

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-96

**TITLE** JOANNE LIMBACH, TAX COMMISSIONER OF OHIO, Petitioner  
v. THE HOOVEN & ALLISON COMPANY

**PLACE** Washington, D. C.

**DATE** February 22, 1984

**PAGES** 1 thru 41



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IN THE SUPREME COURT OF THE UNITED STATES

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JOANNE LIMBACH, TAX COMMISSIONER :  
OF OHIO, :  
:  
Petitioner :  
:  
v. : No. 83-96  
:  
THE HOCVEN & ALLISON COMPANY :  
:  
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Washington, D.C.  
Wednesday, February 22, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:53 a.m.

APPEARANCES:  
RICHARD C. FARRIN, ESQ., Assistant Attorney General of  
Ohio, Columbus, Ohio; on behalf of the Petitioner.  
MICHAEL NIMS, ESQ., Cleveland, Ohio; on behalf of the  
Respondent.

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1                                   P R O C E E D I N G S

2                   CHIEF JUSTICE BURGER: Mr. Farrin, I think you  
3 may proceed when you're ready.

4                   ORAL ARGUMENT OF RICHARD C. FARRIN, ESQ.,  
5                   ON BEHALF OF THE PETITIONER

6                   MR. FARRIN: Mr. Chief Justice, and may it  
7 please the Court:

8                   This case involves the Import-Export Clause of  
9 the United States Constitution in Ohio's ad valorem  
10 personal property tax which applies to all goods used in  
11 business within Ohio regardless of their origin. This  
12 case presents two issues to the Court, both of which  
13 involve the scope of this Court's 1976 decision in  
14 Michelin Tire Corporation v. Wages.

15                   The first issue is whether the Ohio Supreme  
16 Court properly applied and interpreted this Court's  
17 decision in Michelin in its holding that the Tax  
18 Commissioner was collaterally estopped by this Court's  
19 1945 decision in Hooven & Allison Company v. Evatt from  
20 imposing its ad valorem property tax on Hooven &  
21 Allison's imported raw materials which were no longer in  
22 transit or retained in their original packages and were  
23 held for use in manufacturing in Ohio.

24                   Inherent in this issue is whether the original  
25 package doctrine upon which Hooven was based retains any



1 validity with respect to Import-Export Clause cases  
2 subsequent to this Court's decision in Michelin.

3 QUESTION: Mr. Farrin, did the Ohio Supreme  
4 Court apply state collateral estoppel principles in  
5 finding the state precluded by the Hooven & Allison  
6 decision?

7 MR. FARRIN: Justice O'Connor, the state --  
8 the Ohio Supreme Court accepted this Court's limitation  
9 on the doctrine of collateral estoppel enunciated in  
10 Commissioner v. Sunnen, but found that that limitation  
11 being that collateral estoppel is inapplicable where an  
12 intervening decision of this Court has changed the legal  
13 principles upon which the prior decision was based.

14 QUESTION: Well, so you think the Court was  
15 trying to apply federal preclusion principles.

16 MR. FARRIN: Justice O'Connor, I believe the  
17 Court was applying federal law on the issue. I believe  
18 it was required to apply federal law --

19 QUESTION: Thank you.

20 MR. FARRIN: -- Because it was basing its  
21 decision on a decision of this Court.

22 The second issue --

23 QUESTION: What is the source, if I may ask  
24 you? What is the source of the federal collateral  
25 estoppel law? Just is there -- is there sort of a

1 federal common law, is it, of collateral estoppel that's  
2 binding on the states?

3 MR. FARRIN: Justice Stevens, I believe it's  
4 inherent in the basic power of a court that it must  
5 determine the scope of its own judgment. The judgment  
6 upon which the Ohio Supreme Court based its collateral  
7 estopped decision was *Hooven & Allison v. Evatt*, which  
8 was a decision of this Court which dealt solely with the  
9 federal constitutional issue; that is, the immunity  
10 provided by the Import-Export Clause of the federal  
11 Constitution.

12 I believe this Court has on at least two  
13 occasions determined that where collateral estopped is  
14 based upon a federal decision that the effect of that  
15 decision is a federal question reviewable by this Court.

16 The second issue --

17 QUESTION: And what are those cases you're  
18 just referring to?

19 MR. FARRIN: Those -- those cases -- and I  
20 apologize; they were not cited in the brief, because I  
21 was not aware of them at the time -- are *Deposit Bank v.*  
22 *Frankfurt* at 191 U.S. 499, and *Stahl v. Gottlieb*, 305  
23 U.S. at 165.

24 I think this principle is consistent with the  
25 restatement of judgments at Section 87 which in effect

1 carries out the --

2 QUESTION: Do you mind restating what you say  
3 those cases stand for?

4 MR. FARRIN: Certainly, Mr. Justice Brennan.  
5 My position is that those cases state that where a  
6 federal judge -- whether a federal judgment has been  
7 given due effect is a decision for this Court to make.  
8 It's a federal question and not a question for the state  
9 court to decide.

10 I believe they point out that it's a  
11 fundamental concept that a court must determine the  
12 scope and effect of its own judgment.

13 QUESTION: Well, I thought -- the way you  
14 stated it previously, was it the meaning, what the Court  
15 held in the prior cases a federal question, not the --  
16 not the -- not the effect that must be given it in a  
17 state court.

18 MR. FARRIN: Mr. Justice White, I believe what  
19 those cases and what the fundamental principle require  
20 is that where a -- where collateral estoppel is to be  
21 applied based on a decision of this Court, that this  
22 Court must determine the scope and effect of that  
23 decision. If we're to allow a state court to determine  
24 the effect of this Court's decision without review by  
25 this Court, we would be left with the result that each

1 of the 50 states might come up with a different  
2 interpretation of this Court --

3 QUESTION: Well, that wouldn't depend on  
4 collateral estoppel or anything like that. That would  
5 depend on -- on -- on correcting a state court's view of  
6 what this Court held in the past.

