameters of Due Process.²⁹⁸

3. Foreign Commerce Clause Scrutiny

a. *Risk of Multiple Taxation*

In discussing the additional considerations of the tax required by the Foreign Commerce Clause, the Court first concluded that the risk of multiple international taxation did not prohibit California's use of WWCR.²⁹⁹ The Court accepted Barclays's assertion that the use of WWCR carries an aggravated risk of multiple taxation when applied to a foreign corporation with extensive operations outside of the United States, because in such a case, a higher proportion of foreign income will be subject to tax.³⁰⁰ The Court, however, rejected this evidence as

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 2278-79.

²⁹⁶ See *Barclays*, 114 S. Ct. at 2278.

²⁹⁷ *Id.* Specifically, the Court noted 26 U.S.C. § 162 (1988 & Supp. V 1993), which allows deductions for ordinary business expenses, including reasonable allowance for compensation, and 26 U.S.C. § 167 (1988 & Supp. V 1993), which allows depreciation deductions for reasonable wear and tear as evidence that "reasonableness" is an acceptable standard under federal income tax laws. *Barclays*, 114 S. Ct. at 2278.

²⁹⁸ *Barclays*, 114 S. Ct. at 2278-79.

²⁹⁹ *Id.* at 2279, 2281.

³⁰⁰ *Id.* at 2279-80. This increased multiple taxation will arise because California will usually

a basis for prohibiting the use of WWCR.³⁰¹ Rather, the Court restated the *Container* holding that multiple taxation does not invalidate a tax where: (1) multiple taxation is not the inevitable result of WWCR; and (2) no alternative method of taxation will eliminate the risk of multiple taxation.³⁰² The Court further reasoned that neither of those considerations would be dispositively diminished when WWCR is applied to foreign, as opposed to domestic, multinational corporations.³⁰³ The Court concluded that when WWCR is applied to a foreign corporation, multiple taxation is still not inevitable, but rather depends on the individual facts of the case.³⁰⁴ Additionally, the Court reasoned that because separate accounting would not alleviate the risk of multiple taxation in the context of a domestic corporation, it probably would not do so with respect to a foreign corporation.³⁰⁵

The Court also rejected the dissent's argument that multiple taxation is more problematic as applied to a foreign corporation because foreign taxpayers do not have access to the political process in the United States and thus cannot effectively voice their objections to what they perceive to be an unfair tax.³⁰⁶ To the contrary, the Court concluded that foreign governments have effectively responded to California's use of WWCR through diplomatic notes, amicus briefs and retaliatory legislation.³⁰⁷ The Court further supported its conclusion by noting that adverse foreign response was an impetus for California's decision to revise WWCR to include a water's-edge provision.³⁰⁸

b. *Impairment of Federal Uniformity: The "One Voice" Doctrine*

The Court also held that California's use of WWCR did not impede federal uniformity in an area in which uniformity is essential.³⁰⁹ The Court first restated its findings in *Container* that: (1) no legislative history demonstrated a congressional intent to preempt the California tax; (2) the United States Tax Treaty restrictions did not bind the

have higher property values, wage rates, and sales prices than other jurisdictions in which a multinational corporation operates. See *supra* notes 213-16 and accompanying text for discussion of same.

³⁰¹ *Barclays*, 114 S. Ct. at 2280-81.

³⁰² *Id.* at 2280.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Barclays*, 114 S. Ct. at 2281.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 2273, 2281.

³⁰⁹ See *id.* at 2281, 2284, 2286.

states; and (3) Congress had long considered, but not enacted, legislation designed to regulate state taxation of income as evidence that WWCR does not violate the "One Voice" doctrine.³¹⁰ The Court pointed to its reasoning in *Wardair* as additional support for its conclusion that WWCR did not violate the Foreign Commerce Clause.³¹¹ In *Wardair*, the Court had determined that resolutions between the United States and foreign governments allowing for reciprocal exemption from aviation fuel taxes did not constitute federal policy to which the states were required to adhere.³¹² Rather, the Court had determined that the failure of the federal government to bind the states to these resolutions demonstrated congressional acquiescence to state taxation of aviation fuel.³¹³

