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A Review Of Intergovernmental Immunities From Taxation

religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power."[43] And again: "The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong."[44]

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A REVIEW OF INTERGOVERNMENTAL IMMUNITIES FROM TAXATION

The latest of a series of cases in which the Supreme Court has reexamined the doctrine of implied constitutional immunities of federal and state governments from taxation by the other is *New York v. United States*.[1] The language employed in these cases is significant in its tendency to regard the doctrines as fallacious insofar as they afford immunity to state instrumentalities against federal taxation, while reaffirming federal supremacy in the tax field. The danger of the recent Supreme Court decisions lies not in the results on the merits, nor in the narrow application of the doctrine of implied immunities, but in the according of immunity to the instrumentalities of the federal government without a reciprocal immunity to those of the state governments. Thus, the power to tax becomes a power to widen the scope of federal economic and political power at the expense of an equal right in the states.

The present condition of the law leaves the governments of the states in a position where they are suffering increased burdens from federal taxation and at the same time are being deprived of legitimate subjects of taxation by the almost daily entry of the federal government into the field of private enterprise. On the other hand, the federal government is expanding its proprietary enterprises exempt from state taxation and is reaping a harvest through taxation of state and municipal services.

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[43]West Virginia State Board of Education v. Barnette, 319 U. S. 624, 653, 63 S. Ct. 1178, 1192, 87 L. ed. 1628 (1943).

[44]West Virginia State Board of Education v. Barnette, 319 U. S. 624, 654, 63 S. Ct. 1178, 1193, 87 L. ed. 1628 (1943).

[1]326 U. S. 572, 66 S. Ct. 310, 90 L. ed. 265 (1946).

One-half of the historical doctrine, that relating to federal immunity from state taxation, is based upon Chief Justice Marshall's opinion in *McCulloch v. Maryland*[2] where, rather than holding a state tax on bank notes issued by the Bank of the United States unconstitutional because plainly discriminatory, he announced the total absence of any right to tax the means employed by the federal government in the execution of its powers. Chief Justice Marshall's language, which later became the basis for a broad doctrine of intergovernmental immunities, is couched in the following phraseology:

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."[3]

However, this and later statements clearly indicate that Marshall was not establishing intergovernmental immunities but merely immunity of the federal government, and, furthermore, promulgating a doctrine of federal taxation supremacy under the Supremacy Clause:[4]

> "The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government is conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is an empty and unmeaning declamation."[5]

To the argument that the power of taxation in the federal and state governments is concurrent and that each had power to tax instrumentalities of the other, Chief Justice Marshall expressly dissented and drew his often-quoted distinction between the government of the whole taxing a part, the state, and that of a part taxing the whole.[6]

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[2]4 Wheat. 316, 4 L. ed. 579 (1819).

[3]4 Wheat. 316, 431, 4 L. ed. 579 (1819).

[4]U. S. Const. Art. VI, Cl. 2.

[5]4 Wheat. 316, 433, 4 L. ed. 579 (1819).

[6]"But the two cases are not the same. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the state, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves.

On the basis of the above language and the political need in 1819 of strengthening the position of the federal government, it can hardly be controverted that Chief Justice Marshall intended to imply a constitutional immunity to the federal government and to deny a like immunity to the states.[7] At a time when the infant national government was in great need of protecting its undeveloped tax revenues and strengthening its political power in the face of States' Rights opposition, such statements were justified to emphasize federal supremacy.

During the following fifty years the position of the federal government was immensely strengthened because of economic security gained through increased taxation revenues, and favorable interpretation of the Constitution by the Supreme Court. Chief Justice Marshall's language was frequently employed in later decisions, emphasizing the immunity of the federal government from interference and burden through state taxation of specific subjects and activities.[8] However, due to political expediency, Congress soon imposed one limit to this doctrine of absolute immunity by providing for state non-discriminatory taxation on shares of national banks in the hands of individuals.[9] The Supreme Court in *Van Allen v. The Assessors*[10] held that though

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The difference is that which always exists, and always must exist, between the action of the whole or a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme." 4 Wheat. 316, 435, 4 L. ed. 579 (1819).

