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# The Export Clause

Erik M. Jensen

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#### **The Export Clause**

*Erik M. Jensen*

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As hard as it is to imagine today, the Export Clause – which provides that “[n]o Tax or duty shall be laid on Articles exported from any State”<sup>1</sup> – was an essential part of the Constitution. Without the protection the Export Clause provided to exporting states, particularly in the South, the Constitutional Convention would have imploded.<sup>2</sup> Times change, however, and, by mid-twentieth century, the Export Clause had become invisible to all but the nerdiest of constitutional scholars. It had become, at best, a historical curiosity.

Now the Export Clause is making a comeback. Largely ignored for over seventy years, at least in important litigation,<sup>3</sup> the Clause was the subject of Supreme Court decisions in 1996, *United States v. International Business Machines Corp.*,<sup>4</sup> and in 1998, *United States v. United States Shoe Corp.*,<sup>5</sup> both of which struck down levies on constitutional grounds. Those decisions made, or should have made, people take notice: the Export Clause matters.<sup>6</sup>

The congressional taxing power is often described as plenary,<sup>7</sup> and few think the Constitution limits that power in any significant way.<sup>8</sup> But the Export Clause, included in the Article I, section 9 list of what Congress may *not* do, is an apparently straightforward restriction on the taxing power. Yes, there can be

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1. U.S. Const. art. I, § 9, cl. 5.

2. See *infra* Part I.

3. See *Leading Cases: Export Clause*, 110 Harv. L. Rev. 196, 196 (1996) (“Not every word of the Constitution has proven a wellspring of jurisprudence.”).

4. 517 U.S. 843, 863 (1996).

5. 523 U.S. 360, 370 (1998).

6. *Compare* 1 Laurence H. Tribe, *American Constitutional Law* § 5-7, at 842 (3d ed., 2000) (describing Export Clause as “[t]he more important of these limits in Article I, § 9 is that imposed by the Export Clause”), *with* Laurence H. Tribe, *American Constitutional Law* § 5-9, at 318 n.1 (2d ed., 1988) (relegating Export Clause to mention in footnote); see also Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United States v. United States Shoe Corp.*, 84 Minn. L. Rev. 129 (1999). But see 1 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* 1-14 (3d ed., 1999) (giving one paragraph in a five-volume treatise on taxation to the Export Clause).

7. The taxing power is defined broadly: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.” U.S. Const. art. I, § 8, cl. 1. But the taxing power is subject to limitations – the uniformity rule for duties, impost, and excises, U.S. Const. art. I, § 8, cl. 1; the apportionment rule for direct taxes, U.S. Const. art. I, § 2, cl. 3; U.S. Const., art. I, § 9, cl. 4; and the Export Clause, U.S. Const., art. I, § 9, cl. 5.

8. See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 Ariz. St. L.J. 1057, 1058-62 (2001) (discussing conventional understanding of taxing power) [hereinafter *Jensen, Taxing Power*]; see also Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2345-50 (1997) [hereinafter *Jensen, Apportionment*]; Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & Pol. 687 (1999) [hereinafter *Jensen, Taxation and the Constitution*].



questions about application: What’s a “tax or duty”? What’s an “article exported”? What does it mean to say a tax is laid “on” an article? Nevertheless, interpretational difficulties shouldn’t obscure the core principle: *It’s not within the power of Congress to lay a tax or duty on exported articles.*<sup>9</sup>

That principle isn’t meaningless, as Chief Justice John Marshall recognized in *Marbury v. Madison*.<sup>10</sup> Marshall used the Export Clause as an example in defense of the proposition that, “[i]n some cases . . . , the constitution must be looked into by judges”<sup>11</sup> – in defense, that is, of the idea that judicial review is inherent in the constitutional structure:

It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?<sup>12</sup>

Justice Marshall obviously thought those questions were no-brainers. And if the judiciary is going to keep its eyes open, as the *Marbury* Court concluded it must, Congress shouldn’t even try to impose such a prohibited duty.

So there’s *something* to the Export Clause, but a skeptic might still question the value of reexamining the Clause in 2003. To be sure, the duties hypothesized by Justice Marshall were important concerns in the late eighteenth century, when the southern states were worried that, without a prohibition on export duties, the new national government might try to cripple the southern economies.<sup>13</sup> But that was then and this is now. Perhaps the South continues to feel itself under siege, but, if so, it’s not because of export taxation. And even if we think the tax treatment of cotton, tobacco, and flour

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9. The meaning of “export” wasn’t obvious to all in the republic’s early years, when many states maintained a sense of independence. See, e.g., Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, 528 (imposing tax on, among other things, “any note or bill of lading for any goods or merchandise to be *exported*, if from one district to another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents”) (emphasis added). But it’s now clear the reference is “only to exportation to foreign countries,” *United States v. Hvoslef*, 237 U.S. 1, 13 (1915), not to transfers across state lines. Similarly, the term “imports” in the Import-Export Clause [U.S. Const. art. I, § 10, cl. 2; see *infra* note 95] means goods from foreign nations, not goods from other states. See *Woodruff v. Parham*, 75 U.S. 123 (1868).

10. 5 U.S. (1 Cranch) 137 (1803).

11. *Id.* at 179.

12. *Id.*

13. See *infra* notes 31-48 and accompanying text.

is of paramount national importance, what's there to talk about? The analysis of Justice Marshall's hypotheticals is no more difficult now than it was at the time of the founding. *Of course* Congress can't tax such products if they're in the process of being exported. End of discussion.

All of which might make the Export Clause seem intellectually trivial, but (surprise!) this article suggests that's not the case. *IBM* and *U.S. Shoe* reflected a far broader understanding of the Clause's scope than Justice Marshall's hypotheticals would suggest,<sup>14</sup> and the cases effectively revived a body of case law developed in the late nineteenth and early twentieth centuries under the Export Clause.<sup>15</sup> Furthermore, if those cases are taken seriously – and they have to be, as the Court twice within a short period invalidated congressional exercises of the taxing power – *IBM* and *U.S. Shoe* may evidence renewed judicial interest in national taxation. In many other areas, the Supreme Court has been showing less deference to Congress than had been true for decades,<sup>16</sup> and that may be happening with taxation as well. If so, that's a momentous change.<sup>17</sup>

This much can be said for certain: the Export Clause is a historically important constitutional provision that modern courts are obligated to interpret in a way that ensures its continuing vitality. That means, too, that Congress should legislate with a better sense of the Export Clause than it has shown recently.

To explicate the Export Clause, the article begins by describing the founders' understanding of the Clause: although not everyone at the Constitutional Convention was happy with limitations on the national government's power to tax exports, the Export Clause was intended to be a complete prohibition of export taxation, and the prohibition was intended to have real bite. Application of the Clause to situations that go beyond Justice Marshall's hypotheticals isn't at all straightforward, however, and Part II discusses *IBM* and *U.S. Shoe*, which illustrate the inherent difficulties of the Export Clause and the Supreme Court's not always happy treatment of those

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14. There's no reason to think that Marshall's understanding of the Export Clause was really so limited. His slam-dunk hypotheticals were used to support the idea of judicial review, not to provide a full explication of the Export Clause. He certainly had a broader understanding of the Export Clause later in his career. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *infra* notes 254-256 and accompanying text.

15. See *infra* Part III.

16. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (Tenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause); *New York v. United States*, 505 U.S. 144 (1992) (Tenth Amendment).

17. As I'll discuss later, the Court said its analysis in both cases should be limited to the Export Clause, but it's not clear why that should be so. See *infra* notes 129-132 and 197-199 and accompanying text; Part III.C.

difficulties. Part III considers a number of interpretational issues under the Export Clause, derived from the pre-1924 cases that were effectively revived by the Court's decisions in *IBM* and *U.S. Shoe*. Finally, Part IV discusses the role of the Export Clause today.

### I. THE EXPORT CLAUSE AND THE FOUNDING

Treating the Export Clause as a serious limitation on the national taxing power is perfectly consistent with original understanding. The Clause wasn't an afterthought at the Constitutional Convention. Indeed, it's no overstatement to suggest that, without the Clause, the delegates in Philadelphia would have been unable to agree on the formation of a new national government.

Whether to permit the national government to tax exports occupied a surprising amount of time and effort at the Constitutional Convention. Because the Articles of Confederation hadn't permitted the "national" government even to levy import duties,<sup>18</sup> any power given to the government to impose and enforce taxes was going to represent a quantum leap in national authority. It was generally agreed that the government should be able to tax imports – many founders thought that would be the nation's primary source of revenue in ordinary times<sup>19</sup> – but the debates about other forms of taxation, including taxes on exports, were often contentious.

To many Federalists, exports were an appropriate subject of taxation. The nation needed revenue, and exports were one obvious, readily available source of funds. As reported in Madison's notes, Alexander Hamilton argued early at the Constitutional Convention, "Whence then is the national revenue to be drawn? from Commerce, even [from] exports which notwithstanding the common opinion are fit objects of moderate taxation, [from] excise, &c &c. These tho' not equal, are less unequal than quotas."<sup>20</sup> And taxes on exports were thought to be relatively easy to administer, something stressed even by some Anti-Federalists worried about how intrusive other forms of taxation could be. Brutus, for example, thought a tax on exports and imports "should be

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18. The national government was limited to requisitioning funds from the states, without any enforcement mechanism, a procedure that worked poorly. See Erik M. Jensen & Jonathan L. Entin, *Commandeering, The Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 *Const. Comment.* 355 (1998).

19. See Jensen, *Taxing Power*, *supra* note 8, at 1068-69.

20. James Madison, *Notes on the Constitutional Convention* (June 18, 1787), *reprinted in* 1 *The Records of the Federal Convention of 1787*, at 286 (Max Farrand ed., rev. ed. 1937) [hereinafter *Farrand*].

raised by simple laws, with few officers, with certainty and expedition, and with the least interferences with the internal police of the states.”<sup>21</sup>

Three of the most significant participants at the Constitutional Convention, Gouverneur Morris (representing Pennsylvania), James Wilson (also Pennsylvania), and James Madison (of Virginia), spoke in favor of a national power to tax exports, as did many others, and the largely silent, but influential, George Washington supported such a power.<sup>22</sup> Morris thought the power to tax exports was essential: “Taxes on exports are a necessary source of revenue. For a long time the people of America will not have money to pay direct taxes. Seize and sell their effects and you push them into Revolts.”<sup>23</sup> Although most founders focused on taxing *imports* as the easiest way to fund the new government, Morris emphasized “that it would not in some cases be equitable to tax imports without taxing exports; and that taxes on exports would be often the most easy and proper of the two.”<sup>24</sup>

His state, Virginia, wound up opposing export taxation, as did all of the southern states,<sup>25</sup> but Madison agreed with Morris, arguing both in favor of a national power to tax exports and against state power to do so:

1. the power of taxing exports is proper in itself, and as the States cannot with propriety exercise it separately, it ought to be vested in them collectively. 2. it might with particular advantage be exercised with regard to articles in which America was not rivalled in foreign markets, as Tobo. &c. . . [T]he price would be thereby raised in America, and consequently the taxes be paid by the European Consumer. 3. it would be unjust to the States whose produce was exported by their neighbours, to leave it subject to be taxed by the latter.<sup>26</sup>

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21. 2 *Essays of Brutus VII*, N.Y. J. (Jan. 3, 1788), *reprinted in* 2 *The Complete Anti-Federalist* 400, 404 (Herbert J. Storing ed., 1981). Brutus didn’t understand why limits on export taxation were in the Constitution: “I cannot perceive the reason of the restriction. It appears to me evident, that a tax on articles exported, would be as nearly equal as any that we can expect to lay, and it certainly would be collected with more ease and less expence than any direct tax.” *Id.* at 405.

22. The views of Madison and Washington weren’t enough, however, to carry the Virginia delegation, which voted against the power to tax exports. See *infra* text accompanying note 63.

23. 2 *Farrand*, *supra* note 20, at 307 (Aug. 16, 1787).

24. 2 *id.* at 306 (Aug. 16, 1787). “Morris considered such a proviso [restricting export taxation] as inadmissible any where. It was so radically objectionable, that it might cost the whole system the support of some members.” 2 *id.*

25. See *infra* text accompanying note 63.

26. 2 *Farrand*, *supra* note 20, at 306 (Aug. 16, 1787).

And, emphasized Madison, the United States needed to have available the power to tax exports in the future, even if it didn't do so now: "we are not providing for the present moment only."<sup>27</sup>

Wilson, too, "was decidedly agst prohibiting general taxes on exports."<sup>28</sup> Echoing Madison, he noted that granting the power didn't mean it would always be used: "[T]he power had been attacked by reasoning which could only have held good in case the Genl Govt. had been *compelled*, instead of *authorized*, to lay duties on exports."<sup>29</sup> But the power needed to be available: "To deny [it] is to take from the Common Govt. half the regulation of trade."<sup>30</sup>

Taxing exports was nevertheless a touchy subject. The strongest support for prohibition came from southern delegates, who feared that a tax on exports could be used to the South's detriment. In the late eighteenth century, it was the South that was the primary exporter of goods, largely textiles, tobacco, and related products. The southern states were, George Mason of Virginia proudly said, the "staple States."<sup>31</sup> A general tax on exports would therefore hit the South hardest,<sup>32</sup> and, even if that weren't so, many of the

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27. 2 id. at 307. This argument was common. See, e.g. Statement of John Dickenson of Delaware (Aug. 21, 1787), 2 id. at 361. ("The power of taxing exports may be inconvenient at present; but it must be of dangerous consequence to prohibit it with respect to all articles and for ever. He thought it would be better to except particular articles from the power."); Statement of Thomas Fitzsimmons of Pennsylvania (Aug. 21, 1787), 2 id. at 362 (noting he "would be agst. a tax on exports to be laid immediately; but was for giving a power of laying the tax when a proper time may call for it – This would certainly be the case when America should become a manufacturing country."); Statement of James Madison (Aug. 21, 1787), 2 id. at 361. ("As we ought to be governed by national and permanent views, it is a sufficient argument for giving ye power over exports that a tax, tho' it may not be expedient at present, may be so hereafter.") (footnote omitted).

28. 2 id. at 307 (Aug. 16, 1787).

29. 2 id. at 362 (Aug. 21, 1787).

30. 2 id.

31. 2 id. at 306 (Aug. 16, 1787); see also 2 id. at 360 (Aug. 21, 1787) ("Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States.").

32. See James Iredell, Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention (1788), *reprinted in* Pamphlets on the Constitution of the United States 333, 367 (Paul Leicester Ford ed., Da Capo press 1968) (1888) [hereinafter Ford] ("Congress itself are prohibited from laying duties on exports, because by that means those States which have a great deal of produce to export would be taxed much more heavily than those which had little or nothing for exportation.").

southern delegates were afraid northern states would gang up against the South to enact targeted duties.<sup>33</sup> Mason put the concern this way:

“[A] majority when interested will oppress the minority”. . . .  
If we compare the States in this point of view the 8 Northern States have an interest different from the five Southn. States, – and have in one branch of the legislature 36 votes agst 29. and in the other, in the proportion of 8 agst 5. The Southern States had therefore good ground for their suspicions. The case of Exports was not the same with that of imports. The latter were the same throughout the States: the former very different.<sup>34</sup>

A related argument, with a more neutral ring, was that taxing exports would punish industrious behavior. The states producing the most for exportation, whether they were in the North or the South, would obviously be

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33. However, it wasn't only southern delegates worried about export taxation's potential for destroying the union through targeted duties. Elbridge Gerry of Massachusetts, who became an Anti-Federalist, “thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it.” 2 Farrand, *supra* note , at 307 (Aug. 16, 1787); see also 2 *id.* at 362 (Aug. 21, 1787) (noting Gerry's fear that “power over exports . . . might be made use of to compel the States to comply with the will of the Genl Government, and to grant it any new powers which might be demanded”); cf. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 469-70 (Da Capo Press 1970) (1833):

The obvious object of these provisions is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another. If congress were allowed to lay a duty on exports from any one state it might unreasonably injure, or even destroy, the staple productions, or common articles of that state. The inequality of such a tax would be extreme. In some of the states, the whole of their means result from agricultural exports. In others, a great portion is derived from other sources; from external fisheries; from freights; and from the profits of commerce in its largest extent. The burthen of such a tax would, of course, be very unequally distributed. The power is, therefore, wholly taken away to intermeddle with the subject of exports.

Justice Story's reference to “these provisions” was to the Export Clause and the provisions following it in Article I, Section 9, generally preventing Congress from favoring one port over another, or requiring vessels bound to or from one state from being subject to regulation or taxation in another state.

34. 2 Farrand, *supra* note 20, at 362-63 (Aug. 21, 1787).

burdened most by export taxation,<sup>35</sup> and it would be crazy for the nation to create a disincentive to productivity.<sup>36</sup>

Finally, southern opponents of export taxation argued, quite reasonably, that northerners in 1787 might see southern exportation as a source of immediate revenue, but the respective interests of the sections could shift over time: *You northerners make it possible to tax exports now, thinking that it's the South that will pay, and you could be sorry. Your section of the country may be hit later.* George Mason “hoped the Northn. States did not mean to deny the Southern this security [of prohibiting taxes on exports]. It would hereafter be as desirable to the former when the latter should become the most populous.”<sup>37</sup> The argument that, in the long run, the North might suffer helped stiffen the resistance of a few northern delegates already worried that, as Oliver Ellsworth of Connecticut put it, “the taxing of exports would engender incurable jealousies.”<sup>38</sup>

None of those concerns was frivolous, and something else was at stake as well. Although some of the arguments against export taxation were phrased

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35. James McHenry, before the Maryland House of Delegates, made the following argument:

That no Duties shall be laid on Exports or Tonage, on Vessells bound from one State to another is the effect of that attention to general Equality that governed the deliberations of [the] Convention. Hence unproductive States cannot draw a revenue from productive States into the Public Treasury, nor unproductive States be hampered in their Manufactures to the emolument of others.

36. Farrand, *supra* note 20, at 149 (Nov. 29, 1787).

37. See, e.g., 2 *id.* at 359-60 (Aug. 21, 1787) (statement of Oliver Ellsworth of Connecticut) (arguing that export tax “will discourage industry, as taxes on imports discourage luxury”). Founders sensitive to economic forces noted other unhappy effects as well. John Francis Mercer of Maryland worried that taxes on exports would “encourag[e] the raising of articles not meant for exportation.” 2 *id.* at 307 (Aug. 16, 1787).

38. 2 *id.* at 305. Mason’s concern that the South might be picked on went far beyond this point. Despite prevailing on the prohibition of export taxation, he opposed the Constitution. See *The Objections of the Hon. George Mason, to the Proposed Federal Constitution. Addressed to the Citizens of Virginia, reprinted in* Ford, *supra* note 32, at 327, 331 (“By requiring only a majority to make all commercial and navigation laws, the five southern states (whose produce and circumstances are totally different from those of the eight northern and eastern states) will be ruined”).

39. 2 Farrand, *supra* note 20, at 359-60 (Aug. 21, 1787). Justice Story explained the practicalities: “Upon the whole, the wisdom and sound policy of this restriction cannot admit of reasonable doubt; not so much that the powers of the general government were likely to be abused, as that the constitutional prohibition would allay jealousies, and confirm confidence.” 2 Story, *supra* note 33, § 1012, at 471.

in sectionally neutral terms, it was clearly the South that was most concerned about export taxation. A critical issue to the South was the effect of taxes on the “peculiar institution”: duties directed at agricultural exports could be used to strike indirectly at slavery. If southern agriculture were seriously harmed by excessive taxation, slavery itself could be in jeopardy. Taxing exports would have been an emotional subject in any event, but with the slavery connection it became a potentially convention-busting issue.<sup>39</sup>

When apportioning taxation among the states on the basis of population was first seriously addressed at the Constitutional Convention, on July 12, 1787, Gouverneur Morris suggested that apportionment ought to be limited to direct taxation (as is now the case).<sup>40</sup> “Notwithstanding what had been said to the contrary he was persuaded that the imports & consumption were pretty nearly equal throughout the Union,”<sup>41</sup> and apportionment was therefore unnecessary to make sure taxes on items of consumption didn’t result in sectional abuse. Accordingly, he said, “[w]ith regard to indirect taxes on *exports* & imports & on consumption, the rule would be inapplicable.”<sup>42</sup> General Charles Cotesworth Pinckney of South Carolina agreed that it made sense to limit apportionment to direct taxation, but part of what Morris had said scared him:

He was alarmed at what was said yesterday, concerning the Negroes [how slaves should be counted in determining a state’s representation in the House of Representatives].<sup>43</sup> He was now again alarmed at what had been thrown out concerning the taxing of exports. S. Carola. has in one year exported to the amount of £600,000 Sterling all which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she

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39. I’ve argued that another limitation on the taxing power, the apportionment rule for direct taxes, wasn’t pro-slavery and therefore shouldn’t be treated as irredeemably tainted. See Jensen, *Taxation and the Constitution*, supra note 8, at 702-06; Jensen, *Apportionment*, supra note 8, at 2358. Because of this argument, I was outrageously accused of being indifferent to the “legacy of racism.” See Bruce Ackerman, *Taxation and the Constitution*, 99 *Colum. L. Rev.* 1, 30 n.112 (1999). If one is looking for constitutional provisions to trash because of slavery, the Export Clause strikes me as a much better candidate than the apportionment rule.

40. See U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4.

41. 1 Farrand, supra note 20, at 592 (July 12, 1787).

42. 1 *id.*

43. 1 *id.* (footnote omitted). As a good southerner, Pinckney of course wanted slaves counted in full for this purpose. See 1 *id.* at 580 (July 11, 1787) (“Genl. Pinckney insisted that blacks be included in the rule of Representation, equally with the Whites”) (footnote omitted).



then to be subject to a tax on it. He hoped a clause would be inserted in the system restraining the Legislature from a taxing Exports.<sup>44</sup>

A couple of weeks later, General Pinckney emphasized how important the connection between slavery and exportation was. He “reminded the Convention that if the Committee [of Detail] should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report.”<sup>45</sup> This was no idle threat.<sup>46</sup> What was at stake in the debates on export taxation was whether the thirteen colonies would be able to agree on a Constitution at all: South Carolina and Georgia in particular were unwilling to compromise.<sup>47</sup> That’s why the draft prepared by the Committee of Detail provided the security Pinckney demanded: “No Tax or Duty shall be laid by the Legislature, on Articles exported from any State.”<sup>48</sup>

Gouverneur Morris wasn’t convinced that there was anything especially dangerous in the power to tax exports. Skeptics could find something to worry about with *any* power granted to the new national government: “However the legislative power may be formed, it will if disposed be able to ruin the Country.”<sup>49</sup> But, in Morris’s view, such doomsday concerns shouldn’t shut down the process of creating a Constitution. Of course, the delegates should do what they could to minimize risks, but, unless the national government was to be powerless — unless, that is, there was going to be no *nation* — the risks couldn’t be eliminated. Morris thought “local considerations

44. 1 id. at 592 (July 12, 1787).

