

THE IMPORT-EXPORT CLAUSE

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I. INTRODUCTION

A companion piece to the Commerce Clause of the Constitution is the less well-known Import-Export Clause:

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.¹

The Import-Export Clause was the principal remedy proposed by the Philadelphia Convention to remedy the commercial strife that characterized the relations among the states under the Articles of Confederation, as noted by the Supreme Court in 1976:

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This article is adapted from material to be published in a forthcoming treatise entitled *Bittker on The Regulation of Interstate and Foreign Commerce*.

¹ U.S. CONST., art. I, § 10, cl. 2. See generally Elliot D. Hinds, Student Paper, *State Taxes and the Import-Export Clause*, 14 AM. J. TAX POL'Y 73 (1997); Andrew Lizotte, Comment, *Taxation—State Excise Taxes on Goods to Be Exported Held Unconstitutional*, 15 SUFFOLK TRANSNAT'L L.J. 430 (1991). See also Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941); Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*, 26 LAW & POL'Y INT'L. BUS. 1, 6-14 (1994); Walter Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1428-30 (1977).

One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased. Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time, there was no secure source of revenue for the central government.²

The Constitutional Convention of 1787 adopted the Import-Export Clause a few days after it adopted the Federal Export Clause, which forbids the federal government from imposing taxes or duties on "articles exported from any state."³

The Import-Export Clause has long been overshadowed by the Commerce Clause, but their roles were reversed at the Philadelphia Convention, where commercial strife among the states occupied center stage and evoked the passion and eloquence of the delegates, including the Convention's most memorable metaphors—New Jersey was known as the "[c]ask tapped at both ends" by New York and Philadelphia; North Carolina was the "patient bleeding from both arms" because it was located between Virginia and South Carolina.⁴ The proposed remedy for this exploitation of the inland states by the seaboard states was the Import-Export Clause. There were, to be sure, complaints about the lack of effective national commercial leadership, and the Commerce Clause was adopted to cure this deficiency in the Articles of Confederation by authorizing Congress to regulate interstate and foreign commerce. However,

² *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976).

³ U.S. CONST. art. I, § 9, cl. 5. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827) (stating that "[t]here is some diversity in language [between the Import-Export and Federal Export Tax Clauses], but none is perceivable in the act which is prohibited").

⁴ James Madison, *Preface to Debates in the Convention of 1787*, reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 539, 542 (Max Farrand ed., rev. ed. 1966).

the discussion of this issue was tame when compared with the fire and brimstone that erupted during the debate over the Import-Export Clause. Indeed, the Commerce Clause seemed to evoke even less attention than the Federal Export Clause, which prohibited federal taxes or duties on "articles exported from any state."⁵

This marked difference of tone in the Philadelphia debates extends to the choice of language in the phrasing of the Import-Export Clause and the Commerce Clause themselves: the Import-Export Clause is detailed, reflecting its emergence from a spirited debate that aired a diversity of rival proposals for ending the perceived commercial evils, while the Commerce Clause is vague and general, like the terse comments supporting its adoption. On the other hand, the two provisions embody a common failing: neither answered in advance the most troublesome and important question of interpretation. For the Commerce Clause, the question was whether it operated of its own force to restrict state regulations of interstate commerce, even if Congress had not preempted the subject; and for the Import-Export Clause, the unaddressed question was whether it applied to domestic and foreign commerce, or only to the latter. These issues were not settled by the Supreme Court until 1851 and 1868, respectively.⁶

The Import-Export Clause not only attracted more attention at Philadelphia than the Commerce Clause, but its language responded so explicitly and seemingly so comprehensively⁷ to the commercial maladies that led up to the Annapolis conclave of 1786, and then to the Philadelphia Convention, that it is not entirely clear what other problems were to be solved

⁵ U.S. CONST. art. I, § 9, cl. 5.

⁶ See generally *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868) (stating Import-Export Clause is limited to foreign commerce); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (holding that states could not regulate, under Commerce Clause, those subjects that are national or that require single uniform plan of regulation).

⁷ "Seemingly" comprehensive because at its inception, the Import-Export Clause seemed to cover imports and exports between the states as well as in foreign commerce; only in 1868, when *Woodruff v. Parham* was decided, was its apparent breadth curtailed to shipments to and from foreign countries.

by the Commerce Clause. To be sure, the Import-Export Clause restricts only the taxing powers of the states, not their regulatory authority; the latter area of potential interstate commercial strife was subjected to centralized congressional control by the Commerce Clause. But the commercial complaints of 1787 were overwhelmingly, if not exclusively, attributed to state taxes, not to other types of state regulation. As for use of the Commerce Clause as a lever enabling Congress to regulate *private* enterprise as well as to demolish objectionable *state* regulations, there is little evidence that this extension of federal authority was the focus of the Framers' attention.

In a long-forgotten dissent in an early Import-Export Clause case, Justice Nelson offered a plausible explanation of why the Commerce Clause would not do the job that was assigned to the Import-Export Clause. If, as he foresaw, the Commerce Clause was interpreted to allow the states to levy nondiscriminatory taxes on merchandise regardless of its place of origin, southern products like cotton, tobacco and rice might be subjected by the northern states to an ostensibly neutral tax, though in fact the tax would be tantamount to a discriminatory export tax, since the taxing states produced none of the taxed commodity.⁸ Indeed, he viewed the Commerce Clause as merely the ineffectual successor to a provision of the Articles of Confederation,⁹ preserving a provision "which the framers of [the Constitution] had rejected as wholly inadequate for the protection of interstate commerce."¹⁰ In Nelson's eyes, the Im-

⁸ See *Woodruff*, 75 U.S. (8 Wall.) at 145 (Nelson, J., dissenting).

⁹ The provision to which Justice Nelson referred, Article IV of the Articles of the Confederation, in relevant part, guaranteed that

the free inhabitants of each of these [s]tates . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each [s]tate shall have free ingress and regress to and from any other [s]tate, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any [s]tate, to any other state of which the owner is an inhabitant

ART. CONFED., art. IV (U.S. 1781).

¹⁰ *Woodruff*, 75 U.S. (8 Wall.) at 145 (Nelson, J., dissenting).

port-Export Clause was adopted as “a more complete and thorough security to the enjoyment of the privileges of [interstate] commerce.”¹¹

It is therefore not far-fetched to suggest that as of 1789, the Commerce Clause was a handkerchief thrown over something already covered by a blanket. With the passage of time, of course, the Commerce Clause became vastly more important than the Import-Export Clause (perhaps partly because the latter achieved its goals without much litigation),¹² which neither empowers Congress to act (except in waiving the constraints imposed by the Import-Export Clause on the states), nor limits the state’s power to impose non-tax regulations on commerce. Even in its own bailiwick—taxes on imports and exports—the Import-Export Clause yields to the Commerce Clause if the state tax falls on interstate imports and exports, rather than on foreign commerce.¹³ By the end of the twentieth century, therefore, the Commerce Clause became the blanket, and the Import-Export Clause a handkerchief, covering only the few discriminatory state taxes that escape the Commerce Clause’s coverage.

II. THE EARLY IMPORT-EXPORT CLAUSE CASES

The salient textual differences between the Import-Export Clause and the Commerce Clause¹⁴ are: (1) the Import-Export Clause explicitly bans “imposts or duties on imports or exports,” while the Commerce Clause’s restrictions on the states are not explicit, but arise only from congressional action or from the dormant Commerce Clause doctrine (these barriers

¹¹ *Id.* (Nelson, J., dissenting) (rejecting majority’s “foreign commerce” restriction on Import-Export Clause). See generally *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1868) (companion case to *Woodruff*).

¹² Today, of course, some states, rather than being tempted to tax imports or exports, seek to encourage them by establishing tax-free zones or other facilities to attract businesses and jobs to their areas.

¹³ See *infra* notes 21-23 and accompanying text (discussing Import-Export Clause’s inability to protect interstate imports and exports).

¹⁴ *Richfield Oil Corp. v. Board of Equalization*, 329 U.S. 69, 75 (1946) (stating that “[t]he two constitutional provisions, while related, are not coterminous”).

can sometimes be surmounted if the state's interest vis-a-vis the national interest in free trade is sufficiently compelling); (2) the Import-Export Clause prohibits only state fiscal action—the levy of “imposts” and “duties”—while the Commerce Clause can restrict a far wider array of state regulations, including all types of taxes;¹⁵ (3) the Import-Export Clause explicitly authorizes state imposts and duties if Congress consents, whereas the power of Congress to authorize state regulations that would otherwise violate the Commerce Clause—by a so-called “reconveyance”—is a judge-made feature of the Commerce Clause; and (4) the Commerce Clause explicitly covers interstate and foreign commerce, as well as commerce with the Indian tribes, while the Import-Export Clause contains no explicit geographical limits, but as interpreted by the Supreme Court, as explained below, it applies only to foreign commerce.¹⁶

A. *Interstate Commerce and the Import-Export Clause*

In *Brown v. Maryland*, the Supreme Court's first encounter with the Import-Export Clause, Chief Justice Marshall asserted by way of dictum that the Import-Export Clause prohibited state taxes on goods imported from other states, not merely taxes on imports from foreign lands.¹⁷ He viewed this idea, which appears at the end of his discussion of the Commerce

¹⁵ Dissenting in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-40 (1997), Justice Thomas proposed to eliminate the dormant Commerce Clause doctrine, suggesting that its work could properly be done by the Import-Export Clause, provided it was interpreted, as he argued it should be (*contra Woodruff v. Parham*), to cover interstate, not merely foreign, commerce. *Id.* at 1620 (Thomas J., dissenting). But even if it were thus enlarged, the Import-Export Clause could not be employed to invalidate discriminatory state regulations, as distinguished from the specific types of taxes that it covers. *Id.* (noting that Import-Export Clause “seems to prohibit in plain terms . . . the more egregious state taxes on interstate commerce . . .” (emphasis added)). For an analysis and evaluation of Justice Thomas's proposal, see Brannon P. Denning, *Justice Thomas, The Import-Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 COLO. L. REV. 155 (1999).

