The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?

Melvin G. Dakin
The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?

Melvin G. Dakin*

In the recently decided Youngstown and Plywood cases,¹ the United States Supreme Court has almost completed the process, begun many years ago in May v. New Orleans,² of interpreting Justice Marshall's famous dictum in Brown v. Maryland³ in such a manner as to protect the importing-exporting process against state taxation without imparting unnecessary sanctity and immunity to the goods themselves. That it was Justice Marshall's objective to achieve this at the time of the decision might seem to go almost without saying; yet in the one hundred and forty years which have since elapsed we are all too familiar with the almost ridiculous excesses to which the “original package” metaphor has been carried in the search for tax immunity for imported goods.

The door was opened for such excesses by Marshall himself in his statement that: “A duty on imports... is not merely a duty on the act of importation, but it is a duty on the thing imported.” This statement was a rephrasing of the constitutional language; the constitutional draftsman had cagily only said: “No state shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports...”⁴ From the beginning this might have been read to mean “the importing and exporting process.” But Marshall was impressed with the threat of as complete a defeat of the purpose of the clause “by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering port.”⁵ If the process of importation was to be adequately protected, the process must some-

*Professor of Law, Louisiana State University; Consultant, Louisiana Tax Commission.
2. 178 U.S. 496 (1900).

[747]
how reach inland beyond the water's edge; he found a solution by extending it to include the sale by the importer: "The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possesses the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it." Having established the sale as a part of the process of importation, he had no difficulty in equating a license tax on the seller with a tax on the process. "All must perceive," says Marshall, "that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So a tax on the occupation of an importer is, in like manner, a tax on importation."

Out of his usual abundance of caution, Marshall also firmly anchored the sale within the congressional power to regulate foreign commerce; and so he said: "To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part." (Emphasis added.)

Having evolved a formula for importation which served as a satisfactory basis for decision of the case before the court, Marshall might have stopped there; an almost compulsive desire to generalize or at least to embellish drove him on. How distinguish and safeguard the process from being reached through state taxes levied on the goods, he asked? States had the acknowledged power to tax persons and property within their territory: how distinguish from such property goods still within the importing process as he defined it and hence immune from state taxing power? Thus he was moved to say: "... it might be premature to state any rule as being universal in its application. 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 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

6. Id. at 442.
7. Id. at 444.
8. Id. at 447.
is too plainly a duty on imports to escape the prohibition in the
constitution." But even this was not quite a sufficient answer
to the argument of counsel for the state that, with immunity for
the right to sell, the importer would be free to exercise that right
in any manner he pleased, free from regulation or taxation by the
state. To this argument, Marshall replied:

“This indictment is against the importer, for selling a
package of dry goods in the form in which it was imported,
without a license. This state of things is changed, if he sells
them, or otherwise mixes them with the general property of
the state, by breaking up his packages, and travelling with
them as an itinerant peddler. In the first case, the tax intercepts
the import, as an import, on its way to become incorporated with the general mass of property, and denies it the
privilege of becoming so incorporated until it shall have contrib-
tuted to the revenue of the State. It denies to the importer
the right of using the privilege which he has purchased from
the United States, until he shall have also purchased it from
the State.”

Finally, it was argued by counsel for Maryland that unless
the constitutional immunity ended when the goods entered the
country or, in a later Justice’s phrase, “at the water’s edge,” an
importer will be free to bring in goods for his own use “and thus
retain much valuable property exempt from tax.” To this, Mar-
shall replied: “In the last cases, the tax finds the article already
incorporated with the mass of property by the act of the import-
er. He has used the privilege he had purchased, and has himself
mixed them up with the common mass, and the law may treat
them as it finds them. The same observations apply to plate, or
other furniture used by the importer.” (Emphasis added.)

I.

To the immunity which Marshall’s formula conferred on the
importing process in the actual litigation before him, little issue
has been taken during the century and a quarter which has elapsed; nor does it seem seriously threatened today. A tax on
the occupation of importing is proscribed because it must inevi-
tably be reflected in the sale price of goods if the importer is to

9. Id. at 441.
10. Id. at 443.
carry on profitably; no satisfactory formula seems likely which will prevent it from falling on those imported goods properly treated as not a part of the mass of general property in the state as well as on those imported goods which by some "act of the importer" have lost their immunity.

Why should imported goods be provided with a constitutional immunity against such a tax (license tax on importers) and to some degree from other forms of state taxation as well, including even non-discriminatory ad valorem property taxation? The rationale which Marshall gave seems equally valid today, though perhaps less so than in an age when all imported goods reached our shores via the sea. He said:

"Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax, because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States."\(^{13}\)

When Taney, defeated counsel in *Brown v. Maryland*, later prepared, as Chief Justice, his opinion in the *License Cases*,\(^{14}\) he had occasion to restate Marshall's rationale as follows:

"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,

---

13. *Id.* at 440.
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.” (Emphasis added.)

The original package doctrine may thus be viewed as simply a factual illustration, useful in determining whether the process is still going on. If an importer who is not a manufacturer retains goods unsold in the original packages or state of importation, it is wholly plausible to say that the process is still going on and will not be terminated until the importer sells the goods to a middleman or retailer. Only thus can there be sufficient assurance that the coastal states will not, through their power of taxation, distort and hamper the importing process conceived of by the court as the process of getting goods into the country for distribution to manufacturers and retailers. Such goods cannot normally be deemed to come to rest and to become a part of the “general mass of property within a state” until they have completed their journey in both foreign commerce and interstate commerce. Consequently, they are protected against even nondiscriminatory state taxation: as imports, their cost will not be affected except by the deliberate imposition of tariff duties by the federal government. Brown v. Maryland thus precludes application of the normal rule for interstate commerce to imports by distributors that: “by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the state to impose a non-discriminatory property tax.” Such a rule is permissible as to interstate commerce since the problem is limited simply to insuring that Congress alone will

regulate interstate commerce. It is not permissible as to a combination of foreign and interstate commerce as in *Brown v. Maryland* because it does not adequately protect the immunity guaranteed by the Constitution to foreign commerce under the "Export-Import" clause.

