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STATE TAXATION OF EXPORTS: THE STREAM OF CONSTITUTIONALITY

LESLIE W. ABRAMSON†

In May, 1974, the United States Supreme Court decided the case of *Kosydar v. National Cash Register Co.*[1] This was the first decision in twenty-five years that considered on the merits a state tax challenged as violative of the import-export clause of the United States Constitution.[2] The Court strictly limited the tax exemption provided by the Constitution, consistent with its decisions of a quarter century before. In fact, *Kosydar* quoted from and relied upon an 1886 case, *Coe v. Errol*,[3] thereby demonstrating a consistency of constitutional reasoning over a period of almost ninety years that may seem remarkable. Subsequent to *Coe*, two cases indicated that the Court's reasoning was moving toward a broader interpretation of the export tax exemption,[4] but two 1949 cases reversed that trend.[5] The present unanimous view of strictly limiting tax immunity under the import-export clause is in accord with the intentions of the Constitution's Framers, who never intended exports to enjoy broad freedom from state taxation.

HISTORICAL BACKGROUND

In analyzing the export tax prohibition imposed on the states by article I, section 10,[6] the specific evils sought to be eliminated by the Framers must be considered, particularly with respect to the failure of the Articles of Confederation to provide an effective national govern-

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1. 417 U.S. 62 (1974), see text accompanying notes 52-56 *infra*.

2. 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.

3. 116 U.S. 517 (1886).

4. Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946); A.G. Spalding & Bros. v. Edwards, 262 U.S. 66 (1923).

5. Joy Oil Co. v. State Tax Comm'n, 337 U.S. 286 (1949); Empresa Siderurgica v. County of Merced, 337 U.S. 154 (1949).

6. See note 2 *supra*.

ment, especially where commerce was involved.[7] In *The Federalist*, James Madison stated:

> The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. . . . A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.[8]

Since the commercial interests of the various sections of the country were not in accord, it was necessary to insert certain safeguards in the proposed constitution to provide an arrangement acceptable to all of the sectional interests represented at the Constitutional Convention of 1787. The export tax prohibitions appearing in article I, section 9, clause 5[9] and article I, section 10, clause 2 are such safeguards of sectional commercial interests.

The constitutional evolution of the present article I, section 9, clause 5 involved a sectional struggle. In the summer of 1787, at the time of the Constitutional Convention, the northern states had become the shipping center of the nation while the southern states were the chief producers of exports. The southern states were fearful that a congress controlled by the more numerous northern states would impose burdensome levies on these exports. The demand of the southern states for economic protection was first raised by Charles Pinckney of South Carolina on July 23, 1787. According to Madison's notes of the Convention: "Genl. Pinckney 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,

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7. *See generally* THE FEDERALIST Nos. 15-22 (A. Hamilton).

> In addition to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.
>
> The want of a power to regulate commerce is by all parties allowed to be of the number. . . . It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence.

THE FEDERALIST No. 22, at 191 (B. Wright ed. 1961) (A. Hamilton).

8. *Id.* No. 42, at 305.

9. "No tax or duty shall be laid on articles exported from any state." U.S. CONST. art. I, § 9.

he shd. be bound by duty to his State to vote agst. their Report."[10] When the Committee of Detail delivered its report to the Convention on August 6, 1787, article VII, section 4 provided that "[n]o tax or duty shall be laid by the Legislature on articles exported from any State."[11]

When article VII was taken up by the entire Convention on August 16, 1787, George Mason of Virginia urged prohibition of any power of the national government to tax exports.[12] However, this was opposed by Madison and Gouverneur Morris of Pennsylvania, who felt that taxation of exports was a proper power to be vested in the new national government. Madison argued that "it would be unjust to the States whose produce was exported by their neighbors to leave it subject to be taxed by the latter."[13] Other delegates were concerned that the power to tax exports would be exercised improperly if granted to the national government. "Mr. Gerry [of Massachusetts] thought the [national] legislature could not be trusted with such a power [to tax exports]. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it."[14]

It was not until August 21, 1787, almost as an afterthought, that the idea of forbidding the states to tax exports was conceived. On that date, when article VII, section 4 was again taken up by the entire Convention, there was objection by the inland states' delegates that denial to the national government of a power to tax exports would still leave the states free to tax each other's exports.[15] Thereafter, "Mr. Langdon [of New Hampshire] suggested a prohibition on the States from taxing the produce of other States exported from their harbours,"[16] but this was not accepted. On August 28, when article XII of the Committee

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10. 2 THE RECORDS OF THE FEDERAL CONVENTION 95 (M. Farrand ed. 1934) (footnotes omitted).

11. *Id.* at 183.

12. Mr. Mason urged the necessity of connecting with the power of levying taxes duties &c, that no tax should be laid on exports. He was unwilling to trust to its being done in a future article. He hoped the Nothn. States did not mean to deny the Southern this security. It would hereafter be as desirable to the former when the later should become most populous. He professed his jealousy for the productions of the Southern or as he called them, the staple States.

Id. at 305-06.

13. *Id.* at 306. Madison also contended that "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." *Id.*

14. *Id.* at 307.

15. The Convention was called for May 14, 1787, but lacked enough delegates to begin work until May 25. The Convention adjourned on September 17, 1787. Thus, not until less than three weeks before adjournment was any proposal made to forbid *state* taxation of exports. *Id.* at 352-65, 641-50.

16. *Id.* at 361.

of Detail's report was being considered,[17] Rufus King of Massachusetts moved to amend the article to prohibit the states from taxing exports as well as imports,[18] and this amendment passed. On September 12 it was proposed by Mason and seconded by Madison that states be permitted to tax exports to the extent of defraying the expenses of executing their various inspection laws.[19] That provision was included in the report of the Committee of Style on September 12.[20] The final wording of what is now article I, section 10, clause 2 of the Constitution was adopted on September 15 on the motion of Mason.[21]

In discussing the rationale of article I, section 10, clause 2 before the Virginia convention, Madison made it clear that the primary purpose of the state export tax prohibition was to prevent *discriminatory* taxes from being laid on goods produced in other than the exporting state.