¹⁶ See *infra* notes 21-23 and accompanying text.

¹⁷ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1827) (invalidating state tax on importers of goods produced abroad; “we suppose the principles laid down in this case, to apply equally to importations from a sister [s]tate”).

Clause, as an alternative reason for invalidating the Maryland tax; hence his remark might be treated as referring to the Commerce Clause, rather than to the Import-Export Clause. However, the remark has been frequently viewed, seemingly without dispute, as Marshall's construction of the Import-Export Clause.

Marshall's theory was not surprising. The language of the Import-Export Clause is unqualified ("any imposts or duties on imports or exports"), and the pre-1787 complaints that states forced by geography to import goods from outside their borders or to export their locally-produced goods were exploited by neighboring states did not always distinguish between domestic and foreign goods. Marshall's conclusion was not questioned by Chief Justice Taney in the 1861 decision of *Almy v. California*, where Taney struck down a California tax on bills of lading for gold exported from the state and bound for New York.¹⁸ The only question was whether the tax on the bill of lading was, in effect, a tax on the gold itself. "If the tax was laid on the gold or silver exported," Taney wrote, "everyone would see that it was repugnant to the [Import-Export Clause]."¹⁹ Taney then concluded that the tax on the bill of lading was a tax on the goods because it was "in substance the same thing"²⁰

In *Woodruff*, however, Marshall's "casual remark" in *Brown v. Maryland* was repudiated, partly on lexicographical grounds (that the words "import," "export," and "impost" historically referred to foreign commerce unless qualified by "some special form of words to show that foreign commerce is not meant"),²¹ and more forcefully, on the ground that tax immunity for goods imported from another state would produce "the grossest injustice" and negate the "equality of public burdens in all our large cities."²² These hyperbolic claims are puzzling,

¹⁸ *Almy v. California*, 65 U.S. (24 How.) 169, 175 (1860).

¹⁹ *Almy*, 65 U.S. (24 How.) at 173.

²⁰ *Id.* at 174.

²¹ *But see Camps Newfound*, 520 U.S. at 621 (Thomas, J., dissenting) (arguing that scope of Import-Export Clause included interstate commerce).

²² *Woodruff*, 75 U.S. (8 Wall.) at 137 (stating city tax on sales of merchandise, as applied to auctioneer's sales of goods imported from other states, did not vio-

since, as noted below, the goods would, at best, enjoy only a temporary immunity, which would evaporate once they were unpacked at their destination or commingled there with locally-produced goods. Mr. Justice Miller, who wrote for the Court in *Woodruff*, also held that the challenged tax did not conflict with the Commerce Clause. He reasoned that it was nondiscriminatory, and added that a tax which would “discriminate injuriously against the products of other states or the rights of their citizens” would be unconstitutional under the Commerce Clause, even though it did not violate the Import-Export Clause.²³

Thus, restricting the Import-Export Clause to foreign commerce does not liberate the states to enact protective tariffs to restrict the inflow of goods produced in other states. To the contrary, the dormant Commerce Clause doctrine is a shield against such attempts. In *West Lynn Creamery, Inc. v. Healy*, for example, the Supreme Court cited a tariff as “the paradigmatic example of a law discriminating against interstate commerce . . . so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means.”²⁴ The Court’s reference to devices to get the results of a tariff “by other means” is a reminder that the Commerce Clause is broader in its coverage than the Import-Export Clause: the latter prohibits only “imposts or duties,” while the former was employed in *West Lynn Creamery* to invalidate a subsidy because, in the special circumstances of that case, it was tantamount to a tariff.

B. The Import-Export Clause and the Status of United States Territories and Possessions

Building on *Woodruff*’s reference to “foreign commerce” as the beneficiary of the Import-Export Clause’s prohibition, Ohio argued in *Hooven & Allison Co. v. Evatt* that it could levy an

late Import-Export Clause).

²³ *Id.* at 140.

²⁴ *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

ad valorem tax on merchandise imported from the Philippine Islands, which at that time constituted a territory of the United States rather than a foreign country.²⁵ While the Supreme Court acknowledged that the courts have “fallen into the habit of referring to imports as things brought into this country *from a foreign country*,”²⁶ it ruled that the Import-Export Clause’s protection shields articles “brought into the United States” even if they did not originate in a foreign country. The Court then traced the constitutional and statutory relationship between the Philippines and the United States, concluding that “the Islands have been given in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world”²⁷ and that:

[t]he national concern in protecting national commercial relations, by exempting imports from state taxation, would seem not to be essentially different or less in the case of merchandise brought from the Philippines . . . for which we have assumed a national responsibility, than in the case of articles originating on the high seas or in foreign countries. Congress is left free by the terms of the [Import-Export] clause to remove the prohibition of state taxation of imports and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity.²⁸

Despite the Court’s description of the Philippine Islands as a quasi-independent government, the opinion seems to imply that the Import-Export Clause shields imports from all American territories and possessions, even if they enjoy a lesser degree of self-government.²⁹

²⁵ *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945). This decision was overruled in 1984 on another issue. See *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984).

²⁶ *Hooven & Allison*, 324 U.S. at 669 (emphasis added).

²⁷ *Id.* at 676 (footnote omitted).

²⁸ *Id.* at 678-79.

²⁹ See *id.* at 671 (stating that “there may be imports in the constitutional sense which do not have a foreign origin. . . . [I]t is material only whether [the goods] came from a place *without* the ‘country’” in determining whether it is import) (emphasis in original). For the application of the Clause to other territories,

III. THE *MICHELIN TIRE* CASE AND THE DEMISE OF THE ORIGINAL PACKAGE DOCTRINE

In 1976, the Supreme Court startled the tax bar by overthrowing almost a century and a half of case law and adopting a fundamentally new analysis of the Import-Export Clause. Its vehicle was *Michelin Tire Corp. v. Wages*, upholding a Georgia ad valorem property tax on the taxpayer's inventory of imported tires.³⁰ The tires were held in the company's Georgia warehouse after being transported from its manufacturing plant in France in so-called sea vans (over-the-road trailers with removable wheels), which were hauled from the French factory to a port of embarkation, loaded on ships bound for the United States, refitted with wheels on arrival, and trucked to the Georgia warehouse. The tires, which were not individually packaged, were then removed from the vans, sorted, and stored in the warehouse, pending sale and delivery to the taxpayer's franchised dealers in six southeastern states.³¹

The disputed tax was nondiscriminatory in the sense that it applied to all goods owned by taxpayers on Georgia's once-a-year tax assessment day, whether imported or locally produced, and therefore, it could not be characterized as "a tax [falling] on imports *as such because of their place of origin*."³² Under the pre-*Michelin Tire* case law, however, the imported tires would have been exempt from even nondiscriminatory taxes until they lost "their character as imports and [became] incorporated into the mass of property of the State."³³ In determining when this crucial transformation occurred, the prevailing

see, for example *Duty Free Shoppers, Ltd. v. Tax Comm'r*, 464 F. Supp. 730 (D. Guam App. Div. 1979) (applying Import-Export Clause to Guam). *But cf.* *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding Puerto Rico not "state"; therefore, federal export ban did not apply). See generally STANLEY K. LAUGHLIN, *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTION* 3 (1995 & 1997 Supp.).

³⁰ *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976). For an incisive analysis of this case, see Walter Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 SUP. CT. REV. 99.

³¹ *Michelin Tire*, 423 U.S. at 279-80.

³² *Id.* at 286 (emphasis added).

³³ See *Low v. Austin*, 80 U.S. (13 Wall.) 29, 34 (1872).

principle was the original package doctrine, which had its origin in an 1827 Import-Export case, *Brown v. Maryland*, and was then adopted and elaborated in determining when goods moving in interstate commerce could be taxed or otherwise regulated by the state of destination.

Briefly stated, the original package doctrine meant that if the Michelin tires had been shipped in containers (e.g., four tires per carton), they could not have been taxed by Georgia (or even by the state of ultimate destination), until they were removed from the cartons or sold by the importer. The governing principles were less clear for goods shipped in bulk because packaging was unnecessary or impracticable (like wheat, iron ore, oil or the Michelin tires), but their immunity from state taxation ordinarily terminated when the importer “broke bulk” by unloading the goods for processing or sale. Fixing the time when the protection ended was also difficult if the goods were imported by manufacturers for use in their businesses.³⁴ The original package doctrine was much criticized,³⁵ but in an era when “commerce” was often used to refer to business transactions between wholesale or large-scale “merchants,” as distinguished from “trade” between local “shopkeepers” and their customers, the removal of merchandise from long distance shipping containers may well have been a useful and easily enforced way to determine when imported goods became local goods.

The Supreme Court of Georgia, after a lengthy review of the major original package cases, held that the Michelin tires were “incorporated into the mass of [Georgia] property”—so as

³⁴ See *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959) (upholding ad valorem property tax on imported iron ore when unloaded at place of manufacture), and cases cited therein.

³⁵ For analysis of the “gossamer threads” making up the cloak of tax immunity for imports, see Melvin G. Dakin, *The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?*, 19 LA. L. REV. 747 (1959); Alexander R. Early & Robert G. Weitzman, *A Century of Dissent: The Immunity of Goods Imported for Resale From Nondiscriminatory State Personal Property Taxes*, 7 SW. U. L. REV. 247 (1975); Thomas Reed Powell, *State Taxation of Imports—When Does an Import Cease To Be an Import?*, 58 HARV. L. REV. 858 (1945).

to be taxable—when the tires “were sorted, segregated by size and style and commingled [by the taxpayer] with other shipments [in the warehouse].”³⁶ It therefore upheld the tax.