This is the view again taken in the recently decided *Youngstown* case. In the course of his opinion, Justice Whittaker takes occasion to note Justice Taney's statement and to say that: "After coming to this Court, he [Taney] had occasion to say that the theory of that holding was that while the imported articles 'are in the hands of the importer for sale . . . they may be regarded as merely in transit, 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 which they were in truth imported.'"

Since the status of goods held for sale by an importer to points outside the state was not at issue in *Youngstown*, the statements of the court with respect to that point are, of course, not definitive. Nonetheless, it seems fair to conclude that the opinion shows no disposition to disturb the Marshall and Taney conception of the process of importation extending through the point of sale by the importer into interstate commerce thus insuring continuing immunity from state taxation for the goods from "the water's edge," during a period of holding by the importer, and during transit in interstate commerce to the point of being "put to use."

II.

It was probably inevitable that the "original package" illustration which Marshall used as a part of the protective tax armor around the process of importation would be seized upon and used out of context to achieve immunity from state taxation in circumstances much less needful, from the standpoint of protecting the "process," than any Marshall envisaged.

Marshall, however, had said that "this state of things [immunity from state taxation] is changed, if he sells them [the imported goods], or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling

17. *Id.* at 387, n. 6.
with them as an itinerant peddler." The necessity of talking about the goods embraced in the process rather than the process itself and of talking about "breaking up packages" of goods, although in the context of marking the edge of the process, opened the way for development of the notion that if that illustrative event had not occurred, immunity somehow continued. Thus, the Supreme Court itself was persuaded for a long time of the sanctity of imported goods in the original packages. In 1871, in Low v. Austin, they struck down the levy of a non-discriminatory ad valorem tax on bottles of wine in the original cases, exposed for sale in California, quoting approvingly from another passage of Chief Justice Taney's in the License Cases: "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." Yet the court had before it a lucid presentation of the point of view that such imports, exposed for sale in the state, should be regarded as having become incorporated in the general wealth of the state and hence subject to non-discriminatory ad valorem taxation. The following quotation indicates the state court's concern over the discrimination in favor of imports which resulted from exempting the goods from local property taxes:

"We see nothing in this [retention of original packages] which even tends to show that the property had not become incorporated with the general wealth of the State. We see no reason why imported goods exposed in the store of a merchant for sale do not constitute a portion of the wealth of the State, as much as domestic goods similarly situated. Nor do we see the slightest difference whether the importer is also the merchant who sells, or whether the goods are in the original package or not. In either case the goods are exposed for sale in the markets for the profit which may be realized from selling. They may be equally the basis of credit, and alike they require and receive the benefit of the police laws of the State, and upon every principle of equality should contribute to pay for their protection. Possibly the plaintiff, who is a commission merchant, has in his store champagne wines manufactured in Sonoma or Los Angeles, which he is offering to

19. 80 U.S. (13 Wall.) 29 (1871).
sell in the same market, in precisely similar packages. In what possible sense can one be said to constitute a portion of the wealth of the State in which the other does not? The object of the constitutional restriction is said to be to prevent the State from imposing a tax upon commerce, to discriminate against foreign goods. It certainly cannot be intended to discriminate against domestic productions by exempting foreign goods from its share of the cost of protecting it."21

Had the California court more perceptively analyzed Marshall's dictum in Brown v. Maryland and Taney's further elaboration in the License Cases, it could have demonstrated that, as to goods to be sold locally, there was no stated purpose to throw a mantle of immunity around them simply because they were in the "original packages" in which they were imported. Thus, while Marshall did make the oft-repeated statement, by way of illustration, that "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," he also said "this state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them as an itinerant peddler."22

It seems clear enough that, to Marshall, sale of the goods by the importer was only one of the criteria to determine whether goods could be said to have left the process of importation; while sale by the importer into interstate commerce or otherwise would be an appropriate indicium of such process of importation being over, Marshall did not preclude the possibility of the importer so acting upon the thing imported "that it has become incorporated and mixed up with the mass of property in the country." This the importer could do by breaking the bulk, i.e., "breaking up . . . packages" and exposing them for sale, i.e., "travelling with them as an itinerant peddler." Certainly, exposing goods for sale in the state of importation even though in their original packages and even though sold by the importer could be an act by the importer such as to constitute incorporation in the mass of the property subject to taxation in the state.

As indicated, however, the Supreme Court rejected the Cali-

The arguments and *Low v. Austin*28 emerged as a clear holding that the imported goods themselves acquired an immunity from state taxation which continued so long as unbroken packages remained. The case was cited with approval, but distinguished, in *Gulf Fisheries Company v. MacInerney*,24 where the State of Texas levied a license tax upon fish wholesalers based on the amount of fish sold. The fish brought in bulk had been cleaned or partially cleaned and re-iced after their importation. Justice Brandeis said for the court: "These facts made inapplicable cases like *Brown v. Maryland* ... [and] *Low v. Austin* ... All the fish sold have, 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."25 (Emphasis added.)