> Some states export the produce of other states. Virginia exports the produce of North Carolina; Pennsylvania those of Jersey and Delaware; and Rhode Island those of Connecticut and Massachusetts. The exporting states wished to retain the power of laying duties on exports, to enable them to pay the expenses incurred. The states whose produce is exported by other states, were extremely jealous, lest a contribution should be raised of them by the exporting states, by laying heavy duties on their commodities. If this clause be fully considered, it will be found to be more consistent with justice and equity than any other practicable mode: For if the states had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other states, for their own exclusive emoluments.[22]

There was no design to protect exports from all taxation; rather the clause was intended to prevent discriminatory taxation among the states, which Congress could not prevent through the exercise of its

17. Article XII stated that "[n]o State shall coin money; nor grant letters or marque and reprisals; nor enter into any treaty, alliance, or confederation; nor grant any title of Nobility." *Id.* at 187.

18. *Id.* at 442.

19. *Id.* at 588-89, 605.

20. "No state shall, without the consent of Congress, lay imposts or duties on imports or exports, nor with such consent, but to the use of the treasury of the United States . . . ." *Id.* at 597.

21. *Id.* at 624. The final version of this clause included the word "any" following the words "[n]o state shall, without the consent of Congress, lay . . . ." The more significant addition to Mason's provision was to allow a state to lay imposts and duties on imports or exports which were "absolutely necessary for executing" the state's inspection laws. *Id.*

22. 3 *id.* at 328-29.

powers under the commerce clause.[23]

Historically, then, the article I, section 9, clause 5 prohibition was designed to protect the southern states, which were fearful that a congress controlled by the northern states would unfairly tax southern exports, while the provisions of article I, section 10, clause 2 were designed to protect the inland states from discriminatory taxation by the states through which their goods passed in the exportation process. There can be no doubt that these clauses were inserted in the Constitution to protect sectional commercial interests, and were not intended for the direct benefit of exporters.

EARLY JUDICIAL INTERPRETATION

Definitive judicial interpretation of the export aspects of article I, section 10, clause 2 is generally considered to have begun with the leading case of *Coe v. Errol.*[24] However, there were export cases prior to 1886 that warrant discussion.

In *Clarke v. Clarke*[25] a circuit court resolved attacks on a state *ad valorem* property tax levied on certain logs owned by a British subject and held for export to Europe. The logs had been inspected for export (apparently a requirement of Georgia law) and were merely awaiting the arrival of transportation when tax day fell. After the logs were exported without payment of the tax, the tax collector levied execution upon other property of the complainant, whereupon the complainant initiated an action for trespass, claiming the logs were exports and exempt from taxation under article I, section 10, clause 2 of the Constitution. The circuit court agreed.

> The logs on which the tax was levied were the property of, and were in possession of persons engaged exclusively in exporting timber to foreign countries, they were purchased from citizens of Georgia for the purpose of exportation, they were in a port of the United States awaiting shipment, they had been inspected according to the laws of the state, and the purpose of the owners to export the logs was, after the levy of the tax thereon, actually carried out and the logs were exported.[26]

The state claimed that the tax was levied upon the general mass of property within the state and, hence, not subject to the constitutional

23. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8.

24. 116 U.S. 517 (1886).

25. 5 F. Cas. 943 (No. 2846) (C.C.S.D. Ga. 1877).

26. *Id.* at 944.

prohibition. But the court disposed of this argument by finding that such an interpretation would defeat the purpose of the clause because it would allow the state to evade the prohibition by giving the tax another name or by changing the manner of levying the tax.[27]

The case of *Blount v. Munroe*[28] arose in a state court on very similar facts. Munroe, like Clarke, was a subject of Great Britain who was temporarily residing in Georgia for the purpose of engaging in the business of purchasing and shipping timber to European markets. At no time did Munroe sell timber in the United States. Certain timber owned by Munroe was in the port of Darien, Georgia on tax day and an *ad valorem* property tax was imposed upon it. At the time the tax was imposed all of the timber was under a contract of sale to foreign purchasers, and it was all exported subsequently. In his complaint Munroe argued the tax was prohibited by the import-export clause. The state contended that the tax was valid because it was a general tax imposed equally on all property within the state, rather than specifically on exports. The court held for the complainant, finding that the timber was an export on tax day. Factors supporting this finding were: 1) the timber was in the hands of exporters engaged solely in the export business, 2) the timber was awaiting shipment under contract of sale to persons in England, and 3) the timber was actually shipped abroad subsequent to the imposition of the tax. The court further found that the exporter had done all he could do to export the timber, and was merely awaiting the arrival of ships upon which to load it. The court stated:

> It cannot be the meaning of the clause [article I, section 10, clause 2] of the constitution that it [the timber] becomes an export when on shipboard, and not before . . . .
>
> It [article I, section 10, clause 2] was put in the constitution, it is true, to check the power of the seaboard states, and to protect the interior states in the egress of their goods to the markets of the world; but when engrafted upon the constitution, to carry out the object had in contemplation, the clause was made general, so as to prohibit the states from taxing any export, and thus to prevent any trouble or uncertainty in ascertaining whence the product came—narrowing the investigation to a single question: is the article taxed an export?[29]

Implicit in *Clarke* and *Blount* is the determination that goods are tax

27. *Id.* at 944-45.
28. 60 Ga. 61 (1878).
29. *Id.* at 65-68.

exempt as exports when the court finds intent to export plus physicial movement in furtherance of that intent.