The Georgia decision was appealed to the United States Supreme Court, where both sides focused on the ambit of the original package rules.³⁷ The Court, however, chose to launch its own “independent study” of the constitutional history of the Import-Export Clause, which led it to announce—in the first “modern” Import-Export Clause case³⁸—that “a nondiscriminatory *ad valorem* property tax is not the type of state exaction which the Framers of the Constitution . . . had in mind as being an ‘impost’ or ‘duty.’”³⁹ The Court thereupon overruled *Low v. Austin*, the 1872 elaboration of the original package doctrine, and its corollary, that imported goods are exempt from a nondiscriminatory *ad valorem* property tax until removed from their original packages or otherwise “incorporated” into the undifferentiated mass of property located in the taxing state.⁴⁰

In place of the long-entrenched original package doctrine,

³⁶ *Wages v. Michelin Tire Corp.*, 214 S.E.2d 349, 355 (Ga. 1975).

³⁷ The tax was also imposed on imported tubes stored in the warehouse, which were packaged in corrugated cartons at the factory and still held in these containers on the assessment date. The Supreme Court of Georgia held that these items were exempt from the Georgia tax. *Wages*, 214 S.E.2d at 355 (stating original package doctrine “has been almost universally applied, in a mechanical way, for about 150 years . . . [G]reat weight of authority makes a vast distinction between goods shipped in packaging, such as crates or cartons, and goods shipped in bulk”). This part of its decision was not appealed.

³⁸ It was so described by *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993).

³⁹ *Michelin Tire*, 423 U.S. at 283. The opinion, written by Justice Brennan, exudes the spirit of constitutional originalism. Ten years later, Justice Brennan asserted that doctrinaire reliance on the intent of the Framers “is little more than arrogance cloaked in humility.” William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

⁴⁰ See *Low*, 80 U.S. (13 Wall.) at 34. According to Professor Schwartz, the Court’s decision to reexamine *Low* sua sponte came in response to Justice Brennan’s draft opinion in *Michelin Tire*, which questioned *Low*, but did not reexamine it. See BERNARD SCHWARTZ, *THE UNPUBLISHED DECISIONS OF THE BURGER COURT* 342 (1988). The *Michelin Tire* Court argued at length that *Low v. Austin* misunderstood *Brown v. Maryland*, as well as the opinion of Chief Justice Taney (who had argued for the state in *Brown v. Maryland*) in *The License Cases*, 46 U.S. (5 How.) 504 (1847). *Michelin Tire*, 423 U.S. at 282.

the *Michelin Tire* Court promulgated a three-part test for state taxation of imported goods, corresponding to the three goals that, according to the Court, led the Framers to adopt the Import-Export Clause:

The Framers of the Constitution . . . sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: [1] 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; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] 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.⁴¹

The Court then proceeded to apply each of these tests of constitutional validity to Georgia's ad valorem tax on the implicit ground that the Clause prohibits a state tax if, but only if, it has a propensity to interfere with one of the Clause's three objectives.⁴² Such a nondiscriminatory property tax does not

⁴¹ *Michelin Tire*, 423 U.S. at 285-86 (footnotes omitted; bracketed numbers added). This explication of the Import-Export Clause is, by its terms, limited to the status of imports. Indeed, the second element of the test is irrelevant in the case of exports because Congress is forbidden to levy export taxes; but the Court extended it to exports in *Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

⁴² Though Justice Brennan's articulation and elaboration of the Framers' animating purposes behind the Import-Export Clause assumed the nature of a tripartite "test," the logical conclusion, viz., that taxes failing one or more of the elements of the test were unconstitutional, was implicit, rather than stated explicitly. *Michelin Tire*, 423 U.S. at 286 (stating that nondiscriminatory ad valorem tax, "unlike discriminatory state taxation against imported goods and imports, was not regarded as impediment that severely hampered commerce or constituted form of tribute by seaboard States to the disadvantage of other States"). On this point, see the contrary view of Professor William W. Crosskey, who concluded

conflict with the first of the three purposes of the Import-Export Clause (the "one voice" point), according to the Court, because it "does not fall on imports as such because of their place or origin . . . cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and . . . cannot be applied to encourage or discourage imports in a manner inconsistent with federal regulations."⁴³ Such a tax, therefore, "can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Import-Export Clause's

that the remedy of the Framers was intended to bar all taxes:

This overburdening of out-of-state products [by state taxation] is frequently intentional; but as often, perhaps, it is the result of chance, chance that consists in the unforeseen and frequently unperceived multiple hitting of the same product at different stages in its production, its distribution, or its consumption, by the independently determined, infinitely complicated, and constantly varying duty systems of our several states. From this last cause, if from no other, it would be hopelessly insufficient to interdict such taxes, *only* when the evils in question are found actually to be present. For the presence of the evils is too difficult of detection, and too dependent upon factors constantly varying, for any conditional and qualified interdiction to be effective. The one practicable remedy, in any federal national state, is to forbid such taxes absolutely to the component parts; and thereby to drive those parts—*i.e.*, the states—into other forms of taxation, which are unsusceptible of use to attain, and not likely to produce accidentally, the undesired results. And this remedy, it appears, is the one the framers of the Constitution adopted.

1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 297 (1953).

⁴³ *Michelin Tire*, 423 U.S. at 285-86. For subsequent applications of the *Michelin Tire* case, see *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 131-32 (1986) (holding that state ad valorem tax did not violate Import-Export Clause as applied to imported tobacco stored in customs warehouse awaiting domestic manufacture and sale; that there is "nothing transitory" about tobacco which has reached its destination so that "only payment of customs duty, after the appropriate aging, separates it from entrance into the domestic market"); *Los Angeles v. Marine Wholesale Co.*, 19 Cal. Rptr. 2d 664, 669-71 (Cal. Ct. App. 1993) (stating that Import-Export Clause was not violated by city's nondiscriminatory tax on gross receipts and payroll, as applied to goods stored in federally-regulated customs bonded warehouse); *Blue Star Line v. San Francisco*, 143 Cal. Rptr. 647, 652-53 (Cal. Ct. App. 1978) (upholding San Francisco payroll tax on employers doing business within city limits under *Michelin Tire* against challenge, under Foreign Commerce and Import-Export Clauses, by steamship lines, agents and stevedore firms engaged in foreign maritime commerce at city's ocean port).

prohibition.⁷⁴⁴

The most obvious state fiscal action that would conflict with the federal government's right to speak in "one voice" in conducting foreign affairs would be an open and avowed state tariff (e.g., a California duty of one dollar per liter of wine imported from France, a measure that might be designed to make local wines seem like a bargain). Such a tax would increase the cost of French wines and thus penalize California's residents⁴⁵ without producing any revenue for the state, because the Import-Export Clause requires the net revenues from state taxes on imports and exports to be held for the federal government. With such a tax in place, the President or Secretary of State would no doubt encounter heavy seas in persuading France that the United States is committed to free international trade or that France should lower its duties on U.S.-made products.

But other state taxes, including some that are nondiscriminatory,⁴⁶ could also offend a prickly foreign government, particularly if the tax is only superficially nondiscriminatory because it falls on a class of goods that are produced in the taxing state only in small quantities or not at all, such as a North Dakota tax on caviar. Indeed, it is not inconceivable that a foreign government would object to the very tax upheld in *Michelin Tire*, on the ground that its once-a-year feature may charge the importer an undue amount for as little as one day of storage, resulting in an unjustified increase in the price American consumers must pay for goods imported from the complaining

⁴⁴ *Michelin Tire*, 423 U.S. at 286.

⁴⁵ This "self-inflicted" wound point was recognized by Chief Justice Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 440 (stating that "[w]hen we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to so hurt itself, but whether the act is within the words and mischief of the prohibitory clause").

⁴⁶ The Court uses "nondiscriminatory tax" at least twenty-one times in *Michelin Tire*, but does not define the term. In a sense, every tax is discriminatory, since it taxes what it taxes but not what it doesn't tax. For example, the Georgia "nondiscriminatory" ad valorem tax is levied on property held by the taxpayer on the tax-assessment date, but not on property owned on any of the 364 remaining days of the taxable year, and such taxes often distinguish between real and other types of property, between business and non-business property, and between non-profit and for-profit owners.

government's producers, particularly if the products encounter two or more tax assessment days while en route through a number of states to the customer. In close cases, rather than speculate on the impact of a challenged tax, counsel or the court might want to request the State, Justice or Treasury Department to express an opinion on whether the tax impairs the government's ability to "speak with one voice" in negotiations with foreign governments.⁴⁷

Turning to the Import-Export Clause's second goal, the Supreme Court asserted in the *Michelin Tire* case that nondiscriminatory taxation like Georgia's ad valorem property tax does not "deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports, . . . [and hence] deprives the Federal Government of nothing to which it is entitled."⁴⁸ Moreover,

[u]nlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, . . . [nondiscriminatory] property taxes are taxes by which State apportions the cost of such services as police and fire protection among the beneficiaries according to their wealth [and] there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods.⁴⁹

Presumably, police and fire protection was mentioned only as an illustration, and was not intended to imply that importers could not also be required to bear part of the state's entire

⁴⁷ But for an example where the Court refused to be bound by the government's opinion that a state law did not affect the government's ability to manage foreign affairs, see *Zschernig v. Miller*, 389 U.S. 429 (1968); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 163-64 (2nd ed., 1996).

⁴⁸ *Michelin Tire*, 423 U.S. at 286-87. The reference in *Michelin Tire* to revenues from export duties, like the similar reference in the Import-Export Clause itself, is puzzling since the federal government has no right, let alone an "exclusive" one, to tax exports by virtue of the Federal Export Tax Clause; thus, a state tax on exports by definition cannot deprive the United States of anything "to which it is entitled."

⁴⁹ *Id.*

budget, including the cost of educating its children and its welfare programs for the indigent and homeless.

