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THE LEAVE-IT-TO-CONGRESS TREND IN THE CONSTITUTIONAL LAW OF TAX IMMUNITIES

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In the present era of rapidly changing American constitutional law, the law of tax immunities has undergone a marked modification that has been almost wholly in the direction of whittling down long accepted tax exemptions. This extension of taxability is of enormous practical importance but on the theoretical side it is less astonishing than is the Court's repeated reliance upon a new technique in reaching its decisions. The opinions in tax cases still abound in dogmatic formulas derived from the precedents and still seek to balance the probable economic consequences of tax liability with those to be anticipated from immunity, but the recent trend—especially in opinions delivered by the late Chief Justice Stone—is to rest the Court's decision upon the explicit or implicit intention of Congress. Even in those few recent cases in which the Court perpetuates—or even extends—a traditional tax immunity, its reasoning tends to leave it open to Congress to terminate the exemption. It may be said with little exaggeration that the constitutional law of tax immunity is becoming a law of immunity or liability at the option of Congress.

Judicial deference to Congress appears even in opinions concerned with constitutional limitations upon congressional power. An interesting example is to be found in the 1939 case of *O'Malley v. Wood-*

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rough,¹ in which the Supreme Court departed from the doctrine of the precedents² and sustained federal income taxation of the salary of a federal judge appointed subsequent to the enactment of the Revenue Act of 1932. Mr. Justice Frankfurter's opinion stressed the fact that "Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution."³

Repeated expressions of confidence in Congress appear in the recent opinions sustaining the application of federal taxes to state instrumentalities. This practice begins in 1938 with the precedent-shattering case of *Helvering v. Gerhardt*,⁴ in which immunity from federal income taxes was denied to salaries paid by the Port of New York Authority, and in which the then Associate Justice Stone delivered the opinion of the Court. After referring to the leading case of *McCulloch v. Maryland*,⁵ Mr. Justice Stone pointed out that: "In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted

1. 307 U. S. 277 (1939). Mr. Justice Butler wrote a vigorous dissent, while Mr. Justice McReynolds took no part in the decision.

2. *Evans v. Gore*, 253 U. S. 245 (1920); *Miles v. Graham*, 268 U. S. 501 (1925).

3. *O'Malley v. Woodrough*, 307 U. S. 277, 281, 282 (1939), cited *supra* note 1. The full paragraph reads:

"Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which every one else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1 [with a footnote citing the English Act of Settlement and other references on the English judiciary]. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."

4. 304 U. S. 405 (1938). Justices Butler and McReynolds dissented in a brief opinion by the former.

5. 4 Wheat. 316 (U. S. 1819).

on to prevent abuse.”⁶ The same sentiment was recently voiced anew in *New York v. United States*,⁷ in which the Court sustained the collection of a federal soft drinks tax upon the sale by New York State of mineral waters taken from Saratoga Springs. Delivering the leading⁸ opinion in the case, Mr. Justice Frankfurter remarked: “After all, the representatives of all the States, having, as the appearance of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.”⁹ Even more far-reaching is another expression in the same opinion: “Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as that of Article IV, § 4, guaranteeing States a republican form of government, which this Court has deemed not within its duty to adjudicate.”¹⁰

On the related issue of the liability of federal instrumentalities to state taxation, there is a well-established rule that the judiciary will carry out the instructions of Congress whenever that body has either expressly granted or expressly denied tax immunity. In the words of Mr. Justice Stone in the Port of New York Authority case: “Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation. Congress may curtail an immunity which might otherwise be implied, or enlarge it beyond the point where, Congress being silent, the Court would set its limits.”¹¹ No such curtailment or enlargement has ever been invalidated by judicial decision.

But what if Congress is silent? When a state income tax was sustained in 1939 with respect to the salaries of employees of the Home

6. *Helvering v. Gerhardt*, 304 U. S. 405, 412 (1938), cited *supra* note 4.

7. 326 U. S. 572 (1946).

8. There was no “opinion of the Court” in this case, but “Mr. Justice Frankfurter announced the judgment of the Court and delivered an opinion in which Mr. Justice Rutledge joined.” Chief Justice Stone concurred in an opinion in which he was joined by Justices Reed, Murphy and Burton; Mr. Justice Douglas delivered a dissenting opinion in which Mr. Justice Black concurred; and Mr. Justice Jackson took no part in the decision. The case of *South Carolina v. United States*, 199 U. S. 437 (1905) figured conspicuously in all opinions.

9. *New York v. United States*, 326 U. S. 572, 582, 583 (1946), cited *supra* note 8.

10. *Id.* at 582. Mr. Justice Frankfurter cited *Pacific States Tel. & T. Co. v. Oregon*, 223 U. S. 118 (1912), in which the Supreme Court declined to take jurisdiction in a case raising the issue whether the adoption of the initiative and referendum had deprived Oregon of its republican form of government.

11. *Helvering v. Gerhardt*, 304 U. S. 405, 411, n. 1 (1938), cited *supra* notes 4 and 6. The citations in this note are here omitted.

Owners' Loan Corporation,¹² the opinion of the Court, as delivered by Mr. Justice Stone, observed: "Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of ground for assuming any purpose on the part of Congress to create an immunity."¹³ In this case, analysis of the tax disclosed no ascertainable resulting burden upon the federal government, and this was given as a main reason for the Court's denial of tax immunity;¹⁴ but a couple of years later it was considered immaterial that the government suffered a very real burden from certain other state taxes. A contractor constructing an army camp within Alabama on a cost-plus contract with the United States had contested his liability for Alabama taxes on his purchases of certain building materials and his use of others in furtherance of his contract.¹⁵ Again acting as spokesman for the Court, the recently promoted Chief Justice Stone declared that "by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."¹⁶ This was later confirmed in an important dictum in the late chief justice's opinion for the Court in *Penn Dairies v. Milk Control Commission of Pennsylvania*,¹⁷ in which the decision was

12. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939). Justices Butler and McReynolds dissented in an opinion by the former.

13. *Id.* at 480.

14. *Id.* at 484-487.

15. *Alabama v. King & Boozer*, 314 U. S. 1 (1941); *Curry v. United States*, 314 U. S. 14 (1941). There was no dissent in either case.

16. *Curry v. United States*, 314 U. S. 14, 18 (1941), cited *supra* note 15.

17. "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system." 318 U. S. 261, 270, 271 (1943). Only three other justices joined the chief justice in this opinion. Mr. Justice Murphy wrote a concurring opinion; Justices Douglas, Black and Jackson dissented, and Mr. Justice Rutledge took no part in the decision.

that minimum price regulations under a state milk control law were applicable to milk bought by the United States for consumption in an army camp. A few months later, however, the Court proved that it does not necessarily regard the silence of Congress as assent to the imposition of taxation or regulation by the states. In *Mayo v. United States*,¹⁸ a Florida statute requiring the inspection of commercial fertilizers and the collection of inspection fees was held constitutionally inapplicable to fertilizer distributed within Florida under the direction of the United States Secretary of Agriculture in accordance with the provisions of the Soil Conservation and Domestic Allotment Act.¹⁹ Speaking for a substantially²⁰ unanimous court, Mr. Justice Reed pointed out: "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause."²¹ He had previously observed: "It lies within the Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities. No such permission is granted here."²² Finally as a concluding formula: "The silence of Congress as to the subjection of its instrumentalities other than the United States to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues."²³

It may be forcefully objected to this formula that it results in subjecting certain business transactions affecting army camps to taxation and regulation by those favored states in which the camps happen to be located,²⁴ whereas it immunizes the distribution of fertilizer under a soil conservation policy applying to all states as uniformly as differences in their agricultural products permit. The contrast is the more striking when it is remembered that army camps are established under the exclusive power of Congress to raise and support armies, whereas the soil conservation law is merely a manifestation of the power of Congress to spend money towards an end that the national

18. 319 U. S. 441 (1943).