45. 2 id. at 95 (July 23, 1787).

46. See also 2 id. at 374 (statement of Pierce Butler of South Carolina) (Aug. 22, 1787) (“Mr. Butler declared that he never would agree to the power of taxing exports.”).

47. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 10 The Papers of James Madison 214 (Robert A. Rutland et al. eds., 1977):

Some contended for an unlimited power over trade including exports as well as imports, and over slaves as well as other imports; some for such a power, provided the concurrence of two thirds of both Houses were required; Some for such a qualification of the power, with an exemption of exports and slaves, others for an exemption of exports only. The result is seen in the Constitution. S. Carolina & Georgia were inflexible on the point of the slaves.

48. 2 Farrand, supra note 20, at 129, 168-69.

49. 2 id. at 307 (Aug. 16, 1787).

ought not to impede the general interest,”<sup>50</sup> and he saw that happening with a short-sighted focus on exports.<sup>51</sup>

To try to soften the resistance of his fellow southerners, Madison played down the importance of sectional effects on export taxation, taking a number of not entirely consistent positions. At one point, he argued that the feared negative effects on the South were overblown:

As to the fear of disproportionate burdens on the more exporting States, it might be remarked that it was agreed on all hands that the revenue wd. principally be drawn from trade, and as only a given revenue would be needed, it was not material whether all should be drawn wholly from imports – or half from those, and half from exports – The imports and exports must be pretty nearly equal in every State – and relatively the same among the different States.<sup>52</sup>

At another time he suggested that there might be a case for the South’s initially bearing a disproportionate part of the burden: “The Southn. States being most in danger and most needing naval protection, could the less complain if the burden should be somewhat heaviest on them.”<sup>53</sup> And he tried to turn George Mason’s your-turn-will-come argument, used to scare northern delegates about

50. 2 id. at 360 (Aug. 21, 1787). Morris was responding to Hugh Williamson of North Carolina, who had said, “Tho’ N – C. has been taxed by Virga by a duty on 12,000 Hhs of her Tobo. exported thro’ Virga yet he would never agree to this power. Should it take place, it would destroy the last hope of an adoption of the plan.” 2 id.

51.

If no tax can be laid on exports, an embargo cannot be laid, though in time of war such a measure may be of critical importance – Tobacco, lumber, and live-stock are three objects belonging to different States, of which great advantage might be maed [sic] by a power to tax exports – To these may be added Ginseng and Masts for Ships by which a tax might be thrown on other nations. . . . The State of the Country also, will change, and render duties on exports, as skins, beaver & other peculiar raw materials, politic in the view of encouraging American Manufactures.

2 id. Morris’s hyperbole – if we can’t tax exports, we can’t impose an embargo – wasn’t generally accepted. Madison also used the need to be able to impose embargos to justify export taxation, but “Mr. Elseworth [Oliver Ellsworth of Connecticut] did not conceive an embargo by the Congress interdicted by this section [prohibiting export taxation].” 2 id. at 361 (Aug. 21, 1787). In addition, “Mr. McHenry [of Maryland] conceived that power to be included in the power of war.” 2 id. at 362 (Aug. 21, 1787).

52. 2 id. at 361 (Aug. 21, 1787).

53. 2 id. at 306-07 (Aug. 16, 1787).

what export taxation could eventually bring to their part of the country,<sup>54</sup> into something that might placate the South: “time will equalize the situation of the States in this matter.”<sup>55</sup>

But, even if they’d been internally consistent, assurances of this sort could go only so far. Whatever Morris and Madison thought, the parade of horrors was marching through the Constitutional Convention. The fears were real, whether or not well-founded, and piecemeal solutions were unlikely to work. Trying to craft a provision that would have protected against sectional taxation or that would have carved out specified categories of exported products from the taxing power could have tied up the Constitutional Convention for weeks, with no guarantee of success: “To examine and compare the States in relation to imports and exports will be opening a boundless field,” said Roger Sherman of Connecticut.<sup>56</sup> To end the bickering, Sherman argued, “It is best to prohibit the National legislature in all cases. The States will never give up all power over trade. An enumeration of particular articles would be difficult invidious and improper.”<sup>57</sup> The alternative to prohibiting export taxation – particularly with the slavery subtext in the debates – was no constitution at all: “A power to tax exports would shipwreck the whole.”<sup>58</sup>

Further evidence that the prohibition was intended to be total can be found in the unsuccessful attempts to amend the draft Export Clause, to preserve some role for national taxation of exports. For example, George Clymer of Pennsylvania thought export taxation should be permitted as long as it was being done for regulation of trade, but not otherwise. He therefore recommended “inserting after the word ‘duty’ [in the draft language of the Export Clause] the words ‘for the purpose of revenue,’”<sup>59</sup> thus precluding export taxation that had as its only purpose raising revenue. I don’t see how such a purpose-based test could be applied in practice, and Clymer’s motion

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54. See *supra* note 37 and accompanying text.

55. 2 Farrand, *supra* note 20, at 307 (Aug. 16, 1787).

56. 2 *id.* at 308 (Aug. 16, 1787); see also 2 *id.* at 363 (Aug. 21, 1787).

Mr Clymer of Pennsylvania remarked that every State might reason with regard to its particular productions, in the same manner as the Southern States. The middle States may apprehend an oppression of their wheat flour, provisions, &c. and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobo. rice &c – They may apprehend also combinations agst. them between the Eastern & Southern States as much as the latter can apprehend them between the Eastern & middle . . . .

57. 2 *id.* at 361 (Aug. 21, 1787).

58. 2 *id.* at 308 (Aug. 16, 1787).

59. 2 *id.* at 363 (Aug. 21, 1787).

was rejected, suggesting that the founders considered a tax's purpose to be irrelevant under the Export Clause.<sup>60</sup>

A more significant effort at amendment was an attempt, in late August of 1787, to add a supermajority requirement, which, it was hoped, would protect sectional interests in the ordinary course, but would make it possible for the national government to tax exports in extraordinary circumstances. Madison moved, with a second by James Wilson, "to require 2/3 of each House to tax exports – as a lesser evil than a total prohibition."<sup>61</sup> But, as Madison put it, "it passed in the Negative."<sup>62</sup> Five states voted "Yes" (New Hampshire, Massachusetts, New Jersey, Pennsylvania, and Delaware) and six voted "No" (Connecticut, Maryland, Virginia, North Carolina, South Carolina, and Georgia). Virginia's vote reflected a division in the delegation: George Washington joined Madison in the affirmative, but Mason, Edmund Randolph, and John Blair voted No. After that, the total prohibition passed 7-4 (with Massachusetts joining the six "No" votes on the Madison resolution),<sup>63</sup> and a later attempt by Gouverneur Morris and others to recommit the issue, with the hope that "the clauses relating to taxes on exports & to a navigation act . . . may form a bargain among the Northern & Southern States,"<sup>64</sup> also failed.

During the ratification period, there was relatively little public discussion of the merits of the Export Clause, and that shouldn't be surprising. Anti-Federalists concerned about the national taxing power had no reason to criticize a provision that was a limitation on that power. The Export Clause might not have gone far enough for most Anti-Federalists, but it wasn't a negative.<sup>65</sup> For supporters of the Constitution, criticizing the Export Clause would have been counterproductive. Although people like Gouverneur Morris, James Wilson, and James Madison favored a national power to tax exports, a Constitution with an Export Clause was better than no Constitution at all. Besides, since it was necessary for political reasons to stress limits on the national taxing power – any serious, public suggestion that the power was boundless would have been fatal to ratification – the Export Clause was likely to be praised even by those who wished it weren't there.

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60. That's the lesson the Supreme Court drew from this experience. See *Fairbank v. United States*, 181 U.S. 283, 292-93 (1901); *infra* note 83.

61. 2 Farrand, *supra* note 20, at 363 (Aug. 21, 1787). The Madison motion followed a suggestion by John Langdon of New Hampshire that if it's "feared that the Northern States will oppress the trade of the Southn[.], [t]his may be guarded agst by requiring the concurrence of 2/3 or 3/4 of the legislature in such cases." 2 *id.* at 359 (Aug. 21, 1787).

62. 2 *id.* at 363 (Aug. 21, 1787).

63. 2 *id.* at 363-64.

64. 2 *id.* at 374 (Aug. 22, 1787).

65. But see *supra* note 21 and accompanying text (noting Brutus's support for export taxation).

## II. *IBM* AND *U.S. SHOE*: THE MODERN SUPREME COURT AND THE EXPORT CLAUSE

To this point, I've argued that, at the time of the nation's founding, proponents and detractors agreed that the Export Clause was a serious limitation on congressional power; indeed, that's why the Clause was such a controversial subject. The delegates to the Constitutional Convention discussed taxes and duties that might be levied directly on exports – like those hypothesized by Justice Marshall in *Marbury*<sup>66</sup> – and concluded, to the dismay of some, that a complete prohibition on such taxation was necessary.<sup>67</sup>

The founders clearly intended to prohibit a levy that takes the form “one cent per pound of flour exported.” On that point, everyone agrees.<sup>68</sup> And, because the delegates discussed only the easy cases,<sup>69</sup> it's possible to see the Export Clause as doing nothing more than that.<sup>70</sup> But things can't be that simple. We know the Clause was meant to have real effect, and limiting its application to the most straightforward cases (thereby making it easy for Congress to draft around the limitation) would gut the Export Clause. If the purposes of the Clause are to be effectuated, it has to have greater scope than the founding debates intimated.<sup>71</sup>

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66. See *supra* note 12 and accompanying text.

67. When I use the term “direct” or “directly” in this context, I don't intend to raise the specter of direct taxation, which is subject to its own special rules (generally requiring apportionment among the states on the basis of respective populations). U.S. Const. art. I, § 2; U.S. Const. art. I, § 9, cl. 4; see generally Jensen, Apportionment, *supra* note 8. Instead I refer to taxes that are levied on the goods themselves, rather than on, say, associated insurance or on bills of lading attached to the goods.

68. Oh sure, there must be a postmodernist out there who could find fatal ambiguity on this point, but I'm not aware of anyone's trying to do that . . . yet.

69. That's not entirely true. There was brief discussion about whether the Export Clause would prohibit an embargo, suggesting that at least some delegates thought the scope of the Export Clause was *very* broad. See *supra* note 51.

70. The dissenters in *United States v. International Business Machines Corp.* came close to taking that position, with Justice Kennedy emphasizing that “specific taxes on exported goods were the only taxes mentioned . . . at the Constitutional Convention.” 517 U.S. 843, 873 (1996); see *infra* note 92; note 90 (accepting only grudgingly a broader conception of the Export Clause).

71. For most readers, this turns the usual assumption on its head – i.e., that Congress can impose a tax unless there is a clearly applicable limitation. But the anything-goes-unless-specifically-prohibited perspective ignores the founders' legitimate fears of concentrated power. The Constitution made possible many forms of national taxation that hadn't been available under the Articles of Confederation – in that respect it was a pro-tax document – but the taxing power was still to be constrained. I've argued elsewhere that the way to interpret taxing provisions in the Constitution, if one cares about being consistent with original understanding, is to require strict conformity with

Over the years, the judiciary struggled to give content to the Export Clause, to ensure that the purposes of the Export Clause were carried out. The Supreme Court evaluated quite a few levies under the Export Clause between 1876 and 1923, rejecting several,<sup>72</sup> and then the Court seemed to give up. From 1923 until 1996 it heard no Export Clause cases.<sup>73</sup> Perhaps the Court found the cases too boring (they often are); perhaps the Court despaired of developing any coherent understanding of the Export Clause (a good reason for despondency);<sup>74</sup> or perhaps the Court simply decided, as have most academic commentators, that taxation is an area in which Congress can do what it wants.<sup>75</sup> Whatever the reasons for the judicial work stoppage, it ended with *U.S. v. International Business Machines Corp.*<sup>76</sup> and *United States v. United States Shoe Corp.*,<sup>77</sup> decided in 1996 and 1998, respectively.

These cases didn't involve sexy topics – a tax on premiums paid to foreign insurers (*IBM*) and a tax levied to fund harbor maintenance (*U.S. Shoe*) – and they didn't make the front pages. As is often true, however, cases that don't lend themselves to cocktail chitchat may turn out to be the most important. For decades the Supreme Court had left Congress to determine the limits of its own power in taxation. But in both *IBM* and *U.S. Shoe*, the Court invoked the Constitution to reject the application of tax statutes. If nothing else, the cases demonstrate that the Export Clause can't be as simple as the Marshall hypotheticals suggest and that the judiciary once again has a role to play in evaluating the legitimacy of Internal Revenue Code provisions.

#### A. *IBM*

Even though, in 1996, the Supreme Court was looking at the Export Clause for the first time since 1923, the Court managed to dodge almost all the

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the rules. If there's doubt about constitutionality, it should be resolved against the statute. See Jensen, Apportionment, *supra* note 8, at 2414-19; *infra* Parts III.B.4 & IV.

72. See *infra* Part III.B.

73. The last case heard was *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923). See *infra* notes 314-24 and accompanying text.

74. Coherence would require that Export Clause jurisprudence not only make sense on its own terms, but also that the understanding of the Export Clause fit with the Import-Export Clause and the Commerce Clause. But since relatively few cases have required courts to try to square the various clauses, the jurisprudence of each clause has gone off in its own direction. As a result, it's become more and more difficult to fit the pieces together. See *infra* Part III.C.1.

75. See, e.g., Ackerman, *supra* note 39, at 3 (“[T]here are no significant limits on the national governments’s taxing, spending, and regulatory powers where the economy is concerned—other than the requirement that government compensate owners if their property is taken for public purposes.”).

76. 517 U.S. 843 (1996).

77. 523 U.S. 360 (1998).

important interpretational issues in *U.S. v. IBM*.<sup>78</sup> For those who think the Court should be providing detailed guidance about the meaning of constitutional provisions, *IBM* was an exercise in frustration, as I'll demonstrate below.

Frustrating though it was, the case does force us to confront some basic issues in interpreting the Export Clause. In the following pages, I'll use *IBM* as a basis for discussing the nature and purpose of the Export Clause, the significance of early revenue acts in interpreting the Export Clause, and the coherence of the 1915 precedent, *Thames & Mersey Marine Insurance Co. v. United States*,<sup>79</sup> on which the *IBM* Court relied. Although the Court followed *Thames & Mersey* in a mindless way, I'll argue that the old case actually had some merit and that *IBM* therefore came to a defensible result.

*1. The Purpose and Scope of the Export Clause* – In *IBM*, the Court struck down what Justice Thomas called, in the opening paragraph of his opinion for the Court, a “generally applicable, nondiscriminatory federal tax on goods in export transit.”<sup>80</sup> With the case characterized in that way by six justices,<sup>81</sup> *IBM* reinforced the principle that the Export Clause is an absolute prohibition: a tax or duty can be forbidden by the Export Clause even if Congress doesn't single out exports, or a subset of exports, for discriminatory treatment. Relying on one of the Export Clause's original purposes, to prevent taxation directed at the southern states, the government had argued that the tax was constitutional precisely because it didn't discriminate against exports. By its terms, however, the Export Clause has broader sweep, as the Court explained:

The Government's policy argument – that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes – cannot be squared with the broad language of the Export Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.<sup>82</sup>

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78. 517 U.S. 843 (1996).

79. 237 U.S. 19 (1915).

80. *IBM*, 517 U.S. at 845.

81. Justices Kennedy and Ginsburg dissented; Justice Stevens didn't participate. *Id.* at 844.

82. *Id.* at 861; see also *id.* at 852 (noting that “text . . . expressly prohibits Congress from laying any tax or duty on exports”); *id.* at 859-60 (“While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not . . .”); 2 Farrand, *supra* note 20, at 220 (quoting Rufus King of Massachusetts to the effect that “[i]n two great points the hands of the Legislature were

That is, it was *because of* the fear of discrimination that a prohibition on all export taxation was deemed necessary in the Constitution, and that's the way earlier cases had interpreted the Export Clause.<sup>83</sup>

So far, so good.<sup>84</sup> The rest of Justice Thomas's statement of the case, however, assumed the conclusion. He characterized the tax as being "on goods in export transport," which, if true, clearly brought the Export Clause into play. But whether the tax was really on exported articles should have been a key issue, not a given. In form, the tax was an excise on premiums paid to certain foreign insurers (four cents per dollar of premium),<sup>85</sup> not a tax laid directly on

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absolutely tied. [T]he importation of slaves could not be prohibited – exports could not be taxed.") (Aug. 8, 1787).

83. In *Fairbank v. United States*, the Court wrote, "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" 181 U.S. 283, 290 (1901). "[T]he purpose of the restriction is that exportation – all exportation – shall be free from national burden." *Id.* at 292. The Court gave as evidence the Constitutional Convention's rejection of a motion that the "power of taxing Exports . . . should be restrained to regulations of trade, <by inserting after the word 'duty' the words> 'for the purpose of revenue.'" 2 Farrand, *supra* note 20, at 363 (Aug. 21, 1787) (citation omitted); see *supra* notes 59-60 and accompanying text. The inference is that the founders intended to prohibit taxing exports regardless of the purpose behind a tax. *Fairbank*, 181 U.S. at 292.

The levy at issue in *Fairbank* did discriminate against exports, but in other cases the Court used the Export Clause to strike down nondiscriminatory taxes. See, e.g., *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68-69 (1923); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 26-27 (1915); *United States v. Hvoslef*, 237 U.S. 1, 13-16 (1915).

84. The government had argued that developments in interpreting the Import-Export Clause, see *infra* note 95, had invalidated the old authority on the discrimination issue. The Court responded in two ways. First, it seemed altogether to reject the relevance of Import-Export Clause jurisprudence to this analysis. The "textual command" of the Export Clause is absolute, without a hint that lack of discrimination matters. See *infra* notes 128-132 and accompanying text. In the alternative, however, Justice Thomas also suggested that the government had failed to convince the Court that a *state's* nondiscriminatory levy on exports would be acceptable under the Import-Export Clause. See *infra* note 132.

85. IRC § 4371(1). The tax applies to premiums paid to insurers not subject to U.S. income taxation. See IRC § 4372 (defining "foreign insurer").

The first codification of American revenue statutes, the Internal Revenue Code of 1939, had provided for taxation of premiums on some limited categories of insurance issued by foreign insurers, including insurance of "property within the United States . . . against peril by sea or on inland waters," Revenue Act of 1939, § 1804, 53 Stat. 1, 197-98, which applied both to premiums on export insurance ("peril by sea") and premiums on inland transfers. In 1942, the stamp tax was extended to apply to "insurance policies of all kinds" issued by such insurers. H.R. Rep. No. 77-2333, at 61 (1942); see Revenue Act of 1942, Pub. L. No. 77-753, § 502, 56 Stat. 798, 955-56



exported articles.<sup>86</sup> *IBM* challenged the levy as it applied to insurance on exports,<sup>87</sup> but it's not obvious that the Export Clause has anything to do with such a levy. Simply calling the insurance tax a duty "on goods in export transport," as Justice Thomas did, seemed to leave nothing for the Court to decide.<sup>88</sup>

It had been clear for over a century that a tax can implicate the Export Clause even if not levied on exported articles as straightforwardly as the duties hypothesized in *Marbury v. Madison*.<sup>89</sup> If the Export Clause prohibited nothing but taxes imposed directly on goods, it would be easy to circumvent. Instead of taxing an exported article, for example, Congress might impose a tax on the paperwork attached to the article.<sup>90</sup> (Congress tried to do just that several times in the nation's history.<sup>91</sup>) The founders didn't discuss such possibilities in their deliberations on the Export Clause, but it's hard to imagine they would have been indifferent to obvious attempts to sidestep constitutional rules.<sup>92</sup>

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(amending Code section 1804). The change was intended partly to raise revenue for the war and partly to "eliminate an unwarranted competitive advantage" for foreign insurers. H.R. Rep. No. 77-2333, *supra*, at 61. So far as I can tell, the enactment of the 1939 Code and the amendment in 1942 were made without any consideration of Export Clause problems.

86. As the dissent noted, "The statute does not discriminate against exports. Indeed, it does not even mention them." *IBM*, 517 U.S. at 864 (Kennedy, J., dissenting).

87. When *IBM* shipped products to a foreign subsidiary, the sub often placed insurance on the shipment with a foreign insurer. *Id.* at 845.

88. See *id.* at 863-64 (Kennedy, J., dissenting) ("In so reformulating the question, the Court makes the assumption that [the] insurance tax is a tax on export goods, thereby adopting the premise . . . that I had thought we were to address.").

89. See *supra* text accompanying note 12.

90. The *IBM* dissenters seemed to accept this point:

The protections of the Export Clause must extend, *perhaps*, somewhat beyond specific taxes on goods, for "[I]f it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it."

*IBM*, 517 U.S. at 879 (Kennedy, J., dissenting) (emphasis added) (quoting *United States v. Hvoslef*, 237 U.S. 1, 13 (1915)). With "must" and "perhaps" juxtaposed in that way, however, the acceptance was grudging at best. See also *infra* note 92 (noting Kennedy's emphasis on "specific taxes" in founding debates).

91. See *infra* notes 96-97, 106, and 259-70 and accompanying text (describing taxes on bills of lading imposed in 1797, 1862, and 1898).

92. In arguing for a limited role for the Export Clause, Justice Kennedy correctly noted that "specific taxes on exported goods were the only taxes mentioned in the debate at the Constitutional Convention," *IBM*, 517 U.S. at 873 (Kennedy, J. dissenting), but the founding generation wasn't oblivious to substance-over-form

The critical question in a case like *IBM* therefore ought to be how close a connection between tax and exported good is needed before there's an Export Clause problem. At one level everything's connected to everything else, of course – we hear that proposition often in popular discourse – but that principle shouldn't convert every levy into a constitutional issue. The *IBM* Court could have concluded that the tax on insurance premiums was a tax on an ancillary service, insurance, rather than on the exported articles – not close enough, that is, to bring the Export Clause into play.<sup>93</sup> And dissenting Justices Kennedy and Ginsburg thought that was how the case should have been decided. Because the tax on premiums “taxes a service distinct from the goods and is not a proxy for taxing the goods,” Kennedy wrote, “it does not fall within the prohibition of the Export Clause.”<sup>94</sup>

2. *Eighteenth Century Legislation as an Indication of Original Understanding* – The test enunciated by the dissenters – looking to whether the tax reached “a service distinct from the goods and [was] not a proxy for taxing the goods” – was derived from late twentieth-century cases interpreting the Import-Export Clause (which, among other things, limits *state* taxation of exports<sup>95</sup>). I'll turn to the merits of that position in a moment, but I first want to consider, and reject, the proposition that early congressional practice proves the constitutional validity of a tax on export insurance.