The United States Supreme Court first spoke on the problem of state taxation of exports in the case of *Brown v. Houston*,[30] in which a city property tax was upheld as applied to coal held for sale, some of which was sold to a foreign steamship. Plaintiffs were residents of, and primarily doing business in, Pennsylvania. They consigned a bargeload of coal, which they had mined and paid taxes on in Pennsylvania, to their agent in New Orleans to sell for their account. When the challenged tax was levied, the coal was upon a barge afloat in the Mississippi River. Subsequent to the imposition of the tax, about half the coal was "exported" on foreign steamboats (apparently for use by the steamboats rather than for resale in foreign markets) and the remainder sold to domestic purchasers. In upholding the tax the Court noted that, when taxed, the coal was not held with the intent or for the purpose of exportation, but rather with the intent and for the purpose of sale in New Orleans. The Court stated:

> A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. . . . But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should happen to be exported afterwards.[31]

A common thread of legal reasoning connects these early cases: there must be an intent to export the article for which the tax exempt status is claimed under article I, section 10, clause 2. In *Clarke* and *Blount* the articles were moved to the seaport with the intent and for the purpose of exporting them, while in *Brown* the fact that the coal was held for sale to any purchasers, domestic or foreign, prevented its classification as an export. Thus, the lack of intent to export the coal *en mass* was considered sufficient to permit the levying of a nondiscriminatory property tax.

INTENT

As indicated above, one early Supreme Court decision held that intent is a *sine qua non* for tax exemption under the import-export

30. 114 U.S. 622 (1885).
31. *Id.* at 629-30.

clause,[32] while other decisions[33] held that intent to export *plus* physical movement in furtherance of that intent will confer constitutional tax exemption on the goods. At the present time the Supreme Court considers the 1886 case of *Coe v. Errol*[34] to be the "seminal case"[35] dealing with state taxation of exports. In *Coe* the Court held that the owner's intent to export the goods, even coupled with partial preparation to do so, was insufficient to exempt those goods from state taxation. The case involved certain timber cut in New Hampshire, which had been collected in the town of Errol, New Hampshire for about a year awaiting a sufficient level of water in the Androgscoggin River to allow the logs to be floated to Maine.[36] Speaking for the Court in upholding an *ad valorem* tax on the logs, Mr. Justice Bradley disposed of the argument that the owner's intent to export the logs, standing alone, should confer tax immunity by stating that:

> Though intended for exportation, they [the logs] may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?
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> . . . .
>
> . . . Until actually launched on its way to another State, or committed to a common carrier for transportation to such state, its destination is not fixed and certain.[37]

The Supreme Court, then, decided that physical movement of the goods in the process of exportation was necessary to remove them from the general mass of taxable property within the state. The owner's intent was relevant only insofar as it could be demonstrated by actual movement of the goods; the owner's subjective state of mind, by itself, was not determinative of the validity of the state tax as applied to the owner. Accordingly, the Court's rationale seems to have been that the owner could show his intent to irrevocably commit the timber to export only by entering it into the process of actual movement *out* of the taxing state. Therefore, in *Coe*, the movement of the logs from the

32. Brown v. Houston, 114 U.S. 622 (1885).
33. Clarke v. Clarke, 5 F. Cas. 943 (No. 2846) (C.C.S.D. Ga. 1877); Blount v. Munroe, 60 Ga. 61 (1878).
34. 116 U.S. 517 (1886).
35. Kosydar v. National Cash Register Co., 417 U.S. 62, 66 (1974).
36. *Coe* was a case involving interstate commerce rather than exportation of goods out of the country. For a comparison of the commerce clause with the import-export clause see Comment, *Constitutional Law: Sales Tax on Fuel for Ships' Stores Valid Under Import-Export Clause,* 51 MINN. L. REV. 151, 156 (1966).
37. 116 U.S. at 526-28.

forests of New Hampshire to the banks of the Androgscoggin River in the same state did not commence movement out of the taxing state and was constitutionally insufficient to confer immunity from the taxing power of the state. The Court viewed its task as setting a "point of time when State jurisdiction over the commodities of commerce begins and ends,"[38] stating that:

> Such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have started upon such transportation in a continuous route or journey.[39]

The next major case dealing with a claimed exemption under the import-export clause is *A. G. Spalding & Brothers v. Edwards.*[40] This case involved a federal excise tax as applied to the sale of bats and baseballs to the New York agent of a Venezuelan company for export to Venezuela. The Supreme Court invalidated the application of the tax, holding that the sale by Spalding to the New York agent was the first step in the exportation process itself and that the transaction was therefore exempt from state taxation. In defining the point at which the goods acquired the status of exports, the Court decided that mere subjective intent failed to establish such status, holding that "while the goods were in process of manufacture they were none the less subject to taxation [even] if they were intended for export and made with specific reference to foreign wants."[41] This holding is entirely consistent with *Coe* and the earlier cases.[42]

The Supreme Court concerned itself extensively with the element of intent in *Empresa Siderurgica v. County of Merced,*[43] but again held

38. *Id.* at 526, *cited with approval in* Kosydar v. National Cash Register Co., 417 U.S. 62, 66 (1974).

39. *Id.* at 527.

40. 262 U.S. 66 (1923).

41. *Id.* at 69.

42. *But see* Cornell v. Coyne, 192 U.S. 418, 427-28 (1904) (emphasis added), where the Court, in discussing article I, section 9, clause 5 and article I, section 10, clause 2 stated "[t]he prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation *or intended exportation,* or whilst they are being exported." This dictum is not reconcilable with the other cases dealing with intent, since the position set forth above implies that subjective intent alone would be sufficient to confer export exemption for goods merely intended for eventual exportation.

