Does the Commerce Clause Eclipse the Export Clause: Making Sense of United States v. United States Shoe Corp.

Claire R. Kelly
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Does the Commerce Clause Eclipse the Export Clause?: Making Sense of United States v. United States Shoe Corp.

Claire R. Kelly† and Daniela Amzel‡

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INTRODUCTION

Long ignored, the Export Clause\(^1\) of the United States Constitution and its ban against all taxes or duties imposed upon exports have recently been under attack. The Supreme Court has struggled to define the appropriate degree of respect with which to treat the Export Clause and its command that "[n]o Tax or Duty shall be laid on Articles exported from any State."\(^2\) The Court has had particular difficulty reconciling the Export Clause's absolute ban on the taxation of exports with Congress's broad authority to regulate commerce under the Commerce Clause. A pair of recent Supreme Court cases, United States v. IBM Corp.,\(^3\) and United States v. United States Shoe Corp.,\(^4\) illustrates the Court's vacillating Export Clause analysis.

In IBM, the Supreme Court recognized the simple, broad and independent mandate of the Export Clause, that "[n]o Tax or Duty shall be laid on Articles exported from any State."\(^5\) In IBM, the Court encountered a potential conflict between the normative values underlying the Export Clause and those underlying other constitutional provisions, including the Import-Export and Commerce Clauses.\(^6\) IBM recognized that the Export Clause and other constitutional provisions, such as the Import-Export and Commerce Clauses, served separate purposes.\(^7\) Therefore, in IBM, the Court refused to integrate Im-

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2. Id.
5. U.S. CONST. art. I, § 9, cl. 5.
6. See id. art. I, § 8, cl. 3 (the Commerce Clause) ("The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and within the Indian Tribes."); id. art. I, § 10, cl. 2 (the Import-Export Clause) ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for executing its inspection Laws . . . .").
7. The Import-Export Clause protects federal supremacy in international commerce, preserves federal revenue from imports, and prevents an unfair advantage from accruing to the coastal states. See IBM, 517 U.S. at 859. The Export Clause prohibits congressional regulation of international commerce
Shortly after issuing its decision in *IBM*, the Court, in *U.S. Shoe*, retreated from its earlier analysis in *IBM* and interpreted the Export Clause as subservient to the Commerce Clause. *U.S. Shoe* faced a conflict between the values underlying the Export Clause and those underlying the Commerce Clause. *U.S. Shoe* implicitly integrated the Commerce Clause precedent into its Export Clause jurisprudence by acknowledging the potential for a "user fee" exception to the Export Clause. Thus, rather than taking the opportunity to positively define the Export Clause in light of *IBM*, *U.S. Shoe* allowed for the potential eclipse of the Export Clause by the Commerce Clause, despite *IBM*'s holding. The resulting potential conflict between the Export Clause and the Commerce Clause has re-emerged in a series of cases already proceeding through the lower courts.

This Article proposes that *IBM* was on its way to constructing a simple and straightforward analysis of the Export Clause, which the Court should have continued in *U.S. Shoe*. In its retreat from the path taken in *IBM*, *U.S. Shoe* implicitly raised the conflict between the normative values underlying the Export Clause and those underlying the power to impose user fees under the Commerce Clause. *U.S. Shoe* seemed to indicate that the conflict could be resolved simply by subjecting the Export Clause ban to a user fee (Commerce Clause) exception. We believe that *U.S. Shoe*’s approach was incorrect. Our thesis is that by exposing and dissecting the normative values through export taxes and prohibits raising revenue from exports. *See id.*

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8. *See id.* at 862.
11. *See infra* Part I.B.
12. The exactions challenged in these cases are exactly those that fall between the facts of *IBM* and the facts of *U.S. Shoe*, and that will require a principled and uncompromised approach. Thus, the deviation taken in *U.S. Shoe* from the correct path started in *IBM* does not provide a foundation for a principled decision in these future cases. New challenges, already working their way through the lower courts may have been spurred on by the successful challenges in *IBM* and *U.S. Shoe*. *See, e.g.*, Ranger Fuel Corp. v. United States, 33 F. Supp. 2d 466 (E.D. Va. 1998); Cyprus Amax Coal Co. v. United States, Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T, 97-522 T, 1999 U.S. Claims LEXIS 4, at *1 (Fed. Cl. Jan. 8, 1999).
behind the Export Clause and the Commerce Clause, it becomes apparent that there are only a limited number of instances where a true conflict exists. Further, by explicating the Export Clause in light of its underlying values, as well as the precedent interpreting it and its text, a clear and workable definition of an Export Clause tax can be formulated. Once formulated, this definition of an Export Clause tax should be used to avoid the few instances where a conflict between the Export Clause values and the Commerce Clause values exists.

Thus, this apparent conflict should be resolved by positively defining the textual phrase “tax or duty laid on articles exported.” More specifically, the phrase “tax or duty” should be identified as inseparable from the modifier “laid on articles exported.” Taking this definition into consideration, any Export Clause analysis should determine whether an exaction is “laid on articles exported.” This analysis should be applied to any exaction that falls within the scope of “tax or duty,” whether enacted under an exercise of the Taxing Power, the Commerce Clause, or both. We propose the following as a clear formulation of the constitutional term “tax or duty laid on articles exported”:

any exaction which:
1) arises during the process of exportation; and
2) is calculated based upon the export or the process of exportation.

13. U.S. CONST. art. I, § 8 (the Taxing Power) (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises.”). “A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.” United States v. Butler, 297 U.S. 1, 61 (1936); see infra Part V.B. (discussing the meaning of “tax or duty”).

14. See infra Part V.B. For a tax to be prohibited by the Export Clause, the article which it burdens must begin the process of exportation either legally or temporally. See A.G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69-70 (1923) (holding that a general property tax laid upon baseball bats within the course of exportation violates the constitutional prohibition); Turpin v. Burgess, 117 U.S. 504, 507 (1886) (holding that a general tax laid upon all cigarettes, not levied on the cigarettes in the course of exportation, does not violate the constitutional prohibition); United States v. Gosho Co., 23 F.2d 675, 676 (5th Cir. 1928) (stating that a transportation tax applied to cotton in the process of exportation, though temporarily stopped, violated the Export Clause).

15. See Fairbank v. United States, 181 U.S. 283, 312 (1901) (stating that an exaction upon bills of lading taxed exports directly); Pace v. Burgess, 92 U.S. 372, 375 (1875) (holding that a stamp to be affixed to exported tobacco was not a tax because it bore no proportion whatsoever to the quantity or value of the package to which it was affixed).
We believe this definition promotes the values embodied in the Export Clause. Although a conflict may arise between the values sought to be promoted by each clause, we believe that nothing in the Export Clause or its history indicates that the conflict should result in an Export Clause standard that renders the Export Clause subservient to the Commerce Clause. In fact, we argue that in the few instances where a conflict exists, it can be eradicated by modifying the proposed exaction (within the parameters of the powers under the Commerce Clause). Thus, we submit that our proposed definition can serve as a guide to avoid potential conflicts between the two clauses.

Part I explores IBM's rejection of Import-Export and Commerce Clause precedent to construct a comprehensive definition of the Export Clause, leading to U.S. Shoe's unceremonious adoption of a user fee exception to the Export Clause. The user fee exception adopted in U.S. Shoe undermines the approach started by the Court in IBM and will cause confusion in the future. That is, one could imagine a suit challenging exactions that were nominally, or perhaps even actually, user fees, enacted pursuant to Congress's Commerce Power rather than under the Taxing Power, but that would otherwise offend the Export Clause. In addition, a conflict could arise in cases where an exaction is an exercise of concurrent Taxing and Commerce Powers. Thus, we argue, the approach taken by

16. See, e.g., Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943) (holding that imposing penalties for producing cotton over the quota amount does not violate the taxing power, it regulates commerce pursuant to the commerce power).

17. The Supreme Court recently recognized the danger of a nominal constitutional compliance in IBM, where the question involved whether a challenged tax was "on the goods" so as to implicate the Export Clause. See United States v. IBM Corp., 517 U.S. 843, 879 (1995).

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

Id. (quoting United States v. Hvoslef, 237 U.S. 1, 13 (1914)).

18. See, e.g., In re Chateaugay Corp., 154 B.R. 416, 421-22 (S.D.N.Y. 1993), aff'd, 53 F.3d 478 (2d Cir. 1995) ("[T]here is considerable reason to believe that Congress intended such obligations . . . to be exercises of both powers [commerce and taxing powers] simultaneously."). In Chateaugay, the court recognized that whether the Coal Act was enacted pursuant to the Commerce Clause, to the Taxing Power, or to both, directly affects its application. See id.
the Supreme Court in *U.S. Shoe* may endanger principled decisions in Export Clause challenges to come.

Part II examines the values underlying the Export Clause and the Commerce Clause. We examine the economic and political justifications for maintaining a consistent and independent Export Clause standard. Many of the Framers' concerns regarding the protection of geographical regions and the avoidance of political bargaining exist today or can be easily analogized to modern concerns. Nevertheless, it may be argued that the efficiencies promoted by user fees outweigh Export Clause values. Therefore, we identify the efficiencies of user fees as well as other motivations behind such fees. Part III reviews the Export Clause precedent and compares it with relevant Commerce Clause and Import-Export Clause precedent, examining how respective case law addressed the normative values underlying these clauses. The review of the precedent casts doubt upon *U.S. Shoe*’s Commerce Clause analysis that distinguished a user fee exception, i.e., taxes enacted pursuant to the Commerce Clause that are *not* subject to the Export Clause.

Part IV examines the possible meaning of the Export Clause as evidenced by different interpretative approaches. Textual, normative and historical approaches are considered and are found to support the independence of the Export Clause. Finally, Part V proposes a formulation of an Export Clause standard that supports the values underlying the Export Clause and is consistent with Export Clause text and precedent.

I. THE SUPREME COURT'S VACILLATING EXPORT CLAUSE ANALYSIS

The Supreme Court has vacillated in interpreting the Export Clause. In *IBM*, the Court found that the Export Clause was a broad unqualified prohibition against any and all excutions laid upon exports by the federal government. Two terms later in *U.S. Shoe*, the Court signaled an exception to the Export Clause—user fees. In *IBM*, the Court refused to incorporate non-Export Clause precedent to examine the nature of the burden imposed in an Export Clause analysis. On the other
hand, in *U.S. Shoe*, despite its protests to the contrary, the Court implicitly incorporated non-Export Clause precedent when it looked beyond the text and characterized the nature of the exaction placed upon exports.21

A. THE IBM APPROACH

In *IBM Corp. v. United States*,22 the Court of Federal Claims (C.F.C.) explicitly followed the long line of earlier Export Clause cases. The court refused to examine the nature of the tax and held that the proper inquiry under the Export Clause is only whether the tax is so “closely related to the ‘process of exporting’” that it falls within the constitutional prohibition.23 The court specifically rejected an analysis which would require it to incorporate Import-Export Clause precedent.24

In *IBM*, plaintiff, IBM, was a developer and manufacturer of sophisticated information processing systems. Between the years 1975-1984, IBM sold its products made in the United States and overseas throughout a worldwide sales network. IBM shipped products from the United States to the foreign customer by truck and on common carrier. Typically during transit within the United States, the products would be unloaded at intermediate freight locations, awaiting air transportation and finally, the products would be exported to the foreign country.25 Title and risk of loss passed when the merchandise cleared customs in the foreign country. “The terms of sale also called for the purchasing subsidiary to bear the cost of insuring the products against damage or destruction during shipment.”26

jurisprudence... [because] textual differences exist and should not be overlooked.” *Id.* at 857.

21. *United States v. United States Shoe Corp.*, 523 U.S. 360, 363 (1998). "The [Export] Clause, however, does not rule out a ‘user fee,’ provided that the fee [is]... a charge designed as compensation for government-supplied services, facilities, or benefits.” *Id.* Any understanding of a “user fee” cannot be derived from the Export Clause, as user fees are exactions authorized by the Commerce Power. Thus, the Court incorporates Commerce Clause jurisprudence to delineate a permissible exception to the Export Clause.


23. *Id.* at 503 (quoting Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 25 (1915)).

24. *See id.* at 508.

25. *See id.* at 501.

26. *Id.*
All IBM United States-made products sold to foreign subsidiaries were covered by "point to point" casualty insurance.\(^{27}\) When IBM filed its federal excise tax returns, it "did not report any liability under § 4371 of the Internal Revenue Code,"\(^{28}\) a tax provision that levies "a four percent excise tax on premiums paid for certain policies of insurance issued by foreign insurers."\(^{29}\) An IRS audit concluded that IBM was liable for the § 4371 tax.

As part of the audit, IBM requested that the Internal Revenue Service's District Director seek advice from the National Office on whether § 4371 as applied to IBM's exports, violated the Export Clause. The National Office found that the § 4371 exaction was not a tax within the meaning of the Export Clause because the primary object of the tax was regulatory and not revenue-raising.\(^{30}\) On reconsideration the Service issued a Second Technical Advice Memorandum arguing that "the Export Clause did not restrict application of the § 4371 tax because the incurred risks included some transportation within the United States."\(^{31}\) When the case came before the C.F.C., the government abandoned both positions put forth by the Service.\(^{32}\)

In its challenge in the C.F.C., IBM argued that § 4371 was a tax specifically prohibited by the Export Clause because it was a revenue-raising measure.\(^{33}\) Its predecessor was "a stamp tax enacted as part of a comprehensive wartime revenue bill, the Revenue Act of 1918."\(^{34}\) Further, the legislative history indicated that the tax's purpose was to raise revenue: "It is believed that the revised provision will yield an appreciable amount of revenue, and at the same time eliminate an unwarranted competitive advantage now favoring foreign insurers [who are not subject to income tax]."\(^{35}\) IBM put forth that the Export Clause protects merchandise from all taxes once in the

\(^{27}\) The insurance covers "risk of loss to goods during transportation by surface or air transportation from the IBM facility in the United States until delivered to the foreign customer or a foreign consolidation center." \textit{Id.}

\(^{28}\) \textit{Id.} (citing I.R.C. § 4371).

\(^{29}\) \textit{Id.} at 502.

\(^{30}\) \textit{See id.}

\(^{31}\) \textit{Id.}

\(^{32}\) \textit{See id.} at 504.

\(^{33}\) \textit{See id.} at 503.

\(^{34}\) \textit{Id.} (citing Revenue Act of 1918, ch. 18, § 1107, 40 Stat. 1057, 1135-38, \textit{repealed by} 42 Stat. 321 (1921)).

\(^{35}\) \textit{Id.} at 503-04 (citing H.R. REP. NO. 77-2333, at 61 (1942)).
export stream, and that the export stream starts the minute the goods begin continuous journey out of the country.  

IBM relied on an earlier Export Clause case, *Thames & Mersey Marine Insurance, Co. v. United States*, which held that the Export Clause prohibited taxes on marine insurance policies for exports. The government, in *IBM*, sought to invalidate the part of the holding of *Thames & Mersey* which banned all taxes on the process of exportation. On appeal, the court of appeals examined whether the 1915 decision in *Thames & Mersey* was still good law. The court of appeals affirmed the continuing vitality of *Thames & Mersey* by recounting the Supreme Court's Import-Export Clause decisions and by distinguishing the language and policy implications of the Import-Export and the Commerce Clause with those of the Export Clauses. Nevertheless, the court's analysis added little to the substance of Export Clause understanding other than to distinguish it from that of Import-Export Clause understanding.

At the Supreme Court level, significant analysis came in Justice Thomas's majority opinion in *IBM*. The government again contended that the intervening shift in the approach to Commerce Clause and Import-Export Clause cases required a similar shift in Export Clause analysis. Justice Thomas noted that:

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. . . . 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.

Justice Thomas set aside the question of whether a tax on policies insuring exports was a "tax on exports" by stating that the government had not chosen to challenge that aspect of *Thames*
Justice Thomas was then only faced with the problem of whether the absolute prohibition of *Thames & Mersey* was still good law in light of more recent Import-Export Clause cases. In reviewing the Export Clause precedent, his opinion stated:

> 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.

The Court relied on the rule of stare decisis, refusing to adopt the Import-Export Clause analysis, which focused primarily upon whether a tax was discriminatory, without some indication that the Export Clause addressed the same issues to which the Import-Export Clause was directed.

