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amendments, to receive a free flow of political information, regardless of its sponsor; second, the prevention of undue influence by particular organizations, such as corporations, is an invalid state interest to justify an infringement of protected speech; and third, no rational basis had been identified to justify affording first amendment protection to news media corporations and denying it to others. If statutes prohibiting corporate expenditures in candidate elections are subjected to a strict scrutiny review under the first and fourteenth amendments, these principles may similarly require the invalidation of those statutes.

Linda Newman Biggs

State Taxation Under the Commerce and Import-Export Clauses: Department of Revenue v. Association of Washington Stevedoring Companies

The State of Washington attempted to apply its one percent business and occupation tax[1] to the stevedoring services[2] provided by respondents, the Association of Washington Stevedoring Companies and Washington Public Ports Association.[3] The goods handled by the respondents included imports and exports still in transit to various final destinations as a part of the conduct of interstate and foreign commerce. In an attempt to retain the exemption from the tax enjoyed as a result of the Supreme Court decision in *Puget Sound Stevedoring Co. v. State Tax Commission*,[4] respondents sought from a Washington superior court a declaratory judgment

1. The pertinent statute provides:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

WASH. REV. CODE ANN. § 82.04.220 (Supp. 1978).

2. The Supreme Court described the activity of stevedoring in Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90, 93 (1937), as the loading and unloading of ship's cargo. This activity covers the distance between and including the hold of the ship and a convenient point of discharge upon the dock.

3. A ruling of the State of Washington Department of Revenue applied the business and occupation tax specifically to the activity of stevedoring: "EXAMPLES OF TAXABLE INCOME: . . . 3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable." WASH. ADMIN. CODE 458-20-193-D (1974).

4. In Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937), petitioner, a Washington corporation engaged in the stevedoring business, protested a tax measured by a percentage of the business's gross receipts. The United States Supreme Court reversed the state court's dismissal of the action and held that since the business of loading and unloading was interstate commerce, the State of Washington was not at liberty to tax the privilege of doing it. The State of Washington Department of Revenue admitted that the respondents in the instant case were engaged in the same stevedoring activities that were held nontaxable in *Puget Sound.*

that the tax violated both the commerce clause[5] and the import-export clause[6] of the United States Constitution. The Department of Revenue of the State of Washington asserted that the tax did not violate the commerce clause because the levy was nondiscriminatory and because it taxed only intrastate activity: the loading and unloading of ships' cargo. The Department argued that the tax did not contravene the import-export clause because it taxed merely stevedoring services and not the goods themselves. The state superior court found the tax unconstitutional, and on direct appeal the Washington Supreme Court affirmed the decision.[7] Because of the possible impact created by its decision in *Complete Auto Transit, Inc. v. Brady*,[8] the United States Supreme Court granted certiorari. *Held, reversed*: Washington's business and occupation tax, as applied to stevedoring activity within the state, violates neither the commerce clause nor the import-export clause of the United States Constitution. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

I. Development of Judicial Doctrine Under the Commerce and Import-Export Clauses

A. *Commerce Clause*

The earliest Supreme Court cases considering the constitutionality of state taxation of interstate businesses established a direct-indirect taxation dichotomy. Those decisions invalidated state taxes as intrusive upon congressional authority over regulation of interstate commerce and ruled that interstate commerce may not be directly taxed by the states.[9] This interpretation of the commerce clause provided a tax haven for foreign corporations conducting exclusively interstate business by allowing such corporations to avoid business and occupation taxes permissibly imposed upon intrastate businesses.[10] These decisions did not, however, prevent states from taxing businesses such as railroads and telephone and telegraph companies on their tangible property used exclusively in interstate

5. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

6. The import-export clause provides:

> 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 Imposts 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.

Id. § 10, cl. 2.

7. 88 Wash. 2d 315, 559 P.2d 997 (1977). The Washington Supreme Court acknowledged that recent trends supported the constitutionality of the instant tax, but nevertheless held the tax invalid on the strength of *Puget Sound*.

8. 430 U.S. 274 (1977).

9. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

10. *See* Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335 (1976).

operations.[11] Such levies were sustained as indirect taxes that did not inflict an undue burden on commerce. Additionally, states lawfully imposed taxes on manufacturing,[12] producing,[13] and mining[14] conducted within their borders. According to the Supreme Court, these taxes did not constitute a direct tax on commerce because the levy attached before commerce began.[15]

In *Western Live Stock v. Bureau of Revenue*[16] the Supreme Court abolished this absolute immunity from direct taxation and held that businesses engaged in interstate commerce could be required to assume a share of the state tax burden as long as the tax did not impose a risk of cumulative taxation not borne by local commerce.[17] A series of judicial opinions restricting the definition of an exempt interstate business or transaction contributed to the general expansion of the permissible area of state taxation.[18] The local activity of business was separated from its interstate

11. *See* Cleveland, C., C. & St. L. Ry. v. Backus, 154 U.S. 439 (1894). The tax authorities first ascertained the value of the entire railroad line as a single property, and then determined the value of that within the state.

12. *See* American Mfg. Co. v. City of St. Louis, 250 U.S. 459 (1919). St. Louis levied against a West Virginia corporation a tax imposed as a condition of the grant to carry on a manufacturing business in the city. The amount was ascertained by the amount of sales of the manufactured goods, whether sold within or without the state. The Court stated that "the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on [interstate] commerce." *Id.* at 464.

13. *See* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). The Court held that production of electricity was separate from its transmission across state lines in exercise of interstate commerce.

14. *See* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). The State of Utah imposed an occupation tax of 6% of the value of the ore mined. The Court acknowledged that practically all of the output entered into channels of interstate commerce. Nevertheless, the Court sustained the tax after determining that interstate commerce began only after the mining was completed.

15. Mr. Justice Rutledge's concurring opinion in Freeman v. Hewit, 329 U.S. 249, 259 (1946), provides an analysis of the history and weaknesses of the direct-indirect taxation analysis of the commerce clause. The thrust of his argument is as follows:

> The commerce clause was not designed or intended to outlaw all state taxes bearing "directly" on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. Not all . . . *direct* state taxes, can be said to produce those effects. On the other hand, many "indirect" forms of state taxation . . . do in fact produce such consequences and for that reason are invalid.

Id. at 270 (emphasis in original).

16. 303 U.S. 250 (1938).

17. The burden upon interstate commerce of the increased cost of doing business did not serve to prohibit the tax. As noted by the Court in *Western Live Stock*, the fatal characteristic of unconstitutional taxes was that they placed on the interstate commerce burdens that were capable of being imposed or added to with equal right by every state that the commerce touched, merely because interstate commerce was being conducted. *Id.* at 255-56. *See, e.g.*, Meyer v. Wells, Fargo & Co., 223 U.S. 298 (1912); Galveston, H. & S. A. Ry. v. Texas, 210 U.S. 217 (1908).

18. *See, e.g.*, Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941) (a foreign corporation's purchase and resale in Indiana of timber to be transported to Ohio after resale considered local transportation); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) (sale of coal to New York customers by a Pennsylvania corporation held local since conditioned on local activity with purchase, delivery, and consumption occurring in New York); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (prep-

commerce, thereby allowing imposition of the state tax.[19]

The next major inroad against direct-indirect taxation analysis occurred when in *Northwestern States Portland Cement Co. v. Minnesota*[20] the Court held that the commerce clause does not prevent a state from levying a fairly apportioned net income tax on a foreign corporation that carries on an exclusively interstate business from within the taxing state.[21] The Court reconciled its decision with earlier holdings, notably *Spector Motor Service, Inc. v. O'Connor*,[22] by noting that the tax was nondiscriminatory and that it was levied only on that portion of the taxpayer's net income that arose from the business activities within the taxing state.[23]