7 MR. FARRIN: Your Honor, I think that this  
8 Court in order to assure that the state court properly  
9 applies an earlier decision of this Court, particularly  
10 where there's an intervening decision of this Court --

11 QUESTION: Right, right.

12 MR. FARRIN: -- Is a decision that this Court  
13 must make.

14 QUESTION: Yeah. All right. That's a little  
15 different wording of it which I think --

16 MR. FARRIN: I apologize if I confused the  
17 issue earlier, Mr. Justice.

18 QUESTION: But if the earlier case had been  
19 Smith against Jones instead of involving Hooven against  
20 Allison, you still might have a question of what effect  
21 do you give to the decision of this Court. It's  
22 obviously a federal question, but it doesn't depend on  
23 any theory of collateral estoppel.

24 MR. FARRIN: Mr. Justice Rehnquist, that's  
25 correct. However, if you do not apply the concept to



1 decisions which collaterally estop a party based on a  
2 decision of this Court, this Court will never be able to  
3 reach the question of whether or not that application of  
4 the earlier decision by the lower -- by the state court  
5 was proper.

6 CHIEF JUSTICE BURGER: We'll resume at 1:00,  
7 counsel.

8 MR. FARRIN: Thank you.

9 (Whereupon, at 12:00 p.m., the case in the  
10 above-entitled matter was recessed for lunch, to be  
11 resumed at 1:00 p.m., the same day.)  
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AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Farrin, you may  
resume your argument.

CRAL ARGUMENT OF RICHARD C. FARRIN, ESQ.,  
ON BEHALF OF THE PETITIONER -- Resumed  
MR. FARRIN: Thank you.

The second issue presented in this case is a  
broader one; that is, whether Ohio can impose its  
nondiscriminatory ad valorem property tax on imported  
raw materials which are retained in their original  
packages, are no longer in transit, and are held for use  
in manufacturing within the state of Ohio within the  
strictures of the Import-Export Clause.

The Tax Commissioner has two contentions in  
this case. Initially, the Tax Commissioner contends  
that Michelin effected a change in the legal principles  
upon which *Hooven & Allison v. Evatt* was based, thereby  
rendering collateral estoppel inapplicable under the  
limitations enunciated in this Court's decision in  
*Commissioner v. Sunnen*.

The second contention of the Tax Commissioner  
is that Michelin's holding that a nondiscriminatory ad  
valorem property tax imposed on imported goods no longer  
in transit is not an impost or a duty, and therefore is  
not prohibited by the Import-Export Clause, is

1 controlling with respect to the assessment at issue.

2           The holdings below by both the Ohio Board of  
3 Tax Appeals and by the Ohio Supreme Court were that the  
4 Commissioner was collaterally estopped by this Court's  
5 decision in Sunnen from imposing its ad valorem personal  
6 property tax. The Board's decision reveals no  
7 discussion whatsoever of the effect of Sunnen or of this  
8 Court's decision in Michelin. While the Ohio Supreme  
9 Court does accept the limitation enunciated in Sunnen,  
10 it specifically found that this Court's decision in  
11 Michelin neither implicitly overruled nor effected a  
12 change in the legal principles upon which Hooven was  
13 based.

14           QUESTION: Let me make sure I understand what  
15 you're saying about the holding of the tax -- is it the  
16 Tax Commissioner you're referring to or the Supreme  
17 Court of Ohio?

18           MR. FARRIN: Justice Rehnquist, there were  
19 decisions initially by the Ohio Board of Tax Appeals.  
20 It's -- it's a -- or it's a review board which hears  
21 appeals from determinations of the Tax Commissioner.

22           QUESTION: And it -- it ruled how?

23           MR. FARRIN: It ruled that the Tax  
24 Commissioner was estopped from assessing its tax based  
25 on this Court's decision in Hooven.

1           QUESTION: Okay. So it's the original Hooven  
2 decision in the view of the Board of Tax Appeals that  
3 collaterally estops the Commissioner in this case.

4           MR. FARRIN: Yes, Justice Rehnquist. And it  
5 was also the position of the Ohio Supreme Court that  
6 that was the decision that estopped the Commissioner  
7 from issuing the assessment.

8           The facts in this case are rather simple.

9           QUESTION: No one has passed on the  
10 constitutional issue yet?

11          MR. FARRIN: Correct, Justice.

12          The facts are rather simple in this case.  
13 Hooven & Allison is engaged in the manufacture of  
14 cordage. In this manufacturing operation it uses raw  
15 materials that are imported from various foreign  
16 countries. They are shipped by ocean-going vessels to  
17 U.S. ports and then transported by rail to Hooven &  
18 Allison's Ohio plant. After they are received at the  
19 Ohio plant, they are stored in their original packages  
20 in that plant until they are used in the manufacturing  
21 process; that also takes place in that same plant.

22          For tax years 1976 and 1977, the Tax  
23 Commissicner, relying on this Court's decision in  
24 Michelin, issued an assessment against Hooven & Allison  
25 which had the effect of including within its taxable



1 property the imported raw material retained in the  
2 original packages.

3 The Tax Commissioner does not dispute that the  
4 nature of the goods and the nature of the tax at issue  
5 in the present case are the same as those involved in  
6 the decision in this Court or by this Court in *Hooven &*  
7 *Allison v. Evatt*.

8 The Tax Commissioner will first argue that  
9 Michelin effected a change in the legal principles upon  
10 which *Hooven* was based, thereby rendering collateral  
11 estoppel inapplicable, and then will argue that the  
12 holding in Michelin requires a finding that Ohio's tax  
13 is valid under the Import-Export Clause.