The *Barclays* Court concluded that the reasoning underlying both the *Container* and the *Wardair* decisions is that Congress may passively indicate that certain state practices do not impair required federal uniformity.³¹⁴ The Court further concluded that, as in *Container* and *Wardair*, *Barclays* demonstrated no specific indications of congressional intent to bar California's use of WWCR.³¹⁵ In reaching its conclusion that Congress had passively acquiesced to California's use of WWCR, the Court noted that during the eleven years that had passed since the *Container* decision, Congress had considered, but failed to enact, legislation that would prohibit the states' use of WWCR.³¹⁶

The Court also relied upon the history of the drafting of the tax treaty between the United States and the United Kingdom known as the "Convention for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains" as evidence that Congress has approved of the states' use of WWCR.³¹⁷ As originally drafted, the treaty contained a provision precluding the states from using WWCR to determine the tax liability of U.K.-controlled corporations.³¹⁸ The Senate rejected this version of the treaty and

³¹⁰ *Id.* at 2281-82.

³¹¹ *Barclays*, 114 S. Ct. at 2282-83. See *supra*, notes 247-58 and accompanying text for a discussion of the Court's decision in *Wardair*.

³¹² *Barclays*, 114 S. Ct. at 2282.

³¹³ *Id.*

³¹⁴ *Id.* at 2282-83.

³¹⁵ *Id.* at 2283.

³¹⁶ *Id.*

³¹⁷ *Barclays*, 114 S. Ct. at 2284; see also Aug. 26, 1976, U.S.-U.K., art. 9, 31 U.S.T. 5768, 5677, 5709-10 [hereinafter *Convention for the Avoidance of Double Taxation*].

³¹⁸ *Barclays*, 114 S. Ct. at 2284; see also *Convention for the Avoidance of Double Taxation*, *supra* note 317, 31 U.S.T. at 5677.

subsequently ratified the treaty only after the provision precluding the use of WWCR was revised so as not to apply to the states.³¹⁹

The Court additionally rejected Barclays's argument that executive branch actions, statements and amicus filings opposing WWCR constitute a clear federal directive prohibiting states' use of WWCR.³²⁰ In this regard, the Court restated that the United States Constitution expressly grants Congress, and not the President, the power to "regulate Commerce with foreign Nations."³²¹ As such, the Court concluded that executive branch pronouncements lack the force of law and cannot render unconstitutional an otherwise constitutionally valid, congressionally condoned taxing method.³²²

C. *Concurring and Dissenting Opinions*

Justice Blackmun filed a concurring opinion in order to restate his position that the Court should not rely on congressional inaction to prohibit application of WWCR as implicit permission to use the method.³²³ Justice Blackmun, however, did join the decision of the Court.³²⁴ Despite his finding of misplaced reliance on congressional inaction, Justice Blackmun concluded that WWCR meets the requirements of the United States Constitution because it does not directly burden instrumentalities of foreign commerce and does not impair federal uniformity in an area in which such uniformity is essential.³²⁵

Justice Scalia concurred in part and concurred in the judgment for largely the same reasons as Justice Blackmun.³²⁶ Justice Scalia also disagreed somewhat with the majority's opinion that no more than congressional inaction is required to infer permission for the states to impose restrictions on foreign commerce.³²⁷ Alternatively, he would find a negative Commerce Clause restriction where a state law: (1) facially discriminates against interstate or international commerce; or (2) is indistinguishable from a type of law previously held to be unconstitutional.³²⁸ Justice Scalia, however, did concede that his view of the

³¹⁹ *Barclays*, 114 S. Ct. at 2284; see also *Convention for the Avoidance of Double Taxation*, *supra* note 317, 31 U.S.T. at 5709-10 (3d Protocol, amending art. 9).

³²⁰ *Barclays*, 114 S. Ct. at 2285.

³²¹ *Id.*; see also U.S. CONST. art. I, § 8, cl. 3.

³²² *Barclays*, 114 S. Ct. at 2286.

³²³ *Id.* at 2286-87 (Blackmun, J., concurring). Justice Blackmun first stated this position in *Intl Containers International Corp. v. Huddleston*. See 113 S. Ct. 1095, 1110 (1993).