43. 337 U.S. 154 (1949). While not directly addressing the issue of subjective intent in Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946), the Supreme Court did hold that the crucial element in determining when the export process had started is "[t]he certainty that the goods are headed to sea." *Id.* at 82. The certainty that the goods are headed to sea requires their physical movement. The intent

that intent to export would not immunize goods from state taxation under the import-export clause. In that case a South American firm purchased a California cement factory, which was to be dismantled and shipped to Colombia. An export license was obtained and a letter of credit in favor of the seller was deposited in the United States. Title passed to the purchaser, whose agents took possession of the plant. A common carrier began to dismantle the plant and to package it for shipment abroad. After a portion of the plant had actually been exported, an *ad valorem* property tax was imposed on the portion still remaining in California. In upholding the tax, Mr. Justice Douglas stated:

> Under that test [of *Coe v. Errol*] it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.
>
> So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed.[44]

Even in dissent Mr. Justice Frankfurter stated that "[a]ffirmance would be amply supported by bare citation of cases holding that intent to export, no matter how firm, is not by itself enough to confer immunity from taxation."[45] However, he would have remanded for a determination of whether the disassembled plant constituted an organic unit, such that shipment of part would make virtually certain shipment of the whole.[46]

Mr. Justice Frankfurter's views on the insufficiency of intent alone to invoke tax immunity under the import-export clause were again voiced when he spoke for the majority in *Joy Oil Co. v. State Tax Commission*,[47] in which a state *ad valorem* tax was sustained. In 1945, Joy Oil Co., a Canadian corporation, purchased 1.5 million gallons of gaso-

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of the owner ultimately to export them, prior to the movement, was at least impliedly deemed insufficient to confer immunity from taxation upon them by the *Richfield* Court. *Cf. id.* at 78-82.

44. 337 U.S. at 156. The *Empresa Siderurgica* Court stated the test for state taxation of goods as follows: "goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the 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 in a continuous route or journey." *Id., quoting* Coe v. Errol, 116 U.S. 517, 527 (1886).

45. *Id.* at 161 (Frankfurter, J., dissenting).

46. *Id.* at 159 (Frankfurter, J., dissenting).

47. 337 U.S. 286 (1949).

line from Mid-West Refineries, Inc. in Grand Rapids, Michigan. The bills of lading were marked "For Export Only." The gasoline was stored by Joy Oil Co. in leased tanks in Dearborn, Mich., and 50,000 gallons were actually transported from Dearborn to Canada by truck before a federal law was passed prohibiting the transportation of inflammables over international bridges. As shipment by rail was too expensive, Joy Oil Co. elected to transport the remaining gasoline to Canada by water, but a shortage of ships forced the gasoline to remain in storage in Dearborn for fifteen months, during which time the *ad valorem* tax was levied. Mr. Justice Frankfurter, speaking for a majority of six, held that intent to export, even when coupled with partial exportation, failed to confer tax immunity on the gasoline still stored in the tanks on "tax day." Citing *Cornell v. Coyne*[48] and *Empresa Siderurgica,* the Court stated, "[t]he circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation."[49]

In a vigorous dissent urging that the tax should have been invalidated, Chief Justice Vinson argued:

> [T]he Court concedes that petitioner intended to export the gasoline at the time the tax was imposed, and petitioner's uncontradicted evidence shows that it had that intent throughout the period of delay, which was caused by its inability to produce water transportation. . . .
>
> . . . .
>
> The result is that the Court, without consideration of the fact that the gasoline had been started on its journey with the intent that it be transshipped for immediate export to Canada, holds that fifteen months' unavoidable delay is so productive of uncertainty that process of exportation ceases as a matter of law.[50]

In light of the prior cases, this dissent could be considered the high water mark of the theory that subjective intent should be determinative of exemption from state taxation under the import-export clause. Joy Oil Co. had established its intent to export the oil, but the majority dealt directly and conclusively with the intent element and found it insufficient to provide any tax immunity for the gasoline.[51]

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48. 192 U.S. 418 (1904). The use of *Cornell* does not seem to support the holding, since that case at least implies that intent alone might be sufficient to confer immunity from taxation. *See* note 42 *supra.*

49. 337 U.S. at 288.

50. *Id.* at 289-92 (Vinson, C.J., dissenting).

51. *See also* Rice Growers' Ass'n v. County of Yolo, 17 Cal. App. 3d 227, 94 Cal.

In its most recent decision concerning a challenge to a state *ad valorem* tax as violative of the import-export clause, the Supreme Court refused to modify its holding in *Empresa Siderurgica* to allow certainty of export to be demonstrated in any manner other than by actual entry of the goods into the export stream. In *Kosydar v. National Cash Register Co.*[52] the taxpayer was storing in an Ohio warehouse certain machines designed, ordered and manufactured for use in foreign countries. These machines, according to evidence introduced by NCR, were in no way usable in the United States,[53] and were being held pending completion of administrative details incident to shipment abroad when an *ad valorem* tax was levied upon them. The Court phrased the issue in a manner that excluded the subjective intent of NCR as a relevant factor, stating:

> the essential problem in cases involving the constitutional prohibition against taxation of exports has therefore been to decide whether a sufficient commencement of the process of exportation has occurred so as to immunize the article at issue from state taxation. *Of necessity the inquiry has usually been a factual one.*[54]

The Court further noted that "at least some such entrance [into the export stream] is a prerequisite to the [Import-Export] Clause's operation."[55]

Quoting from *Empresa Siderurgica* and *Joy Oil Co.*, the Court disregarded National Cash Register's clear intent to export the goods, stating that "[o]ur prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine."[56]

Therefore, it appears that the Supreme Court views intent, without accompanying physical movement of the goods, as inadequate to protect the goods from state taxation under the import-export clause. This is not to say that intent to export is totally irrelevant, for as *Brown* points out, entry into the export stream without intent will not confer immunity from state taxation.[57] But it does seem accurate to state that

Rptr. 847 (Ct. App. 1971), where a clear intent to export specially milled rice not sellable in the United States was proved, but the court held that "[a]n intention to export does not bar general ad valorem taxation." *Id.* at 234, 94 Cal. Rptr. at 851.