14 QUESTION: Of course, in Michelin the Court  
15 overruled *Low v. Austin*, but it didn't overrule *Hooven*.

16 MR. FARRIN: Justice Blackmun, it did not  
17 expressly overrule *Hooven*. I would submit that it  
18 implicitly overruled *Hooven*, because *Hooven* was based on  
19 the original package doctrine that was formalized by the  
20 Court in the *Low v. Austin* decision.

21 A review of both decisions reveals that the  
22 identical portions of *Brown v. Maryland* and the license  
23 cases were relied on by the Court in *Low* and by the  
24 Court in *Hooven*. Those were the provisions that this  
25 Court in the Michelin decision specifically found that

1 Low had misread.

2 QUESTION: Suppose we agree with you on the  
3 collateral estoppel issue. Should we remand the case  
4 for the Ohio court to pass on the constitutional issue,  
5 or should we decide it here?

6 MR. FARRIN: Justice Blackmun, I would submit  
7 that it would be appropriate to decide the issue here.  
8 While this Court's decision on the collateral estoppel  
9 issue would resolve the specific issue determined by the  
10 court below, I believe this case presents an appropriate  
11 vehicle for this Court to dispel any questions with  
12 respect to the scope of its decision in Michelin.

13 QUESTION: Well, what -- Mr. Attorney General,  
14 what would -- what do you suppose your -- the state  
15 court would have done if -- if in Michelin we had  
16 specifically said that not only Low but Hooven is -- are  
17 -- is overruled?

18 MR. FARRIN: I feel confident that our court,  
19 in light of such a decision, would have upheld the  
20 imposition of Ohio's tax. But --

21 QUESTION: Even though -- even though it  
22 involved the same party that had had a favorable  
23 decision below -- before.

24 MR. FARRIN: Justice White, I think it's clear  
25 that if this Court had specifically overruled Hooven,

1 that the Ohio Supreme Court would not have applied  
2 collateral estoppel.

3 QUESTION: Well, let's assume that in -- let's  
4 assume that in -- let's assume that in Michelin the  
5 Court had said we overrule Low against Austin, but  
6 whether Hooven should be overruled we save for another  
7 day. Then what? Then what should your courts have done?

8 MR. FARRIN: Justice White, I believe our  
9 court should have read the decision in Michelin and  
10 looked at the -- the basic principles that were adopted  
11 in that decision. Michelin adopted a fundamentally  
12 different approach to Import-Export Clause cases. And  
13 under this Court's decision in Sunnen, it clearly  
14 affected it.

15 QUESTION: You don't think it would have been  
16 required to -- to say just what it did at -- at Hooven  
17 -- if Hooven 1 is overruled, it's going to have to be by  
18 the Supreme Court since it saved for itself that  
19 question for another day?

20 MR. FARRIN: Mr. -- or Justice White, I think  
21 it may have done so. And in a reading of the court's  
22 decision below, there are alternative -- there is  
23 alternative language in that decision which I think  
24 leaves it unclear as to exactly what it would do.

25 It accepted the principle of Sunnen that a

1 change in a legal principles renders the doctrine  
2 inapplicable --

3 QUESTION: Right.

4 MR. FARRIN: -- But then it also quoted some  
5 language from a lower court decision in the Penfield  
6 case, indicating that it was not within the province of  
7 a lower court to guess at what this Court might do.

8 I think in light of the nature of this -- this  
9 Court's decision in Michelin that that particular  
10 language quoted by the court was inapplicable. It's  
11 the Tax Commissioner's position that the decision of  
12 this Court in Michelin so clearly controls this case  
13 that --

14 QUESTION: But if -- but if we had said in  
15 Michelin we put -- we put off to another day the  
16 decision of Hooven, whether Hooven is overruled, would  
17 you think it would be -- that that -- would you be  
18 arguing that Ohio was constitutionally disentitled to  
19 apply collateral estoppel in this case?

20 MR. FARRIN: Justice White, I think it would  
21 -- it would have depended on the language that this  
22 Court used in -- in -- in --

23 QUESTION: Well, I just gave you the language.

24 MR. FARRIN: If that were the only difference  
25 in the Michelin case, it would still be the Tax



1 Commissioner's position that the Ohio Supreme Court  
2 should have refused to apply collateral estoppel.

3 QUESTION: That may be so, but as a matter of  
4 federal constitutional --

5 MR. FARRIN: As a matter of -- Justice White,  
6 I think it's more a matter of applying the decision of  
7 this Court in Commissioner v. Sunnen and determining  
8 whether or not Michelin v. Wages changed or effected a  
9 growth or modification in the legal principles.

10 By applying collateral estoppel, the Court of  
11 Appeals -- or the Ohio Supreme Court did not even reach  
12 the constitutional issues. And I suggest that that is  
13 the problem. Sunnen doesn't say that simply because  
14 there's a growth in the legal principles that you have  
15 to find against the party relying on collateral estoppel  
16 on the merits.

17 QUESTION: But in my example it is -- the  
18 Court says remember, fellows, Hooven isn't overruled by  
19 this case.

20 MR. FARRIN: If the Court specifically stated  
21 that Hooven was not overruled and simply didn't say that  
22 we don't reach the question, I believe that the lower  
23 court would properly have applied collateral estoppel.

24 QUESTION: Well, collateral estoppel and the  
25 constitutional issue are kind of blended together,

1 aren't they, because the Sunnen case says if there's  
2 been a change in the law, collateral estoppel doesn't  
3 apply; and the argument here is whether there's been a  
4 change in the law.