³²⁴ *Barclays*, 114 S. Ct. at 2287 (Blackmun, J., concurring).

³²⁵ *Id.* (Blackmun, J., concurring).

³²⁶ *Id.* at 2287 (Scalia, J., concurring in part and concurring in the judgment).

³²⁷ *Id.* (Scalia, J., concurring in part and concurring in the judgment).

³²⁸ *Id.* (Scalia, J., concurring in part and concurring in the judgment).

negative Foreign Commerce Clause analysis and that of the majority would likely produce similar results in application.³²⁹

Justice O'Connor filed an opinion, in which Justice Thomas joined, dissenting in the majority decision in *Barclays* and concurring in the majority opinion in the companion case of *Colgate-Palmolive Co. v. Franchise Tax Board*.³³⁰ Justice O'Connor, who had earlier dissented in the *Container* decision, stated that she did not think that the earlier decision should be overruled, but thought that its holding should not be extended to the *Barclays* situation involving a foreign-based parent company of a multinational enterprise.³³¹ Specifically, Justice O'Connor concluded that WWCR met the *Complete Auto* interstate commerce requirements, but failed to meet the additional requirements, set forth in *Japan Line*, for taxes affecting foreign commerce.³³² Justice O'Connor agreed with the majority's reasoning that, given the failure of Congress affirmatively to prohibit the use of WWCR, the need for federal uniformity does not prevent such use.³³³ Justice O'Connor, however, concluded that the risk of multiple taxation created by California's application of WWCR is sufficient to render it unconstitutional.³³⁴

Justice O'Connor reasoned that double taxation is inevitable with the application of WWCR to foreign multinational enterprises due to its inconsistency with the taxing method used by foreign taxing authorities.³³⁵ She noted that to the extent that California has higher property values, wage rates and sales prices than other taxing jurisdictions in which a corporation may operate, California's use of WWCR will consistently result in multiple taxation of income.³³⁶ She further reasoned that although WWCR passed constitutional muster in *Container* because the tax fell on a domestic international corporation, the *Container* Court purposely left open the question of whether the same

³²⁹ *Barclays*, 114 S. Ct. at 2287 (Scalia, J., concurring in part and concurring in the judgment).

³³⁰ *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part). Justices O'Connor and Thomas concurred in the judgment in *Colgate-Palmolive Co. v. Franchise Tax Board* (consolidated with *Barclays*) because it presented an identical constitutional challenge to *Container Corp. v. Franchise Tax Board*, and the decision thus affirmed the Court's earlier holding in *Container*. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³¹ *Id.* at 2287 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³² *Id.* at 2288 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³³ *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³⁴ *Barclays*, 114 S. Ct. at 2290 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³⁵ *Id.* at 2288 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³⁶ *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor further noted that California will usually be such a jurisdiction. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

tax would be constitutional as applied to a foreign parent corporation.³³⁷ She determined that this question must be answered in the negative.³³⁸

Justice O'Connor thus concluded that a state method of taxation that results in multiple taxation of foreign corporations due to its nonconformity with international practice is unconstitutional, even though the same tax would be constitutional as applied to a domestic multinational corporation.³³⁹ In this regard, she noted that, although domestic taxpayers have access to the political process at both state and national levels and can seek redress through the normal channels, such access is not available to foreign taxpayers.³⁴⁰ She further emphasized that most of the United States' trading partners have objected to California's use of WWCR and that deterrence of foreign investment in the United States would adversely affect the nation as a whole.³⁴¹ Justice O'Connor thus concluded that the multiple taxation of foreign enterprises and the likely adverse consequences faced by the United States as a result of California's application of WWCR are sufficient evidence to render the California tax unconstitutional.³⁴²

VII. PROBLEMS WITH THE *BARCLAYS* CONSTITUTIONAL ANALYSIS

Several problems exist with the constitutional analysis of WWCR contained in the Court's decision in *Barclays*. The Court, while pretending to adhere to *Japan Line*, diluted the requirements set forth in that opinion so as to render them useless as constitutional safeguards. In doing so, the Court improperly extended the questionable *Container* constitutional analysis of WWCR, even though the *Container* Court formulated that analysis based on the fact that *Container* was a domestic corporation, and the decision specifically reserved determination of whether the same guidelines would be applicable to a foreign or foreign parent corporation.³⁴³