19. 49 STAT. 163 (1935) *et seq.*, 16 U. S. C. § 590 a (1941) *et seq.*

20. There was no dissent, but Mr. Justice Black merely concurred in the result.

21. *Mayo v. United States*, 319 U. S. 441, 447 (1943), cited *supra* note 18.

22. *Id.* at 446.

23. *Id.* at 447, 448.

24. The advantageous position of these states in such matters is not unlike that formerly enjoyed by seaboard states with reference to import duties. On the possibility of importation directly into an inland state at the present day, see the discussion of *Hooven and Allison Co. v. Evatt*, *infra* pp. 12-15.

government lacks power to attain by regulation.²⁵ It might easily have been held that state regulations under the police power are superior to federal activities in a field immune from federal legislation, but here is the Supreme Court covering even the power of the purse with the mantle of federal supremacy. Given such an interpretation, there is much to say for the position of the old conservative majority in *Butler v. United States*,²⁶ which maintained that Congress lacks power to spend money in order to induce behavior in a field left by the Constitution to control by the states. On the other hand, once granting the constitutionality of the Conservation and Domestic Allotment Act, the very preëminence of the states in agricultural matters furnishes a motive for the recognition of immunity by a Court bent on leaving questions of tax liability to determination by Congress. Whereas it would be the simplest of propositions to sustain congressional legislation terminating the tax liability recognized by the Court in the army camp cases, it is difficult to devise any theory on which fertilizer distributed under the federal spending power could be exempted by Congress from state taxation if the Court had once held that inspection fees might be imposed by a state in the silence of Congress.

25. It is not unworthy of note that the section of the federal act immediately invoked is a temporary provision anticipating the early relinquishment of control to the states. "In order to carry out the purposes specified in § 590 g (a) of this title during the period necessary to afford a reasonable opportunity for legislative action by a sufficient number of States to assure the effectuation of such purposes by State action and in order to promote the more effective accomplishment of such purposes by State action thereafter, the Secretary shall exercise the powers conferred in this section during the period prior to January 1, 1947, except with respect to farming operations commenced in any State after the effective date of a State plan for such State approved pursuant to § 590 g of this title. No such powers shall be exercised after December 31, 1946, except with respect to payments or grants in connection with farming operations carried out prior to January 1, 1947." 55 STAT. 860 (1941), 16 U. S. C. § 590 h (a), as amended in 1941. The amendment substituted "1947" for "1942" and "1946" for "1941."

26. 297 U. S. 1 (1936). Of particular interest are the following excerpts from Mr. Justice Roberts' opinion for the majority: "An appropriation to be expended by the United States under contracts calling for violation of a state law clearly would offend the Constitution. Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action. But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject-matter of the contract. If this does reach the subject-matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a state. This would reverse the cardinal principle embodied in the Constitution and substitute one which declares that Congress may only effectively legislate as to matters within federal competence when the states do not dissent." *Id.* at 72, 73, 74. Mr. Justice Roberts, who joined in the majority opinion, and Mr. Justice Stone, who wrote the dissent in *Butler v. United States*, were the only justices who participated in both that case and the *Mayo* case.

Without lingering longer over the decisions on intergovernmental taxes—recently exhaustively examined by Professor Thomas Reed Powell in articles in the *Harvard Law Review*²⁷—the purpose of this article is to fit the Court's recent position on import taxation into the pattern developed in the intergovernmental tax cases. It is obvious that state taxes affecting imports must be ostensibly examined under the express provision that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."²⁸ Nevertheless it is the writer's theory that the Court's use of the import clause in recent years has far less in common with the line of import clause precedents than it has with the leave-it-to-Congress trend observed in the cases on intergovernmental taxation.

Only a very few recent Supreme Court decisions have hinged upon the language of the import clause. Indeed, throughout the entire history of the Court, this clause has proved far less useful than the commerce clause in averting state taxes aimed at goods introduced from without.²⁹ The vast majority of goods of extra-state origin were deprived of the protection of the import clause when it was decided in 1868 that this constitutional prohibition has no application to interstate commerce,³⁰ and goods from abroad were held in the same term of court to have lost their character as imports upon sale by the importer.³¹ Although one of these holdings was in conflict, and one in accord, with suggestions made by Chief Justice Marshall in the leading case,³² the two 1868 decisions were at one in narrowing the definition of imports. A few years later the commerce clause was used to

27. Powell, *The Waning of Intergovernmental Tax Immunities* (1945) 58 HARV. L. REV. 633, and *The Remnant of Intergovernmental Tax Immunities*, *id.* at 757.

28. U. S. CONST.: Art. I, § 10, Par. 2.

29. On the use of these clauses see Spahr, *The Supreme Court on the Incidence and Effects of Taxation* (1925) X, SMITH COLLEGE STUDIES IN HISTORY, Nos. 2, 3, 4, chapters II and III. Except as a few modifications are indicated in the present article, the writer adheres to the views she expressed twenty years ago.

30. *Woodruff v. Parham*, 8 Wall. 123 (U. S. 1868). Mr. Justice Nelson, the only survivor of the Court that had sat in the License Cases, uttered a vigorous dissent.

31. *Waring v. Mayor of Mobile*, 8 Wall. 110 (U. S. 1868).

32. "It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state." *Brown v. Maryland*, 12 Wheat. 419, 449 (U. S. 1827). "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." *Id.* at 441, 442. This second quotation constitutes the well-known original package formula.

invalidate a state law which forbade peddling without a license but which exempted those peddlers who sold nothing but the growth, produce or manufacture of the taxing state.³³ From this it followed that the commerce clause became available, as a supplement or as an alternative to the import clause, whenever state taxes should discriminate against *foreign* commerce.³⁴ In 1878, in deciding the case of *Cook v. Pennsylvania*,³⁵ the Supreme Court invoked both the import clause and the commerce clause against a state tax on auctioneers measured by their gross receipts from auction sales of goods of foreign origin, while auction sales of domestic articles were left untaxed. The main emphasis was upon the import clause in this decision,³⁶ but sixty years later, under somewhat similar circumstances, the Supreme Court of our own day preferred a different technique. Exorbitant state "inspection fees" upon cement imported from abroad, where there was no corresponding inspection of domestic cement, were contested in 1939 in the case of *Hale v. Bimco Trading, Inc.*;³⁷ the "fees" were first examined under the commerce clause and were found so clearly objectionable that the Court did not even take up the question raised under the import clause.³⁸

Another tax recently invalidated under the commerce clause, although objections had been urged under the import clause as well, met its doom because of the actual exercise by Congress of its power to regulate foreign commerce. The respondent corporation in *McGoldrick v. Gulf Oil Corporation*³⁹ had imported crude petroleum into New York City under bond, manufactured it into fuel oil in a bonded warehouse, and delivered it alongside the foreign-bound vessels to which the oil had been sold as fuel. The federal law provided for a drawback,

33. "It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin." *Welton v. Missouri*, 91 U. S. 275, 282 (1875).

