Section 4371.—Imposition of Tax

Ct.D. 2060

SUPREME COURT OF THE UNITED STATES

No. 95–591

UNITED STATES, PETITIONER v. INTERNATIONAL BUSINESS MACHINES CORPORATION

[517 U.S.—]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

June 10, 1996

Syllabus

Pursuant to § 4371 of the Internal Revenue Code, respondent International Business Machines Corporation (IBM) paid a tax on insurance premiums remitted to foreign insurers to cover shipments of goods to its foreign subsidiaries. When its refund claims were denied, IBM filed suit in the Court of Federal Claims, contending that § 4371's application to policies insuring export shipments violated the Export Clause, which states that ''[n]o Tax or Duty shall be laid on Articles exported from any State.'' The court agreed, rejecting the Government's argument that *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19—in which this Court held that a federal stamp tax on policies insuring marine risks could not, under the Export Clause, be constitutionally applied to policies covering export shipments—had been superseded by subsequent decisions interpreting the Import-Export Clause, which states in relevant part, ''No State shall . . . lay any Imposts or Duties on Imports or Exports.'' The Court of Appeals affirmed.

Held: The Export Clause prohibits assessment of nondiscriminatory federal taxes on goods in export transit.

(a) While this Court has strictly enforced the Export Clause's prohibition against federal taxation of goods in export transit and certain closely related services and activities, see, *e.g., Thames & Mersey, supra,* it has not exempted pre-export goods and services from ordinary tax burdens or exempted from federal taxation various services and activities only tangentially related to the export process, see, *e.g., Cornell* v. *Coyne*, 192 U.S. 418. Conceding that the tax assessed here violates the Export Clause under *Thames & Mersey*, the Government asks that the case be overruled because its underlying theory has been rejected in the context of the Commerce and Import-Export Clauses and those Clauses have historically been interpreted in harmony with the Export Clause.

(b) When this Court expressly disavowed its early view that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288–289, it resolved a long struggle over the meaning of the nontextual negative command of that Clause. 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 dormant Commerce Clause's scope cannot govern Export Clause interpretation. Cf. *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U. S. 69, 75–76.

(c) While one may question *Thames & Mersey*'s finding that a tax on policies insuring exports is functionally the same as a tax on exportation itself, the Government apparently has chosen not to do so here. Under the principles that animate the policy of *stare decisis*, the Court declines to overrule *Thames & Mersey*'s long-standing precedent, which has caused no uncertainty in commercial export transactions, on a theory not argued by the parties.

(d) This Court's recent Import-Export Clause cases do not require that *Thames & Mersey* be overruled. 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*, 423 U.S. 276, and *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, valid, the Court recognized that the Import-Export Clause's absolute ban on ''Imposts or Duties'' is not a ban on every tax. Because impost and duty are thus narrower terms than tax, a particular state assessment might be beyond the Import-Export Clause's reach, while an identical federal assessment might be subject to the Export Clause. The word ''Tax'' has a common, and usually expansive, meaning that should not be ignored. The Clauses were also intended to serve different goals. The Government's policy argument—that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes—cannot be squared with the Clause's broad language. The better reading is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all. See *Fairbank* v. *United States*, 181 U. S. 283.

(e) Even assuming that *Michelin* and *Washington Stevedoring* govern the Export Clause inquiry here, those holdings do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit.

59 F. 3d 1234, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which GINSBURG, J., joined. STEVENS, J., took no part in the consideration or decision of the case.

JUSTICE THOMAS delivered the opinion of the Court.

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

I

Section 4371 of the Internal Revenue Code imposes a tax on insurance premiums paid to foreign insurers that are not subject to the federal income tax.[1] 26 U. S. C. § 4371 (1982 ed.). International Business Machines Corporation (IBM) ships products that it manufactures in the United States to numerous foreign subsidiaries and insures those shipments against loss. When the foreign subsidiary makes the shipping arrangements, the subsidiary often places the insurance with a foreign carrier. When it does, both IBM and the subsidiary are listed as beneficiaries in the policy.