The *Container* analysis of the Foreign Commerce Clause implications of WWCR was based on faulty reasoning. Additionally, even if the *Container* guidelines are valid, they do not apply to the case of a

³³⁷ *Id.* at 2289 (O'Connor, J., concurring in the judgment in part and dissenting in part); see also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 189 n.26 (1983).

³³⁸ *Barclays*, 114 S. Ct. at 2289 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³³⁹ *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

³⁴⁰ *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

³⁴¹ *Id.* at 2290 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³⁴² *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

³⁴³ See *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 189 n.26 (1983).

foreign-parent corporation.³⁴⁴ As such, the *Barclays* Court did not review the validity of WWCR under the Foreign Commerce Clause with the requisite degree of scrutiny. First, the Court did not properly address the problem of multiple taxation caused by WWCR and even dismissed as irrelevant the fact that actual multiple taxation will exist when WWCR is applied to a multinational corporation.³⁴⁵ Additionally, the Court applied a theoretical Foreign Commerce Clause "One Voice" analysis that ignored reality in its determination that WWCR does not implicate foreign policy issues.³⁴⁶

A. Multiple Taxation Issues

In *Japan Line*, the Court pointed out that even "a slight overlapping of tax—a problem that might be deemed de minimis in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."³⁴⁷ In finding the tax in question unconstitutional, the Court emphasized that the California tax produced not only the risk of multiple taxation, but also multiple taxation in fact.³⁴⁸

In *Container*, the Court relaxed the *Japan Line* test somewhat, stating that multiple international taxation will not invalidate a state tax where: (1) multiple taxation is not inevitable; and (2) no reasonable alternative exists that will prevent multiple taxation.³⁴⁹ The Court concluded that multiple taxation was not the inevitable result of the use of WWCR, because no single jurisdiction had the right to tax the property in full, and thus an overlap in taxes, as opposed to actual double imposition of taxes, caused any multiple taxation.³⁵⁰ The Court additionally concluded that separate accounting was not a reasonable alternative to WWCR because its use could still result in multiple taxation if jurisdictions applied differing accounting principles.³⁵¹ In deciding to relax the *Japan Line* analysis, the *Container* Court distinguished *Japan Line* from *Container* because the taxpayer in *Japan Line* was a foreign corporation and the taxpayer in *Container* was a domestic corporation.³⁵² As the *Container* Court formulated the revised version

³⁴⁴ See *id.*

³⁴⁵ *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 114 S. Ct. 2268, 2280 (1994).

³⁴⁶ *Id.* at 2281–86.

³⁴⁷ *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 456 (1979).

³⁴⁸ *Id.* at 452.

³⁴⁹ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 192–93 (1983).

³⁵⁰ *Id.* at 188.

³⁵¹ *Id.* at 191.

³⁵² *Id.* at 188–89.

of the *Japan Line* test, it emphasized that *Container* was distinguishable from *Japan Line* because the legal incidence of the tax in *Container* fell on a domestic-owned, as opposed to foreign-owned, multinational enterprise.³⁵³

The Court's conclusion in *Container* that multiple taxation is not the inevitable result of California's use of WWCR was based on theoretical assumptions and not economic realities. The majority in *Container* concluded that unlike the inevitable double taxation which arose in *Japan Line* because California taxed property that Japan had the right to tax in full, the multiple taxation resulting from California's use of WWCR in *Container* was not inevitable because it resulted from overlapping methods of allocation rather than a second layer of taxation.³⁵⁴ Although theoretically this may be true, the dissent in *Container* well illustrated the economically correct result of the tax—because California is a state where property values, wage rates and sales prices are consistently higher than the other jurisdictions in which most international corporations operate, the three-factor formula will inevitably result in taxation of profits actually earned in the foreign operations.³⁵⁵ Because the rest of the international community uses the separate accounting method, those foreign jurisdictions already will have imposed a tax on the profits earned within their borders, there will be a layering of taxes, and the end result will be the same as the "inevitable" multiple taxation found in *Japan Line*.³⁵⁶