[7]However, the contention is made in the dissenting opinion in New York v. United States, 326 U. S. 572, 66 S. Ct. 310, 321, 90 L. ed. 265 (1946) that other language of Marshall is sufficient to sustain the case for reciprocal immunity. See 4 Wheat. 316, 429, 4 L. ed. 579 (1819). But, the last sentence of the quoted paragraph omitted from the opinion in the principal case, whatever the implication in the previous context, limits immunity to the federal government: "The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give." 4 Wheat. 316, 430, 4 L. ed. 579 (1819).

[8]Tax on a branch of a Bank of the United States, Osborn v. Bank of the United States, 9 Wheat. 738, 6 L. ed. 204 (1824); tax on federal securities owned by a private citizen, Weston v. City of Charleston, 2 Pet. 449, 7 L. ed. 481 (1829); income tax on an officer of the federal government, Dobbins v. Commissioners, 16 Pet. 435, 10 L. ed. 1022 (1842); tax on the nominal capital of a state bank invested in federal securities, Bank of Commerce v. New York, 2 Black 620, 17 L. ed. 451 (1862); tax measured by the capitalization of state banks partially invested in federal securities, Bank Tax Case, 2 Wall. 200, 17 L. ed. 793 (1864); tax on certificates of indebtedness of the federal government, The Banks v. The Mayor, 7 Wall. 16, 19 L. ed. 57 (1868); tax on United States bank notes, Bank v. Supervisors, 7 Wall. 26, 19 L. ed. 60 (1868).

[9]13 Stat. 99 (1864).

[10]3 Wall. 573, 18 L. ed. 229 (1865). See also, Bradley v. People, 4 Wall. 459, 18

the constitutional immunity of the federal government was "absolute," Congress, having created the instrumentality, could limit the immunity.

Only one judicial inroad was made into the doctrine of absolute immunity. In *Thomson v. Pacific Railroad*[11] the Supreme Court held that in the absence of affirmative prohibition on the part of Congress, a state tax on an agency of the federal government was valid. Only a dictum in one case[12] and the dissenting opinion in another[13] even suggested any further limitation on immunity.

Thus, on entering the era subsequent to the War Between the States, the implied constitutional immunity of the federal government was absolute, subject only to the intent of Congress. As a result of the outcome of the War, confirming the supremacy of the national government, the government of the Union reached the stage of development where its economic and political power exceeded the aggregate of that of the several states.

With this background, the decision of *Collector v. Day*[14] established the other half of the doctrine of intergovernmental immunities. There

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L. ed. 433 (1866); People v.Commissioners, 4 Wall. 244, 18 L. ed. 344 (1866); National Bank v. Commonwealth, 9 Wall. 353, 19 L. ed. 701 (1869).

[11]9 Wall. 579, 19 L. ed. 792 (1869). While a distinction was made between means employed by the government and property of agents employed by the government, on the basis of dictum in McCulloch v. Maryland, silence on the part of Congress was treated as affirmative consent to tax. As a corollary see Bank v. Supervisors, 7 Wall. 26, 19 L. ed. 60 (1868).

[12]National Bank v. Commonwealth, 9 Wall. 353, 362, 19 L. ed. 701 (1869): "The limitation is, that the agencies of the federal government are only exempt from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve the government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustified invasion of the rights of the states."

[13]Weston v. City of Charleston, 2 Pet. 449, 479, 7 L. ed. 481 (1829), where a distinction was made in the dissenting opinion on the basis of the direct or indirect nature of the tax with regard to the federal government.

[14]11 Wall. 113, 20 L. ed. 122 (1870). As immediate background for this case there is the decision in Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482 (1869) where the right of the federal government to tax an instrumentality of a state was challenged for the first time and upheld on narrow grounds. A federal tax on state bank notes, the object of the tax being to drive state bank notes out of existence, was declared valid under the constitutional power of the federal government to provide a uniform currency. However, it was conceded that "...and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress." 8 Wall. 533, 547, 19 L. ed. 482 (1869). Further support for the Day case is drawn from dictum in Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227 (1868): "Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the

the Supreme Court held that a non-discriminatory federal income tax imposed upon the salary of a state officer was unconstitutional as constituting a burden on an instrumentality of the state government. In a well-considered opinion, Mr. Justice Nelson pointed out that there was no express constitutional prohibition upon the state against taxing the means or instrumentalities of the federal government but necessary implication required such prohibition as otherwise the states could impair or destroy the functions of the federal government. Furthermore, he stated that the same construction applies to federal taxation of state instrumentalities. The language of the opinion thus emphasizes the reciprocal nature of intergovernmental immunities:

> "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other."[15]

In his dissenting opinion, Mr. Justice Bradley, on the other hand, stressed Marshall's distinction between state taxation of federal instrumentalities and federal taxation of state instrumentalities, and emphasized the supremacy of the federal taxing power. However, the Court specifically rejected this distinction.[16]

Thus, at a time when the federal and state governments had reached a balance of power in political and economic fields and there was no

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maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." Again, in Lane County v. Oregon, 7 Wall. 71, 77, 19 L. ed. 101 (1868) the Court, speaking of the taxing powers of the national and state governments, stated: "It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute."