### B. THE U.S. SHOE APPROACH

Shortly after the decision in *IBM*, the Court faced another Export Clause challenge in *United States v. United States Shoe Corp.* In *U.S. Shoe*, the lower courts and the Supreme Court considered an exaction which fell directly on the exports and could not be disguised as anything other than an exercise of the Taxing Power. The Harbor Maintenance Tax (HMT), as enacted, was assessed on the importation, exportation, domestic movement of cargo and admission of cargo into foreign trade zones. When goods were exported from the United States, the exporter was liable for payment of the HMT. The HMT was calculated upon the legally declared value of the shipment loaded, i.e., on an *ad valorem* basis.

U.S. Shoe Corporation sought to invalidate the HMT, claiming it was a tax levied on exports, and therefore, violated the Export Clause. U.S. Shoe argued that the plain language of the HMT, its legislative history, its substance, purpose and structure demonstrated that the HMT was clearly a tax im-

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42. *See id.* at 854-55.
43. *See id.* at 857.
44. *Id.* at 848.
45. *See infra* Part III.C. (discussing the Import-Export Clause analysis of whether an exaction is an impost or duty).
48. *See 15 C.F.R. § 30.7* (1999). The value declared on the Shipper's Export Declaration or other pertinent documentation represented the free alongside sale price of the merchandise, which is one measurement of the value of the goods.
posed by Congress through its Taxing Power. Therefore, U.S. Shoe argued that the HMT violated the Export Clause's absolute prohibition on the assessment of taxes or duties on articles exported from any state in the United States.49

Given that the HMT was arguably a Taxing Power exaction nominally disguised as a user fee, U.S. Shoe simply argued that the exaction, as an exercise of the Taxing Power, violated the Export Clause without question. This strategy evolved in part out of the government's argument that the HMT was a valid user fee.50 U.S. Shoe had such a strong argument that the HMT was not a valid user fee that there was little incentive to argue that even a valid user fee was subject to the prohibition under the Export Clause.51

Nevertheless, U.S. Shoe did argue that even if the courts did not find that the HMT was enacted under the Taxing Power, the Export Clause was intended by the Framers—and stands to this day—as an absolute bar to any burden placed upon exports, regardless of its enactment under a particular legislative intent of Congress, its possible nondiscriminatory effects or its nominal characterization as a user fee.52 Thus, U.S. Shoe and amici argued that the substance of the exaction, rather than any superficial attempts at its recharacterization under another Constitutional Power, should be the basis for determining whether it was a tax on exports.53 The lower courts’


50. The government rebuked U.S. Shoe's claim that the HMT was an exercise of the Taxing Power and thus subject to the Export Clause. Rather, the government argued that the HMT was a legitimate and appropriate attempt by Congress to enact a "fee for services" pursuant to its authority under the Commerce Clause. See Memorandum of the United States in Support of Its Motion for Summary Judgment at 31-32, United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) (No. 94-11-00668, 95-173). The government assumed, and the Court did not disagree, that if its characterization of the HMT as a Commerce Clause exaction was upheld, no further Export Clause analysis would be required. See id. at 39.

51. At all times, the Act refers to the HMT as a "tax," and it was specifically listed as an "excise tax" within the Internal Revenue Code. See I.R.C. § 4461.


53. See id. In a scheduling order dated February 25, 1995, the Court of International Trade allowed certain plaintiffs having HMT cases pending in the court at that time to participate in this litigation as amicus curiae. Thus, numerous attorneys filed briefs on behalf of various amici arguing, in most cases, the same theories.
decisions however, did not reach the latter argument stated above. Instead, the courts concluded, for a variety of reasons, that the purpose and effect of the Act was clearly that of levying a tax.\footnote{54} Beyond merely identifying the HMT as a tax, however, the Court of International Trade (C.I.T.) analyzed the Commerce Clause argument put forth by the government. The court concluded "there is little indication that Congress intended to establish a user fee."\footnote{55} The C.I.T. examined the legislative history of the HMT, which evidenced that Congress actively sought funding of harbor projects it clearly intended to undertake.\footnote{56} The reality that the HMT was not a user fee seemed to be recognized by Congress when it enacted the HMT, as the Senate stated that the tax in title 8 is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and is to be paid by the owner of the cargo, or his agent.\footnote{57} This statement revealed the tax as one placed upon the exported merchandise itself, not upon harbor use by vessel operators or owners.\footnote{58}
The analysis of these issues performed by the C.I.T. was upheld by the Court of Appeals for the Federal Circuit (C.A.F.C.) in full. And, although the C.A.F.C. affirmed the supremacy of the Commerce Clause in its analysis and invalidated the HMT, it also acknowledged the potential conflict between a Commerce Clause analysis and an Export Clause analysis, stating: "the power to regulate commerce cannot completely override the effect of the Export Clause."

The Supreme Court, in affirming the decisions of the C.I.T. and the C.A.F.C. in *U.S. Shoe*, rhetorically retreated from the lower courts' analyses, which focused on determining whether Congress had enacted an exaction pursuant to the Commerce Clause or the Taxing Power. The Court claimed to reject this approach because it was based on the use of precedent which did not involve the Export Clause. In addition, it seemed to reject the fluid interpretations applied to the Commerce Clause, stating: "the Court reasoned in IBM, '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."


60. *Id.* at 1575 (citing North Am. Co. v. SEC, 327 U.S. 686, 704-05 (1946)) ("This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as section 9 of Article I and the Bill of Rights.").

The power of Congress over commerce... is not restricted, except as the Constitution expressly provides... For example, the provisions of Article I, § 9, forbidding the giving of preferences "by any Regulation of Commerce or Revenue to the Ports of one State over those of another," and commanding that "No Tax or Duty shall be laid on Articles exported from any State."


61. "The government's reliance [on] various 'user fee' cases is misplaced as those 'decisions involved constitutional provisions other than the Export Clause, however, and thus do not govern here.'" United States v. United States Shoe Corp., 523 U.S. 360, 368 (1998).


63. *Id.* at 368 (quoting United States v. IBM Corp., 517 U.S. 843, 851 (1996)).
Nevertheless, despite restraining itself to an Export Clause-only line of precedent, and rejecting a fluid interpretative methodology, the Court was still able to find a user fee exception to the Export Clause. The Court stated: "The Clause, however, does not rule out a user fee, provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits." The Court was able to find a user fee exception despite its rhetorical rejection of Commerce Clause precedent by finding it within Export Clause precedent itself, specifically within *Pace v. Burgess.* In *Pace,* the Court had rejected an Export Clause challenge to a charge for a stamp affixed to packages of tobacco, where the charge for the stamp bore no relationship whatsoever to the quantity or value of the package to which it was affixed. The *U.S. Shoe* Court concluded that "[t]he guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains our time-tested decision in *Pace.*" Thus, the Court appears to have carved out a Commerce Clause user fee exception to the Export Clause, despite claims to the contrary.

It is our contention that the Court's claim of a user fee exception found in direct Export Clause precedent, and not derived from Commerce Clause precedent, is incorrect as it fails to recognize the conceptual genealogy of the user fee concept. Thus, although the Court nominally rejected direct Commerce Clause precedent, it still utilized it by employing the mode of thinking created in the Commerce Clause jurisprudence. Prior to the introduction of the Commerce Clause jurisprudence specifically raised by the government in *U.S. Shoe,* and addressed by the C.I.T. and C.A.F.C., no concept of a user fee exception had been, or would have been, read into *Pace v. Burgess.* In

64. *Id.* at 363.
65. 92 U.S. 372 (1875). However, this is exactly where the Court strayed from its claim of rejecting Commerce Clause precedent and adhering to Export Clause precedent. The Court's reading of a user fee exception into *Pace,* where it had not previously existed, is a reinterpretation of *Pace* based on modes of thinking created subsequent to that case in the Commerce Clause precedent which the Court was claiming to reject.
66. *See id.* at 375-76.
fact, the Court began correctly by rejecting Commerce Clause precedent in *U.S. Shoe*, but then erred in attempting to locate a Commerce Clause concept in Export Clause precedent. Thus, the Court in *U.S. Shoe* contradicted its own explicitly stated intention to exclude Commerce Clause precedent. By doing so, the Court merely kept the debate within the tax/user fee dichotomy created in Commerce Clause precedent.

This Article contends that both Export Clause and Commerce Clause precedent prove that this tax/user fee dichotomy is irrelevant, misleading, and incorrect when applied to Export Clause cases. This erroneous approach assumes a Commerce Clause-based dichotomy between tax and user fee, and then asserts that “user fees” should be exempt from the Export Clause “tax” prohibition. However, this approach begs the question of how to determine the standard for distinguishing a user fee from a tax or duty under the Export Clause, and assumes the utility of making this distinction. We shall address these issues, arguing that continuing with the Commerce Clause mode of thinking is both incorrect and not useful in analyzing Export Clause cases. The creation of a user fee exception contradicts the approach to Export Clause interpretation adopted in *IBM*, and the explicitly stated intent of the Court in *U.S. Shoe* of eschewing Commerce Clause precedent. Also, it contradicts the values and text of the Export Clause, while creating more problems for interpretation in future cases.

II. POLICY ISSUES UNDERLYING THE EXPORT CLAUSE AND THE COMMERCE CLAUSE DEBATE

Although not undertaken by the Court in either *IBM* or *U.S. Shoe*, a review of the policy issues underlying the Export Clause and the Commerce Clause helps to understand how these clauses can—and should—be interpreted with respect to each other. It is only by examining the underlying political aims, and the conflicts between them, that a coherent policy can be derived. The Export Clause, as a broad ban against any tax or duty “laid on Articles exported from any State,” fosters the uniform protection of exports in order to encourage United States industry and exportation and to promote fairness in national policies towards the states. That is, by removing ex-

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69. U.S. Const. art. I, § 9, cl. 5.
ports as possible ammunition in the arsenal of government fund-raising, and therefore removing their potential as a political bargaining tool, U.S. competitiveness on an international plane is protected from domestic political intervention.\textsuperscript{71} Thus, a uniform, clear, and absolute ban on exactions on exports discourages Congressional attempts to find loopholes in the Export Clause, which would needlessly undermine the foregoing goals.

On the other hand, the relevant Commerce Clause policies are those that have, in the development of its jurisprudence, created a fairer or more useful method of government exaction.\textsuperscript{72} These exactions are distinguished from general taxation by the greater fairness and utility in the use of the funds generated.\textsuperscript{73} However, these values are not sufficient to make the tax/user fee dichotomy helpful in the Export Clause analysis. The application of any exaction at all on exported goods, regardless of its greater fairness and utility, still runs afoul of the underlying purpose of the Export Clause. In addition, certain other values promoted by user fees, such as revenue-enhancement, are clearly contrary to the values promoted by the Export Clause.\textsuperscript{74} The Export Clause was explicitly enacted to prevent exports from being a source of revenue, due to their sensitive political nature.\textsuperscript{75} Thus, altering the form of an exaction (from tax to user fee) to promote values of fairness, utility, or revenue enhancement does not negate the nature of the exactions as contrary to the underlying values of the Export Clause.

Finally, although the values promoted by a user fee distinction do not overcome the need to preserve the underlying values embodied by the broad construction of the Export Clause, the values behind user fees can be served by identifying cases where the two values do not conflict. Where there is a conflict, an accommodation can be achieved by properly constructing user fees to avoid offense of the Export Clause. Specifically, by observing the limit of application of the Export Clause.

\textsuperscript{1987).}

\textsuperscript{71} See Fairbank v. United States, 181 U.S. 283, 292 (1901).
\textsuperscript{72} See infra notes 92-117 and accompanying text (describing the allocation of cost for goods and services provided by the government).
\textsuperscript{73} See Wolfe, supra note 68, at 786-87.
\textsuperscript{74} "[T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden." Fairbank, 181 U.S. at 292.
\textsuperscript{75} See id.
Clause only to exactions "laid on Articles exported," appropriate fiscal relief promoting the values of utility and fairness can still be achieved outside the reach of the Export Clause.

A. THE VALUES SUPPORTED BY THE EXPORT CLAUSE

The Export Clause’s complete ban on all exactions laid on exports serves several important goals. It encourages industry and competition by removing government interference in market forces by way of taxation.\footnote{See id. at 292-93.} It protects exports as a vital component of international trade.\footnote{See id. at 291.} It reduces the export industry’s vulnerability to political bargaining.\footnote{See id. at 292.}

The qualified scope of the Export Clause set forth by the Court in \textit{U.S. Shoe} endangers the uniform protection of exports envisioned by the Framers. James Madison reported that the Constitution's Framers insisted on a complete ban against taxes on exports in part due to concerns that such taxes would discourage industry and would prevent taxation uniformity as a result of differing produce among the States.\footnote{See \textit{MADISON, supra} note 70, at 498. Additionally, the Export Clause was intended to give the Southern States assurance that the Northern States, through their power in the federal government, would not impose a burden of taxation on the Southern States.} In fact, the Framers were acutely aware of the possible long-term implications of the Export Clause, yet still chose to adopt it in its broadest form. At the Convention of 1787, a series of proposals to limit the breadth and severity of the Export Clause were specifically rejected.\footnote{See id. at 499-503.} One of these proposals—to restrict the Export Clause's application only to taxes whose purpose was raising revenue—was rejected, suggesting that interpretation of the Export Clause should not produce this effect.\footnote{See id. at 501.} Most interestingly, another proposal directly addressed the issue presented over 200 years later in \textit{U.S. Shoe}. The proposal, which was considered and rejected, suggested that Congress limit the Export Clause's scope in case regulation of exports was deemed necessary by Congress.\footnote{See id. at 499-500. Other proposals considered and rejected included requests for exemption of enumerated articles from export taxes and provisions for imposition of an export tax subject to a super-majority vote of Congress. See \textit{id.} at 499-503. “The power of taxing exports may be inconvenient
More importantly, at a time when globalization encourages states to compete more efficiently, the possible subservience of the Export Clause shield to a Commerce Clause user fee may distort the United States' comparative advantage in any particular industry. User fees placed upon exports add a cost to exports while creating a cross subsidy for some other good or service. The ability of United States exports to compete efficiently in world markets directly affects the domestic economy.

Moreover, the Court's failure to recognize the clear independence of the Export Clause from the Commerce Clause threatens the safety of exports from political bargaining at the federal level. The Export Clause was enacted due to the very specific and real concern the Framers from the Southern States had that the Northern States might unduly burden the South's economy relied on exports. Although the precise geographic rivalries may not exist today, new ones do. Like-

at present; but it must be of dangerous consequence to prohibit it with respect to all articles and for ever." Id. at 499.

83. See Jeffrey L. Dunoff, Rethinking International Trade, 19 U. PA. J. INT'L ECON. L. 347, 349-58 (1998) (outlining the efficiency model of trade and critiquing its application to linkage issues). "The theory of comparative advantage teaches that, in the absence of trade restrictions, each nation will specialize in the production and export of goods and services that it can produce relatively more efficiently than other nations." Id. at 350. See generally DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1865) (detailing the theory of comparative advantage).

84. See Gillette & Hopkins, supra note 10, at 815. A cross subsidy occurs when a user fee "falls short of the cost of the service they receive, [shifting] a burden... onto other segments of society." Id. It follows that a fair user fee, i.e., one that accurately reflects the cost of an individual's use of a service, permits a service to be provided free of subsidy. See id.; infra Part II.B.


86. See MADISON, supra note 70, at 498.

87. See id.

wise, industry rivalries exist as well. Although the characterization of a fee, as known today, might not have existed at the Constitutional Convention, a modification of the general prohibition which would have allowed for fees was raised and rejected at that time.\textsuperscript{89} The potential for political bargaining with federal exactions based upon geographic or industry preferences exists today as it did when the Constitution was written.\textsuperscript{90}

Finally, the Court's vacillating approach to Export Clause interpretation leaves the lower courts, as well as Congress, unguided and perhaps even misguided regarding the scope of the Export Clause protection. Certainty in judicial decisions can almost always be cited as a reason to support one interpretation or another. However, in this case it is clear that the Export Clause prohibits all taxes or duties laid upon exports, whether or not those exactions are nominally called a tax or a fee. Focusing a definition upon whether the exaction offends the Export Clause vis-à-vis its relationship to the exported articles, rather than by means of identifying the nature of the exaction, will avoid the likely attempt of Congress to circumvent the scope of the Export Clause by constructing nominal fees or other exactions. A true charge for service can always be based upon the service as an alternative to basing the charge on the export.\textsuperscript{91}

Thus, the goals of the Export Clause are simply to protect exports and to keep political or geographical jockeying out of international trade. Carving out a user fee exception to the Export Clause undermines these goals and, as will be discussed

\begin{itemize}
\item \textsuperscript{89} See MADISON, supra note 70, at 499-500. Madison's suggestion that "[a] proper regulation of exports may & probably will be necessary hereafter, and for the same purposes as the regulation of imports; viz, for revenue—domestic manufactures—and procuring equitable regulations from other nations" was ultimately disregarded in favor of a complete prohibition of taxes on exports. \textit{Id.}
\item \textsuperscript{90} During oral arguments, the \textit{U.S. Shoe} Court discussed Congress's failure to enact a tonnage rather than a value-based tax, implying that the decision was at least in part influenced by Senator Hatfield, whom Justice Scalia remarked hailed from the great timber state of Oregon. \textit{See} Transcript of Oral Argument, United States v. United States Shoe Corp., 523 U.S. 360 (1998) (No. 97-372), available in 1998 WL 102578, at *8-9 (Mar. 4, 1998).
\item \textsuperscript{91} \textit{Id.} at *8-10.
\end{itemize}
below, is not necessary to preserve the goals fostered by the Commerce Clause.