In the *Container* dissent, Justice Powell also pointed out that although multiple taxation may occur with separate accounting, such multiple taxation is not inherent in the tax method itself.³⁵⁷ He further reasoned that, because the international community accepts the separate accounting method, it is likely that any multiple taxation problems caused by inconsistent application of the method could be resolved by international agreement on how to apply the method.³⁵⁸ Conversely, WWCR creates multiple taxation because it fundamentally differs from tax methods applied by foreign countries and is not accepted by United States foreign trading partners, thus it is less likely that an amicable resolution to the multiple taxation problem created by WWCR could be reached through international negotiation.³⁵⁹

³⁵³ *Id.*

³⁵⁴ *Container*, 463 U.S. at 188.

³⁵⁵ *Id.* at 199–200 (Powell, J., dissenting).

³⁵⁶ *Id.* (Powell, J., dissenting).

³⁵⁷ *Id.* at 200–01 (Powell, J., dissenting).

³⁵⁸ *Id.* at 201 (Powell, J., dissenting).

³⁵⁹ *Container*, 463 U.S. at 201 (Powell, J., dissenting). In fact, the majority of U.S. trading

Additionally, in *Barclays*, the taxpayer corporation was foreign-owned, and thus, even if the Court's analysis in *Container* was sound, the *Barclays* Court should have applied the stricter guidelines set forth in *Japan Line*. Therefore, because *Barclays* produced evidence of both actual multiple taxation of its foreign income and an aggravated risk of double taxation for foreign multinational corporations, the tax was unconstitutionally applied and the analysis should have gone no further. Keeping in mind the language in *Japan Line* concerning the impermissibility of even a slight overlap in taxation in the international context, WWCR clearly fails to meet constitutional requirements when applied to foreign multinational corporations.³⁶⁰

In finding WWCR constitutional, the *Barclays* Court did not attach the requisite importance to the fact that multiple taxation has long been regarded as offensive to the Commerce Clause.³⁶¹ The *Japan Line* Court recognized that multiple taxation was especially problematic in the international context because of the lack of an authoritative tribunal capable of ensuring that the aggregate of taxes placed on international income or property does not exceed one full value.³⁶² In both *Container* and *Barclays*, the Court dismissed actual multiple taxation as irrelevant to the determination of the constitutionality of a tax without providing any sound reason for ignoring the precedents that state otherwise.³⁶³

B. "One Voice" Doctrine

In *Japan Line*, the Court stated that a tax would be unconstitutional as violating the "One Voice" doctrine of the Foreign Commerce Clause if it prevented federal uniformity in an area in which uniformity was required.³⁶⁴ That same Court noted that international commerce

partners have openly contested the use of WWCR and have sought to have it declared unconstitutional. See *Barclays*, 114 S. Ct. at 2268, 2289-90 (O'Connor, J., concurring in the judgment in part and dissenting in part). As such, it is unlikely that members of the international trading community would negotiate with California to alleviate multiple taxation problems associated with the use of WWCR. *Id.*

³⁶⁰ See 441 U.S. 434, 456 (1979) (even a slight overlap in international tax is impermissible).

³⁶¹ *Id.*; see, e.g., *Evco v. Jones*, 409 U.S. 91, 93-94 (1972); *Central R.R. of Pa. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-85 (1952); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938).

³⁶² 441 U.S. at 447-48. Conversely, the United States Supreme Court has required apportionment of taxes among the taxing states in order to prevent multiple taxation of interstate commerce. *Id.* at 446-47.

³⁶³ See *supra* notes 177-86 and accompanying text for a discussion of the *Container* Court's reasoning on this issue, and notes 299-308 and accompanying text for a discussion of the *Barclays* Court's analysis of same.