Finally, the direct-indirect taxation analysis was completely rejected in *Complete Auto Transit, Inc. v. Brady*.[24] The decision shifted analysis under the commerce clause to the practical effect of tax statutes,[25] measuring the constitutionality against four factors: (1) the nexus between the activity and the taxing state; (2) the reasonableness of the apportionment of the tax; (3) the relationship of the amount of the tax to the services provided by the state;[26] and (4) the degree to which the tax may unduly burden interstate commerce.[27]

B. *Import-Export Clause*

The Supreme Court first interpreted the language of the import-export clause in *Brown v. Maryland*.[28] Characterizing imports as foreign goods remaining in their original form or package,[29] the Court determined whether a tax was within the constitutional prohibition by examining the effect on the price of the imports upon which the levy was imposed.[30] If

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aration, printing, and publishing of a magazine constituted local business even though the magazine had interstate circulation and advertising).

19. For a review of this area of the law, see Barrett, *State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?*, 4 VAND. L. REV. 496 (1951). Professor Barrett discusses the pre-1938 decisions, the multiple burdens doctrine, and the case law extending to Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

20. 358 U.S. 450 (1959). The Court concluded that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming a sufficient nexus to support the same. *Id.* at 452.

21. *Id.*; *see* West Publishing Co. v. McColgan, 328 U.S. 823 (1946), *aff'g per curiam* 27 Cal. 2d 705, 166 P.2d 861 (1946).

22. 340 U.S. 602 (1951). In *Spector* the Court held that a state may not levy a tax on the "privilege" of engaging in interstate commerce.

23. 358 U.S. 450, 464 (1959). The Court stated that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the states for tax purposes by formulae utilizing instate aspects of interstate affairs.

24. 430 U.S. 274 (1977).

25. In reaching its decision, the Court overruled *Spector Motor Service*, thereby abolishing the practice of constructing a distinction between the unconstitutional tax on "the privilege of doing business" and a permissible tax on "the privilege of exercising corporate functions within the State." *Id.* at 282-85.

26. *See The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 79-81 (1977).

27. 430 U.S. 274, 279 (1977).

28. 25 U.S. (12 Wheat.) 419 (1827).

29. *Id.* at 442.

30. *Id.* at 444.

the tax added to the price of the goods in the same manner as would a direct duty on the article itself, the state was intruding upon authority reserved for the federal government.[31] Subsequent decisions, however, ignored analysis of the effect of the tax and held that once goods were determined to be imports under the original-package test, any tax directly upon them was within the prohibition of the import-export clause.[32]

Examination of the economic climate prior to ratification of the United States Constitution illustrates why the Court interpreted the ban of taxation on imports and exports so broadly. Under the Articles of Confederation, the few states advantageously situated along the Atlantic seaboard individually regulated international commerce by imposing controls on the conduct of foreign trade that flowed into the harbors of their ports.[33] This factional and diffuse foreign policy frustrated the nation's early attempts to establish parity in international trade. Decentralized commercial authority also weakened the Union internally by dividing the landlocked states against the seaport states. As a result of unrestrained levy of excises on newly imported goods, citizens of states without major harbors paid inflated prices for the purchase of imported commodities.[34] Several cynical commentators labeled these higher prices a "tribute" to the harbor states paid for the privilege of consuming imported goods.[35] The framers of the Constitution intended to reduce this friction and consolidate the Union's commercial strength by empowering the federal government to exercise this power exclusively through the authority vested in a more representative body politic, specifically, Congress.[36] The final consideration of the framers was fiscal. Acknowledging the wealth to be derived from regulation of international trade, they planned to finance the new republic primarily by means of the combined effect of the import-export and commerce clauses.[37] Imposts and duties were to be major sources of revenue.[38]

The Supreme Court's analysis of the import-export clause reflected these economic and political concerns. In its zeal to effectuate the intent of the framers, however, the Court failed to recognize the distinction between imposts and duties and other types of taxes, such as general ad valorem property taxes. As a result, while the Constitution eliminated the inequity

31. *Id.* With respect to exports, the determinative question was whether the goods had entered the "export stream," that is, the final continuous journey out of the country. As soon as the journey began, tax immunity attached. *See generally* Empresa Siderurgica v. County of Merced, 337 U.S. 154, 157 (1949); A.G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69 (1923); Coe v. Errol, 116 U.S. 517, 527 (1886).