B. THE VALUES SUPPORTED BY THE COMMERCE CLAUSE AND THE BASIS FOR USER FEES

The creation of a user fee as distinct from a tax in Commerce Clause jurisprudence is based on promoting policies such as utility, fairness, and revenue enhancement.92 User fees as payments based on direct measurable consumption of service can be used to further economic utility.93 They are benefit-based charges that, generally speaking, foster the efficient allocation of goods and services controlled by the government.94 Typically the government undertakes to provide a service because the market has failed or will fail to do so for a variety of reasons.95 As Professors Gillette and Hopkins point out, "these market failures may be attributable to the existence of public goods, substantial externalities, information or immobility problems, or natural monopolies."96 Alternatively, user fees may be imposed not to rectify a market failure, but rather to promote a separate governmental objective. Alternative governmental objectives include "fairness, revenue enhancement, and privatization."97

Professors Gillette and Hopkins indicate that user fees are appropriate when, because of these market failures, a government charge based upon use will "foster a more efficient allocation of goods and services."98 A market failure may occur because the good or service is a "public good," i.e., street lighting or national defense.99 A public good is nonrival (use by one party does not encroach upon use by another) and nonexcludable (use cannot be prohibited).100 Where a good is a public

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92. See generally Gillette & Hopkins, supra note 10, at 799.
93. See generally id. at 795; Wolfe, supra note 68, at 786.
94. For our understanding of the goals behind user fees we rely on the writings of Gillette and Hopkins. See generally Gillette & Hopkins, supra note 10, at 795.
95. See id. at 800-01.
96. Id. at 800.
97. Id. at 813.
98. Id. at 800.
99. See id. at 801-02.
100. See id. at 801; see also Terrence J. Schroepfer, Fee-Based Incentives and the Efficient Use of Spectrum, 44 FED. COMM. L.J. 411, 414 (1992) (explaining the user fee theory in order to evaluate the efficiency of user fees proposed by the Federal Communications Commission).
good the market will be hesitant to provide the service because it will be difficult, if not impossible, to profit. Further, user fees may provide for the efficient allocation of information (which itself is a public good).

The market also fails where there are externalities. Simply put, externalities are costs or benefits which accrue to third parties not involved in the transaction. The government may impose a user fee to subsidize a good or service which has positive externalities or to penalize a good or service which has negative externalities. Accounting for externalities is most efficient as it reveals the true cost of any good or service. Likewise, user fees may be used to control monopolies (which have a variety of externalities).

As Professors Gillette and Hopkins explain, user fees may also serve goals other than the efficient allocation of resources, namely: fairness, revenue enhancement or rationalization. "[The fairness issue... involves the evaluation of] whether, for any given program, a user fee is a suitable means to lessen burdens that otherwise would be borne by taxpayers who derive little or no benefit from the service." Similarly, revenue enhancement seeks to decrease the burden on the general revenue for services provided by the government. User fees may also serve to invite competition for government services to determine whether a market failure truly does exists. A user fee for a government service erodes the protection of that service and encourages the market to supply the service. If the market can supply the service, government supply will no longer be needed because the market will be the most efficient supplier of the resources (assuming no significant externalities).

Nevertheless, a user fee is not always appropriate when the government provides a service. For example, sometimes the cost of the good does not increase with increased usage, i.e.,

101. See Gillette & Hopkins, supra note 10, at 802.
102. See id. at 804.
103. See id. at 803.
104. See id. at 803-04.
105. See id. at 803.
106. See id. at 804.
107. See id. at 799.
108. Id. at 814.
109. See id. at 818.
110. See id. at 821.
there is no marginal cost. Where the service is a public good it is a nonrival good, and thus, its marginal cost is zero making any approximation of use charge difficult, if not impossible. However, a user fee may be appropriate where a good is nonrival and excludable or rival and nonexcludable. In either case, the good is neither a purely public good (which is best provided for by the general revenue) nor a purely private good (which is best provided for by the market place). Thus, as one commentator has noted user fees are most appropriate when the good is neither a public good nor a private commodity but rather a "public commodity."

The efficiency of a user fee on a public commodity will depend on whether any externalities are involved. If there are no externalities, it would appear that a user fee is most efficient and appropriate because the government should recover the actual cost of providing the service. However, it would seem that in such a case the government is acting as a market would. Therefore, if the fee would offend a separate constitutional prohibition, then perhaps the market should assume the provision of the service so as to avoid the constitutional conflict.

Where, however, there are externalities to account for, a user fee may be very appropriate. A user fee may encourage the efficient utilization of resources (resources whose use will presumably benefit society at large) that will go under used if simply left to the market place. Likewise a user fee may eliminate the cross subsidy to a private activity which generates costs to third parties. To the extent that a user fee accomplishes either of these goals, it seems to be effective when it encourages or discourages behaviors by increasing or decreasing the cost of engaging in a behavior (using a service). These

111. See id. at 801-03. The theory behind user fees reveals that the services or goods in general may be either excludable or nonexcludable, namely, either its use can be controlled or it cannot. See Schroepfer, supra note 100, at 414. Moreover, the services are either rival or nonrival, meaning the use by one precludes the use of another or it does not. See id. User fees are appropriate for either excludable nonrival services or rival nonexcludable services. See id. Rival excludable services are called private commodities and nonrival nonexcludable services are called public goods. See id.

112. See Schroepfer, supra note 100, at 414.

113. See id.

114. See id. at 413.

115. See Wolfe, supra note 68, at 733-34.

116. See Gillette & Hopkins, supra note 10, at 803-05.

117. See id. at 814-15.
types of "externality accounting" user fees present the most troubling potential conflict with the Export Clause because they serve a cost-efficient purpose which cannot be achieved without government intervention.

Finally, it would appear that user fees imposed for reasons other than market failures (i.e., to further legitimate, but discretionary government goals, such as revenue enhancement) should cede in all instances to a constitutional prohibition. If a user fee is imposed based upon fairness or redistribution reasons, it would appear that the very imposition of the fee, or at least its calculation, is discretionary from an economic efficiency standpoint. Rules of efficiency, which are objective and predictable, do not mandate the fee. Instead, the fee is imposed and calculated in part by subjective criteria. Thus, it should be subject to an outright constitutional prohibition.

Similarly, fees imposed for purposes of revenue enhancement are most discretionary. Given the tax nature of revenue enhancement user fees, it would seem that such fees should at least be subject to the same restrictions as pure taxing measures. Lastly, where a fee is imposed to encourage rationalization and privatization, its purpose is to test the existence of a market failure. Congress should choose an alternative testing mechanism, rather than offend an absolute constitutional prohibition. Moreover, if the same cost can be imposed by a private entity without any efficiency loss, it would seem simplest to avoid the constitutional conflict by removing the government as instigator.

118. See id.
119. As Professors Gillette and Hopkins point out, fairness concerns may trump efficiency arguments for or against user fees. See id. at 815. Nevertheless, because such concerns are in our view necessarily subjective, they should not trump a constitutional prohibition.
120. The Export Clause is:
   a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed.
121. See Gillette & Hopkins, supra note 10, at 819.
122. See id. at 821-22.
Thus, as Gillette and Hopkins demonstrate, user fees are most appropriate, and distinguishable from a tax, when the user fees are imposed to provide for the efficient allocation of resources which have failed to be provided by the market. \(^{123}\) As stated above, to the extent that a user fee on exports involves a public service with little or no marginal cost, it seems that a user fee would be inappropriate in that such an exaction cannot be based on an approximation of use. \(^{124}\) Therefore, it must fall into the category of a "tax" which does not necessarily correlate to use and is, without argument, prohibited by the Export Clause. Likewise, user fees imposed for reasons not having to do with market failures are, at least in part, discretionary, and should not trump a seemingly absolute constitutional prohibition.

The resulting question, therefore, is whether, where a user fee accounts for an externality encouraging the most efficient allocation of resources, that efficiency should be forfeited in order to comply with the prohibition of the Export Clause. We believe that the purposes behind the Commerce Clause and the Export Clause may be preserved by explicating the meaning of the Export Clause so as to identify offending exactions and construct user fees in those instances to avoid offense. \(^{125}\) In other words, a clear and broad construction of the Export Clause will identify its application to all exactions "laid on articles exported," but will also acknowledge its limitation to those exactions. Therefore, exactions laid on the use of ports, for example, would promote the underlying values of both the Commerce Clause and the Export Clause, without running afoul of either.

### III. JUDICIAL INTERPRETATIONS OF THE EXPORT CLAUSE AND RELATED CLAUSES

The clear Export Clause standard we propose avoids the limited conflict between the policy issues underlying the Export Clause and the Commerce Clause. Past judicial interpretations of the Export Clause, the Import-Export Clause, and the Commerce Clause have already extensively considered these policy considerations. An integrated review of this combined body of case law supports an interpretation of the Export Clause that

\(^{123}\) See id. at 802.
\(^{124}\) See id. at 802-03.
\(^{125}\) See infra Part V.
EXPORT CLAUSE

protects exports from any national burden laid upon them during the course of exportation, whether or not that burden supports a legitimate exercise of a regulation by Congress. An exaction is “laid on articles exported” if it (i) accrues during the process of exportation; and (ii) bears a relationship to the property to be exported. Thus, exactions made in connection with exportation that bear no relationship to property to be exported, or that fail to accrue during the process of exportation do not fall into the constitutional prohibition, whether characterized as a tax or a fee. Alternatively, as the text itself suggests, an exaction pursuant to the Commerce Clause should violate the Export Clause if it is laid on exported articles. However, a Commerce Clause exaction that is not laid upon the articles exported or that does not arise during the course of exportation is permitted.

In contrast to interpretations of the Export Clause, judicial interpretations of the Commerce Clause examine whether an exaction is a permissible Commerce Clause exaction by questioning whether the exaction was incidental to a permissible regulation. The “incidental to” examination arose to identify exercises of the Commerce Power as distinct from exercises of the Taxing Power. Under the Taxing Power, Congress has the authority to lay and collect taxes for the general support of the government, i.e., to raise revenue. However, exactions under the Taxing Power are subject to certain specific limitations. Commerce Power regulations may “incidentally” raise revenue,

126. See infra Part V.B. In our view an exaction bears a relationship to the goods if it is calculated pursuant to the goods themselves or the process of exportation.
130. The Taxing Power Clause grants “a very extensive power... with only one exception and two qualifications.” Fairbank v. United States, 181 U.S. 283, 295-96 (1901) (citing The License Tax Cases, 72 U.S. (5 Wall) 462, 471 (1866)). Those qualifications, the Apportionment Clause and the Uniformity Clause, apply to the exercise of the Taxing Power only. See id. at 296. The Uniformity Clause provides: “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 9, cl. 4. The Apportionment Clause provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” Id. art. I, § 9, cl. 4. The exception is the absolute ban provided in the Export Clause.
and such exactions are not subject to the certain specific limitations on the Taxing Power.\textsuperscript{131} In some instances, determining whether an exaction raises revenue under the Taxing Power, or incidentally raises revenue via the Commerce Power may affect whether the exaction is permissible.\textsuperscript{132} Thus, the Commerce Power inquiries contemplate the purpose of an act as well as its result to determine whether Congress acted outside of its power.

Finally, the analysis performed by courts under the Import-Export Clause, after initially focusing on the nature of the article taxed (whether it was an import or export) shifted to examining whether the exaction was an "Impost" or "Duty."\textsuperscript{133} The foundation for this inquiry can be traced to the specific language chosen by the Framers, which appears to envision an absolute ban on very precise types of exactions.\textsuperscript{134} To uncover the type of exaction the Framers envisioned, the courts have understandably gone beyond the text to adopt an interpretive approach that examines the Framers' expectations. The limited specificity of the language used in the Import-Export Clause warrants adoption of nontextual interpretive aids.\textsuperscript{135} The Import-Export Clause language also reinforces the textual approach for Export Clause interpretation. As discussed in \textit{IBM}, the Import-Export Clause required consideration of contextual factors because the language of the clause limited the application of the clause to certain exactions.\textsuperscript{136} In other words, the language of the Import-Export Clause itself calls for a lim-

\textsuperscript{131} See, e.g., Massachusetts, 435 U.S. at 444 (addressing the intergovernmental tax immunity doctrine); National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974) (stating that taxes must be imposed by Congress); Nicol v. Ames, 173 U.S. 509 (1899) (holding that direct taxes are subject to the rule of proportionality and indirect taxes are subject to the rule of uniformity); Head Money Cases, 112 U.S. 580, 582-83 (1884) (discussing proportionality); Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943) (discussing proportionality). Reference should also be made to the Origination Clause of the Constitution, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, \S 7, cl. 1.

\textsuperscript{132} See infra notes 180-203 and accompanying text.

\textsuperscript{133} See United States v. IBM Corp., 517 U.S. 843, 852 (1996).

\textsuperscript{134} See id. at 857.

\textsuperscript{135} See id. at 857-58 ("We said that the term 'Impost or Duty' is not self-defining and does not necessarily encompass all taxes and that the respondents' argument to the contrary ignored the central holding of Michelin that the absolute ban is only of 'Imposts or Duties' and not of all taxes."). (quoting Department of Revenue v. Association of Washington Stevedoring, 435 U.S. 734, 759 (1978)).

\textsuperscript{136} See id.
ited ban, and thus, nontextual interpretive aids are needed to define the scope of the ban. The Export Clause, by comparison, revolves around comprehensive and absolute language, i.e., a complete ban on all exactions.\textsuperscript{137} Thus, the language of the Clause itself supports a clear definition of its scope.

\section*{A. EARLY EXPORT CLAUSE CASES}

The Supreme Court has consistently interpreted the Export Clause to prohibit Congress from imposing \textit{any} exaction (whether a direct tax or otherwise) upon exports regardless of whether or not it (i) raises revenue for the general revenue or for a specific purpose,\textsuperscript{138} (ii) is nondiscriminatory, or (iii) is nominally characterized as something other than a tax.\textsuperscript{139} The series of Export Clause cases provide fairly clear language and reasoning for the enunciation of these principles.

Since the earliest Export Clause cases commencing over one hundred twenty years ago, the Court has focused on prohibiting burdens "laid on articles exported." At the time of those decisions, the Commerce Clause was not interpreted as expansively as it would be in subsequent cases.\textsuperscript{140} The early Export Clause cases examined the requirements of the Export Clause prohibition itself. These cases elicited a clear test for

\begin{itemize}
\item \textsuperscript{137} The Court in \textit{IBM} stated that it was: 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. \textit{Id.} at 859 (citations omitted).
\item \textsuperscript{138} The Court in \textit{Fairbank v. United States} noted that the Framers specifically rejected an attempt to modify the prohibition to exclude taxes "for the purpose of raising revenue." 181 U.S. 283, 292 (1901). This suggests that a tax does not ever need to raise revenue to offend the Export Clause.
\item \textsuperscript{140} See generally infra notes 173-78 and accompanying text (providing broad background information about the Commerce Clause and how courts have interpreted it).
\end{itemize}
export taxes based upon the text of the clause,\textsuperscript{141} which can easily continue to apply even in the post-Commerce Clause expansion era.

First, in \textit{Fairbank v. United States}, the Supreme Court held that a flat stamp tax on a bill of lading for exported goods effected a tax on the goods themselves, and therefore, a tax on exports.\textsuperscript{142} In that case, the Court made clear that the Export Clause was an absolute bar to \textit{any} national burden being placed upon exports, stating:

\begin{quote}
whether such a provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress \ldots \textsuperscript{143}
\end{quote}

Thus, the Export Clause is a constitutional imperative that requires neither an analysis of the goal of the Congress in imposing such a burden, nor of the discriminatory effect of the burden nor of the nominal characterization of the burden.