³⁶⁴ 441 U.S. at 450-51.

was such an area.³⁶⁵ In *Container*, the Court reaffirmed the *Japan Line* reasoning and elaborated on the test by stating that a state tax would violate the "One Voice" standard if it either implicated foreign policy issues that must be left to the federal government or violated a clear federal directive.³⁶⁶ The *Container* Court recognized that the most obvious impermissible foreign policy implication of a state tax is that it might offend American trading partners and lead to retaliation against the nation as a whole.³⁶⁷ The *Container* Court then set forth objective standards for determining the likelihood of international offense and retaliation and concluded that the risk of retaliation created by the tax in question was slight, because: (1) the tax fell on a domestic corporation; (2) the tax did not create an automatic asymmetry in international taxation; and (3) California could have achieved the same tax result with use of the separate accounting method by raising its tax rates.³⁶⁸

The factors that led the Court in *Container* to uphold the unitary tax are either questionable in their logic or do not apply in the case of application of WWCR to Barclays. For example, in finding WWCR constitutional, the *Container* Court emphasized that the legal incidence of the tax fell upon a domestic entity.³⁶⁹ The Court distinguished *Container* from *Japan Line* because the tax in *Container* was imposed upon a domestic corporation, and the tax in *Japan Line* was imposed upon a foreign entity.³⁷⁰ The *Container* Court noted that this factor would be absent even in the case of a domestic corporation owned by foreign interests, and specifically refrained from addressing the constitutionality of WWCR as applied to a foreign corporation.³⁷¹ As a foreign enterprise with certain operations entirely outside the United States, Barclays clearly fell within the reservation maintained by the *Container* Court, and thus the *Barclays* Court should not have applied the same analysis.

Further, as the dissent in *Container* emphasized, automatic asymmetry is present when the unitary tax is applied to a multinational corporation.³⁷² The United States and all of its trading partners have adopted the arm's length method of allocating income for taxation.³⁷³

³⁶⁵ See *id.* at 452-53.

³⁶⁶ 463 U.S. 159, 194 (1983).

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 194-95.

³⁶⁹ *Id.* at 195.

³⁷⁰ *Id.* at 188.

³⁷¹ 463 U.S. at 189 n.26, 195 n.32.

³⁷² See *id.* at 202 (Powell, J., dissenting).

³⁷³ *Id.* at 187.

Because the arm's length method and WWCR are based on differing economic assumptions, there exists no effective means of reconciling the differences in the application of these methods.³⁷⁴ Conversely, overlapping taxation caused by differing applications of the arm's length method is not inherent in the method itself, and any resulting discrepancies are easier to resolve through international negotiation.³⁷⁵ Although theoretically the use of WWCR may not result in multiple taxation of foreign income in every single case, that allocation method is inconsistent enough from accepted international practice that multiple taxation is inevitable in the majority of cases.³⁷⁶ Further, as Justice Powell noted in his dissent in *Container*, because California's property values, wage rates and sales prices are usually higher than the other jurisdictions in which international enterprises operate, multiple taxation inevitably results from the asymmetry created by California's application of WWCR.³⁷⁷

In finding California's use of WWCR constitutional, the *Container* Court also emphasized that California could achieve the same tax result through use of the arm's length method by raising its tax rates.³⁷⁸ The reasoning of the Court here is questionable in its logic. The fact that the same tax could be achieved by the use of a constitutional taxing method should not validate the use of an unconstitutional method. As Justice Powell noted in his dissent in *Container*, even if California could achieve the same tax result with an increased tax rate, an increased tax burden caused by an unfair tax differs substantially from an increased tax burden created by a properly increased tax rate.³⁷⁹ First, if California were to raise its corporate tax rates, it would have to do so through the correct political channels, which would provide corporate taxpayers the opportunity to effectively lodge their objections to the increase.³⁸⁰ Second, WWCR is problematic in that it is based on fundamental assumptions that conflict with the method used by foreign nations and has thus invited retaliatory action by offending U.S. trading partners. As such, the fact that the same tax could be achieved by properly raising the general tax rates does not reduce the problems associated with the application of WWCR to the income of foreign entities.

³⁷⁴ *Id.* at 199, 201 (Powell, J., dissenting).

³⁷⁵ *Id.* at 201 (Powell, J., dissenting).