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matters. Chief Justice Marshall, in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827), raised a substance-over-form hypothetical involving the Export Clause – a hypo that he thought had a clear answer. See *infra* notes 254-56 and accompanying text. On the other hand, Congress in 1797 enacted a stamp tax that appears to have been, at least in part, an attempt to circumvent the Export Clause. The 1797 stamp tax was valid only if the Export Clause was understood in the most formalistic way possible, to apply only to “specific taxes on exported goods.” See *infra* Part II.A.2.

93. For what it's worth, Congress didn't seem to have bad motives in enacting the modern version of the tax on insurance premiums. See *supra* note 85. But it also didn't go out of its way to address the constitutional problems raised in an earlier Supreme Court decision. See *infra* note 119.

94. *IBM*, 517 U.S. at 864 (Kennedy, J., dissenting).

95.

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

U.S. Const. art. I, § 10, cl. 2.

In *IBM*, dissenting Justices Kennedy and Ginsburg pointed to an early revenue act, enacted by the Fifth Congress, in support of just that proposition. Congress in 1797 approved “An Act laying Duties on stamped Vellum, Parchment and Paper,” titled to suggest that duties were being laid on legal documents, like bills of lading, rather than on goods. The 1797 Act included a stamp duty on

any policy of insurance or instrument in nature thereof, whereby any ships, vessels or goods going from one district to another in the United States, or from the United States to any foreign port or place, shall be insured, to wit, if going from one district to another in the United States, twenty-five cents; if going from the United States to any foreign port or place, when the sum for which insurance is made shall not exceed five hundred dollars, twenty-five cents; and when the sum insured shall exceed five hundred dollars, one dollar.<sup>96</sup>

With that statutory language, it’s clear the Fifth Congress knew the duty had export implications. The 1797 Act stayed on the books for five years, and, when it was repealed under the Presidency of Thomas Jefferson, it was because of a policy shift, not because of any perceived constitutional problems.<sup>97</sup>

Justices Kennedy and Ginsburg thought, as had four dissenters in *Fairbank v. United States*,<sup>98</sup> decided in 1901, that the 1797 statute should be given controlling weight in determining the original understanding of the Export Clause: “We have always been reluctant to say a statute of this early origin offends the Constitution, absent clear inconsistency.”<sup>99</sup> And Kennedy and Ginsburg rejected the idea that the Fifth Congress had been trying

96. Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, 527.

97. The tax rate had been changed by the Act of Feb. 28, 1799, ch. 17, 1 Stat. 622, and repeal came with the Act of Apr. 6, 1802, ch. 19, 2 Stat. 148. Henry Carter Adams, *Taxation in the United States 1789-1816*, at 57 (1884) (“[U]pon the accession of Jefferson to the Presidency, it was endeavored to change radically the financial policy of the United States. . . . [I]n 1802, all internal and direct taxes were abolished . . .”). A similar levy was enacted during the Civil War. See Act of July 1, 1862, ch. 119, 12 Stat. 432, continued by Act of June 30, 1864, ch. 173, 13 Stat. 223, 291, repealed by Act of June 6, 1872, ch. 315, 17 Stat. 230, 256. See Randolph E. Paul, *Taxation in the United States* 6 (1954).

98. 181 U.S. 283 (1901); see *infra* notes 258-66 and accompanying text.

99. *IBM*, 517 U.S. at 875 (Kennedy, J., dissenting) (citing *Knowlton v. Moore*, 178 U.S. 41, 56 (1900) finding support in 1797 Act, which included a legacy tax, for congressional power to enact unapportioned estate tax); *Ludecke v. Watkins*, 335 U.S. 160, 171 (1948) (“The [Alien Enemy Act of 1798] is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights.”).

to circumvent the Export Clause. The early Congresses were scrupulous in honoring the Export Clause by making specific exemptions for exports in laws imposing general taxes on goods. Their refusal to grant exporters similar exemptions from insurance taxes indicates that those taxes were not viewed as equivalent to taxes on goods.<sup>100</sup>

In the Kennedy-Ginsburg view, when a founding Congress acted with noble motives in enacting a statute that wasn't clearly inconsistent with the Export Clause, we should assume that constitutional requirements, as originally understood, had been satisfied. Therefore, Kennedy and Ginsburg concluded, "[t]axes on insurance do not offend the Export Clause."<sup>101</sup>

Using the 1797 Act as a definitive statement of original intent has its problems. For one thing, some understandings implicit in the Act were discarded long ago, and properly so. It should be no surprise to legal scholars that Congress, even in 1797, wasn't always careful in drafting. Unless we're going to revive a few suspect ideas – for example, that the term "export"

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100. *Id.* at 876 (Kennedy, J. dissenting) (citing Act of Mar. 3, 1791, ch. 15, § 51, 1 Stat. 199, 210-11 (tax on distilled spirits); Act of June 5, 1794, ch. 51, § 14, 1 Stat. 384, 387 (tax on snuff and refined sugar)). Section 51 of the 1791 Act, for example, provided that

if any of the said spirits [otherwise subject to the levy]. . . shall, after the last day of June next, be exported from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, by way of drawback, equal to the duties thereupon, according to the rates in each case by this act imposed.

Act of Mar. 3, 1791, *supra*, § 51, 1 Stat. at 210; see also Act of June 5, 1794, *supra*, § 14, 1 Stat. at 387 (providing similar drawback). Refunding duties paid on exported spirits, including spirits not earmarked for exportation at the time of distillation, was more generous than the modern understanding requires. See *infra* Part III.B.1.b (discussing Court's conclusion that pre-export taxation of ultimately exported goods is permissible).

101. *IBM*, 517 U.S. at 876 (Kennedy, J. dissenting).

includes goods that merely cross state lines<sup>102</sup> – we can’t defer totally to the Fifth Congress.

And the *IBM* dissenters were too generous in their praise for that Congress. Federalists in power didn’t always act in ways consistent with constitutional language, particularly not by 1797,<sup>103</sup> with Washington gone, Federalism on the wane, and political nastiness at a high level.<sup>104</sup> This was, we should remember, the same Congress that enacted the Alien and Sedition Acts, which aren’t often used as appropriate indicators of constitutional meaning.<sup>105</sup>

The 1797 Act itself included at least one provision that calls the highmindedness of Congress into question – a tax on bills of lading for “goods to be exported to any foreign port or place” imposed at a rate higher than that applicable to domestic bills of lading.<sup>106</sup> Yes, the late eighteenth century was a more formalistic time than today, and *maybe* the tax on bills of lading wasn’t as blatant a violation of the Export Clause as a tax imposed directly on exported goods would have been. But obviously Congress legislated with the Clause in mind – otherwise why not simply tax the goods? – and it’s hard to see this part

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102. See *supra* note 9 (quoting 1797 Act language including in category of “goods . . . exported [those transported] from one district to another district of the United States, not being in the same State”). The founders weren’t always clear on this point because the states had a much stronger sense of independence in the post-Revolutionary period than we recognize today. But implicit in almost all the founding debates was the assumption that “exports” referred only to transfers to foreign nations, and, in any event, that’s clearly the law today. See *United States v. Hvoslef*, 237 U.S. 1, 13 (1915).

103. We’re talking about the *Fifth* Congress, after all. Even if early Congresses are entitled to deference in constitutional matters, the Fifth is presumably entitled to less than the First or Second.

104. Interpretations of the early Supreme Court, made up of Federalist justices trying to prop up a Federalist government, shouldn’t be taken at face value in determining original understanding. See Jensen, *Taxing Power*, *supra* note 8, at 1078 n.115. The same principle applies here: we need to be careful in attributing constitutional principles to political actors who, in time-dishonored fashion, may have been trying to push the limits of their power. Cf. *Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) (Souter, J., concurring) (rejecting idea that public acts of founding generation in support of religion are controlling in interpreting Establishment Clause: the acts “prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle”).

105. See Act of July 6, 1798, ch. 66, 1 Stat. 577 (“An Act respecting Alien Enemies”); Act of July 14, 1798, ch. 74, 1 Stat. 596 (“An Act in addition to the act, entitled ‘An Act for the punishment of certain crimes against the United States’”).

106. The 1797 Act reached “[a]ny note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same state, ten cents; if to be exported to any foreign port or place, twenty-five cents.” Act of July 6, 1797, Ch. 10, § 1, 1 Stat. 527, 528.

of the 1797 Act as anything other than a transparent attempt to circumvent the limitations of the Export Clause.<sup>107</sup>

What participants in the early governments did is relevant in discerning original understanding, of course, and I don't mean to suggest otherwise. But the *IBM* majority's unwillingness to defer to the Fifth Congress on matters of constitutional interpretation was eminently justifiable. For many reasons, we should resist using the 1797 Act as a definitive indication of constitutional meaning.<sup>108</sup>

3. *The 1915 Precedent: Thames & Mersey* – However imperfect the Fifth Congress's constitutional expertise may have been, or however indifferent that Congress may have been to constitutional limitations, Justices Kennedy and Ginsburg's position in *IBM* ultimately didn't depend on unqualified acceptance of the 1797 Act. The constitutional status of a tax that reached

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107. In *United States v. Fairbank*, 181 U.S. 283 (1901), a divided Court invalidated a statute similar to the 1797 Act in its application to, and discrimination against, exports, see Act of June 13, 1898, ch. 448, § 6, 30 Stat. 448, holding in effect that there was “clear inconsistency” between the Export Clause and the act: “when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged.” *Fairbank*, 181 U.S. at 311; see *infra* notes 258-266 and accompanying text. In *IBM*, Justice Kennedy noted in the dissent that it was possible to accept *Fairbank*'s conclusion that a tax on bills of lading was a proxy for taxing the goods, while still approving a tax on insurance premiums:

The tax here, unlike the stamp duty in *Fairbank*, does not discriminate against exports; it taxes a service distinct from the act of exporting; and it has the clear regulatory purpose of eliminating a perceived competitive advantage of foreign insurers. Viewed in this light, the conclusion of the Fifth Congress that the Export Clause did not bar any tax on export insurance should have great weight in assessing the constitutionality of § 4371, and *Fairbank* is not to the contrary.

*IBM*, 517 U.S. at 876-77 (Kennedy J., dissenting). The first quoted sentence makes sense: if we were starting from scratch, those distinctions might justify different treatment for a tax on insurance and a tax on bills of lading. But the 1797 Act as a whole hardly supports Kennedy's general proposition that we ought to defer to the Fifth Congress because that body was sensitive to constitutional restraints.

108. In addition to the tax on bills of lading, the 1797 Act contained another provision, a tax on charter parties, the constitutionality of which was called into doubt by later litigation. See Act of July 6, 1797, ch. 10, § 1, 1 Stat. 527, 528 (imposing tax of one dollar on “any charter-party”); *United States v. Hvoslef*, 237 U.S. 1 (1915) (striking down 1898 tax on charter parties); *infra* notes 271-281 and accompanying text (describing *Hvoslef*).

export insurance wasn't an issue with a clearly right answer derivable from constitutional text, structure, or original understanding; this sort of issue simply hadn't come up in founding debates.<sup>109</sup> As a result, Justices Kennedy and Ginsburg's conclusion that the tax on insurance premiums violated the Export Clause because it reached "a service distinct from the goods and [was] not a proxy for taxing the goods"<sup>110</sup> was a plausible interpretation of the Clause. If the *IBM* Court had been writing on a clean slate, the dissenters might have carried the day.<sup>111</sup>

But *IBM* wasn't a case of first impression, and taxpayer *IBM* had precedent on its side—precedent that, as I'll demonstrate below, had something to be said for it.<sup>112</sup> In 1915, in *Thames & Mersey Marine Insurance Co. v. United States*,<sup>113</sup> the Court used the Export Clause to invalidate an 1898 federal stamp tax on policies insuring against marine risks insofar as the policies related to export shipments. (The tax, part of a comprehensive scheme to raise funds for the Spanish-American War, applied to insurance "upon property . . . whether against peril by sea or on inland waters," and was measured by the "amount of premium charged."<sup>114</sup>) The *Thames & Mersey* Court said the critical question was whether "the tax upon such policies [is] so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation."<sup>115</sup> Determining substance depended on "the actual course of trade,"<sup>116</sup> and, because it couldn't "be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation,"<sup>117</sup> the Court held that the tax on insurance was forbidden by the Export Clause.

The parties in *IBM* agreed there was no fundamental difference between the tax in *Thames & Mersey* and the tax in *IBM*, and that's probably

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109. One might argue, however, that, given the strong feelings against export taxation evidenced in those debates, see *supra* Part I, any doubt about the legitimacy of a tax with ties to exportation ought to be resolved against the tax. See *infra* Parts III.B. 4.d. and IV.

110. *IBM*, 517 U.S. at 864 (Kennedy, J., dissenting).

111. I emphasize the "might," however, because I also think it possible that a court could have concluded that the insurance premiums *were* a proxy for the exported goods. See *infra* notes 135, 137-144, and 148 and accompanying text.

112. See *infra* notes 135, 137-144, and 148 and accompanying text.

113. 237 U.S. 19 (1915).

114. See Act of June 13, 1898, ch. 448, 30 Stat. 448, 461 (imposing tax on, among other things, marine, inland, and fire insurance policies "upon property . . . whether against peril by sea or on inland waters," measured by "the amount of premium charged, one-half of one cent on each dollar or fractional part thereof").

115. *Thames & Mersey*, 237 U.S. at 25.

116. *Id.* at 26.

117. *Id.*

right.<sup>118</sup> (In fact, the modern tax on premiums paid to foreign insurers is traceable to the earlier statute. The language today is more neutral than it used to be – making no reference to exports or anything smacking of exports – but the language change wasn’t a response to constitutional difficulties.<sup>119</sup>) As Justice Thomas put it, “A tax on policies insuring exports is not, precisely speaking, the same as a tax on exports, but *Thames & Mersey* held that they

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118. The tracing problem (which premiums related to exportation?) was easier on the facts of *Thames & Mersey* than on the facts of *IBM*:

When the shipper had a cargo of goods ready for export, ‘designated and set apart from all other goods for shipment on a particular ship,’ he filled up certain blank forms of declaration (furnished to him by the Company) in accordance with the facts of each case and delivered the declaration to the Company at or about the time of the sailing of the vessel with the cargo on board. In many cases the declaration was not delivered until the vessel had sailed. Upon receiving each of the declarations, the Company entered the amount and rate of the premium and delivered to the shipper a certificate of insurance by which the goods described were insured for the voyage and upon the vessel specified.

*Id.* at 22-23. Accordingly, the Court was “not called upon to deal with transactions which merely anticipate exportation, of [sic] with goods that are not in the course of being actually exported.” *Id.* at 25.

*IBM* was harder, and, even then, Justice Kennedy complained that “[n]ot every case will fit the simple model here: a policy written for a single shipment; coverage beginning only with a common carrier picking up the goods from the warehouse or manufacturing plant.” *IBM*, 517 U.S. at 871 (Kennedy, J., dissenting). He saw enforcement nightmares: “It would appear . . . that if a company has an open policy from a foreign insurer covering the domestic leg of the journey for all shipments, the [Internal Revenue Service] must untangle what portion of the insurance covered goods that had commenced the process of exportation, and then prorate the tax.” *Id.* One answer to Kennedy is that the *Service* doesn’t have to untangle anything. Taxpayers must make out a case for exemption.

119. The connection between the 1898 statute and the current Internal Revenue Code isn’t direct. The modern statute is intended to protect the income tax system, by taxing premiums paid to foreign insurers that aren’t subject to U.S. taxation, see *supra* note 85 and accompanying text, and there was no income tax, personal or corporate, in effect in 1898.

But the reference to “against peril by sea or on inland waters” in the 1898 Act was identical to the phrase used in IRC of 1939 § 1804, the predecessor of current IRC § 4371. See *supra* notes 85 and 114 and accompanying text. Thus, despite the 1915 decision in *Thames & Mersey*, Congress retained statutory language that directly implicated the Export Clause. The change to more neutral language was part of a 1942 effort to broaden the application of the tax to “insurance policies of all kinds.” See *supra* note 85 and accompanying text.



were functionally the same under the Export Clause.”<sup>120</sup> If *Thames & Mersey* remained good law, therefore, the result in *IBM* was foreordained.

It wasn’t clear that *Thames & Mersey* still had vitality, however, and that’s why there was a serious issue crying for resolution in *IBM*. A lot had changed doctrinally since 1915.<sup>121</sup> Courts had become much more willing to let Congress unilaterally define what can be taxed;<sup>122</sup> the national power over commerce had expanded exponentially;<sup>123</sup> and cases under the Import-Export Clause seemed to have contracted the judicial understanding of what constitutes a tax on exports.<sup>124</sup> With a lot of favorable authority on its side, the government asked to have *Thames & Mersey* overruled.<sup>125</sup> That’s what *IBM* was – or should have been – about.

Indeed, it’s difficult to see why the Court agreed to hear *IBM* unless it was going to reconsider *Thames & Mersey*. Nevertheless, that didn’t happen. In one chunk of his opinion for the Court, Justice Thomas discussed *stare decisis*, rather than the merits of *Thames & Mersey*, concluding that *IBM* wasn’t a case in which rejecting precedent – precedent that had established a “workable” rule – was appropriate.<sup>126</sup> Moreover, to the dissenters’ dismay, Thomas said the government hadn’t even argued that a tax on services ought to

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120. *IBM*, 517 U.S. at 854.

121. Furthermore, as the *IBM* dissenters noted, the *Thames & Mersey* Court hadn’t been briefed on, and therefore hadn’t considered, the relevance of the 1797 statute. *Id.* at 877 (Kennedy, J., dissenting); *supra* Part II.A.2. It would have been possible, therefore, for the Court in 1996 to have concluded that the Court in 1915 had, through no fault of its own, misinterpreted original understanding.

122. Cf. Ackerman, *supra* note 39, at 3 (“Under the constitutional regime inaugurated by the New Deal, there are no significant limits on the national governments’ taxing, spending, and regulatory powers where the economy is concerned – other than the requirement that government compensate owners if their property is taken for public purposes.”).

123. The power had expanded to such a point that it was considered noteworthy in academia when the modern Court held that Congress’s power under the Commerce Clause *wasn’t* limitless. See *United States v. Lopez*, 514 U.S. 549 (1995).

124. The *IBM* dissenters’ position, that the tax on insurance premiums “taxes a service distinct from the goods and is not a proxy for taxing the goods,” and, as a result, “does not fall within the prohibition of the Export Clause,” *IBM*, 517 U.S. at 863 (Kennedy, J., dissenting) derived, in part, from *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Dep’t of Revenue of Wash. v. Ass’n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978), two Import-Export Clause cases.

125. See *IBM*, 517 U.S. at 850. Because *Thames & Mersey* hadn’t been explicitly overruled, the lower courts in *IBM* felt bound to follow the case. See *IBM*, 31 Fed. Cl. 500, 506-07 (1994), *aff’d*, 59 F.3d 1234, 1238-39 (Fed. Cir. 1995).

126. See *IBM*, 517 U.S. at 856 (“*Thames & Mersey* has been controlling precedent for over 80 years, and the Government does not, indeed could not, argue that the rule established there is ‘unworkable.’ . . . [T]here is simply no evidence that *Thames & Mersey* has caused or will cause uncertainty in commercial export transactions.”). But see *Leading Cases*, *supra* note 3, at 201-05 (questioning reliance on *stare decisis* in this case).

be treated as distinct from a tax on exported articles, and the Court therefore wouldn't consider that obviously critical issue.<sup>127</sup> Finally, the Court rejected the government's argument that developments after 1915 in interpreting the Commerce Clause and the Import-Export Clause were relevant to the Export Clause.<sup>128</sup> Those other provisions contain nothing like the clear "textual command" of the Export Clause,<sup>129</sup> said the Court, and it therefore discarded the long-time understanding that the Export Clause and the Import-Export

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127. Justice Thomas wrote that

one may question the finding in *Thames & Mersey* that the tax was essentially a tax upon the exportation itself. . . . [T]he marine insurance policies in *Thames & Mersey* arguably "had a value apart from the value of the goods." . . . Nevertheless, the Government apparently has chosen not to challenge that aspect of *Thames & Mersey* in this case.

*IBM*, 517 U.S. at 854 (quoting *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 756 n.21 (1978)). It would have been inappropriate, he wrote, to examine the issue "without the benefit of the parties' briefing," *id.*, and that point was tied to the value of precedent: "The principles that animate our policy of *stare decisis* caution against overruling a longstanding precedent on a theory not argued by the parties . . ." *Id.* at 856. The dissenters, however, said the government had made no such concession. See *id.* at 866 (Kennedy, J., dissenting).

128. In dissent, Justice Kennedy stressed that "the *Thames & Mersey* Court relied in part on the theory that insurance is not commerce," *id.* at 877 (Kennedy, J., dissenting), an understanding abandoned long ago. And Kennedy noted the Court had approved

a state gross-receipts tax on a steam railroad, even as applied to the railroad's handling of exports and imports from its marine terminal . . . . The tax "was not on the *goods* but on the *handling* of them at the port," . . . and "when the tax is on activities connected with the export or import the range of immunity cannot be so wide."

*Id.* at 878 (quoting *Canton R.R. Co. v. Rogan*, 340 U.S. 511, 514-15 (1951)); see also *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978) (holding state taxation on services, when not measured by value of goods, acceptable under Import-Export Clause).

129. See *IBM*, 517 U.S. at 851 ("Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid.").

Clause should be read as a package, with mutually reinforcing goals.<sup>130</sup> John Marshall had written, in 1827, that “[t]here is some diversity in language [between the clauses], but none is perceivable in the act which is prohibited.”<sup>131</sup> The *IBM* Court thought it knew better, however, apparently concluding that the Export Clause is *sui generis*.<sup>132</sup>

After all this bobbing and weaving, none of which directly concerned the merits of *Thames & Mersey*, the Court concluded that “[r]eexamination of the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day.”<sup>133</sup> As a result, the key issue in the case, perhaps the *only* issue, wasn’t addressed – a peculiar way for the Court to handle its first Export Clause case in decades.<sup>134</sup>

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130.