Unlike the Court's first test of the Georgia tax's validity, the diversion of income test does little to separate tax sheep from tax goats, because *if* a state taxes imports or exports, the Import-Export Clause provides that the net revenue "shall be for the use of the Treasury of the United States;" thus, there is no diversion, except perhaps temporarily. The Court, however, did not mention this point; perhaps its theory was that a state tax is invalid if, *but for* the Import-Export Clause's federal-inurement provision, it would divert import revenues away from the United States. If this theory is accepted, however, it seems to follow that the federal-inurement provision is a dead letter, because any tax that could *in theory* generate import revenue would be invalid *ab initio*, and thus would produce no net revenue to be held by the state for the federal government, except for the crumbs, if any, left on the table by taxpayers who paid the tax and failed to request refunds in time.⁵⁰

Finally, the Court ruled in *Michelin Tire* that Georgia's tax did not violate the third test of constitutional validity (preservation of interstate harmony) that it distilled from the Import-Export Clause's constitutional history, because nondiscriminatory ad valorem property taxes "do not interfere with the free flow of imported goods among the states, as did the exactions by States under the Articles of Confederation directed solely at imported goods."⁵¹ In support of this assertion, the Court noted that importers of goods destined for delivery to inland states can "easily avoid" taxes imposed by seaboard states by using air freight, containerized packaging, rail and water routes, and other means that would bypass the taxing state. To this odd suggestion that a challenged tax might be sanitized by the possibility of easy avoidance, the Court added another

⁵⁰ Madison described the federal-inurement proviso "as preventing all State imposts." See Brennan's discussion and hypothetical questions, *id.* at 302 n.13. In its potential application to state imposts on exports, the federal-inurement provision conflicts in spirit with the Federal Export Tax Clause, which forbids Congress to tax exports.

⁵¹ *Id.* at 288.

point—really no more than a repetition of the tax benefit theory adduced to establish that the Georgia tax surmounted the second policy test—that any increase in the cost to out-of-state purchasers of the taxpayer's tires caused by Georgia's tax was a quid pro quo for the public services supplied by Georgia to importers and non-importers alike. "Ultimate consumers," the Court observed, "should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with these goods."⁵²

This analysis evidently presupposes that if the states of destination complained about Georgia's ad valorem property tax (which, the Court acknowledged, would increase the cost of imported goods), the complaint would be unwarranted, presumably because the state of destination, if it responded in a reasonable manner, would admit that Georgia's services were worth their cost. The ad valorem property tax is, at best, a rough and ready device to charge for the benefits conferred on the owner by the taxing state, since taxpayer *A* may enjoy 364 days of police and fire protection but pay nothing if its property is not in the state on the once-a-year tax assessment day, while taxpayer *B* may have to pay for 365 days of state services, even though its property tarries in the state for only one day.⁵³ The Justices did not address this point, perhaps because it was not raised by the taxpayer. If it had been, the Court might have concluded that they would find themselves in a quagmire if they undertook to judge whether taxpayers get their money's worth from the tax burdens they bear.

Moreover, if the intent of the Framers is to be controlling, as the *Michelin Tire* case presupposes, one might wonder whether the inland states, in the era of the Articles of Confederation, complained about taxes levied by seaboard states only if they exceeded the value of the services that the taxing states

⁵² *Id.* at 289 (footnote omitted).

⁵³ For apportionment of a California ad valorem tax under the Commerce Clause, based on the number of the taxpayer's cargo containers present in California on average during the taxable year, rather than the number that happened to be in the state on the assessment day, see *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 445 n.8 (1979).

supplied to the imported goods while they were in transit. If those ancient complaints were in fact qualified by a "tax benefit" concession, the evidence is not adduced in the *Michelin Tire* opinion.

Continuing its explanation of the third goal of the Import-Export Clause, the Court asserted: "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*."⁵⁴ At first glance, this historical explanation implies that the Import-Export Clause does not prohibit taxes on imported goods by the state of *destination* even if discriminatory or, in the case of exported goods, an export tax by the state of *origin*. But if the Import-Export Clause's function today is solely to outlaw "transit fees" by states *through* which imports and exports pass, a repeal of the Clause would hardly be noticed, because virtually any exaction levied solely for the privilege of transit would be a regulation of foreign commerce in violation of the Commerce Clause. Another way of putting the point is that the brave new approach of the *Michelin Tire* case comes close to depriving, in one fell swoop, both the Import-Export Clause, and the first and second tests of *Michelin*, of any independent function.

It is doubtful, however, that the Supreme Court intended to adopt so radical a "new approach" to the Import-Export Clause. The Court may well decide that the Clause's prohibition extends beyond mere transit fees; certainly, the language chosen by the Framers is broader than necessary to accomplish that limited objective. Conversely, however, the Court may decide that transit fees are not necessarily invalid, leaving room for states to charge for the benefits (*e.g.*, police and fire protection) they provide to goods while in transit and for the expense they impose on the state (*e.g.*, road repairs), even if

⁵⁴ *Michelin Tire*, 423 U.S. at 290 (emphasis added) (footnote omitted); see also the reference in the next sentence to property taxes "on goods which are merely in transit *through the State* when the tax is assessed." *Id.* (emphasis added). For an earlier analysis of this issue, see generally Thomas Reed Powell, *Taxation of Things in Transit* (pt. 1), 7 VA. L. REV. 167 (1920).

local entrepreneurs who receive imports or originate exports are exempted from the transit charges because they bear their share of the state's expenses, by paying other taxes that goods in transit escape. Moreover, even an "in transit" tax that for some reason cannot be justified as a quid pro quo for the taxing state's benefits and burdens, might be validated as an inspection fee in appropriate circumstances (e.g., to determine if the goods in transit are dangerously toxic).

IV. "IMPOSTS OR DUTIES ON IMPORTS OR EXPORTS" AFTER *MICHELIN TIRE*

In deciding *Michelin Tire*, the Supreme Court devoted the main body of its opinion to a lengthy explication of the pre-ratification history and objectives of the Import-Export Clause, but it did not explicitly anchor its threefold test of the constitutionality of state taxation to the operative language of the Clause—"No state shall . . . lay any Imposts or Duties on Imports or Exports." Indeed, the Court began its brief analysis of this language by admitting that "the wording of the prohibition of the Import-Export Clause does not in terms except nondiscriminatory taxes with some impact on imports or exports."⁵⁵ The Court then pointed out a second, equally obvious, feature of the language used by the Clause—that it does not prohibit *all taxes* on imports and exports, but only "imposts" and "duties"—and the Court contrasted this restricted list of prohibited exactions with the broader power of Congress, created by Article I, Section 8, Clause 1, to "lay and collect taxes, duties, imposts and excises."⁵⁶ The issue is further complicated by the reference in the Federal Export Tax Clause (Article I, Section 9, Clause 5) to a "tax or duty" on exports,⁵⁷ and in the Uni-

⁵⁵ *Michelin Tire*, 423 U.S. at 290.

⁵⁶ *See id.*

⁵⁷ In *United States v. IBM Corp.*, the Court observed that in *Michelin Tire*, "we left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax, and would be subject to the Export Clause." *United States v. IBM Corp.*, 517 U.S. 843, 857 (1996).

formity Clause (Article I, Section 8, Clause 1) to “duties, imposts and excises.”

For help in defining “imposts” and “duties,” the Court turned in *Michelin Tire* to Professor Crosskey’s “persuasive demonstration” that in 1787, these terms were “well understood to be exactions upon imported goods *as imports*.”⁵⁸ But while Crosskey’s book, a veritable lexicon of late eighteenth century legal and business terminology, establishes that the troublesome terms “imposts” and “duties” *sometimes* referred to taxes on “imports as such,” it shows that they were also used as labels for taxes on a broad array of other products and events.⁵⁹ Moreover, if one were *really* won over by Crosskey’s “persuasive demonstration,” one would have to reject *Woodruff v. Parham*, and apply the Import-Export Clause to interstate as well as foreign commerce, since that decision was the main impetus for his search for the eighteenth century meanings of “imposts” and “duties” as used in the Import-Export Clause, and his search led to the conclusion that “it would be fantastic to suggest that the Americans of the time could have read the [Import-Export] Clause as applying to ‘foreign imports’ and ‘foreign exports’ only.”⁶⁰

Rather than follow Crosskey, however, the Court quickly terminated its excursion into eighteenth century lexicography, and implicitly acknowledged that the *Michelin Tire* case could not be settled by consulting the dictionary: “The terminology employed in the Clause—‘Imposts or Duties’—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.”⁶¹

Despite this acknowledgment that the Framers’ terminology is ambiguous, the Court reached an eminently plausible conclusion in defining “imposts or duties on imports” as taxes

⁵⁸ *Michelin Tire*, 423 U.S. at 290-91 (emphasis supplied). See also 1 CROSSKEY, *supra* note 42, at 296-97.

⁵⁹ See 1 CROSSKEY, *supra* note 42, at 297-300.

⁶⁰ *Id.* at 304.

⁶¹ *Michelin Tire*, 423 U.S. at 293-94.

levied on "imports as such" or on "products because of their foreign origin."⁶² The Court, therefore, was on sound ground when it ruled that the Import-Export Clause does not shield imports and exports from such broad-based state levies as the ad valorem property tax upheld by *Michelin Tire*, where the challenged tax was not aimed at imports or exports, as such, but reached them only because they happened to be in the line of fire, like innocent bystanders, so to speak.⁶³

In its lexicographic analysis of the Import-Export Clause, the *Michelin Tire* Court did not turn its attention to another ambiguity—that the Clause prohibits state taxes only if they

⁶² *Id.* The defining element "as such" is used at least twice in the *Michelin Tire* opinion, and "foreign origin" appears at least four times. This interpretation of the Import-Export Clause was explicitly rejected in *Low v. Austin*, where the California Supreme Court ruled that certain imported goods were taxable "because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but are included [for taxation] as part of the whole property of its citizens which is subjected equally to ad valorem tax." *Low*, 80 U.S. (13 Wall.) at 34. The Court stated further in *Richfield Oil Corp. v. Board of Equalization* that the Import-Export Clause imposed an "absolute prohibition," from which nondiscriminatory taxes could not be exempted, quoting with approval Chief Justice Taney's announcement that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evidence from the whole instrument, that no word was unnecessarily used, or needlessly added." *Richfield Oil Corp. v. Board of Equalization*, 329 U.S. 69, 77 (1946) (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840)) (holding state retail sales tax invalid as applied to oil pumped from taxpayer's storage tanks into vessel for shipment to New Zealand). Since the Clause explicitly granted only one exemption from its prohibition (for the state's necessary inspection expenses), the Court ruled that no other exemption (*e.g.*, for nondiscriminatory taxes) could be applied. *Richfield Oil Corp.*, 329 U.S. at 76. *But see* *Peck & Co. v. Lowe*, 247 U.S. 165, 174, 175 (1918) (holding that Federal Export Tax Clause does not prohibit federal income tax on net income from export sales, (1) since "[t]he tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. . . . [W]hat is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins;" and (2) federal income tax "is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income").