IBM filed federal excise tax returns for the years 1975 through 1984, but reported no liability under § 4371. The IRS audited IBM and determined that the premiums paid to foreign insurers were taxable under § 4371 and that IBM—as a named beneficiary of the insurance policies—was liable for the tax. The IRS assessed a tax against IBM for each of those years.

IBM paid the assessments and filed refund claims, which the IRS denied. IBM then commenced suit in the Court of Federal Claims, contending that application of § 4371 to policies insuring its export shipments violated the Export Clause. The focus of the suit was this Court's decision in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), in which we held that a federal stamp tax on policies insuring marine risks could not, under the Export Clause, be constitutionally applied to policies covering export shipments. The United States argued that the analysis of *Thames & Mersey* is no longer valid, having been superseded by subsequent decisions interpreting the Import-Export Clause—specifically, *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976), and *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734 (1978). The Court of Federal Claims noted that this Court has never overruled *Thames & Mersey* and ruled that application of § 4371 to policies insuring goods in export transit violates the Export Clause. 31 Fed. Cl. 500 (1994). The Court of Appeals for the Federal Circuit affirmed. 59 F. 3d 1234 (1995). We agreed to hear this case to decide whether we should overrule *Thames & Mersey*. 516 U.S. __ (1995).

II

The Export Clause states simply and directly: ''No Tax or Duty shall be laid on Articles exported from any State.'' U.S. Const., Art. I, § 9, cl. 5. We have had few occasions to interpret the lan-

[1] The tax does not apply if a policy issued by a foreign insurer is ''signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business.'' 26 U. S. C. § 4373(1) (1982 ed.).

guage of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term ''Articles exported'' to permit federal taxation of pre-export goods and services.

Our early cases upheld federal assessments on the manufacture of particular products ultimately intended for export by finding that pre-export products are not ''Articles exported.'' See *Pace* v. *Burgess*, 92 U. S. 372 (1876); *Turpin* v. *Burgess*, 117 U. S. 504 (1886); *Cornell* v. *Coyne*, 192 U. S. 418 (1904). *Pace* and *Turpin* both involved a federal excise tax on tobacco products. In *Pace*, though tobacco intended for export was exempted from the tax, the exemption itself was subject to a per-package stamp charge of 25 cents. When a tobacco manufacturer challenged the stamp charge, we upheld the charge on the basis that the stamps were designed to prevent fraud in the export exemption from the excise tax and did not, therefore, represent a tax on exports. 92 U.S., at 375. When Congress later repealed the 25-cent charge for the exemption stamp in a statute that referred to the stamp as an ''export tax,'' another manufacturer sued to recover the money it had paid for the exemption stamps. See *Turpin*, *supra*. Without disturbing the prior ruling in *Pace* that the stamp charge was not a tax on exports, 117 U.S., at 505, we 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.*, at 507. We said that the plaintiffs would have had no Export Clause claim even if there had been no exemption from the excise because the goods were not in the course of exportation and might never be exported. *Ibid.* *Turpin* broadly suggested that the Export Clause prohibits both taxes levied on goods in the course of exportation and taxes directed specifically at exports.

In *Cornell*, the Court addressed whether the Export Clause prohibited application of a federal excise tax on filled cheese manufactured under contract for export. Looking to the analysis set out in *Turpin*, we rejected the contention that the Export Clause bars application of a nondiscriminatory tax imposed before the product entered the course of exportation. ''The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.'' *Cornell*, *supra*, at 427. *Pace*, *Turpin*, and *Cornell* made clear that nondiscriminatory pre-exportation assessments do not violate the Export Clause, even if the goods are eventually exported.

