Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government

## United States v. International Business Machine, 517 U.S. 843 (1996)

*Congress imposed a tax on insurance premiums paid to foreign insurers that are not subject to the federal income tax. International Business Machine (IBM), a U.S. corporation, regularly shipped products to foreign subsidiaries and insured those shipments with foreign insurance providers. When the Internal Revenue Service (IRS) determined that those insurance premiums were taxable, IBM filed suit for a refund in the Court of Federal Claims. IBM argued that such a tax on the insurance of export shipments violated the export clause of the U.S. Constitution, which bars any federal tax on "articles exported from any state." The trial court agreed with IBM, and the U.S. Court of Appeals for the Federal Circuit affirmed that ruling. The United States appealed to the U.S. Supreme Court, which affirmed the lower courts in a 6–2 decision. The majority concluded that a generally applicable, nondiscriminatory federal tax on goods in export transit was unconstitutional, and a tax on insurance policies of such goods was functionally equivalent to a tax on the goods themselves.*

*How comparable is the export clause to other provisions of the U.S. Constitution? Why might the Court extend the ban on taxes beyond the exported articles themselves? Why would taxes that do not distinguish between articles in export and other goods be unconstitutional? What is the justification for the inclusion of the export clause in the Constitution? How should that justification affect interpretation of the clause? Under what circumstances should the Court be willing to overrule precedent?*

JUSTICE THOMAS, delivered the opinion of the Court.

We resolve in this case whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit. We hold that it does not.

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The Export Clause states simply and directly: "No Tax or Duty shall be laid on Articles exported from any State." We have had few occasions to interpret the language of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term "Articles exported" to permit federal taxation of pre-export goods and services.

Our early cases upheld federal assessments on the manufacture of particular products ultimately intended for export by finding that pre-export products are not "Articles exported." . . . "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Cornell v. Coyne* (1904). . . .

At the same time we were defining a domain within which nondiscriminatory taxes could permissibly be imposed on goods intended for export, we were also making clear that the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation. *Fairbank v. United States* (1901). . . .

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The Court has strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit, and we have extended that protection to certain services and activities closely related to the export process. We have not, however, exempted pre-export goods and services from ordinary tax burdens; nor have we exempted from federal taxation various services and activities only tangentially related to the export process.

The Government concedes, as it did below, that this case is largely indistinguishable from *Thames & Mersey Marine Ins. Co. v. United States* (1915) [which imposed a stamp tax on marine insurance] and that, if *Thames & Mersey* is still good law, the tax assessed against IBM . . . violates the Export Clause. The parties apparently agree that there is no legally significant distinction between the insurance policies at issue in this case and those at issue in *Thames & Mersey*, and, accordingly, the Government asks that we overrule *Thames & Mersey*.

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The Government contends that our dormant Commerce Clause jurisprudence has shifted dramatically and that our traditional understanding of the Export Clause, which is based partly on an outmoded view of the Commerce Clause, can no longer be justified. It is true that some of our early Export Clause cases relied on an interpretation of the Commerce Clause that we have since rejected. In *Fairbank*, for example, we analogized to *Robbins v. Shelby County Taxing District* (1887), in which we held that "interstate commerce cannot be taxed at all [by the States], even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." . . .

Our rejection in *Complete Auto Transit, Inc. v. Brady* (1977) of much of our early dormant Commerce Clause jurisprudence did not, however, signal a similar rejection of our Export Clause cases. Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports. These textual disparities strongly suggest that shifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot, govern our interpretation of the Export Clause. . . .

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The Import-Export Clause, which is textually similar to the Export Clause, says in relevant part, "No State shall . . . lay any Imposts or Duties on Imports or Exports." Though minor textual differences exist and the Clauses are directed at different sovereigns, historically both have been treated as broad bans on taxation of exports, and in several cases the Court has interpreted the provisions of the two Clauses in tandem. . . . The Government argues that our longstanding parallel interpretations of the two Clauses require judgment in its favor. We disagree.

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. . . . *Thames & Mersey* has been controlling precedent for over 80 years, and the Government does not, indeed could not, argue that the rule established there is "unworkable." Despite the dissent's speculative protestations to the contrary, there is simply no evidence that *Thames & Mersey* has caused or will cause uncertainty in commercial export transactions. . . .

What the Government does argue is that our Import-Export Clause cases require us to overrule *Thames & Mersey*. We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. . . . Though we have frequently interpreted the Clauses together, our more recent Import-Export Clause cases, on which the Government relies, caution that meaningful textual differences exist and should not be overlooked. The Export Clause prohibits Congress from laying any "Tax or Duty" on exports, while the Import-Export Clause prevents the States from laying any "Imposts or Duties" on imports or exports. . . . Though we found in *Michelin Tire Corp. v. Wages* (1976) that a nondiscriminatory state property tax does not transgress the policy dictates of the



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Import-Export Clause, we also recognized that the Import-Export Clause is "not written in terms of a broad prohibition of every 'tax,'" and that impost and duty are narrower terms than tax. . . .

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

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

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. . . . This case, as it comes to us, is a hybrid in which the tax both burdens exports during transit and – as the Government concedes and our earlier cases held – is essentially a tax on the goods themselves. . . .

