ORIGINAL

In the

# Supreme Court of the United States

SEARS, ROEBUCK AND CO. & CORPORATION,

PETITIONER,

V.

COUNTY OF LOS ANGELES AND CITY OF COMPTON,

RESPONDENT.

No. 78-1577

Washington, D. C.
January 15, 1980

Pages 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

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| SEARS, ROEBUCK AND CO., a corporation, Petitioner, | : | |
| v. | : | No. 78-1577 |
| COUNTY OF LOS ANGELES AND CITY OF COMPTON, Respondents. | : | |

Tuesday, January 15, 1980

Washington, D. C.

The above-entitled matter came on for argument at 10:36 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Jr., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW S. GARB, ESQ., 1600 One Wilshire Building, Los Angeles, California 90017; on behalf of the petitioners.

ERNEST J. BROWN, ESQ., Attorney, Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

JAMES DEXTER CLARK, Deputy County Counsel, County of Los Angeles, 648 Hall of Administration, Los Angeles, California 90012; on behalf of respondents.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Sears, Roebuck against County of Los Angeles, No. 78-1577.

Mr. Garb, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW S. GARB, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GARB: Mr. Chief Justice, and may it please the Court:

This case comes to the Court on stipulated facts. The case involves the constitutionality of California's Revenue and Taxation Code, Section 225.

That statute was enacted in 1975, following attempts by the assessors in California to impose the personal property tax on imported goods held in the State that had long been considered immune under the original package doctrine.

In order to avoid and prevent the diversion of import business from California to other States that offered more attractive tax laws, California enacted this exemption which applied to imported goods held in the State for shipment to other States.

The respondents here have attacked the statute as being unconstitutional, alleging that the exemption that was extended to imported goods held for shipment out of

the State must also be extended to interstate goods travelling through the State as well.

On the tax rule date, in 1976, the petitioner held imported goods in a warehouse in the State of California for shipment out of the State. These are precisely the type of goods that are exempt under Section 225.

QUESTION: Mr. Garb, are you going to address yourself to the standing issue of the County of Los Angeles at all?

MR. GARB: I had not intended to, Your Honor, although we believe that that issue is certainly an interesting one, and one presented in the California courts.

QUESTION: Well--

MR. GARB: I would be happy to address myself to that issue if Your Honors--

QUESTION: I, for one, would be interested, considering it a part of our Article II jurisdictional limitation.

MR. GARB: Certainly; let me address myself at this time to that issue.

We're in an interesting situation here. There is no evidence in this case that any shipper of interstate goods has ever been injured by this statute; indeed, we know f no lawsuit brought by any interestate shipper to complai about this.

We rather have ourselves in a rather anomalous situation. We have the County of Los Angeles, which is the revenue collecting authority arguing here that its parent, the State of California, that enacted an exemption statute, didn't go far enough.

And what they're contending here is that the statute should have gone further and exempted more goods.

Therefore, we have the kind of situation where there is no injured party, no evidence of actual injury to anyone in a protected class who has ever brought a case of this sort.

QUESTION: Certainly no more than injury in fact, at most.

MR. GARB: We have even no injury in fact, Your Honor. What we had in the Court of Appeals was an invalidation of this statute based on certain assumptions, certain assumed competition between goods.

And we submit not only that there was no evidence that these assumptions in fact exist in fact; but moreover, the hypothetical construct, the abstraction that was relied upon by the Court of Appeals was in fact erroneous.

And if I may address myself to that for a moment, the concept that was created by the Court of Appeals to invalidate the statute was a suggestion that somehow the Revenue and Taxation Code, Section 225, affords a competitive advantage to imported goods, when they compete with similar

domestic goods.

Now, as Mr. Justice Rehnquist pointed out, not only is there no evidence of such competition in fact, but we submit that that construct is erroneous for at least two reasons.

First, we have many States in this country that have so-called free port laws; roughly three-quarters of the States. None of these free port laws exempt locally manufactured goods that are sold within the State. Very few of those statutes exempt locally manufactured goods that are shipped to other States.

Accordingly, imported goods that are exempt under these other free port States compete with domestic goods that have been taxed, either in those States or in other States. The same type of competitive advantage that is alleged to exist as a result of 225 exists as well.

And independent of that, we have as a corollary of our Federal system the fact that States have broad autonomy to fashion their own tax systems. Indeed, we have States such as New York that have decided to impose no personal property tax whatsoever.

Therefore, when goods are imported through New York, and compete with domestic goods in other States which have been subjected to tax in those other States, as a result of the interaction between the New York statute and

the other states' tax laws, the imported goods that were free of tax that came from New York again have precisely the same type of competitive advantage that 225 of the California Revenue and Taxation Code is alleged to afford.

Now, if this type of advantage is perceived as an evil, it cannot be eradicated by striking Section 225. In fact, it could not even be eradicated by striking the free port acts of three-quarters of the States in this country.

We would submit that this problem--if this situation is perceived as a problem, the only solution would be for Congress to impose uniformity and require that all States either refrain from taxing personal property completely, or that all States tax at precisely the same rate.

And this, we would submit, goes far beyond anything that this Court has ever held or suggested; and indeed, flies in the face of basic principles of federalism in our country.

QUESTION: Mr. Garb, let me ask a curious question. Where is the Attorney General of California in this case?

MR. GARB: The Attorney General of California did not participate in this case?

QUESTION: Why not? Why isn't he here defending his statute?

MR. GARB: The Attorney General of California was not a party in terms of the plaintiffs and defendants in the

lawsuit.