52. 417 U.S. 62 (1974).
53. *Id.* at 64 & n.3.
54. *Id.* at 67 (emphasis added).
55. *Id.* at 68.
56. *Id.* at 71.
57. *See* text accompanying notes 30-31 *supra.*

placing the goods irrevocably into the export stream is the only judicially cognizable manner in which intent to export can be demonstrated. Although the rule may be somewhat harsh and overly mechanical in individual instances, the exclusion of subjective intent as a relevant factor gives the courts and state taxing authorities a test which is easy to apply. Under this approach the courts and taxing agencies must examine only the degree and extent of physical movement of the goods in question to determine if exportation has begun. Inquiry into these factors, though not always a simple task, at least may provide more predictability than examination of the owner-taxpayer's state of mind.

CERTAINTY OF EXPORT

As discussed above, the Supreme Court has rejected subjective criteria as a basis for determining the applicability of the import-export clause.[58] However, there are other, more "objective" indicia, which the Court has alluded to in its decisions. One of these is the certainty that the goods will eventually be exported even though they are not actually in the export stream when taxed. This element has also been considered in terms of the potential for diversion of the goods to domestic use prior to exportation.

In *Spalding* the alleged taxable event was the manufacturer's delivery of baseballs and bats to the domestic agent of a foreign purchaser.[59] At the time of that delivery, which occurred within the United States, movement out of the country had not yet begun, so the alleged taxable event occurred before the goods had entered the export stream by commencing movement to a foreign destination. Therefore, the tax would appear valid if the "physical movement" test of *Coe* were strictly applied. But the tax was stricken. Mr. Justice Holmes, speaking for a unanimous Court, stated: "[t]he question is whether the sale was a step in exportation assuming, as appears to be the fact, that the title passed at the moment when the goods were delivered into the carrier's hands . . . ."[60] He also noted that if the transaction had been entirely domestic the taxable event would have been the "act that passed the title." However, since that very act "committed the goods to the carrier that was to take them across the sea,"[61] they had already

58. *See* text accompanying notes 43-51 *supra*.

59. *See* text accompanying notes 40-42 *supra*. This was an article I, section 9, clause 5 case, but the same principles are also applied to import-export clause cases.

60. 262 U.S. at 68-69.

61. *Id.* at 69.

started on their journey abroad at that point and were properly classified as exports. It was further recognized that the domestic agent could have diverted the bats and balls to domestic use, but this possibility was summarily dismissed by the conclusion that "[t]here was not the slightest probability of any such change and it did not occur."[62]

The above-quoted language indicates that once the goods have been acted upon in such a manner as to make ultimate exportation virtually certain, the constitutional immunity from state taxation will apply. However, the holding in *Spalding* may not be so radical a departure from the *Coe* doctrine as it might appear, for there was *physical movement* when the manufacturer delivered the goods to the purchaser's carrier, and this action could have easily been construed as the point where the goods began their continuous journey to a foreign port. Thus, the same result could have been reached by application of a pure physical movement test had the Court so desired. Nonetheless, *Spalding* does provide a basis for assuming that mere "certainty of export" is sufficient to confer immunity from taxation upon the goods.

The possibility of a departure from the physical movement test appeared again in *Richfield Oil Corp. v. State Board of Equalization,*[63] in which the seller's act of pumping oil into the foreign purchaser's ship was sufficient to provide exemption from a state sales tax. The *Richfield* Court apparently conceived the holding in *Spalding* as being based upon the ground of certainty of export, and dealt with that issue at length, noting that:

> [W]hen the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.
>
> It seems clear . . . that the commencement of the export would occur no later than the delivery of the oil into the vessel.[64]

From this passage it appears that the *ratio decidendi* of *Richfield* was the certainty that the oil would be exported. But again, the situation was such that the certainty of export was demonstrated by some physical movement, which occurred when the oil was pumped into the

62. *Id.* at 70.
63. 329 U.S. 69 (1946).
64. *Id.* at 83.

purchaser's ship. It seems that application of the *Coe* physical movement test would have sufficed to invalidate the tax without need for the Court to involve itself with an analysis of the oil's diversion potential. But, when *Spalding* and *Richfield* are considered together, they do imply that the import-export clause immunity could obtain in the absence of physical movement of the taxed goods if the certainty of export were positively established by some other means. However, the Supreme Court began a return to a strict physical movement test for invalidation of state taxes in *Empresa Siderurgica,* although the factor of certainty of export was again mentioned.[65] But, in accordance with *Coe,* the Court would only recognize certainty of export once the goods had physically entered the export stream.

Any lingering implications that certainty of export alone would confer tax immunity were unequivocally negated by the Court in the *Kosydar* decision,[66] which rests squarely on the *Coe* physical movement test. In *Kosydar* the taxed goods were designed for exclusive overseas use and were not even operable in the United States. A clearer certainty of ultimate export and a more complete absence of diversion potential would be difficult to envision. The machines were taxed while stored in a warehouse in Ohio prior to their movement out of the country. The tax was sustained because of this absence of actual physical movement, despite the certainty that the machines would be exported at some future date.[67]

Although *Spalding* and *Richfield* may have signified the beginning of a broader judicial application of constitutional immunities for exports, *Empresa Siderurgica* and *Kosydar* constitute a complete repudiation of any such broadening, and a return to physical movement as the overriding criterion for tax exemption. As with the taxpayer's sub-

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65. The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . Delivery of packages to an exporting carrier for shipment abroad [citing *Spalding*], and the delivery of oil into the hold of the ship furnished by the purchaser to carry the oil abroad [citing *Richfield*], have been held sufficient. It is the entrance of the articles into the export stream that marks the start of the process of exportation. *Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use.* Nothing less will suffice.