We are . . . hesitant to adopt the Import-Export Clause’s policy-based analysis without some indication that the Export Clause was intended to alleviate the same “evils” to which the Import-Export Clause was directed. Unlike the Import-Export Clause, which was intended to protect federal supremacy in international commerce, to preserve federal revenue from import duties and imposts, and to prevent coastal States with ports from taking unfair advantage of inland States, . . . the Export Clause serves none of those goals. Indeed, textually, the Export Clause does quite the opposite. It specifically prohibits Congress from regulating international commerce through export taxes, disallows any attempt to raise federal revenue from exports, and has no direct effect on the way the States treat imports and exports.

*Id.* at 859.

131. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827).

132. See *IBM*, 517 U.S. at 857 (“We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. . . . [M]eaningful textual differences exist [between the two Clauses] and should not be overlooked.”). The Court didn’t summarily reject the relevance of all Import-Export Clause cases in this context. Justice Thomas suggested that Import-Export Clause jurisprudence precludes state-imposed, “nondiscriminatory taxes on imports and exports in transit,” *id.* at 861 – or at least that the government hadn’t convinced him otherwise – just as the Export Clause precludes such taxes. The Court nonetheless refused to use Import-Export cases as aids in determining what constitutes a tax or duty on exported articles. See *infra* Part III.C (discussing whether Export Clause is really unique).

133. *IBM*, 517 U.S. at 863.

134. Justice Kennedy complained: “It mystifies me that in a constitutional case, where our decision is not subject to congressional revision, the Court here accepts the Government’s purported concession of the meaning of the Export Clause without any

*Thames & Mersey* wasn't necessarily wrongly decided, and the result in *IBM* therefore wasn't necessarily wrong either. Evaluating whether a levy is really on exports can't be as easy as Chief Justice Marshall's examples in *Marbury* might have suggested.<sup>135</sup> Furthermore, had the Court reached the merits of *Thames & Mersey* in *IBM*, it might have concluded that the tax on premiums was in fact a "proxy for taxing the goods," to borrow a phrase from the dissenters,<sup>136</sup> and therefore invalid.

In fact, *Thames & Mersey* made some sense. I can imagine at least two ways in which the Court might have concluded that the taxes in *IBM* and *Thames & Mersey* were "prox[ies] for taxing the goods," and that *Thames & Mersey* therefore had been rightly decided. First, in both cases, the taxes were measured by the amount of insurance premiums paid,<sup>137</sup> a figure that correlates with the value of exported cargo. Insurance rates reflect other factors as well, of course – as the dissenters emphasized<sup>138</sup> – but, all other things being equal, the higher the value of cargo, the higher the cost of insurance, and therefore the higher any tax on premiums.<sup>139</sup> If, as one commentator sympathetic to the Kennedy-Ginsburg dissent has suggested, the question should have been

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independent examination of the question, and then invokes the Export Clause to strike down a statute." *Id.* at 870 (Kennedy, J., dissenting).

135. See *supra* text accompanying note 12. Once we get beyond the idea that the only cases to which the Export Clause might apply are *Marbury*-like hypotheticals — and no one thinks the Export Clause is so limited, see *supra* note 90 — attempts to define a bright-line rule are doomed. And they might be doomed anyway. Even with a tax on the exportation of flour, say, it's still necessary to determine the point at which a tax attaches to flour that might, or might not, be headed for exportation. No bright-line rule can control that determination. See *infra* Part III.B.3.

136. See *supra* text accompanying note 94.

137. See *supra* notes 85 and 114 and accompanying text.

138. *IBM*, 517 U.S. at 879-80 (Kennedy, J., dissenting) ("Premiums, i.e., the price of insurance, depend on risk of loss and value of the goods is only one component factor of risk.").

139. Assume A ships one \$100 widget and B ships two \$100 widgets on the same vessel. The three widgets are stored in precisely the same circumstances, and the likelihood of loss is therefore the same. Ignoring any volume discounts, or any other reason for treating A or B specially, one would expect B's insurance bill to be twice A's.

Since the same analysis could also apply under the Import-Export Clause, the Court could have decided *IBM* in favor of the taxpayer without also concluding, as it did, that Import-Export Clause cases are irrelevant in interpreting the Export Clause. In *Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978), the Court held that a state tax was permissible because it didn't "relate[] to the value of the goods, and therefore . . . [wasn't] taxation upon the goods themselves." *Id.* at 757. Insurance premiums *do* relate to the value of goods, and a tax on premiums could therefore be characterized as a tax on the insured goods – under either clause.

“whether the cost of the export service taxed correlate[d] tightly with the value of the exported goods,”<sup>140</sup> the Court might have answered that question “Yes.”

So the Court could have taken the dissenters’ test on its own terms, and concluded that the tax on insurance premiums failed the test. (The assumption of the *IBM* dissenters, and of the commentator, was that the “proxy” test would automatically have led to upholding the tax,<sup>141</sup> but that’s not necessarily true.) And there’s another way the *IBM* Court could have reconfirmed the result of *Thames & Mersey*. The “tight correlation” idea is an accurate restatement of the dissenters’ position in *IBM*, but it isn’t a test mandated by the Export Clause. *Nothing in the Export Clause requires that, for a tax or duty to be prohibited, it be tied to the value of exported articles.*<sup>142</sup> A one cent per shipment tax on exports is as impermissible under the Export Clause as is a one percent tax measured by the value of the exported goods.

Had it reached the merits in *IBM*, the Court might simply have concluded, as it had in *Thames & Mersey*, that “insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation,”<sup>143</sup> and, as a result, that a tax on insurance premiums is a proxy for taxing the goods – *regardless of the relationship between amount of tax and value of goods and regardless of the correlation between the cost of the insurance and the value of the goods.*<sup>144</sup> A tax on a service that is “integrally related” to exportation might very well be treated as on exported articles.<sup>145</sup>

If the *IBM* Court had reexamined the foundation of *Thames & Mersey*, it could have found the case structurally sound, under either of the above rationales, or, following Justices Kennedy and Ginsburg, it could have issued a condemnation order. It did neither. By deferring the key issue, the Court provided no guidance about how disputes should be analyzed, other than emphasizing that discrimination is irrelevant – something we knew already<sup>146</sup>

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140. Leading Cases, *supra* note 3, at 200-01 (“If the Court had reached this issue in *IBM*, it might have adopted Justice Kennedy’s sensible approach, which focused on whether the cost of the export service taxed correlates tightly with the value of the exported goods.”).

141. See *id.*

142. Dissenting Justices Kennedy and Ginsburg seemed to assume that, if the tax weren’t measured by the value of the goods, it shouldn’t be treated as falling on “exported articles,” see, e.g., *IBM*, 517 U.S. at 879-80 (Kennedy, J., dissenting), but the Export Clause doesn’t speak in those terms.

143. *Thames & Mersey*, 237 U.S. at 26.

144. If there is a “tight correlation,” the tax ought to be treated as falling on exported articles. But failing to satisfy a tight-correlation test shouldn’t lead to any particular result under the Export Clause.

145. See *infra* Part III.B.2.b.

146. Although the government in *IBM* relied heavily on the argument that lack of discrimination matters under the Export Clause, the older cases and the language of

– and suggesting that the Export Clause occupies a world of its own, a conclusion that, by shrinking the universe of arguably relevant authority, may not simplify matters. If Import-Export Clause jurisprudence can't be used to help determine whether a levy is *on* exports under the Export Clause – as had been done since at least 1827<sup>147</sup> – the only authority under the Export Clause is a body of cases predating 1924.<sup>148</sup>

*Thames & Mersey* was thus left standing, but plastered with “Enter at your own risk” signs. All that we know for sure after *IBM* is that taxes on export insurance are forbidden today, but maybe they won't be forbidden tomorrow. It's as if the Court had said, *Perhaps the rules have changed, but we're not going to tell you for sure until later*. Deferring consideration of the key issue for “another day,” after having revived interest in the Export Clause simply by taking the case, wasn't helpful to anybody, including Congress, which must legislate in the shadow of *IBM*.<sup>149</sup>

4. *Why Care About IBM?* – *IBM* wasn't one of the high points in the history of the Supreme Court. The case was an exercise in judicial evasion,<sup>150</sup> and substantively the Court seemed to do little more than leave in place a 1915 precedent, *Thames & Mersey*, on which lower courts had relied.<sup>151</sup> In form, by

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the Clause itself pointed in the opposite direction. See *supra* notes 82-83 and accompanying text.

147. The Import-Export Clause applies to “Imposts or Duties,” and the Export Clause to “Tax[es] or Dut[ies],” but the assumption had been that the process of determining whether a levy is on “Exports” or “Articles exported” is the same under the two clauses. See *supra* note 131 (quoting Chief Justice Marshall); *infra* Part III.C.1.

148. It's possible, however, that cutting the tie between the two clauses does simplify matters, in the following way. The Court may have decided that the cases under the two clauses had developed in irreconcilable ways. They should have been consistent, at least for purposes of determining whether a levy is on exports, as John Marshall suggested, see *supra* note 131, but the Import-Export Clause cases had become so permissive that the rules developed there simply don't work with the “clear textual command” of the Export Clause. See *infra* Part III.C.1. Ignoring those cases may therefore make the Export Clause stronger — and simpler.

149. Is Congress supposed to try again with a tax on insurance premiums, leading eventually to resolution of the issue now left for “another day”? Or, facing this uncertainty, does Congress give up on the issue, thereby insuring that “another day” never comes?

150. The way *IBM* was decided suggests that many Justices wound up wishing they hadn't granted the petition for writ of *certiorari* in the first place, maybe because they hadn't realized how intractable (or boring) the case would be. Once the petition was granted, however, the Court was locked in. Dismissing the petition as improvidently granted was a possibility, but one the Court uses sparingly. Adhering to precedent was a way to resolve the dispute, while ducking broader issues.

151. See *supra* note 125.

blessing an old case, albeit in a backhanded way, the Court merely preserved the *status quo*.

Not so. The mere fact that the Court agreed to hear *IBM* suggests that it sees a continuing role for the Export Clause – why spend precious judicial time otherwise? – and that, by itself, was a significant development. In addition, the Court used the Constitution to repudiate the application of a tax statute, something that hadn't happened in decades,<sup>152</sup> and, in taking that step, the Court showed little deference to Congress, as the dissenters complained.<sup>153</sup> Rather than presuming that the application of the tax was constitutional, and looking for ways to interpret the statute in a constitutionally acceptable way, the Court left in place a 1915 case that did neither of those things. It would have been noteworthy if the Court had struck down the application of a tax after carefully reviewing the substance of the dispute; it's astonishing that the Court did so in this summary fashion.

When the Court adhered to rules of taxation developed in the second decade of the twentieth century, it wasn't preserving the *status quo*. The astonishing effect of *IBM* is that, in avoiding the merits, the Court effectively revived a tradition of judicial scrutiny of taxing statutes that nearly all commentators assumed had disappeared forever. By agreeing to hear *IBM* and

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152. Several cases in the 1920s, including *Eisner v. Macomber*, 252 U.S. 189 (1920), rejected provisions of the personal income tax on the ground that the taxed items weren't "income" within the meaning of the Sixteenth Amendment. As recently as 1934, the Supreme Court took limits on the taxing power for granted. See *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371, 378 (1934) ("If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment."); Jensen, *Taxing Power*, supra note 8, at 1133-46. After 1934, however, no federal tax was rejected on constitutional grounds until *IBM*. The pervasive view in the academic world is that, apart from due-process limitations unlikely ever to come into play (Congress couldn't tax members of different races differently, for example), Congress can tax what it wants when it wants. Cf., e.g., Ackerman, supra note 39, at 3.

153. Wrote Justice Kennedy:

The majority cites no case in which we have declared a federal statute unconstitutional by disregarding an unargued theory that would save the statute . . . . We should at least consider a construction of the Export Clause that would render it inapplicable . . . , rather than assuming the issue away and reaching the unnecessary judgment that a coordinate branch violated the Constitution.

*IBM*, 517 U.S. at 869 (Kennedy, J., dissenting); see also *id.* at 868 ("To give Congress the respect it is owed, we must decide whether the statute is in fact unconstitutional as applied, not make the borderline call that the Government's litigation position bars us from reaching a question . . . .").

then refusing to substantively reexamine *Thames & Mersey*, the Court effectively transferred to the late twentieth century the doctrines of an earlier era, when courts were much more skeptical about the taxing power.

And there's another important point about *IBM*. Although the Court fumbled the analysis, it came to a defensible result. Constitutional limitations on the taxing power should be taken seriously in 2003, just as they were in 1915.

### B. *U.S. Shoe*

Considering how badly it handled *IBM*, the Supreme Court should probably have decided to leave the Export Clause alone for another seventy years. But that wasn't to be. Two years later, the Court revisited the Export Clause and again got the right result (or arguably the right result) – this time after full consideration of the issues – rejecting the application of a federal tax in the export context.<sup>154</sup> No longer could there be any doubt about the Court's signal: the Export Clause should be seen as a limitation on congressional power. If Export Clause jurisprudence were a matter of public interest,<sup>155</sup> cries of "judicial activism" would have been heard across the land.

1. *The Harbor Maintenance Tax* – In *U.S. Shoe*,<sup>156</sup> the Court considered whether the Harbor Maintenance Tax (the "HMT"), as it applied to exports, was an invalid tax or duty on exported articles. In general, the HMT is an excise imposed on any "port use" in an amount now equal to 0.125% of the value of the "commercial cargo" involved.<sup>157</sup> "Commercial cargo" is "any cargo transported on a commercial vessel," including exported goods.<sup>158</sup>

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154. There were pressures to act. When *U.S. Shoe* was being argued, 4000 cases with the same issue had been stayed in the Court of International Trade, and over 100 in the Court of Federal Claims. See *United States v. United States Shoe Corp.*, 523 U.S. 360, 365 n.2 (1998) (citing Brief for United States at 4).

155. Which should happen once *Reader's Digest* picks up this article.

156. 523 U.S. 360 (1998).

157. IRC § 4461(a). "Port use" means "the loading of commercial cargo on, or . . . the unloading of commercial cargo from, a commercial vessel at a port." IRC § 4462(a)(2).

158. IRC § 4462(a)(3)(A). For these purposes, "cargo" includes "passengers transported for compensation or hire." *Id.* In *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed. Cir. 2000), and *Princess Cruises, Inc. v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), the Federal Circuit reversed the Court of International Trade, concluding in both cases that the HMT was validly applied to cruise ship passengers. See Keith E. Ranta, Note, *The Harbor Maintenance Tax and the Constitutionality of Taxing Cruise Passengers as Commercial Cargo Under the Export Clause: Carnival Cruise Lines, Inc. v. United States*, 54 Tax Law. 211 (2001); see generally Sara Lundell, Note, *Princess Cruises, Inc. v. United States: Will the Love*



Since there was no question that the HMT did apply to exported articles, and since the Court had reiterated in *IBM* that lack of discrimination against exports doesn't matter for these purposes,<sup>159</sup> the government was left to argue that the HMT wasn't a "tax or duty" at all. It was, the government said, a fee for use of the ports – "a charge designed as compensation for government-supplied services, facilities, or benefits"<sup>160</sup> – and the government pointed to authority going back to 1876 in support of the proposition that a user fee isn't forbidden by the Export Clause.<sup>161</sup>

Apparently oblivious to Export Clause concerns in enacting the HMT in 1986,<sup>162</sup> Congress called the HMT a "tax," and placed it in the Internal Revenue Code.<sup>163</sup> As embarrassing as that designation may have been – Congress seemed to be asking for an Export Clause challenge – that wasn't the real constitutional problem.<sup>164</sup> Congressional acts aren't invalid simply because Congress acts in ignorance, paying no attention to constitutional dictates.<sup>165</sup>

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Boat Finally Sink the Harbor Maintenance Tax?, 8 *Minn. J. Global Trade* 325 (1999). The Federal Circuit gave great weight to regulations interpreting the HMT, but the most straightforward justification for the results is that the founders wouldn't have considered a passenger (with the possible exception of a slave) to be an "Article" under the Export Clause, and modern usage of the term also doesn't suggest that it includes people.

159. See *supra* note 83 and accompanying text.

160. *U.S. Shoe*, 523 U.S. at 363. The proceeds are deposited in a fund from which Congress can appropriate amounts for harbor maintenance and development projects. See IRC § 9505(a).

161. See *Pace v. Burgess*, 92 U.S. 372, 375-76 (1876); *infra* notes 188-193 and accompanying text.

162. The HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, §§ 1401-03, 100 Stat. 4082, 4266-70. See *U.S. Shoe*, 523 U.S. at 363.

163. The HMT was also to be administered and enforced "as if [it] were a customs duty." IRC § 4462(f)(1), (2).

164. See *Penn Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 20 (3d Cir. 1960) ("It is not necessary to uphold the validity of [a] tax . . . that the tax itself bear an accurate label.").

165. Congress really wasn't paying attention. Reports on the HMT used the terms "tax" and "fee" without precision, and without sensitivity to constitutional concerns. See, e.g., S. Rep. No. 99-126, at 112 (1986) ("national uniform fee"); H.R. Rep. No. 99-228, at 1 and 7 (1986) ("port user charges" and "port use charge"); H.R. Conf. Rep. No. 99-1013, at 228-29 (1986) (describing House version as imposing "port use tax" and "excise tax on the use of a U.S. harbor" and Senate version as imposing "charge (in the Internal Revenue Code) . . . on the use"); *id.* at 230 (describing conference agreement as imposing "port use tax or charge" or "excise tax in the Internal Revenue Code").

One reason Congress ignored the Export Clause may be that the discussion focused on the HMT's application to *imports*, which the national government can tax. See, e.g., S. Rep. No. 99-126, at 133 (1986) (additional views of Sen. Mitchell). But if

What was crucial in *U.S. Shoe* was the substance of the charge. Did the payor receive something specific in return for its payment, as part of a value-for-value transaction similar to that which might occur in a commercial context? Or were the benefits to the payor, if discernible at all, merely the more generalized ones that every taxpayer gets from paying his, her, or its share of the costs of civilization? The HMT failed constitutionally, held the unanimous Court, because the measure of the charge, the value of the cargo, wasn't "a fair approximation of services, facilities, or benefits furnished to the exporters."<sup>166</sup> If the HMT wasn't part of a value-for-value transaction, it had to be a tax, not a fee. And insofar as the tax applied to exported articles, it was invalid under the Export Clause.

2. *Taxes Versus Other Governmental Levies* – Reasonable people can disagree about how close the relationship should be between amount charged and the value of a specific benefit received for a charge to be treated as a user fee rather than a tax. To be a fee, said the *U.S. Shoe* Court, the HMT had to "fairly match the exporters' use of port services and facilities,"<sup>167</sup> but that formulation necessarily leaves wiggle room. The benefits provided by governments are often of a sort not readily available in the marketplace, making determination of a "fair match" problematic. Recognizing this difficulty, the Court hasn't required absolute equivalence (whatever that would mean) between value and charge for a charge to be treated as a fee.<sup>168</sup> Ultimately, and inevitably, characterization is going to depend on the facts and circumstances.

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Congress had been sensitive to effects on international commerce, it should have been concerned about possible Export Clause violations.

166. *U.S. Shoe*, 523 U.S. at 363. The Court of International Trade had come to the same conclusion: "The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo . . . . Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported." *U.S. Shoe*, 907 F. Supp. 408, 418 (Ct. Int'l Trade 1995), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997).

167. *U.S. Shoe*, 523 U.S. at 370.

168. For example, in *Pace v. Burgess*, 92 U.S. 372 (1876), in upholding a charge as a user fee, the Court said that,

[t]he rule by which [the amounts] are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. . . . [H]aving due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to.

*Id.* at 375-76.

As the Court put it in 1876, “[T]he sense and reason of the thing will generally determine the character of every case that can arise.”<sup>169</sup>

But that’s not to say that anything goes, that a charge is a fee just because Congress characterizes it that way. Congress hadn’t done that with the HMT anyway – it was the Department of Justice lawyers defending the HMT who argued that the HMT wasn’t a tax<sup>170</sup> – so *U.S. Shoe* wasn’t a case of congressional duplicity. (Ignorance perhaps, but not duplicity.<sup>171</sup>) The Court nevertheless saw the case as an opportunity to send Congress a message, picking up language from *Pace v. Burgess*,<sup>172</sup> decided over 100 years earlier: “[I]f we are ‘to guard against . . . the imposition of a [tax] under the pretext of fixing a fee,’ . . . we must hold that the HMT violates the Export Clause as applied to exports.”<sup>173</sup>

That message was gratuitous – it had nothing to do with the actual dispute in *U.S. Shoe*<sup>174</sup> – but it contained a core of good sense. Despite the tendency in popular discourse to treat all governmental exactions as indistinguishable – Richard Darman’s statement that if a charge “looks like a duck, walks like a duck, and quacks like a duck, it’s a duck” is an example of this phenomenon<sup>175</sup> – all charges aren’t identical. There’s a legally significant difference between the quack of a fee – a charge to get into a park, for example – and the quack of a more abstract levy, a tax.<sup>176</sup>

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169. *Id.* at 376.

170. The Customs Service, by form letter, had stated that “the HMT is a statutorily mandated fee assessment on port users, not an unconstitutional tax on exports,” *U.S. Shoe*, 523 U.S. at 364, but that self-serving designation obviously couldn’t be controlling.

171. See *supra* note 165.

172. 92 U.S. 372 (1876).

173. *U.S. Shoe*, 523 U.S. at 370 (quoting *Pace*, 92 U.S. at 376).

174. Congress in enacting the HMT *hadn’t* tried to disguise the levy as a user fee. Furthermore, the “guard against” language came from a case, *Pace*, in which the levy at issue was held to be a permissible user fee, not a disguised tax. 92 U.S. at 376. *Pace* was therefore also not a case of congressional overreaching. See *infra* notes 188-193 and accompanying text.

175. *Quoted in* Ellin Rosenthal & Pat Jones, Year in Review, 46 Tax Notes 16, 16 (1990) (quoting Office of Management and Budget Director-designate). Darman was interpreting the first President Bush’s “no new taxes” pledge, and his statement came to stand for the wrong-headed proposition that any governmental exaction is a “tax.”