34. "The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the States. If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden." *Cook v. Pennsylvania*, 97 U. S. 566, 573 (1878), cited *infra* note 35.

35. 97 U. S. 566 (1878).

36. "The tax on sales made by an auctioneer is a tax on the goods sold, . . . and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports." *Id.* at 573.

37. 306 U. S. 375 (1939).

38. "But it would not be easy to imagine a statute more clearly designed than the present to circumvent what the Commerce Clause forbids. *Cook v. Pennsylvania*, 97 U. S. 566; *Voight v. Wright*, 141 U. S. 62. This makes it unnecessary to consider the objections urged under Article I, § 10, cl. 2." *Hale v. Bimco Trading, Inc.*, 306 U. S. 375, 380, 381 (1939), cited *supra* note 37.

39. 309 U. S. 414 (1940).

under such circumstances, of the usual tariff duties on imported crude petroleum, but the city of New York attempted to collect its sales tax upon the fuel oil sold and delivered within its limits. Without any dissent,⁴⁰ the Supreme Court found that the sales tax "must fail as an infringement of the Congressional regulation of the commerce," and that no other objections need be considered.⁴¹ It should be noted, however, that Mr. Justice Stone's opinion contained a dictum on the subject of imports⁴² which enabled him later, in a case concerned wholly with the import clause, to cite *McGoldrick v. Gulf Oil Corporation* as an authority on that provision.⁴³

A few years before the *Gulf Oil Corporation* decision, the case of *Anglo-Chilean Nitrate Sales Corporation v. Alabama*⁴⁴ had involved the import clause so obliquely that the Supreme Court divided six to three as to whether the issue of state taxation of imports had even been raised. The appellant was a New York corporation which had qualified to do business in Alabama and had been subjected to a franchise tax measured by its capital employed in that state. For the tax year in question, the only capital employed by the corporation within Alabama had been several million bags of nitrate of soda which had been imported from Chile, stored in a public warehouse in Mobile, and sold—upon orders—to customers, to whom the nitrate was eventually shipped in the same hundred-pound bags in which it had been originally imported. On these facts, the majority of the Court, speaking by Mr. Justice Butler, determined that the Alabama tax on foreign corporations was laid upon the actual doing of business within the state, that the only business done within Alabama in this instance was the selling of imports in the original packages, and that therefore the franchise tax was void as a tax on imports levied by a state "with-

40. It is improbable that any significance is to be attached to the fact that Mr. Justice McReynolds took no part in the decision of the case.

41. "The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. . . . The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce. . . . It is unnecessary to consider whether the tax upon the sale of the oils as ships' stores to vessels engaged in foreign commerce is in the circumstances of this case an impost on imports or exports, or a duty of tonnage prohibited by Article I, § 10, Clauses 2 and 3 of the Constitution." *Id.* at 429.

42. "For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation." *Id.* at 423.

43. *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 666 (1945).

44. 288 U. S. 218 (1933).

out the consent of Congress.”⁴⁵ In opposition to this, Justices Cardozo, Brandeis and Stone reasoned, in an opinion delivered by Mr. Justice Cardozo, that the Alabama tax was laid upon the privilege of doing business in a corporate capacity rather than upon the business done, that Alabama might legitimately use the capital employed within the state as the measure of a tax upon a foreign corporation, and that “it was a mere fortuity that in this instance the capital was made up of imports still intact.”⁴⁶ In developing their argument, the dissenters showed that the discriminatory taxes invalidated in certain earlier cases had subjected imported articles to a burden considered and intended, whereas the presence of imported packages in the instant case was an adventitious circumstance.⁴⁷ No reference was made in the dissent to the majority’s remarks concerning the consent of Congress to state taxation.

In comparison with the case just examined, that of *Gulf Fisheries Co. v. Mac Inerney*⁴⁸ is almost absurdly simple. A Texas license tax upon wholesale dealers in fish was contested by a company that did its entire business on a wharf in Galveston. On this wharf, fish that had been caught in the Gulf of Mexico were landed in bulk, weighed, washed, re-iced, gutted (except for a small percentage of the catch), and either loaded on express cars or sold to local wholesale dealers. The company contended that a tax on a business so conducted was a tax upon imports, but the Supreme Court held unanimously that “the tax is not laid until the fish have lost their alleged distinctive character as imports and have become through processing, handling and sale, a part of the mass of property subject to taxation by the state.”⁴⁹ Mr.

45. “The stipulation of the parties shows that the only transactions in Alabama in which appellant is concerned are the landing, storage, and sale of the nitrate in the form and packages in which it was put up abroad and transported into the United States. The bags were kept intact, no nitrate was removed therefrom, and prior to the delivery of the same to those who bought from appellant, it was not in any manner commingled with, and did not become a part of, the general mass of property within the state. The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales would take from appellant the very rights in respect of importation that are conferred by the Constitution and laws of the United States. Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. *Brown v. Maryland*, 12 Wheat. 419, 436, 442-444.” *Id.* at 225, 226.

46. *Id.* at 235.

47. “*Brown v. Maryland* was a case of a discriminatory tax upon the business of importers, and *Cook v. Pennsylvania* a case of a discriminatory tax upon an auctioneer selling for importers. In neither was there a franchise, or a tax upon a franchise, or reference to capital as a standard of measurement. In each the presence of imported packages to be subjected to a burden was an event considered and intended, not an adventitious circumstance developing unexpectedly in the application of the tax to one taxpayer out of many.” *Id.* at 238.

48. 276 U. S. 124 (1928).

49. *Id.* at 127. Note also: “The tax is laid, not according to the weight of the fish when landed, but upon the fish sold. All that is sold has been handled as above stated.

Justice Brandeis' opinion for the Court distinguished several earlier cases in which state taxes had been invalidated, but neglected all reference to the decision reached in 1900 in *May v. New Orleans*.⁵⁰ The authority of the *May* case might, however, have been effectively used to support the Court's position in the *Gulf Fisheries Company* case, for in both instances alleged "imports" were denied immunity from non-discriminatory state taxation on the ground that the goods had been so acted upon as to be incorporated into the common mass of property in the state.⁵¹ In the *New Orleans* case, the taxes were general property taxes and the goods assessed were imported dry goods in the same packages in which they had been originally placed by the foreign manufacturers and in which they were subsequently sold by sample. The manufacturers' packages had, however, been shipped to this country within wooden boxes and the Supreme Court held, by a bare majority,⁵² that the opening of the wooden cases incorporated the parcels into the mass of property within Louisiana and subjected them to taxation as property along with other property in the state.⁵³ Mr. Justice Harlan's rather rambling opinion devoted disproportionate space to a description of the packing and shipping practices used in the importer's business, but included a fairly effective differentiation of property taxes from taxes that singled out imports,⁵⁴

None of it has remained in its original condition. None is in an original package, and little in its original form. This is obviously true of the 75 per cent. which is beheaded and gutted and of the 7 to 10 per cent. more which is gutted and gilled with the heads on. But the small remainder is, when sold, no longer in its original condition. Before sale, it is washed and re-iced. It is taken from the bulk and put loose with ice in barrels. And all this has been done on the wharf. These facts make inapplicable cases like *Brown v. Maryland*; *Low v. Austin*; *Cook v. Pennsylvania*."

50. 178 U. S. 496 (1900).