32. *See, e.g.*, Low v. Austin, 80 U.S. (13 Wall.) 29 (1871).

33. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 542 (1911).

34. 1 J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 33 (1893).

35. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 88 (1966).

36. 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW § 10:49 (1969).

37. J. MADISON, *supra* note 35, at 272.

38. Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); THE FEDERALIST NO. 12 (A. Hamilton).

of inland consumers bearing the burden of duties levied by seaboard states, judicial interpretations imposed the inequity of import-export businesses enjoying state services with immunity from state taxation.[39]

In *Michelin Tire Corp. v. Wages*[40] the Court initiated a different approach to the import-export clause. Ignoring the hypertechnical question of whether goods were imports, the Court analyzed the nature of the tax to determine whether it was an impost or duty. Imposts and duties are essentially taxes on the commercial privilege of bringing goods into a country.[41] By contrast, ad valorem taxes are property taxes by which a state apportions the cost of services such as police and fire protection.[42] The Court reviewed the history of the import-export clause[43] and found nothing that suggested a prohibition of an ad valorem tax applied equally to domestic and imported goods in return for benefits provided by the state.[44] Admittedly, this tax increased the cost of goods to the consumer, but the Court reasoned that the cost of state services such as fire and police protection are as valid a part of the retail price as are other merchandising services associated with ultimate sale of the product.[45]

II. DEPARTMENT OF REVENUE V. ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES

The Supreme Court granted certiorari in this case to determine whether a state could levy general business taxes on the value of stevedoring services performed within the state when these services were an integral part of interstate and foreign commerce involving both imported and exported

39. For example, in Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), an ad valorem tax based on the average value of ore stored on public docks in Ohio was levied on all merchants. The Court held that ores falling under the definition of an import were exempt from the tax, while domestic ores remained subject to taxation. *Id.* at 550-51.

40. 423 U.S. 276 (1976).

41. *Id.* at 287; *see, e.g.*, May v. New Orleans, 178 U.S. 496, 504 (1900).

42. 423 U.S. at 288-89. An ad valorem tax may be distinguished from an impost or duty on two fundamental grounds. First, a property tax is ordinarily imposed on all property owners within a state, rather than levied on a single industry as in the case of an impost or duty. Second, a tax consistently applied to both imports and domestic goods is not within the conception of the import clause prohibition of trade restriction. Note, *Ad Valorem Taxation as an "Impost or Duty" Under the Import Clause: Michelin Tire Corp. v. Wages*, 12 WAKE FOREST L. REV. 1055, 1059 (1976).

43. The Court summarized the problems that made necessary the inclusion of the import-export clause:

> The Framers of the Constitution thus sought to alleviate three main concerns . . . : the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

Michelin Tire Corp. v. Wages, 423 U.S. at 285-86 (footnotes omitted).

44. *Id.* at 286.

45. *Id.* at 289.

goods. In a majority decision, with one concurring opinion, the Court found that neither the commerce clause nor the import-export clause had been violated, thereby overruling *Puget Sound Stevedoring Co. v. State Tax Commission*[46] and *Joseph v. Carter & Weekes Stevedoring Co.*[47]

Absolute immunity from state taxation of interstate commerce had already been removed in the *Western Live Stock* and *Northwestern Cement* cases.[48] Further expansion of a state's power to tax interstate commerce was provided in *Complete Auto*,[49] in which the Court ruled that, under appropriate conditions, a state may tax directly the privilege of conducting interstate business.[50] The constitutionality of the tax was determined by examining its nature and its practical effect.[51] Four considerations entered into this determination. The first consideration was the relationship between the taxing state and the taxed business or occupation. The Court required the presence of a nexus sufficient to justify the state's interest in exacting from interstate commerce a fair share of the cost of state government.[52] The nexus in the present case was ample in that respondents conducted their entire stevedoring operations within the state. The second consideration weighed by the Court was that of apportionment. State tax on an activity of interstate commerce that is subject to taxation by another state unduly burdens commerce and falls within the constitutional protection of the commerce clause.[53] When a general business tax is levied only on the value of services performed within the state, however, the tax is properly apportioned and multiple burdens cannot logically occur.[54] The Washington tax applied only to the value of loading and unloading that occurred within the state and was therefore fairly apportioned.[55] The Court stated the third consideration in the form of a prohibition. States are not allowed to apply a tax that discriminates against interstate commerce by imposing a burden that is not applied to competing intrastate commerce of like character. Since the one percent tax rate was applied to stevedoring and generally to all businesses rendering services, the Court found it nondiscriminatory.[56] Finally, the Court's analysis under the practical-effect approach required that the tax be fairly related to services and