176. This distinction is recognized statutorily. For example, many state “taxes” are deductible in computing federal taxable income, see IRC § 164, but fees for benefits aren’t taxes for this purpose. See, e.g., Rev. Rul. 77-29, 1977-1 C.B. 44 (“Taxes are not payments for some special privilege granted or service rendered . . .”); Rev. Rul. 61-152, 1961-2 C.B. 42 (to same effect). And many foreign taxes are either creditable or deductible in computing taxable income, see IRC §§ 901-903, but a payment to a foreign country for a specific economic benefit isn’t a tax for this purpose. See Regs. §

To be sure, that distinction doesn't jump out from the founding debates or the language of the Constitution. The founders' terminology for governmental exactions was so varied that a search for certainty in characterizing levies is doomed: "Taxes, Duties, Imposts and Excises" in Article I, section 8;<sup>177</sup> "Duties, Imposts, and Excises" in the Uniformity Clause;<sup>178</sup> "Tax or Duty" in the Export Clause<sup>179</sup> and in the clause limiting a levy on the "Migration or Importation" of slaves to "ten dollars for each Person";<sup>180</sup> "Imposts or Duties" in the Import-Export Clause;<sup>181</sup> and "Tax" or "Taxes" in the Direct-Tax Clauses.<sup>182</sup> Most of these provisions have a core of good sense, but it's doubtful that each term standing alone had a precisely understood meaning. There's overlap among the terms<sup>183</sup> – "imposts," "duties," and "excises" are "taxes," for example, at least for some purposes<sup>184</sup> – and cases generally haven't turned on fine distinctions among the terms, even when they might exist.<sup>185</sup>

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1.901-2(a)(2)(i) ("[A] foreign levy is not pursuant to a foreign country's authority to levy taxes, and thus is not a tax, to the extent a person subject to the levy receives (or will receive) . . . a specific economic benefit . . . from the foreign county in exchange for payment pursuant to the levy.").

177. U.S. Const. art. I, § 8, cl. 1.

178. *Id.*

179. U.S. Const. art. I, § 9, cl. 5.

180. U.S. Const. art. I, § 9, cl. 1.

181. U.S. Const. art. I, § 10, cl. 2.

182. U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 4.

183. For example, when the language of the general taxing power ("Taxes, Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1) was discussed at the Convention, Luther Martin "asked what was meant by the Committee of detail (in the expression) 'duties' and 'imposts.' If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear." 2 Farrand, *supra* note 20, at 305 (Aug. 16, 1787). James Wilson responded, "[D]uties are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties &c." *Id.*

184. I've argued elsewhere that the term "Taxes" in Article I, section 8, was an umbrella term that encompassed the "Duties, Imposts, and Excises" subject to the uniformity rule as well as the direct taxes subject to the apportionment requirement. See Jensen, *Apportionment*, *supra* note 8, at 2393-97; see also Jensen, *Taxation and the Constitution*, *supra* note 8, at 694-99.

185. One exception: The Court in *IBM* gave as one of the reasons that the Import-Export Clause can't be used to interpret the Export Clause the "meaningful textual differences" between the two clauses, including the difference between "Tax or Duty" and "Imposts or Duties." *IBM*, 517 U.S. at 857. I agree that the term "tax" is broader than "impost," see *supra* note 184, and the prohibition under the Export Clause should be broader than under the Import-Export Clause. See *IBM*, 517 U.S. at 857 (recognizing "that the Import-Export Clause is 'not written in terms of a broad prohibition of every 'tax,' and that impost and duty are narrower terms than tax")

Nevertheless, none of these terms works in context if understood to include garden-variety governmental charges for services or other benefits. How, for example, can Congress apportion a fee for services among the states on the basis of population, as it would have to if the fee were a direct “tax”? Should the Export Clause or the Import-Export Clause really be interpreted to preclude the appropriate governmental body from charging those who use ports and harbors?<sup>186</sup> And if a federal charge is imposed for use of a particular port, what would it mean to require that the charge be “uniform” throughout the United States? Surely the Constitution can’t require that the same fee be charged for services provided in every U.S. port, regardless of the value (or the cost) of the services. One of the reasons the fee-tax distinction doesn’t appear in the founding debates is that the founders, when discussing provisions dealing with taxation, simply weren’t talking about charges for specific benefits.<sup>187</sup>

The distinction between a fee and a tax also has support in older Supreme Court cases construing the Export Clause. For example, the stamp tax upheld in *Pace v. Burgess*,<sup>188</sup> decided in 1876 (a case on which the Court relied in *U.S. Shoe*), was determined to have been “compensation given for services

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(quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290-93 (1976)); *id.* at 857-58 (noting “that the term ‘Impost or Duty’ [in the Import-Export Clause] is not self-defining and does not necessarily encompass all taxes’ and . . . ‘the central holding of *Michelin* [is] that the absolute ban is only of ‘Imposts or Duties’ and not of all taxes’”) (quoting *Dep’t of Revenue of Wash. v. Ass’n of Wash. Stevedoring Cos.*, 435 U.S. 734, 759 (1978)). But it should also be true that a state levy on exports that *fails* Import-Export Clause requirements would be prohibited to the national government under the Export Clause. See *infra* Part III.C.1.

186. The Import-Export Clause does include a passage that creates some interpretational difficulty: it permits a state to lay imposts or duties without congressional consent if doing so is “absolutely necessary for executing its inspection Laws.” U.S. Const. art. I, § 10, cl. 2. It’s been said that “[t]he inspection fees which may properly be imposed under this clause are in no sense a duty on imports or exports, but are a compensation for services.” Thomas M. Cooley, *The Law of Taxation* (4th ed., Clark A. Nichols ed., 1924). But if the fees are user fees, why mention them at all, because they wouldn’t have been precluded anyway?

187. The founders’ silence doesn’t mean Congress has no power to impose fees in cases in which specific economic benefits are received by payors (assuming, of course, that Congress has the power to provide the goods or services in the first place). Such fees may be necessary to prevent unwarranted subsidies to the beneficiaries of the goods or services. But see Kelly & Amzel, *supra* note 6 (arguing that *U.S. Shoe* Court improperly let Commerce power trump Export Clause); *infra* Part III.A.2 (discussing Kelly & Amzel article).

188. 92 U.S. 372 (1876).

properly rendered” and hence not a tax or duty.<sup>189</sup> Congress had enacted an excise tax on tobacco, generally thirty-two cents per pound, but with an exemption for tobacco intended for exportation. Exported tobacco was instead required to have a twenty-five cent stamp affixed to each package, regardless of the package’s size or value.<sup>190</sup>

The taxpayers in *Pace* argued that the charge for the stamp on exported tobacco was itself a forbidden tax or duty on exports, but the Court characterized the charge as, in effect, a user fee. Unlike the tax in *U.S. Shoe*, the charge “bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed.”<sup>191</sup> *Ad valorem* levies like the HMT thus shouldn’t be characterized as user fees for these purposes: if a harbor usage *fee* is going to be measured by value, it should be the value of the benefit provided (presumably determined by the amount or manner of harbor use), not the value of the goods being shipped.<sup>192</sup> Furthermore, the stamps in *Pace* had a payment-for-services flavor: they were intended to prevent fraud, and the proceeds from the stamps were used to fund the administrative mechanism necessary to police the excise tax. In short, said the Court, “A stamp may be used, and, in the case before us, we think it is used, for quite a different purpose. . . [than] a tax or

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189. *Id.* at 375. In *IBM*, Justice Thomas did at one point cite *Pace* for the proposition “that pre-export products are not ‘Articles exported,’” *IBM*, 517 U.S. at 846, as if that had been the reason for upholding the charge at issue in the case. And the Court had provided this alternative justification for the result in *Pace* when it reexamined the same stamp-tax statute in *Turpin v. Burgess*, 117 U.S. 504 (1886). See *infra* notes 290-300 and accompanying text. But Thomas quickly switched gears and got the *Pace* rationale right: “When a tobacco manufacturer challenged the stamp charge, we upheld the charge on the basis that the stamps were designed to prevent fraud in the export exemption from the excise tax and did not, therefore, represent a *tax* on exports.” *IBM*, 517 U.S. at 847 (emphasis added). Although *Turpin* did supply an alternative rationale to justify the result in *Pace*, it’s absolutely clear from the short *Pace* opinion that the Court concluded, under the circumstances, that the stamp levy was not a “tax or duty.” See *infra* notes 224-228 and accompanying text.

190. Act of July 20, 1868, ch. 186, § 74, 15 Stat. 125, 157-58.

191. *Pace*, 92 U.S. at 375 (quoted in *U.S. Shoe*, 523 U.S. at 369).

192. Ultimately the question depends on correlation:

*Pace* establishes that . . . the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace*, the HMT is determined entirely on an *ad valorem* basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter.

*U.S. Shoe*, 523 U.S. at 369 (emphasis added).

duty: indeed, it is used for the very contrary purpose, – that of securing exemption from a tax or duty.”<sup>193</sup>

The distinction between a user fee and a tax may be important in other ways as well,<sup>194</sup> but, at a minimum, it’s a distinction inherent in the structure of the Export Clause.

3. *The Significance of U.S. Shoe* – On the importance of the distinction between tax and fee in interpreting the Export Clause, the *U.S. Shoe* Court thus got it right: not all governmental charges that affect exportation are limited by the Export Clause. As it did with *IBM*, the Court applied old precedent to a modern controversy: what the Court said about the Export Clause in 1876, in *Pace v. Burgess*,<sup>195</sup> has continuing significance today. Furthermore, in *U.S. Shoe*, the Court left no doubt that the old precedent was the law now and in the future. The Court blessed *Pace* in a way that it wouldn’t bless *Thames & Mersey* in *IBM*.<sup>196</sup>

All of that’s important, but even more important is the confirmation that what the Court had done in *IBM* – striking down a taxing statute on constitutional grounds – wasn’t an accident. Congressional enactments in taxation are no longer automatically immune from judicial scrutiny.

As was true in *IBM*, however, the Court emphasized the uniqueness of the Export Clause. In other contexts, the government argued, the Court had characterized some flat and *ad valorem* levies as user fees, even though the charges bore no necessary, or even arguable, relationship to the value of benefits received.<sup>197</sup> But, wrote Justice Ginsburg, those cases didn’t matter; they “involved constitutional provisions other than the Export Clause, . . . and thus do not govern here.”<sup>198</sup> “*IBM* plainly stated,” wrote Ginsburg, “that the Export Clause’s simple, direct, unqualified prohibition on any taxes or duties

193. *Pace*, 92 U.S. at 376 (emphasis added).

194. See *infra* Part III.C.2 (discussing fees for patent applications).

195. 92 U.S. 372 (1876).

196. See *supra* Part II.A.3.

197. See, e.g., *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (holding that 1½ % *ad valorem* fee on awards certified by Iran-U.S. Claims Tribunal was user fee, not so excessive as to violate Takings Clause); *Massachusetts v. United States*, 435 U.S. 444, 463-70 (1978) (holding flat federal registration fee on civil aircraft was user fee that could be applied to state-owned aircraft despite state’s immunity from federal taxation); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717-21 (1972) (holding flat charge for each passenger enplaning, levied for maintenance of state’s airport facilities, not in violation of dormant Commerce Clause). In *Sperry Corp.*, the Court said it had “never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. . . . All that we have required is that the user fee be a ‘fair approximation of the cost of benefits supplied.’” *Sperry Corp.*, 493 U.S. at 60 (quoting *Massachusetts*, 435 U.S. at 463 n.19).

198. *U.S. Shoe*, 523 U.S. at 368.

distinguishes it from other constitutional limitations on governmental taxing authority.”<sup>199</sup> I’ll return to the question of whether the Export Clause’s “simple, direct, unqualified prohibition” really makes it unique later in the article.<sup>200</sup>

### III. INTERPRETATIONAL ISSUES AFTER *IBM* AND *U.S. SHOE*: NEW LIFE FOR OLD CASES

At first glance, as I’ve noted, the Court didn’t seem to do anything striking in either *IBM* or *U.S. Shoe*. It pointedly avoided reevaluating a 1915 case in *IBM*, and then relied on an 1876 precedent in *U.S. Shoe*. If the Court had heard the disputes in 1916, the results would presumably have been the same as they were in the late 1990s. It’s as if Woodrow Wilson were still in the White House . . . old news.

But it’s *because* of the time warp that the results in the two cases were striking. Resuscitating old doctrines isn’t old news. *IBM* and *U.S. Shoe* made it clear that the Export Clause is alive and well, and, while that wouldn’t have been noteworthy in 1916, it certainly was in 1996 and 1998. Moreover, by leaving a 1915 precedent in place, and by explicitly relying on an 1876 decision, the Court in effect told us to start retrieving a lot of other old Export Clause cases that, as far as many students of taxation were concerned, had been transferred to the intellectual equivalent of offsite storage.

In this part of the article, I discuss the state of Export Clause jurisprudence, which, after *IBM* and *U.S. Shoe*, in many respects still means the state of pre-1924 Export Clause jurisprudence. First, I consider whether any issues remain in distinguishing taxes and duties from other levies, and I criticize the argument, made by two scholars, that we shouldn’t even be trying to make such a distinction. Second, I extract principles from cases that have tried to determine in some difficult, and some not so difficult, situations when a tax or duty that has an arguable effect on exportation ought to be treated as falling *on* exported articles. Finally, I question the Court’s assertion, in both *IBM* and *U.S. Shoe*, that the Export Clause is unique – that the Clause neither illuminates, nor is illuminated by, other constitutional provisions.

#### A. Taxes Versus Other Charges

Unless the terms “tax” and “duty” subsume all conceivable exactions, the Export Clause doesn’t seem to apply to everything: “No *Tax or Duty* shall be laid on Articles exported from any State.”<sup>201</sup> And, as I argued above, the Court in *U.S. Shoe* did a respectable job of distinguishing between taxes or

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199. *Id.*

200. See *infra* Part III.C.

201. U.S. Const. art. I, § 9, cl. 5 (emphasis added).



duties, on the one hand, and user fees, on the other, in the process of concluding that the Export Clause isn't an absolute prohibition of all governmental charges on exports.<sup>202</sup>

*1. Is Anything Other Than a User Fee Permitted?* – One question the Court didn't answer in *U.S. Shoe* – it didn't have to – is whether user fees are the only permissible charges on exportation or whether Congress has the power to enact still other types of levies without running afoul of the Export Clause. The Export Clause effectively divides the universe of levies into taxes and duties – which can't fall on exported articles – and everything else. Does the “everything else” include any charge that isn't a user fee (and that also isn't a tax or duty)? Given the founders' bewildering variety of terms for governmental exactions,<sup>203</sup> the classification scheme inherent in the Export Clause might be even more complex than *U.S. Shoe* suggests.

Who knows? I certainly don't. But I'm skeptical that this will turn into a real litigation issue, at least in the near future. No court has yet uncovered a permissible charge on exports that isn't a user fee, and I doubt that future courts will want to search for such a linguistically possible, but perhaps mythical, concept.<sup>204</sup> If my skepticism is justified, the key distinction under the Export Clause will remain the one outlined in *U.S. Shoe*: taxes or duties versus user fees.<sup>205</sup>

And that's an important distinction. To conclude, as the Court did in *U.S. Shoe*, that Congress may impose value-for-value charges affecting exportation without being constrained by the Export Clause isn't a trivial result – even if that's all that Congress can do in the export context.

*2. Kelly and Amzel's Criticisms of U.S. Shoe* – The typical academic commentator thinks that the taxing power is, and should be, unconstrained, except by political forces, and that provisions like the Export Clause are nothing but irritants. For those who believe that Congress's taxing power is plenary, the Export Clause gets in the way, and that's not a good thing.<sup>206</sup>

Although their numbers are small, a few other scholars think that the Court in *U.S. Shoe* left Congress with *too much* flexibility. In an interesting 1999 article, Claire Kelly and Daniela Amzel were highly critical of the case, arguing that, although the Court came to the right result, it got a key part of the

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202. See *supra* Part II.B.

203. See *supra* notes 177-185 and accompanying text.

204. Since the Supreme Court hasn't blessed any other sort of levy, lower courts would obviously feel reluctant to strike out on their own.

205. Legislators, too, should probably treat user fees as the only permissible levies on exports.

206. See, e.g., Ackerman, *supra* note 39, at 3; see also *supra* note 122 and accompanying text.

analysis wrong.<sup>207</sup> Under the Export Clause, they concluded, Congress may not impose *any* charge, including a user fee, that falls on exported articles.

Kelly and Amzel's big point was that, by endorsing a "mythical user fee exception," the Court allowed the Commerce Clause potentially to trump the Export Clause in a way not intended by the founders.<sup>208</sup> Because the Court determined that the HMT was really a tax, that didn't happen in *U.S. Shoe*, but it could have. If the Court had decided that the HMT was a user fee, it would have upheld the HMT – a result that, in Kelly and Amzel's view, would have been inconsistent with the dictates of the Export Clause.

In effect, Kelly and Amzel concluded that the Court had made things too complicated: since any governmental charge on exports is forbidden, they said, the Court should simply have asked whether the HMT was imposed on "Articles exported" – whether, that is, it was "an exaction which: (1) arises during the process of exportation; and (2) is calculated based upon the export or the process of exportation."<sup>209</sup> If it was – and about that there could have been little doubt – it should have been prohibited by the Export Clause.

Kelly and Amzel were half right, as I'll now demonstrate. Congress ought not to be able to rely on the Commerce Clause to circumvent the limitation of the Export Clause, but the user fee "exception," rather than being a creation of the Commerce Clause, is implicit in the Export Clause itself.

#### a. *Can the Commerce Clause Trump the Export Clause?*

Kelly and Amzel were right that a tax or duty on exported articles is forbidden, regardless of whether the levy might otherwise have been within Congress's power to regulate commerce. If the Export Clause were simply another factor to throw on the scales – weighing the commerce power against effects on exportation – the Export Clause wouldn't have been so controversial at the Constitutional Convention. But the founding discussions about the Clause make clear that what was at stake was whether Congress could tax exports at all.<sup>210</sup> The Export Clause is a specific prohibition within the otherwise generally expansive congressional power to regulate commerce.<sup>211</sup>

It's true that, in practice, this point may not be nearly as significant as it was in 1787. Congress can often avoid Export Clause issues by relying directly on its regulatory powers under the Commerce Clause (powers that have

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207. Kelly & Amzel, *supra* note 6.

208. *Id.* at 161; see U.S. Const. art I, § 8, cl. 3 (noting congressional power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian tribes").

209. Kelly & Amzel, *supra* note 6, at 198.

210. See generally *supra* Part I.

211. It is, of course, also a specific limitation on the congressional power to impose taxes.

expanded exponentially over the last two centuries). For example, suppose Congress wishes to prohibit exports of a particular good. A confiscatory tax on the export of the good could have a prohibitory effect, but such a tax would face Export Clause scrutiny.<sup>212</sup> In contrast, if Congress has the power under the Commerce Clause (or some other constitutional provision) directly to forbid exportation of the good, no Export Clause issue would be raised.<sup>213</sup>

A prohibitory tax and direct prohibition may have the same substantive effect, but form matters: a congressional attempt to use the *taxing* power to achieve a goal otherwise permitted by the Commerce Clause would be precluded by the Export Clause. At a minimum, the Export Clause cuts down on the options available to Congress to affect exportation.

b. *Does the Export Clause Forbid All Charges Affecting Exports?*

I agree with Kelly and Amzel that the Commerce Clause can't trump the Export Clause when taxation is involved, but I disagree with them about what happened, and what should have happened, in *U.S. Shoe*. And I disagree that the user fee exception blessed in that case, derived as it was from nineteenth-century cases and constitutional text, was "mythical."

*U.S. Shoe* wasn't a triumph of the Commerce Clause over the Export Clause – the Court didn't speak in those terms<sup>214</sup> – but a case in which the Court properly struggled to determine what levies are prohibited by the Export Clause. Kelly and Amzel argued that "[i]nvestigation into the Framers' intent with respect to the Export Clause reinforces that the text is the best reflection

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212. If the Export Clause wouldn't forbid such a levy, it would have to be because a court might characterize a measure intended to raise little or no revenue as something other than a "tax or duty." Cf. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 549 (1869) (upholding tax on state bank notes, although purpose of tax was to drive notes out of existence). In *Veazie Bank*, the government had power to regulate the currency, so that the "tax" at issue might have been valid even if not characterized as a tax. *Id.*

213. In appropriate circumstances, the power to embargo would presumably be implicit in the power to declare war. See *supra* note 51 (noting conclusion of some founders that war power encompassed power to embargo goods). But see *id.* (discussing whether forbidding export taxation would have precluded embargo on exports).

214. A serious problem for the Kelly-Amzel thesis is that the Court didn't even hint it was relying on the Commerce Clause. Kelly and Amzel instead saw intellectual osmosis at work, referring to the "conceptual genealogy of the user fee concept," and stating that, "although the Court nominally rejected direct Commerce Clause precedent, it still utilized it by employing the mode of thinking created in the Commerce Clause jurisprudence." Kelly & Amzel, *supra* note 6, at 142. That strikes me as an insubstantial foundation on which to build a case that the Commerce Clause controlled in *U.S. Shoe*.

of their intent,”<sup>215</sup> and I agree. What follows from the text, however, is that if a charge isn’t a “tax or duty,” the Export Clause isn’t implicated.<sup>216</sup>

Treating fees for goods or services as something other than taxes may not be mandated by constitutional text, but it’s perfectly consistent with that text. As I argued earlier, the provisions of the Constitution creating the taxing power, and those imposing limitations on that power, simply don’t work if interpreted to apply to fees for goods or services.<sup>217</sup> And the use of the terms “tax” and “duty,” when so many other configurations of terms had been used in provisions controlling governmental levies,<sup>218</sup> suggests that the founders didn’t intend for all conceivable levies to be subject to the Export Clause.<sup>219</sup>

That’s what the Supreme Court had been saying for a long time.<sup>220</sup> The judicial conclusion that what we now call a user fee isn’t a tax or duty dates from 1876 in the Export Clause context, and the Court in *Pace v. Burgess*<sup>221</sup> purported to be interpreting constitutional text. Other nineteenth-century cases

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215. *Id.* at 182 (footnote omitted).

216. Kelly and Amzel argued that the term “tax or duty” shouldn’t be interpreted standing alone, that it instead “should be identified as inseparable from the modifier ‘laid on articles exported.’” *Id.* at 132. Reading the Export Clause in this way seemed to give primacy to the second phrase, but I’m not sure why that should be so. I’ll concede that the two phrases should be read together — a levy isn’t precluded unless it is both a tax or duty *and* a levy on articles exported — but that still doesn’t mean that all exactions falling on exports are necessarily included in the prohibited category.