51. "All the fish sold here, after landing and before laying the tax, been so acted upon as to become part of the common property of the State. They have lost their distinctive character as imports and have become taxable by the state." *Gulf Fisheries Co. v. MacInerney*, 276 U. S. 124, 127 (1928), cited *supra* note 48. "So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had so acted upon the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation. . . . In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the State as other like property situated within its limits." *May v. New Orleans*, 178 U. S. 496, 508, 509 (1900), cited *supra* note 50.

52. Chief Justice Fuller and Justices Brewer, Shiras and Peckham dissented without opinion.

53. *May v. New Orleans*, 178 U. S. 496, 508, 509 (1900). See note 51 *supra* for quotation.

54. "The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the State. It was not a tax on the plaintiffs' goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels, and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. . . . A different view is not justified by anything said in *Brown v. Maryland*. It was there held that the importer by paying duties acquired the right to sell in the original packages the goods imported,—the Maryland statute requiring a license from the State before any one could sell 'by wholesale, bale or package, hogs-

and pointed out the unfortunate economic consequences that would result from tax immunity under the circumstances of the particular case.⁵⁵

The case most recently decided under the import clause, *Hooven and Allison Co. v. Evatt*,⁵⁶ differs from other recent cases but resembles *May v. New Orleans*—and one earlier case⁵⁷—in that it involved the validity of general property taxes. The appellant was a cordage manufacturing concern, and the property assessed by Ohio consisted of bales of fibers stored in the warehouse of the company's factory at Xenia in the original packages in which they had been imported into the United States. Some of the bales had been shipped from foreign countries and others from the Philippine Islands, but all alike were intended for eventual use as raw material in the company's factory. The Ohio courts had held that the foreign sellers or their agents were the importers, and that the fibers had therefore lost their immunity as imports by reason of sale to the cordage company. In the United States Supreme Court, however, there was apparently no dissent from Chief Justice Stone's opinion that the instant case differed from that on which the Ohio courts relied⁵⁸ in that the cordage company's contracts of purchase were the inducing and efficient cause of the importation,⁵⁹ and in that the risk of loss from change of market value was on the company,⁶⁰—not on the seller or on the broker or banker who served as consignee. Although the imported goods were regularly entered at New York City and trans-shipped to Xenia, the intricate business practices of the present day had enabled the Ohio

head, barrel or tierce,' goods imported from other countries. But it was not held that the right to sell was attended with an immunity from all taxation upon the goods as *property*, after they had ceased to be imports and had become by the act of the importer a part of the general mass of property in the state. The contrary was adjudged. [Italics in original.]” *Id.* at 509.

55. In particular: “It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders, seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business.” *Id.* at 503. Also: “Indeed, under plaintiffs’ view, the Constitution secures to the manufacturer of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing violence to the words of the Constitution.” *Id.* at 504.

56. 324 U. S. 652 (1945), cited *supra* note 43. For an exceedingly interesting discussion of the opinions in this case, see Powell, *State Taxation of Imports* (1945) 58 HARV. L. REV. 858.

57. *Low v. Austin*, 13 Wall. 29 (U. S. 1871). This case, which is reviewed later in this article, *infra* pp. 22-24, seems to have been overlooked by both counsel and Court in *May v. New Orleans*.

58. *Waring v. Mayor of Mobile*, 8 Wall. 110 (U. S. 1868). For the position of the United States Supreme Court towards this case, see particularly *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 663, n. 4 (1945), cited *supra* notes 43 and 56.

59. “Petitioner’s contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation.” *Id.* at 661.

60. “The risk of loss from change of market value was on petitioner, save as it might insure against such loss at its own expense.” *Id.* at 662.

manufacturer to become an importer. The decision of the Supreme Court on this point has much to commend it over a contrary holding based upon technical questions of passing of title, but it is odd that an opinion concerned with Ohio taxation of a Xenia importer should praise the import clause as a protection to the interior states from unequal taxation by states on the seaboard.⁶¹

The cordage company having thus been declared to be the importer, the question to be determined was whether the imported fibers retained their tax immunity while stored for use in manufacture. The chief justice answered in the affirmative, but carried with him only four of his associates, Justices Roberts, Reed, Frankfurter and Jackson. Justices Black, Douglas, Murphy and Rutledge gave a negative answer in an emphatic opinion by Mr. Justice Black. In striking contrast with the iconoclasm evidenced by the "New Deal Court" toward certain other dogmas of constitutional law, both the majority and the dissenting opinion in this import clause case treated Chief Justice Marshall's original package formula⁶² as though it were an inspired text.⁶³ The chief justice rephrased the classic rule in terms of the purpose of the importation, thus bringing imports for manufacture into the same class as imports for sale⁶⁴; Mr. Justice Black undertook to prove that the formula, taken in its context, establishes the immunity of imports only while they are still *en route* to their ultimate purchaser,⁶⁵ wherefore goods awaiting use in manufacture are liable to

61. "It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framers, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties." *Id.* at 656.

62. *Brown v. Maryland*, 12 Wheat. 419, 449 (U. S. 1827). The formula is quoted *supra* note 32 and also *infra* pp. 15-17.

63. Note, for example, the following passage from Chief Justice Stone's opinion: "On the other hand the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case since *Brown v. Maryland*, an import is deemed to retain its character as such 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported' or until put to the use for which it was imported." *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 665 (1945), cited *supra* notes 43, 56 and 58. Also, from the opinion of Mr. Justice Black: "In *Brown v. Maryland*, Marshall, C. J., pointedly rejected the argument that the rule announced in that case would permit an importer to 'bring in goods . . . for his own use, and thus retain much valuable property exempt from taxation.' Today, this Court, in holding that an Ohio manufacturer may escape payment of a non-discriminatory state *ad valorem* tax on goods imported from abroad and held for use in its factory, interprets Marshall's opinion in a manner which squarely conflicts with his own interpretation of the rule he announced." *Id.* at 686, 687.

64. "Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package and before they are devoted to the purpose for which they were imported." *Id.* at 668.

65. "The Court, in *Brown v. Maryland*, was in reality treating goods in the hands of an importer for sale, as though they were still in transit until the first sale had

taxation.⁶⁶ Each justice cited Chief Justice Taney as an authority on Chief Justice Marshall's meaning,⁶⁷ but neither showed any awareness of the fact that Chief Justice Taney had expressly conceded the validity of property taxes on imported goods held by a resident importing merchant for sale⁶⁸ and had at least hinted that Chief Justice Marshall had held the same opinion on this point.⁶⁹

The final constitutional issue in *Hooven and Allison Co. v. Evatt* concerned the propriety of regarding fibers brought into the continental United States from the Philippine Islands as *imports* in the constitutional sense of the term. Starting with Chief Justice Marshall's definition of imports as "articles brought into a country"⁷⁰ and relying on the admitted power of Congress to lay tariff duties upon goods brought from the Philippines,⁷¹ Chief Justice Stone argued that a foreign origin is not indispensable and that fibers brought from the Philippines are imports on exactly the same terms as fibers from foreign countries.⁷² Justices Douglas and Murphy, although dissenters

been made. This was in accord with the interpretation of the rule by Chief Justice Taney in the *License Cases*. He there said that while imported articles 'are in the hands of the importer for sale . . . they may be regarded as merely *in transitu*, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported.' *Id.* at 688.