5 MR. FARRIN: I think that's correct, Justice  
6 Rehnquist. I believe that -- I believe the issues are  
7 interrelated. In order to determine whether or not  
8 collateral estoppel was properly applied, I believe the  
9 Court has to determine, as it did in Sunnen, whether or  
10 not the principles upon which the earlier case -- and in  
11 this case because they were constitutional issues -- it  
12 has to be determined whether those constitutional issues  
13 have remained unmodified or unchanged. In this case I'd  
14 argue they've -- they've -- the constitutional principle  
15 was specifically repudiated, and it's a much stronger  
16 case for the application of the limitation in Sunnen.

17 QUESTION: If we just say here, well, under --  
18 reread Michelin and reread the old Hooven, and we think  
19 Michelin fatally wounded Hooven, Hooven won, and so  
20 Hooven is overruled, that's all we need to say. Then we  
21 remand, don't we?

22 MR. FARRIN: Justice White, I believe that  
23 that would resolve the case.

24 QUESTION: Yes.

25 MR. FARRIN: And I believe if that was --

1           QUESTION: We needn't say anything about  
2 collateral estoppel then. We just say --

3           MR. FARRIN: I -- I think that's probably  
4 correct, Justice White. I -- I'm not -- I'm sure if  
5 this Court said it were overruled, the Ohio Supreme  
6 Court would -- would no longer upon remand attempt to  
7 apply collateral estoppel.

8           QUESTION: Yes, but that brings up my  
9 question, which I thought you answered, as to whether we  
10 go ahead and decide the constitutional issue.

11          MR. FARRIN: Justice Blackmun, I believe if  
12 this Court held that *Hooven* was overruled that it would,  
13 in effect, decide the constitutional issue, because by  
14 overruling *Hooven* it would have specifically answered  
15 the second issue we present; that is, whether Ohio's tax  
16 can be constitutionally applied to imported raw  
17 materials, as well as imported goods held for resale,  
18 regardless of whether those goods were retained in their  
19 original package.

20          I -- it's -- I would -- the Respondent has  
21 raised issues in his brief regarding the Commerce Clause  
22 and the Import-Export Clause and its effect on the  
23 validity of the tax at issue. These issues were not  
24 raised in any notice of appeal within this process, nor  
25 was a cross-petition raising these issues filed by the

1 Respondent.

2 I would submit that those issues are not  
3 properly before this case, having simply been argued by  
4 the Respondent in the briefs filed in the Ohio Supreme  
5 Court and in this case.

6 QUESTION: Well, but they were raised and  
7 argued, were they?

8 MR. FARRIN: They -- these -- the -- at the  
9 Ohio Supreme Court these matters were argued in the  
10 briefs. I would suggest, though, under the Ohio scheme  
11 of appeals regarding tax cases, the issue was not  
12 properly raised. In the Ohio statutes in order to raise  
13 an issue on appeal, that particular issue must be  
14 specified in the notice of appeal unlike --

15 QUESTION: Ordinarily, as you know, a  
16 respondent may support a judgment here on grounds raised  
17 and argued below. You don't think that principle would  
18 apply here because of your Ohio rule?

19 MR. FARRIN: Mr. -- or Justice Brennan, I  
20 don't believe that -- or I do believe that the Ohio --  
21 that the failure to follow Ohio provisions with respect  
22 to raising those issues would preclude him raising those  
23 issues before this Court, even though I admit that those  
24 issues were specifically argued in the briefs in this  
25 matter and in oral argument before the Ohio Supreme



1 Court.

2 QUESTION: Well, could we independently  
3 conclude that they were sufficiently raised for our  
4 purposes, notwithstanding your Ohio rule?

5 MR. FARRIN: I believe this Court has that  
6 authority, Justice Brennan.

7 QUESTION: Well, you say they weren't properly  
8 before the Ohio Supreme Court.

9 MR. FARRIN: They were not properly before the  
10 Ohio Supreme Court, Justice White, because they were not  
11 specified in the notice of appeal to that court.

12 QUESTION: I thought it -- I thought it was  
13 the -- I thought the -- the Hocven & Allison was the  
14 appellee in the Supreme Court of Ohio.

15 MR. FARRIN: It was the appellant and  
16 cross-appellee, Justice Rehnquist. The Board of Tax  
17 Appeals decided the collateral estoppel issue, refused  
18 to consider the constitutional issues. Hooven & Allison  
19 appealed the refusal of that Board to resolve the  
20 constitutional issues that it had raised before the  
21 court. We appealed the Board's decision on the  
22 collateral estoppel issue. Therefore, we were both  
23 appealing from the decision of the Board of Tax Appeals.

24 The -- the notice of appeal did raise one  
25 issue, I should clarify, with respect to the Foreign

1 Commerce Clause and the Import-Export Clause, and that  
2 was the argument by Hooven & Allison that imposition of  
3 the tax would impair the federal government's exclusive  
4 right to regulate foreign commerce.

5 The other issues -- multiple taxation, free  
6 flow of goods among the states, and the possibility that  
7 the federal government's exclusive right to imposts from  
8 imports and duties would be impaired were not raised in  
9 that notice of appeal.

10 I would like to reserve the remainder of my  
11 time to respond to the arguments of Hooven & Allison  
12 regarding these constitutional issues.

13 CHIEF JUSTICE BURGER: Very well.

14 MR. FARRIN: Thank you.

15 CHIEF JUSTICE BURGER: Mr. Nims.

16 ORAL ARGUMENT OF MICHAEL NIMS, ESQ.,

17 ON BEHALF OF THE RESPONDENT

18 MR. NIMS: Mr. Chief Justice, and may it  
19 please the Court:

20 I'm a bit mystified by the position the Tax  
21 Commissioner is taking upon the procedural posture in  
22 which this case arrives at this Court, and I think it  
23 needs to be straightened out.

24 If you look in the appendix in the cert  
25 petition, it is very clear at page 17 in the appendix to

1 the cert petition that the Board of Tax Appeals  
2 specifically noted that Hooven & Allison was raising not  
3 only collateral estoppel issues, but going beyond that  
4 and saying, and if, for some reason, you no longer think  
5 Hooven does state the law, you have to reach the  
6 constitutional questions. And they state that  
7 specifically in their opinion, which is printed at page  
8 17 of the appendix in the petition for cert.