[15]11 Wall. 113, 127, 20 L. ed. 122 (1870). Mr. Justice Nelson continued: "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

[16]"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question

further need of judicial statesmanship to bolster the authority of the federal government, the Supreme Court established a doctrine of concurrent taxing powers and reciprocal implied immunities. That such doctrine was accepted by the outstanding constitutional authorities of the day is shown by a declaration of Judge Cooley that "If the states cannot tax the means by which the national government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the state governments."[17]

In the cases that followed until the turn of the century, it was emphasized that the immunity of the state governments was reciprocal with that of the federal government. In *Ambrosini v. United States,* holding a federal stamp tax inapplicable to bonds taken out by an individual in accordance with municipal license laws, Chief Justice Fuller said:

> "The general principle is that the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the general government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter."[18]

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before us, cannot be maintained." 11 Wall. 113, 126, 20 L. ed. 122 (1870). See also, 1 Story Commentaries (4th ed. 1873) 324 and Cooley, Constitutional Limitations (3d ed. 1898) 36 on the concurrent taxing powers of the federal and state governments.

[17]Cooley, Constitutional Limitations (2d ed. 1883) 598. In justification of this rule Cooley states: "It is the theory of our system of government that the state and the nation alike are to exercise their powers respectively in as full and ample a manner as the proper departments of government shall determine to be needful and just, and as might be done by any other sovereignty whatsoever. This theory by necessary implication excludes wholly any interference by either the state or the nation with an independent exercise by the other of its constitutional powers. If it were otherwise, neither government would be supreme within what has been set apart for its exclusive sphere, but on the other hand, would be liable at any time to be crippled, embarrassed, and perhaps wholly obstructed in its operations at the will or caprice of those who for the time being wielded the authority of the other, and that an exercise of the power to tax might have that effect is manifest from a consideration of the nature of the power." Cooley, Taxation (1st ed. 1876) 57. See also 1 Destry, Taxation (1st. ed. 1884) 67; Burroughs, Taxation (1st. ed. 1877) 120, 504.

[18]187 U. S. 1, 7, 23 S. Ct. 1, 3, 47 L. ed. 49 (1902). See also the following cases holding federal taxes invalid as imposed on a state instrumentality: United States v. Railroad Co., 17 Wall. 322, 21 L. ed. 597 (1872); Mercantile Bank v. New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895 (1886). Compare, Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670, 28 L. ed. 845 (1885).

The same position was taken in *Pollock v. Farmers' Loan & Trust Co.*[19] where the Supreme Court held a federal income tax invalid as applied to income derived from municipal bonds.

However, due to the fact that both the federal and state governments began to tap new sources of tax revenue in the search for more income to support increasing governmental activities, the overwhelming majority of the cases began to limit both federal and state immunities. Thus, it was held that property bequeathed to the United States was subject to a state inheritance tax on the reasoning that the tax was on the power of the testator to bequeath and was imposed before it reached the hands of the government.[20] Conversely, it was held that the federal government has power to tax the transmission of property by legacy to states or their municipalities, and that such tax is on the right to succeed to property, not on the state.[21]

Other cases upheld the questioned tax as imposed on the right to do business, not against the government instrumentality,[22] or on personal property of an individual even though it consisted of minerals dug from federally owned lands,[23] or on real property of an individual upon which the government had only a claim.[24] All of the enumerated objects of taxation would seem to be clearly outside of the doctrine of implied immunities as neither a means, property, nor instrumentality of the government was involved, even though it was possible in each case for the ultimate economic burden of the tax to fall upon the government.