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. See *Fairbank* v. *United States*, 181 U. S. 283 (1901); *United States* v. *Hvoslef*, 237 U. S. 1 (1915); *Thames & Mersey Marine Ins. Co.* v. *United States*, *supra*. In *Fairbank*, for example, we addressed a federal stamp tax on bills of lading for export shipments imposed by the War Revenue Act of 1898. The Court found that the tax was facially discriminatory, *Fairbank*, *supra*, at 290, and, though not directly imposed on the goods being exported, the tax was nevertheless ''in effect a duty on the article transported,'' 181 U. S., at 294. Consequently, the tax fell directly into the category of forbidden taxes on exports defined in *Turpin*. In striking down the tax, we said:

> ''The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such 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 . . . .'' 181 U. S., at 290.

Hvoslef and *Thames & Mersey* differed from *Fairbank* in that the taxes imposed in those cases—on ship charters and marine insurance, respectively—did not facially discriminate against exports. The Court nonetheless prohibited the application of those generally applicable, nondiscriminatory taxes to the transactions at issue because each tax was, in effect, a tax on exports. The type of charter contract at issue in *Hvoslef* was ''in contemplation of law a mere contract of affreightment,'' 237 U.S., at 16, and we found that the tax, as applied to charters for exportation, ''was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports,'' *id.*, at 17. Likewise, in *Thames & Mersey*, we found that ''proper insurance during the voyage is one of the necessities of exportation'' and that ''the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves.'' 237 U. S., at 27.

Shortly after *Hvoslef* and *Thames & Mersey*, the Court rejected an attempt to shield from taxation the net income of a company engaged in the export business. *William E. Peck & Co.* v. *Lowe*, 247 U. S. 165 (1918). In accordance with the analysis set out in *Turpin*, we found both that the tax was nondiscriminatory and that ''[i]t is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.'' 247 U. S., at 174.

Only a few years later the Court struck down the application of a tax on the export sale of certain baseball equipment. See *A. G. Spalding & Bros.* v. *Edwards*, 262 U. S. 66 (1923). Although the tax was clearly nondiscriminatory, we explained that the goods being taxed had entered the course of exportation when they were delivered to the export carrier. *Id.*, at 70. Because the taxable event, the transfer of title, occurred at the same moment the goods entered the course of exportation, we held that the tax could not constitutionally be applied to the export sale. *Id.*, at 69–70.

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

III

The Government concedes, as it did below, that this case is largely indistinguishable from *Thames & Mersey* and that, if *Thames & Mersey* is still good law, the tax assessed against IBM under § 4371 violates the Export Clause. See

Tr. of Oral Arg. 5; 59 F. 3d, at 1237. The parties apparently agree that there is no legally significant distinction between the insurance policies at issue in this case and those at issue in *Thames & Mersey*, and, accordingly, the Government asks that we overrule *Thames & Mersey.*

The Government asserts that the Export Clause permits the imposition of generally applicable, nondiscriminatory taxes, even on goods in export transit. The Government urges that we have historically interpreted the Commerce, Import-Export, and Export Clauses in harmony and that we have rejected the theory underlying *Thames & Mersey* in the context of the Commerce and Import-Export Clauses. Accordingly, the Government contends that our Export Clause jurisprudence, symbolized by *Thames & Mersey*, has become an anachronism in need of modernization. The Government asks us to reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as we have under the Commerce Clause and, it argues, under the Import-Export Clause.

A

The Government contends that our dormant Commerce Clause jurisprudence has shifted dramatically and that our traditional understanding of the Export Clause, which is based partly on an outmoded view of the Commerce Clause, can no longer be justified. It is true that some of our early Export Clause cases relied on an interpretation of the Commerce Clause that we have since rejected. In *Fairbank*, 181 U. S., at 298–300, for example, we analogized to *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 497 (1887), in which we held that ''[i]nterstate commerce cannot be taxed at all [by the States], even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.'' Referring to the categorical ban on taxation of interstate commerce declared in *Robbins*, we likened the scope of the Commerce Clause's ban on state taxation of interstate commerce to the Export Clause's ban on federal taxation of exports. *Fairbank*, *supra*, at 300; see also *Hvoslef*, 237 U. S., at 15 (''The court [in *Fairbank*] found an analogy in the construction which had been given to the commerce clause in protecting interstate commerce from state legislation imposing direct burdens''). After *Thames & Mersey*, the Commerce Clause construction espoused in *Robbins* fell out of favor, see *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938) (''It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business''), and we expressly disavowed that view in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 288—289 (1977).