In *Anglo-Chilean Corporation v. Alabama*,26 involving the levy of an Alabama corporate franchise tax, while the court did not cite *Low v. Austin*,27 it again adhered to the tests there relied upon:

"[T]he 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."28

23. 80 U.S. (13 Wall.) 29 (1871).
25. Id. at 127.
27. 80 U.S. (13 Wall.) 429 (1871).
It is to be noted, however, that the Anglo-Chilean case was decided on the ground that the importer-taxpayer did no local business and that to sustain the tax would burden foreign commerce. Justice Cardozo, in dissent, was of the opinion that, since the corporation had a franchise to do business locally, it could be taxed on the exercise of that franchise even though measured by capital employed in the distribution of imported goods. Nonetheless, the case gave continuing vitality to the doctrine that "it is the article itself to which the immunity attaches... so long as it is in the form and package in which imported and in the custody and ownership of the importer"; the taxpayer-importer would thus have immunity from state taxation for his imported goods despite the fact that he might ultimately sell those goods locally as well as in interstate commerce.29

There is, however, another current in the court's jurisprudence which, while still genuflecting to the "original package" doctrine in the rigid and unimaginative form in which it was applied in Low v. Austin,30 nonetheless displays a deeper and more sympathetic insight into the problem of synchronizing protection of the process of importation with the state's power to levy ad valorem taxes on the general mass of property in the state. It is best exemplified, perhaps, by the opinion of Justice Harlan in May v. New Orleans.31 The imports in that case consisted of linens packaged in wholesale lots in France and placed in a larger container for shipment. The importer, resisting an attempt to place the inventory on his shelves on the tax rolls, argued that, since his goods were in original foreign packages, they were immune from state taxation under Article I, Section 10, of the Constitution as interpreted in Brown v. Maryland.32 The court said:

"In our judgment, the 'original package' in the present

29. It is to be noted that the Louisiana Supreme Court, in deciding Mexican Petroleum Corp. v. Tax Commission, 173 La. 604, 138 So. 117 (1931), interpreted the original package doctrine as it had been interpreted in Low v. Austin and held that crude oil imported in tankers and pumped into storage tanks in Louisiana for later processing by the importer had not had its character as an import destroyed; the court refused to accept the argument that the tanker was the "original package" and that "bulk was broken" in unloading. Rather it relied upon the fact that the form was unchanged and upon a dicta in Sonneborn Brothers v. Cureton, 262 U.S. 506, 509 (1922) that: "It is the article itself to which the immunity attaches and whether it is in transit or at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it."
30. 80 U.S. (13 Wall.) 29 (1871).
31. 178 U.S. 496 (1900).
32. 25 U.S. (12 Wheat.) 419 (1827).
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. 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. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the State the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the Government, and in many instances, with the intent to protect the industries of this country against foreign competition. 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, hogshead, 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. 33 (Emphasis added).

33. 178 U.S. 496, 508, 509 (1900).
It seems clear from the foregoing excerpts that the importing process, subject to constitutional protection, is deemed by the court to be terminated not only by sale in the original packages but also by "placing the goods in the market for sale in separate parcels" in the state of importation.

It is thus not enough to continue immunity as an import until sale that the property remain the property of the importer and be kept in his warehouse, in the original form or package in which it was imported; if it is exposed for sale to consumers in the state of importation, such practice with respect to the commodity may also render it a part of the general mass of property in the state with no entitlement to the constitutional protection merely because it is in the same form as when imported. This is so because there is in these circumstances no longer any reason to afford it such protection; Brown v. Maryland was addressed to no such result but, more probably, to the result arrived at in May v. New Orleans.

III.

The final bit of dicta which Justice Marshall appended to his holding in Brown v. Maryland did not come in for extensive analysis until the court had under consideration at its 1944 term the case of Hooven and Allison Co. v. Evatt. Marshall had replied, in answer to argument of counsel that his interpretation of the export-import clause conferred an unlimited right on importers to hold until sale, that his observations with respect to immunity for imported goods ceasing when they were sold by the importer or were otherwise mixed with the general property of the state applied also to "plate or other furniture used by the importer"; in other words, that, as to goods brought in for use, the immunity ceased when put to such use. Justice Taney, in the later License Cases, also seemed to set limits of constitutional protection which excluded goods brought in for use, by stating as his understanding of the theory that while the 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,

34. 25 U.S. (12 Wheat.) 419 (1827).
35. 178 U.S. 496 (1900).
37. 46 U.S. (5 How.) 504 (1847).
and for the supply of which they were in truth imported."\textsuperscript{38} However, if not in the hands of the importer for sale and transport to interior points of the country but in his hands for the use for which they were imported, constitutional protection would seem no longer applicable in Justice Taney's analysis also.\textsuperscript{38}

In 	extit{Hooven and Allison},\textsuperscript{40} the court nonetheless decided that the State of Ohio could not levy a non-discriminatory ad valorem tax on fibers imported by a manufacturer and held for use in its manufacturing operation. Justice Stone, speaking for the majority, said:

"[N]o opinion of this Court has ever said or intimated that imports held by the imported in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. . . .

"In 	extit{Brown v. Maryland} . . . the imported merchandise held in original packages in the importer's warehouse for sale, was deemed tax immune. We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases."\textsuperscript{41} (Emphasis added.)