The \textit{Fairbank} Court stated that this broad construction of the ban contained in the Export Clause was based on the Framers' intent to prevent restrictive trade practices which would burden exports.\textsuperscript{144} The Export Clause is unqualified and, therefore, the goal of Congress in imposing a burden is irrelevant since congressional intent:

\begin{quote}
although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word “duty” the words “for the purpose of revenue”\textsuperscript{145}
\end{quote}

\begin{footnotes}
141. See, e.g., \textit{A.G. Spalding}, 262 U.S. at 69-70; \textit{Thames & Mersey}, 237 U.S. at 25; \textit{Hvoslef}, 237 U.S. at 15; \textit{Fairbank}, 181 U.S. at 292-93. The cases did, however, establish a basic framework for defining what qualifies as in the process of exportation and a tax or duty laid on articles exports. \textit{See infra} Part V.B.

142. 181 U.S. at 293.

143. \textit{Id.} at 290. This statement by the Court indicates that, at least in the Court's view, the Export Clause should be examined from a textual perspective. In fact, the Court stated that “[t]here are in that instrument grants of power, prohibitions and a general reservation of ungranted powers. \ldots \textit{[T]he words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named.” \textit{Id.} at 287. The Court went on to state that:

if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the power granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety.

\textit{Id.} at 289.

144. \textit{See id.} at 292.
\end{footnotes}
but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.\textsuperscript{145}

Thus, \textit{Fairbank} understood the Export Clause as prohibiting all exactions placed on exports.

Second, the Court foreshadowed future Commerce Clause arguments when noting that the prohibition of the Export Clause with respect to the tax could not be overcome by making it even-handed or nondiscriminatory.

If mere discrimination between the States was all that was contemplated it would seem to follow that an \textit{ad valorem} tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export.\textsuperscript{146}

Finally, and perhaps most importantly, \textit{Fairbank} focused on the ultimate question—what does the Export Clause prohibit? The Court concluded that a tax on the goods, could not be enacted. The Court correctly examined the power to tax and Congress's ability to carry out any legitimate grant of power with such means as it sees necessary.\textsuperscript{147} Nevertheless, the Court pointed out that the absence of power renders methodology irrelevant.

The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. By a graduated system, although the tax is called a tax on “the vellum, parchment or paper” upon which transactions are written, or by which they are evidenced, a burden may be cast upon exports sufficient to check or retard them

\textsuperscript{145} \textit{Id.} at 292-93 (emphasis added).

\textsuperscript{146} \textit{Id.} at 292. The viability of challenges under the Export Clause should not be underestimated based upon the less vigorous judicial application of the prohibition contained in the Import-Export Clause. In fact, the courts have restricted the scope of protection afforded by the Import-Export Clause to prohibit only discriminatory taxes levied by states upon exports when the goods are not in transit. This analysis, however, which focuses on a determination as to the nature of the tax, was expressly rejected by the courts for challenges under the Export Clause. \textit{See supra} Part I.A. (discussing the Supreme Court's \textit{IBM} decision). Further, the limited protection afforded by the Import-Export Clause may not be all that limited when the exaction is made upon goods which are still in the course of importation or exportation. As discussed below, the narrowing of the limitation occurred when a property tax was levied on all goods and the question arose whether goods which had once been imports (and were still in the custody of the importer) could be exempted from the tax. \textit{See infra} Part III.C.

\textsuperscript{147} \textit{See Fairbank}, 181 U.S. at 289-92.
and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon.\textsuperscript{148}

Thus, Fairbank found that any exaction "laid on articles exported" violates the Export Clause regardless of how it is nominally characterized or described.

The Supreme Court in \textit{U.S. Shoe}, by recognizing a user fee exception to the Export Clause, indicated that the purpose of the exaction (e.g., the proceeds being designated for a certain fund) could affect the nature of the exaction (i.e., whether an exaction was an export tax). This type of characterization was first addressed in \textit{Fairbank} where the Court, in response to an argument which said that a tax on a bill of lading was not a tax on the goods, rejected such labels.

\[\text{No legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. . . . It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.}\textsuperscript{149}

Likewise, an artificial camouflage constructed by virtue of designating the funds for a particular purpose would still restrict the free exportation of the goods.

In \textit{United States v. Hvoslef},\textsuperscript{150} the Supreme Court reinforced the prohibition against exactions that fell upon exports (or exportation) when it examined whether a stamp tax on charter parties violated the Export Clause. The Court held that the Export Clause was:

\[\text{designed to give immunity from taxation to property that is in the actual course of such exportation. . . . It was the clear intent of the Framers of the Constitution that "the process of exporting the products of a State, the goods, chattels, and property of the people of the several States, should not be obstructed or hindered by any burden of taxation."}\textsuperscript{151}

Once again the Court looked solely to whether the tax fell upon exports and did not examine its relationship to an exporter's use of a government service. \textit{Hvoslef} makes clear that the tax could cover:

\[\text{a small lot, or a partial cargo, or an entire cargo, whether the goods occupy a part of the cargo space or the whole cargo space, can make no constitutional difference. The charters were for the exportation; they related to it exclusively; they serve no other purpose. A tax on}\]

\textsuperscript{148} \textit{Id.} at 291 (emphasis added).

\textsuperscript{149} \textit{Id.} at 290-91.

\textsuperscript{150} 237 U.S. 1 (1915).

\textsuperscript{151} \textit{Id.} at 13 (citations omitted).
these charter parties was in substance a tax on the exportation, and a
tax on the exportation is a tax on the exports.\(^\text{152}\)

Thus, *Hvoslef* rejected an attempt to justify a tax as an appro-
priate approximation of use.

Likewise, in *Thames & Mersey Marine Insurance Co. v. United States*,\(^\text{153}\) the plaintiff brought an action to recover the
amount paid as stamp taxes upon policies insuring certain ex-
ports against marine risks. The Supreme Court inquired
whether the tax was "so directly and closely related to the 'pro-
cess of exporting' that the tax is in substance a tax upon the
exportation and hence within the constitutional prohibi-
tion[.]\(^\text{154}\) The Court held that the insurance upon goods was
such a necessity of exportation that a tax upon such policies
was, in effect, a tax upon the goods themselves and, as such, a
violation of the Export Clause.\(^\text{155}\)

Following *Thames & Mersey*, the Supreme Court in *A.G.
Spalding & Bros. v. Edwards*,\(^\text{156}\) held that an *ad valorem* sales
tax imposed upon bats and balls violated the Export Clause be-
cause the sale triggering the tax occurred when the goods were
delivered to the carrier for export, and thus the process of ex-
portation and the protection of the Export Clause had begun.\(^\text{157}\)
The tax could not be saved by its accord with a general law that
applied to all sales of the merchandise. The Court reaffirmed
*Thames & Mersey* and noted that "one would doubt that . . .
[the goods] were exempt after they had been loaded upon the
vessel."\(^\text{158}\)

\(^{152}\) *Id.* at 17.

\(^{153}\) 237 U.S. 19 (1915).

\(^{154}\) *Id.* at 25.

\(^{155}\) The Court noted that a tax on the marine policies was a tax upon ex-
portation and distinguished it from a tax upon the goods themselves not im-
posed during the process of exportation. *See id.* at 27. "It is manifest that we
are not called upon to deal with transactions which merely anticipate exporta-
tion, or with goods that are not in the course of being actually exported." *Id.*
at 25 (citations omitted). However, the Court did not elaborate on how the tax
was otherwise tied to the goods. The failure to establish a method by which an
exaction not nominally placed upon articles exported could be tied to the goods
was again repeated in *IBM*. *In IBM*, the Court simply adopted the holding in
*Thames & Mersey*. This failure was criticized by the dissent in *IBM*. *See su-
pra* Part I.A.; *infra* Part V.B.

\(^{156}\) 262 U.S. 66 (1923).

\(^{157}\) Again, when the exaction fell "on articles exported," as in this case, by
virtue of being triggered by the process of exportation, the nature of the tax
(its method of calculation or purpose or even-handedness) was irrelevant. *See
id.* at 69.

\(^{158}\) *Id.*
Finally, in *Pace v. Burgess*, the Court considered whether the Export Clause was violated by a law requiring exporters to purchase a stamp from the government and affix it to packages of tobacco which were to be exported. Because there was a general tobacco tax to which exported tobacco was not subject, the Commission of Internal Revenue needed a means by which to identify the exempt tobacco. Exporters were charged 25 cents per stamp used to segregate packages. The Court held that the stamp was clearly not a "tax on the export" because the charge for the stamp bore no relationship whatsoever to the quantity or value of the package to which it was affixed. Thus, the Court formulated part of an Export Clause definition by finding that at the very least an Export Clause tax had to bear a relationship to the exported articles.

In finding that the tax in question was not an Export Clause tax or duty, the Court in *Pace* likened the charge for the stamps to a "fee for clearing the vessel... or for making out and certifying the manifest of the cargo." In short, the Court saw the charge for the stamps as representing a charge for the "employment of [an] instrumentality" provided by the government.

*Pace* did not, however, carve out a user fee exception in making the foregoing analogy. If the tax in question bore a relationship to the articles exported (and was imposed during the process of exportation) it would have fallen within the consti-

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159. 92 U.S. 372 (1875).
160. See id. at 374.
161. Id. at 375.
162. See id.
163. Id.
164. Id. at 376.
165. In *Turpin v. Burgess*, a manufacturer sued to recover the money it had paid for export exemption stamps. 117 U.S. 504, 504 (1886). Without disturbing the prior ruling in *Pace*, the Court held that the stamp charge was not a tax on exports. See id. at 507. The Court explained that the prohibition of the Export Clause "has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported." Id. The Court continued, "[i]n the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer." Id. (emphasis added).

In *Cornell v. Coyne*, the Court addressed whether the Export Clause prohibited the application of a federal excise tax on filled cheese manufactured under contract for export. 192 U.S. 418, 419-20 (1904). Relying on *Turpin*, the Court rejected the contention that the Export Clause bars application of a
tutional prohibition, even if it also compensated the government for services rendered to the exporter. *Pace* merely found that the exaction in question bore no quantitative or valutative relationship to the goods because the exaction was calculated without reference to the goods.\(^{166}\)

Some may argue that the Court in *Pace* sustained the tax on the grounds that the exaction was made in order to fund a legitimate exercise of the Commerce Power. Given the opinion in *Pace*, we do not suggest that such a reading is clearly erroneous or absurd. However, we suggest that the Court in *Pace* found that the tax fell outside of the Export Clause's prohibition not because it was not a "revenue raising exaction" under the Taxing Power or fell into some mythical user fee exception under the Export Clause, but because the exaction was not laid upon articles exported and bore no relationship to those articles.\(^{167}\) The fact that it also funded a legitimate service provided by the government does not affect its nature. Thus, *Pace* should not be read as a case in which the Court recognized a user fee exception to the Export Clause. Rather the tax in *Pace* simply did not implicate the prohibition of the Export Clause. *Fairbank, Hvoslef, Thames & Mersey* and *A.G. Spalding* all followed *Pace* and support the foregoing analysis of *Pace*. The Supreme Court in *U.S. Shoe* toyed with an analysis that recognized that an exaction such as the one in *Pace* is simply not a tax on exports.\(^{168}\) However, in failing to state what a tax on exports is, the *U.S. Shoe* Court implied the user fee exception:

> In sum, if we are to "guard against . . . the imposition of a [tax] under the pretext of fixing a fee" and resist erosion of the Court's decision in *IBM*, we must hold that the HMT violates the Export Clause as applied to exports. This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor develop-

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nondiscriminatory tax imposed before the product entered the course of exportation. *See id.* at 427-28. "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." *Id.* at 427. *Cornell* made clear that nondiscriminatory pre-exportation assessments do not violate the Export Clause, even if the goods are eventually exported.

166. 92 U.S. at 375.
167. *See infra* Part V.B.
Thus, the U.S. Shoe Court implied that the Export Clause permits a user fee on exports so long as the fee approximates use. This implication is simply not supported by the language of the Export Clause, by Pace, or by the other Export Clause precedent.

Furthermore, the Court's own language in U.S. Shoe belies the implication that it makes. The Court stated that "[t]his does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities." The Court is correct in stating that "exporters" may not be exempt from user fees, but it fails to specify that "exports" are indeed exempt from user fees that offend the Export Clause. It is exactly this distinction that is glossed over by the Court's ruling and analysis. As discussed throughout this Article, if properly formulated, a user fee may indeed be charged on harbor use without running afoul of the Export Clause. However, until the Export Clause standard is properly formulated and clarified, confusion and litigation will abound. Thus, efforts should be made to properly formulate user fees which would not run afoul of the Export Clause, rather than attempting to make exceptions for user fees under the Export Clause.

The implication that there is a user fee exception to the Export Clause is unsupported by the Court's analysis and is directly contradicted by Export Clause precedent, and the Export Clause itself. From these early Export Clause cases, and from the text itself, one can formulate a definition of an export tax which would first inquire whether the exaction was on exports or the process of exportation within the meaning of the Export Clause.

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169. Id. at 370 (citations omitted).
170. Id. (emphasis added).
171. However, a fee directed solely at exporters would violate the Export Clause as it would in effect be a tax on the process of exportation. See discussion infra Part V.B. “A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported.” Fairbank v. United States, 181 U.S. 283, 294 (1901).
172. See discussion infra Part V.A.
Fairbank, Hvoslef, Thames & Mersey, and A.G. Spalding found that any burden on exports violated the Export Clause, regardless of how it was nominally characterized or described. These cases evaluated exactions which were triggered by the process of exportation, and assessed on an attribute of the goods to be exported, or on a process intimately connected to exportation. The cases found that these burdens violated the Export Clause. Rather than presenting some limitation to this broad prohibition of burdens on exports, Pace merely evaluated an exaction which was not calculated pursuant to an attribute of the goods, and thus not "laid on articles exported." The ruling in Pace did not find a type of exaction outside the scope of "tax"; instead it found an exaction outside the scope of "tax or duty laid on articles exported" and therefore outside the scope of the Export Clause.

B. COMMERCE CLAUSE CASES

The Commerce Clause grants the federal government the "power to prescribe the rules by which commerce is to be governed." Although the Commerce Clause broadened during the expansion era, it is not unlimited. The courts, considering the issue of regulatory statutes imposing exactions, found the generation of revenue to be outside the power granted under the Commerce Clause. That is, with an important exception: if the generation of revenue was purely incidental to the regulation of commerce, then it would remain within the

174. See Bruce Little, A Case of Judicial Backsliding: Artificial Restraints on the Commerce Power Reach of the Sherman Act, 1985 U. ILL. L. REV. 163, 173-75; David N. Mayer, Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment, 25 CAP. U. L. REV. 339, 379 (1996); Stephen R. McAllister, Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause? 44 U. KAN L. REV. 217, 224-25 (1996). The "expansion" refers to the Supreme Court's shift from its restrictive interpretation of the Commerce Clause in cases such as United States v. E.C. Knight Co., 156 U.S. 1, 14 (1895) (recognizing a distinction between manufacturing, which Congress may not regulate under the Commerce Clause, and commerce which Congress may regulate when it has a direct effect on interstate commerce), to a broad interpretation of the Commerce Clause, in cases such as NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937) (finding that Congress may regulate labor relations because companies engaging in unfair labor practices have a close and substantial relationship to interstate commerce).
175. See Moon v. Freeman, 379 F.2d 382, 391 (9th Cir. 1967); Rodgers, 138 F.2d at 994.
The courts began identifying two types of exactions which could raise revenue within the confines of the Commerce Clause: (i) a user fee paid to defray the cost of regulation or (ii) a penalty imposed to enforce a regulation of commerce. Thus, the cases examined have defined the breadth of the Commerce Clause by delineating exactly the limited exception to the precept that regulations cannot raise revenue. In addition, the Supreme Court explicitly acknowledged that such Commerce Clause exactions could not otherwise offend the Constitution—indicating that testing for other unconstitutionality must precede the user fee analysis.

Courts have been called upon to delineate the permissible exactions under the Commerce Clause when such exactions, if made under the Taxing Power, would be impermissible. An exaction under the Commerce Clause is not subject to the limitations on the Taxing Power, namely the Uniformity and Apportionment Clauses. Commerce Clause cases which inquire into the authority of Congress do so in order to evaluate an exercise of power and not to determine whether a prohibition has been violated.