66. "But the fibers here were not *in transitu* in any possible sense of the phrase. Every conceivable relationship they had once borne to the process of importation had ended. They were at rest in the petitioner's factory along with its other raw materials, having arrived at the point where they were 'to be used and consumed' in current production, and kept as a 'backlog' to assure constant operation of the plant." *Id.* at 688, 689.

67. For Mr. Justice Black's reference to the views of Chief Justice Taney see note 65 *supra*. Chief Justice Stone's reference is: "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown v. Maryland*, in which he appeared as counsel for the State, declared, as we now affirm: 'Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.'" *Id.* at 666.

68. "Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner." *License Cases*, 5 How. 504, 576 (U. S. 1847).

69. This point is developed *infra* pp. 18-19.

70. "The Constitution provides us with no definition of the term 'imports' other than such as is implicit in the word itself. Imports were defined by Chief Justice Marshall in *Brown v. Maryland* at 437 as 'things imported' and 'articles brought into a country.' He added: 'If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country.'" 324 U. S. 652, 669 (1945), cited *supra* notes 43, 56, 58 and 63.

71. *Id.* at 672-674, 678.

72. "We conclude that practical as well as theoretical considerations and the structure of our constitutional system require us to hold that articles brought from the Philippines into the United States are imports, subject to the constitutional provisions relating to imports both because, as was said in *Brown v. Maryland*, they are brought

as to the immunity of imports held by the importer for use in manufacture, concurred in the chief justice's opinion that goods from the Philippines may be regarded as imports,⁷³ but Mr. Justice Reed, who had been of the majority on the former question, uttered a vigorous dissent from the Court's holding that "the Philippine Islands is not a part of this 'country'." ⁷⁴ Mr. Justice Reed preferred to make "country" coterminous with sovereignty ⁷⁵ and to define imports as "things brought into the territory under the jurisdiction or sovereignty of the American government." ⁷⁶ Important considerations of policy were advanced on both sides, but this policy issue is inextricably bound up with the theory advanced by Chief Justice Stone that it may be left to Congress to obliterate, should this seem desirable, the import clause limitations upon the tax power of the states. This leave-it-to-Congress proposition will be carefully examined in due course, but first it is fitting to give further consideration to the major premise of *all* the several opinions in *Hooven and Allison Co. v. Evatt*. As already observed, this premise is the allegedly orthodox proposition that imports in the original package enjoy a special immunity from the tax power of a state, even when that power is exerted in a non-discriminatory general property tax.

The words *original package* in American constitutional law are probably to be traced to an act passed in 1819 by the Maryland legislature, which required an eight-dollar annual license from every retail merchant. By way of definition, this statute provided that "every person who shall deal in the selling of any goods, wares or merchandize, except such as are of the growth, produce, or manufacture of the United States, and except such as are sold by the importer thereof in the original cask, case, box or package, wherein the same shall have been imported, shall be deemed to be, and hereby is declared to be, a retail dealer in merchandize within the meaning of this act." ⁷⁷ Importers selling in the original packages remained untaxed until 1821,

into the United States, and because the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable." *Id.* at 679.

73. Mr. Justice Douglas merely indicated his concurrence on this point, while Mr. Justice Murphy wrote a short opinion.

74. "My disagreement with the Court is confined to that portion of the opinion which determines that the Philippine Islands is not a part of this 'country' as that word is defined in the opinion." *Id.* at 679, 680.

75. "Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their foreign character and become a part of the territories of the victor." *Id.* at 681, 682.

76. "No light can come from the history of the adoption of the section. The idea of an American possession was not in being. But since the Founding Fathers were creating a commercial as well as a political entity, it seems more consonant with their purpose to define imports under the section as things brought into the territory under the jurisdiction or sovereignty of the American government." *Id.* at 685, 686.

77. Laws of Maryland (1819) c. 184, § 1.

when Maryland enacted a supplementary statute which provided that "all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spiritous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrell or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars."⁷⁸ Thus Maryland required no license of dealers all of whose wares were articles produced within the United States, but classified dealers in foreign products into the three categories of importers, wholesale dealers, and retail dealers by reference to the packages in which the imported articles were offered for sale. In 1827, the case of *Brown v. Maryland*⁷⁹ brought before the Supreme Court the tax laid by Maryland on an *importer*, but the only weapon at the Court's disposal was a constitutional text that used the word *imports*. Thus it came about that *original packages* passed from the Maryland statutory definition of *importer* into Chief Justice Marshall's classic definition of *imports*:—"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has thus become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."⁸⁰ It will be observed that whereas the fibers in the *Hooven and Allison* case were *imports* under this language taken literally, the cordage manufacturers would not have been *importers* under the Maryland conception of an importer as a dealer in merchandise in the original cask, case or package in which it had been imported.

But was it ever intended that the *original package* formula should be literally applied to a state tax bearing upon all property alike? The Maryland license system discriminated against dealers handling foreign products, much as the tax on banknotes involved in *McCulloch v. Maryland*⁸¹ discriminated against the banking operations of the National Bank. Chief Justice Marshall's language in the *McCulloch* case was sweeping enough to condemn any state taxation in any way relating to the bank, but he added: "This opinion does not deprive the states of any resources which they originally possessed. It does

78. Laws of Maryland (1821) c. 246, § 2.

79. 12 Wheat. 419 (U. S. 1827).

80. *Id.* at 441, 442.

81. 4 Wheat. 316 (U. S. 1819).

not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.”⁸² It may very well be that the chief justice intended likewise to limit the effect of his import formula by the caution, “We do not mean to give any opinion on a tax *not discriminating between foreign and domestic articles.*” To be sure, the observation is printed as “We do not mean to give any opinion on a tax discriminating between foreign and domestic articles,”⁸³ but this is meaningless in view of the fact that the very tax invalidated in *Brown v. Maryland* did discriminate in this very manner. The writer adheres to her hypothesis⁸⁴ that a negative particle was inadvertently omitted by the chief justice or the reporter or the printer from a sentence that was intended to discourage inferences condemning the validity of non-discriminatory taxes.

By the time that the import clause again reached the Supreme Court, Chief Justice Marshall was dead, but the attorney general who had presented Maryland's case against Brown had become Chief Justice Taney. Exceptional importance therefore attaches to that portion of the chief justice's opinion in the *License Cases*⁸⁵ that deals with the tax immunity of imports. His views are so frequently misrepresented by partial quotation that it seems wise to quote his entire review of the leading import case:

“It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision and depending altogether upon the words of the Constitution.

“This question came directly before the court for the first time in the case of *Brown v. The State of Maryland*. And the court there held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was im-

82. *Id.* at 436.

83. *Brown v. Maryland*, 12 Wheat. 419, 449 (U. S. 1827).

84. Spahr, *op. cit. supra* note 29 at 146.

85. 5 How. 504 (U. S. 1847).

ported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no State, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property. This I understand to be substantially the decision in the case of *Brown v. The State of Maryland*, drawing the line between foreign commerce which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the States, and over which Congress can exercise no control.

“I argued the case in behalf of the State and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no sense be regarded as part of the mass of property in the State usually taxed for the support of the State government. The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu*, and on their way

to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.

“Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. [Italics added.] But a tax of this description stands upon a very different footing from the tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition.