⁶³ See *supra* notes 32-40 and accompanying text. *Michelin Tire* supports the idea that imports and exports in "transit" through a state might be immune from taxation even if the tax is nondiscriminatory. See *supra* notes 32-40 and accompanying text.

are “on” imports or exports. Of course, imports and exports do not pay taxes, people do; but that does not mean that the term “on” is meaningless. Its meaning came before the Court as early as 1827, when Chief Justice Marshall ruled in *Brown v. Maryland*,⁶⁴ the Court’s first Import-Export Clause case, that a state occupational tax on importers was within the purview of the Import-Export Clause.⁶⁵ Rejecting the argument that “this is not a tax upon the [imported] article, but on the person,” he wrote:

All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do because it is prohibited by the constitution.⁶⁶

Chief Justice Marshall’s lead was followed by later courts, which similarly applied the Import-Export Clause to taxes on activities so connected with the goods that the levy could be plausibly described as a tax “on the article itself.” Thus, in *Almy v. California*, the Court invalidated a California stamp tax on bills of lading for the transportation of gold or silver, because the intention was “to lay a tax on the gold and silver exported, and not upon articles of any other description.”⁶⁷ In

⁶⁴ 25 U.S. (12 Wheat.) 419 (1827).

⁶⁵ *Brown*, 25 U.S. (12 Wheat.) at 447-48.

⁶⁶ *Id.* at 444. The rejected argument was advanced by Roger Taney, counsel for Maryland, who stuck to his guns and resuscitated the claim when he succeeded Marshall in the Chief Justice’s chair. See *The License Cases*, *supra* note 40.

⁶⁷ *Almy v. California*, 65 U.S. (24 How.) 169, 174 (1861). Although decided before, the Court, in *Woodruff v. Parham*, confined the prohibition to goods shipped

Thames & Mersey Marine Insurance Co. v. United States,⁶⁸ the Court extended the constitutional prohibition a bit further to encompass policies of marine insurance on exported goods.⁶⁹ The taxable document in each of these cases was readily viewed as a “proxy” for the goods themselves, since in commercial practice the bill of lading and accompanying policy of marine insurance are often essential to a legally effective transfer of the goods.⁷⁰

In 1951, however, the Court drew back from this expansive construction in *Canton Railroad Co. v. Rogan*,⁷¹ which involved a state tax on the gross receipts of a railroad that operated a marine terminal, which handled goods arriving from abroad or consigned to foreign buyers.⁷² The Court acknowledged that “the prohibition of the Import-Export Clause against taxes on imports and exports involves more than an exemption from taxes laid upon the goods themselves,”⁷³ but it rejected the taxpayer’s claim that “its handling of the goods, which are destined for export or which arrive as imports”⁷⁴ immunized it against a state gross receipts tax:

The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them.⁷⁵

to or from foreign countries, *Woodruff* did not undermine the *Almy* proposition that the tax was “on” the property covered by the taxed document. *Woodruff*, 75 U.S. (Wall.) at 137.

⁶⁸ 237 U.S. 19 (1915).

⁶⁹ *Thames & Mersey Marine Ins. Co.*, 237 U.S. at 27.

⁷⁰ *Id.* at 26. See *United States v. IBM Corp.*, 517 U.S. 843, 879-80 (1996) (Kennedy, J., dissenting) (explaining concept of “a proxy for taxing the goods”).

⁷¹ 340 U.S. 511 (1951).

⁷² *Canton R.R. Co.*, 340 U.S. at 512.

⁷³ *Id.* at 514.

⁷⁴ *Id.*

⁷⁵ *Id.* at 515.

The Court went on to hold that a tax on the taxpayer's receipts from renting a crane to stevedoring companies, who used the crane in loading and unloading imports and exports, was too remote from the goods to be invalidated by the Import-Export Clause.⁷⁶ Intimating that a tax on the activities of the stevedoring firms might qualify for protection, the Court concluded "that any activity *more* remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."⁷⁷ In still another encounter with the pestiferous preposition "on," in *Itel Containers International Corp. v. Huddleston*,⁷⁸ the Court ruled that a Tennessee sales tax imposed on the proceeds of leasing cargo containers for use exclusively in international shipping was not prohibited by the Import-Export Clause, for the reason that it was "levied on leases transferring temporary possession of containers to third parties . . . not on the containers themselves or on the goods being imported in those containers."⁷⁹

The elusive preposition "on" also appears in the Federal Export Clause, prohibiting any federal tax or duty "on articles exported from any state," and the similarity of language between this Clause and the Import-Export Clause has resulted in what the Supreme Court has called "our longstanding parallel interpretations of the two Clauses."⁸⁰ In *United States v. IBM Corp.*, a Federal Export Clause case, the Court pointed out that it had "struck down taxes that were not asserted directly on goods in export transit, but which [it] found to be so closely related as to be effectively a tax on the goods them-

⁷⁶ *Id.*

⁷⁷ *Id.* (emphasis added). The *Canton Railroad Co.* case was followed by *Department of Revenue v. Association of Wash. Stevedoring Cos.*, which narrowed the "in transit" exception suggested by *Michelin Tire* by denying Import-Export Clause immunity to a state tax that "does not fall on the [imported or exported] goods themselves [but] only on the business of loading and unloading ships." 435 U.S. at 755.

⁷⁸ 507 U.S. 60 (1993).

⁷⁹ *Itel Containers Int'l Corp.*, 507 U.S. at 77 (Justice Scalia concurring only in judgment on this issue; Justice Blackmun dissenting on other grounds).

⁸⁰ *IBM Corp.*, 517 U.S. at 853.

selves," but added that it had never "carefully defined how we decide whether a particular federal tax is sufficiently related to the goods or their value to violate the Export Clause."⁸¹ The Court seemed poised to reconsider its holding in *Thames & Mersey Marine Insurance Co. v. United States*, a leading example of the "closely related" approach; but the government did not challenge that decision; and in the interest of *stare decisis*, the Court did not disturb it.⁸²

V. "EXPORTS" AFTER *MICHELIN TIRE*

Before *Michelin Tire*, goods shipped to foreign shores gained immunity from state taxation under the Import-Export Clause upon their "entrance into the export stream."⁸³ This was a shorthand expression for a principle set out in *Coe v. Erroll*,⁸⁴ which held that under the dormant Commerce Clause doctrine,

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.⁸⁵

For exports, this boundary line is the counterpart of the original package doctrine as applied to imports, which was not suitable for exported goods, because they are often packed by the manufacturer in identical containers, whether they are to be shipped to foreign countries, other states, or even other loca-

⁸¹ *Id.* at 855 n.3.

⁸² *Thames & Mersey Marine Ins. Co.*, 237 U.S. at 27 (1915).

⁸³ See *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 67 (1974), and cases there cited; see also *IBM Corp.*, 517 U.S. at 871 (complaining of "factual morass of determining when exportation has begun"); Leslie W. Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C. L. REV. 59 (1975). For the effect of interruptions en route, see *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922).

⁸⁴ 116 U.S. 517 (1886).

⁸⁵ *Coe*, 116 U.S. at 527.

tions within the state of manufacture. Since identically-packaged goods cannot be distinguished at this point from "the general mass of property in the state [of manufacture]," it was necessary to find an alternative starting line for exports to serve as the analogue of the original package rule for imports.⁸⁶

Like the original package rule, the "stream of export" rule engendered some close cases.⁸⁷ A defense of this principle can be found in *Kosydar v. National Cash Register Co.*,⁸⁸ upholding a state ad valorem tax on machines built to foreign buyers' specifications and awaiting shipment abroad, with possession and title still in the manufacturer, even though exportation was virtually certain. Movement to foreign shores, however, had not started, and the Court observed:

It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question."⁸⁹

When *Michelin Tire* repudiated the original package rule for imports in favor of a new approach to the Import-Export

⁸⁶ *Id.* at 525.

⁸⁷ *See, e.g.,* *Richfield Oil Corp. v. Board of Equalization*, 329 U.S. 69, 82-83 (1946) (invalidating California sales tax as applied to oil produced in California by taxpayer and shipped by pipeline to its storage tanks in California harbor, then pumped into oil tanker for delivery to New Zealand; transfer of oil from taxpayer's storage tanks into hold of vessel was start of oil's "export journey"), and cases there cited.

⁸⁸ 417 U.S. 62 (1973).

⁸⁹ *Kosydar*, 417 U.S. at 71 (quoting *Coe*, 116 U.S. at 526). In addition, the Court reiterated its support for previous decisions holding that "the protections of the Import-Export Clause are not available until the article . . . begins its physical entry into the stream of exportation." *Id.* Thus tax immunity is negated based on subjective factors like a manufacturer's intent to export.

Clause, by which a challenged state tax was tested to ascertain if it threatened the evils which the Clause was intended to prevent, disenchantment with the “stream of export” rule—the original package rule’s counterpart—was almost a foregone conclusion. A turnabout came only two years after *Michelin Tire*, when the Court announced in *Washington Department of Revenue v. Association of Washington Stevedoring Cos.* that “the *Michelin* approach should apply to taxation involving exports as well as imports.”⁹⁰ *Michelin Tire* dealt only with a property tax, while the *Washington Stevedoring* tax was levied on business income, but the Court did not distinguish between them on this flimsy ground, perhaps because it assumed that the taxation would be reflected in the price of both the goods that were taxed in *Michelin Tire* and those that were handled by the taxed stevedoring firms in *Washington Stevedoring*. In extending its new import rule to exports, the Court might have pointed out that the Import-Export Clause forbade taxes on exports for the same reason it barred import taxes, *i.e.*, to dampen down the commercial strife between the seaboard states and their inland neighbors; thus, North Carolina was “a patient bleeding at both arms”⁹¹ because Virginia and South Carolina, with their port cities, could levy import duties on foreign goods bound for North Carolina and export duties on North Carolina’s tobacco en route to foreign lands.