For example, in The Head Money Cases the plaintiff challenged a “duty” of fifty cents upon each non-United States passenger who came by vessel from a foreign port to any port within the United States. The plaintiff challenged the exaction as an exercise of the Taxing Power and thus subject to and in violation of the Uniformity Clause. The government contended that the charge was a fee for services rather than a tax, and thus not subject to the Uniformity Clause which limited the Taxing Power only and not the Commerce Clause. The money was to be used to “defray the expense of regulating immigration under [the] act,” caring for immigrants arriving in the United States, for the relief of immigrants in distress, and for the general purposes and expenses of carrying the Act into effect. The fee was calculated on a per use basis and in dis-

176. See Moon, 379 F.2d at 391; Rodgers, 138 F.2d at 994.
177. See Head Money Cases, 112 U.S. 580, 595-96 (1884).
180. 112 U.S. at 581.
181. See id. 112 U.S. at 583.
182. Id. at 590. The Act in question also provided for limits on the number of passengers which any vessel could carry. See id. at 589. It called for a gov-
bursing the money raised by the fee, no port could receive more money than it provided. Based upon the foregoing, the Court found that the exaction was a "mere incident of the regulation of commerce."\textsuperscript{183}

In so finding the Court first looked to the overall purpose of the Act, which it found was the regulation of immigration, and not the raising of funds for the general welfare. The Court's inquiry into the purpose of the Act appears to be a logical exercise given that the Court's decision turned upon whether the Act was enacted pursuant to the Commerce or Taxing Power. To evaluate an exercise of power one must necessarily ask "what was Congress trying to do?"\textsuperscript{184} By ascertaining what the Congress had intended to do, that is, regulate commerce, the Court could apply existing limitations on that power and determine whether Congress exercised its power within those limitations.\textsuperscript{185}

Likewise, in Rodgers v. United States,\textsuperscript{186} the plaintiff challenged, on the basis of the proportionality requirement,\textsuperscript{187} a penalty imposed by Congress on the marketing of excess cotton. The statute in question imposed cotton quotas upon farmers, and exacted a penalty on over-production in order to enforce those quotas. The court held that Congress did not levy a tax pursuant to the Taxing Power, but rather established a regulation to achieve the express purpose of controlling production of cotton affecting interstate commerce.\textsuperscript{188} The court reasoned that to determine what power Congress used in enacting the statute it was necessary to "view the objects and purposes of the statute as a whole."\textsuperscript{189} The court determined that Congress's clear intent in enacting such a scheme was to regulate and conserve commerce, not to raise revenue. Thus, the court

\begin{itemize}
\item[183.] \textit{Id.} at 596.
\item[184.] \textit{Id.} at 591.
\item[185.] Compare such an inquiry to one which determines whether an act is prohibited. In such a case the questions are no longer "what did the doer intend to do?" Rather, because a court is faced with an absolute prohibition rather than a choice of limitations, the question is only "what did the doer actually do?" Thus, evaluating an exercise of the grant of power differs from evaluating an absolute prohibition on constitutional powers.
\item[186.] 138 F.2d 992, 994 (6th Cir. 1943).
\item[187.] See U.S. CONST. art. I, § 9, cl. 4.
\item[188.] See Rodgers, 138 F.2d at 994.
\item[189.] \textit{Id.}
\end{itemize}
characterized the exaction as a penalty designed to regulate the behavior of the farmers, not as a tax to generally raise revenue. The court's holding rendered the proportionality requirement irrelevant because it only applies to acts enacted pursuant to the Taxing Power.

In *National Cable Television Association v. United States*, petitioner challenged the Federal Communications Commissioner's imposition of a fee as an unauthorized exercise of the Taxing Power. The Court inquired into the purpose of the exaction and that of the Independent Offices Appropriation Act which authorized federal agencies to prescribe fees for services which benefited a select portion of the public. In doing so, the Court emphasized the behavioral standard for identifying a user fee:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

Thus, the Court emphasized the necessary connection of a user fee to the behavior sought to be regulated.

In addition, *National Cable* indicated that only by enacting taxes under its Taxing Power may Congress impose charges which bear no correlation to the reciprocal benefits bestowed upon a taxpayer for his or her behavior. Only under the Taxing Power may Congress arbitrarily assess charges (e.g., based upon ability to pay, value of the property, or income) without any calculation of the benefits bestowed on the taxpayer. Taxes are levied for the support of the government, with their amount and structure dictated only by the government's view of what is necessary. On the other hand, a user fee may not be based arbitrarily on the obligor's ability to pay, the value of property, or income, but rather must correlate di-

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192. Id. at 340-41 (footnote omitted).
193. See id.
194. See id. at 340.
195. See id. at 341.
rectly to the behavior sought to be regulated and/or the service provided.\textsuperscript{196} Tolls or fees are compensation for the use of a service or property, and must be structured and determined by the value or benefit conferred upon the payor for the use of the service or property.\textsuperscript{197} The Court's distinction between user fees and taxes was warranted given the nature of the challenge in \textit{National Cable}. However, the Export Clause makes no such distinction between taxes that approximate use and those that are arbitrary.

In the most telling case with respect to the issue under discussion, \textit{Massachusetts v. United States},\textsuperscript{198} the Supreme Court enunciated a three-prong test derived from earlier case law to identify a user fee incidental to the regulation of commerce.\textsuperscript{199} In addressing whether an aircraft registration fee violated the intergovernmental tax immunity doctrine,\textsuperscript{200} the Court stated that to constitute a user fee, (1) the charge must not discriminate against a constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some regulatory system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the Government of the benefits conferred.\textsuperscript{201} The last two prongs merely re-emphasize the prior case law holdings requiring correlation of the exaction to the behavior sought to be regulated. However, the first prong of the analysis implies an additional prerequisite: that, by definition, an exaction which offends a constitutionally-protected interest is not a user fee. In \textit{Massachusetts}, the Court stated that:

\begin{itemize}
\item \textsuperscript{196} \textit{See id.}
\item \textsuperscript{197} \textit{See id.; see also} Sands v. Manistee River Improvement Co., 123 U.S. 288, 294 (1887) (explaining that tolls are intended to compensate the property owner).
\item \textsuperscript{198} 435 U.S. 444 (1977).
\item \textsuperscript{199} \textit{See id.} at 464 (citing Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-720 (1972)).
\item \textsuperscript{200} The intergovernmental immunity doctrine was first recognized in Collector v. Day, which implied the immunity from the existence of the states as independent sovereigns at the time the Constitution was adopted. 78 U.S. (11 Wall) 113 (1870). In \textit{Day}, the Court reasoned that the immunity sprung from the Constitution's guarantee that the states continue to function as states performing traditional sovereign functions. \textit{See id.} at 125-26. As an implied immunity, the protection of states from federal taxation has undergone significant narrowing. \textit{See Massachusetts}, 435 U.S. at 455-56.
\item \textsuperscript{201} \textit{See Massachusetts}, 435 U.S. at 464-70.
\end{itemize}
So long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied, there can be no substantial basis for a claim that the National Government will be using its taxing powers to control, unduly interfere with, or destroy a State's ability to perform essential services.

Therefore, Massachusetts suggests that not only is there no user fee exception to the Export Clause, but that before being able to apply a Commerce Clause user fee analysis, the courts must first determine if a constitutionally-protected interest—such as the Export Clause—is offended. This test requires, logically, that the Export Clause constitutionality of an exaction be examined first, prior to any determination of whether such exaction is a user fee.

One Ninth Circuit case used a grant of power analysis to determine whether the Export Clause's constitutional prohibition had been violated. In Moon v. Freeman, the court examined whether the structure of the Agricultural Act of 1964 violated the Export Clause. Under the Act, wheat farmers who voluntarily participated in an acreage control program became eligible for domestic and export wheat marketing certificates. The number of certificates available for any particular year depended upon the Secretary of Agriculture's projected requirement of wheat for domestic use, export use, and the projected supply. Using these projections, the Secretary would determine how much of the projected supply would require price support in order to maintain the price goals set by the Act. Further, the Secretary would set the face value of the certificates, although he could not do so arbitrarily.

In the year in question, the Secretary had determined that 90% of the supply of wheat would require price support. Thus, each farmer participating in acreage control as set forth in the

202. Id. at 466-67 (emphasis added).
203. See Moon v. Freeman, 379 F.2d 382, 384 (9th Cir. 1967). The court indicated that if an exaction is enacted pursuant to some purported regulatory scheme which raises a substantial amount of revenue, it in fact cannot be characterized as purely incidental to a regulation of commerce. See id. at 384-90. The court stated that "certainly if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." Id. at 392.
205. See id. at 385.
Act would be given (rather than having to purchase) certificates for 90% of his projected yield. Nonparticipating farmers would have to buy the certificates either from farmers who were given certificates, but did not produce their projected yield, or from the Secretary. To the extent that nonparticipating farmers produced even more wheat than had been projected, the demand for certificates would increase and the cost (either paid to the Secretary or to a participating farmer) would increase. The Secretary could not print more certificates in order to raise more funds and once the certificates were used, they were void. Finally, in order to encourage exports, the face value of the certificate would be adjusted on the date of exportation depending upon the international price of wheat. Thus, exporters sometimes could receive a subsidy from the use of an export certificate.206

Affirming the trial court, the court of appeals in Moon held that because the Act was an exercise of the Commerce Clause, it was not subject to the prohibition of the Export Clause.207 The court specifically rejected the argument that the Export Clause acted as a limitation upon the Commerce Clause as well as the Taxing Power. Inexplicably, the court quoted Justice Marshall in Gibbons v. Ogden and its reference to the Commerce Power: “'[i]t is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."'208 It is difficult to suppose to what limitations the Moon court thought Marshall was referring, since it would appear that the Export Clause is one of those constitutional limitations.

The court qualified its own analysis by adding that a fee "nominally imposed under the commerce power" also could be considered an exercise of the power to raise revenue and therefore was barred by the Export Clause.209 Had the court im-

206. See id. at 385-86.
207. See id. at 385.
208. Id. at 389 (emphasis added) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).
209. See id. at 390. The Supreme Court previously held that the exercise of the Taxing Power is not mutually exclusive of the exercise of another grant of power. The power of taxation may be utilized by Congress to effectuate the exercise of another power which is granted to Congress. See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393-94 (1940).
posed an Export Clause analysis in the first place, this qualifi-
cation would have been unnecessary.210

Under an Export Clause analysis, dictated by the text and
supported by the Supreme Court case law, the Moon court
should have determined that the exaction did not offend the
Export Clause because it was not "laid upon articles exported." The
monies exacted for the export certificates were not "laid on
the articles exported" as the amount charged for the certificates
was not calculated based upon an attribute of the goods. Like
the exaction in Pace, the monies in Moon were not calculated
based upon a formula which had as a variable some attribute of
the goods. One could argue that for any particular export, the
scheme in Moon imposed a "price" upon the export certificate
that related to the quantity to be exported. However, given the
formula established by the Act in Moon, it would appear that
the monies exacted were calculated not with reference to any
particular exportation of wheat but with reference to a wheat
market. Thus, it is our view that Moon was correctly decided,
but wrongly reasoned.

In summary, the foregoing cases held that an exaction was
a user fee or penalty charged for the purpose of regulating
commerce, and thus not subject to the limitations of the Taxing
Power. The courts evaluated the exercise of power by examin-
ing the approximation of use, the amount of revenue generated
and the compliance with other constitutional provisions. These
cases fail to carve out a user fee exception to constitutional
prohibitions such as the Export Clause. In fact, they reinforce
the idea that exactions made pursuant to the Commerce Clause
are entitled to no special exceptions from explicit constitutional
restrictions such as the Export Clause.

C. IMPORT-EXPORT CLAUSE CASES

The Import-Export Clause prohibition requires courts to
look beyond its textual provisions for the scope of the protection
afforded by the clause. Traditionally, the Import-Export
Clause was thought to have created a "general prohibition
against state taxation of imports and exports," i.e., goods which

210. See, e.g., United States v. West Texas Cotton Oil Co., 155 F.2d 463,
465 (5th Cir. 1946) (considering a challenge to penalties paid under the Agri-
cultural Adjustment Act of 1938, the Fifth Circuit implicitly made a Com-
merce Clause distinction in validating the exaction by looking at the purpose
of the Act rather than the result).
traveled in foreign commerce.\textsuperscript{211} Consequently, courts focused on whether articles were imports or exports to determine whether they were immune from state taxation (regardless of the type of taxation, i.e., excise tax or property tax). A shift in Import-Export Clause analysis began in \textit{Michelin Tire Corp. v. Wages},\textsuperscript{212} where the Court focused its inquiry on the nature of the exaction, rather than the status of the goods.\textsuperscript{213} \textit{Michelin} pointed to the limiting language of the Import-Export Clause, prohibiting only "Imposts or Duties," to justify a more specific inquiry into the nature of the exaction. Thus, to evaluate the nature of the exaction, the Court inquired into the intent of the Framers in choosing the limited language of the Import-Export Clause.\textsuperscript{214}

Traditionally, the Import-Export Clause protected imports and exports from "state exactions upon \textit{imports as imports}" or \textit{exports as exports}.\textsuperscript{215} A broader interpretation of the Import-Export Clause prohibition arose after a misreading of dictum from \textit{Brown v. Maryland} by the Court in \textit{Low v. Austin}.\textsuperscript{216} \textit{Low} had struck down a nondiscriminatory property tax, because imports were stored in property subject to the tax.\textsuperscript{217} Prior to \textit{Low}, property taxes that did not single out imports or exports were not thought to violate the Import-Export Clause.\textsuperscript{218} \textit{Brown} held that a discriminatory license fee would violate the Import-Export Clause. In doing so, it retreated from announcing a universal rule. Instead it simply carved out a class of items which could not be taxed without offending the Import-Export Clause. Before an item loses its distinctive character as an import, "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."\textsuperscript{219} From this equivocal dictum, \textit{Low} reasoned that any tax—even if it fell on property, rather than on the goods—would be invalidated if imports or

\begin{itemize}
\item \textsuperscript{211} \textit{IBM Corp. v. United States}, 59 F.3d 1234, 1237 (Fed. Cir. 1995).
\item \textsuperscript{212} 423 U.S. 276 (1976).
\item \textsuperscript{213} \textit{See id. at 282}.
\item \textsuperscript{214} \textit{See id. at 282-83}.
\item \textsuperscript{215} \textit{Id}.
\item \textsuperscript{216} \textit{See id. at 282}.
\item \textsuperscript{217} \textit{See Low v. Austin}, 80 U.S. (13 Wall.) 29, 33 (1871).
\item \textsuperscript{218} \textit{See id}.
\item \textsuperscript{219} \textit{Brown v. Maryland}, 25 U.S. (12 Wheat.) 419, 441 (1827).
\end{itemize}
exports were involved, or if the exaction fell on imports as im-
ports or exports as exports.\textsuperscript{220}

The \textit{Michelin} Court characterized \textit{Low} as “the leading de-
cision of this Court holding that the States are prohibited by
the Import-Export Clause from imposing a nondiscriminatory
\textit{ad valorem} property tax on imported goods until they lose their
character as imports and become incorporated into the mass of
property in the State.”\textsuperscript{221} \textit{Michelin} involved Georgia’s effort to
impose \textit{ad valorem} property taxes on Michelin’s inventory of
imported tires and tubes. Michelin, relying on \textit{Low}, argued
that the \textit{ad valorem} tax was prohibited by the Import-Export
Clause, as it was imposed on goods which traveled in foreign
commerce. The Court rejected Michelin’s position, stating:
“[n]othing in the history of the Import-Export Clause even re-
motely suggests that a nondiscriminatory \textit{ad valorem} property
tax which is also imposed on imported goods that are no longer
in import transit was the type of exaction that was regarded as
objectionable by the Framers of the Constitution.”\textsuperscript{222} \textit{Low}, the
Court continued, improperly expanded the protection of the
Import-Export Clause and rejected the better reasoned views
expressed by earlier Justices,\textsuperscript{223} that an examination of the ori-
gins of the Clause “makes crystal clear that the prohibition ap-
plied only to state exactions upon \textit{imports as imports} and did
not apply to nondiscriminatory \textit{ad valorem} property taxes.”\textsuperscript{224}
Accordingly, the Court found that \textit{Low} was wrongly decided
and explicitly overruled it.\textsuperscript{225}