“Adopting, therefore, the rule as laid down in *Brown v. The State of Maryland*, I proceed to apply it to the cases of Massachusetts and Rhode Island.”⁸⁶

Except for the introduction of italics and the omission of a citation, these passages stand exactly as they appear in Chief Justice Taney’s printed opinion. There is an undoubted implication that a state may not lay property taxes upon one who is not a citizen of that state, but it is crystal clear that the chief justice believed that any one who is taxable on his property is taxable upon his *entire* property, *including*

86. *Id.* at 574-576.

imported merchandise held for sale. What is even more significant is the insertion of the passage on property taxation so as to make it part and parcel of "the rule as laid down in *Brown v. The State of Maryland*." Whether or not Chief Justice Marshall actually intended his remark to read: "We do not mean to give any opinion on a tax *not* discriminating between foreign and domestic articles," there seems to be no doubt about Chief Justice Taney's conception of his predecessor's views. Clearly the later chief justice had no suspicion that the Supreme Court had asserted that imports in the original package enjoy exemption from the regular property taxes imposed by the state of which the importer is a resident.

Careful study of all the diverse opinions delivered in the *License Cases* and of the voluminous reports of the arguments of counsel serves to confirm this view of the almost contemporaneous understanding of the doctrine of *Brown v. Maryland*. The only intimation that the original package doctrine bars property taxation of imports in the original packages was given by Mr. Justice Daniel,⁸⁷ and this particular justice, far from indorsing such extended tax immunity, flatly repudiated the entire original package doctrine.⁸⁸ As for the argument of counsel, it should be noted that all attacks made upon the liquor license measures under consideration were directed against their regulatory

87. "The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulged in the reasoning of this court in the case of *Brown v. The State of Maryland*—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these. That under the operation of that provision in the constitution which confers on Congress the power of regulating commerce with foreign nations, etc., etc., and by the further provision which prohibits to the States the power of levying imposts or duties on imports, merchandise, or property imported from abroad—however completely its transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the federal government, and however absolutely, exclusively, and undeniably it shall have become the property, and passed into the possession, of the citizen resident within the State, and protected both in person and property by the laws of the State—shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package, or form in which it shall have been imported, nor until (to use the language of the court) it shall have been 'broken up and mingled with the general mass of property.'" *Id.* at 611, 612.

88. "With regard to this phrase, 'broken up and mingled with the mass of property', so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity! With respect to the phrase above mentioned, it may be retorted that a person may import a steam engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home." *Id.* at 612, 613.

and prohibitory aspects.⁸⁹ The counsel for the appellant in the Rhode Island case emphasized his point by contrasting the power to tax with that to prohibit. As to the former: "The taxing power is a sovereign power, necessary for the support of government, and never in its nature or effect treated as a repugnant power. When exerted by the State over personal property in general, including imports, it cannot affect foreign commerce, or the revenues of the United States, since it bears equally upon all articles, and thus keeps their relative value the same. To become mischievous, either constitutionally or practically, to foreign commerce, a tax law must discriminate as to the subjects of it."⁹⁰ It seems reasonably certain that in 1847, twenty years after the first pronouncement of the Supreme Court on the import clause, the constitutional tradition as to the immunity of imports in the original packages did not include acceptance of the invalidity of state property taxes as applied to such imported goods.

But it is not surprising that the various dicta of the *License Cases* made less impression upon legal thought than did the phrases of Chief Justice Marshall in *Brown v. Maryland*. In 1872, when the case of *Low v. Austin*⁹¹ squarely raised the issue whether California property taxes might be collected upon imported wines stored in their original cases in the warehouse of a San Francisco importer, the unanimity of the Supreme Court and the phraseology of its opinion made it abundantly clear that there was an accepted constitutional orthodoxy on the tax immunity of imports.⁹² Appealing to the authority of Chief

89. Under the Massachusetts licensing act, the county license commissioners were empowered to refuse to grant any licenses "when in their opinion the public good does not require them to be granted," and no licenses had been granted for six years in the county in which Thurlow violated the law by selling intoxicating liquor at retail without a license. *Id.* at 509, 510, 512. In Rhode Island, "No licenses shall be granted for the retailing of wines or strong liquors in any town or city in this State, when the electors in such town or city, qualified to vote for general officers, shall, at the annual town or ward meetings held for the election of town or city officers, decide that no such licenses for retailing as aforesaid shall be granted for that year," and the town in which Fletcher sold liquor without a license was at the time on a no-license basis. *Id.* at 540. As for the New Hampshire statute, which required a license for the sale of liquor in any quantity and which Pierce violated by selling a barrel of gin that he had imported from Massachusetts, his counsel conceded in argument that it did not appear that the state law compelled him to pay anything for his license. *Id.* at 561. It is thus clear that the import clause was not actually involved in any one of the three cases, and that the discussion of the meaning of the term *import* was introduced only to aid in drawing the line between purely intrastate commerce on the one hand and foreign or interstate commerce on the other hand.

90. *Id.* at 549. The next paragraph reads: "This, however, is not true of prohibitory laws, like the law in question. If practically such a law forbids the sale, destroys the vendible character of an imported article, which constitutionally it cannot do, it does not help the law in relation to such articles, that it also destroys the vendible character of the like article manufactured in the State, which constitutionally it may do. It is void *pro tanto* imports, in any form or shape." *Ibid.*

91. 13 Wall. 29 (U. S. 1871).

92. "The reasons advanced by the *Chief Justice* not only commend themselves, by their intrinsic force, to all minds, but they have received recognition and approval by this court in repeated instances." *Id.* at 33. Further proof of the accepted doctrine in

Justice Marshall and pointing to Chief Justice Taney as a convert to the original package doctrine,⁹³ Mr. Justice Field's opinion furnished a pattern which was closely followed by Chief Justice Stone seventy years later in the most recent import clause case. Mr. Justice Field was in no way impressed by the attempt of the California Supreme Court to distinguish *Brown v. Maryland* from *Low v. Austin*. "The Supreme Court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown v. The State of Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax."⁹⁴ From *Low v. Austin*, rather than from *Brown v. Maryland*, follows the invalidation of Ohio property taxes on imported fibers stored for use in the factory of a Xenia cordage manufacturer. It should be noted that these two cases of *Low v. Austin* and *Hooven and Allison Co. v. Evatt* constitute the entire line of Supreme Court decisions actually holding imports immune from general property taxes.⁹⁵

The cumulative authority for the immunity of imports from non-discriminatory property taxation was thus far less compelling in 1945 than the doctrine of intergovernmental tax immunity had been in 1938.

the post-Civil-War decade can be found in the passage in *Woodruff v. Parham*, 8 Wall. 123, 137 (U. S. 1868), in which Mr. Justice Miller listed the disastrous consequences that would follow from a determination that goods brought into one state from another were *imports* on the same terms as goods from abroad: "The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

93. *Low v. Austin*, 13 Wall. 29, 32-34 (U. S. 1871).

94. *Id.* at 34.

95. In *May v. New Orleans*, 178 U. S. 496 (1900), the contested tax was a general property tax, but it was sustained by the Court. See *supra* pp. 10-11.