46. 302 U.S. 90 (1937). The Court in *Puget Sound* invalidated the Washington business and occupation tax on stevedoring only because the tax applied directly to interstate commerce. Because the decision ignored the issues of apportionment, reimbursement to the state for services rendered, and the risk of multiple tax burdens, it was no longer valid as authority.

47. 330 U.S. 422 (1947). Because the basis for this decision had been derived from the holding in *Puget Sound*, it, too, was inadequate.

48. *See* notes 16-23 *supra* and accompanying text.

49. *See* notes 24-27 *supra* and accompanying text.

50. 430 U.S. at 287-89. Thus, the direct-indirect taxation analysis, suffering from repeated criticism during the past four decades, received the final blow in *Washington Stevedoring*, when the Court explicitly rejected it. 435 U.S. 734, 745 (1978).

51. 435 U.S. at 750.

52. *Id.*

53. *Id.* at 748.

54. *Id.* at 746-47.

55. *Id.* at 750.

56. *Id.*

protection provided by the state.[57] States have a justifiable interest in being reimbursed for benefits they provide, such as fire and police protection. The commerce clause, then, instead of reserving all taxing powers for Congress, requires a weighing of the competing interests. The balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.[58]

In addressing the import-export clause challenge, the Court ignored the question of whether the goods handled were imports or exports, and, following the *Michelin* approach, analyzed the nature of the tax to determine whether it was an impost or duty. Referring back to the original considerations leading to inclusion of the clause,[59] the Court concluded that Washington's ad valorem property tax violated none of those policies. First, the tax did not interfere with the federal government's implementation of foreign policy.[60] The assessments were levied only upon business conducted entirely within the state. Second, the tax did not deny any import revenues otherwise due to the federal government. The levy merely compensated Washington for services and protection the state provided to the stevedoring business.[61] Third, since the desire to prevent internal friction does not vary significantly from the primary purpose of the commerce clause, this policy is vindicated if the requirements under the commerce clause are satisfied.[62]

The Court expanded the scope of the *Michelin* test by addressing goods exported as well as imported and determined that the formal distinction between the two did not defeat the *Michelin* analysis. Policy considerations remained constant,[63] with the exception of the concern for protection of federal revenue.[64] The state's business and occupation tax therefore applied constitutionally to unloading of imports as well as loading of exports.[65] The Court noted further that the Washington tax, as applied to stevedoring activity, occurred while imports and exports were still in transit.[66] The tax, however, did not fall upon the goods themselves. Citing authority from *Canton Railroad v. Rogan*,[67] the Court distinguished a tax on the goods themselves from mere handling of the goods.[68] Since the Washington tax attached only to services, it was not a prohibited impost or duty.

57. *Id.* at 750-51.
58. *Id.* at 748.
59. *See* text accompanying notes 33-37 *supra.*
60. 435 U.S. at 753.
61. *Id.*
62. *Id.* at 753-54.
63. *See* note 43 *supra* and accompanying text.
64. This issue is not relevant to the Court's analysis since the Constitution forbids federal taxation of exports: "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.
65. 435 U.S. at 758.
66. The Court in *Michelin* qualified its holding with the observation that the state had applied the ad valorem tax to goods no longer in transit. 423 U.S. at 302.
67. 340 U.S. 511, 514-15 (1951).
68. 435 U.S. at 755-57.