9           They went on to find that the collateral  
10 estoppel arguments were well taken, because Hooven did  
11 remain the law, not having been reversed by this Court,  
12 which was the only court with the power to reverse it;  
13 and they noted that they lacked authority to decide  
14 constitutional issues as an administrative tribunal  
15 anyway; and they ruled in favor of Hooven & Allison's  
16 position on collateral estoppel that the state could not  
17 in fact collect the tax it was seeking to assess.

18           In order to protect its position before a  
19 court which could rule upon constitutional issues,  
20 Hooven & Allison did file a notice of appeal in the Ohio  
21 Supreme Court which specifically stated that the Board  
22 erred in failing to find that the tax being sought was  
23 proscribed by the Import-Export Clause and the Commerce  
24 Clause of the United States Constitution --

25           QUESTION: Were you -- were you just reading

1 from your brief in the Supreme Court of Ohio?

2 MR. NIMS: I was reading from the notice of  
3 appeal filed in the Ohio Supreme Court by Hooven &  
4 Allison. And those arguments were made before the Ohio  
5 Supreme Court, briefed before the Ohio Supreme Court --

6 QUESTION: I'm sorry. Is that the one at A-17  
7 and 18?

8 MR. NIMS: Well, the appendix A-17 and 18 is  
9 the opinion of the Board of Tax Appeals. The notice of  
10 appeal filed by Hooven & Allison in the Ohio Supreme  
11 Court is not part of the appendix, but I was reading  
12 from the notice of appeal which was filed.

13 QUESTION: But it's in the record of the Court?

14 MR. NIMS: It is in the record, yes.

15 And finally, I note that in the Supreme Court  
16 of Ohio's opinion, the last thing they said in the final  
17 paragraph before holding that the decision of the Board  
18 of Tax Appeals is firm, that finding that the tax is  
19 barred by the doctrine of collateral estoppel, we  
20 decline to address the constitutional issues raised by  
21 Hooven in its appeal. And that's -- that's printed at  
22 appendix A-9 of the cert petition.

23 So I think it is very apparent that the  
24 procedural posture in which the case arrives at this  
25 Court is one in which Hooven has argued all along below

1 that this Court decided in 1945 that this very tax the  
2 State of Ohio now wants to exact and collect was  
3 unconstitutional, it has not been overruled, we never  
4 denied that Michelin required one to review the opinion  
5 and determine whether Hooven had been overruled. We  
6 said we read the opinion; we don't think Hooven has been  
7 overruled. The Court clearly has left that decision for  
8 another day, and it remains the law.

9 QUESTION: Well, now, Mr. Nims, does  
10 something, in your view, turn on the question of whether  
11 when this Court says we leave the question of whether  
12 Hooven & Allison I is still good law for another day,  
13 does that mean that this Court meant that only this  
14 Court was free to disavow that case in the light of  
15 Michelin, or perhaps, on the contrary, that any court  
16 having jurisdiction to consider constitutional questions  
17 could look at Michelin alongside Hooven & Allison and  
18 say certainly the Supreme Court of the United States did  
19 not expressly overrule, but it's nonetheless clear that  
20 Michelin is inconsistent with Hooven & Allison, and  
21 therefore, we decide that Hooven & Allison I is no  
22 longer good law?

23 MR. NIMS: I think a court could do that.  
24 Courts are obviously hesitant to predict what this Court  
25 would do on constitutional issues, but they clearly will



1 do it if they believe they have an adequate basis for  
2 predicting it. But what turns upon that is the fact  
3 that the Tax Commissioner below didn't give the court  
4 any facts upon which to predict what this Court would do  
5 if it looked at the facts in the *Hooven*, because the Tax  
6 Commissioner chose below a different strategy.

7           It said I'm not going to try and convince you,  
8 Ohio Supreme Court, that if you look at all the facts  
9 and examine the three policies behind the Import-Export  
10 Clause which *Michelin* said were important, and look at  
11 how this tax is applied, that you will find that this  
12 tax does not prevent the state or the nation from  
13 speaking with one voice on import-export policy. You'll  
14 find that this tax does not deprive the federal  
15 government of the opportunity to collect the duties and  
16 imposts on imports. You'll find that this tax does not  
17 create an opportunity for disharmony among the states.  
18 They didn't do those things that they had to do if their  
19 position was let's look at the facts in *Hooven* and try  
20 and predict what the United States Supreme Court will do  
21 if it were given those facts and asked to apply the  
22 *Michelin* analysis.

23           QUESTION: When you -- when you say look at  
24 the facts of *Hooven*, you're not talking about the facts  
25 of the present case but the facts of *Hooven I*?

1                   MR. NIMS: No. I'm talking about the facts of  
2 the present case.

3                   QUESTION: So you say there's nothing in the  
4 record that shows what factually happened in this case?

5                   MR. NIMS: The only thing you know is that  
6 Ohio is seeking to assess an ad valorem personal  
7 property tax on imported raw materials which Hooven &  
8 Allison subsequently will incorporate into its  
9 manufacturing processes. You don't have any facts about  
10 how that tax impacts, how it interacts with federal  
11 policy on dealing with Third World countries, on  
12 exporting raw materials. You don't have the facts.

13                  QUESTION: Well, is that something the Board  
14 -- the Ohio Tax Commissioner is apt to have a great deal  
15 of expertise?

16                  MR. NIMS: No, they're not, but the point is  
17 that if you were to ask the Board of Tax Appeals or the  
18 Ohio Supreme Court to predict what this Court would do  
19 applying a Michelin analysis to Hooven facts, you've got  
20 to give it some facts.