QUESTION: Maybe I should ask your opponents this, but it is strange when an Attorney General is not here defending his statute. We have a case tomorrow in which he's coming and defending, and his presence is contested. He wasn't here on this one.

MR. GARB: I see. Other than participation as an amicus, he would not have had an opportunity to be involved in this case. And I can certainly represent to Your Honor that he was never asked to participate as an amicus, so I would not want there to be any inference that the Attorney General has declined to participate in defense of the statute.

QUESTION: Well, he doesn't have to be asked if a State statute is being challenged, does he?

MR. GARB: Not to my knowledge, Your Honor, but the subject was never broached. And indeed, we have never had any contact with the State Attorney General.

QUESTION: Aren't you required to notify him officially that a State statute was under attack?

MR. GARB: Mr. Justice Marshall, there is no requirement in the State of California to do that, no.

QUESTION: We had one other case with a Pennsylvania statute under fire, and the Attorney General refrained, in fact, said it was unconstitutional; we thought it was a little strange.

MR. GARB: I would think so as well.

One last point that I would like to make on the matter that we were discussing, and that is this, that we also feel that it is very unlikely that these differences in State tax laws are even taken into account by Congress and the President in fashioning tariffs, as was suggested by the Court of Appeals and is relied upon by respondent.

For as I have said, when we have some States that impose no property tax at all, other States that may tax at a high rate, other States thathave different exemptions from each other, it seems to be virtually an impossibility for Congress to take this potpourri of laws into effect in fashioning tariffs.

And even if they could somehow do that, since there are changes in these laws from time to time, it would require an almost constant monitoring by Congress of these laws. And for that reason, we also believe that this abstraction by the Court of Appeals is erroneous.

Finally--

QUESTION: May I ask another question on standing that Justice Rehnquist raised?

It's true that the--as I understand the case--if the exemption were broader, it would defeat the argument that they make. But why can't they argue that the exemption itself is unconstitutional; if you eliminate the exemption,

you'll also eliminate the disparity. And they do gain tax revenues if you hold the exemption unconstitutional.

Why doesn't that give them standing? I don't quite follow.

MR. GARB: Exempting goods from tax we know is within the purview of the legislature to do, as New York has done.

QUESTION: Yes, but if it's within a statute that generally imposes a tax, as Section 225 says the goods involved here are not subject to tax. And the County of Los Angeles says, that exemption is unconstitutional. If you knock it out, we will get tax revenue.

Why doesn't that give them standing?

MR. GARB: Because, Your Honor, as I see it, the reason that they are basing this entire attack on the statute is an alleged discrimination. They've contended that there is someone against whom the statute works in a discriminatory way.

QUESTION: And they're saying you remove the discrimination by holding the exemption unconstitutional.

MR. GARB: That is what they're saying. But we know--

QUESTION: And they will get more revenue if you do that?

MR. GARB: Correct. But we know that in

cases in which discrimination is the basis of the attack, the tests enunciated by this Court suggest, as the Court did in First Federal Savings & Loan v. the State Tax Commission, that it is necessary to see how the statute operates in fact, to see if the practical effect of this statute is to create a competitive handicap.

We know of no case--

QUESTION: But doesn't that go to the merits rather than the standing, is what I'm saying?

MR. GARB: Well, it goes to the nature of the attack; it's an attack on discrimination. And in order to prove, or to demonstrate discrimination, this Court has legitimately held that it is necessary to show that the statute in fact creates a discriminatory effect.

We know of no situation in which the effect was assumed to exist, as the Court of Appeals did in our case. And it seems to us--

QUESTION: And you say it's a discriminatory effect if the goods come from Nevada, they're subject to tax; if they come from Canada, they're not subject to tax?

MR. GARB: If they are shipped out of the State of California thereafter, correct.

QUESTION: If that's transshipped out of the city.

MR. GARB: Right.

QUESTION: And that's a discrimination--and why

isn't that a discrimination?

MR. GARB: Pardon me?

QUESTION: Why was that not a discrimination?

MR. GARB: Well, there is no--

QUESTION: I mean, maybe it's not an unconstitutional discrimination, but why isn't it at least a disparity that gives them standing? I--

MR. GARB: Well, it is a differential in treatment. However, in order to have standing to challenge the statute on discriminatory grounds--

QUESTION: You have to show the statute costs you some money.

MR. GARB: --the statute--well, you have to show if discrimination is the basis, that there is indeed a discriminated class.

QUESTION: Well, don't you also have to show more than just injury in fact, the loss of money that Justice Stevens was referring to? That you're within the zone of protected interest. And there's a two-step analysis, as I understand it from Warth against Seldon and from Barlow's and Data Processing. Injury in fact simply is not enough to confer standing.

MR. GARB: I believe that is correct, Your Honor. And my use of the term, "injured class," or "discriminated-against class," was intended to mean a class entitled to

protection under those cases, and under the doctrine--

QUESTION: Is there really a standing problem here? Didn't this case get started by the denial of an exemption?

MR. GARB: Yes it did, Your Honor.

QUESTION: And Sears applied for an exemption, claimed an exemption?

MR. GARB: It did.

QUESTION: It was denied?

MR. GARB: It was.

QUESTION: It was denied on two grounds.

MR. GARB: It was denied on--

QUESTION: Statutory, local statutory grounds, and constitutional grounds.

MR. GARB: That is correct.

QUESTION: And Sears took the decision up. Now, is there really a lack of a case or controversy when somebody--when they're about to levy a tax, and it's objected to?