The right of the state of origin to tax its *own* exports, however, seems to require separate analysis, since such a levy would not, absent unusual circumstances, disturb the exporting state’s neighbors or deprive the federal government of import revenues, two of the results that the Import-Export Clause, as interpreted by *Michelin*, was intended to prevent. Raising the cost of export goods to foreign customers may undermine the federal government’s power “to speak with one voice when

⁹⁰ *Washington Dep’t of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 758 (1978), *overruling* *Puget Sound Stevedoring Co. v. State Tax Comm’n*, 302 U.S. 90 (1937) (establishing decision based on Commerce Clause, but foreign commerce aspect could have been based on Import-Export Clause).

⁹¹ *See supra* note 4 and accompanying text.

regulating commercial relations with foreign governments,"⁹² and thus frustrate the first goal of the Import-Export Clause. Moreover, a state may thus interfere with the constitutional authority of Congress to regulate foreign commerce, in violation of the dormant Commerce Clause principle.

VI. GOODS IN TRANSIT

In the *Michelin Tire* case, the Supreme Court came close to ruling that state taxes on imports and exports are never subject to the prohibitions of the Import-Export Clause if the goods are taxed only as part of a broader nondiscriminatory tax base, such as Georgia's general ad valorem property tax; but the Court drew back at the last minute by hinting that the constitutional prohibition might apply to "nondiscriminatory property taxes on goods that are merely in transit through the State when the tax is assessed."⁹³ This tentative reservation did not embrace the tires in *Michelin Tire* because, the Court ruled, they were "no longer in transit," but were instead stored in a distribution warehouse that was operated "no differently than would be a distribution warehouse operated by a wholesaler dealing solely in domestic goods."⁹⁴

The *Michelin Tire* in-transit reservation evidently assumes that the goods remain "imports" until they arrive at their ultimate destination. However, the Court also appears to assume that a nondiscriminatory tax can meet the threshold *Michelin Tire* requirement that the tax be levied on imports or exports *as such* or *because of their foreign origin*. Moreover, the "in transit" reservation requires a qualification to avoid going too far. For example, would it prohibit a nondiscriminatory state

⁹² See *supra* notes 41-47 and accompanying text.

⁹³ *Michelin Tire*, 423 U.S. at 290. For a discussion of ambiguities in defining the term "in transit," see Hellerstein, *supra* note 30, at 122-26. In *United States v. IBM Corp.*, involving the constitutional prohibition of a federal tax on exports, the government argued that the Supreme Court's "Import-Export jurisprudence now permits a State to impose a nondiscriminatory tax directly on import or export transit." *IBM Corp.*, 517 U.S. at 861-62. This reading of the case law was rejected by the Court, though by way of dictum. *Id.*

⁹⁴ *Michelin Tire*, 423 U.S. at 302.

inheritance tax on a case of jeroboams of Lafitte Rothschild, vintage 1962, if the owner died while the wine was en route from Bordeaux to Chicago, and his will left the prized cargo to Walter Hellerstein?

Two years after deciding *Michelin Tire*, the Court had an opportunity to expand on its tantalizing hint about taxes on goods in transit when it decided *Department of Revenue v. Association of Washington Stevedoring Companies*.⁹⁵ Upholding a Washington tax on the gross income or receipts of "every person engaging within this state in any business activity," as applied to stevedoring firms that engaged in interstate and foreign commerce by loading and unloading ships in Puget Sound,⁹⁶ the Court followed *Michelin Tire's* iconoclastic lead by overruling two cases, one of them more than forty years old. However, it reserved judgment on *Michelin Tire's* "in transit" suggestion.

First, the Court rejected the taxpayers' claim that the tax was unconstitutional under the dormant Commerce Clause doctrine. Looking to "the practical effect of the exaction," the Court pointed out that it had "repeatedly . . . sustained taxes that are applied to activity with a substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State"; thus, the Washington tax satisfied the standard Commerce Clause mantra of constitutionality—that "interstate commerce must bear its fair share of the state tax burden."⁹⁷

The Court then proceeded to examine the stevedoring firms' claim that the tax violated the Import-Export Clause, a challenge that applied only to their activities in foreign commerce. The issue was not settled by the Court's Commerce Clause ruling, which unlike the Import-Export Clause, called

⁹⁵ See *supra* note 90.

⁹⁶ *Association of Wash. Stevedoring Cos.*, 435 U.S. at 738 n.4. See also *Diamond Shamrock Ref. & Mktg. Co. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298 (Tex. 1994).

⁹⁷ *Association of Wash. Stevedoring Cos.*, 435 U.S. at 750.

for a balancing of the interests of the taxpayers and the state. Applying the *Michelin Tire* analysis,⁹⁸ the Court concluded that the Washington tax did not generate any of the evils that the Import-Export Clause was intended to prevent:

First, the tax does not restrain the ability of the Federal Government to conduct foreign policy. As a general business tax that applies to virtually all businesses in the State, it has not created any special protective tariff. . . . No foreign business or vessel is taxed. Respondents, therefore, have demonstrated no impediment posed by the tax upon the regulation of foreign trade by the United States.

Second, the effect of the Washington tax on federal import revenues is identical to the effect in *Michelin Tire*. The tax merely compensates the State for services and protection extended by Washington to the stevedoring business. Any indirect effect on the demand for imported goods because of the tax on the value of loading and unloading them from their ships is even less substantial than the effect of the direct ad valorem property tax [upheld in *Michelin Tire*] on the imported goods themselves.

Third, the desire to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause. . . . The third Import-Export Clause policy, therefore, is vindicated if the tax falls upon a taxpayer with reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State.⁹⁹

In this formulation of the third test of constitutionality, the *Washington Stevedoring* case departed from the third Import-Export Clause test as promulgated by *Michelin*, and substitut-

⁹⁸ It is not clear that the Washington tax could be described as levied on "imports as such" or "exports as such," as required by *Michelin Tire*, since the tax evidently applied to the taxpayer's receipts from handling cargo in Puget Sound, whether the shipments involved foreign, interstate, or intrastate commerce.

⁹⁹ *Id.* at 754-55 (citations omitted). Although the Court refers in its second point only to the imported goods handled by the stevedoring firms, the tax on their services in handling exports did not undermine this goal because it did not divert any funds to which the federal government is entitled; the Constitution forbids federal taxation of exports. *See id.* at 759.

ed a test derived from a 1977 Commerce Clause case, *Complete Auto Transit, Inc. v. Brady*.¹⁰⁰ That case tested state taxes against what the *Washington Stevedoring* Court termed the Commerce Clause's "four safeguards" of interstate harmony—"the prohibition of discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits."¹⁰¹ This process of constitutional homogenization resulted a year later in a judicial merger of *Michelin Tire*'s first test of constitutionality under the Import-Export Clause, with the test applied under the foreign commerce component of the dormant Commerce Clause doctrine. In *Japan Line, Ltd. v. County of Los Angeles*, the Court held that the controlling standard under both provisions is whether the state tax prevents the United States from "speaking with one voice" in conducting its commercial relations with foreign governments.¹⁰²

This evidently leaves *Michelin Tire*'s second test of constitutionality—diversion of import revenues from the federal government—as the only unique contribution of the Import-Export Clause. The stevedoring companies argued that the three-part standard of constitutionality promulgated by *Michelin Tire* did not apply to them, in any event, because the merchandise loaded and unloaded by them was still "in transit," whereas the Georgia tax upheld in *Michelin Tire* was on goods "no longer in transit."¹⁰³ But in *Washington Stevedoring*, the Court treated this distinction as irrelevant because the challenged Washington tax "[did] not fall on the goods themselves," and "the *Michelin Tire* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service [*i.e.*, loading and unloading] distinct from the goods and their value."¹⁰⁴ This distinction (enunciated without explanation) seems to imply that *Michelin Tire*'s "in transit" reservation applies only if the taxpayer is the owner of

¹⁰⁰ See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

¹⁰¹ *Association of Wash. Stevedoring Cos.*, 435 U.S. at 761.

¹⁰² *Japan Line, Ltd.*, 441 U.S. at 434, 453-54.

¹⁰³ For this aspect of *Michelin Tire*, see *supra* note 48-54 and accompanying text.

¹⁰⁴ *Association of Wash. Stevedoring Cos.*, 435 U.S. at 757 (footnote omitted).

the goods, as in the *Michelin Tire* case, even though the Court notes that pre-*Michelin Tire* cases “had assumed that all taxes on imports and exports *and on the importing and exporting process itself* were banned by the [Import-Export] Clause.”¹⁰⁵

Once the Court ruled that state taxes were prohibited by the Import-Export Clause only if levied on imports or exports “as such,” it came close to depriving all three *Michelin Tire* tests of any operative significance because (1) taxes levied on imports or exports “as such” seem ipso facto to threaten either the first and third evils in the case of exports, or all three in the case of imports;¹⁰⁶ while (2) taxes that are not levied on imports “as such” do not qualify for immunity because they do not meet the threshold definitional requirement of the Clause, with the possible exception of taxes on imports or exports in transit.¹⁰⁷ But if this reserved possibility is ultimately recognized by the Court, it would evidently have to rest on the curious and unexplained theory that a tax threatening one or more of the evils described by *Michelin Tire* is prohibited by the Import-Export Clause even if it is not a tax on imports or exports “as such.” This in turn suggests that the terminology used in the Clause was even more ambiguous than the Court acknowledged in *Michelin Tire*.¹⁰⁸

Since *Washington Stevedoring*, the Supreme Court has addressed only one case alleging that a state tax violated the Import-Export Clause because it was levied on exports. In *Itel Containers International Corp. v. Huddleston*, the taxpayer alleged that Tennessee’s general sales tax violated the Import-Export Clause, to the extent that it was imposed on income from leasing cargo containers for exclusive use in international commerce.¹⁰⁹ Without commenting on the fact that the tax

¹⁰⁵ *Id.* at 752 (emphasis added).