Yet the Supreme Court departed from precedent in *Helvering v. Gerhardt*⁹⁶ and took a first step in undermining the whole theory of intergovernmental immunity, while in *Hooven and Allison Co. v. Evatt* the traditional immunity of imports was extended. The key to the paradox, at least as far as Chief Justice Stone is concerned, seems to have been the late chief justice's desire to refer questions of tax liability to Congress. Although the various dissenting and partially concurring opinions implied that the tax immunity conferred upon the bales of fibers in the case was irrevocable,⁹⁷ Chief Justice Stone, as spokesman for the majority, unqualifiedly declared: "In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture."⁹⁸ Also, on the final issue: "The advantages and disadvantages, if any, which result from the tax immunity, are inherent in the import clause. But those advantages and disadvantages in the case of the Philippines are no more beyond the reach of Congress than in the case of other imports. Congress is left free by the terms of the import clause to remove the prohibition of state taxation of imports and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity. Congress, through the commerce clause, possesses the same power of control of state taxation of all merchandise moving in interstate or foreign commerce. And Congress is free, as in the case of other imports, to regulate the flow of merchandise from the Philippines into the United States by the imposition of either customs duties or internal revenue taxes."⁹⁹

Mr. Justice Reed, in rejoinder, argued that little can be expected in the way of congressional relief for an inequitable situation. "Freedom from taxation has today become an appreciable advantage. Furthermore this freedom from state taxation is gained through an interpretation of Constitutional power and therefore is beyond the reach of equalization by the states alone in all circumstances and by the Con-

96. 304 U. S. 405 (1938). See *supra* pp. 2-3.

97. Mr. Justice Black deploras any discrimination in favor of goods imported by a manufacturer for his own use. *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 689, cited *supra* notes 43, 56, 58 and 63. Mr. Justice Murphy shares this opinion but opposes a construction of the term *imports* that would place Philippine products at a disadvantage on the American market as compared with products from foreign countries. *Id.* at 692. Mr. Justice Reed, on the other hand, agrees with the Chief Justice about imports for use, but objects to placing the products of unincorporated territories or possessions at an advantage over competing products of the continental United States. *Id.* at 680.

98. *Id.* at 668.

99. *Id.* at 679.

gress except by complex tariff legislation which would only reach warehoused imports from dependencies. The Congressional relief to producers of the several states of the Union, therefore, is an awkward approach, which will create irritation with the importing territories by reason of countervailing tariff increases." ¹⁰⁰ It is probably no mere coincidence that Mr. Justice Reed, who saw little hope from congressional action, quoted the import clause in full, ¹⁰¹ while Chief Justice Stone resorted to asterisks ¹⁰² instead of proceeding to the net produce clause, which apparently prohibits in express terms any congressional consent to state collection of import duties for the benefit of state treasuries. As remarked by Professor Powell in his recent article on "State Taxation of Imports": "Doubtless local producers in need of protection against foreign competitors have had and will continue to have sufficiently favorable consideration from Congress. This, however, may not adequately help their local state treasuries which yearn for property taxes and sales taxes. Congressional consent to the levy of such taxes would not directly help, since 'the net Produce of all Duties and Imposts, laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States.' This is not to say that Congress could not recompense the states by grants in aid or by direct assumption of burdens historically borne by the states. This, however, would be clumsier than full non-discriminatory taxation by the states, with the power of Congress in the offing to impose any restrictions or prohibitions that experience might suggest." ¹⁰³

It seems not unlikely that Chief Justice Stone entirely overlooked the net produce clause, but this is not the only possible explanation. It is occasionally maintained that the Constitution empowers Congress to consent to a state's collection of import taxes for its own use. The late Dean James Parker Hall went so far as to assert that "Between 1790 and 1823 small import duties were frequently permitted by Congress to be levied at particular ports and their proceeds applied by the

100. *Id.* at 680.

101. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's Inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." (U. S. CONST., Art. I, § 10, Par. 2.) This is quoted, *id.* at 681.

102. *Id.* at 656.

103. Powell, *op. cit. supra* note 56 at 876. In a footnote to this passage is the comment: "The interpretation given above in the text assumes that 'the net Produce of all Duties and Imposts' is not confined to those for the execution of inspection laws, which do not require the consent of Congress, but includes 'all Duties and Imposts, laid by any State on Imports or Exports.' If the narrower interpretation should be given, then Congress would be untrammelled in giving its consent to state taxation of imports and exports." *Id.* note 64.

states to various local port and quarantine purposes.”¹⁰⁴ It happens, however, that the acts of Congress cited on this point¹⁰⁵ fall far short of proving the assertion. In most of the listed statutes, the duties to which Congress consented were expressly duties of tonnage,¹⁰⁶ as to which there is no constitutional earmarking for the treasury of the United States. In the few instances where Congress merely gave consent to “duties”,¹⁰⁷ the present writer is unable to prove that these were not duties on imports,¹⁰⁸ but conjectures that they also were tonnage duties.

As for judicial interpretation of the net produce clause, the question has never been brought squarely before the Supreme Court. The clearest utterance is a dictum in Mr. Justice Miller’s opinion in the important case of *Woodruff v. Parham*,¹⁰⁹ in which the Court in 1868, contrary to intimations in earlier cases, decided that the terms *import* and *export* in the Constitution are restricted to foreign commerce. As a major link in his chain of reasoning against the interpretation of the terms so as to include goods shipped in interstate commerce, Mr. Justice Miller pointed out:

“There are two provisions of the clause under which exemption from State taxation is claimed in this case, which are not without influence on that prohibition, namely: that any State may, with the assent of Congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the Treas-

104. HALL, CASES ON CONSTITUTIONAL LAW (1913) 1052, note.

105. “See, e. g., 1 STAT. 184, 189, 243, 393, 425, 462, 463, 546; 2 STAT. 18, 103, 152, 316, 357, 484, 658, 820; 3 STAT. 125, 683.” *Ibid.*

106. For example: “*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the consent of Congress be and is hereby granted and declared, to the operation of an act of the General Assembly of Maryland, passed the twenty-eighth of December, one thousand seven hundred and ninety-three, intitled ‘An Act to appoint a health officer, for the port of Baltimore, in Baltimore County,’ so far as to enable the state aforesaid to collect a duty of one cent per ton, on all vessels coming into the district of Baltimore, from a foreign voyage, for the purposes in the said act intended.” 1 STAT. 393, § 1 (1794).

107. 1 STAT. 243 (1792) and 1 STAT. 463 (1796) both consent to the operation of an act passed by the General Assembly of Maryland on the first Monday of November, 1791, entitled “An act empowering the wardens of the port of Baltimore to levy and collect the duty therein mentioned.”

1 STAT. 546 (1798) consents to the operation of a Massachusetts act passed February 2, 1798, entitled “An act to incorporate Tobias Lord, Oliver Keating, Thatcher Goddard and others for the purpose of keeping in repair a pier, at the mouth of the Kennebunk river, and to grant them a duty for reimbursing the expenses of erecting the same.”

2 STAT. 152 (1802) consents to a Virginia act, entitled “An act to amend and reduce into one, the several acts of assembly for improving the navigation of Appomattox river, from Broadway to Pocahontas bridge.”

2 STAT. 658 (1811) consents to the operation of a Georgia act, passed December 12, 1804, “establishing the fees of the harbor master and health officer of the ports of Savannah and St. Mary’s.”

108. The state acts referred to in the preceding note are not to be found in the volumes of early statutes collected in the Columbia Law Library.

109. 8 Wall. 123 (U. S. 1868).

ury of the United States. The framers of the Constitution, claiming for the General Government, as they did, all the duties *on foreign* goods imported into the country, might well permit a State that wished to tax more heavily than Congress did, foreign liquors, tobacco or other articles injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of Congress, and was paid into the Federal treasury. But that it was intended to permit such a tax to be imposed by such authority on the products of neighboring States for the use of the Federal government, and that Congress, under this temptation, was to arbitrate between the State which proposed to levy the tax and those which opposed it, seems altogether improbable.