Justice Stone, almost arbitrarily, assumed that the only point capable of practical determination where the imported articles can be said to have become a part of the mass of taxable property in the state is when they have been subjected to manufacture. The constitutional necessity, he said, is that the immunity survive the landing of the goods in the case of the manufacturer-importer as well as in the case of the importer for sale. But this is necessary under the logic of Marshall and Taney only

\begin{thebibliography}{9}
\bibitem{38} Id. at 575, 576.
\bibitem{39} That the former type of goods was primarily sought to be protected is evidenced from Chief Justice Taney's comment that: "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." \textit{Id.} at 575.
\bibitem{40} 324 U.S. 652 (1944).
\bibitem{41} \textit{Id.} at 666-67.
\end{thebibliography}
to the extent that the goods in both cases are deemed to be in transitu. If the goods imported have reached their point of use and the process of importation is over, there is hardly the same need for immunity as where the goods are still in the hands of the importer and held for possible sale into the interior of the country; in the latter case, they are susceptible of being improperly subjected to state taxes just as would goods in actual interstate commerce be improperly burdened by state taxes levied on the goods en route. Marshall probably visualized such goods as lying in their original cases in the importer's warehouse awaiting such shipment; it is difficult to conceive of his attributing any more significance to the "original packages" than as a mark of ready identification that the goods were of such character and not goods to be sold locally.

Justice Black strove valiantly, in his dissent in Hooven and Allison, to establish that Marshall's dicta provided no protection for goods brought in for use or to be held for use; however, it seems unlikely that Marshall had envisaged goods being imported by a manufacturer and held for use by processing in a factory, since the example Marshall gives is clearly one of consumer's goods. Thomas Reed Powell, commenting upon the case, castigates Justice Black severely for his interpolation of "held for use" along with Marshall's example of goods "used" by the importer. Perhaps the reliance should have been on Taney's language in the later License Cases, where Taney concedes Marshall's correctness on the main adjudication and likens such goods before sale as being "in transitu" on their way "to be used and consumed." Certainly, goods sold by an importer, once arrived at point of destination and ready "to be used," are outside the process of importation. They would seem equally to be so when no sale has intervened or is necessary, because the manufacturer is the importer and he has the goods in his factory ready to be used. No doubt Powell is right that Justice Black would have been on firmer ground had he not attempted to claim "doctrinal apostolic succession" from Marshall on the distinction between goods imported for sale and those imported for use or "to be held for use"; nonetheless, more validity can be attached

42. Id. at 686.
43. Powell, State Taxation of Imports — When Does an Import Cease To Be an Import?, 58 Harv. L. Rev. 858 (1945).
44. 46 U.S. (5 How.) 504 (1847).
to the distinction, whether made by Marshall, Taney, or Justice Black, than Powell is willing to concede. Powell suggests, for example, that “no Supreme Court decision has held that the protection accorded to imports awaiting sale is lost by a mere intent to improve or transform them before sale” and that “no Supreme Court Justice had uttered any such notion before Mr. Justice Black.” Further, he suggests that “if a distinction were to be drawn between finished goods and raw materials awaiting processing, it would seem that the goods not ready for market have a stronger claim to immunity than those that are since they will not escape from a tax on their later sale in finished form.” Consequently, he would put them “one step” further away from “intermingling” or “incorporation” in the mass of taxable property in the state. However, this conclusion seems to ignore the rather obvious fact that a manufacturer-importer, in choosing to conduct his manufacturing process in a given state, submits his complete operation to the taxing and regulatory power of the state in exchange for its protection and should be entitled to no special immunities because of the foreign source of some of his raw materials. The importer for sale, on the other hand, is in the position of a link in the distribution process of foreign goods, a process which the Constitution has placed under federal protection; to the extent that state taxes should be exacted for protection afforded such goods, such exactions can be made only by consent of Congress, thus assuring uniformity in the treatment of such goods by the states. Justice Black could say very plausibly, whether or not supported by Marshall’s dicta, that:

“[T]he 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.

“. . . The rule announced by the Court also discriminates against other states. Their products held for use are subject to state taxation. Products from abroad are not. Wines offer an illustration. Wines, stocked in one’s private cellar, produced from California or New York grapes, and held for

46. Id. at 871.
future use in the original package or otherwise, are subject to state taxation. Today's rule renders a state wholly powerless to tax wines imported from abroad and held for future use side by side with taxable wines made in the United States. Thus, through constitutional interpretation, all foreign products are granted a tax subsidy at the expense of the individual states affected." 

47

The majority nonetheless concluded that the same immunity applied to goods held for manufacture as to those held for sale; in doing so, however, they left open a question which, as it turned out, could serve as a basis for the present court practically to overturn the decision without specifically overruling it. The *Hooven and Allison* court concluded:

"It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." 

48

(Emphasis added.)

IV.

Mr. Justice Whittaker for the majority in *Youngstown Sheet and Tube Company v. Bowers and United States Plywood Corporation v. City of Algoma* sets up the issue of immunity versus taxation in this way:

"In Hooven & Allison Co. v. Evatt ... it was held that

47. 324 U.S. 652, 688, 690 (1945).
48. Id. at 667.
49. 79 S.Ct. 383 (U.S. 1959).
goods imported for 'use' share the same immunity as goods imported for 'sale,' and that goods imported 'for manufacture [do not] lose their character as imports any sooner or more readily than imports for sale' . . . but 'when [the imported goods are] used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.' . . .