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We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit. Reexamination of the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day. . . . The judgment of the Court of Appeals for the Federal Circuit is *affirmed*.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG joins, dissenting.

The Court today holds a federal statute unconstitutional without giving heed to the simplest reason for sustaining it. We granted certiorari on the question "whether, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad, the tax . . . violates the Export Clause of the Constitution of the United States. A straightforward answer to the question presented requires us to address the narrow issue of the continuing validity of our holding in *Thames & Mersey Marine Ins. Co. v. United States* (1915), that a general tax on certain insurance premiums, as applied to exporters, is a prohibited tax on export goods.

Rejecting this course, the Court ventures upon a broad constitutional inquiry not even implicated by the statute. To do so, it rewrites the question presented. . . . In so reformulating the question, the Court makes the assumption that [the] insurance tax is a tax on export goods, thereby adopting the premise of *Thames & Mersey* that I had thought we were to address. In the end the Court assumes the statute to be invalid rather than deciding it to be so. . . . Worse yet, the Court's assumption is wrong; because [the] tax is a service distinct from the goods and is not a proxy for taxing the goods, it does not fall within the prohibition of the Export Clause. . . .

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Resolution of the case requires us to determine whether the Export Clause has any bearing on taxes on services like insurance provided to exporters, where the service itself is not exported. The plain



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text of the Clause casts much doubt on the proposition. It states: "No Tax or Duty shall be laid on Articles exported from any State." . . .

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To give Congress the respect it is owed, we must decide whether the statute is in fact unconstitutional as applied, not make the borderline call that the Government's litigation position bars us from reaching a question which, as the Court seems to agree, is presented by the case. In interpreting statutes, for example, we have long observed "the elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." . . .

There may be instances, even in constitutional cases, when we should eschew alternative theories for sustaining a statute. For example, we might do so if the theories depend upon different provisions of law or require factual development and legal analysis far afield from that done by the parties or the courts below. That is not this case. The question whether the Export Clause applies to taxes on distinct export-related services requires most of the same inquiries the majority undertakes: construing the text of the Export Clause, considering its history and purpose, and reviewing our precedents. It also requires explicit reexamination of the reasoning of *Thames and Mersey* (1915), which the Government has asked us to overrule, in particular the idea that a tax on insurance premiums is a tax on the goods. The last is the only step the Court refuses to take.

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. . . . It would appear, from today's decision, that if a company has an open policy from a foreign insurer covering the domestic leg of the journey for all shipments, the IRS must untangle what portion of the insurance covered goods that had commenced the process of exportation, and then prorate the tax. So too would proration (or some other accommodation) appear necessary if the policy is taken out on a single shipment but part of the shipment is delivered within the country and part abroad.

In addition, the Court's decision draws the IRS into the factual morass of determining when exportation has begun. That will often be less clear than it is here. . . .

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In my view, the Framers understood the Export Clause to prohibit what its text says: any federal tax "laid on Articles exported," not taxes on services like insurance that may have indirect effect on the cost of exporting. . . .

. . . . As the Convention records indicate, depriving the Federal Government of the power to tax even export goods was a contentious issue, given the concern that it would cut off a needed source of revenue as well as disable Congress from using export taxes as an instrument of policy. . . . There is no cause for extending the Export Clause beyond the bargain struck at the Convention and embodied in its text.

There is other compelling historical evidence weighing against *Thames & Mersey*'s view of the Export Clause as a prohibition extending even to taxes on services that have the indirect effect of raising exportation costs. In 1797 the Fifth Congress passed "An Act laying Duties on stamped Vellum, Parchment and Paper." Among its provisions was as a stamp duty upon [insurance policies on ships and goods in transit]. . . . The duties survived until the unpopular Federalist tax system, which was felt to bear too heavily upon those least able to pay, was abolished soon after Jefferson took office.

. . . . The 1797 statute should dispel any doubt on the issue. Taxes on insurance do not offend the Export Clause. It is not likely, moreover, that the Act was passed to circumvent the Export Clause. The early Congresses were scrupulous in honoring the Export Clause by making specific exemptions for exports in laws imposing general taxes on goods. . . . Their refusal to grant exporters similar exemptions from insurance taxes indicates that those taxes were not viewed as equivalent to taxes on goods.

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We have discarded, in Import-Export Clause cases, the idea afoot in . . . *Thames & Mersey* that a tax on services necessary to the export process is equivalent to a tax on goods. . . .



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The Court's effort to justify its decision on the grounds of stare decisis is unconvincing. Stare decisis does not protect a constitutional decision where the reasoning is as poor as it is in *Thames & Mersey*. . . .

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The insurance premiums taxed here, like those taxed in *Thames & Mersey*, bear some relation to the value of the goods, but this does not make them a proxy for a tax on the goods. . . . Given the stipulated, undeniable premise that premiums are graded by risk of loss, they are not a predictable proxy for a Congress intent upon taxing export value. Premiums are a rough proxy, however, for the income of foreign insurers, which is why a Congress intent on eliminating the income tax advantages of those insurers would structure [the tax] as it did.

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