217. See *supra* notes 186-187 and accompanying text.

218. See *supra* notes 177-185 and accompanying text.

219. “Tax” is an umbrella term that encompasses some, if not all, of the other terms used to refer to governmental levies. See *supra* note 184. But that doesn’t mean it necessarily includes payments for goods or services. Kelly and Amzel insisted that, “[a]lthough the specific characterization of a governmental exaction as a fee rather than a tax . . . did not exist at the Constitutional Convention, a modification of the general prohibition which would have allowed for the imposition of fees was raised and rejected at that time.” Kelly & Amzel, *supra* note 6, at 183 (citing James Madison, Notes of Debates in the Federal Convention of 1787, at 499-503 (Adrienne Koch ed., 1987)). I’ve read the cited pages; the inference drawn by Kelly and Amzel isn’t one I would draw.

220. Kelly and Amzel stated that the Court in *IBM* had “recognized that the phrase ‘taxes or duties’ relates to all exactions that in any way burden exports.” Kelly & Amzel, *supra* note 6, at 180 (citing *IBM*, 517 U.S. at 847-48). I don’t think the Court said any such thing on the cited pages – it certainly didn’t say so straightforwardly – which may explain why Kelly and Amzel used a “see” signal to introduce the citation. (The Court did quote the majority opinion in *Fairbank* to the effect that “[t]he requirement of the Constitution is that exports should be free from any governmental burden. The language is ‘no tax or duty.’” *IBM*, 517 U.S. at 848 (quoting *Fairbank*, 181 U.S. at 290). But the *Fairbank* language is hyperbole. Obviously the Constitution doesn’t forbid the national government from imposing *any* burden on exportation; it simply forbids imposing a tax or duty.)

221. 92 U.S. 372, 376 (1876); see *supra* notes 188-193 and accompanying text.

explicating other constitutional provisions similarly distinguished user fees from the governmental exactions specifically referred to in the Constitution.<sup>222</sup>

To diminish the precedential value of *Pace*, Kelly and Amzel reinterpreted the decision, suggesting that it wasn't based on the taxes-fees distinction. Instead, they suggested,

the Court in *Pace* found that the tax fell outside of the Export Clause's prohibition not because it was not a "revenue raising exaction" under the Taxing Power or fell into some mythical user fee exception under the Export Clause, but because the exaction was not laid upon articles exported and bore no relationship to those articles.<sup>223</sup>

If that's what *Pace* stands for, it's consistent with principles applied in other cases – by its terms, the Export Clause doesn't apply to a levy that's not on articles exported<sup>224</sup> – and it's consistent with the way Kelly and Amzel argued that Export Clause cases should be approached.

This isn't convincing. Perhaps *Pace* could have been decided using an alternative rationale – some later cases said that might have happened<sup>225</sup> – but

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222. For example, in *Packet Co. v. St. Louis*, 100 U.S. 423 (1879), the Supreme Court held that a municipal corporation could "charg[e] and collect[] from those using its wharves and facilities, such reasonable fees as will fairly remunerate it for the use of its property." *Id.* at 427. When a governmental entity is merely receiving "just compensation," *id.* at 428 (discussing *Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577 (1874), and *Packet Co. v. Keokuk*, 95 U.S. 80 (1877)), the charge doesn't violate the Import-Export Clause's prohibition on states' levying "Imposts or Duties on Imports or Exports" without congressional consent. U.S. Const. art. I, § 10, cl. 2; *supra* note 95.

223. Kelly & Amzel, *supra* note 6, at 161.

224. See *infra* Part III.B.

225. See, e.g., *IBM*, 517 U.S. at 846 (citing *Pace* for proposition that "pre-export products are not 'Articles exported'"). But see *supra* note 189 (noting that Justice Thomas, at another point, gave as *Pace*'s rationale that levy wasn't a "tax," *IBM*, 517 U.S. at 847). In *Turpin v. Burgess*, 117 U.S. 504 (1886) (discussed in *supra* note 189 and *infra* notes 290-300 and accompanying text), a case interpreting the same statute at issue in *Pace*, the Court concluded the levy wasn't on articles in the stream of exportation and therefore was valid even if it were a tax. But the Court explicitly didn't repudiate *Pace*: "The reasons for that decision were given at length in the report of that case, and we see no occasion to modify the views then expressed." *Turpin*, 117 U.S. at 505. And it treated the levy as a "tax" only for the sake of argument, to provide a basis for the alternative rationale: "In the present case, the tax (*if it was a tax*) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported . . ." *Id.* at 507 (emphasis added). (For what it's worth, I question this alternative characterization. See *infra* notes 302-307 and accompanying text.)

that's not what the Court did. I find it impossible to read the short *Pace* opinion and see it as standing for anything other than the distinction between a tax or duty and a user fee. Indeed, the Court ended its opinion with the statement that "[t]he court being of the opinion that the charge for the stamps . . . was not a tax or duty within the meaning of the [Export] clause . . . , it is unnecessary to examine the other questions that were discussed in the argument of the cause."<sup>226</sup> Not much reason for doubt there.<sup>227</sup> If cases are authoritative (or not), it's because of the reasoning actually included in the opinions, not because of might-have-beens.<sup>228</sup>

On its face, *Pace* stands for the exemption of user fees from the prohibition of the Export Clause. The exemption is quite real, not mythical, and, since the exemption is also consistent with constitutional text, there was no reason for the *U.S. Shoe* Court to reject the traditional understanding of *Pace*. To implement the Export Clause, a court must determine what is a tax or duty and what isn't. The result in *Pace*, like the result in *U.S. Shoe*, fits the text of the Clause perfectly well.

#### *B. The Required Relationship Between a Tax or Duty and "Articles Exported"*

Some charges may not be taxes or duties and therefore may not be precluded by the Export Clause. In addition, not all taxes or duties that have an arguable effect on exportation, or on exporters, are prohibited by the Export

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226. *Pace*, 92 U.S. at 376 (emphasis added).

227. But see Kelly & Amzel, *supra* note 6, at 163 ("The ruling in *Pace* did not find a type of exaction outside the scope of 'tax' . . .").

228. I understand it's common practice among law professors to examine a line of cases in order to identify a unifying theme, even if the courts deciding the cases didn't articulate any such theme. (The practice has been most closely identified with the law-and-economics movement, but it's not exclusive to that movement.) If the goal is to identify a rationale that can guide courts in the future, fine. A scholar might argue that results in a line of cases are consistent with, say, economic efficiency, although the courts didn't discuss efficiency in their opinions, and that future courts ought to apply an efficiency rationale explicitly. There's nothing wrong with looking for better reasons to justify desirable results.

But if the argument is that courts were intentionally or subliminally applying a particular rationale while nothing like that was expressed in the opinions, the project rewrites history. Cf., e.g., Richard A. Posner, *Economic Analysis of Law* 251-55 (4th ed., 1992) (describing "implicit economic logic of the common law"). It's one thing to say that *Pace* could have been decided with a different rationale. (The Court said that in *Turpin v. Burgess*, 117 U.S. 504 (1886); see *supra* note 225.) It's quite another to say that *Pace* stands for something other than what was articulated by the Court in 1876. See also *supra* note 214 and accompanying text (questioning Kelly and Amzel's proposition that *U.S. Shoe* was based on Commerce Clause even though Court stated no such rationale).

Clause. In this section, I discuss some of the general principles, derived from the old cases, affecting when a tax or duty is treated as falling *on* articles exported.

As I've noted, when the founders considered the propriety of taxing exports, they didn't focus on the sorts of issues that have become relevant today – such as whether a tax that affected the export market but that wasn't imposed directly on exported goods was subject to the Export Clause. I could find no reference in founding debates to questions about how close the relationship between a tax and the act of exporting would need to be before the tax was prohibited. And one can tell from Chief Justice Marshall's discussion of the Export Clause in *Marbury*, quoted above,<sup>229</sup> that one very bright person, for a particular rhetorical purpose, focused on easy cases in explicating the scope of the Export Clause.<sup>230</sup>

But the founders were smart men, and we shouldn't infer from their failure to discuss all issues at mind-numbing length that the Export Clause should be limited to taxes and duties imposed directly on exported articles. Such an interpretation would have made the Clause a dead letter and, although many founders didn't favor the Export Clause, they understood that it was supposed to have real effect. Indeed, that's why many opposed it.<sup>231</sup>

On the other hand, it also makes no sense to try to find Export Clause issues in every levy that can be tangentially tied, by an imaginative lawyer, to exportation. There need to be some principles, even if they can't be converted into bright-line rules, to distinguish taxes or duties that are levied “on” exported articles from those that aren't. In 1996, in *IBM*, the Court said that its “cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term ‘Articles exported’ to permit federal taxation of pre-export goods and services.”<sup>232</sup> I've criticized *IBM* at some length,<sup>233</sup> but I have to admit that's a pretty good description of the state of Export Clause jurisprudence.

The following discussion is divided into four parts. First, I explicate the proposition that a tax of general application isn't limited by the Export Clause.

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229. See *supra* text accompanying note 12.

230. It's unfair to conclude from Marshall's examples in *Marbury* that he had no idea that the Export Clause might apply to other sorts of levies. The point of the examples was that some cases are so clear that judicial review is inherent in the constitutional system, and it would have muddied Marshall's rhetorical waters to throw in more difficult characterization issues. I suspect Marshall had a sophisticated sense of substance-versus-form in 1803. He certainly had it by the time of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827). See *infra* notes 254-256 and accompanying text.

231. See *supra* Part I.

232. *IBM*, 517 U.S. at 846.

233. See *supra* Part II.A.

Second, I discuss the cases standing for the principle that some levies, although nominally not imposed on exported goods, are so closely tied to such goods that exempting the levies from the Export Clause would effectively eviscerate the Clause. Third, I discuss when a good is treated as entering the stream of exportation – the point in time after which Congress may no longer impose a tax or duty on the good. Finally, I suggest a principle, derived from a 1923 Supreme Court case, that should be applied in doubtful situations to determine whether a levy falls on exported articles – and, more generally, to resolve all issues affecting the scope of the Export Clause.

*1. Taxes of General Application* – The cases are clear that a tax of general application doesn't violate the Export Clause, as long as the tax's connection with exportation is sufficiently attenuated. At a minimum, this category includes a generally applicable income tax and a generally applicable excise on pre-export goods or services.

*a. Generally Applicable Income Tax*

A tax that reaches the income of an exporter in exactly the same way it reaches the income of any other taxpayer is consistent with the Export Clause. In *W. E. Peck & Co. v. Lowe*,<sup>234</sup> decided in 1918, the Court held that an exporter could be subject to a corporate income tax, which applied to the "entire net income arising or accruing from all sources during the preceding calendar year."<sup>235</sup> As imposed, the income tax had no particular connection to exportation: "It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. . . . [W]hat is taxed – the net income – is as far removed from exportation as are articles intended for export before the exportation begins."<sup>236</sup>

To make the point another way: liability under the corporate income tax wasn't attributable to exportation *per se*, but to the success of the enterprise (measured by net income). And the fact and level of the tax would have been exactly the same if none of the income had derived from exportation.

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234. 247 U.S. 165 (1918).

235. Act of Oct. 3, 1913, ch. 16, § II, 38 Stat. 166, 172. The Court said that the Sixteenth Amendment was irrelevant to its analysis, in that the Amendment didn't extend the taxing power to new sources. *W. E. Peck & Co.*, 247 U.S. at 172-73. In any event, corporate income taxes had previously been held to be excise taxes not subject to the apportionment requirement for direct taxes. See generally *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916).

236. *W. E. Peck & Co.*, 247 U.S. at 174-75. One can infer that a tax imposed only on exportation income or on the income of exporters would therefore not be permitted. See *infra* Part III.B.1.c.



I admit that's not a totally satisfactory explanation as to why a generally applicable income tax shouldn't be constrained by the Export Clause. We know that a tax on exported articles doesn't become acceptable just because it's imposed in a nondiscriminatory way,<sup>237</sup> and a tax that reaches the income of a successful exporter burdens the exporter in a very real sense: he has fewer dollars after taxes than would otherwise be the case.

But at some point, the connection with exportation isn't close enough to implicate the Export Clause; ultimately a qualitative judgment is required. One reason a generally applicable income tax should be constitutionally acceptable is that it doesn't necessarily apply to someone engaged in exporting. For someone who isn't successful – someone, that is, with no net income – the income tax doesn't come into play at all, an indication of how tenuous the connection is between a tax on income and the process of exportation. The connection is there, but it's not strong enough.

Of course we can't say for sure what the founders would have thought about income taxes. There was no well-developed conception of an income tax in 1787,<sup>238</sup> and, for that matter, there was no conception at all of corporations. Nevertheless, we can say this much: if a generally applicable income tax were treated as falling on exported goods – and were, as a result, considered unconstitutional insofar as it applied to the export income of a taxpayer – then any tax that reaches someone involved in exportation, however tangentially, could have constitutional problems. And that result would give the Export Clause *too much* effect.<sup>239</sup> The Export Clause was intended to be a real limitation within its sphere, but not to be the primary check on the taxing power.

b. *Generally Applicable Excise on Pre-Export Goods or Services*

The reference in *W. E. Peck* to “articles intended for export before the exportation begins”<sup>240</sup> picked up on a line of cases, discussed in more detail

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237. See *supra* notes 82-83 and accompanying text.

238. See Jensen, *The Taxing Power*, *supra* note 8, at 1079 n.117 (noting that England adopted income tax only in 1799).

239. National taxes on real property, for example, were intended to be possible under the Constitution, as long as the apportionment rule for direct taxes was satisfied. See Jensen, *Apportionment*, *supra* note 8, at 2353-54. There was no discussion at the Constitutional Convention suggesting that the Export Clause might limit such taxes as they applied to the real estate of exporters. (Of course, I have to admit that there were almost no discussions about how the Export Clause might limit *any* levy except one imposed directly on exported articles. See *supra* Part I.)

240. See *supra* text accompanying note 236.

below,<sup>241</sup> that tried to determine the point at which goods ought to be treated as “Articles exported.” If, for example, a tax is imposed once a good is on a ship ready to head overseas, there’s no question: the tax is on “Articles exported,” within the meaning of the Export Clause.

At the other extreme, a tax imposed at the time of manufacture is generally acceptable, even if it’s known that some of the goods will eventually be exported and even if, in fact, the tax winds up falling both on the goods that are exported and those that aren’t.<sup>242</sup> This was what Justice Thomas, in *IBM*, referred to as “federal taxation of pre-export goods and services,”<sup>243</sup> permissible under the modern understanding of the Export Clause.<sup>244</sup>

The “pre-export goods” exemption from the Export Clause was first articulated in an 1886 Supreme Court case, *Turpin v. Burgess*,<sup>245</sup> which relied, in part, on a contemporaneous case interpreting the Import-Export Clause.<sup>246</sup>

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241. See *infra* Part III.B.3.

242. For this purpose, “manufacture” ought to be understood broadly, and not be limited to industrial goods. For example, an excise on agricultural products imposed while the goods are still on the farm should be treated in the same way as goods taxed while still at the factory. However, how these principles ought to apply to federal taxation of e-commerce – particularly to downloadable materials that aren’t manufactured or shipped at all in traditional ways – is just beginning to be explored. See Travis McDade, *Federal Taxation of E-Commerce? The Constitution Says ‘No,’* 98 *Tax Notes* 1903, 1906 (2003).

243. *IBM*, 517 U.S. at 846. “Services” wouldn’t be covered by the Export Clause in any event, unless the services are integrally related to, or are surrogates for, “Articles exported.” See *supra* Part III.B.2.

244. It may be that the founders wouldn’t have been happy with such an interpretation. The First Congress did provide, in 1791, for refunds of excises that were collected on distilled spirits that were later exported, and subsequent Congresses followed suit. See *supra* note 100. I’m skeptical that the actions of early Congresses ought to be given controlling weight in constitutional interpretation, but, if there’s a case for doing so at all, the actions of the First Congress presumably are as authoritative as you can get. Cf. *supra* note 103 (discussing lesser deference to be given to Fifth Congress).

Nevertheless, one shouldn’t infer from any particular enactment that Congress was exercising the full measure of its power. (Congress can always decide to do *less* than what is constitutionally permitted.) Rather than evidencing the limits of congressional power, the refund provisions may simply have reflected caution. Why invite disputes about the legitimacy of a levy (and therefore about the legitimacy of Congress itself) when it was possible to eliminate any arguable Export Clause claim (and therefore any arguable claim of congressional overreaching) by providing a refund mechanism?

245. 117 U.S. 504, 507 (1886).

246. See *Coe v. Errol*, 116 U.S. 517, 527 (1886) (“goods do not cease to be part of the general mass of property in the State, subject, as such, . . . to taxation in the

The Court explained the rationale for the exemption, in 1904, in *Cornell v. Coyne*:<sup>247</sup>

The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.<sup>248</sup>

At the time of manufacture a good isn't yet an "exported article," and Congress may therefore impose an excise on the manufacture of widgets without violating the Export Clause.<sup>249</sup>

As with the generally applicable income tax, there's a connection with exportation at an abstract level: under the Supreme Court's understanding, a good that is ultimately exported may, despite the Export Clause, be subject to taxation. But if a tax or duty is to be prohibited, the Export Clause requires a closer, more concrete relationship between levy and exported good than results from the mere possibility of future exportation. The line between permissible and impermissible levies may not be bright – Not again! I hear you say<sup>250</sup> – but it's a boundary that must be policed as best we can.

In any event, the difficult cases that inevitably arise at the margin shouldn't hide the basic principle at work here: if a tax is imposed at the time of manufacture and isn't directed at exportation *per se*, there should be no problems under the Export Clause.

*c. Taxes on Exportation Disguised as Taxes of General Application*

None of this is to say, however, that an income tax or an excise on manufactured goods is automatically safe under the Export Clause. If a tax is targeted at exports, it ought to fail the Export Clause regardless of its other characteristics. For example, if an excise on manufacturing applied only to goods that were to be exported, even though in form it might appear to be a

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usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation").

247. 192 U.S. 418 (1904).

248. *Id.* at 427.

249. See *infra* Part III.B.3.a.

250. About which, more later. See *infra* Part III.B.4.

neutral, pre-exportation tax, it should be invalid.<sup>251</sup> An excise would also be flawed if the rate applicable to exported goods were higher than for other articles. As is generally true in American tax law, substance ought to control in characterizing a levy under the Export Clause.

Similarly, if a tax applied to the income of exporters only, and not to that of other business persons<sup>252</sup> – or if income from exportation were taxed at a higher rate than other income – a court should see the tax as burdening exportation and hence as falling on “Articles exported.”<sup>253</sup> Such a tax would be like a levy hypothesized in 1827 by Chief Justice Marshall, in *Brown v. Maryland*.<sup>254</sup>

Marshall’s examples of export taxation in *Marbury* were ridiculously simple, and therefore noncontroversial,<sup>255</sup> but, in *Brown*, Marshall showed a sophisticated sense of substance-over-form in discussing a hypothetical occupational tax that would fall only on exporters: “Would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that [the occupational tax on exporters] was a tax on the person, not on the article, and that the legislature had a right to tax occupations?”<sup>256</sup> The tie between the tax

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251. For example, suppose a tax is imposed, in a facially neutral way, on a category of goods that is manufactured solely, or primarily, for exportation.

A bit later I discuss whether a tax is valid if it’s imposed while goods remain at the place of manufacture but some of the goods have already been designated for exportation. See *infra* notes 302-307 and accompanying text (discussing uncertainty remaining after *Turpin v. Burgess*).

252. I question whether a tax that reaches only a small part of the nation’s income-earners would constitute a “tax on incomes” within the meaning of the Sixteenth Amendment, and would therefore be exempt from the apportionment requirement that otherwise applies to direct taxes. See Jensen, Apportionment, *supra* note 8, at 2410-11. For present purposes, however, I’ll put that question aside.

253. Presumably the same result should apply if the tax fell disproportionately on exporters for other reasons—for example, if exporters were denied business deductions that were available to other taxpayers.

254. 25 U.S. (12 Wheat.) 419 (1827). *Brown* was an Import-Export Clause case, and the discussion of the occupational tax under the Export Clause is technically dictum, but Marshall thought the Export Clause and the Import-Export Clause should be interpreted consistently. See *supra* note 131 and accompanying text.

255. See *supra* note 12 and accompanying text.

256. *Brown*, 25 U.S. (12 Wheat.) at 445. Justice Story also took for granted that such an occupational tax would be invalid: “The prohibition extends not only to exports, but to the exporter. Congress can no more rightfully tax the one, than the other.” Story, *supra* note 33, § 1012, at 471. I’m not sure, but I think both Marshall and Story were concerned about a tax on the person in his capacity as exporter or importer, and that they wouldn’t have thought a tax was unconstitutional simply because it wound up reaching someone who was an exporter. Neither jurist would necessarily have been bothered by

and any particular exported good might be minimal with such an occupational tax, but the link between the tax and exportation would be so strong that the tax should fall.

2. *Taxes on Goods and Services Related to Exportation* – Justice Marshall’s dictum in *Brown* was an early indication that courts ought to apply substance-over-form principles to determine whether a tax or duty is on articles exported. As I’ve just argued, one case in which such principles must apply, unless the Export Clause is to be a nullity, is when Congress imposes a tax on an unquestioned surrogate for “Articles exported.” But it’s also appropriate to see some services, what I’ll call “integrally related services,” as so closely intertwined with exported goods that a tax on the services ought to be treated as a tax on the goods.

a. *The Slam-Dunk Cases: Taxes on Surrogates for Exported Goods*

To my mind, there’s little doubt that the Export Clause should prevent Congress from imposing taxes on clear surrogates for exported goods, such as bills of lading. Nevertheless, Congress did just that several times, beginning in 1797,<sup>257</sup> and the legitimacy of such a tax wasn’t tested until 1901, in *Fairbank v. United States*.<sup>258</sup>

The Court in *Fairbank* evaluated the constitutional legitimacy of a stamp tax, imposed at a rate of ten cents, that applied to, among other things, “[b]ills of lading . . . for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place.”<sup>259</sup> (Bills of lading for domestic shipping were subject to only a one cent tax.<sup>260</sup>) The provision was part of the same 1898 act to raise funds for the Spanish-American War that created another Export Clause issue in *Thames & Mersey*.<sup>261</sup>

The amount of the tax wasn’t measured by the value of the goods shipped, but nothing in the Export Clause limits its scope to taxes or duties

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the result in *W. E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918), finding no Export Clause problem with a corporate income tax. See supra notes 234-236 and accompanying text; see also 1 Bittker & Lokken, supra note 6, 360, at 1-14 (noting that Sixteenth Amendment, permitting unapportioned tax on income “from whatever source derived,” was irrelevant to Export Clause question).