"Thus, though Brown v. State of Maryland, supra, holds that goods brought into the country by an importer 'for his own use' are not exempted from state taxation by the Import-Export Clause, and Hooven & Allison Co. v. Evatt, supra, holds that they are, both agree that when the imported goods are 'used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.""50

What the court had to do in order to bring Youngstown and Plywood within the exception saved in Hooven was to establish that the ore in Youngstown and the bundles of lumber and veneers in Plywood were "so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported." This would permit the court to say that they had been "used" within the Marshall dictum but would not represent an adoption of the somewhat questionable interpolated "held for use" doctrine which Justice Black read into the Marshall dictum. This rather delicate operation was accomplished through the device of accepting the characterization of the Ohio and Wisconsin Supreme Courts thus:

"Unlike Hooven, these are not cases of the mere storage in a warehouse of imported materials intended for eventual use in manufacturing but not found to have been essential to current operational needs. Here the Ohio and Wisconsin courts have in effect held that the stipulated and found facts show that the imported materials that were taxed by those States were so essential to current manufacturing requirements that they must be said to have entered the process of manufacture, and those courts have rested their judgments, in major part at least, on that ground. Our question therefore is precisely the one which the Court did not reach or consider in the Hooven case.""51

50. Id. at 388.
51. Id. at 389.
The court then looked at the factual circumstances surrounding the storing and using of the ore and lumber and concluded:

"The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers. Compare May & Co. v. City of New Orleans."

This all might seem a little reminiscent of "gamesmanship" and "how to win without seeming to." Justice Stone could have concluded, by similar acceptance of the Ohio court's characterization in *Hooven and Allison* of a broker utilized in purchasing the hemp fibers there involved as the actual buyer and seller, that when the manufacturer-taxpayer received the fibers they had already been "sold" by an importer and had hence passed beyond Marshallian immunity. The *Hooven and Allison* court, however, chose to look beneath the state court characterization and, when it did, found the manufacturer to be the actual importer. Justice Black did not dissent from this determination.

---

52. *Id.* at 392.
54. *Id.* at 659 et seq. The shipper was using the usual security device of an order bill of lading, but in this case addressed to the broker. Upon arrival, the broker entered the goods at the customhouse in his own name as a convenience to purchaser and thereafter shipped the goods to purchaser on a straight bill of lading. The purchaser later remitted the purchase price to the broker, who in turn settled with shipper. It thus appeared that the order bill was not actually used as a security device and that shipment was in fact made on the basis of the purchaser's credit alone; the only purpose of the order bill was apparently to facilitate the movement of the goods through customs. Acceptance of this as a valid purchase and sale by
since he was in no doubt that the manufacturer was the importer; as previously indicated, he urged that Marshall's illustration of goods imported for the importer's "own use" as not being immune from state taxation included also goods imported by a manufacturer and "held for use" in manufacture by such importer.55

V.

Thomas Reed Powell hazards the view, in criticizing Justice Black's dissent in Hooven and Allison, that the Justice's concern was "less with the merits of a distinction between prospective sale in changed and that in unchanged form [and attributing the distinction to Marshall] than with ending immunity upon arrival."56 This being Powell's belief, he would have had Justice Black engage in a completely fresh consideration of the problem and make a genuinely frontal attack on the proposition laid down by the majority in Hooven and Allison that "there is no purpose of taxing importation . . . itself, even its ultimate suppression, which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer."57 Powell would have dismissed the distinction drawn by Justice Black between "sale" and "use" as petty, particularly the statement that: "neither the rule nor the reasoning in Brown v. Maryland, nor any of the cases which followed it, support the Court's holding that one who imports an article for his own use or consumption can enjoy the full benefits of ownership, and simultaneously claim an immunity for state taxation on the ground that it is still an import."58

As noted earlier, however, there is a solid distinction, to which Powell was willing to concede only small weight,59 between goods imported for distribution throughout the country by an importer-wholesaler and those imported by an importer-manufacturer for further processing by such manufacturer. In the latter case, the interest which the import-export clause protects,

the broker would hence have created a rather artificial basis on which to decide the case and, had it been upheld, would no doubt have meant the elimination of the use of "order bill" as a convenience in clearing customs.


56. Powell, State Taxation of Imports — When Does an Import Cease To Be an Import?, 58 Harv. L. Rev. 858, 874 (1945).


58. Id. at 688.

namely, the process of importation, has clearly ended; and taxes levied on the manufacturer by the state of his situs, not directed at the goods as foreign goods but only as a means of financing the governmental benefits which all property in the state enjoys, should hardly be defeated by the cloak of import immunity. On the other hand, taxes levied on goods stored by an importer-wholesaler for distribution to points throughout the United States may, in a very real sense, interfere with the process of importation even though non-discriminatory, by virtue of the cumulative impact of such taxes on the price of goods on their way to become part of a stock of goods for resale locally. Here, the clause, by granting immunity, or by vesting complete control in the federal government over permissible state taxation, can either completely proscribe or in any event limit state taxes to those involving a direct *quid pro quo* for state services expended on such goods.  

Powell would also discount the significance of the distinction drawn by Marshall and Taney between goods imported for *sale* and those imported for *use*, on the ground that transportation patterns have now changed and that importation is now possible directly into the interior states. Hence, he concludes, the distinction has no further geographical significance. But it doesn’t follow that, because importation can now be directly to the interior state, there are not still many genuine importer operations in which the importer buys the goods with the intention of reselling them to points outside the state of importation, using the arteries of interstate commerce; certainly, not all foreign goods are yet brought directly to the state where they are to be distributed locally.  

It is probably true that there was no evidence in *Brown v. Maryland* that Mr. Brown had customers outside of Maryland; again, it doesn’t necessarily follow, however, that, because Marshall would protect the importer from an occupational license tax on importers without satisfying himself as to the destination of the importer’s goods, he would also protect the importer against nondiscriminatory taxes levied on the goods, even in their original packages, when exposed for local sale. As to such

---

60. Goods of an importer-manufacturer, on the way to factory stockpile for further processing, should, of course, be similarly protected.


goods, the importer is certainly deriving the same benefits from
the state and should be in the same position as a "peddler" if
the goods are locally sold in their original packages from the
importer’s warehouse, even though the importer may not qualify
as "itinerant."