21                  QUESTION: Well, but, you know, how do we know  
22 anything more about the Ohio -- than the Ohio Board of  
23 Tax Appeals about how a certain tax impacts on the Third  
24 World or something like that?

25                  MR. NIMS: You don't get out of this record

1 because the Tax Commissioner chose consciously not to  
2 put anything on this record and argued Hooven in I has  
3 been implicitly overruled.

4 QUESTION: Well, do we know all that much of  
5 our own knowledge in Michelin or in Hooven-Allison I?  
6 These are really basically not factual arguments that  
7 you're suggesting should have been made, but kind of  
8 rough judicial notice arguments, aren't they?

9 MR. NIMS: Well, they're facts. Admittedly,  
10 one has to take judicial notice. But there are a lot of  
11 differences between the tax you were looking at in  
12 Michelin when you, by looking at the facts, applying  
13 whatever judicial notice you wanted to apply, decided  
14 that tax would not contravene any of the policies that  
15 you saw behind the Import-Export Clause.

16 There are a lot of differences between that  
17 analysis involved in that tax and the analysis that  
18 would be made in looking at the Hooven & Allen tax --  
19 the Hooven & Allison tax.

20 Michelin, you had a situation in which  
21 Michelin, major competitor of domestic tire  
22 manufacturers, has got all its tires stored in Georgia.  
23 They're ready for sale. The only thing that remains to  
24 be done is selling. And the question you were faced  
25 with, if those are still imports under the original

1 package doctrine, the State of Georgia can never tax  
2 them, because the next thing that's going to happen is  
3 Michelin is going to sell them, and the State of Georgia  
4 can never tax them.

5           And does that really make any sense when you  
6 look at the policies behind the Import-Export Clause?  
7 But we have a very different situation when we start  
8 talking about importing raw materials, for which there's  
9 no domestic source, which are going to be incorporated  
10 into a manufactured product. Those raw materials are  
11 going to be taxed. That's not at issue, whereas it was  
12 at issue in Michelin.

13           The question is when are they going to be  
14 taxed and how often are they going to be taxed. They  
15 come in as raw materials. They're not sitting there,  
16 held, ready to be sold, and as soon as Hooven & Allison  
17 sells them, the State of Ohio will lose its opportunity  
18 to tax them.

19           They're sitting in a warehouse for a period  
20 one, three, six months, depending upon how much backlog  
21 Hooven & Allison keeps on their raw materials, and then  
22 they're moved onto the manufacturing floor, opened up,  
23 and become work in process. At that point, the full  
24 value, the full value of those imported raw materials  
25 goes into the tax equation and Ohio collects.

1           What the State of Chic is trying to do is say  
2 wait a minute, we don't have to wait until you put those  
3 raw materials into your manufacturing process. We'll  
4 start taxing them as soon as they hit your storage  
5 warehouse. They don't have to be work in process. As  
6 soon as they hit your storage warehouse, we can tax  
7 them, and that's okay now because Michelin said it's  
8 okay.

9           Michelin didn't say that was okay. Michelin  
10 didn't deal with that factual situation. You even  
11 pointed out in Michelin that you weren't dealing in  
12 Michelin with tubes which Michelin was going to later  
13 put into tires and which would be taxed when Michelin  
14 put them into tires; you were dealing with tires. And  
15 that was the tax that you had to juxtapose against the  
16 policies that you saw behind the Import-Export Clause.

17           QUESTION: Are there customs warehouses  
18 available for you to store your raw materials in before  
19 you take them out for incorporation into your product?

20           MR. NIMS: I believe -- you're -- you're  
21 getting a little beyond the knowledge I'm sure of. I  
22 believe there is a federal customs duty-free warehouse  
23 in Columbus, but Columbus is quite a ways from Xenia.  
24 Hooven & Allison is not General Motors. Transporting  
25 materials is not as easy for little Hooven & Allison,



1    which makes rope. It would work a -- it would have a  
2    major impact on how it gets its goods.

3                QUESTION: Well, I'm not asking -- I just -- I  
4    just wondered is there a customs warehouse system  
5    available for -- to protect against these kinds of  
6    duties until they're taken out for local consumption?

7                MR. NIMS: Like I say, I believe there is a  
8    duty-free warehouse --

9                QUESTION: All right.

10              MR. NIMS: -- In Columbus, but I'm not sure.

11              But the point is, the point is to the extent  
12    that all of your Commerce Clause analysis, to the extent  
13    that your Import-Export Clause analysis has had as a  
14    backdrop your concern that somebody dealing in imported  
15    goods paid his fair share and that you allow a tax to be  
16    assessed, the only effect of which is to be properly  
17    apportioned and cause him to pay his fair share for  
18    those services he uses, that's not this situation at  
19    all, because Hooven & Allison is going to do that.  
20    Every penny that goes --

21              QUESTION: Well, what if you were located --  
22    what if you were located in Cleveland? What if Hooven &  
23    Allison were located in Cleveland and could have used  
24    the customs warehouse and didn't? Do you think that's  
25    some kind of congressional suggestion that no federal

1 policy is going to be infringed if you don't use the  
2 customs warehouse?

3 MR. NIMS: No, I don't think so at all. I  
4 think, as we point out in our brief, in general,  
5 American tariff policy on dealing with raw materials  
6 from undeveloped nations has been to allow them in  
7 duty-free as part of an overall economic policy to help  
8 underdeveloped nations maximize their development and  
9 achieve what they can.

10 So to the extent that federal policy is  
11 important, and as we read Michelin, you didn't say  
12 anywhere in Michelin, federal policy is no longer  
13 important; indeed, you said federal policy is very  
14 important. What's no longer important is original  
15 package. Let's look at what the tax does and how it  
16 impacts on federal policy.