\textit{Michelin} recharacterized the focus of the Import-Export
Clause cases from the nature of the goods as imports, to the na-
ture of the tax at issue (i.e., whether the tax is an “impost or
duty” and thus barred by the Import-Export Clause).\textsuperscript{226} Spec-
cifically, the Court found the tax was not an impost or duty be-

\begin{itemize}
\item[220.] \textit{See Low}, 80 U.S. (13 Wall.) at 34.
\item[221.] \textit{Michelin Tire Corp.}, 423 U.S. at 282.
\item[222.] \textit{Id.} at 286.
\item[223.] For example, Justice Marshall's views in \textit{Brown}, 25 U.S. (12 Wheat.)
at 458, and Justice Taney's views in \textit{The License Tax Cases}, 72 U.S. (5 Wall)
462, 481 (1866).
\item[224.] \textit{Michelin Tire Corp.}, 423 U.S. at 300 (emphasis added).
\item[225.] \textit{See id.} at 301.
\item[226.] \textit{See id.} at 301 n.13; \textit{see also} R.J. Reynolds Tobacco Co. v. Durham
County, 479 U.S. 130, 156 (1986) (concluding that an \textit{ad valorem} tax on im-
ports does not violate the Import-Export Clause); Limbach v. Hooven & Allison
Co., 466 U.S. 353, 363 (1984) (holding that \textit{Michelin} changed the Import-
Export Clause inquiry to whether the tax is an impost or duty).
\end{itemize}
cause it did not offend the policies behind the clause: (i) concern that an impost or duty might interfere with the federal government's regulation of commercial relations with foreign governments; (ii) fear that on account of such state taxation the federal government would lose an important source of revenue; and (iii) a desire to maintain harmony among the states, which would be disturbed if seaboard states could tax goods "merely flowing through their ports" to other states not so favorably situated.227

The Michelin analysis of a challenge to imposts or duties on imports under the Import-Export Clause was then extended to a tax on exports under the Import-Export Clause, in Department of Revenue v. Association of Washington Stevedoring Cos.228 The Court resumed the analysis it had begun in Michelin. The Court noted that "Michelin initiated a different approach to Import-Export Clause cases. It ignored the simple question whether the tires and tubes were imports. Instead, it analyzed the nature of the tax to determine whether it was an 'Impost or Duty' . . . ."229

Although the Court in Washington Stevedoring recognized that there were some factual distinctions between it and Michelin,230 it extended the Michelin "three concerns" analysis to taxation involving exports. The Court pointed out that an export tax need only be measured against the first and third concerns: the export-tax ban of the Import-Export Clause does not serve the second concern, protection of federal revenues.231

Importantly, Michelin differed from Washington Stevedoring in that the tax in Michelin fell on the goods themselves, whereas the tax in Washington Stevedoring fell on stevedoring, the business of loading and unloading ships.232 The Court noted that a tax on the stevedoring did not relate to the value

229. Id. at 752.
230. One of the distinctions between Washington Stevedoring and Michelin was that in Michelin the tax was not upon goods in transit. Thus, the question faced by the Court in Washington Stevedoring—whether the Import-Export Clause prohibited a nondiscriminatory tax upon goods in the process of exportation, regardless of whether the concerns of the Framers were even implicated—was left unanswered by Michelin and ultimately by Washington Stevedoring as well.
231. The Export Clause eliminates the federal government's concern, as no federal source of revenue exists with respect to exports.
of the goods being transported and, therefore, could not be considered a tax on the goods themselves.\textsuperscript{233}

In order to draw the distinction between a tax on goods and a tax on services, \textit{Washington Stevedoring} referred briefly to \textit{Canton Railroad Co. v. Rogan}.\textsuperscript{234} In \textit{Canton Railroad}, the Court upheld a gross-receipts tax on a railroad which engaged in various services relating to importing and exporting. \textit{Canton Railroad} upheld the tax because it found the immunity provided by the Import-Export Clause to services incidental to exporting was not as broad as the immunity provided to the goods themselves.\textsuperscript{235} This distinction described in \textit{Canton Railroad} also found favor in \textit{Washington Stevedoring}.\textsuperscript{236}

Unfortunately, no bright-line test for distinguishing between goods and related services emerged from \textit{Canton Railroad}. However, as the Court in \textit{Washington Stevedoring} noted, \textit{Canton Railroad} did distinguish the tax it upheld from other taxes which the Court had previously invalidated.\textsuperscript{237} Among the cases distinguished was \textit{Thames & Mersey}. In the words of the \textit{Washington Stevedoring} Court:

\begin{quote}
In [the cases in which the Court had previously struck down taxes,] . . . the State had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves. . . . [T]he stamp tax on bills of lading in \textit{Fairbank} effectively taxed the goods because the bills represented the goods. The basis for distinguishing \textit{Thames & Mersey} is less clear because there the tax fell upon marine insurance policies. Arguably, the policies had a value apart from the value of the goods. In distinguishing that case from the taxation of stevedoring activities, however, one might note that the value of goods bears a much closer relation to the value of insurance policies on them than to the value of loading and unloading ships.\textsuperscript{238}
\end{quote}

Thus, not only was the nature of the prohibited exaction in the Import-Export Clause narrower than that of the Export Clause, but the reach of the immunity also appeared more limited.\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{233} See \textit{id.}.
\item \textsuperscript{234} Canton R.R. Co. v. Rogan, 340 U.S. 511, 519 (1951).
\item \textsuperscript{235} See \textit{id.} at 519.
\item \textsuperscript{236} \textit{Washington Stevedoring}, 435 U.S. at 757.
\item \textsuperscript{237} \textit{Id.} at 756 n.21.
\item \textsuperscript{238} \textit{Id.}.
\item \textsuperscript{239} It is unclear whether \textit{Washington Stevedoring} calls \textit{Thames & Mersey} into question. We would argue that \textit{Thames & Mersey}'s holding, that a tax on insurance policies was related to the goods so as to be a tax upon the goods themselves, should have been re-examined in \textit{IBM}. The dissent in \textit{IBM} thought so too. See United States v. IBM Corp. 517 U.S. 843, 863-64 (1996) (Kennedy, J., dissenting).
\end{itemize}
The distinction between the immunities found in the Export Clause and the Import-Export Clause can be traced at least in part to their respective textual commands. The Court viewed the more fluid textual command contained in the Import-Export Clause as focusing not upon the goods being burdened, but rather upon the nature of the burden imposed. Thus, because that text distinguished between types of burdens rather than prohibiting all burdens, it was necessary for the Court to determine which burdens were prohibited. Given the specificity of the words used in the text, it appears that the Court adopted an approach which identified the Framers' expectations and, in doing so, outlined the concerns the Framers sought to address.  

As previously discussed, the government in *IBM* claimed that to determine whether the Export Clause prohibited a tax, the court should examine the Import-Export Clause factors discussed in *Washington Stevedoring*. Further, the government argued that there was no meaningful difference between a tax on the proceeds of stevedoring services and a tax on premiums paid for policies of casualty insurance, a transaction that the government described as being incidental to the process of exporting. The government argued that the tax was nondiscriminatory because it did not discriminate against exports, i.e., the tax did not target exports as exports. Instead the tax was generally applied on insurance policies written by foreign insurers regardless of whether the insured goods were in the export stream. Therefore the government concluded the tax did not run afoul of the Export Clause.  

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240. Additionally, *Washington Stevedoring* noted the textual differences between the Commerce Clause and the Import-Export Clause, namely that the Commerce Clause reaches all taxation and regulation of commerce while the Import-Export Clause only addresses imposts or duties. Moreover, *Washington Stevedoring* noted that the Import-Export Clause states an absolute ban, whereas the Commerce Clause merely grants power to Congress. *See* 435 U.S. at 751.

241. *See IBM*, 517 U.S. at 852. The Import-Export Clause involves (i) concern that an impost or duty might interfere with the federal government's regulation of commercial relations with foreign governments; (ii) fear that on account of such state taxation the federal government would lose an important source of revenue; and (iii) a desire to maintain harmony among the states, which would be disturbed if seaboard states could tax goods "merely flowing through their ports" to other states not so favorably situated. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976).


243. The government failed to argue, and the Supreme Court's majority opinion failed to address, whether the portion of *Thames & Mersey* which held
Moreover, the government argued that a narrowing of the prohibition of the Import-Export Clause required a similar shift in the Export Clause analysis. Additionally, the IBM Court rejected the government's claim that the Import-Export Clause case *Washington Stevedoring* governed cases arising under the Export Clause. Rather than focusing on the nature of the tax, IBM relied upon *Thames & Mersey*, holding that the Export Clause bans all taxes or duties on the process of exportation. The *Thames & Mersey* Court found that to determine if a tax violates the Export Clause it examines whether "the tax . . . [is] so . . . closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition."

In *IBM*, the Court explained that the parties were in agreement that § 4371 imposes "a 'tax' on the goods themselves." The Court noted that it did not read *Washington Stevedoring* as overruling *Thames & Mersey*, and, therefore, it would follow established precedent. The Court stated that:

> meaningful textual differences that should not be overlooked exist between the Export Clause and the Import-Export Clause. In finding the assessments in *Michelin Tire Corp. v. Wages . . . and Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos. . . . valid, the Court recognized that the Import-Export Clause's absolute ban on 'Imposts or Duties' is not a ban on every tax."

The Court found that the terms "impost" and "duty" were narrower than the term "tax" and thus a particular state assessment may be beyond the Import-Export Clause's reach, while an identical federal assessment might be subject to the Export Clause. The Court continued:

> The distinction between imposts or duties and taxes is especially pertinent in light of the peculiar definitional analysis we chose in *Michelin*. Finding substantial ambiguity in the phrase "Imposts or Duties," we "decline[d] to presume it was intended to embrace taxation that taxing marine insurance policies was the same as taxing goods, was still good law. The dissent criticized the Court's failure to revisit the holding in *Thames & Mersey* with regard to this issue. See id. at 863-64. (Kennedy, J., dissenting). See generally discussion infra Part V.B. The majority's failure to address whether a tax on marine insurance policies was truly a tax laid on articles exported was a mistake which we believe further frustrates the search for a principled definition of the Export Clause prohibition in the case law.

> 244. *See IBM*, 517 U.S. at 857.
> 246. *IBM*, 517 U.S. at 855.
> 247. *Id.* at 844.
> 248. *See id.* at 857.
that does not create the evils the Clause was specifically intended to eliminate." We entirely bypassed the etymological inquiry into the proper meaning of the terms "impost" and "duty," and instead created a regime in which those terms are conclusions to be drawn from an examination into whether a particular assessment "was the type of exaction that was regarded as objectionable by the Framers of the Constitution." We are not prepared to say that the word "Tax" is "sufficiently ambiguous," that we may ignore its common, and usually expansive, meaning in favor of an Export Clause decisional rule in which a tax is not a "Tax" unless it discriminates against exports. Consequently, Michelin and Washington Stevedoring, which held that the assessments in question were not "Imposts or Duties" at all, do not logically validate the assessment at issue in this case, which, by all accounts, remains a "Tax."249

Justice Thomas seemed content, therefore, to reaffirm Fairbank and its progeny, emphasizing that mere protection from discrimination was not the goal of the Export Clause and thereby distinguishing the significance of Import-Export Clause jurisprudence. Moreover, Justice Thomas made clear that the textual differences between the two Clauses prohibited the use of Import-Export Clause analysis to interpret the scope of the Export Clause.

IBM emphasized the purpose of the Export Clause, that is, the prevention of any burden being placed on exports.250 However, it did not go far enough in providing a positive formulation of that which Justice Thomas calls "export taxes." The user fee exception argument was not before the Court as it was dropped by the IRS at the C.F.C. Further, Justice Thomas (despite complaints from Justice Kennedy in the dissent) failed to re-examine the portion of the holding in Thames & Mersey that marine insurance policies were "inextricably" tied to exports. Thus, although a rejection of the Import-Export Clause analysis was clear, the Court offered no useful enunciation of an Export Clause standard. The closest Justice Thomas came was in the following statement regarding the Export Clause: "It specifically prohibits Congress from regulating international commerce through export taxes, [and] disallows any attempt to raise federal revenue from exports."251

249. Id. at 858 (citations omitted).
250. See id. at 859.
251. Id.
IV. INTERPRETATIVE METHODOLOGIES FOR CREATING A POSITIVE EXPORT CLAUSE STANDARD

We believe that an Export Clause standard can be positively enunciated, despite the Court's failure to do so in *IBM* and *U.S. Shoe*. Our proposed standard is derived from the text of the Export Clause, as well as the principles and policies which underlie it. In *IBM*, the Court indicated that the meaning of the Export Clause should be constructed according to a text-based interpretation which focuses on its own text, rather than looking past these words to other influences, such as developments in other areas of constitutional jurisprudence. A text-based approach constructs a definition of the words in question by means of the words themselves, as well as the structure and the context in which they are placed. The actual words of the Export Clause provide for a ban on all burdens placed by Congress on exports regardless of the purpose of the exaction. Despite *IBM*'s apparent preference to restrict its analysis to the text alone, we find that looking beyond the text to the principles, policies and history underlying the Export Clause fosters an interpretation which, in fact, confirms and supports the textual interpretation. The resulting interpretation will help courts identify an Export Clause standard. More importantly, formulating a definition reveals how the seeming conflict between the Export Clause and the Commerce Clause may be avoided.

Given the nature and clarity of the text and principles embodied in the Export Clause, we do not feel that it is necessary to advocate one interpretive methodology over another. However, as the text provides a reasonable interpretation of the Export Clause, uncontradicted by interpretations under other methodologies, we believe the textual approach is at least a good place to start. Further, it appears that when courts have interpreted the Export Clause, they have struggled to construct


254. See discussion infra Part V.B.
the meaning from the text, recognizing a textual methodology as appropriate. Thus, the purpose of this Article is not to advocate any particular methodology in general, but to simply articulate what the Court has been grasping at in Export Clause jurisprudence.

A. A TEXT-BASED ANALYSIS OF THE EXPORT CLAUSE

A text-based interpretation of the Export Clause extracts a reasonable standard by turning initially to textualism as an interpretive methodology. Textualism presumably focuses on the text alone, recognizing the range of meaning of the words themselves and construing those words reasonably. Justice Scalia argues that textualism "should not be confused with so-called strict constructionism . . . text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably." Inherent in such a command is the acknowledgment that words have a limited and identifiable range of meaning. Any serious identification of a "range of meaning," however, must go beyond the free standing words themselves and consider the structure and context in which those words are uttered. Thus, a textual interpretation should not attempt to simply "discover" meaning, but rather to "construct" meaning, by starting with the text. Of course, as will be discussed below, constructing the meaning of any text poses dangers as the construction tools themselves influence the final result.

Constructing the meaning of the Export Clause requires courts to focus on the words "no tax or duty" and "laid on Articles exported." As discussed above, the Court has consistently read these two phrases as prohibiting all exactions which are tied to an exported article by virtue of being calculated with

257. Id.
258. See id. at 24; see also Taylor, supra note 252, at 341 ("In contrast to standard views of literalism and plain meaning, textualism does not evaluate the meaning of contested statutory terms in isolation, totally acontextually.").
259. See Taylor, supra note 252, at 342-43.
260. "To unfold the world of a text may be very different from articulating its supposed rule. '[M]eaning must be constructed—it is not given in the written signs . . . ." Id. at 354 (quoting Paul Ricoeur, Construing and Constructing, TIMES LITERARY SUPP., Feb. 25, 1977, at 216).
261. See Schauer, supra note 253, at 818.
reference to such an article or its exportation process. The Court has traced this simple definition to the words themselves. No "tax or duty" signifies a ban against all exactions rather than a limited range of exactions that might be connoted by more specific words such as "imposts or duties." Moreover, the Supreme Court recognized that the phrase "taxes or duties" relates to all exactions that in any way burden exports.

Furthermore, the phrase "laid on articles exported" requires that the exaction be connected to the exports in some significant way. The word "laid" connotes an exaction which is physically upon the goods. Since a purely physical or per unit measure could easily be circumvented, a meaningful interpretation of the clause must account for exactions indirectly laid on the goods by virtue of being calculated pursuant to any attribute of the goods, or the exportation process itself. Moreover, the phrase "articles exported" seems to suggest that the physical connection of the exaction must occur at a particular temporal point, namely when they are in the process of exportation.

The Supreme Court recognized the validity of a textual approach and issued a clear mandate that the broad language of the Export Clause excludes a fluid analysis. In IBM, the Court explicitly stated its position for a textual analysis of the Export Clause:

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

262. See United States v. IBM Corp, 517 U.S. 843, 847, 857 (1996) ("[I]mport and duty are narrower terms than tax."); see also MADISON, supra note 70, at 466 ("[D]uties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties.").