Nor can too much significance be attached to the fact that
later decisions did not draw the distinction between goods for
local sale and goods for sales interstate. Justice Frankfurter,
dissenting in Youngstown and Plywood,\textsuperscript{63} notes that the court’s
decision not only overrules Hooven and Allison\textsuperscript{64} as to goods
imported for use in manufacturing but also Low v. Austin\textsuperscript{65} and
Anglo-Chilean Nitrate,\textsuperscript{66} although none specifically. Thus, it is
said by Justice Frankfurter that "we are left with a confusing
series of conflicting cases amidst which the States must blindly
move in determining the extent of their constitutional power to
tax.”\textsuperscript{67} But Low had already been overruled in principle by May
v. New Orleans,\textsuperscript{68} unless the nuances and vagaries of “breaking
the original package” are to completely dominate.\textsuperscript{69}

In the May case, the imported linens were in their original
wrappings but had been unpacked from a larger packing case; in
Low v. Austin, the bottles of wine were no doubt in a multiple-
bottle container. Surely, the decision in May was supported by
something more than such gossamer threads of distinction. It
seems more plausible to conclude that the tax there sustained
was upheld because “it was not a tax on the plaintiff’s 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 prop-

\textsuperscript{63} 79 S.Ct. 383, 392 (U.S. 1959).
\textsuperscript{64} 324 U.S. 652 (1945).
\textsuperscript{65} 80 U.S. (13 Wall.) 29 (1871).
\textsuperscript{66} 288 U.S. 218 (1933).
\textsuperscript{67} 79 S.Ct. 383, 392 (U.S. 1959).
\textsuperscript{68} 178 U.S. 496 (1900).
\textsuperscript{69} See Mr. Justice Black dissenting in Hooven and Allison, 324 U.S. 652, 691 (1945) : “Previous opinions of this Court have indicated the difficulties and de-
fects of an original package doctrine. Are these fibers to be taxed when the ‘reed’
which covers them is removed, or must the state wait until it can prove one of the
steel bands has been broken? Other questions suggest themselves in regard to wine
imported for use and stored in one’s private cellar for individual consumption. When,
of at all, can a state tax it? Is it when the wine reaches the cellar or must
the state withhold its taxing hand until the wine is ‘subjected to the [consumption]
for which it was imported’? Or can the state tax each crate when the owner,
or someone for him, removes the crate’s top with a crowbar? If the wine is im-
ported in large casks, does it become taxable when the stopper is removed from
the bunghole or only when a part or all of it has been consumed? The states are
ettitled to have a definite answer to these practical questions.”
property, in the same condition, that had its origin in this country.”

It would be necessary to assign the entire significance of the court’s statement to the reference to “sale in separate parcels” in order to conclude that this distinguished the holding from the Low holding and thus saved the latter ruling. But there would then have been no need to re-examine Brown v. Maryland, as the May court did, and conclude that “it was not held [in Brown v. Maryland] 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.”

It seems at least plausible to conclude that the “act of the importer,” relied upon to some substantial degree as incorporating the goods in the general mass of property in the state, was the exposure for sale locally, whatever the condition of the product as to form and wrappings so long as it was in a form and wrapping to be sold on local markets in lots for local processing or retailing. Low v. Austin seemed already to be overruled in this view of May v. New Orleans.

The Anglo-Chilean case, which Justice Frankfurter argues has been improperly and indirectly overruled by Youngstown and Plywood, was decided at the 1932 term, and struck down an Alabama franchise tax on the ground that it imposed a tax on selling nitrates in that state which had been imported from Chile and were sold in the original paper sacks in which the nitrate had been packaged abroad. It does not cite Low but does cite May, regarding the latter decision as upholding Brown v. Maryland and excepted from its rule because the sales were not in the original packages rather than because the goods were exposed for sale in a local market. However, Anglo-Chilean could have been decided as it was without giving this narrow construction to May, because the Anglo-Chilean corporation “did no local business in the State.”

The Alabama Supreme Court decision upholding the tax was reversed because “that decision

70. 178 U.S. 496, 500 (1900).
71. 80 U.S. (13 Wall.) 29, 34 (1871): “[G]oods 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.”
72. 178 U.S. 496, 500 (1900).
73. 80 U.S. (13 Wall.) 29 (1871).
74. 178 U.S. 496 (1900).
75. 288 U.S. 218 (1933).
76. 79 S.Ct. 383 (U.S. 1959).
77. 288 U.S. 218, 224 (1933).
plainly rests upon the assumption that Alabama had power to tax appellant's sales in original packages of the nitrate into that State only for sale [but not locally] and that such sales constituted a business that is taxable [by Alabama]." It was held that such an exaction necessarily burdens foreign commerce. Only if sales of nitrate in the original bags to Alabama purchasers are included in "foreign commerce" can the case be said to follow Low. If such is the learning of the case, then the earlier May case survived indeed by only the slender distinction that the packages there had come encased in larger packing cases whereas the sacks of nitrate in Anglo-Chilean came encased only in the hold of a ship. But if the ship's hold was not the original package in Anglo-Chilean and if "breaking the bulk" were the only valid test, then the absurdity would result that only if the hundred pound bags were broken would the immunity be lost; since this was no doubt the conventional unit of sale both at wholesale and retail, no breaking of the original package by a seller would ever occur and only "sale" by the importer would end the protective immunity. Commodities imported in actual bulk in the holds of cargo ships for local distribution as well as interstate shipment pose the problem of demarcating the end of the process of importation even more sharply. Here, the only possible "original package" is clearly the hold of the ship, and "bulk" is clearly "broken" during the unloading process. Immunity for such goods, regardless of their destination being for sale in the local markets of the state of importation or for processing there, was achieved by reliance upon the fact that Marshall had used not only the "original package" as an illustration of protective immunizing armor but also "original form." Consequently, commodities such as nitrate and phosphate carried in bulk cargo and crude oil carried in tankers were deemed to retain immunity after being unloaded and stored even though destined in part for local sale for processing. All of this was of course simply to apply the notion articulated in Low of an undiscriminating immunity for im-

78. Ibid.
79. Galveston v. The Mexican Petroleum Corp., 15 F.2d 208 (S.D. Tex. 1926); "It is a matter of hornbook knowledge that the original statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive."
ported goods until sale or manufacture solely because in the original form or package. In a dictum in Sonneborn Brothers v. Cureton, the court clearly so characterized the import immunity, saying: "It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it."