One case arose, however, which to some extent disturbed the doctrine of absolute intergovernmental immunities. In *Railroad Co. v. Peniston*[25] it was held that a state property tax could be validly im-

[19]157 U. S. 429 at 583, 15 S. Ct. 673 at 690, 39 L. ed. 759 at 821 (1894). In also holding that a federal tax on the rents or income of real estate is a direct tax and being un-proportioned is unconstitutional, this decision necessitated the passage of the Sixteenth Amendment to the Constitution.

[20]United States v. Penkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. ed. 287 (1895). Accord, Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, 44 L. ed. 998 (1899).

[21]Snyder v Bettman, 190 U. S. 249, 23 S. Ct. 803, 47 L. ed. 1035 (1902). The dissenting opinion stressed the fact that the federal government had no power to regulate transmission of property on death, thus the constitutionality of its inheritance tax was based solely on its power to tax, and it was accomplishing indirectly what it could not do directly.

[22]Home Insurance Co. v. New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025 (1889). But see Telegraph Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067 (1881).

[23]Fauber v. Gracey, 94 U. S. 762, 24 L. ed. 313 (1876).

[24]Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, 25 S. Ct. 50, 49 L. ed. 242 (1904).

[25]18 Wall. 5, 21 L. ed. 787 (1873). The majority felt that the doctrine of implied

posed on a corporation formed under the laws of the United States. A distinction was made on the basis of the effect of the tax—a tax on the property causes only a remote interference with the exercise of governmental power, but a tax on operations is a direct obstruction to the exercise of this power. This ruling was counterbalanced somewhat, at least so far as federal corporations are involved, by *California v. Pacific Railroad Co.*[26] where it was held that a corporate franchise conferred by Congress cannot be taxed by a state in the absence of Congressional permission.

From the foregoing it can be seen that with the turn of the century, while the doctrine of intergovernmental tax immunities had been restricted slightly from its original broad interpretation, the basic idea had been reiterated so often in specific decisions and dicta that it had become firmly implanted in the law. Even more significant is the fact that the doctrine was completely accepted as one of reciprocity both in the language and effect of the decision.

Two elements were now to begin a drastic limitation on the doctrine, especially as to instrumentalities of the states: one, the increasing entry of the states into activities formerly regarded as limited to private business; and, two, the growing need of additional federal revenue. These elements induced a judicial attitude of discrimination against the immunity of state instrumentalities at a time when the federal government had not begun its program of operating economic enterprises.

The inroads on the doctrine began with the case of *South Carolina v. United States*[27] though indications of the trend are seen at an earlier date.[28] The Supreme Court held that a federal liquor license tax was

immunities must be given a practical effect. Mr. Justice Bradley in his dissent felt that this was a tax on a federal corporation under the rule of McCulloch v. Maryland.

[26]127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150 (1887). The Court distinguished Railroad Co. v. Peniston on the basis that there the tax was on property while here it was on the franchise. Nevertheless, the decision in its effect very narrowly restricted the doctrine of the Peniston case.

[27]199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905).

[28]In United States v. Railroad Co., 17 Wall. 322, 21 L. ed. 597 (1872) the majority opinion rejected the proposition that a municipality is subject to federal taxation when acting outside of its ordinary governmental capacity because any power exercised for the benefit of a state or municipality is in the course of government. The dissenting opinion made the distinction that private property owned by a municipality in a proprietary right and used merely for income, gain and profit is taxable as if owned by an individual. In Ambrosini v. United States, 187 U. S. 1, 23 S. Ct. 1, 47 L. ed. 49 (1902) the Court made an incidental statement that a municipal

applicable to the liquor dispensary system conducted by the state of South Carolina. Though the precise reasoning behind the decision is a bit obscure, the court apparently makes a distinction between state enterprise which is in the nature of ordinary private business for profit and the usual, strictly governmental function. The former is taxable as any business, while the latter is constitutionally immune from federal taxation. The Court pointed out that the tax is not on property belonging to the state but is a charge on business, before any profits are realized.[29] It was emphasized that all cases condemning federal taxes involved situations where property, means or an instrumentality was employed by a state in the discharge of its ordinary function of government. But the Court failed to make a clear definition of what the term "ordinary functions" connoted. Three dangers in the extension of immunity to state-conducted business enterprise were enumerated: one, the withdrawing of subjects and property from federal taxation; two, the possibility that the ownership by a state of public utilities might destroy the republican form of government, as private business could not compete with tax exempt government-owned business; and, three, the small but growing number of persons clamoring for state ownership of all property and business, which, if realized, would render the federal government impotent economically. An analogy was made to the distinction between governmental and propriety activities in the responsibility of a municipal corporation. Though the Court clearly intended it only as an analogy to a field of law in which there is considerable conflict of opinion,[30] this distinction formed the basis of a test of immunity which has, with variations, become accepted by the Supreme Court.[31]

In the following thirty years, the states continued to enter the business field to a larger extent and the federal government's scope of taxation was increased through the passage of the Sixteenth Amendment

bond was taken in the exercise of a function belonging to the city in its ordinary govenmental capacity.