17 To the extent federal policy is important,  
18 federal policy is a very definite policy in dealing with  
19 underdeveloped nations exporting raw materials. There's  
20 simply no doubt that the economic reality -- and it's  
21 shown in Mr. Bucks' affidavit which is contained as an  
22 appendix to the brief of the Respondent -- economic  
23 reality is that the sources from which Hooven & Allison  
24 can obtain these natural fibers to make rope are  
25 charging either almost exactly the same price to sell

1 Hooven & Allison the raw material as to sell it the  
2 finished good, or in some cases, even a higher price to  
3 buy the raw material than the finished goods. And the  
4 obvious reason for that, they want Hooven & Allison and  
5 other companies to put their manufacturing facility in  
6 Mexico, and in Bangladesh, and in the Philippines, and  
7 employ their nationals.

8 QUESTION: Mr. Nims, may I interrupt you for a  
9 moment?

10 MR. NIMS: Certainly, Your Honor.

11 QUESTION: You're arguing a lot of facts that  
12 say this case is different from the original Hooven &  
13 Allison case, is that right?

14 MR. NIMS: Yes.

15 QUESTION: And are all those --

16 MR. NIMS: Well, and it's different than  
17 Michelin, more importantly.

18 QUESTION: Well, but first of all we start  
19 with Hooven & Allison. Is this the same or a different  
20 case than Hooven & Allison number I?

21 MR. NIMS: It is the same case, the same tax,  
22 the same facts as Hooven I. The question is, looking at  
23 those facts and putting this supposed change in legal  
24 principles that came along in Michelin, do you reach a  
25 different constitutional result with the same facts?

1 What I'm suggesting is the answer is no.

2 QUESTION: If we start from the premise that  
3 they're the same facts, then we really -- we can just  
4 look at the record in that case and find all the facts  
5 we need, can't we?

6 MR. NIMS: Yes. In deal -- in dealing with  
7 1940 sources, 1940 prices, there are some facts in that  
8 record, but they deal in 1940s economic terms.

9 QUESTION: Well, to the extent that you think  
10 there are additional 1982 facts or '81 or whenever the  
11 tax was assessed, are those facts now in the record?

12 MR. NIMS: No.

13 QUESTION: Why not? Didn't you have the  
14 burden to explain why the tax couldn't properly be  
15 assessed?

16 MR. NIMS: No. As far as we're concerned,  
17 this Court has already said the tax can't be assessed.  
18 The state came along and said this Court --

19 QUESTION: Yeah, but if we rely on that reason  
20 --

21 MR. NIMS: -- This Court would now say  
22 differently given Michelin. It was their burden to show  
23 that.

24 QUESTION: But if we rely on the reason that  
25 this is a different case, then I suppose -- you say they

1 have to put in the facts why they go -- I don't  
2 understand you.

3 MR. NIMS: They --

4 QUESTION: Procedurally.

5 MR. NIMS: They took the position, Your Honor  
6 --

7 QUESTION: And they won, yeah.

8 MR. NIMS: -- That collateral estoppel wasn't  
9 important, and the reason it wasn't important is even  
10 though the Supreme Court of Ohio -- or excuse me -- the  
11 Supreme Court of the United States had previously said  
12 in 1945 that the very tax they want to collect is  
13 unconstitutional, you can ignore that, and the reason  
14 you can ignore it is because if you read Michelin,  
15 you'll find that the Supreme Court of the United States  
16 has implicitly overruled Hooven. We said --

17 QUESTION: But --

18 MR. NIMS: -- No. You'll find that they  
19 haven't overruled Hooven, and if the State of Ohio wants  
20 to tell you that if you look at the facts and apply a  
21 Michelin analysis, you can predict that the United  
22 States Supreme Court will now reach a different result  
23 than the one it reached, let 'em prove it to you,  
24 because we think if you look at those facts, you'll find  
25 the Supreme Court of the United States will reach the



1 same result.

2 But they chose we don't have to do that. Look  
3 at Sunnen. Michelin is a new change in atmosphere.

4 QUESTION: But insofar as we're working with a  
5 change in the law as to whether the law is different  
6 after Michelin, it seems to me we just assumed the case  
7 is on all fours with the prior case. At least that's  
8 what I've done in looking at it.

9 And if I think that Michelin --

10 MR. NIMS: Assume that --

11 QUESTION: -- Overruled Hoover I, that's all I  
12 have to decide. What -- why do I have to go into all  
13 these other facts?

14 MR. NIMS: Because --

15 QUESTION: If you didn't put them all in the  
16 record?

17 MR. NIMS: But, Your Honor, you would be  
18 putting on us the burden to put in the record to show  
19 that a case we've already run we're still ripe on. And  
20 it seems to me at the very least, having already won it,  
21 we ought to be entitled to have the burden put on the  
22 party who says it's now going to be reversed.

23 QUESTION: Well, but usually res judicata or  
24 collateral estoppel is an affirmative defense, and the  
25 burden is on the party pleading.

1           MR. NIMS: Yeah, but -- but we met the burden  
2 by proving that Hoover I remains unreversed. They're  
3 the ones who want the Supreme Court of Ohio to predict  
4 that that won't happen again.

5           QUESTION: Yes, but supposing we disagree and  
6 say it was reversed? Then that's the end of the  
7 ballgame.

8           MR. NIMS: If you say we had intended to  
9 reverse it; we're surprised you didn't find it reversed;  
10 we reverse it, there is no doubt it'll go back and the  
11 State of Ohio will say it's reversed, and we will then  
12 -- we will then have the affirmative burden to say all  
13 right, by gosh, we're going to win it again. We're  
14 going to win it on new constitutional principles. But  
15 it's our position --

16          QUESTION: You are if Ohio says you can -- you  
17 can have a second bite at the apple. If they say that,  
18 you can, yeah.