Our rejection in *Complete Auto* of much of our early dormant Commerce Clause jurisprudence did not, however, signal a similar rejection of our Export Clause cases. Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view.[2] 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. Cf. *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U. S. 69, 75–76 (1946) (distinguishing accommodations made under the Commerce Clause from the express textual prohibition of the Import-Export Clause).

B

The Government's primary assertion is that modifications in our Import-Export Clause jurisprudence require parallel modifications in the Export Clause context. More specifically, the Government argues that our decisions in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976), and *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734 (1978), establish that States may impose generally applicable, nondiscriminatory taxes even if those taxes fall on imports or exports. The Export Clause, the Government contends, is no more restrictive.

The Import-Export Clause, which is textually similar to the Export Clause, says in relevant part, ''No State shall . . . lay any Imposts or Duties on Imports or Exports.'' U. S. Const., Art. I, § 10, cl. 2. Though minor textual differences exist and the Clauses are directed at different sovereigns, historically both have been treated as broad bans on taxation of exports, and in several cases the Court has interpreted the provisions of the two Clauses in tandem. For instance, in the Court's first decision interpreting the Import-Export Clause, Chief Justice Marshall said:

> ''The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited.'' *Brown* v. *Maryland*, 12 Wheat. 419, 445 (1827).

See also *Kosydar* v. *National Cash Register Co.*, 417 U. S. 62, 67, n. 5 (1974); *Hvoslef*, *supra*, at 13–14; *Cornell*, 192 U. S., at 427–428; *Turpin*, 117 U. S., at 506–507. The Government argues that our longstanding parallel interpretations of the two Clauses require judgment in its favor. We disagree.

In *Michelin*, we addressed whether a State could impose a nondiscriminatory ad valorem property tax on imported goods that were no longer in import transit. Michelin, which imported tires from Canada and France and stored them in a warehouse, argued that Georgia could not constitutionally assess ad valorem property taxes against its imported tires. We explained that ''[t]he Framers of the Constitution . . . sought to alleviate three main concerns'': (i) ensuring that the Federal Government speaks with one voice when regulating foreign commerce; (ii) preserving import revenues as a major source of federal revenue; and (iii) preventing disharmony likely to be caused if seaboard States taxed goods coming through their ports. *Michelin*, *supra*, at 285–286. The Court found that nondiscriminatory ad valorem taxes violate none of these policies. A century earlier, however, the Court had ruled that, under the ''original package doctrine,'' a State could not impose such a tax until the goods had lost their

[2] The Commerce Clause is an express grant of power to Congress to ''regulate Commerce . . . among the several States.'' U. S. Const., Art. I, § 8, cl. 3. It does not expressly prohibit the States from doing anything, though we have long recognized negative implications of the Clause that prevent certain state taxation even when Congress has failed to legislate. See *Fulton Corp.* v. *Faulkner*, 516 U. S. __, __ (1996) (slip op., at 4–5); *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 309 (1992).

character as imports and had been incorporated into the mass of property in the State. *Low* v. *Austin*, 13 Wall. 29, 34 (1872). The *Michelin* Court overruled *Low* and held that the nondiscriminatory property tax levied on Michelin's inventory of imported tires did not violate the Import-Export Clause because it was not an impost or duty on imports. 423 U. S., at 301. See also *Limbach* v. *Hooven & Allison Co.*, 466 U. S. 353 (1984) (reaffirming that *Michelin* expressly overruled the original package doctrine altogether and not merely *Low* on its facts).