MR. GARB: Well, Your Honor, I think when you perceive it--

QUESTION: That may be--I can't imagine why there's any case or controversy.

MR. GARB: Well, the standing problem that we see is that the argument throughout the brief of the respondent--

QUESTION: Well, it's not an Article III question,

you know. Is it a prudential--that the county just shouldn't be able to assert a constitutional issue, even though there's a perfectly good case or controversy here?

MR. GARB: Well, I think it really exists on two different levels, first the question of whether the progeny of the State can attack the enactments of its parent at all; and secondly, even if it can--

QUESTION: And the tax assessor says, "I take an oath to observe the Constitution of the United States, too." And--

QUESTION: But the tax assessor isn't a party to this suit.

MR. GARB: That is correct.

QUESTION: It's just the County of Los Angeles.

MR. GARB: That is precisely correct. The assessor--you don't have one of those situations where a government representative is being told personally to engage in an act--

QUESTION: No, but who is on the other side when--how did this case get started? How did it get into the courts?

MR. GARB: It got into the courts by the denial--after the denial of the exemption. Sear, Roebuck filed suit against the County of Los Angeles as the revenue collection agent, not--

QUESTION: Well, who else would they have sued?

Nobody. That's the procedure that's provided.

MR. GARB: That's correct. In some states, Your Honor--

QUESTION: He is--that is the tax collector.

MR. GARB: Well, the assessor is the tax collector, the personal tax collector.

QUESTION: No. That isn't--apparently, under State law, you don't sue the assessor, you sue the county.

MR. GARB: That is correct, and precisely for that reason, you do not come within those cases that permit an individual who has been called upon to perform an act that he believes is unconstitutional to file suit, or to defend suit himself, and to have standing to do so, to avoid the necessity of his engaging in an unconstitutional act.

QUESTION: So it is a standing problem; it's not a case or controversy problem?

MR. GARB: I see it as a standing problem.

The Court of Appeals in this case reasoned that if the case only involved an equal protection question, the statute would be valid, because it has a rational distinction. And under this Court's decision in Allied Stores of Ohio v. Bowers, the statute would not run afoul of the equal protection clause.

However, the Court of Appeals went further, and actually held that any differentiation between interstate

and foreign commerce is unconstitutional as a regulation of foreign commerce and interstate commerce.

Now, with respect to cases involving discrimination against interstate commerce, under thecommerce clause, the traditional history of the clause has been that it is applied to invalidate State laws that are used to discriminate against interstate commerce as a means of favoring local economic interests.

In this case, California taxed local goods precisely the same as it taxed goods traveling in interstate commerce. Moreover, it did not use discrimination as a method of benefiting local economic interests.

For these reasons, the Boston Stock Exchange case, and the other cases relied upon by respondents, and by the Court of Appeals, are inapposite.

Now with respect to the concern of thecommerce clause as to the foreign power--foreign commerce power of Congress,the concern there has been to avoid disruption, to avoid interference with foreign relations.

Just last term in Japan Line, Ltd. v. County of Los Angeles, this case--this Court struck down the application of the California law with respect to the taxation of foreign instrumentalities in foreign commerce.

There we had a situation in which the unfavorable treatment of foreign commerce could create the possibility

of embarrassment or retaliation; by contrast, in the case at bar, we have a statute that treats foreign goods favorably, and does not result in any potential for frustration or embarrassment to the national government.

Mr. Chief Justice, if I may, I would like to reserve the remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Garb.

Mr. Brown.

ORAL ARGUMENT OF ERNEST J. BROWN, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. BROWN: Mr. Chief Justice, may it please the Court:

Speaking for the United States as amicus in this case, we believe there is no substantial basis for a constitutional challenge to Section 225 of California's Revenue and Taxation Code; and that it is the interest of the United States that it be sustained.

This is not a case, as many cases involving State taxation that have come to this Court are, as the Court has described them, cases where the legitimate interests of a State--financial, fiscal, or in other cases, health--point in one direction, and the interest of the Federal government in free and open trade points in another.

Here, they coincide. And California, perhaps recognizing that great cities grow and develop at points of

transshipment, seeking to remove obstacles that this Court in Michelin said were tolerable, but nevertheless, burdens to some extent; seeking to remove obstacles that New York removes, the first port of the country, removes by statute, in providing against any taxation of personal property on an ad valorem basis; that Louisiana, the second port of the country most of the time, gives a much broader exemption even than California, to imported goods.

California moves in this area to remove this obstacle. Now, the Court below invoked two grounds, one, a certain inconsistency which it asserted with the tariff laws; with respect--that seems almost fanciful. The Congress is certainly aware of the patchwork of State property tax laws. Over the years, their non-uniformity from the extreme of New York on down. And of the rates.

If the tariff laws were affected, this would freeze all State statutes. Rates couldn't be changed; exemptions couldn't be changed one way or the other. More than that, there's really no correlation between tariff statutes and these annual property taxes.

The tariff is imposed on all goods, dutiable goods, that come into the country. Property taxes may or may not affect any goods that come in. They may be consumed before the annual tax day, which varies from State to State. They may run, as it were, a slalom course around--between the

property taxes. Or on the other hand, they may label and be taxed more than once.

But there's no correlation at all. And as I say, the other argument would require that these be frozen.

