SUPREME COURT OF THE UNITED STATES

No. 91–321

ITEL CONTAINERS INTERNATIONAL CORPORATION, PETITIONER *v.* JOE HUDDLESTON, COMMISSIONER OF REVENUE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

[February 23, 1993]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join all of the Court's opinion except those sections disposing of the petitioner's "negative" Foreign Commerce Clause and Import-Export Clause arguments (Parts IV and V, respectively). As to those sections, I concur only in the judgment of the Court.

I have previously recorded my view that the Commerce Clause contains no "negative" component, no self-operative prohibition upon the States' regulation of commerce. "The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce." *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 263 (1987) (SCALIA, J., concurring in part and dissenting in part); see also *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 202–203 (1990) (SCALIA, J., concurring in judgment). On *stare decisis* grounds, however, I will enforce a self-executing, "negative" Commerce Clause in two circumstances: (1) against a state law that facially discriminates against interstate commerce,[1] and (2) against a state law that is

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[1]See *Healy* v. *The Beer Institute*, 491 U. S. 324, 344 (1989) (SCALIA, J., concurring in part and concurring in judgment); *New Energy Co. of Indiana* v. *Limbach*, 486 U. S. 269 (1988); *Trinova Corp.* v. *Michigan Dept. of Treasury*, 498 U. S. 358, 387 (1991) (SCALIA, J.,

indistinguishable from a type of law previously held unconstitutional by this Court.[2] These acknowledgments of precedent serve the principal purposes of *stare decisis*, which are to protect reliance interests and to foster stability in the law. I do not believe, however, that either of those purposes is significantly furthered by continuing to apply the vague and open-ended tests that are the current content of our negative-Commerce-Clause jurisprudence, such the four-factor test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977), or the "balancing" approach of *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). Unlike the prohibition on rank discrimination against interstate commerce, which has long and consistently appeared in the precedents of this Court, see *New Energy Co. of Indiana* v. *Limbach*, 486 U. S. 269, 273 (1988), those tests are merely the latest in a series of doctrines that we have successively applied, and successively discarded, over the years, to invalidate nondiscriminatory state taxation and regulation—including, for example, the "original package" doctrine, see *Leisy* v. *Hardin*, 135 U. S. 100 (1890), the "uniformity" test, see *Case of the State Freight Tax*, 15 Wall. 232, 279–280 (1873), cf. *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, 319 (1852), the "directness" test, see *Hall* v. *DeCuir*, 95 U. S. 485, 488–489 (1878), and the "privilege of doing interstate business" rule, see *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 609 (1951). Like

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concurring in judgment); *Amerada Hess Corp.* v. *Director, Div. of Taxation, N.J. Dept. of Treasury*, 490 U. S. 66, 80 (1989) (SCALIA, J., concurring in judgment); *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 304 (1987) (SCALIA, J., dissenting).

[2]See *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 204 (1990); *Quill Corp.* v. *North Dakota*, 504 U. S. ___, ___ (1992) (SCALIA, J., concurring in part and concurring in judgment) (slip op., at 2).

almost all their predecessors, these latest tests are so uncertain in their application (and in their anticipated life-span) that they can hardly be said to foster stability or to engender reliance deserving of *stare decisis* protection.

I have not hitherto had occasion to consider an asserted application of the negative Commerce Clause to commerce “with foreign Nations”—as opposed to commerce “among the several States”—but the basic point that the Commerce Clause is a power conferred upon Congress (and not a power denied to the States) obviously applies to all portions of the Clause. I assume that, for reasons of *stare decisis*, I must apply the same categorical prohibition against laws that facially discriminate against foreign commerce as I do against laws that facially discriminate against interstate commerce—though it may be that the rule is not as deeply rooted in our precedents for the former field. I need not reach that issue in the present case, since the Tennessee tax is nothing more than a garden-variety state sales tax that clearly does not discriminate against foreign commerce. As with the Interstate Commerce Clause, however, *stare decisis* cannot bind me to a completely indeterminate test such as the “four-factored test plus two” found in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 446–451 (1979), which combines *Complete Auto* with two *additional* tests.

Japan Line, like *Complete Auto* and *Pike*, ultimately asks courts to make policy judgments—essentially, whether nondiscriminatory state regulations of various sorts are “worth” their effects upon interstate or foreign commerce. One element of *Japan Line*, however, the so-called “speak with one voice” test, has a peculiar effect that underscores the inappropriateness of our engagement in this enterprise of applying a negative Commerce Clause. Applied literally, this test would always be satisfied, since no state law can ever actually “*prevent* this Nation from `speaking with one voice' in regulating foreign commerce,” *Japan Line*, *supra*, at 451 (emphasis added), or “interfere with [the United States'] *ability* `to speak with one voice,'” Brief for

United States as *Amicus Curiae* 24 (emphasis added). The National Government can always explictly pre-empt the offending state law. What, then, does the "one voice" test mean? Today, the Court relies on two considerations in determining that Tennessee's tax passes it: (1) that federal treaties, statutes and regulations restrict a State's ability to tax containers in certain defined circumstances, and the state tax here does not fall within those proscriptions; and (2) that the Government has filed an *amicus* brief in support of the State. *Ante*, at 14-15. The first of these considerations, however, does not distinguish the ad valorem property tax invalidated in *Japan Line*, which would also not violate the Container Conventions or the relevant federal statutes and regulations as construed in today's opinion, *ante*, at 4, 10. The second consideration does distinguish *Japan Line*, and it thus appears that a ruling on the *constitutionality* of a state law ultimately turns on the position of the Executive Branch. Having appropriated a power of Congress for its own use, the Court now finds itself, at least in the area of foreign commerce, incompetent to wield that power, and passes it off (out of "due regard" for foreign-policy expertise) to the President. *Ante*, at 15. I certainly agree that he is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only the Congress.

Petitioner's Import-Export Clause challenge is, for me, a more difficult matter. It has firm basis in a constitutional text that cannot be avoided by showing that the tax on imports and exports is nondiscriminatory.[3] See *Richfield Oil Corp.* v. *State*

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[3]The Import-Export Clause provides: "No State shall, without the Consent of the Congress, lay any Imposts

Bd. of Equalization, 329 U. S. 69, 76 (1946). To come within this constitutional exemption, however, the taxed good must be either an import or an export "at the time that the tax accrued." *Id.*, at 78. I do not think a good can be an export when it will be used in this country, for its designed purpose, before being shipped abroad. In *Richfield*, the Court held that California could not impose its nondiscriminatory sales tax on a shipment of oil that was being exported to New Zealand. The tax accrued upon the delivery of the oil to the purchaser, which was accomplished by pumping the oil into the hold of the vessel that would transport it overseas. The *Richfield* Court noted not only that no portion of the oil was "used or consumed in the United States," *id.*, at 71, but also that "there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use," *id.*, at 83. With respect to the containers at issue in the present case, by contrast, it was entirely certain that after the time at which the tax accrued (*viz*., upon delivery of the empty containers to the lessee) they would be used in this country, to be loaded with goods for export. See Brief for Petitioner 7 ("[E]ach [leased] container initially was used to export American goods to foreign ports"). It could not be said, when the tax attached, that "the process of [their] exportation ha[d] started." *Richfield*, *supra*, at 82. Because I find that the containers at issue were not protected by the Import-Export Clause, I need not consider whether the Tennessee tax would satisfy the test set forth in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976).

For the reasons stated, I concur in the Court's conclusion that Tennessee's tax is not unconstitutional under the Foreign Commerce Clause

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or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws . . . ." U. S. Const., Art. I, §10, cl. 2.

or the Import-Export Clause.