Two years later, in *Washington Stevedoring*, we upheld against an Import-Export Clause challenge a nondiscriminatory state tax assessed against the compensation received by stevedoring companies for services performed within the State. The Court found that Washington's stevedoring tax did not violate the policies underlying the Import-Export Clause. Unlike the property tax at issue in *Michelin*, the activity taxed by Washington occurred while imports and exports were in transit. That fact was not dispositive, however, because the tax did not fall on the goods themselves:

> ''The levy reaches only the business of loading and unloading ships or, in other words, the business of transporting cargo within the State of Washington. Despite the existence of the first distinction, the presence of the second leads to the conclusion that the Washington tax is not a prohibited 'Impost or Duty' when it violates none of the policies [that animate the Import-Export Clause].'' *Washington Stevedoring*, *supra*, at 755.

Relying on *Canton R. Co.* v. *Rogan*, 340 U. S. 511 (1951), which upheld a tax on the gross receipts of a railroad that operated a marine terminal and transported imports and exports, we ruled in *Washington Stevedoring* that taxation of transportation services, whether by railroad on the docks or by stevedores loading and unloading ships, did not relate to the value of the goods and could not be considered imposts or duties on the goods themselves. 435 U.S., at 757.

1

A tax on policies insuring exports is not, precisely speaking, the same as a tax on exports, but *Thames & Mersey* held that they were functionally the same under the Export Clause. We noted in *Washington Stevedoring* that one may question the finding in *Thames & Mersey* that the tax was essentially a tax upon the exportation itself. 435 U. S., at 756, n. 21. We expressed concern that ''[t]he basis for distinguishing *Thames & Mersey* is less clear'' than for *Fairbank* or *Richfield Oil*, because the marine insurance policies in *Thames & Mersey* arguably ''had a value apart from the value of the goods.'' 435 U. S., at 756, n. 21. Nevertheless, the Government apparently has chosen not to challenge that aspect of *Thames & Mersey* in this case. Tr. of Oral Arg. 5, 8–9, 40. When questioned on that implicit concession at oral argument, the Government admitted that it ''chose not to'' argue that § 4371 does not impose a tax on the goods themselves. *Id.*, at 9. It would be inappropriate for us to reexamine in this case, without the benefit of the parties' briefing, whether the policies on which § 4371 is assessed are so closely connected to the goods that the tax is, in essence, a tax on exports.[3] See, *e.g.*, *id.*, at 27–28 (''[T]he record doesn't reveal the sort of statistical information Justice Breyer was suggesting might be relevant'' to determine ''whether this is sufficiently indirect that it's not a tax on exports, . . . because the Government has conceded throughout that they are not disputing that this tax, if discriminatory, is in violation of the Constitution'').

Stare decisis is a ''principle of policy,'' *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and not ''an inexorable command,'' *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). Applying that policy, we frequently have declined to overrule cases in appropriate circumstances because *stare decisis* ''promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'' *Id.*, at 827. ''[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Id.*, at 842 (SOUTER, J., concurring) (quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)).

Though from time to time we have overruled governing decisions that are ''unworkable or are badly reasoned,'' *Payne*, *supra*, at 827; see *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944), we have rarely done so on grounds not advanced by the parties. *Thames & Mersey* has been controlling precedent for over 80 years, and the Government does not, indeed could not, argue that the rule established there is ''unworkable.'' Despite the dissent's speculative protestations to the contrary, *post*, at 9–11, there is simply no evidence that *Thames & Mersey* has caused or will cause uncertainty in commercial export transactions. The principles that animate our policy of *stare decisis* caution against overruling a long-standing precedent on a theory not argued by the parties, and we decline to do so in this case.[4]

2

What the Government does argue is that our Import-Export Clause cases require us to overrule *Thames & Mersey*[5]. We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. Though we have frequently interpreted the Clauses together, see *supra*, at 9–10, our more

[3] The Court has never held that the Export Clause prohibits only direct taxation of goods in export transit. In *Brown* v. *Maryland*, 12 Wheat. 419 (1827), Chief Justice Marshall expressed in dicta his skepticism that a federal occupational tax on exporters could pass scrutiny under the Export Clause. *Id.*, at 445 (''[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 *Fairbank*, *Hvoslef*, and *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, 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. See *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. ___, ___ (1994) (slip op., at 15); *Russell* v. *United States*, 369 U. S. 749, 754, n. 7 (1962).