The second ground asserted by the State is discrimination which has been discussed. And discrimination is not an abstract. And if we assume that California rather than an interstate shipper can invoke this--statutes, Mr. Justice Stevens, I believe are not held unconstitutional in the abstract; someone who is hurt usually has to invoke the specific grounds. I heard something in the argument that just preceded us on a very different basis. But in any event here, during a hundred years, while this Court held that goods--imports in their original package were exempt from property tax, it was also holding--in fact, for four years before Low v. Austin, in Woodruff v. Parham, that interstate goods in their original package were not exempt.

Now, I can hardly believe that the Court, having formed, perhaps erroneously as it has recently held, an exemption for interstate goods would tolerate this discrimination if it were an unconstitutional discrimination.

So that I think the Court would be reluctant to impose upon its predecessors for a hundred years this unconstitutional--not erroneous, but unconstitutional action.

Moreover, the Federal statute on air transportation

creates the same differentiation. It taxes interstate air transportation and domestic, but not foreign.

So we have a parallel in Congressional action.

More than that, this Court has frequently--and as pointed out, as recently as last term in Japan Lines--pointed out the preeminence of the Federal interest in foreign commerce, while noting that the control of interstate commerce is more a matter--shared with the States and the Federal government.

And this differentiation has existed throughout; the Court itself in a number of instances has differentiated. The impact of the 21st amendment is only one situation.

So this discrimination--I prefer to say differentiation--is one widely recognized. And before it is taken as a basis for invalidating action that parallels the Federal action and is in the Federal interest, it should be shown, we believe, to have adversely affected someone who is engaged in interstate commerce; not someone merely who would seek to increase the revenues of a county as opposed to the action of that State.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Clark, at the outset would you mind clarifying for us the absence of the Attorney General of the State? Many States, as you know, or some, at least, have statutes requiring the Attorney General to defend

the State statute whenever and wherever it's attacked.

ORAL ARGUMENT OF JAMES DEXTER CLARK, ESQ.,

ON BEHALF OF THE RESPONDENTS.

MR. CLARK: Yes, Your Honor.

Mr. Chief Justice, may it please the Court:

The State has been told, and is fully informed of the proceedings; and has been informed of those proceedings ever since this case arrived at the Court of Appeals below.

I have been in personal contact with the Attorney General, the State Board of Equalization, and have also been called at their own initiative by the State Office for Economic Development and International Trade.

I have explained the situation. I have explained my position on this particular statute; that is, the respondent's position on this particular statute. And as far as I know, California has determined to take no action with regard to this case.

QUESTION: Does that mean he agrees that the statute is unconstitutional?

MR. CLARK: I cannot speak for the Attorney General, because I have only spoken with assistants and deputies. And my telling this Court, Your Honor, that Mr. ? Dukmeijan believes one way or the other, I think would be incorrect.

I have been informally involved with that, and

perhaps it would be best if I simply said that I was in contact, and they were aware of our position. They have indicated to me informal views which perhaps--with all due respect, Your Honor, maybe it would be better if I just didn't talk about those, because they are not the position of the office.

QUESTION: In any event, I suppose it's your position that having informed the Attorney General, you have discharged any obligation which the County has in the matter, and from there on, it's up to him?

MR. CLARK: Yes, Your Honor. And I think that that is certainly true insofar as the State statutes are concerned; and I think that that is admitted by the petitioners here, that there is no real requirement for us to notify the State Attorney General that this statute is under attack.

I realize that there is a parallel statute--or, not a parallel statute, but there is a statute covering the parallel situation when a Federal statute or a Federal enactment is under attack for us to notify the Attorney General or Solicitor General.

QUESTION: Will you advise us as to the status of the pending California legislation?

MR. CLARK: Yes, Your Honor; the State has effectively repealed Section 225; it is not effective for the future.

QUESTION: Well, was there not also refund

legislation?

MR. CLARK: Yes, Your Honor. It has passed the Senate, and it is now in the State Assembly Revenue and Taxation Committee.

QUESTION: What is your estimate as to the likelihood of that passage?

MR. CLARK: It really--I have no feel for that.

QUESTION: Are you opposing it?

MR. CLARK: Your Honor, we--the County's position is that we're going to lose money, and we would like to be reimbursed for any refunds that take place. Because the way the statute is presently worded, the counties would have to reimburse. What we'd like to have the State do is reimburse it through their general fund, rather than ours.

It's a matter of county versus State kind of who gives the money, and where it comes from, at this point.

QUESTION: Now what has been repealed?

MR. CLARK: Section 225, the statute in question, has been repealed effectively by the enactment of an overall exemption, which exempts all inventory from taxation in the State of California, whether it comes in interstate--

QUESTION: Right.

MR. CLARK: --or foreign commerce.

If I may, I'd like to address myself briefly to Mr. Justice Stevens' and Mr. Justice Rehnquist's questions.

QUESTION: Could I just ask you for a minute?

MR. CLARK: Yes, Mr. Justice White.

QUESTION: I take it the California courts saw no problem with your taking the position you do and mitigating the issue?

MR. CLARK: No, Your Honor, as a matter of fact, as I was about to point out, in terms of the so-called standing issue, the case arises, as has been pointed out to this Court, in the context of a taxation event by the local county.

We made this taxation on the ground that the statute could have a narrow interpretation, and that the goods here involved ought to be taxable.

One of our positions with regard to that interpretation was that a broad interpretation which would include these issues would run into constitutional difficulties. And so we took that position, made the tax; were in turn sued for a refund by the petitioners here.

The question was raised as to whether we could consider the constitutional issue, either as a support for an interpretation or by itself, if one were to take automatically the broad interpretation--

QUESTION: I take it the county is the State's assessing agent?