257. See Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527; supra Part II.A.2 (discussing 1797 Act).

258. 181 U.S. 283 (1901).

259. Act of June 13, 1898, ch. 448, 30 Stat. 448, 459.

260. *Id.*, 30 Stat. at 459.

261. See Part II.A.3. And still another in *United States v. Hvoslef*, 237 U.S. 1 (1915). See infra notes 271-281 and accompanying text.

measured by value.<sup>262</sup> The Court looked to the tax's effect – “a stamp duty on a bill of lading is in effect a duty on the article transported”<sup>263</sup> – and came to the obvious conclusion: Congress couldn't burden exports through a tax on exported articles, and that's exactly what it had done here, albeit surreptitiously.<sup>264</sup>

*Fairbank* was nevertheless a controversial case, with four dissenters accepting the government's argument that the tax was really on the bills of lading, which weren't “Articles exported.” Adopting an incredibly formalistic position, Justice Harlan wrote that “stamp duties were imposed specifically for and in respect of the vellum, parchment or paper upon which was written or printed a bill of lading for goods or merchandise to be exported to foreign countries.”<sup>265</sup> As I discussed earlier, the dissenters relied in part on the fact that a similar levy had been imposed in 1797, inferring that the founding generation thought such a tax was consistent with the Constitution.<sup>266</sup> But because this interpretation would have left the Export Clause with almost no effect, contrary to the understanding at the Constitutional Convention, *Fairbank* had to be decided the way it was.

#### b. Taxes on Integrally Related Services

*Fairbank* was (or should have been) easy. In other cases, the Court had to consider levies that weren't as closely tied to particular goods as was a tax on bills of lading. In two cases in particular, the Court decided, in effect, that if a tax reaches a service that is critical to exportation, so that one can't

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262. See *supra* notes 141-144 and 148 and accompanying text (discussing how *IBM* Court could have approved the 1915 result in *Thames v. Mersey*).

263. *Fairbank*, 181 U.S. at 294.

264. Chief Justice Roger Taney had made a similar point in *Almy v. California*, 65 U.S. (24 How.) 169 (1860), a case interpreting the Import-Export Clause:

[A] tax or duty on a bill of lading, although differing in form from a duty on the article shipped is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another.

*Id.* at 174. The California duty at issue in *Almy* was on bills of lading associated with the transfer of gold and silver out of California, and the legislative purpose was clearly to tax the transfer of the gold and silver itself. “The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. . . . If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form . . . .” *Id.* at 174-75.

265. *Fairbank*, 181 U.S. at 315 (Harlan, J., dissenting).

266. See *supra* Part II.A.2.

realistically untangle the service from the goods, the Export Clause ought to forbid the tax. I'd call this the "integrally related" test.

One example is *Thames & Mersey*, the 1915 case relied on by the Court in *IBM*.<sup>267</sup> Exporting valuable goods without insurance is almost inconceivable, making insurance "an integral part of the exportation."<sup>268</sup> As a result, a tax on insurance premiums was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation"<sup>269</sup> – a conclusion validated, in a backhanded way, in *IBM*.<sup>270</sup>

A similar analysis was applied in *United States v. Hvoslef*,<sup>271</sup> a companion case to *Thames & Mersey*. Like *Thames & Mersey*, *Hvoslef* involved yet another tax imposed under the 1898 act as it applied to certain "charter parties" – generally contracts for the lease of vessels – for carrying cargo from the United States to foreign ports,<sup>272</sup> and it involved yet another levy with ties to the 1797 Act, which also included a tax on charter parties.<sup>273</sup>

The amount of tax was based on the tonnage of the vessel, not on the value of the cargo carried,<sup>274</sup> but nothing in the Export Clause limits its application to taxes or duties tied to the value of exported articles.<sup>275</sup> Instead of

267. See supra Part II.A.3.

268. *Thames & Mersey*, 237 U.S. at 26.

269. *Id.* at 25.

270. See supra Part II.A.3. As I argued above, the *IBM* Court could have concluded not only that it wouldn't overrule *Thames & Mersey*, but also that the earlier case was rightly decided. See supra notes 135, 137-144, and 148 and accompanying text.

271. 237 U.S. 1 (1915).

272. Act of June 13, 1898, ch. 448, § 6, 30 Stat. 448, 451, 460. Section 6 of the Act specified that a tax be imposed on the "things mentioned and described in Schedule A," and Schedule A included "charter party," defined as a

[c]ontract or agreement for the charter of any ship, or vessel, or steamer, or any letter, memorandum, or other writing between the captain, master, or owner, or person acting as agent of any ship, or vessel, or steamer, and any other person or persons, for or relating to the charter of such ship, or vessel, or steamer, or any renewal or transfer thereof.

30 Stat. at 460; see *Hvoslef*, 237 U.S. at 16.

273. See Act of July 6, 1797, ch. 448, § 1, 1 Stat. 527 (imposing one-dollar tax on "any charter-party"). As the *IBM* dissenters noted, the 1797 Act wasn't briefed to the Court in *Hvoslef* or *Thames & Mersey*. See *IBM*, 517 U.S. at 877 (Kennedy, J., dissenting); supra note 121.

274. For vessels of three hundred tons or less, the tax was three dollars. For vessels of more than three hundred, but not more than six hundred, tons, the tax was five dollars. For vessels over six hundred tons, the tax was ten dollars. 30 Stat. at 460.

275. See supra notes 142-143 and accompanying text.

imposing a tax directly on exported goods, Congress had slapped a levy on the ships carrying the goods, or, perhaps more precisely, on the paperwork associated with arranging for the ships.<sup>276</sup>

It's difficult to imagine anything more "integrally related" to exportation: "The charters were for the exportation; . . . they serve no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports."<sup>277</sup> The tax didn't discriminate – the levy applied to all charter parties, whether or not the ships went to other countries – but the Export Clause is an absolute prohibition.<sup>278</sup> At bottom, the Court concluded that it was necessary to reject the tax on charter parties if the Export Clause was to be protected:

This prohibition . . . is designed to give immunity from taxation to property that is in the actual course of such exportation . . . This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.<sup>279</sup>

Not surprisingly, the Court referred approvingly to Chief Justice Marshall's substance-over-form dictum in *Brown*.<sup>280</sup>

If there was any question at all in *Hvoslef* about the substance of the tax on charter parties, it arose when only part of a vessel's cargo was destined for exportation. Even then, however, the Court decided that the Export Clause

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276. Perhaps I therefore should have discussed *Hvoslef* together with *Fairbank*, rather than with *Thames & Mersey*. Ultimately, I think it doesn't matter.

277. *Hvoslef*, 237 U.S. at 17.

278. See supra notes 82-83 and accompanying text.

279. *Hvoslef*, 237 U.S. at 13.

280. 25 U.S. (12 Wheat.) 419, 441 (1827); see supra notes 254-256 and accompanying text. *Brown* involved state power under the Import-Export Clause, and Marshall emphasized that the Export Clause should be interpreted so as not to defeat its purposes:

But, while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.



applied: “Whether the contract of carriage covers a small lot, or a partial cargo, or an entire cargo . . . can make no constitutional difference.”<sup>281</sup> Since the tax was based on the vessel’s tonnage, rather than being tied to the value or weight of the cargo, that result was hardly surprising. A tax on a vessel carrying goods for export, or on the arrangements for the vessel, was in substance a tax on the cargo, including the exported articles.

3. *When Has a Taxed Good Entered the Stream of Exportation?* – *Fairbank, Thames & Mersey*, and *Hvoslef* considered whether taxes that didn’t fall directly on goods nevertheless ought to be treated as reaching articles exported. At a minimum, that should be true when the tax falls on a clear surrogate for the goods or when the “integrally related” test is satisfied. In still other cases, the Court had to decide whether a tax that was unquestionably on goods ought to be treated as falling on *exported* goods.

That is the subject of the next portion of this article. I consider the treatment of, in order, pre-export goods (a subject I’ve already introduced<sup>282</sup>), goods that are unquestionably in the process of exportation, and goods that fall between the two polar cases.

#### a. *Pre-export Goods*

Despite the Export Clause, Congress may impose a generally applicable tax on goods, or on the manufacture of goods, even if some of the goods wind up being exported, as long as the tax attaches before the goods have entered a stream of commerce that is heading toward exportation. That’s what the *IBM* Court called “federal taxation of pre-export goods and services,”<sup>283</sup> or a “nondiscriminatory pre-exportation assessment.”<sup>284</sup>

For example, an excise that applies at the time of manufacture to all widgets, whether they’ll be exported or not, is constitutionally permissible. Suppose identical widgets A and B are manufactured simultaneously in Massachusetts. It turns out that A is headed for Mississippi and B for England, but it could just as well have been the other way around. As long as the tax applies before the fungible widgets leave the factory, the tax isn’t foreclosed by the Export Clause; it isn’t a tax on articles exported.

And the principle is broader than that. Suppose widgets are, in general, manufactured for use both inside and outside the United States, but a particular manufacturer produces widgets only for exportation. An excise applied to those

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281. *Hvoslef*, 237 U.S. at 17.

282. See *supra* Part III.B.1.b.

283. *IBM*, 517 U.S. at 846; see *supra* note 243 and accompanying text.

284. *IBM*, 517 U.S. at 848 (citing *Pace v. Burgess*, 92 U.S. 372 (1976); *Turpin v. Burgess*, 117 U.S. 504 (1886); and *Cornell v. Coyne*, 192 U.S. 418 (1904)).

to-be-exported widgets would be permissible so long as it applied to all manufacturers of the widgets – those who export everything they produce, those who don't export at all, and those who export only some of their product.

This principle is illustrated by *Cornell v. Coyne*,<sup>285</sup> decided in 1904, in which the Court, over two dissents, held that a one cent per pound manufacturing tax on filled cheese could be imposed on all such ersatz cheese,<sup>286</sup> including stuff to be exported.<sup>287</sup> The tax had nothing specifically to do with exporting: “Subjecting filled cheese manufactured for the purpose of export is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export.”<sup>288</sup> Just because they're exported later, articles aren't “relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation.”<sup>289</sup>

The result in *Cornell* followed the stated rationale of *Turpin v. Burgess*,<sup>290</sup> decided in 1886. In *Turpin*, the Court reaffirmed the result in *Pace v. Burgess*<sup>291</sup> – the 1876 case that first analyzed user fees under the Export Clause<sup>292</sup> – but also added an alternative justification for *Pace*'s result.

The statute in *Turpin* was precisely the same one involved in *Pace*: it imposed a stamp levy on tobacco marked for export at a lower rate than would otherwise have applied.<sup>293</sup> *Turpin* was decided just ten years after *Pace*, and it appears that the Court decided to hear the new case only because, in the meantime, Congress had repealed the levy.<sup>294</sup> Maybe, it was argued, the repeal showed that Congress had conceded the stamp charge's constitutional problems.

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285. 192 U.S. 418 (1904).

286. Act of June 6, 1896, ch. 337, § 9, 29 Stat. 253. “Filled cheese” was “[a]ll substances made of milk or skimmed milk, with the admixture of butter, animal oils or fats, vegetable or any other oils, or compounds foreign to such milk, and made in imitation or semblance of cheese.” *Id.*, § 2, at 253. *Yum*.

287. The act also subjected imported filled cheese to a substantial duty. *Id.*, § 11, at 255. Congress was trying to encourage the domestic cheese industry. *Cornell*, 192 U.S. at 427.

288. *Cornell*, 192 U.S. at 427. Because the Import-Export Clause generally precludes states from imposing duties on exports, a contrary result might have led to the conclusion that a state “government was bound to refund all prior taxes imposed on articles exported. A farmer may raise cattle with the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle?” *Id.* The question was, of course, rhetorical.

289. *Id.*

290. 117 U.S. 504 (1886).

291. 92 U.S. 372 (1876).

292. See *supra* notes 188-192 and accompanying text.

293. See Act of July 20, 1868, ch. 186, § 74, 15 Stat. 125, 157.

294. See Act of Aug. 8, 1882, ch. 473, 22 Stat. 372.

The Court didn't buy the concession argument,<sup>295</sup> however, and that might have ended the dispute. Once it decided that repeal didn't affect how the statute should be interpreted, the Court could simply have reaffirmed its analysis in *Pace*. For reasons that aren't clear, however, it didn't do that. Instead, without repudiating the reasoning in *Pace*, the Court added a new justification for the result.<sup>296</sup> The stamp tax, it said, wasn't imposed "by reason or because of [the goods'] exportation or intended exportation, or whilst they are being exported."<sup>297</sup> "[A] general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."<sup>298</sup>

Even if *Pace's* stated rationale didn't hold up – and the Court specifically refused to say any such thing<sup>299</sup> – the result would have been exactly the same. The levy was valid: "In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer."<sup>300</sup>

It's possible to get a pretty good sense of what the Court meant about pre-export levies in both *Turpin* and *Cornell*, but the Court left a troubling loose end in *Turpin*. One of the striking things about the Court's opinion is that it didn't connect with the facts. Whatever the merits of permitting a "general tax, laid on all property alike, and not levied . . . because of [the good's] intended exportation,"<sup>301</sup> that wasn't the situation in the case. The levy at issue in both *Turpin* and *Pace* did single out goods to be exported.<sup>302</sup> The charge for tobacco was generally thirty-two cents per pound, but exported tobacco was instead required to have only a twenty-five cent stamp affixed to each package.<sup>303</sup> With such a differential rate structure, the total amount a producer owed Uncle Sam couldn't be determined until the producer had decided which tobacco was to be exported, and which wasn't.

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295. The repeal wasn't "a concession by Congress that the charge for the stamp was an export tax," said the Court, *Turpin*, 117 U.S. at 505, or, even if the repeal were interpreted that way, "it would only be the opinion of one Congress opposed to that of another." *Id.* at 506.

296. Maybe the Court felt that, if it provided enough reasons for validity, people would decide that it was pointless to keep asking the Court to deal with boring Export Clause issues.

297. *Turpin*, 117 U.S. at 507.

298. *Id.*

299. See *supra* note 225.

300. *Turpin*, 117 U.S. at 507.

301. *Id.*

302. See *supra* notes 188-193 and accompanying text.

303. Act of July 20, 1868, ch. 186, § 74, 15 Stat. 125, 157.

Does *Turpin* therefore mean that, despite the Export Clause, a tax directed at exported goods can be levied on goods that have been set aside for exportation, as long as the goods are still at the factory? The language of the opinion – *not levied . . . because of [the good’s] intended exportation*<sup>304</sup> – suggests the answer to that question is “No,” but the result of the case is otherwise. To be sure, the charge for the stamp affixed to exported tobacco in *Pace* and *Turpin* was *lower*, indeed much lower, than would otherwise have been the case; exported goods therefore weren’t being singled out for discriminatorily unfavorable treatment. But lack of discrimination isn’t supposed to matter under the Export Clause: a tax on exports doesn’t become acceptable simply because exported goods are relatively well treated. Since the cases discussing the irrelevance of discrimination came after *Turpin*, however, maybe the *Turpin* result depended on an understanding of the Export Clause that was repudiated in *Fairbank* and other cases.<sup>305</sup>

I’m not sure, but it seems to me that a tax that applies specifically because articles have been designated for exportation shouldn’t be treated as on “pre-export goods” – wherever the goods are located when the tax attaches and whether the tax on goods to be exported is less than, equal to, or greater than any tax on other goods.<sup>306</sup> As meritorious as *Turpin*’s rationale may have been in the abstract, it shouldn’t have applied to the facts of *Turpin*. That said, however, *Turpin* is cited these days for the proposition that a “nondiscriminatory pre-exportation assessment” is permissible. (The Court characterized *Turpin* that way in *IBM*.<sup>307</sup>) If *Turpin* is really an example of such an assessment, then a tax that falls on goods set aside for exportation is valid, as long as the goods haven’t “left the factory,” and, presumably, as long as the tax rate for exported goods is no higher than for other goods.

#### b. *In the Stream of Exportation*

As *Turpin* and *Coyne* concluded (and as revisionists interpret *Pace* as concluding<sup>308</sup>), Congress may tax goods at the pre-export stage without violating the Export Clause. At the other extreme, once articles have entered the

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304. *Turpin*, 117 U.S. at 507.

305. *Fairbank*, the first strong judicial statement that lack of discrimination against exports is irrelevant, wasn’t decided until 1901, fifteen years after *Turpin*. See *supra* note 83.

306. Let me reemphasize, however, that the result of *Turpin* would have been unchanged, even if the levy had been treated as targeting exports, so long as the levy was a user fee, as the Court had concluded in *Pace v. Burgess*, 92 U.S. 372 (1876). See *supra* notes 188-193 and accompanying text.

307. See *IBM*, 517 U.S. at 848.

308. See *supra* notes 223-228 and accompanying text.

stream of commerce that leads inexorably to exportation, Congress may not impose a tax on the articles. That's what the Export Clause is all about.

For example, an excise applied only to widgets that have been set aside for exportation would, I think, be invalid.<sup>309</sup> An even clearer case: if the widget is already on a ship bound for England at the time the tax attaches, no one would doubt that the tax violates the Export Clause insofar as it applies to the exported goods, even if all shipped widgets – those going to other countries and those staying within the U.S. – are subject to the tax.

*c. At the (Wide?) Margin: Spalding*

Except in the polar cases, where a good is still at the manufacturing stage<sup>310</sup> or is already on a vessel headed overseas,<sup>311</sup> determining whether a good is an “Article exported” isn't easy. Even if a purportedly bright-line rule were adopted that would confine the Export Clause to cases like those in Justice Marshall's *Marbury* hypotheticals<sup>312</sup> – a tax laid directly on flour, say – there can still be questions about whether, or when, the flour is being exported. If Congress is going to tax goods, or surrogates for goods, or services integrally related to goods, there's no way to eliminate characterization questions of that sort.<sup>313</sup>

*A. G. Spalding & Brothers v. Edwards*,<sup>314</sup> decided in 1923, the Court's last Export Clause case before *IBM*, illustrates the difficult line-drawing that is inevitable. At issue was the constitutionality of a wartime tax imposed on “baseball bats, . . . balls of all kinds . . . sold by the manufacturer, producer, or importer,”<sup>315</sup> as that tax applied to baseball equipment that would ultimately wind up in Venezuela. A Venezuelan purchaser enlisted the efforts of a commission merchant to acquire equipment on its behalf and have the equipment shipped. The commission merchant did just that, arranging for

309. As I suggested above, there may be some doubt about a tax that is directed at goods set aside for exportation, before they've left the factory, see *supra* notes 302-307 and accompanying text, but that treats the exported goods no less favorably than goods that aren't exported.

310. But see *supra* notes 302-307 and accompanying text.

311. By “overseas,” I mean to include Canada and Mexico as well as the countries that are, by any definition, overseas.

312. See *supra* text accompanying note 12.

313. Obviously the more narrowly the Export Clause is understood, the smaller the universe of characterization issues. But even in the Clause's most narrowly understood form – and no one, I think, believes that the Export Clause applies to *less* than Justice Marshall's hypotheticals – it's necessary to determine whether the taxed (or potentially taxed) cotton, tobacco, or flour is actually being exported.

314. 262 U.S. 66 (1923).

315. War Revenue Act, ch. 63, § 600(f), 40 Stat. 300, 316 (1917).

Spalding to deliver the goods to a carrier, at which point title passed. Spalding was paid by the commission merchant and the merchant was paid later by the ultimate purchaser.

If the equipment had still been “in process of manufacture” at the time the tax attached, the tax would have been valid, under the authority of *Turpin*<sup>316</sup> and *Cornell*.<sup>317</sup> In contrast, Justice Holmes wrote for the Court, “no one would doubt that [the bats and other equipment] were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued.”<sup>318</sup>

The problem was that the *Spalding* facts fell between those two extremes. The tax liability was not on the manufacture, but it also wasn’t on goods loaded for overseas shipment. The Court had to decide which of the two polar cases the facts were closer to, and Justice Holmes concluded, with a decided lack of certainty, “It seems to us that the facts recited are closer to the latter than to the former side, and that the export had begun.”<sup>319</sup>

Manufacture alone wouldn’t have been treated as a “step in exportation,”<sup>320</sup> but this tax was on the *sale* of the equipment – which by itself gets us closer to the export stage. Moreover, although baseball bats manufactured in the U.S. weren’t ordinarily headed overseas, in this case, as Holmes put it, “[t]he transaction from start to finish was understood and intended by [Spalding and the commission merchant] to be for the purpose of exporting the goods to [the Venezuelan buyer].”<sup>321</sup> If all of that weren’t enough, “[t]he overt act of delivering the goods to the carrier marks the point of distinction between this case and *Cornell v. Coyne* [the filled-cheese case].”<sup>322</sup>

Some might see arbitrariness in this line-drawing, and Justice Holmes admitted as much: “[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary.”<sup>323</sup> Even hard cases need to be decided, but the harder the case, the easier it is to conclude that the case should have been decided differently.

*Spalding* wasn’t clear-cut, but that doesn’t mean the result was arbitrary. Justice Holmes prescribed a way to decide difficult Export Clause cases. His reference to the “overt act of delivering the goods to the carrier” was coupled with a principle which justified treating that event as critical: to have

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316. 117 U.S. 504 (1886); see supra notes 290-300 and accompanying text.

317. 192 U.S. 418 (1904); see supra notes 285-288 and accompanying text.

318. *Spalding*, 262 U.S. at 69.

319. *Id.* at 69.

320. *Id.*

321. *Id.* at 68.

322. *Id.* at 70; see supra notes 285-288 and accompanying text (discussing *Cornell*).

323. *Spalding*, 262 U.S. at 69.

the Export Clause come into play “at any later point would fail to give to exports the *liberal protection* that hitherto they have received; of which an example may be seen in *Thames & Mersey*. . . .”<sup>324</sup>

As I’ll now discuss, the idea that exported articles should be provided “liberal protection” against the national taxing power is a useful principle to resolve Export Clause issues generally.

*4. Interpreting the Export Clause: “Liberal Protection”* – I’ve been considering the necessary relationship, if the Export Clause is to apply, between a tax or duty and exported articles. The cases advance some reasonably consistent principles on this point, but, if Congress is aggressive in enacting taxes that have export implications, courts will inevitably face tough judgment calls. For that matter, Congress also faces uncertainty in evaluating the likelihood that a proposed tax could face a legitimate Export Clause challenge.

Because modern commentators generally see Congress’s power to enact taxes as plenary,<sup>325</sup> they are unlikely to take this uncertainty seriously. One who sees few, if any, limitations on the taxing power is likely to resolve any doubt about constitutionality in favor of a challenged (or a proposed) tax. And resolving doubt in favor of constitutionality means, as a practical matter, that modernists are unlikely to raise any doubts about constitutionality to begin with.