[4] The dissent suggests that ''the Court assumes the statute to be invalid rather than deciding it to be so.'' *Post*, at 2. We make no such assumptions. Rather, we begin with a longstanding decision that, by all accounts, controls this case. Even the Government agrees that Congress enacted a law whose application in this case directly contravenes our holding in *Thames & Mersey*. We sit not to condemn § 4371, but rather to determine whether it is to be saved by overruling binding precedent.

[5] The dissent suggests that we make a ''serious mistake'' in deciding whether a nondiscriminatory tax on goods violates the Export Clause, *post*, at 19. We do not agree that it is a mistake to address the arguments actually advanced by the parties.

recent Import-Export Clause cases, on which the Government relies, caution that meaningful textual differences exist and should not be overlooked. The Export Clause prohibits Congress from laying any ''Tax or Duty'' on exports, while the Import-Export Clause prevents the States from laying any ''Imposts or Duties'' on imports or exports. In both *Michelin* and *Washington Stevedoring*, we left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause. Though we found in *Michelin* that a nondiscriminatory state property tax does not transgress the policy dictates of the Import-Export Clause, we also recognized that the Import-Export Clause is ''not written in terms of a broad prohibition of every 'tax,' '' and that impost and duty are narrower terms than tax. 423 U. S., at 290–293. In *Washington Stevedoring*, we likewise rejected the assertion that the Import-Export Clause absolutely prohibits all taxation of imports and exports. 435 U. S., at 759. 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.'' *Ibid.*

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 does not create the evils the Clause was specifically intended to eliminate.'' *Michelin*, *supra*, at 293–294. 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.'' 423 U. S., at 286. We are not prepared to say that the word ''Tax'' is ''sufficiently ambiguous,'' *id.*, at 293, that we may ignore its common, and usually expansive,[6] 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.''

It is not intuitively obvious that *Michelin*'s three-pronged analysis of the Framers' concerns is really just another way of stating a nondiscrimination principle. But even if it were, the Government cannot reasonably rely on *Michelin* to govern the Export Clause because *Michelin* drew its analysis around the phrase ''Imposts or Duties'' and expressly excluded the broader term ''Tax'' that appears in the Export Clause. *Michelin* marked a more permissive approach to state taxation under the Import-Export Clause only by distinguishing the presumptively stricter language of the Export Clause. We agree with the Government that *Michelin* informs our decision in this case, but not in a way that supports the Government's position. It is simply no longer true that the Court perceives no substantive difference between the two Clauses.

We are similarly hesitant to adopt the Import-Export Clause's policy-based analysis without some indication that the Export Clause was intended to alleviate the same ''evils'' to which the Import-Export Clause was directed. Unlike the Import-Export Clause, which was intended to protect federal supremacy in international commerce, to preserve federal revenue from import duties and imposts, and to prevent coastal States with ports from taking unfair advantage of inland States, see *Michelin*, *supra*, at 285–286, 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.

As a purely historical matter, the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South. See 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 95, 305–308, 359–363 (rev. ed. 1966). The Government argues that this ''narrow historical purpose'' justifies a narrow interpretation of the text and that application of § 4371 to policies insuring exports does not conflict with the policies embodied in the Clause. Brief for United States 32–34. While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language. See, *e. g.*, 2 Farrand, Records of the Federal Convention, at 220 (Mr. King: ''In two great points the hands of the Legislature were absolutely tied. The importation of slaves could not be prohibited—exports could not be taxed''); *id.*, at 305 (''Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports''); *id.*, at 360 (Mr. Elseworth [sic]: ''There are solid reasons agst. Congs taxing exports''); *ibid.* (''Mr. Butler was strenuously opposed to a power over exports''); *id.*, at 361 (Mr. Sherman: ''It is best to prohibit the National legislature in all cases''); *id.*, at 362 (''Mr. Gerry was strenuously opposed to the power over exports'').