MR. CLARK: Yes, Your Honor. As a matter of fact, the assessor was a party to this action in Superior Court,

and we stipulated out the assessor's presence.

QUESTION: Because the county--

MR. CLARK: Simply because it was the county. And as a matter of fact, they had named a former assessor, and we felt that rather than having the former assessor's name on because of certain political considerations, we thought it would be better if we simply had it in the entities that were required to be sued by statute.

I should point out, Your Honor, that Revenue Taxation Code Section 538, which was described in our response to a petition for a hearing before the State Supreme Court, has been enacted by the legislature, largely in response to the Section--to this problem.

And that Section reads that the statute charges--I'm sorry, the section charges assessors for leaving a state tax, or a state exemption, to be unconstitutional, quote--those assessors--shall, in lieu of making such an assessment bring an action for declaratory relief against the State Board of Equalization.

And the legislative analyst, in describing that statute for the legislature, gave exactly the same rendition of the assessor's requirements to follow the constitution as the Court of Appeals did.

In essence, the State legislature has recognized the authority of the County to bring an action to declare

invalid under the constitution a state exemption; and at the same time, recognized the previous authority of the assessor to render the assessment in view of his own belief, as the constitutional problem.

QUESTION: Well, Mr. Clark, are you familiar with our decision in Doremus v. Board of Education in 342 U.S., where the State of New Jersey Supreme Court held that a taxpayers' action would lie to challenge the constitutionality of a release time program under New Jersey law. There was standing on the taxpayer. And this Court dismissed the appeal because it said New Jersey is free to determine for itself State standing questions, but that it's a Federal question whether you have a standing to raise a Federal constitution question.

MR. CLARK: No, Your Honor, I have not become acquainted with that. I was relying on Board of Education v. Allen, 392 US 236, which involves the issue of whether or not an officer, a local officer, whose duty is sworn to uphold the constitution--

QUESTION: But here you have no individuals listed as--it's just the County of Los Angeles.

MR. CLARK: Well, Your Honor, it seemed to me anomolous to--on the fact that I foolishly stipulated out the assessor's name, because it was not required by State statute, to say that the people involved do not have standing

to raise constitutional issues, even when that has been recognized specifically by the State legislature, which I recognize that you are telling me that under Doremus would be irrelevant.

But my feeling is, Mr. Justice Rehnquist, that the whole idea of the Board of Education v. Allen does stand for the proposition that when the officer is sworn to uphold the constitution, and makes that decision, that I believe the entity which is sued for the repayment of taxes, and certainly there are individuals involved, and certainly the assessor is going to comply with whatever decision comes down, and the tax collector and all the other individuals involved will do so as well; that they are so intimately wound up, as the Court of Appeals has determined, with the entity being sued itself, that the entity is entitled to raise that particular issue.

The basic issue on the merits is whether the states can regulate imports. There are three reasons why we believe this to be improper.

We believe that Section 225 impinges on the area of free trade, which was defined by this Court in Boston Stock Exchange v. State Tax Commission.

We believe that it invades the area of the Federal exclusive right to regulate imports, not only to insure their uniformity, and--but also to, as this Court said

in Board of Trustees v. U.S., describe the extent to which the tariff regulations go; that precise extent.

And also, 225 we believe to be precluded by the Tariff Acts.

The petitioner suggests different issues, in essence. He suggests that there are, quote, no facts. The Court of Appeals accepted the petitioner's request that this statute have a broad interpretation; and yet the petitioner seeks to avoid the ambit of that broad interpretation as described and found by the Court of Appeals.

The first answer to the petitioner's contention is that American Oil applies, pure and simple.

The second answer is that there are facts in this particular case which show that Section 225 yields non-conformity in tariff regulations. Goods which derive from the same manufacturer, which are held after the same foreign commerce, and which are held in the same warehouse, but which are eventually sold to a Phoenix customer, are treated differently for their temporary storage than if they go to a Sacramento customer.

225 tells the foreign manufacturer, "If you are lucky enough to sell to somebody in Phoenix, you're in great shape. But if you're unlucky enough to sell to somebody in Sacramento, you lose. I'm sorry."

We paint this picture because of the conditions in

Section 225, which reach beyond the California border, and encourage and discourage certain activities in foreign countries, and in other States, merely on the basis of their temporary presence in the taxing jurisdiction.

On the export side, we tell a Pittsburgh manufacturer via Section 225 who brings his goods into the State for sale, or who may bring those goods into the State, or who is thinking about bringing those goods into the State, that if he sells to a foreign customer, that's fine; he will not be taxed on the basis of that temporary presence in the State; but if he sells to an Hawaiian customer, he loses.

Section 225 thereby creates a pricing regulation for the interstate customer of foreign and interstate goods, and also, imposes a regulation on that Pittsburgh manufacturer who is thinking of bringing his goods into the State for temporary storage.

It says, in essence, we're going to treat these things separate simply because it's within our power to do so.

Now, the petitioners have suggested that this is all saved for various reasons. They suggest that they can avoid the appellate court finding, because the appellate court finding doesn't apply to Sears; that the appellate court should have found the statute constitutional as to Sears, but unconstitutional as to Z Toys, because Z Toys

did have the facts with regard to distribution. This case was consolidated below without objection, and the Court of Appeals found that the ambit of the statute--and defined it. Now the petitioner seeks to avoid that ambit, even though it asserted that it could go forward with the broad interpretation.