³⁷⁶ *See Container*, 463 U.S. at 199 (Powell, J., dissenting).

³⁷⁷ *Id.* at 199-200 (Powell, J., dissenting).

³⁷⁸ *Id.* at 195.

³⁷⁹ *Id.* at 203-04 (Powell, J., dissenting).

³⁸⁰ *Id.* (Powell, J., dissenting).

The *Container* and *Barclays* reasoning that the use of WWCR does not violate the "One Voice" doctrine is especially problematic because such reasoning does not align with the language in *Container* that stated, "[T]he most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole."³⁸¹ As previously discussed, WWCR is completely inconsistent with the internationally accepted method of taxation. Most of the United States' trading partners have objected to California's use of WWCR.³⁸² In 1985, the United Kingdom enacted retaliatory legislation, and, dissatisfied with the ineffective efforts to alleviate the unfairness of the WWCR provisions, threatened to implement such legislation as recently as 1993.³⁸³ Clearly, the use of WWCR to tax foreign entities offends foreign trading partners and creates a severe risk of both retaliation against U.S. interests abroad and deterrence of foreign investment in the United States.³⁸⁴

The *Container* Court avoided deciding whether the tax in question implicated foreign policies by stating that the Court has little experience in determining when foreign trading partners will be offended by a tax and instead adopted "objective standards" for determining when there is likelihood of offense and retaliation.³⁸⁵ The *Barclays* Court could not reasonably hide behind such a shield of ignorance, because the strong evidence of international objection to WWCR removed any need for guesswork regarding the likelihood of offense and retaliation. Even if analyzed under the objective standards in *Container*, WWCR fails to meet the requirements of the "One Voice" doctrine because the risk of offense and retaliation with its use is actual and clear.

CONCLUSION

The constitutional problems raised by multijurisdictional taxation are truly complex and perhaps unavoidable. Although any chosen

³⁸¹ *Container*, 463 U.S. at 194.

³⁸² *Barclays*, 114 S. Ct. 2268, 2289-90 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part). The nations that have voiced their objection to the use of WWCR include: Belgium, Australia, Austria, Canada, Finland, Japan, Norway, Sweden, the United Kingdom and Switzerland. See *id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

³⁸³ Carson, *supra* note 65, at 8.

³⁸⁴ See *Barclays*, 114 S. Ct. at 2290 (O'Connor, J., concurring in the judgment in part and dissenting in part).

³⁸⁵ *Container*, 463 U.S. at 194. See *supra* notes 193-99 and accompanying text for a delineation of the objective standards set forth in *Container*.

allocation method could create an unfair allocation, this fact does not render a constitutional analysis of an allocation method unnecessary. Both the Commerce Clause and the Due Process Clause of the United States Constitution set forth guidelines for state taxes, and in *Japan Line*, the United States Supreme Court unequivocally voiced its interpretation of the exact requirements of those guidelines.³⁸⁶

Truly, the expanding global economy and concomitant increase in the complexity of taxation methods have created a need for modern and unexpected interpretations of the relevant clauses of the Constitution. As the *Japan Line* decision well demonstrated, however, the words and policies contained in the Commerce and Due Process Clauses of the Constitution are effectively adaptable to any taxation method, regardless of its level of complexity.³⁸⁷ Interestingly, both the *Container* Court and the *Barclays* Court chose not to overrule the *Japan Line* decision, but instead limited the constitutional guidelines set forth in *Japan Line* so as to render them ineffective.³⁸⁸ In finding the use of WWCR to determine the tax of foreign entities constitutional, the *Barclays* Court ignored the basic precepts set forth in the Constitution and delineated in *Japan Line*. Post-*Barclays*, one can only wonder whether any constitutional restrictions on the allocation of an international state income tax still exist.

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³⁸⁶ 441 U.S. 434, 446-48 (1979); see also U.S. CONST. art. 1, § 8, cl. 3, amend. XIV.

³⁸⁷ *Japan Line*, 441 U.S. at 446-48.

³⁸⁸ See *Barclays*, 114 S. Ct. 2268; *Container*, 463 U.S. 159; *Japan Line*, 441 U.S. 434.