"Yet this must be the construction of the clause in question if it has any reference to goods imported from one State to another."¹¹⁰

So far as the writer knows, the only Supreme Court authority that can be listed *contra* is *De Bary v. Louisiana*,¹¹¹ which Dean Hall cited in support of his statement that "The federal Wilson act now permits the states to levy regulative taxes upon imported liquor in the unsold original packages."¹¹² The Supreme Court indubitably held that the Wilson Act¹¹³ authorized Louisiana to collect license taxes for the privilege of engaging in the retail liquor business although the only sales made in the taxable period were of foreign liquor sold in the original package from the importer's warehouse in New Orleans, but Chief Justice White's brief memorandum opinion treated the issue as one of commonplace statutory construction. In the court below, counsel for De Bary had urged that the Louisiana licensing act was only a revenue measure outside the terms of the Wilson Act, and that the act had "reference only to liquors 'transported' into a state, and not to liquors 'imported' into a state,"¹¹⁴ but the Louisiana Supreme Court had decided against him on both points. It had also been contended that "the Wilson Act, if construed to authorize the states to impose taxes upon imports, becomes obnoxious to Article I, Section

110. *Id.* at 133.

111. 227 U. S. 108 (1913).

112. HALL, *op. cit. supra* note 104 at 1052, note. Dean Hall cites his authority as "State v. De Bary & Co., 130 La. 1090, 1095 (1912), affirmed in *De Bary & Co. v. Louisiana*, 227 U. S. 108 (1913)."

113. "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 STAT. 313 (1890).

114. *State v. De Bary*, 130 La. 1090, 1094 (1912).

10, of the Constitution of the United States" (quoting the import clause in its truncated form).¹¹⁵ To this the Louisiana tribunal had replied: "Suffice it to say, in answer to this, that this constitutional provision has reference only to such state taxes as may be attempted to be laid upon imports without the consent of Congress, and has no reference to state taxes laid with the consent of Congress."¹¹⁶ If De Bary's counsel had availed himself of the net produce provision of the import clause, an interesting constitutional issue would have confronted the Louisiana court, and would then undoubtedly have figured in the final argument in Washington. As it was, the import clause received absolutely no mention in the memorandum opinion delivered by the United States Supreme Court and one must surmise that it went unheeded in the argument before that tribunal. The Supreme Court emphatically agreed with the court below that the Wilson Act did not exempt liquors originating in a foreign country from the operation of the statute,¹¹⁷ but that is the entire holding of *De Bary v. Louisiana*. If the Court should hereafter find that the net produce clause does not invalidate a congressional act authorizing a state to collect taxes on imports for its own benefit, the decision would hardly be based upon the authority of the *De Bary* case. Rather would the dictum of Chief Justice Stone in *Hooven and Allison Co. v. Evatt* be regarded as the principal¹¹⁸ fingerpost pointing towards a new conclusion.

From the standpoint of policy, there is much to be said in favor of a congressional statute phrased in some such terms as: "All goods introduced into any state from any other state, or from any territory or other possession of the United States, or from any foreign country, shall, upon arrival in such state, be subject to the revenue laws of such state to the same extent and in the same manner as though produced in such state." Such a statute, if only it might be sustained by the Supreme Court, would sharply curtail many forms of tax avoidance

115. *Ibid.* The quotation from the import clause stops without including the net produce provision.

116. *Ibid.*

117. "The word 'all' [in the Wilson Act] causes a consideration of the point of origin of the liquors transported to be wholly negligible, and this irresistible conclusion as to the meaning of the text is rendered if possible clearer by a consideration of the intent of Congress in enacting the Wilson law. In reason it is certain that the purpose which led to the enactment of the law was to give the several States power to deal with all liquors coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject; a purpose which would be plainly set at naught by exempting liquors brought into a State from a foreign country from the operation of the statute." *De Bary v. Louisiana*, 227 U. S. 108, 110-111 (1913), cited *supra* note 111.

118. So far as the writer knows, the only other such pointer is to be found in *Anglo-Chilean Nitrate Sales Corporation v. Alabama*, 288 U. S. 218 (1933), cited *supra* notes 44 and 45, in which, at 226, Mr. Justice Butler remarked: "Alabama was powerless, *without the consent of Congress*, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. [*Italics added.*]"

and would ease the Court's burden by simplifying several branches of the law of taxation. It is the writer's belief that the language of the Court's opinion in *Hooven and Allison Co. v. Evatt*—perhaps also the actual determination of the issue—hinged upon the late chief justice's conscious or unconscious wish for such an outcome. (It will be remembered that in 1890 frequent allusions to the consent of Congress,¹¹⁹ made by Chief Justice Fuller in an opinion condemning certain manifestations of a state prohibition law enacted without such consent, led to the enactment of the Wilson Act¹²⁰ by Congress and its subsequent validation by the Supreme Court.¹²¹)

Venturing further in psychoanalysis, the writer detects as to imported fibers not only judicial willingness to sanction congressional consent to state taxation but also judicial reluctance to deny tax immunity in such terms as to prevent Congress from subsequently conferring exemption. It is simple enough for Congress to amend a *federal* tax law so as to confer an immunity not previously recognized by the Court, but its power to terminate an approved liability to *state*-taxation is likely to be tenuous. It has been noted that the initial invalidation of state inspection fees imposed in the silence of Congress on federally distributed fertilizer gives rise to a subsequent power of Congress to determine the issue either way.¹²² Similarly, a sufficient motive for the invalidation of general property taxes in *Hooven and Allison Co. v. Evatt* may be found in a more or less conscious realization that it would be next to impossible to find a basis for congressional exemption of imported fibers awaiting manufacture from a judicially recognized liability to non-discriminatory general property taxes. If the Supreme Court wants Congress to decide whether or not alleged "imports" shall be subject to state taxation, its recent opinion, despite the straining of the precedents and the utter disregard of the net produce provision, probably selects the lesser horn of the dilemma.

To summarize briefly, the writer believes that *Hooven and Allison Co. v. Evatt* is to be understood by comparison with recent intergovernmental tax opinions rather than in the setting of the import clause precedents. These latter are by no means determinative of the

119. In *Leisy v. Hardin*, 135 U. S. 100 (1890). *Inter alia*: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. [Italics added.]" *Id.* at 109, 110. Also: "Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. [Italics added.]" *Id.* at 124, 125.

120. See note 113 *supra*.

121. In *re Rahrer*, 140 U. S. 545 (1891).

122. *Supra* pp. 5-6.

issue presented. The only previous holding of the Court against the liability of imports to general property taxation—in *Low v. Austin*—had been accompanied by a weak opinion that relied upon a misapprehension of Chief Justice Taney's opinion in the *License Cases*, and even *Low v. Austin* had conferred no tax immunity upon imports held for use in manufacture. On the other hand, *Hooven and Allison Co. v. Evatt* fits closely into the pattern of the intergovernmental tax cases in which a judicial finding for or against liability depends primarily upon the presumed intention of Congress and is declared to be subject to modification by express congressional determination. The 1945 import clause decision furnishes an outstanding example of the leave-it-to-Congress technique that should go down in history as one of the important contributions of the late Chief Justice Stone to the constitutional law of taxation and tax immunities.