But the Export Clause can’t just be brushed aside. When the Supreme Court decides two cases under the Export Clause within a two-year period,<sup>326</sup> and strikes down congressional enactments both times, the Export Clause has a great deal more legitimacy than if it were being promoted only by some crazy law professor.<sup>327</sup> *IBM* and *U.S. Shoe* weren’t aberrations. (One case might have been characterized that way; two in two years can’t be.)

The founders intended the Export Clause to be a real restriction on what Congress can do,<sup>328</sup> and it should be interpreted in a way that ensures it has real effect. Moreover, that’s the way other constitutional restrictions on the taxing power used to be interpreted,<sup>329</sup> until modern conceptions of congressional plenary power gained currency, and that’s the way Justice Holmes concluded that the Export Clause should be applied in *Spalding*. With the Export Clause, we’re no longer in the plenary-power era: courts after *IBM* and *U.S. Shoe* have an obligation to police the Export Clause.

The bottom line in *Spalding* was this: if there’s doubt about whether a tax falls on exported articles – if there’s uncertainty as to where, on the

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324. *Id.* at 70 (emphasis added).

325. See, e.g., Ackerman, *supra* note 39, at 3.

326. See *supra* Part II.

327. A term that may be redundant.

328. See generally *supra* Part I.

329. See Jensen, Apportionment, *supra* note 8, at 2414-19.

continuum between manufacture and overseas transport, a particular tax attaches to goods – the doubt should be resolved in a way that protects the principles of the Export Clause. That’s the *liberal protection* that Justice Holmes was talking about.

A common argument today is that it’s too onerous to tell whether a levy has suspect effects. The difficulty of determining whether a tax or duty ought to be treated as falling on exported articles isn’t imaginary, and therefore, the argument goes, the constitutional limitation shouldn’t be applied – except, perhaps, in the most straightforward, noncontroversial situations. Life’s just too short to worry about this sort of thing.

That was one of Justice Kennedy’s points in his *IBM* dissent. He suggested that it was going to be a real chore, in most cases, to determine how a tax on insurance premiums relates to exportation, and therefore courts shouldn’t even have to try. If that reluctance leaves the Export Clause applying to nothing but *Marbury*-like hypotheticals, and therefore leaves Congress with a basically unconstrained power to burden exportation, so be it.<sup>330</sup>

That can’t be the right interpretational principle. The idea that constitutional limitations ought to be applied only when they’re easy to apply gives away the store. The older cases, of which *Spalding* is one, suggest another, reasonable way a limitation might be applied: if there’s doubt about whether a particular levy attaches closer to the manufacturing stage or the transport stage, the doubt should be resolved *against* the levy.<sup>331</sup> To give “liberal protection” to the Export Clause is, in effect, to create a default rule, and the default position is that a tax *isn’t* valid unless its legitimacy can be demonstrated.<sup>332</sup>

Providing liberal protection to exported articles isn’t merely a matter of courts getting it right in interpreting the Export Clause. For a legislator contemplating a proposed piece of tax legislation, a similar rule should apply: if there’s doubt about whether the Export Clause would forbid a proposed tax, that doubt should be resolved against the proposal. If courts are going to defer to Congress’s implicit determination that enactments are constitutional – and that’s still likely to happen, despite *IBM* and *U.S. Shoe* – then Congress should

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330. See supra note 118.

331. There can also be difficulty in determining whether an exaction is a tax or duty, and that issue too should be resolved, when it arises, through application of a “liberal protection” standard. And it may be the case that downloaded electronic materials, which at no point enter the transport stage – at least not in a traditional way – ought to be immune from federal taxation because of the Export Clause, or so it has been argued. See McDade, supra note 242, at 1906.

332. I don’t mean to suggest that every levy is in danger. The cases that have dealt with taxes of general application, for example, and those dealing with pre-export goods and services will protect many levies from serious constitutional challenge.



legislate with a good sense of what the Constitution, including the Export Clause, requires.

*C. Is the Export Clause Really Unique?*

In both *IBM* and *U.S. Shoe*, the Supreme Court discussed the Export Clause as if it were unique.<sup>333</sup> The Court rejected the importation of principles from other constitutional provisions into its analysis of the Export Clause, and it suggested, as well, that Export Clause principles should be confined to the analysis of that provision. Among other things, the Court specifically rejected the application of jurisprudence developed under the Import-Export Clause – the provision restricting *states'* power to tax exports<sup>334</sup> – to disputes arising under the Export Clause. In the strongest statement of this interpretational posture, Justice Ginsburg wrote, in *U.S. Shoe*, “*IBM* plainly states that the Export Clause’s simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.”<sup>335</sup> And, if that weren’t clear enough, she rejected the idea that authority “involv[ing] constitutional provisions other than the Export Clause [should] govern” in an Export Clause dispute.<sup>336</sup>

I’ll concede that the Export Clause speaks in a direct and relatively unqualified way, but I’m unconvinced that the Export Clause is unique in that regard. Of course, if by fiat the Court creates an impenetrable barrier around the Export Clause, that’s just the way it’s going to be, at least for awhile. But it will be difficult for the Court to maintain that position in an intellectually coherent way. In the following discussion, I’ll suggest three respects in which the Export Clause should not be treated as *sui generis*.

*1. What’s a Levy “on” Exports?* – The language of the Export Clause is strong, but treating it as if it occupies its own legal universe, particularly in determining whether a levy falls on exported goods, is a marked break with tradition. For decades the assumption had been that the Import-Export Clause, restricting state authority, and the Export Clause, restricting national authority, ought to be interpreted in tandem. The Export Clause forbids a national “tax or duty” on “articles exported”; the Import-Export Clause generally forbids state “duties” on “exports” without congressional consent.<sup>337</sup> In 1827, in a passage I quoted earlier, Chief Justice John Marshall wrote that “[t]here is some

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333. See *infra* notes 129-132 and 197-199 and accompanying text.

334. See *supra* note 95 (quoting Import-Export Clause).

335. *U.S. Shoe*, 523 U.S. at 368.

336. *Id.*

337. U.S. Const. art. I, § 10, cl. 2. The language of the Export Clause forbids “Imposts or Duties on Imports or Exports,” but presumably the term “imposts” is limited to imports, so that “duties” is left for exports.

diversity in language [between the Import-Export and the Export Clauses], but none is perceivable in the act which is prohibited.”<sup>338</sup>

The term “tax or duty” is broader than “duty,”<sup>339</sup> obviously, so that the prohibition under the Export Clause might very well be broader than under the Import-Export Clause,<sup>340</sup> as the Court concluded in *IBM* and *U.S. Shoe*.<sup>341</sup> Moreover, the Export Clause contains a direct “textual command”<sup>342</sup> and it’s sort of an “unqualified prohibition.”<sup>343</sup> That’s not as clearly true with the Import-Export Clause.<sup>344</sup>

The Export Clause is therefore arguably the stronger restriction. Nevertheless, it should also be true that the sort of state levy on exports that *fails* Import-Export Clause requirements would be prohibited to the national government under the Export Clause. That is, at a minimum – even if we can’t find any other connections between the two clauses – it should be possible to glean from Import-Export Clause jurisprudence some of the state levies that, if imposed by the national government, would fail the Export Clause because they fall on exported articles.

I can think of no good reason for having two different bodies of law on what is, at bottom, a single issue: when a levy is treated as falling on exported goods. John Marshall also thought there was no good reason for such a situation and, on confusing questions, I’m inclined to side with John Marshall. For that matter, the post-Marshall Supreme Court said the same thing, repeatedly, when it was hearing Export Clause cases on a regular basis. It wasn’t until 1996 and the decision in *IBM* that the Court said the two provisions might reasonably be interpreted in different ways.

How could it have happened that the Supreme Court, after not hearing an Export Clause case in over seventy years, suddenly rejected the time-honored understanding that the Export Clause and the Import-Export Clause have a core of common meaning?

I have a couple of theories. One is straightforward: some of the justices who favored treating the Export Clause as if it were *sui generis* might have been uncomfortable with questioning the national taxing power. Overturning

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338. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827).

339. See *supra* note 184.

340. See *supra* note 185.

341. However, the relatively permissive Import-Export Clause cases haven’t relied so much on the distinction between “tax or duty” and “duty” as on a relatively permissive understanding of what constitutes a levy “on” exports.

342. *IBM*, 517 U.S. at 851.

343. *U.S. Shoe*, 523 U.S. at 368. But see *infra* Part III.C.3 (questioning whether Export Clause is really more “unqualified” than other restrictions on taxing power).

344. The purposes of the two clauses are also different: the Export Clause is a restriction on national power, and the Import-Export Clause is a statement of national supremacy. See *supra* note 130 (quoting *IBM*).

a revenue statute was unusual enough in the late twentieth century; doing so twice in two years was extraordinary. Justice Ginsburg's opinion in *U.S. Shoe*, which stressed the unique nature of the Export Clause,<sup>345</sup> was written by someone who had already shown her distaste for an expansive interpretation of the Clause in *IBM*.<sup>346</sup> Cabining the Export Clause, as her opinion for the Court in *U.S. Shoe* did, may have been a form of damage control.

A second, more elaborate theory is probably closer to the truth. In the years between 1923 and 1996, the Court was deciding cases under the Import-Export Clause and ignoring the Export Clause. The Import-Export Clause became increasingly permissive as the Court, for whatever combination of reasons (boredom?), became less and less willing to see state prerogatives limited by the Export Clause. For one thing, even though the Export Clause doesn't say so, the Court had stated that, if a tax didn't "relate[] to the value of the goods, [it wasn't] taxation upon the goods themselves."<sup>347</sup> And the Court had hinted, without resolving the question directly, that a state levy was invalid under the Import-Export Clause only if it discriminated against imports or exports.<sup>348</sup>

At the same time, because the Court was hearing no Export Clause cases, no one was paying attention to the fact that the rules being applied under the Import-Export Clause were becoming far removed from what had been traditionally understood to apply under the Export Clause.<sup>349</sup> That result shouldn't be surprising. Start with two bodies of law that are governed by a common core of principles, but then focus judicial effort on only one of the bodies of law. At the end of the day, and certainly at the end of seventy years, the original principles may have been stretched out of shape in the active area of the law. Notwithstanding *stare decisis*, courts do make changes in doctrine over time, and the cumulative effect of several decades worth of incremental changes can be dramatic.

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345. See *supra* notes 198-200 and accompanying text.

346. She joined Justice Kennedy's dissent.

347. *Dep't of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 757 (1978). As I've noted, nothing in the Export Clause limits the prohibition to taxes measured by the value of the taxed goods. See, e.g., *supra* 142 and accompanying text.

348. The government argued in *IBM* that a tax failed the Export Clause only if it discriminated against exports, and it cited developments in Import-Export Clause jurisprudence in support of that proposition. See *supra* note 84. However, Justice Thomas's opinion for the Court suggested that Import-Export Clause cases hadn't held that a nondiscriminatory levy was permissible. See *IBM*, 517 U.S. at 861; *supra* note 132.

349. Because the Import-Export Clause and the Export Clause are directed at different sovereigns, cases generally don't require analyzing both provisions, so it's not surprising that no one was paying attention to the relationship between the two.

Only in 1996, when the Court revisited the Export Clause after a long hiatus, did it become apparent that the two lines of cases were no longer compatible. If, in the interests of conformity, the Court in 1996 had applied modern Import-Export Clause jurisprudence, there would have been little left of the Clause. Applying permissive rules to the interpretation of a Export Clause that, by its terms, isn't at all permissive simply wouldn't have worked. To preserve a significant role for the Export Clause, the Court had to break the historical connection between the two clauses, or so I hypothesize.

Under the circumstances, breaking the connection between the two clauses made sense, but Chief Justice Marshall was still right that the clauses should be interpreted consistently. If conformity is to be reached, however, the Court will need to reexamine the principles it developed under the Import-Export Clause. When it does that, it shouldn't resist making use of Export Clause jurisprudence.<sup>350</sup>

2. *What's a Tax?* – It's not automatically the case that the term "tax" and its variants have to mean the same thing throughout the Constitution, but I would use conformity in meaning as a starting point and abandon it only if absolutely necessary.<sup>351</sup> Variation in the meaning of terms in a single legal document, even (especially?) a Constitution, is something we ought to resist, not to endorse.

Export Clause cases should therefore provide useful guidance on what distinguishes a tax from other governmental exactions. At a minimum, I see no reason why the understanding that a user fee isn't a "tax or duty" under the Export Clause, reaffirmed by the Supreme Court in *U.S. Shoe*, shouldn't be extended to the interpretation of other taxing provisions in the Constitution.<sup>352</sup> As I've argued, those provisions don't work if interpreted to include user fees, and we don't need a full explication of what, if anything, distinguishes a "tax"

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350. It's worth noting that Justice Thomas, in his opinion for the Court in *IBM*, hinted that the Import-Export Clause cases might not be as permissive as they've generally been interpreted to be. For example, contrary to conventional wisdom, he suggested that a state duty needn't discriminate against imports or exports to be subject to that Export Clause. See *supra* note 132. Maybe the reconciliation of the two clauses has already begun.

351. But see *Bush v. Gore*, 531 U.S. 98 (2000) (concluding that Equal Protection analysis in case should be limited to particular facts – i.e., that a single provision can have different meanings in different contexts).

352. Maybe the understanding of what constitutes a "user fee" should be extended to non-tax provisions as well, see *supra* note 197 (citing user fee cases arising under other provisions), but at least there should be conformity among the various taxing clauses.

from the multitude of other terms used in the Constitution to distinguish between a “tax” and a “user fee.”<sup>353</sup>

This is a distinction that matters. For example, suppose Congress delegates to an administrative agency the power to set the fees for services provided by the agency – such as fees for processing patent applications. And suppose the administrative agency sets a charge that greatly exceeds any amount that can reasonably be viewed as a fee.<sup>354</sup>

At least the amount of the excess (and maybe the whole charge) might be recharacterized as a “tax” – the learning in *U.S. Shoe* as to what is, and what isn’t, a “tax” should be relevant to that determination – and, if so, there should be questions about the authority of an administrative agency to impose the tax. Regardless of how broad the federal taxing power is, Congress ought not to be able to delegate that power to an administrative agency.

3. *Review of Tax Statutes Generally* – Perhaps the biggest question that arises from the Court’s efforts to cabin Export Clause jurisprudence is this: Is the Court’s willingness to review taxing statutes, and to direct other courts to do the same, limited to the Export Clause? And if the answer to that question is “Yes,” we should wonder why that should be so.

In *IBM* and *U.S. Shoe*, the Court struck down taxing statutes on constitutional grounds, something that hadn’t happened since the 1920s.<sup>355</sup> As I’ve suggested, treating the Export Clause as unique may well have been intended, by at least some justices, to leave the remainder of the congressional taxing power generally unconstrained by judicial review.<sup>356</sup>

But why should the Court interpret the Export Clause expansively and other limitations on the taxing power narrowly? Justice Ginsburg in *U.S. Shoe* pointed to the Export Clause’s being an “unqualified prohibition” as one reason for treating the Export Clause as different from other tax provisions in the Constitution,<sup>357</sup> and, in *IBM*, Justice Thomas noted the clear “textual command” of the Export Clause as a distinguishing factor.<sup>358</sup> But the Export Clause isn’t fundamentally different, in either respect, from other limitations on the national taxing power.

The Export Clause *is* “unqualified” in a way – when it applies, it’s a command without reservations – but the Export Clause applies only to levies on “Articles exported,” a fairly significant qualification. In any event, compare

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353. See supra notes 177-185 and accompanying text.

354. How much is too much will be a question of fact, to be resolved in the particular case, but assume that we can agree that, at some point, a levy is too great to be a user fee.

355. See supra note 152.

356. See supra notes 345-346 and accompanying text.

357. *U.S. Shoe*, 523 U.S. at 368.

358. *IBM*, 517 U.S. at 851.

the Export Clause to, say, the direct-tax apportionment clauses, which absolutely prohibit direct taxes that haven't been apportioned on the basis of respective state populations,<sup>359</sup> or the Uniformity Clause, which absolutely prohibits duties, imposts, and excises that aren't uniform.<sup>360</sup> In fact, the form of the direct-tax apportionment clause in Article I, section 9 is *identical* to the form used for the Export Clause: "No Capitation, or other direct, Tax shall be laid" versus "No Tax or Duty shall be laid." If the Export Clause contains a clear "textual command," so, too, does that direct-tax clause. If Congress were to enact an unapportioned direct tax – a national real-estate tax would be the clearest case – or a duty on imports that wasn't uniform, a court should be just as willing to reject the levy as the Supreme Court was in *IBM* and *U.S. Shoe*.

Perhaps one can infer from the language in both *IBM* and *U.S. Shoe* that the Court is unlikely to be as vigorous in enforcing other limitations on the taxing power as it was with the Export Clause, and I can understand the reluctance to get involved. Maybe the Export Clause is so peculiar that we should draw no grand conclusions about the Supreme Court's willingness to hold taxing statutes, outside the export context, to constitutional requirements. Maybe, but I don't see why.

#### IV. CONCLUSION: THE EXPORT CLAUSE TODAY

The Export Clause was understood, at the time of the founding, to be a critical limitation on the national taxing power, and Supreme Court cases interpreting the Clause gave it great scope. But until *IBM* and *U.S. Shoe* came along in the 1990s, the cases that treated the Export Clause seriously were from a period, before 1924, in which the Court was generally skeptical of the national taxing power. One might have expected modern developments to have reoriented the understanding of the Export Clause, just as modern developments have led to the widespread understanding that the national taxing power is largely unconstrained by the Constitution.

With the Export Clause, however, that didn't happen. Neither *IBM* nor *U.S. Shoe* rejected the old doctrines. Quite the contrary: both cases applied interpretational principles derived from decades-old cases. The Export Clause was revived as a limitation on the national taxing power, and the old cases interpreting the Export Clause were revived as sources of guidance.

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359. See U.S. Const. art. I, § 2, cl. 3; U.S. Const., art. I, § 9, cl. 4. Income taxes were exempted from the apportionment requirement by the Sixteenth Amendment. U.S. Const. amend. XVI.

360. See U.S. Const. art. I, § 8, cl. 1. This has been interpreted to require only *geographical* uniformity: "if a particular item is subject to tax, it must be taxed at the same rate throughout the United States. . . ." Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 *Tax Law.* 3, 10 (1987); see *Knowlton v. Moore*, 178 U.S. 41, 83-106 (1900).

One point of guidance that hasn't received the notice it deserves comes from Justice Holmes's 1923 opinion in *Spalding*,<sup>361</sup> striking down a tax as it applied to exportation of baseball equipment. The dispute was a difficult one, with case law providing no definitive means of resolution. Justice Holmes concluded, however, that, in a doubtful situation, exports should be provided "liberal protection" to ensure that constitutional values would be protected.<sup>362</sup> I interpret this idea as meaning that, when the status of a taxing statute is in doubt, the Export Clause applies.

Giving "liberal protection" for exports is a rule of interpretation for the judiciary, but it's also a useful guide for Congress, which should tread lightly when imposing taxes with effects on exportation. Congress should legislate with more sensitivity to constitutional limitations in taxation than has been the case for several decades.

Professor Zelenak has argued that "conscientious legislators" effectively define what constitutes income subject to the modern income tax, and legislators shouldn't have to worry whether every conceivable variation in income tax policy might cause the tax as a whole not to be a "tax on incomes" within the meaning of the Sixteenth Amendment.<sup>363</sup> Deference to legislative determinations is inevitable, Zelenak argued, in the income tax context.

Whatever the merits of Professor Zelenak's position for the income tax,<sup>364</sup> it shouldn't be extended to other levies. There's no reason to defer to the "constitutional" determinations of a legislative body that pointedly doesn't evaluate the constitutionality of its enactments. If we're to defer to legislators' views, we should, at a minimum, insist that legislators make a good faith effort to resolve constitutional issues in the drafting process.<sup>365</sup> A Congress that enacts something called a "tax" which will obviously affect exportation, and does so

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361. 262 U.S. 66 (1923); see *supra* notes 314-324 and accompanying text.

362. *Spalding*, 262 U.S. at 70.

363. See Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 *Colum. L. Rev.* 833 (1999).

364. I'm not entirely convinced. See Jensen, *Taxing Power*, *supra* note 8, at 1154-58.

365. Deference to Congress may be appropriate when the question is whether a taking is for a "public purpose" or whether a statute serves the "general welfare." Those constitutional phrases were once thought to be judicially enforceable, but it's now conceded to be up to Congress to define "public purpose" and "general welfare." See Jensen, *Taxing Power*, *supra* note 8, at 1059, 1090-91. In contrast, questions that arise under the Export Clause – what's a tax? when's a good an "exported article"? – lend themselves to judicial resolution, as more than a century of jurisprudence indicates.

without consideration of constitutional issues – exactly what happened with the Harbor Maintenance Tax – isn't made up of conscientious legislators.<sup>366</sup>

Of course one might argue that this is much ado about nothing; maybe it's time for the Export Clause simply to disappear from the Constitution. The fears of sectional strife that gave rise to the Clause are weaker in 2003 than they were in 1787, but, even if that weren't true, it's doubtful that without the Export Clause we'd see strife reflected in discriminatory taxation of exports. And the Clause has its embarrassing history. Although I think something like the Export Clause would have wound up in the Constitution anyway, the Clause did have an unfortunate connection with slavery.<sup>367</sup>

Besides, the Export Clause is a peculiarly limited protection against abuse of the national taxing power: when it applies, it has great effect, but it applies only within a narrow area. As sources of revenue largely unknown to the founders have come to dominate the national taxing system – the income tax in particular – a limitation on the national power to tax exports may seem to be an anomaly.

Nevertheless, there are at least three reasons to care about the Export Clause. First, like it or not, the Clause is in the Constitution, and it's not going to disappear in the near future. Second, the Supreme Court in *IBM* and *U.S. Shoe* took the Clause seriously, which means that we have to, too. Finally, and most important, the Court showed in those two cases that it's now willing, at least occasionally, to evaluate the constitutional merits of a federal revenue statute. If the Export Clause isn't unique in its fundamentals, and I've argued that it isn't, the long-time assumption that the judiciary will keep its collective hands off the national revenue system may no longer be justified.

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366. Indeed, it's *because* we might think of deferring to Congress's characterization of the HMT as a "tax" that the constitutional issue becomes so apparent. See *supra* notes 162-165 and accompanying text.

367. See *supra* notes 39-48 and accompanying text.