[29]The Court drew an analogy between this situation and those contained in United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. ed. 287 (1895) and Snyder v. Bettman, 190 U. S. 249, 23 S. Ct. 803, 47 L. ed. 1035 (1902).

[30]For a complete discussion of the conflicts of opinion as to this tort liability see: Borchard, Government Liability in Tort (1924) 34 Yale L. J. 1, 129, 229.

[31]Thus in Flint v. Stone Tracey Co., 220 U. S. 107, 31 S. Ct. 342, 55 L. ed. 389 (1910) the Court stressed that implied immunity has not been extended to exclude merely private business from federal taxation although the power to exercise that business is derived from the state. The exemption of state agencies from federal taxation is limited to those of a strictly governmental character.

to the Constitution providing for the income tax. These two factors combined to furnish incentive to the Supreme Court to weaken further the states' immunity from federal taxation, in order to bring income derived from state conducted business within the purview of federal income taxation. Though the immunity of the federal government was frequently affirmed in many cases that followed,[32] and in a few cases, was limited on the basis of past decisions,[33] reciprocity of immunities was further overbalanced in favor of the federal government by one limited extension of federal immunity[34] and by the adoption of a new test of immunity and its application to specific factual situations discriminatingly against state immunity.

This new test of immunity was adopted in *Metcalf and Eddy v. Mitchell*,[35] where it was held that the salary of a consulting engineer derived from employment by a state is subject to federal income taxation. After strongly reaffirming the doctrine of reciprocal immunities, the Count pointed out that the taxing power of either government, when exercised in an admittedly necessary and proper manner, unavoidably has some economic effect upon the other. It follows that the doctrine of immunities must be given a practical construction, balancing freedom from governmental interference against impairment of

[32]Home Savings Bank v. Des Moines, 205 U. S. 503, 27 S. Ct. 571, 51 L. ed. 901 (1906); Williams v. Talladega, 226 U. S. 404, 33 S. Ct. 116, 57 L. ed. 275 (1912); Farmers Bank v. Minnesota, 232 U. S. 516, 34 S. Ct. 354, 58 L. ed. 706 (1913); Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234 (1914); Indian Oil Co. v. Oklahoma, 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779 (1915); Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1921); Federal Land Bank v. Crosland, 261 U. S. 374, 43 S. Ct. 385, 67 L. ed. 703 (1922); Northwestern Insurance Co. v. Wisconsin, 275 U. S. 136, 48 S. Ct. 55, 72 L. ed. 202 (1927); Long v. Rockwood, 277 U. S. 142, 48 S. Ct. 463, 72 L. ed. 824 (1927); McCallen Co. v. Mass., 279 U. S. 620, 49 S. Ct. 432, 73 L. ed. 874 (1928). See also Cohen and Dayton, Federal Taxation of State Activities and State Taxation of Federal Activities (1925) 34 Yale L. J. 807.

[33]Tax on property used by an individual under a federal contract, Gnomer v. Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499, 56 L. ed. 801 (1911); tax on premiums on federal bonds paid by insurance companies, Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, 36 S. Ct. 298, 60 L. ed. 664 (1915); tax on gross income including that under a mail contract, Alward v. Johnson, 282 U. S. 509, 51 S. Ct. 273, 75 L. ed. 496 (1930).

[34]In Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. ed. 328 (1923) a state property tax was held invalid as applied to a corporation, chartered by the federal government as part of the war effort, whose property was furnished by the United States and whose entire bond and stock issue was federally owned. The Court rejected the distinction in Thomson v. Pacific Railroad, 9 Wall. 579, 19 L. ed. 792 (1869), that taxation of the property of an agent is not taxation of the means, on the basis of the peculiar facts of this case.