337 U.S. at 156-57 (citations omitted) (emphasis added).

66. See text accompanying notes 52-56 *supra. See also* Rice Growers' Ass'n v. County of Yolo, 17 Cal. App. 3d 227, 94 Cal. Rptr. 847 (1971), which foreshadowed the result in *Kosydar.*

67. 417 U.S. 62, 70 (1974). The Court quoted from *Empresa Siderurgica* in support of the position that certainty of export is not the same as commencement of the exportation process, and stated that only the latter will confer constitutional tax immunity upon the goods. *Id.*

jective intent, certainty of export may be considered a relevant factor only insofar as it can be demonstrated by physical movement of the taxed goods.

LEAVING THE COUNTRY AND CONTINUITY OF JOURNEY

Once goods have left the United States destined for a foreign country they are exports and thus exempt from state taxation. But this is not to say that all goods which leave the country become exports,[68] and certainly the status of "export" is not conferred retroactively upon taxed goods by virtue of the fact that they are subsequently shipped abroad. Once the goods have entered the export stream by commencing their final journey to a foreign destination, then, and only then, do they become exports in the constitutional sense. Problems can arise, though, when the journey is interrupted before the goods leave the country, and a state tax is imposed during the period of interruption.

Although *Spalding* arguably implies that mere passage of title in the goods to a foreign purchaser starts them on their journey, the later decisions in *Empresa Siderurgica* and *Kosydar* require actual movement of the goods as an absolute prerequisite to immunity from taxation. However, it is possible that factors such as passage of title from a domestic seller to a foreign buyer might reduce the degree of physical movement necessary for the goods to acquire tax immunity. For example, in *Richfield* the title to the oil passed at the time it was delivered into the hold of the purchaser's ship.[69] Had the seller retained title after delivery it is possible that the California tax would have been sustained. The importance of the passage of title to the *Richfield* result is emphasized by the treatment of that factor in the dissent of Mr. Justice Black, who argued that the taxed sale was "purely intrastate" and that "formal 'passage of title' was not an adequate criterion for measuring a state's constitutional power to tax sales made within the State."[70] However, granting the truth of this assertion does not rule

68. In Brown v. Houston, 114 U.S. 622 (1885), a bargeload of coal held for sale in New Orleans was taxed by the city. Subsequently, some of this coal was "exported" on a foreign steamship (it appears that the ship itself used the coal rather than transporting it for sale abroad). The tax was sustained as applied to the entire bargeload and was not limited to the portion of the load sold domestically.

69. "The California Supreme Court conceded that the delivery of the oil 'resulted in the passage of title and the completion of the sale, and the taxable incident.'" 329 U.S. at 84.

70. *Id.* at 88 (Black, J., dissenting). He continued:

Private parties are free to decide, so far as their own interests are concerned, when legal title shall be considered to "pass." But a state surely is

out an interrelationship between physical movement of the goods and other factors, such as passage of title. In fact, state courts have held that such interrelationships exist between the degree of physical movement required for tax immunity and other factors, such as the necessity to collect the goods at a port until a sufficient quantity is accumulated to be shipped economically.[71]

Even though actual movement of the goods to a foreign destination may have commenced, and the status of exports may have attached, that status may be lost by an interruption in the journey, notwithstanding that the interruption is beyond the control of the exporter. Such a situation occurred in *Joy Oil*, in which gasoline destined for Canada remained in storage for fifteen months because a change in the laws necessitated use of another mode of transportation, and during that time a tax was imposed.[72] The Court upheld the tax, stating:

> It is of course true that commodities destined for shipment by water must be transshipped at the water's edge and so may require a brief period of storage at that point which will not be deemed a delay sufficient to interrupt the continuity of the export process. . . . But here the period of storage at Dearborn was so long as to preclude holding that the first step toward exportation would inevitably be followed by others.[73]

While the gasoline would have been exempt from taxation if it had been promptly shipped out of the country, it lost its exemption because the interruption in the journey was unduly lengthy. *Joy Oil* is the most recent Supreme Court case dealing with an interruption of a journey abroad. However, *Empresa Siderurgica* and *Kosydar* imply that the classification of goods as tax exempt exports could survive only a minimal interruption in the export process, even though circumstances beyond the exporter's control may have precluded resumption of the export journey at an earlier time.[74] The Court may have been

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> not required by the Constitution to forbear from taxing that part of a sales transaction which precedes the particular moment the parties have arbitrarily selected for a conceptual transfer of title.

Id.

71. *See, e.g.*, Cargill of California, Inc. v. County of Yolo, 26 Cal. App. 3d 704, 103 Cal. Rptr. 259 (Ct. App. 1972).

> Since the maximum production of export pellets from all sources was 450 tons per day, and a typical vessel at the Port of Sacramento could load 2000 to 2500 tons per day, a ship could not economically be loaded by direct daily delivery. Instead, it was necessary to accumulate the pellets in the elevator in anticipation of the arrival of one vessel per month for loading.

Id. at 706-07, 103 Cal. Rptr. at 258.

72. See text accompanying notes 47-48 *supra*.

73. 337 U.S. at 288.

74. In both *Empresa Siderurgica* and *Kosydar*, the export exemption from state

motivated partially by the belief that exports should "pay their own way."[75] The Court must have considered the protection which the state provided the gasoline during the period of storage at Dearborn when it stated, "[t]he Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property *eventually to be exported* from its share of the cost of local services."[76]

ANALYSIS OF PRESENT JUDICIAL APPROACHES

As recognized by Mr. Justice Holmes in *Spalding*, the principal problem for the Court in export tax cases is determination of the point beyond which goods are considered to be "exports" and therefore constitutionally immune from state (or federal) taxation.[77] Since its decision in *Coe*, the Court has held fast to the position that goods are not "exports" until they have commenced movement abroad "in a continuous route or journey."[78] Other tests, such as the owner's intention ultimately to export the goods or the "objective" certainty of export based on contract or manufacture to foreign specifications, have been rejected by the Court.[79] The question to be examined is what goals and policies are furthered by the judicial approach the Court has chosen to adopt.