263. See IBM, 517 U.S. at 847-48.

264. See id. at 846. When the Supreme Court has "interpret[ed] the language of the Export Clause . . . [it has] broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process." Id. "It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed." Fairbank v. United States, 181 U.S. 283, 289 (1901).

265. See Fairbank, 181 U.S. at 290-91.

266. See, e.g., Wm. E. Peck & Co. v. Lowe, 247 U.S. 165, 173-75 (1918) (finding that the income tax on net profits was levied after the process of exportation and thus did not violate the Export Clause).
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. 267

The Court makes the point that the Export Clause (as disparate from the Commerce Clause) contains the blueprint for its own textual interpretation: its plain language can be seen as contradicting the use of a nontextual methodology. In fact, this has been the view of the Court since the beginning of its Export Clause interpretation that "[t]he true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."268

B. SUPPORTING INTERPRETATIVE SOURCES

The examination of the creation of the Export Clause supports our formulation of an Export Clause ban on exactions placed on the exports themselves during the course of exportation. An examination of the history and purpose of the Export Clause justifies a standard which removes exports from any type of political gamesmanship by Congress. This historical approach is often grouped with the "original understanding" approach under the heading of originalism; however, the two approaches are distinct forms of interpretation.269 The historical, intent-based approach requires constitutional interpretation based on the historical investigation of the intent of the Framers and ratifiers.270 On the other hand, the "original understanding" approach (also often contained under the umbrella of textualism) bases its interpretation on the public understanding of language at the time of enactment.271 Intent theory reasons that "the historically demonstrable intentions of the framers" is a "normative guide" to the Constitution's

267. IBM, 517 U.S. at 851-52 (citations omitted).
268. Fairbank, 181 U.S. at 289.
270. See id.
271. See id. at 12-13, n. 47. The historical evidence used to determine the Framers' intent, e.g., Records of the Constitutional Convention, can also be considered "strong evidence of how relevant language would have been understood by the ratifiers and the public generally." Id.
meaning, as it represents "past, publicly accountable acts" accepted under "historically established norms." For example, at a time when "intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation," one Senator explained: "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt... we cannot err if we turn to the framers..." Critics of the intent theory, however, point out that it is difficult to attribute one intent to a group of individuals, because there will always be "specific issues that some members never considered and as to which others may actually have diverged," thereby leaving too much latitude for the interpreter's predilections or prejudices.

Investigation into the Framers' intent with respect to the Export Clause reinforces that the text is the best reflection of their intent. James Madison reported that the Constitution's Framers insisted on a complete ban against taxes on exports, in part due to concerns that such taxes would discourage industry and would prevent uniformity as a result of differing

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273. Fallon, supra note 269, at 11.

274. Powell, supra note 272, at 947. Intentionalism in the modern sense of historical investigation of Framers' private intentions, did not appear until the 1820s, and came into full force by the outbreak of the Civil War. See id. at 945-47. This arose as a result of many factors, including increased adoption of modern private intent concepts in other areas of law and the increased availability of historical materials regarding the constitutional enactment. See id.

275. Id. at 947 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866) (speech of Sen. Charles Sumner)).

276. Fallon, supra note 269, at 13; see also RONALD DWORKIN, LAW'S EMPIRE 313-17 (1986).

277. It could be argued that the consistency between the legislative history and the text is not surprising as the text is unambiguous and thus it is really unnecessary to look any further than the text. However, the C.I.T.'s and the C.A.F.C.'s investigation of Commerce Clause precedent under an Export Clause case demonstrates an apparent ambiguity requiring investigation under this theory. See supra Part I.B.

produce among the States. In fact, the Framers were acutely aware of the possible long-term implications of the Export Clause yet still chose to adopt it in its broadest form. At the Convention of 1787, a series of proposals to limit the breadth and severity of the Export Clause were specifically rejected. One of these proposals—to restrict the Export Clause's application only to taxes whose purpose was raising revenue—was rejected, seeming to indicate that interpretation of the Export Clause should not produce a restrictive ban. Although the specific characterization of a government exaction as a fee rather than a tax (as they are presently distinguished) did not exist at the Constitutional Convention, a modification of the general prohibition which would have allowed for the imposition of fees was raised and rejected at that time. Interestingly, another proposal which directly addressed the issue presented over 200 years later in U.S. Shoe—to limit the Export Clause’s scope in case regulation of exports could someday be deemed necessary by Congress—was considered and rejected.

In addition to an intent based or historical approach, another methodology examined suggests the consideration of

279. See MADISON, supra note 70, at 498. Additionally, the Export Clause was intended to give the Southern States assurance that the Northern States, through their power in the federal government, would not impose a burden of taxation on the Southern States. See id.

280. See id. at 499-503.

281. See id. Madison’s suggestion that “[a] proper regulation of exports may & probably will be necessary hereafter, and for the same purposes as the regulation of imports; viz, for revenue—domestic manufactures—and procuring equitable regulations from other nations” was ultimately disregarded in favor of a complete prohibition of taxes on exports. Id. at 499-500.

282. See id. at 499-503. Other proposals considered and rejected included requests for exemption of enumerated articles from export taxes and provisions for imposition of an export tax subject to a super-majority vote of Congress. “The power of taxing exports may be inconvenient at present; but it must be of dangerous consequence to prohibit it with respect to all articles and for ever.” Id. at 499.

283. We will utilize as the example of principle-based theory Ronald Dworkin’s “law as integrity,” developed throughout his works into a “systematic and articulate statement and defense of the powerful theory of law and legal interpretation.” Jeffrie G. Murphy, Book Note, 15 POL. THEORY 669, 669-73 (1987) (reviewing DWORKIN, supra note 276). This was selected because it has the greatest possibility of application. Other principle-based theories are based on the existence of extra-textual fundamental rights under natural law. See, e.g., HADLEY ARKES, BEYOND THE CONSTITUTION 10-20, 71-76 (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 39, 48-54 (1980).
the Framers' more abstract convictions. These more abstract principles can be ascertained from the language and structure of the Constitution. This mode of interpretation looks to the text of the Constitution to extrapolate more abstract principles, derived from the interpreter's understanding of what the Framers "intended—or expected or hoped—would be the consequence" of the document. The principle-based methodology differs from the textual approach, which represents "concrete or dated rules" that reflect what the Framers "intended to say in enacting the language they used." It also differs from the more literal historical approach which studies the stated intent of the drafter.

When applied to the Export Clause, this principle-based approach reinforces the results of the textual and historical approaches. In fact, from the language and structure of the Export Clause, it is evident that the Framers sought to embody, in the broadly drafted text of the Export Clause, the abstract principles of promoting exports and protecting them from any politically-motivated and discriminatory exactions. The Framers intended the consequences of the Export Clause to result in a reading of the Export Clause which would broadly protect exports from political maneuvering. Since the Framers considered numerous, more limited constructions for the text and rejected them, it would be contradictory for an evolving judicial reading of the Export Clause to permit scenarios the Framers explicitly discussed and rejected as undesirable. Thus, the

284. See DWORKIN, supra note 276, at 316-17.
285. See id. at 313-17.
287. Dworkin, supra note 286, at 116. The theory of ascribed intent also differs from a historicist intent-based theory, in which historical research is undertaken to determine what the Framers actually intended. See discussion supra notes 269-76 and accompanying text.
288. This investigation of original intent reflects a historicist approach, so its implications for the Export Clause are not surprising. Scholars have acknowledged that "[t]he common law poses an obvious problem for the historicist" interpreters, who generally contend that "it is unacceptable for judges and justices to develop constitutional law on a common law model." Fallon, supra note 269, at 12 n.44. But see SCALIA, supra note 256, at 139-40 (stating that stare decisis is a compromise of all philosophies of interpretation, so that "what is false under proper analysis must nonetheless be held to be true, all in the interest of stability"); Antonin Scalia, Originalism: The Lesser Evil, 57 U.
extrapolation of principles from the Export Clause formulates a broad prohibition, paralleling the broadly formulated textual command.

The investigation into the creation of the Export Clause, including both the explicit and extrapolated policy goals of the Framers, indicates the creation of a broad mandate in the Export Clause. In addition, these considerations apply with equal force today. Therefore, the broad, clear Export Clause standard we have developed is supported by the textual approach to the Export Clause suggested by the Court in *IBM*, as well as the intent and principles embodied in the clause.

V. AN EXPORT CLAUSE STANDARD

A clear Export Clause standard can be derived from the text of the Export Clause as well as the intent and principles behind it. The Export Clause precedents have, in fact, recognized a clear and complete ban. When revealed and articulated, this standard provides a workable definition of Export Clause exactions. Using this definition as a guide, Congress and the courts may enable the Commerce Clause to ameliorate market failures, accounting for any externalities, without running afoul of the Export Clause.

As a result of the foregoing analysis, we have developed a two prong test which delineates the scope of the Export Clause prohibition. We have developed the test from the text of the Export Clause and the cases interpreting it. Our definition evolves from a text-based approach, and we believe it comports with the purpose of the Export Clause as envisioned by the Framers. Further, we believe that this definition complements principled understandings of permissible exactions under the Import-Export Clause and the Commerce Clause. Our test questions whether an exaction:

1) arises during the process of exportation; and

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289. See *supra* Part III.A.

290. For a tax to be prohibited by the Export Clause, the article which it burdens must begin the process of exportation either legally or temporally. *See* A.G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69-70 (1923) (holding that a general property tax laid upon baseball bats within the course of exportation violates the constitutional prohibition); Turpin v. Burgess, 117 U.S. 504, 507 (1886) (holding that a general tax laid upon all cigarettes, not levied on the cigarettes in the course of exportation, does not violate the constitutional prohibition); United States v. Gosho Co., 23 F.2d 675, 676 (5th Cir. 1928) (holding that a transportation tax applied to cotton in the process of exportation,
2) is calculated based upon the export or the process of exportation.291
This two-prong test will effectively protect against direct and indirect burdens upon exports without perpetually relieving the goods from the ordinary burdens of taxation.

A. NO USER FEE EXCEPTION

There is nothing in the text, case law or history of the Export Clause which suggests that there is a user fee exception to its broad prohibition. Textually, the Clause prohibits all taxes or duties laid on articles exported from any state. The phrase "tax or duty" encompasses all exactions. First, as discussed in the Import-Export Clause cases, as well as in IBM, the terms themselves cast the widest possible net. Unlike "impost or duties", the phrase "tax or duty" reaches beyond charges for particular purposes. Moreover, the phrase is modified by the words: "laid upon Articles exported." Thus, it is defined in terms of how it is calculated without regard to the purpose of the exactation.

The Court in U.S. Shoe indicated that it intended to disregard non-Export Clause precedent, in favor of an Export Clause analysis rooted in its own text and precedent.292 Yet, the Court then went on to inquire whether the HMT could fall into the user fee exception of the Export Clause. As there is no mention of a user fee exception in the Export Clause or its case law (or any words that would even remotely hint at such an exception),293 it would appear that the Court implicitly adopted Commerce Clause precedent to create one.294 That is, the Court

though temporarily stopped, violated the Export Clause).

291. See Fairbank v. United States, 181 U.S. 283, 312 (1901) (stating that an exaction upon bills of lading taxed exports directly); Pace v. Burgess, 92 U.S. 372, 375 (1875) (holding that a stamp to be affixed to exported tobacco was not a tax because it bore no proportion whatsoever to the quantity or value of the package to which it was affixed). See generally Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1914); United States v. Hvoslef, 237 U.S. 1 (1914).


293. Presumably, one could argue that the Export Clause prohibition only relates to taxes or duties and thus does not encompass "fees." Obviously, Congress cannot circumvent the Export Clause through mere nominal characterization. Thus, it is appropriate to isolate the charges prohibited by the language. The language captures all exactions and provides for no exceptions—regardless of how they are nominally characterized.

294. See supra notes 165-69 and accompanying text (stating the authors' belief that the Court's reliance upon Pace for the creation of the user fee excep-
adopted the concept created in Commerce Clause precedent and read it into the interpretation of a long-standing Export Clause case, *Pace*. This resulted in an anachronistic interpretation of the *Pace* decision. In other words, the Court read *Pace* as if it were written after the development of Commerce Power user fee jurisprudence. *Pace* cannot reflect the Post New Deal commerce power understandings, as it was decided long before those understandings evolved.

The adoption of Commerce Clause user fee analysis was not only beyond the text of the Export Clause, but it also contradicted the instructions of earlier Export Clause precedent. *Fairbank* stated that the broad limitation imposed by the Export Clause could not be circumvented by nominally imposing a tax upon exports under another constitutional grant of power. As noted in *Fairbank*, this broad prohibition not only derives directly from the text, but also reflects the intention of the Framers. Further, *IBM* specifically rejected the adoption of non-Export Clause precedent.

Additionally, the Commerce Clause precedent has established that the Commerce Clause is limited by the other constitutional limitations. The Commerce Clause, as delineated by the Framers, is a grant of power which allows Congress discretion in the methods it uses in implementing policies. However, this discretion is not, and should not be, unlimited: the methods chosen must still conform to other general limitations created by the Framers' restrictions set forth throughout the Constitution. The power to regulate under the Commerce

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297. See *id.* at 288-89.
298. See *id.* at 287-88.
Clause is as limited by the restraints of the Export Clause, as it is by the restraints of the Bill of Rights. 302 The Supreme Court stated:

For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." ... This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as § 9 of Article I and the Bill of Rights. 303

With regard to an Export Clause analysis, the distinction between a Taxing Power and a Commerce Clause exaction, i.e., between a tax and a user fee, is unclear and unnecessary. In fact, the Court's identification of a user fee exception to the Export Clause is a result of its failure to take into account the text and history of the Export Clause. This misinterpretation of the clause, in conjunction with its misinterpretation of Pace in the same vein, turns on its failure to recognize the significance of the phrase "laid on articles exported." Pace identified a tax which was not "laid on articles exported." The Court, in U.S. Shoe, using later-developed and inapplicable precedent, misread this as identifying a user fee. The consequence of this misinterpretation is U.S. Shoe's fallacious proposition: the exemption of a user fee (which in the Commerce Clause sense is an exaction charged on a service), from the Export Clause prohibition of taxes on goods (i.e., the prohibited taxes are those "laid on articles exported").

In sum, many factors point toward a disregard for Commerce Clause user fee precedent when interpreting the Export Clause, in favor of a clearer Export Clause standard. These factors include: interpretation of the text itself, the adherence to specific Export Clause precedent, the honoring of the clause's underlying principles, and the significance of the Supreme Court's ruling in IBM. The standard proposed in this Article attempts to follow these indications and provide clear guidance for future interpretation. Each prong of the proposed standard

303 Id. at 704-05 (emphasis added) (citations omitted).
acknowledges the coherence of the textual phrase "tax or duty laid on articles exported," and then relies on direct Export Clause precedent in its interpretation. This approach avoids the mistake made in *U.S. Shoe*, of parsing apart the phrase "tax or duty," and interpreting it out of context and based on inapplicable conceptual precedent, thereby causing unnecessary reliance on the inapplicable Commerce Clause concept of a user fee.

B. A TAX OR DUTY LAID UPON ARTICLES EXPORTED

The text of the Export Clause itself defines the scope of the constitutional mandate as prohibiting only (and all) taxes or duties "laid on articles exported." Thus, the text defines its parameters by reference to the goods being exported. For the Export Clause to have any meaning at all, its prohibition must restrict the ability of Congress to burden exports directly or indirectly. At the same time, this protection is not meant to exempt exports from "ordinary burdens of taxation" which are by definition not "laid on articles exported." The Supreme Court has faltered in defining the phrase "tax or duty laid on articles exported." In doing so, it has failed to fully articulate what is prohibited by the Export Clause. Consequently, it has mistakenly resorted to the user fee distinction to articulate what is permitted under the Export Clause.

With regard to the nature of the exactions prohibited by the Export Clause, the text bans all exactions. No "tax or duty" signifies a ban against all exactions, rather than the limited range of exactions that more specific words such as "imposts or duties" might connote. Modifications of the general prohibition which would allow for "fees" were raised and rejected at the Constitutional Convention. Moreover, the Supreme Court itself has recognized the breadth of this prohibition.