¹⁰⁶ See Hellerstein, *supra* note 30, at 115.

¹⁰⁷ For *Michelin’s* reservation of this exception, see *supra* notes 55-63 and accompanying text.

¹⁰⁸ *Michelin Tire*, 423 U.S. at 293.

¹⁰⁹ 507 U.S. 60, 63 (1993). The taxpayer also attacked the tax as violating the foreign commerce component of the Commerce Clause and the Supremacy Clause, the latter challenge being based on an alleged violation of federal regulations

was levied on an extremely broad spectrum of transactions (the "transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration"), so that it could hardly be described as imposed on imports or exports "as such,"¹¹⁰ the Court held that it did not threaten to produce either the first or third of the three evils identified in *Michelin Tire* (interference with the nation's ability to speak "with one voice" in foreign commercial matters and the disturbance of harmony among the states).¹¹¹ The Court then turned to the tax's viability under the second *Michelin Tire* test (diversion of import duties from the federal government).¹¹² This evil, the Court held, was not produced by the Tennessee tax, because "it is not a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing state," and hence it "does not divert import revenue from the Federal Government."¹¹³

Finally, the Court rejected the argument that the tax violated "the prohibition on the direct taxation of imports and exports 'in transit.'" Hinting that this prohibition, which had been applied in the *Richfield Oil* case,¹¹⁴ had been "altered" by the approach adopted in *Michelin Tire*, the Court held that it did not apply to the case before it. The Court stated, "Tennessee's sales tax is levied on leases transferring tempo-

relating to containers, and of two international conventions to which the United States is a party. *Itel Containers Int'l Corp.*, 507 U.S. at 63. Both claims were rejected. *Id.* at 69, 75.

¹¹⁰ *See id.* at 69. In rejecting the taxpayer's claim that the tax was preempted by two international conventions, however, the Court said explicitly that "[t]he tax is a sales tax of general application that does not discriminate against imported products either in its purpose or effect [and] its assessment bears no relation to importation whatsoever." *Id.* This pronouncement by itself should have doomed the taxpayer's Import-Export Clause claim.

¹¹¹ *Id.* at 77-78. In holding that these two evils were not produced by the tax, the Court treated the *Michelin Tire* requirements as identical with the requirements of the foreign commerce component of the Commerce Clause. *See supra* notes 89-90 and accompanying text.

¹¹² *Id.*

¹¹³ *Id.* at 77.

¹¹⁴ *See supra* note 62.

rary possession of containers to third parties in Tennessee; it is not levied on the containers themselves or on the goods being imported in those containers.”¹¹⁵

In *Louisiana Land & Exploration Co. v. Pilot Petroleum*, the Fifth Circuit Court of Appeals squarely confronted the possible application of the Import-Export Clause to prohibit a nondiscriminatory tax if imposed on goods in transit, an issue on which the *Michelin Tire* Court reserved judgment.¹¹⁶ The *Pilot Petroleum* case involved a nondiscriminatory Alabama sales tax on the sale of jet fuel oil, which was delivered by the seller to a foreign oil tanker anchored in the port of Mobile, Alabama for export to Canada.¹¹⁷ Relying both on a similar pre-*Michelin Tire* “in transit” decision and on the *Michelin Tire* reservation, the Court held that the Alabama tax “is an impost upon an export within the meaning of the Import-Export Clause, and is therefore unconstitutional.”¹¹⁸

In reaching this conclusion, the Fifth Circuit noted that the Alabama tax was a “direct tax that is levied on the goods themselves,” distinguishable from both the “indirect” tax upheld in *Michelin Tire* “on stored inventory which includes imported or exported products,” and from the *Washington Stevedoring* tax “on a business or occupation which is related to the importation or exportation process.”¹¹⁹ The Court, however, did not explicitly address the *Michelin Tire* comment that 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*.”¹²⁰ It takes some stretching to attach this label to the Alabama tax, which (1) was imposed on sales of jet fuel,

¹¹⁵ *Itel Containers Int’l Corp.*, 507 U.S. at 77.

¹¹⁶ *Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990) (divided court), *cert. denied, sub nom. Department of Revenue v. Pilot Petroleum Corp.*, 498 U.S. 897 (1990). The tax was imposed on “every distributor, refiner, retail dealer, [and others] of gasoline or any substitute . . . sold for use as a fuel to propel aircraft.” *Louisiana Land & Exploration*, 900 F.2d at 817 n.1.

¹¹⁷ *Id.* at 817.

¹¹⁸ *Id.* at 821.

¹¹⁹ *Id.*

¹²⁰ *Michelin Tire*, 423 U.S. at 290 (emphasis added).

whether for use in Alabama or for shipment to other states or foreign countries; and (2) would not apply if the seller retained ownership of the exported fuel until it arrived at its foreign destination. A dissenting judge offered a cogent defense of the Alabama tax, though his pioneering rationale has not yet caught hold:

The majority is surely correct that most oil exports are by tanker and that only coastal states can tax this form of commerce; by the same token it is only coastal states that bear the regulatory, administrative and, increasingly, environmental costs of this commerce. The Framers did not intend such states to bear all these costs, and this nondiscriminatory tax imposed at the Mobile, Alabama port on fuel, which happened to be exported, is not unconstitutional.¹²¹

It is doubtful that this invocation of the intent of the Founders is rooted in history; but if the Import-Export Clause is sufficiently ambulatory to take account of today's realities, the argument is persuasive.

The "in transit" issue was examined at length by the Supreme Court of Texas in *Virginia Indonesia Co. v. Harris County*, involving the validity of a county ad valorem personal property tax on goods purchased by a Delaware agent for an Indonesian joint venture ("VICO").¹²² Under the sales contract, the vendors shipped the goods to an independent Houston export packer for inspection and, assuming conformity to the contract specifications, the goods were then packed and shipped abroad by the next available vessel. The export packer held the goods for no more than forty-five days, but the period could be as long as 175 days if the goods were damaged or defective or if approval for import into Indonesia was delayed; some goods remained in the Houston facility throughout the year.

Calling attention to the distinction in *Washington Stevedoring* between a "direct tax on goods and a tax on the busi-

¹²¹ *Louisiana Land & Exploration*, 900 F.2d at 822-23 (Jolly, C.J., dissenting).

¹²² *Virginia Indonesia Co. v. Harris County*, 910 S.W.2d 905 (Tex. 1995). The case was cited with approval by the Supreme Court in *United States v. IBM Corp.*, 517 U.S. 843, 862 (1996).

ness of handling goods,” and to *Michelin Tire*’s reservation of judgment with respect to direct state taxes on imports and exports in transit, the Texas court observed that *Michelin Tire* “appears to preserve bright-line immunity for goods in the stream of export.”¹²³ Moreover, the Texas court announced that since the “Supreme Court has not overruled *Coe v. Erroll* or any of its progeny, we apply the long-standing rule that a tax on goods in the export stream of commerce violates the Import-Export Clause.”¹²⁴ The Texas court then examined the reasons for holding the goods in Houston en route from the vendors to Indonesia, concluding that the goods remained in transit under the long-established *pre-Michelin* principle that the continuity of transit is not interrupted by stoppages “due to the necessities of the journey or for the purpose of safety and convenience in the courts of the movement,” as distinguished from transit-breaking delays for such purposes as further processing or the receipt of orders.¹²⁵

Rather than stopping at this point, however, the Texas court ruled that the tax imposed on VICO’s goods violated the “one voice” policy set out in *Michelin Tire* by interfering with the United States’ commercial relations with Indonesia, which might “turn to other countries for its imported goods, or might engage in retaliatory taxation of its own exports destined for the United States.”¹²⁶ The Court rejected the taxpayer’s arguments that (1) the in-transit status of the goods is a “threshold” issue, and (2) if the goods were still in transit despite the delay in Houston, “it is unnecessary to analyze whether the tax impinges upon the *Michelin Tire* policies.”¹²⁷ Two

¹²³ *Virginia Indonesia*, 910 S.W.2d at 911. The “stream of export” standard was, for exports, the counterpart of the now defunct original package rule promulgated for imports.

¹²⁴ *Id.* at 912.

¹²⁵ For a discussion of the “interruption/continuity” of journey cases, see *Diamond Shamrock Refining & Mktg. Co. v. Nueces County Appraisal Dist.*, 876 S.W.2d 298, 302 (Tex. 1994) (holding oil imported into state from foreign country, reaching its ultimate destination in-state, may be taxed despite fact it is still “in transit” within taxing state).

¹²⁶ *Virginia Indonesia*, 910 S.W.2d at 915.

¹²⁷ *Id.* at 910.

justices dissented in *Virginia Indonesia*, asserting that:

[T]he United States Supreme Court has abandoned the exclusive use of the in-transit rule and related condensations of constitutional principles like “original package” and “export stream” as accurate or adequate substitutes for the principles themselves. The fundamental difference in Import-Export Clause jurisprudence since *Michelin Tire* . . . is that the constitutional provision’s limit on state taxation is now defined in every instance by the actual policies which support the limits required by *Michelin Tire*’s predecessor cases, to which the doctrine of *stare decisis* requires obedience.¹²⁸

VII. THE IMPORT-EXPORT CLAUSE AND STATE INSPECTION DUTIES

A. *Inspection Charges*

The Import-Export Clause’s prohibition of state imposts and duties on imports and exports exempts charges that are “absolutely necessary for executing [the state’s] inspection laws.” In *Gibbons v. Ogden*, Chief Justice Marshall observed:

The object of inspection laws is to improve the quality of articles produced by the labour of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state and not surrendered to the general government; all which can be most advantageously exercised by the states themselves.¹²⁹

In Marshall’s day, state inspection laws embraced everything from pork to barrels, gunpowder to firewater, and lumber to fish; they regulated every aspect of these and other commod-

¹²⁸ *Id.* at 915-16 (Hecht & Owen, JJ., dissenting).