But if both "original package" and "original form" are simply illustrations, are they not merely illustrations of physical states which serve as guides to determine whether the "process of importation" has been completed? And is it not possible that the "process of importation" must be protected in different ways depending upon the purpose of the importation? Marshall surely must have thought so in concluding that an importer would not bring in goods and pay the custom duties on them if he could not sell them free from further taxation by the states. But the context of his and Taney's analysis seems to indicate that this was thought necessary in order to protect the importing process as it served interior states and to save it from burdensome taxation in transit. The goods were given immunity because they were within the process, not because they were imported goods. Conversely, goods and commodities brought in for the purpose of local distribution within a state would seem to have no claim to be within the process if, as in May, they have reached the local market for which they were intended and are there exposed for sale. Whatever their condition as to "original form or package" and whatever the surroundings in which they are "exposed for sale," the process would seem to have ended.

81. 262 U.S. 506, 509 (1922).
82. In Louisiana, the Tax Commission took action to bring onto the tax rolls, on the authority of May v. New Orleans, 51 La. Ann. 1064, 25 So. 959 (1879), aff'd, 178 U.S. 496 (1900), commodities imported in bulk, for local sale directly from Port Authority property; the result was a resort to the legislature rather than to litigation. Louisiana now boasts a statute providing as follows: "[G]oods, commodities and articles imported into this State from outside of the United States shall not be treated as incorporated into the mass of the property in this State so long as such goods, commodities and articles remain upon the public property of the Port Authority where such imports first entered this State." Section 2 also takes care of exports: "[W]here goods, commodities and other articles are placed upon the public property of a Port Authority for the purpose of being exported from this State to a point outside the United States, such goods, commodities and other articles shall be regarded as severed from the mass of the property of this State from the time the same are placed upon the public property of the Port Authority." Such legislation adds unnecessary protection to goods actually within the exporting or importing process; its purpose and effect seem obviously to place property not within the protection of LA. Const. art. I, § 10(2), as interpreted in May v. New Orleans, beyond the reach of state taxation. LA. R.S. 47:1951 (Supp. 1958).
VI.

There was sharp disapproval registered of the conclusions reached by the majority in *Youngstown* and *Plywood.* In fact, as to the foregoing type of analysis generally, Mr. Justice Frankfurter seems in complete disagreement. In his dissent from the majority in *Youngstown* and *Plywood*, he took the approach that the court has in fact consistently applied *Brown v. Maryland* as conferring immunity for imported goods "while retained by the importer in their original 'package' or form prior to the use of the goods or their sale." He would subscribe neither to the notion that goods imported for sale on local markets could be taxed to the importer nor to the notion that goods imported for manufacture could be taxed prior to actual use in manufacture. As he states it:

"Indeed there is no process of logic, however dextrous, which would strike down a tax on imported goods being held prior to sale and allow a tax on goods stored prior to the processing which is preliminary to sale. . . . Goods lying in a manufacturer's warehouse in their original form or container are no more a part of the general mass of property of a State, than are goods which are displayed by a commission merchant, in their original crates, for purposes of sale; nor is a tax on goods stored for manufacture any less of an 'interception' of those goods while they are still imports than is a tax on goods immediately prior to their first sale."

It would seem that Justice Frankfurter gives insufficient weight, in attributing to the court unvarying allegiance to "immunity for the goods" on the basis of Marshallian illustrations, to the developments which have taken place since the *Hooven and Allison* case in the export field.

A significant development in this field has been the deliberate reaffirmance and adaptation to "import-export" problems in foreign commerce of a rule formulated by the court many years ago, in *Coe v. Errol* for dealing with problems of interstate commerce. The court there said: "... goods do not cease to be part of the general mass of property in the State, subject, as

---

84. *Id. at 393.*
85. *Id. at 399.*
86. *324 U.S. 652 (1944).*
87. *116 U.S. 517 (1886).*
such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey."

The rule was early followed in cases involving federal attempts to tax state exports precluded under Article I, Section 9, Clause 5, of the Constitution. In *Cornell v. Coyne*, the court said:

"The true construction of the Constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation." (Emphasis added.)

Application of these principles to foreign commerce and the "Export-Import Clause" was evidenced in *Richfield Oil Corporation v. State Board*, involving an attempt to collect a California sales tax on the sale of a cargo of oil. The court invalidated the tax, saying:

"The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose . . . when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point." (Emphasis added.)

The emphasis upon the process of exportation as conferring the constitutional immunity is further noted in *Empresa Siderúrgica v. (County) Merced* and in *Joy Oil Company v. State Tax Commission*. In the *Empresa Siderúrgica* case, the court upheld an ad valorem tax imposed upon a cement plant sold to a

---

88. Id. at 527.
89. 192 U.S. 418, 427 (1904).
90. 329 U.S. 69, 82, 83 (1946).
91. 337 U.S. 154 (1949).
92. Id. at 286.
Colombian purchaser. On the tax date, 88% of the plant was still on California soil, although within the year all of it had been dismantled and exported. Under the rule of Coe v. Errol,93 the court upheld the tax, saying:

"Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."94 (Emphasis added.)