The idea, then, of validating Section 225 because it prefers foreign goods over interstate goods, is to my way of thinking, equally invalid. It is invalid because Section 225 distinguishes between foreign goods; it does not even support all foreign goods. Any product which is brought into the State of California from Japan, which is quote manufactured, and I respectfully direct the attention of the Court to the definition of manufacturing, or the exemption--or the exception to the definition of manufacturing in Section 225, which in essence states that if you can label those goods in California, and they will not be taxable, but you paint them and they will be taxable, even though they arrive at the same interstate customer's location; even though they are produced in the beginning by the same foreign manufacturer; and even though they are brought into the State by the same method of transportation.

QUESTION: Well, let's assume all that were true. What about these goods?

MR. CLARK: These goods, Your Honor, have--

QUESTION: Because--why do you say the exemption was unconstitutional with respect to these goods?

MR. CLARK: Well, Your Honor, the particular goods which are the subject of the stipulation involve two classes of goods. One class were those that were brought in from a foreign manufacturer, held in the State, and eventually sold to foreign customers--not foreign customers, but customers out of state.

The other class of goods, which the petitioner does not claim the exemption for, are a class of goods which were brought into the state from foreign manufacturers and held in Los Angeles, but for a Sacramento shipment.

And at that particular time, I think that the petitioner did not even know whether or not those goods were going to be sold to that Sacramento customer, or to the Arizona customer.

QUESTION: The transshipped goods are exempt; in-State goods are not?

MR. CLARK: Transshipped--

QUESTION: Well, I mean the goods that are shipped out.

MR. CLARK: The--I'm sorry Your Honor, the--

QUESTION: Well, what--

MR. CLARK: No, Your Honor, as a matter of fact, California manufacturers--

QUESTION: Well, the exemption--does the exemption purport to cover both of these classes of goods?

MR. CLARK: No, sir.

QUESTION: No.

MR. CLARK: No, it distinguishes between them, and it also distinguishes between the in-state--

QUESTION: Is that the vice of it you think, or not?

MR. CLARK: Well, I think that's one of the vices of it, because it makes the tariffs--in essence, it gives a tariff rebate to one set of foreign goods and doesn't give it to another. And I think that can be reached from the stipulated facts.

If American Oil does not apply, if the language of the statute is not seen in and of itself--that these extra-territorial conditions are not seen in and of themselves as an invasion of free trade (Boston Stock Exchange), and if it is not seen as a deprivation of the Federal government's right to regulate imports (Board of Trustees v. Illinois), and if it is not seen as a conflict with the Tariff Acts, then the stipulated facts do support the distinction that is made between foreign goods, which makes them un-uniform, which is contrary to the Tariff Act.

And as we pointed out in our brief, there's a specific section which requires uniformity of tariffs.

I do not believe that we can one way suggest, as the

Federal government has suggested here, that because the Federal government's current policy is to help certain foreign interests, that is, the airplane flights, that suddenly all States can enact this same kind of exemption that cuts across these same lines.

What that does is effectively open the doors to any interest groups supporting foreign manufacturers, and close them to our own domestic manufacturers, because the Solicitor General has also suggested that any regulation which hurts foreign commerce is a bad thing.

We can't do that, I think, and still retain the kind of ability that this country has to have a system which is uniform, a system which operates on perhaps the kinds of goods differently; that is, if we say we have a timber exemption, or a different rate for cattle, as Wisconsin does for different kinds of goods, those statutes on their face do not cut across these lines.

But Section 225, and its extra-territorial conditions, do. On its face, in the context of Article XIII, Section 1, of the State constitution, which requires all property in the State to be taxed, those selective encouragements and discouragements of foreign and interstate activity operate as inhibitions. And I respectfully refer the Court to footnote 13 of the Boston Stock Exchange opinion, which talks about those particular kinds of inhibiting effects of

State taxes.

The language itself of this statute directs--actually cuts against the Federal government's ability to determine the extent to which tariff regulations act.

Are we assume--is one to assume, I ask rhetorically--whether--that the Federal government, once a tariff is imposed, simply lets it go? That the regulation does not go into effect?

QUESTION: Well, you're not--are you really suggesting that the exemption is inconsistent with, or frustrates, any statutory enactment of Congress?

MR. CLARK: Yes, Your Honor.

QUESTION: Well--

MR. CLARK: I believe that the exemption by its own conditions, and referring to the Tariff Act which we have cited in our brief, in essence mandates almost as broadly as the Tariff Acts themselves, a rebate of tariffs which have been paid, insofar--and the Court of Appeals found the distinction between interstate and foreign goods.

QUESTION: Yes, well I take it that the Representatives of the United States disagree with you in that respect?

MR. CLARK: I believe they do, Your Honor, although I'm not--

QUESTION: But that doesn't--I agree, that doesn't

answer the matter.

MR. CLARK: Well, if I may, Your Honor, for just a moment.

The basis for the argument that the Federal government has made here, that the inconsistency--that there is no inconsistency with the tariff laws, is that the Congress is aware of the patchwork of State taxation, and Congress would have acted if they didn't; and the Court was directed--

QUESTION: Yes, but they argue that there's no inconsistency between this exemption and the tariff laws.

MR. CLARK: Well, Your Honor, they do that on the basis that I have stated. They say--first of all, they say there is no inconsistency. Then they say, Congress would have acted if there were.

QUESTION: Well, assume there's no inconsistency; then that should be the end of the matter. They don't need to have a second reason.