¹²⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). See also the references to state inspection laws in Chancellor Kent’s opinion in *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. Sup. Ct. 1812).

ities, including the “quality of the article, form, capacity, dimensions, weight or package, mode of putting up, and marking and branding of various kinds.”¹³⁰ In the words of an early Pennsylvania statute, “It is the duty and interest of all governments to prevent fraud, and promote the interests of just and useful commerce.”¹³¹ Evidently, the purpose was often less to protect local consumers than to establish and maintain the state’s reputation for supplying products of high quality to markets in other states and abroad.¹³²

Commenting in *McCulloch v. Maryland* on the scope of the Necessary and Proper Clause of the Constitution, Chief Justice Marshall pointed out that “necessary,” in the affairs of the world, “frequently imports no more than that one thing is convenient, or useful, or essential to another”; but that by adding the word “absolutely” in phrasing the Import-Export Clause, the Framers intended to change “materially” the meaning of the naked word “necessary.”¹³³ Given this view of the solemnity of the phrase “absolutely necessary,” as well as the ubiquity

¹³⁰ See, e.g., the laws cited by counsel for the respondent in *Gibbons*, 22 U.S. (9 Wheat.) at 115-125; for the matters covered by inspection laws, see *Turner v. Maryland*, 107 U.S. 38 (1883) (holding that inspection fee charge “appears to be a charge for services properly rendered,” not in violation of Import-Export Clause, or wrongful state interference with interstate commerce). For an extended list of commodities subject to inspection in 1883, see *Turner*, 107 U.S. at 55-58, notes (a)-(c).

¹³¹ 1 Dallas Pennsylvania Laws 883. See generally LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 204ff (1948).

¹³² See *Neilson v. Garza*, 17 F. Cas. 1302, 1303 (C.C.E.D. Tex. 1876) (No. 10,091) (Bradley, C.J.) (stating “no doubt the primary and most usual object of inspection is to prepare goods for exportation to preserve the credit of our exports in foreign markets”).

State laws still evince a strong interest in the protection of the reputation of their products, though the method of protection differs somewhat. Recently, many states have enacted so-called “food disparagement” statutes that create “a cause of action for damages from disparaging statements or dissemination of false information about the safety of the consumption of food products.” David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 196 (1998) (citing examples of such statutes from thirty-one states that either passed or are considering food libel laws). Invoked most famously (and unsuccessfully) against talk show host Oprah Winfrey, the constitutionality of these statutes is hotly debated.

¹³³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819).

of the early state codes for enforcing inspection laws, there is a surprising paucity of litigation by aggrieved importers and exporters.¹³⁴ This may reflect a fear that if success in court produced a lower fee, there would be an offsetting reduction in the state's staff of inspectors, resulting in costly delays in meeting commercial schedules.

In one of the few Import-Export Clause cases asserting that a state's inspection charges were excessive, Justice Bradley, sitting on circuit, expressed doubts about how such an allegation could be tried, observing that submitting it to a jury "might give rise to great diversity of judgment, the result of which would be to make the law constitutional on one day, and in one case, and unconstitutional another day, in another case."¹³⁵ Quoting the final clause of the Import-Export Clause—"all such laws shall be subject to the revision and control of [C]ongress"—he then ruled that the allegedly excessive charge "must stand until [C]ongress shall see fit to alter it."¹³⁶

These remarks were quoted with approval in a later Supreme Court decision upholding a North Carolina fee for inspecting imported agricultural fertilizer, but the Court said that "we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected as to justify the imputation of bad faith"¹³⁷ The Court also observed that if "the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge."¹³⁸ (Of

¹³⁴ In a few cases, states have defended a challenged fee on the theory that it was not regulation interfering with interstate commerce, which would be a violation of the Commerce Clause, but an inspection law. *See, e.g., Hale v. Bimco Trading*, 306 U.S. 375 (1939) (treating excessive "inspection" fee on out-of-state goods as unconstitutional tax on interstate commerce); *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 488 (1888) (same); *see also Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (holding tax on intoxicants invalid).

¹³⁵ *Neilson*, 17 F. Cas. at 1303.

¹³⁶ *Id.*

¹³⁷ *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 354 (1898).

¹³⁸ *Patapsco Guano*, 171 U.S. at 354.

course, a correction that was prospective only would not necessarily inure to the benefit of the complaining taxpayer.) Another Supreme Court case, challenging the amount charged by North Carolina for inspecting imported kerosene and other illuminating oils, stated that if the charge was excessive, the Court would indulge

the presumption . . . that in the orderly conduct of the public business of the State the necessary correction will be made to cause the act to conform to the authority possessed [by the state], which is to impose a fee solely to recompense the State for the expenses properly incurred in enforcing the authorized inspection.¹³⁹

The Court refused to discuss what relief would be granted if the state failed in this duty of correction, noting that the suit was commenced immediately after the law was passed, too soon for the accumulation of experience on the relationship of the charge to the state's expenses. Whether by intent or inadvertence, however, it did not quote or refer to the counsel of despair in the two earlier cases—that Congress was the ultimate arbiter of whether the charge was excessive.

Still another case held out more hope for the enforcement of the Import-Export's "absolutely necessary" criterion, without an inquiry—obviously distasteful to the federal judiciary—into the hearts and minds of the state legislators, even though the case arose under the interstate commerce aspect of the Commerce Clause, rather than under the Import-Export Clause itself. In *Cleveland Refining Co. v. Phipps & Phipps*, a three-judge district court invalidated an Ohio fee for inspecting out-of-state petroleum products on a showing that the fee exceeded the state's expenses by about sixty-three percent and that this excess was increased over time; the court ruled that the fee interfered unjustifiably with interstate commerce.¹⁴⁰ The state

¹³⁹ *Red 'C' Oil Mfg. Co. v. Board of Agric.*, 222 U.S. 380, 393-94 (1912).

¹⁴⁰ 277 F. 463 (S.D. Ohio 1921), *aff'd* 261 U.S. 449 (1923). A three-judge district court convened because the case involved the constitutionality of a state statute.

sought to salvage its law by arguing that the aggregate amount collected, which covered both interstate and intrastate shipments, should be allocated between the two categories, and that this would show that the interstate shipments were inspected at a loss to the state. The court rejected this proposal to bifurcate the charges, on the ground that the state law "makes no such separation of cost, nor does it afford any means for so doing."¹⁴¹ (The Court did not comment on whether this refusal would be appropriate if a taxpayer offered to show that the state was inspecting domestic products at a loss and recouping the deficiency by overcharging out-of-state shippers.) The state appealed to the Supreme Court, which affirmed, stating that the district court had ruled against the state on the facts and that "[i]t is enough to say that we approve" of the district court's reasoning.¹⁴²

Finally, if an inspection fee is found to exceed the amount that is "absolutely necessary" to enforce the state's program, the excess might well be characterized as a forbidden impost or duty on imports or exports. So viewed, it seems to qualify for the federal-inurement feature of the Import-Export Clause. This means that the taxpayers who sought refunds in the cases summarized were the wrong claimants, since the amount should have been disgorged to the Treasury of the United States.

B. Congressional Consent

The Import-Export Clause begins with a blanket authorization to Congress to consent to an otherwise forbidden impost or duty on imports or exports, somewhat similar to the judge-made right of Congress to consent to an otherwise prohibited state violation of the dormant Commerce Clause. In exercising its Import-Export consent power, Congress can evidently pick and choose among the states and, within any particular state, among one impost or duty and another. To be sure, the Consti-

¹⁴¹ *Phipps*, 277 F. at 468.

¹⁴² *Phipps*, 261 U.S. at 452.

tution provides that “all Duties, Imposts and Excises shall be uniform throughout the States,”¹⁴³ but this constraint applies only to federal exactions, and it seems unlikely that a state impost or duty would become a tax imposed and collected by Congress by virtue of a Congressional consent that brushes aside the prohibition imposed on state taxes by the Import-Export Clause. Moreover, the consent presumably negates application of the federal-inurement provision of the Import-Export Clause; otherwise, the consent procedure, as a practical matter, would become a dead letter.¹⁴⁴ In any event, doubts about this conclusion could be dispelled by including a release of any federal claim to the resulting state revenue in the consent itself.

At the end of the Import-Export Clause, there is a puzzling second reference to the powers of Congress to “revis[e] and controul” “all such laws.” If “all such laws” refers only to the state’s inspection laws, the power seems never to have been exercised; if, on the other hand, the reference is to state taxing laws, the power seems to add nothing to the consent procedure set out at the beginning of the Clause.

VIII. CONCLUSION

Though the Import-Export Clause’s framing and initial interpretation by the Supreme Court seemed to portend an important role for the future, the Clause has become handmaiden to the Commerce Clause—not the other way around, as early events may have suggested. Restricted to the field of foreign commerce in the late nineteenth century by the Supreme Court, the Court then further eased the Clause’s limitations on states’ taxing powers in the second half of the twentieth century. The 1976 *Michelin Tire* decision replaced the mechanistic original package doctrine, long criticized for its overly generous tax immunity for foreign commerce, with a

¹⁴³ U.S. CONST., art. I, § 8, cl. 1.

¹⁴⁴ The amount inuring to the federal government is the “net produce” of the imposts and duties, so that the state presumably can at least reimburse itself for its inspection costs and other expenses of collection.

more purposeful approach. While the Court's doctrinal replacement for the original package doctrine has been easier to articulate than to apply, there is no mistaking the general trend towards the allowance of state taxes that are not intended to discriminate against foreign commerce, that do not impose on foreign commerce more than its "fair share" of the state's tax burden, and that do not tax foreign commerce merely *because of its origins*.

Should Congress deem it necessary or expedient to allow states to impose the sorts of taxes otherwise forbidden by the Import-Export Clause, Congress has the power to remove the prohibition. In addition, states may impose, without congressional consent, imposts and duties "absolutely necessary" for the execution of their inspection laws, though they must hold the net proceeds from those impositions for the benefit of the United States Treasury. Moreover, according to the Clause, Congress seems to retain the right to revise and control any such inspection laws, though the scope and limitations of such power are undefined, largely because Congress has not exercised it.