Mr. Justice Powell concurred in the decision, but expressed dissatisfaction with the Court's analysis of taxes on goods as opposed to taxes on services.[69] In his view, the separation of a tax on the goods from a tax on the handling of them at port reverted back to the direct-indirect distinction rejected in *Complete Auto*.[70] Powell also criticized the inquiry employed by the Court to determine whether the tax relates to the value of the goods.[71] Under the economic reality analysis, Powell reasoned that the threshold question should have been whether the state was simply making the goods pay their own way, as opposed to exacting a fee merely for the privilege of moving through a state.[72] Since the stevedores undoubtedly avail themselves of fire and police protection, as well as other benefits Washington offers its local businesses, the tax at issue is not a transit fee within the prohibition of the import-export clause.[73]

Mr. Justice Powell's reasoning on this point is more consistent with the practical-effect analysis than is the majority's dependence on authority from *Canton Railroad*. The majority's distinction between a tax on services and a tax on goods ignores the standards established by the Court for determining the constitutionality of a tax. Washington's tax was not a levy on the imported articles shifted to the incident of stevedoring. Washington's tax was a levy on stevedoring, constitutionally permissible only because the activity had a substantial nexus with the taxing state, the tax was reasonably apportioned to the value of the commerce that took place within the state, the tax did not discriminate against interstate commerce, and the amount of the tax was fairly related to the services provided by the state. This reasoning supports the transit fee prohibition by illustrating that the levy was a quid pro quo for benefits actually conferred by Wash-

69. *Id.* at 761-64.

70. *Id.* at 762.

71. Mr. Justice Powell stated:

> That this distinction [between a tax on services and a tax on goods in transit] has no economic significance is apparent from the fact that it is possible to design transit fees that are imposed "directly" upon the goods, even though the amount of the exaction bears no relation to the value of the goods. For example, a State could levy a transit fee of $5 per ton or $10 per cubic yard. These taxes would bear no more relation to the value of the goods than does the tax at issue here, which is based on the volume of the stevedoring companies' business, and, in turn, on the volume of goods passing through the port. Thus, the Court does not explain satisfactorily its pronouncement that Washington's business tax upon stevedores—in economic terms—is not the type of transit fee that the *Michelin* Court questioned.

Id. at 763.

72. The Court, in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), emphasized the ban on transit fees:

> In effect, the [Import-Export] Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State. A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

Id. at 290 (footnotes omitted).

73. 435 U.S. at 764.

ington.[74]

The Court emphasized that the absolute ban of the import-export clause extended only to imposts and duties, taxes paid with no benefit received.[75] Instead of asking only whether goods have retained their status as imports or exports, the nature of the tax itself must be examined to determine whether it is an impost or duty.[76] Washington's nondiscriminatory ad valorem property tax was neither; rather, the levy was a method by which commerce paid for governmental services it received. The distinction between a tax on goods and a tax on services has not been abandoned, however. In the opinion of the Court, the tax did not relate to the value of the goods, and, therefore, the tax could not be considered taxation upon the goods themselves.[77]

III. CONCLUSION

Cases prior to *Washington Stevedoring* had determined the constitutionality of a state tax by examining superficial factors, such as whether the tax applied "directly" to interstate commerce or whether an article continued to be an import by remaining in its original package. *Washington Stevedoring* strengthened the requirement established in *Complete Auto* and *Michelin* that businesses must pay their fair share of the state tax burden. The Court reaffirmed that not all state tax burdens impermissibly impede interstate commerce or fall with the prohibition of an impost or duty. The nature of the tax and its practical effect should determine the validity of the tax under the commerce and import-export clauses. Distinction between a tax on services and a tax on goods is inapposite in a practical-effect analysis. The determinative question should be, as Mr. Justice Powell noted, whether the taxpayer has received a benefit from the state.

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74. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 288-90 (1976).
75. *See* notes 38, 41 & 72 *supra* and accompanying text.
76. 435 U.S. at 752.
77. *Id.* at 755-57.