MR. CLARK: Well, Your Honor, I think they used that second argument as a support for the first.

QUESTION: Yes, well maybe--let's assume we disagreed with you on this--in this respect, that the exemption is not inconsistent with any statutory enactment of Congress. Then your argument is that the Commerce Clause itself, invalidates this exemption; is that it?

MR. CLARK: That the commerce clause itself--

QUESTION: Invalidates the injunction?

MR. CLARK: Yes, Your Honor.

QUESTION: --on some kind of commerce, several kinds of commerce.

MR. CLARK: Well, not necessarily with a burden, Your Honor. But--

QUESTION: It's discrimination.

MR. CLARK: That is true, and also, Your Honor, that because it effectively rebates tariffs in an area where the President is empowered to protect domestic goods, that it takes away from the Presidential power to protect those goods.

QUESTION: I'm assuming we disagree with you on that.

MR. CLARK: I'm sorry. I was trying to separate out, if I may, Your Honor, the idea of a specific conflict with the Tariff Acts, and the exclusive right of the Federal government to regulate imports.

QUESTION: Well, I would say that would just be a frustration of the Federal law, and I will assume that out; assume that out of the case. Then yours is a straight commerce clause argument.

MR. CLARK: Well, yes, sir. Although I do believe the exclusivity argument is also under the commerce clause area.

QUESTION: Yes.

MR. CLARK: That we believe that Boston Stock Exchange applies here. We believe that because it cuts against the types of commerce; it cuts between types of foreign commerce; between types of interstate commerce, particularly on the export side; and between foreign and interstate commerce.

QUESTION: Mr. Clark, did the Court of Appeals rely on any cutting between different kinds of foreign commerce?

MR. CLARK: The Court of Appeals--

QUESTION: I thought it just considered there to be a discrimination between foreign as a class, and all interstate as a class.

MR. CLARK: Yes, Mr. Justice Stevens, it did dwell on that particular point. During oral argument, we attempted--or the petitioner attempted to deal with the export side, and the Justice which was basically the author of the opinion said that he felt that it would be clearer if they went for one particular side of the issue.

QUESTION: And that's what your case rests on, just one--didn't go into your distinction, for example, between shipments to Phoenix and shipments to Sacramento?

MR. CLARK: No, Your Honor, it did not.

I think that the third issue that is raised by the petitioners here, and also by the Solicitor General, is that

the statutes of other States have the effect of validating Section 225. This, of course, is I think improper. Austin v. New Hampshire, 420 US 656, I think stands for the proposition that this Court will not take another state's statutes, another state's statute, and attempt to validate a first state's statute on the ground that the other one exists or is interpreted in any particular way.

In fact, these other State statutes show how the job can be done with less impact on interstate and foreign commerce. These other States--the New York statute referred to by the Solicitor General, the Louisiana statutes that were referred to by the Solicitor General, the eight statutes that we pointed out in our brief--show how the extra-territorial effect can be avoided; that is, the way that California eventually determined that it would be avoided; that is, by exempting all inventories or all personal property in the jurisdiction.

California's new exemption does not create the selective barriers; does not present the picture to the interstate manufacturer. It's the foreign manufacturer--

QUESTION: I take it your argument, then, domestically--assume thatthe city--assume that Cook County in Chicago said, we tax inventories that are located here on a certain date, except the following, and one of them they list is, inventories that are here that have come from out of State and are going to

be shipped out within two weeks, or--goods that are destined to go elsewhere out of the State.

I suppose you would say that was a burden on commerce?

MR. CLARK: I think that it does not create the foreign-interestate distinction.

QUESTION: I know, but it certainly creates a distinction between goods from out of State that are going to be shipped--that are going to be sold locally, and goods that are going to be transshipped.

MR. CLARK: That is--

QUESTION: That's certainly one of your arguments. That certainly is one of your arguments here.

MR. CLARK: Well, I think that one of our arguments, Mr. Justice White, is the idea that those kinds of statutes do not create the same degree of problems that Section 225. And yes, there are a whole string of statutes which raise from 225 over here on the left side, as showing the foreign-interstate dichotomy, to the eight statutes that we presented in our brief which, in effect, only tax goods which are being shipped from one point in the state to another point in the state; and down to the Louisiana, New York statutes.

Yes, there is a spectrum; and yes, there is a spectrum of burden. Our position is that 225, because it does practically everything, and does it the wrong way, is

improper and unconsitutional.

We take the position that Section 225 reaches out beyond the State borders like none of these other statutes do, and encourage between out-of-state activity.

QUESTION: Yes, but you've got to argue in this case that the exemption is invalid because of the goods--Sears goods that are shipped out of the State, or exempt under this exemption, and the ones that are destined for Sacramento are not.

MR. CLARK: Well, Your Honor, if the Court--

QUESTION: Those are the only goods that are involved here.

MR. CLARK: If the Court of Appeals--

QUESTION: Is that right or not?

MR. CLARK: Well, no, Your Honor, because we believe that the Court of Appeals determination--we agree that that is one of the issues; and we agree that the statute is unconstitutional.

QUESTION: Well, why--is there any broader issue here? Because these are the only goods that are here.

MR. CLARK: The Court of Appeals determined the ambit of the statute as creating a distinction between foreign and interstate goods. That statute was described by the Court of Appeals--

QUESTION: You can't challenge it on its face. You

have to challenge it on the basis of the goods of your client.

QUESTION: Not your client.

MR. CLARK: Which is not my client, right.