Since the requirement of actual movement of the goods into the stream of export before state tax immunity attaches is a relatively "wooden or mechanistic"[80] test, it is easily applied by the states.[81] In

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taxation is construed quite narrowly. The purpose of such construction appears to be a judicial desire to preserve the states' power to tax to the maximum degree possible. Thus, the taxed goods are held to be part of the "general mass of property" until the last possible moment. If such an interpretation of judicial motivation is correct, then it would follow that the slightest interruption in the export journey might be seized upon by the Court as an opportunity to restore the states' power to tax. The Court took a step in that direction in *Joy Oil*.

75. *Cf.* Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

76. Joy Oil Co. v. State Tax Comm'n, 337 U.S. 286, 288 (1949) (emphasis added).

77. The question is whether the sale was a step in exportation . . . .

> . . . To answer it with regard to any transaction we 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.

262 U.S. at 68-69.

78. 116 U.S. at 517.

79. *See* Kosydar v. National Cash Register Co., 417 U.S. 62 (1974); Joy Oil Co. v. State Tax Comm'n, 337 U.S. 286 (1949); Empresa Siderurgica v. County of Merced, 337 U.S. 154 (1949).

80. Kosydar v. National Cash Register Co., 417 U.S. 62, 71 (1974).

81. *See* text following note 57 *supra*.

fact, physical movement of the goods is arguably the simplest test for the states to apply, since such movement can usually be proved or disproved by bills of lading and other transportation documents. The easy applicability of the *Coe* physical movement test is underscored by the small number of cases involving claimed tax immunity under the import-export clause which have reached the Supreme Court. The *Kosydar* Court stated that under the physical movement test the judicial inquiry is a factual one.[82] And, of course, factual disputes are generally simpler for judicial resolution than disputes of law. Ease of applicability and of judicial resolution are worthwhile goals for a test of tax immunity, and are consistent with the constitutional purposes of the import-export clause.

The physical movement test allows state tax administrators and taxpayers to know with certainty when goods become exempt from taxation. "[I]t is highly important, both to the shipper and to the State, that it [tax immunity under the import-export clause] should be clearly defined so as to avoid all ambiguity or question."[83] As stated by Holmes, "any legal standard must, in theory, be capable of being known."[84] The *Coe* test is "capable of being known" with certainty, so it has some theoretical, as well as practical, validity.

The physical movement test does have disadvantages. Since the test is mechanistic, it does not serve well in exceptional cases, such as *Kosydar* and *Joy Oil*, in which factors beyond the exporters' control prevent the taxed goods from entering or remaining in the stream of exportation. In those cases if additional factors had been considered, it is possible that "export" status and, therefore, tax immunity would have been conferred on the goods. Perhaps with respect to export tax immunity the Court considers that certainty of the constitutional standard should override any test that, though fairer, may require resolution on a case-by-case basis. The Court thus far has opted for simplicity and certainty in its test, and shows no inclination to alter its choice at this point.[85]

Not only is the current test easy to apply, but its narrow range of immunity from state taxation maximizes the amount of tax revenue

82. *See* text accompanying note 54 *supra.*

83. Coe v. Errol, 116 U.S. 517, 526 (1886), *cited with approval in* Kosydar v. National Cash Register Co., 417 U.S. 62, 71 (1974).

84. O. HOLMES, THE COMMON LAW 88-89 (Harvard ed. 1963).

85. See text accompanying note 56 *supra.* For a further discussion of tax goals in relation to the export tax exemption, *see* Note, *Import-Export Clause: A Blanket Prohibition Misapplied,* 40 S. CAL. L. REV. 528 (1967).

available to state governments. In tax cases under the commerce clause, the Court has explicitly recognized that interstate commerce must "pay its own way."[86] The Court has implicitly applied the same rationale to cases arising under the import-export clause.[87] Most forms of state taxation, such as sales taxes or *ad valorem* property taxes, may be assessed on exports. These taxes are essential to states' overall revenue plans, but this fact does not permit states to tax exports in the face of a direct constitutional prohibition. Although the import-export clause was intended to prevent the states from taxing exports in a discriminatory manner,[88] its language is sufficiently broad to exclude all taxation of exports. Even a nondiscriminatory state tax which falls upon exports is constitutionally void regardless of how desperately the taxing state needs the revenue therefrom and regardless of the amount of services provided the taxpayer by the taxing state. Exports are exempt from taxation even though they are sufficiently linked to the taxing state to satisfy fourteenth amendment due process requirements.[89]

The balancing problem faced by the Court appears to have been greatest in *Joy Oil Co. v. State Tax Commission*,[90] in which the goods had initially entered the export stream but the journey abroad had been interrupted by circumstances beyond the exporter's control. During the interruption, the goods remained stored within the taxing state for fifteen months and the state-supplied services (such as police and fire protection) continued. The tax in question was a nondiscriminatory *ad valorem* property tax. The problem facing the Court was whether it was proper to allow goods, which were to be exported, to receive substantial benefits from the state over an extended period of time without being required to pay a portion of the state's cost of providing services therefor. "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, *not to relieve*

86. "While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the state." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461-62 (1959).

87. *See* note 75 and accompanying text *supra*.

88. See text accompanying notes 15-23 *supra*.

89. Even if goods to be exported have not yet entered the export stream, they are exempt from state taxation under the fourteenth amendment if they lack a sufficient connection with the taxing state. *See* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Note, 40 S. CAL. L. REV., *supra* note 85, at 538.