The Export Clause cannot protect goods from governmental burdens unless those goods are "articles exported." Charac-

308. *See MADISON*, supra note 70, at 499-503.
309. *See IBM*, 517 U.S. at 848, 859-60; *Fairbank*, 181 U.S. at 290.
terizing goods as “articles exported” creates a temporal label. Accordingly, to ascertain the meaning of this phrase, courts have properly focused on whether the articles are “in the process of exportation.” “Articles exported,” as a temporal classification, suggests both a beginning and an end to the classification. Thus, Export Clause cases have understood the Export Clause not to excuse articles from exactions when those goods are not in the process of exportation. Such exactions falling outside the temporal parameters were labeled by the Court as “ordinary burdens of taxation.”

The Supreme Court has commented that the term “export” is the same for the Import-Export Clause as it is for the Export Clause, and explained that an “export” is something that has entered the “stream of export.” Thus, in Empresa Siderurgica, an Import-Export Clause case involving a challenge to a state property tax, the Court set forth the following definition:

it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. The tax immunity runs to the process of exportation and the transactions and documents embraced in it. Delivery of packages to an exporting carrier for shipment abroad and the delivery of oil into the hold of the ship furnished by the foreign purchaser to carry the oil abroad have been held sufficient. It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.

Thus, the temporal start of the exportation triggers the protection of the Export Clause against a tax or duty laid upon the article. Moreover, when the exportation has ceased, the Export Clause protection ceases as well.

312. Cornell, 192 U.S. at 427.
315. Interestingly, this requirement that the goods be in the process of exportation in order to claim the immunity appears to be an alternative justification for the Court’s decision in Pace. The goods in Pace had not entered the
Maintaining a constant and reliable understanding of what is the process of exportation and when it starts and ends is essential to capturing a workable Export Clause formula. The straightforward Empresa definition may not be up to the task. Empresa defines when property has left the state such that it may no longer be subject to property taxes, however, it fails to address taxes which fall upon the process of exportation rather than on property. Nor does it adequately address excise taxes or sales taxes. Fairbank, Hvosleif, Thames & Mersey, and IBM all involved taxes on the process of exportation and seem to indicate that a tax on the process of exportation, by definition, falls within the temporal limitation. The harder question arises when an excise tax or tax on a sale falls upon articles exported. A.G. Spalding invalidated a tax on goods in a warehouse where the tax accrued on the sale for export and the sale for export committed the goods to the carrier for export.316 Turpin refused to invalidate a tax on goods in a warehouse because it was not clear that the goods would in fact be exported.317 Peck held that an income tax on net profits accrued after the exportation process had ceased and thus was not subject to an Export Clause ban.318 Depending upon the exaction in question, the various factors may need to be considered to determine whether the export process has begun and whether it has ended.319

Once the nature of the prohibited exactions and the window of protection is established, the remaining inquiry is what protection is afforded. The only limitation on the prohibition is

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316. See A.G. Spalding, 262 U.S. at 70; cf. Cornell, 192 U.S. at 427 (stating that a manufacturing tax on cheese committed to export may accrue on goods in the process of exportation).
317. See Turpin, 117 U.S. at 507.
318. See Wm. E. Peck & Co. v. Lowe, 247 U.S. 165, 175 (1918).
319. A thorough examination of the temporal parameters of “export” within the meaning of the Export Clause is beyond the scope of this Article. Given the variety of exactions which may arise and the various contexts that are possible, we would suggest that the Empresa Siderurgica approach is merely a starting point.
that it must be "laid on articles exported." The foregoing phrase not only connotes a temporal element of the definition, it also connotes a physical element to the definition.\textsuperscript{321} Exactions must be connected to (laid on) the articles exported. Connecting an exaction to an article occurs when the exaction is derived from the article—when the exaction is calculated with reference to the article. The articles, however, incorporate a variety of attributes: weight, value, shape, size and amount. Thus, where the amount of a charge is calculated by such an attribute—value, quantity, weight or size of an export—the exaction could be said to be "laid on the article exported." In A.G. Spalding, the Court invalidated a tax based upon the value of the exported articles.\textsuperscript{322} The tax in U.S. Shoe offended the Export Clause because it was based upon the value of the articles exported.\textsuperscript{323}

It is not difficult to imagine that in some instances separate documents may represent the exports such that a tax on

\textsuperscript{320} To some extent the questions of whether a tax relates to the process of exportation and whether it is "on the goods" are somewhat related. Where an exaction is calculated without reference to the goods it would seem likely that the exaction would also not be related to the process of exportation. See, e.g., Turpin, 117 U.S. at 507; Pace v. Burgess, 92 U.S. 372, 376 (1875).

\textsuperscript{321} The importance of the term "laid" as connoting a physical attachment to the goods is significant, as a physical attachment may not necessarily be dispositive in determining the existence of a tax when other constitutional limitations are concerned. In fact, in Fairbank the Court pointed to Nicol v. Ames, 173 U.S. 509 (1899), to explain that when a tax fell on something other than the goods, it was to be a "direct tax" subject to the rule of apportionment. Fairbank v. United States, 181 U.S. 283, 293 (1901). In Nicol, the Court considered a stamp duty which required a tax "[u]pon each sale, agreement of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery ... ." Id. (citing Nicol, 173 U.S. at 509). The Court in Fairbank noted:

We sustained that tax as a tax upon the privilege or facilities obtained by dealings on exchange, saying: "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

\textit{Id.} (quoting Nicol, 173 U.S. at 521). The tax in Nicol was placed on the value of the merchandise sold at the Chicago exchange. See \textit{id}.

\textsuperscript{322} The statute under attack in A.G. Spalding provided that "there shall be levied ... [u]pon all ... baseball bats [and] ... balls of all kinds ... sold by the manufacturer ... a tax equivalent to three per centum of the price for which so sold." A.G. Spalding & Bros. v. Edwards, 285 F. 784, 785 (1922), rev'd, 262 U.S. 66 (1923).

\textsuperscript{323} See United States v. United States Shoe Corp., 523 U.S. 360, 369 (1998) ("[T]he HMT is determined entirely on an \textit{ad valorem} basis.").
the documents would be a tax on the exports themselves. These documents would stand in place of the exports when they are essential to some other element of the exportation process (e.g., bills of lading or export visas). In *Fairbank*, the Court struck down a flat tax on bills of lading because a bill of lading was necessary for each export shipment, and thus the tax was a per shipment tax on exports. Likewise, in *Hvoslef*, the Court struck down a tax imposed upon charter parties for export, as such a tax was directly on the exportation process.

Once again, maintaining a constant and reliable understanding of the scope of the process of exportation is essential to a workable Export Clause standard. Certainly, the process of exportation extends beyond the mere physical goods. Yet the connection to the process cannot be so derivative as to reach exactions which are not "laid," temporally at least, during the process of exportation. In attempting to capture the entire exportation process within the constitutional prohibition, the Court has sometimes "linked" private services (e.g., the service of providing insurance) to the process of exportation. The Court has linked services to the process of exportation by subjectively determining that a service is "inextricably tied" to the exportation process.

Thus, in *Thames & Mersey*, the plaintiff brought an action to recover the amount paid as stamp taxes upon policies insuring certain exports against marine risks. The Supreme Court inquired whether the tax was "so directly and closely related to the 'process of exporting' that the tax was in substance a tax upon the exportation and hence within the constitutional prohibition." The Court held that the insurance upon goods was such a necessity upon exportation that a tax upon such

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325. *See id.* at 293-94 (citing Almy v. California, 65 U.S. 169, 174 (1860)). "A bill of lading... is invariably associated with every cargo of merchandise exported... and consequently a duty upon that is, in substance and effect, a duty on the article exported." *Id.* at 294.
326. *See United States v. Hvoslef*, 237 U.S. 1, 17 (1914) ("The charters were for the exportation; they related to it exclusively; they serve no other purpose. A tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports.").
329. *Id.* at 25.
policies was, in effect, a tax upon the goods themselves and as such, a violation of the Export Clause.\(^{330}\)

However, we believe that the Court's examination of the service, rather than the exaction, led it down the wrong path. We contend that in order to determine whether a tax falls within the constitutional prohibition, the text of the Export Clause and the cases indicate that courts should focus on whether the exaction is tied to the export or the process of exportation. A tax is tied to an export when it is calculated based upon an attribute of the export or the exportation process. Thus, a tax violates the Export Clause if placed upon a service tied to the process of exportation via an attribute of the goods, i.e., placed upon an insurance policy and measured by the value of the goods.

The subjective approach put forth in \textit{Thames & Mersey} was left untouched in \textit{IBM}. The dissent in \textit{IBM} noted the Court's failure to perform an analysis as to whether an exaction was sufficiently tied to the process of exportation. In a footnote, the Court's majority opinion avoided addressing the \textit{Thames & Mersey} misstep:

The Court has never held that the Export Clause prohibits only direct taxation of goods in export transit. In \textit{Brown v. Maryland}, Chief Justice Marshall expressed in dicta his skepticism that a federal occupational tax on exporters could pass scrutiny under the Export Clause.\ldots ("[W]ould government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?"). In \textit{Fairbank}, \textit{Hvoslef}, and \textit{Thames & Mersey}, we struck down taxes that were not assessed directly on goods in export transit, but which the Court found to be so closely related as to be effectively a tax on the goods themselves. We have never repudiated that principle,\textit{ but neither have we ever carefully defined how we decide whether a particular federal tax is sufficiently related to the goods or their value to violate the Export Clause.} To the extent the issue was raised in the petition for certiorari, the Government failed to address the issue in its brief on the merits and therefore has abandoned it.\(^{331}\)

\(^{330}\) The Court noted correctly that a tax on the marine policies was indeed a tax upon exportation and distinguished it from a tax upon the goods themselves not imposed during the process of exportation. "It is manifest that we are not called upon to deal with transactions which merely anticipate exportation, or with goods that are not in the course of being actually exported." \textit{Id.} (citations omitted).

\(^{331}\) \textit{United States v. IBM Corp.}, 517 U.S. 843, 855 n.3 (emphasis added) (citations omitted).
Thus, although Justice Thomas's opinion appropriately rejected the Import-Export Clause and Commerce Clause precedent to limit the scope of the Export Clause, he declined to articulate the complete scope of the Export Clause. Defining this scope may have required the Court to reexamine its precedent in *Thames & Mersey*. We would agree with the dissent in *IBM* that such an exercise is essential.

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 & Mersey* . . . 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.\textsuperscript{32}

In effect, the *IBM* Court got half-way there. It rejected precedents other than Export Clause precedent to limit the scope of the Export Clause. Yet, it failed to positively define its scope. Had it done so, we believe the Supreme Court would not subsequently have needed to create the fiction of the user fee exception in *U.S. Shoe*.

We suggest that the Court should have considered whether the tax was sufficiently tied to the process of exportation or the exports themselves, so as to be "laid on articles exported." Thus, if the same tax were imposed on insurance premiums, but calculated without connection to the value, size or quantity of the underlying good (as in *Pace*), such a tax would not trigger the Export Clause.

The tax in *Pace*, calculated without reference to the goods, passes muster under the Export Clause not because it is a user fee, but because it is not "laid on articles exported." The exaction in *Pace* was not calculated with reference to any attribute of the good or the process of exportation.\textsuperscript{33} By examining the exaction, rather than the service provided, the *U.S. Shoe* Court could have avoided the slippery slope of insulating collateral export services without resorting to a Commerce Clause analysis.

Just as it would be too broad to say that articles which may at some time be exports should be free at all times of governmental burden, the government is not required to refrain from assessing all activities which may relate in some way to exports

\textsuperscript{32} Id. at 869 (Kennedy, J., dissenting).
\textsuperscript{33} See supra notes 159-66 and accompanying text.
or the process of exportation. Yet, Commerce Clause regulations which impose permissible exactions, even in light of the Export Clause, by definition will most often fall outside of the text-based mandate of the Export Clause. Such burdens will not be limited by the Export Clause in cases where they do not fall upon the export, i.e., they are not calculated based upon an attribute of the export or the process of exportation. Interestingly, the Court in *Thames & Mersey* seemed to make this distinction. In distinguishing the tax on the marine insurance policies from taxes on goods actually in the process of exportation, the Court stated that it was not concerned "in the present case, with the taxation of the insurance business, as such...."\(^{334}\)

Therefore, it is quite possible for an otherwise valid Commerce Clause exaction to be prohibited by the Export Clause. Likewise, it is possible to construct a Commerce Clause exaction which complies with the Export Clause. For example, if the tax in *U.S. Shoe* were calculated based on the use of the port rather than based on an attribute of the article exported, it would not have offended the Export Clause prohibition. This would be true even if such fees were either assessed by the government on the exporter, but calculated based on the use of the port, or assessed by the government on the transport company based on port use, but passed on by the transport company to the exporter by a charge calculated based on an attribute of the goods. In either case these valid user fees would not come within the purview of the Export Clause because the fee imposed by the government would not have been "laid on articles exported." Rather it would have been laid on port use, with which the Export Clause has no quarrel.\(^{335}\) As discussed, the concerns of the Framers and the principles they embodied in the Export Clause relate to the hindrance of foreign trade resulting from political manipulations.\(^{336}\) Congress, in choosing the method for placing burdens on exports, is subject to political influence; this power for the government was a very specific

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335. Although port use is related to exportation, the limit of the Export Clause prohibition may be drawn at some point. We suggest in this Article that the limit should be drawn at the limit clearly suggested by the text and precedent of the clause.

336. See *MADISON, supra* note 70, at 498-99.
evil which the Framers envisioned, feared and sought to prevent.\textsuperscript{337}

Interestingly, at oral argument before the Supreme Court in \textit{U.S. Shoe}, the Deputy Solicitor General responded to the complaint that an \textit{ad valorem} tax, such as the HMT, was not a user fee by stating that what he believed to be a true user fee (one not based on value but on a fair approximation of use) would actually be more of a burden on exports and therefore contrary to the underlying policy of the Export Clause. Such a true user fee would hinder exports, the government argued, because it would not be based upon the value of exports or their profitability and therefore would be contrary to the purpose of the Export Clause. Alternatively, the government argued that the assessment was a user fee on port use, but that calculation of a user fee necessarily involves approximation of the fees to be charged. In this argument, the government claimed that the \textit{ad valorem} basis of calculation was merely the best method of approximating the benefit received by the exporter from the port use.\textsuperscript{338} Although these arguments may be enticing to some, it is crucial to recognize that they do not address the relevant issue, that is, whether the exaction undermines the very interests the Framers sought to protect. The Framers did not seek to preserve the least burdensome, most fair, or most useful exactions on exports, they sought to prohibit all burdens on articles exported. Any retrenchment from this position threatens the principles embodied in the text of the clause.

CONCLUSION

Explicating the meaning of the Export Clause is important to maintain the protection it provides even when that protec-

\textsuperscript{337} Arguably, the Framers specific concerns arose when Congress enacted the HMT. In oral argument the \textit{U.S. Shoe} Court remarked on Congress's failure to enact a tonnage rather than a value based tax. The Court's questioning implied that Congress's choice may have been influenced by Senator Hatfield, whom Justice Scalia remarked hailed from the timber state of Oregon. \textit{See} Transcript of Oral Argument, United States v. United States Shoe Corp., 523 U.S. 360 (1998) (No. 97-372), \textit{available in} 1998 WL 102578, at *8-9 (Mar. 4, 1998).

\textsuperscript{338} This method would state that the most equitable way of allocating the costs of port use is to those who benefit most from its service. Thus, exporters with high value items derive more benefit from being able to transport and sell their items than sellers of low value items. Apart from the constitutional arguments we have presented, this position is disputable in that even accepting this arguendo, benefit would still not be best measured based on the value of the goods, but rather by profit margin.
tion may sacrifice another worthy and otherwise constitutional exaction. A workable explication began in *IBM*. *IBM* failed to complete its task. The facts of *U.S. Shoe* did not require that the Court continue *IBM*'s work in order to reach the correct result in *U.S. Shoe*. As a result, *U.S. Shoe* mistakenly opened the door for a user fee exception to the Export Clause. A user fee exception to the Export Clause cannot be supported by precedent. Moreover, it would have been better for the Court simply to continue the explication process begun in *IBM* and set forth a definition of what constitutes an Export Clause tax or duty, instead of defining what constitutes a user fee exception to an Export Clause tax or duty.

We believe that we have set forth a workable Export Clause definition as an exaction which:

1) arises during the process of exportation; and
2) is calculated based upon the export or the process of exportation.

The foregoing two-part test reflects the text of the Export Clause, as well as its spirit. It is supported by the Export Clause precedent and is consistent with other constitutional provisions. Given the size of the taxpayer refunds estimated in *U.S. Shoe* alone, it is certain that future Export Clause challenges will follow. We believe the foregoing analysis provides a clear, workable and principled definition for such challenges.