The Government argued for a different narrow interpretation of the Export Clause in *Fairbank*. See 181 U. S., at 292–293. Arguing that the Debates expressed a primary interest in diffusing sectional conflicts, the Government urged the *Fairbank* Court to interpret the Export Clause to permit taxation of ''the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country.'' *Id.*, at 292. We rejected that argument:

> ''If mere discrimination between the States was all that was contemplated, it would seem to follow that an *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.'' *Ibid.*

[6] Though *Michelin* discusses ''taxes'' in terms of ''every exaction,'' 423 U. S., at 290, it also suggests that at the time of the Founding ''probably only capitation, land, and general property exactions were known by the term 'tax' rather than the term 'duty,' '' *id.*, at 291. In any event, the *Michelin* Court understood that the terms used in the Export Clause were broader than those used in the Import-Export Clause.

As in *Fairbank*, we think the text of the constitutional provision provides a better decisional guide than that offered by the Government. The Government's policy argument—that the Framers intended the Export Clause to narrowly alleviate the fear of northern repression through taxation of southern exports by prohibiting only discriminatory taxes—cannot be squared with the broad language of the Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.

3

Even assuming that *Michelin* and *Washington Stevedoring* govern our Export Clause inquiry in this case, the Government's argument falls short of its goal. Our holdings in *Michelin* and *Washington Stevedoring* do not reach the facts of this case and, more importantly, do not interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit. *Michelin* involved a tax on goods, but the goods were no longer in transit. The tax in *Washington Stevedoring* burdened imports and exports while they were still in transit, but it did not fall directly on the goods themselves. This case, as it comes to us, is a hybrid in which the tax both burdens exports during transit and—as the Government concedes and our earlier cases held—is essentially a tax on the goods themselves. The Government argues that *Michelin* and *Washington Stevedoring* by analogy permit Congress to impose generally applicable, nondiscriminatory taxes that fall directly on exports in transit. Brief for United States 32 (*Michelin* and *Washington Stevedoring* ''demonstrate that, when a generally applicable, nondiscriminatory tax is at issue, the mere fact that the tax applies also to goods that are in the export or import process does not provide a constitutional immunity from taxation''). If this contention is to succeed, the Government at the very least must show that our Import-Export Clause jurisprudence now permits a State to impose a nondiscriminatory tax directly on goods in import or export transit. We think the Government has failed to make that showing.

The Court has never upheld a state tax assessed directly on goods in import or export transit. In *Michelin*, we suggested that the Import-Export Clause would invalidate application of a nondiscriminatory property tax to goods still in import or export transit. 423 U. S., at 290 (compliance with the Import-Export Clause may be secured ''by prohibiting the assessment of even nondiscriminatory property taxes on [import or export] goods which are merely in transit through the State when the tax is assessed''). See also *Virginia Indonesia Co.* v. *Harris County Appraisal Dist.*, 910 S. W. 2d 905, 915 (Tex. 1995) (invalidating application of a nondiscriminatory ad valorem property tax to goods in export transit).

We also declined to endorse the Government's theory in *Washington Stevedoring*. After reciting that the Court in *Canton R. Co.* had distinguished *Thames & Mersey*, *Fairbank*, and *Richfield Oil*, we pointed out that in those cases ''the State [or Federal Government] had taxed either the goods or activity so connected with the goods that the levy amounted to a tax on the goods themselves.'' *Washington Stevedoring*, 435 U. S., at 756, n. 21. We expressly declined to ''reach the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit,'' *id.*, at 757, n. 23, because, although the goods in that case were in transit, the tax fell on ''a service distinct from the goods and their value,'' *id.*, at 757. Thus, contrary to the Government's contention, this Court's Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit. We think those cases leave us free to follow the express textual command of the Export Clause to prohibit the application of any tax ''laid on Articles exported from any State.''

* * * * *

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

It is so ordered.