90. 337 U.S. 286 (1949).

property eventually to be exported from its share of the cost of local services."[91] This analysis appears correct in light of the sectional conflict that led to the inclusion of the import-export clause in the Constitution.[92] The Court in *Joy Oil* was in sympathy with the states' need for revenue, and, in view of the historical roots of the import-export clause, opined that a narrow range of immunity from state taxation was appropriate.

In *Kosydar*, certain machines to be exported were stored within the taxing state. Again, the state had provided services for which it was fair to demand payment, and, as in *Joy Oil*, the Court defined "export" narrowly so as to validate the state tax. However, it must be noted that in *Kosydar* the inventory of parts from which the machines were manufactured had already been taxed, as had the total tangible assets in Ohio of the corporate exporter. Thus, the state was already receiving a large payment for benefits it was conferring on NCR.

In view of the various forms of taxation available to the state and the many "taxable events" on which taxes may be levied, it is unlikely that a broader interpretation of the constitutional tax immunity for exports would plunge the states into destitution or bankruptcy. In fact, a loss of revenue for this reason could be offset by an increase in the corporate income tax. This would, however, affect the taxes paid by exporting and nonexporting firms alike, and would result in the nonexporting firms paying a higher proportion of the cost of state services.

The *Coe* test of intent plus physical movement for state tax immunity minimizes the prospect that nonexporting firms will pay disproportionately higher taxes than exporting firms, but also may have harmful effects for the United States in international trade. When the Constitution was drafted in 1787, the United States was dependent upon international trade. In fact, the defects of the Articles of Confederation concerning trade accounted, in part, for the need to replace the Articles. The Framers felt that preventing the states from discriminating against each others' exports and preventing Congress from favoring sectional interests were the only protections the nation's international trade required. As the United States expanded, developed its resources, and industrialized, international trade became progressively less important. Isolationism flourished at a time when the nation was relatively independent of foreign trade. Since World War II, international

91. *Id.* at 288 (emphasis added).

92. *See* text accompanying notes 8-24 *supra*.

trade has risen in importance to the extent that it is now a major factor in the economy.

Since exports are constitutionally exempt from federal and state taxation, it is possible that manufacturers of goods for export may carry less than their proportionate share of the tax burden compared to manufacturers of goods for domestic use. If exporters are relieved of certain taxes by virtue of the import-export clause, then the states must raise the lost tax revenue by increasing the burden on other taxpayers. This reallocation of the tax burden forces manufacturers of goods for the domestic market to subsidize a portion of the state services for manufacturers of exports. This, in turn, means that goods may be sold to consumers abroad at a lower price, and may be more competitive in the international market. It is obvious that the earlier in the manufacturing and shipping process the goods acquire the constitutional status of exports, the greater the shift in the tax burden from exporters to other taxpayers.

The fact that the import-export clause shifts the tax burden to some extent may explain why the Court has narrowly construed the term "export." The Court may wish to minimize this shifting, since no shift was within the contemplation of the Framers. Perhaps the Court is reluctant to shift tax burdens because this is traditionally a legislative function.[93] While the competitiveness of American products in the international marketplace is a proper subject for governmental policy, the Court may feel that it is not the institution which should make such policy. But regardless of its motivations, the Court's current approach, while equalizing tax burdens, means that goods must be sold in the international market at a higher price, and thus may be less competitive.

Beyond the aforementioned implications of the Court's approach, an overriding consideration deserves attention. It is entirely possible that the import-export clause has outlived its usefulness.[94] The intense sectional rivalries that caused the clause to be included in the Constitution no longer exist. In this era of air travel[95] the trade advantages and opportunities once enjoyed by the coastal states have been greatly reduced.[96] Even in the absence of the import-export clause, Congress would have ample power to prevent discrimination on the

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93. *See* note 23 *supra.*
94. *See* Comment, 51 MINN. L. REV., *supra* note 36, at 157.
95. *See* Note, 40 S. CAL. L. REV., *supra* note 85, at 536.
96. *See* Canton R.R. v. Rogan, 340 U.S. 511, 516-17 (1951) (Jackson, J., reserving judgment).

part of "shipping" states by using the ever-expanding powers of the commerce clause. Thus, the export businesses may no longer require the protection of the import-export clause. Duties imposed by the importing country are the important factor, and they are largely controlled by treaties and agreements made under the aegis of the executive branch.

The present limited utility of the import-export clause supports the narrow interpretation which the Court has placed on it. The circle of tax immunity which encompasses the exported goods themselves is quite small, but the circle covering the activities and processes of exportation is almost nonexistent. "An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide."[97]

However, a possible area of remaining vitality for the import-export clause is its prevention of state interference with the establishment of a uniform national policy, the absence of which would affect interstate as well as international trade. For example, if California were to tax exports and New York did not, many producers would prefer to ship the products from New York. American goods destined for Japan would become more costly and less competitive in Japanese markets, and adverse balance of trade problems might result. The import-export clause, then, may engender a necessary uniform standard, and perhaps the Court has chosen the better course by interpreting the tax immunity narrowly.

CONCLUSION

The narrow scope the Court has consistently given to the tax immunity provided by the import-export clause has produced a reasonable balance between the goals of the Framers and practical considerations. The nation was able to overcome the sectional rivalries that plagued commerce under the Articles of Confederation. The approach now taken by the Court provides state tax administrators a relatively objective and easily applied test of tax immunity, and provides exporters and their attorneys an acceptable degree of certainty as to the law. The test also preserves the states' taxing power over goods "to be exported" for the maximum possible time. International

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97. *Id.* at 514-15.

trade is unencumbered, and the Court's test results in a minimum shift of the tax burden toward nonexporting taxpayers. These advantages seem to compensate more than adequately for any disadvantages caused by the "wooden" or "mechanistic" nature of the test. Perhaps these disadvantages are small in comparison with the benefits for the nation's international commerce.