QUESTION: Well, of the goods which you seek to tax, or which you have had refund proceedings with respect to.

MR. CLARK: Well, right, Your Honor. And we did that before the Court of Appeals, and on the basis of those particular goods and those particular facts, the Court of Appeals determined the ambit of the statute.

And we believe that that ambit is improper, as did the Court of Appeals.

QUESTION: So that the Court of Appeals preferred position was that any exemption for goods originating abroad is just a discrimination--

MR. CLARK: I think--

QUESTION: --against domestic commerce.

MR. CLARK: That was the Court of Appeals--

QUESTION: Yes.

MR. CLARK: --decision that when those goods go out of State as well; in other words, when we have an inter-state shipment, and a foreign commerce--and a foreign shipment, which eventually go out of State, the Court of Appeals held that 225 operates to distinguish between those two; that in essence it distinguishes between those two

branches of commerce; that distinguishing between those two branches of commerce is improper; and that that, we believe, is supported by American Oil, and by the idea that the Court of Appeals made, as part of the broad interpretation which was supported and urged by the petitioner, that--

QUESTION: Well, do you think the California Court of Appeals would have rendered a similar decision, even if declaratory relief, if the issues had been framed in terms that 12 months of now the County of Los Angeles was going to assess these goods and the owners were going to refuse to pay it?

MR. CLARK: I'm sorry, I do not really understand the question.

QUESTION: What I'm trying to get at is how free does your Court of Appeals feel to render declaratory relief or injunctions just on construction of statutes in the abstract without regard to what may have happened or mwhat may have been done by the parties before them?

MR. CLARK: I'm sorry, Your Honor, I thought--before the Court of Appeal, Your Honor, there were facts that that interstate commerce did exist; that interstate commerce is being brought through the State for distribution purposes to other States. And that was part of the Z Toys facts which were consolidated with this case without objection. That the Court of Appeals had before it facts contrary to petitioner's

assertion that they have no facts. They had facts with regard to that interstate shipment, the same facts, in essence, that we show by our Appendix B; that in essence, there are goods which are brought into the State from other States for regional distribution.

Thank you.

MR. CHIEF JUSTICE BURGER: You have four minutes left, Mr. Garb.

REBUTTAL ARGUMENT OF ANDREW S. GARB, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GARB: Thank you, Mr. Chief Justice.

I would like to make a couple of comments concerning the repeal of the California inventory tax that we pointed out in our brief.

First, I would like to point out that this case continues to have importance to California taxpayers, since we have a statute which was in effect for four years, and we have a four-year period within which to bring claims for refund in California. The outcome of this case is of great importance to California taxpayers.

In addition, since the respondents have taken the position here that statutes are invalid that exempt locally, but to fail to exempt locally manufactured goods, as respondents have now argued, and have argued in their briefs, since none of the other 36 States that have free port laws

exempt locally manufactured goods sold in the State, the outcome of the constitutional issue asserted by respondents in this case, is of major importance to the statutes of those other 36 States as well.

With respect to this pending refund statute, as we pointed out in our brief, the California constitution has a doctrine that prohibits the legislature from enacting a statute which constitutes a gift of public funds. And in a long series of cases, dating back to the last century, cited in our brief, that constitutional provision has been applied with respect to accrued tax liabilities.

For that reason it appears very likely that any attempt to refund taxes, if indeed this--the decision of the Court of Appeals is upheld, would violate the California constitution.

I am advised that the State of Utah had a similar situation in which a refund was attempted after the repeal of a tax law. And there, as well, the repeal--after the repeal, the refund was held to be beyond the power of the State.

I would like to move for a moment to the uniformity argument mentioned by respondents in aoral argument. And I think we have a bit of confusion here, because what the Constitution requires is uniformity of tariff rates. The respondents have somehow twisted that constitutional requirement

of uniform tariff rates to suggest that State property taxes have to be uniform.

And yet we know that, even though we have uniform tariff rates, we have different State property tax laws that obviously are going to have a different impact on imported goods and domestic goods as well. And accordingly, the suggestion that there's a constitutional requirement of uniformity in tariffs simply cannot be stretched to suggest the requirement of uniform State property tax laws.

Next, I would like to make a comment again on this argument that Section 225 constitutes a rebate of tariffs. We're already, in my opening, given about three reasons why this is invalid, and a fourth one comes to mind.

In fact, when the Tariff Acts that counsel has now stated he relies upon were enacted, goods of substantially the same type as those involved in this case were immune from State taxation under the original package doctrine.

When Section 225 was enacted, it preserved the nontaxable status of these very goods; and accordingly, when Congress set the level of protection that it intended to create for domestic manufacturing, that same level of protection was perpetuated precisely by Section 225.

So for that reason as well, the major premise of respondent's argument on this supposed tariff reduction is simply erroneous.

And as I listened to the oral arguments of respondents, and heard the extension to which their argument is now taken, that the commerce clause should even invalidate State laws that do not exempt locally manufactured goods sold locally, it strikes me, first of all, that that runs counter to Allied Stores of Ohio v. Bowers, which validated such treatment on equal protection grounds; and Alaska v. Arctic Maid, which permitted a State to tax locally competing industries more onerously than interstate competing industry.

But in addition, it probably does suggest, as Mr. Justice White was questioning me in my opening, that where you have a party who is contending--a tax collecting agent who is contending that the proper way to handle this is to exempt more goods, it seems very likely that you may not have a case or controversy at that point.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:34 o'clock, a.m., the case in the above-entitled matter was submitted.)