But, despite these developments in the export cases since Hooven, Mr. Justice Frankfurter says, dissenting, in Youngstown and Plywood:

". . . if we simply substitute 'place of sale,' for 'plant' in the Court's reasoning — and we are not vouchsafed reasons either in abstract reasoning or in practical logic to disallow it — the identical enumeration of factors here thought sufficient to subject the imports to tax is found to be present in virtually every case in which this Court has invalidated a state tax on imports. The crates of champagne in Low . . . and the bags of nitrate in Anglo-Chilean . . . were also 'needed, imported, and irrevocably committed to supply,' and 'were actually being used to supply, the day-to-day manufacturing requirements' of the place of sale. In effect, the result of today's decision means that if imported goods are

93. 116 U.S. 517 (1886).
94. 337 U.S. 154, 156 (1949). These cases, of course, still preserve the distinction between the state's power to tax interstate commerce for its fair share of the costs of local government from which it receives benefits and the absolute proscription, without federal consent, of any power in the state to levy taxes on the export-import process even though only for a fair share of government benefits conferred on such process. No judicial accommodation is possible as to the export-import process, as the court pointed out in Richfield Oil Corp. v. State Board, 329 U.S. 69, 82 (1946), saying: "It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. . . . It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. . . . [T]he two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other."
needed, they are taxable. If useless, they retain their constitutional immunity."\textsuperscript{95}

However, in concluding that there is now no basis for distinguishing goods imported for sale from those imported for use, he overlooks the important criterion relied upon by the majority as marking the point at which imported goods have left the process of importation and have become a part of the taxable mass of property in the state. This is a criterion which traces its genealogy back to Marshall and Taney, even though, as Justice Frankfurter points out, it was not applied in Low and Anglo-Chilean. Justice Whittaker expresses it thus, after concluding that the ore in Youngstown and the lumber in Plywood were actually being used to supply daily operating needs: "In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purpose for which they had been imported."\textsuperscript{96} (Emphasis added.)

Surely it continues to be equally true that goods imported for sale and distribution throughout the country in interstate commerce have not been put to the purpose for which they have been imported until they have reached the destination where they will be exposed for local sale and hence should enjoy the immunity of the importation process while in transit in the hands of the importer, lying in his warehouse in the original form and packages. Even though the importer's sale marks the end of the importing process,\textsuperscript{97} such goods will enjoy the protection of interstate commerce until they reach the destination where they

\textsuperscript{95} 79 S.Ct. 383, 403 (U.S. 1959).

\textsuperscript{96}  Id. at 392.

\textsuperscript{97} In making the point that it is well settled "that imported goods lose their character as 'imports' upon being sold," Justice Whittaker makes unfortunate use of the adverb "when" as a substitute for "until" in leading into a quotation from Justice Marshall in Brown v. Maryland. Thus Justice Whittaker, \textit{Id.} at 397, n. 7, states that "the Court (Justice Marshall et al.) said that 'when the imported goods are sold 'the tax intercepts the import, as an import, on its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State.'" It seems apparent that "until" rather than "when" would more clearly focus on the fact of sale, as being a point marking the boundaries of the importing process and marking, consequently, a point, in the progress of the goods on the way to becoming a part of the taxable mass of the property of some interior state, before which a state of importation may not exact contributions to its revenues without congressional consent.
will be "used . . . for the purpose for which they had been imported."98

As was said at the outset, the court has almost completed the process of re-interpreting the Marshallian "original form — original package" dictum in such a manner as to protect only the importing-exporting process without imparting unnecessary immunity to the goods themselves. Youngstown and Plywood do this as to goods and commodities imported for use in manufacturing. It is significant that, in accomplishing this end, reliance has been on the reasoning of Justice Harlan in May, in which he refused to "impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the [importers]," that is, to give immunity to imported goods after they had been exposed for sale in local markets "in separate parcels."99 It seems fair to assume that just as commodities imported for processing when "actually being used to supply daily operating needs" are deemed to have been put to the purposes for which imported and are hence outside the process of importation, so goods exposed for local sale will be likewise treated whether or not there has been a technical "breaking of bulk" or a "change in form." The issue is saved for future consideration by Justice Whittaker when he says: "Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale . . . goods that have been so imported for use in manufacturing are

98. Goods moving in interstate commerce in the form or package in which imported would "have the benefit of the protection appropriate to interstate commerce" although the rule "is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries." Baldwin v. Seelig, 294 U.S. 511,526 (1935). In Austin v. Tennessee, 179 U.S. 343 (1900), the court had occasion to note that: "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country." The court then rejected a defense in a prosecution for selling cigarettes that the sales were beyond the reach of state law because made in the "original packages" in which they had moved in interstate commerce, the sales being made in packages of ten transported in open baskets. A similar absurd use of the "original package" doctrine in interstate commerce was rejected in Cook v. Marshall County, 196 U.S. 261 (1905), where cigarette sales were claimed to be beyond the reach of the state because the sales were made in packages which were shoveled in and out of railroad cars so as to preserve the notion of the package for ten cigarettes being the unbroken and original package. Absurdities quickly develop when Marshall's illustration of a condition of goods deemed to demarcate an immune process going on is deemed to impart immunity to the goods when the process has ended and the goods are being used for the purpose for which they have been transported through interstate commerce.

not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.' 

100. 79 S.Ct. 383, 391 (U.S. 1959).