19          MR. NIMS: Sure we can. So, too, can the  
20 state. The state tried to shortcut it by saying forget  
21 facts; facts are irrelevant. Michelin controls all. If  
22 we want to have a personal property tax, we can have  
23 one. And that -- that shortcut isn't available, we  
24 don't believe.

25          Thank you. I think I've said all I need to

1 say.

2 CHIEF JUSTICE BURGER: Mr. Farrin, do you have  
3 anything further?

4 ORAL ARGUMENT OF RICHARD C. FARRIN, ESQ.,  
5 ON BEHALF OF THE PETITIONER -- REBUTTAL

6 MR. FARRIN: Mr. Chief Justice, and may it  
7 please the Court:

8 Just a few matters in rebuttal. The Tax  
9 Commissioner's position was initially that collateral  
10 estoppel did not apply because the controlling legal  
11 principle upon which *Hoooven* was based had been  
12 repudiated or at least changed by this Court's decision  
13 in *Michelin*.

14 There was no necessity for the Tax  
15 Commissioner to present any factual evidence with  
16 respect to that claim. The only facts necessary for  
17 that determination are that the same tax -- the same  
18 type of tax was involved -- that is, a state  
19 nondiscriminatory ad valorem property tax -- and that  
20 the imported goods upon which that tax was attempted to  
21 be imposed were no longer in transit.

22 Michelin specifically held that such attacks  
23 on those goods is not an impost or a duty. If it's not  
24 an impost or a duty, it was not immune, or it was not  
25 prohibited by the Import-Export Clause.

1           The Respondent's attempt to put some burden on  
2 the Commissioner to prove its case is, I think, a  
3 disingenuous attempt to get this Court to ignore the  
4 clear ruling of the Michelin decision. The -- the  
5 Respondent in this case actually waived its right to an  
6 evidentiary hearing before the Board and chose obviously  
7 to rely on its collateral estoppel attack and abandon  
8 any attempt to actually prove any constitutional  
9 violation by the imposition of a tax in the present case.

10           I would point out with respect to a couple of  
11 statements made by the Respondent regarding the notice  
12 of appeal and what was raised by the Respondent. As I  
13 indicated in my opening argument, the Respondent did  
14 raise in his notice of appeal the Commerce Clause aspect  
15 regarding the federal regulation of foreign commerce.  
16 That is the only portion of the Commerce Clause that was  
17 raised in the notice of appeal as the -- as the decision  
18 of the Board of Tax Appeals at page A-17 of the petition  
19 for cert appendix reveals.

20           With respect to Justice Rehnquist's question  
21 regarding custom-bonded warehouses, I believe that such  
22 warehouses would only protect imported goods from the  
23 imposition of a state tax if those goods are  
24 subsequently re-engaged in foreign commerce; that is,  
25 transported out -- out of the state. If those goods are

1 removed from a custom-bonded warehouse to some domestic  
2 source, those goods are subject to the tax in the  
3 jurisdiction in which those goods are located. I think  
4 --

5 QUESTION: While they were in the warehouse.

6 MR. FARRIN: When removed from the warehouse,  
7 it --

8 QUESTION: How about for the period they were  
9 in the warehouse?

10 MR. FARRIN: Well, under the -- under the  
11 customs-bonded warehouse statutes, it's my understanding  
12 that as long as they're put in those warehouses, they  
13 are presumed to be intended for use later in foreign  
14 commerce. Only when they are then removed are they  
15 subject to tax.

16 QUESTION: So if Hooven put their fibers in  
17 bonded warehouses and only took the fibers out when they  
18 were about to make some rope out of them, you would have  
19 some problems?

20 MR. FARRIN: Justice White, I don't believe --

21 QUESTION: For -- for the period of time that  
22 the fibers were in the warehouse.

23 MR. FARRIN: Justice White, I don't think they  
24 would have been allowed to put their materials within  
25 that warehouse --



1 QUESTION: Unless they --

2 MR. FARRIN: -- If -- if they had stated they  
3 were going to use them in foreign commerce.

4 Another point that I would make is that the  
5 tax at issue here is not a tariff, it's not a duty on  
6 the right to bring goods into the country. It's a  
7 property tax that is imposed on goods after those goods  
8 have come to rest within Ohio. It merely is a method by  
9 which Ohio apportions to the individuals who do business  
10 within the state the fair share of the cost of the  
11 government services provided to those particular  
12 businesses and individuals.

13 In order to allow an exemption for Hoover &  
14 Allison in the present case would require others within  
15 the state who are subject to the tax to subsidize the  
16 cost of those services provided to Hoover & Allison.  
17 That is a requirement that Michelin specifically said  
18 was not required by the Import-Export Clause, and I  
19 don't believe that this Court should allow the  
20 Respondent in the present case to avoid paying its fair  
21 share of the cost of the government services that Ohio  
22 provides to it by paying a tax on the goods that it has  
23 in its Ohio warehouse awaiting its intended use in  
24 business.

25 Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen,  
2 The case is submitted.

3 We'll hear arguments next in Kirby Forest  
4 Industries against the United States.

5 (Whereupon, at 1:46 p.m., the case in the  
6 above-entitled matter was submitted.)

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CERTIFICATION

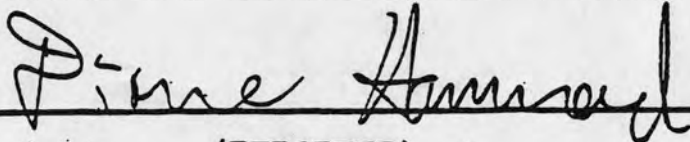
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#86-96 - JOANNE LIMBACH, TAX COMMISSIONER OF OHIO, Petitioner v.  
THE HOOVEN & ALLISON COMPANY

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "P. H. Hunsaker", written over a horizontal line.

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