[35]269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384 (1925).

the taxing power.[36] In further holding that the effect of the particular tax on the functioning of the state government was insubstantial, the Court furnished the foundation for the test of "remoteness of burden" which was followed in later cases with equal application to restrict both federal and state immunity.[37] The language of "burden" or "remoteness of burden" thus appears in the cases: a particular tax was said to operate so as "directly to retard, impede and burden the exertion by the United States of its constitutional powers;"[38] in another instance, that it would be difficult to suppose any case in which "the adverse effects of the tax would be more remote or attenuated;"[39] again, that for a tax to be invalid "it must appear that the burden is real, not imaginary; substantial, not negligible;"[40] and again, that no immunity exists "where no direct burden is laid upon the governmental instru-

[36]"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax; or the appropriate exercise of the functions of the government affected by it." 269 U. S. 514, 523, 46 S. Ct. 172, 174, 70 L. ed. 384 (1925).

[37]In the following cases a state tax was held valid as constituting only a remote interference to the federal government: Educational Films Corp. v. Ward, 282 U. S. 379, 51 S. Ct. 170, 75 L. ed. 400 (1930); Susquehanna Power Co. v. Tax Commissioner, 283 U. S. 291, 51 S. Ct. 434, 75 L. ed. 1042 (1930); Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. ed. 1010 (1931), overruling Long v. Rockwood, 277 U. S. 142, 48 S. Ct. 463, 72 L. ed. 824 (1927); Indian Territory Oil Co. v. Board of Equalization, 288 U. S. 325, 53 S. Ct. 388, 77 L. ed. 812 (1932). In the following cases a state tax was held invalid as constituting a burden on the federal government: Jaybird Mining Co. v. Weir, 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112 (1925); Panhandle Oil Co. v. Knox, 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857 (1927). In the following cases a federal tax was held valid as constituting only a remote burden on the state government: Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125, 75 L. ed. 304 (1930); Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 51 S. Ct. 432, 75 L. ed. 1032 (1930); Burnet v. A. T. Jergins Trust, 288 U. S. 508, 53 S. Ct. 439, 77 L. ed. 925 (1932). Compare Wheeler Lumber Co. v. United States, 281 U. S. 572, 50 S. Ct. 419, 74 L. ed. 1047 (1929) where the Court distinguished Panhandle Oil Co. v. Knox, on rather tenuous grounds. In the following cases a federal tax was held invalid as constituting a burden on the state government: National Life Insurance Co. v. United States, 277 U. S. 508, 48 S. Ct. 591, 72 L. ed. 968 (1927); Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815 (1931).

[38]Excise Tax on sale of gasoline including that sold to the United States, Panhandle Oil Co. v. Knox, 277 U. S. 218, 222, 48 S. Ct. 451, 453, 72 L. ed. 857 (1927).

[39]Property tax on submerged land owned by licensee under Federal Power Commission, Susquehanna Power Co. v. Tax Commissioner, 283 U. S. 291, 295, 51 S. Ct. 434, 435, 75 L. ed. 1042 (1930).

[40]Income tax on profits from sale of municipal securities owned by an individual, Willcuts v. Bunn, 282 U. S. 216, 234, 51 S. Ct. 125, 130, 75 L. ed. 304 (1930).

mentality, and there is only a remote, if any, influence upon the exercise of the functions of government."[41]

Thus, a doctrine of reciprocal implied immunities, qualified by practical application on the basis of remoteness of governmental interference, became the order of the day. The doctrine was inherently subject to inconsistencies in application and was applied more leniently in favor of the federal government.[42] However, during this transitional period, the Court oscillated between emphasis on "absolute" immunity and sharp criticism of the whole concept of immunity. In *Indian Motorcycle Co. v. United States,* after holding that a federal excise tax was invalid as applied to motorcycles sold to a municipal corporation, Mr. Justice Van Devanter stated for the Court that "where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."[43] Mr. Justice Holmes, however, dissenting in *Panhandle Oil Co. v. Knox,* stated:

"It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Mar-

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[41]Willcuts v. Bunn, 282 U. S. 216, 225, 51 S. Ct. 125, 127, 75 L. ed. 304 (1930).

[42]Though variations of the same language were applied in limiting federal and state immunities, it can be seen from an examination of the oil and gas lease cases that the Supreme Court has been more prone to limit state immunity than federal immunity. Thus, it was held in Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1921), based on the decisions in Choctow O. & G. R. Co. v. Harrison, 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234 (1914) and Indian Oil Co. v. Oklahoma, 240 U. S. 522, 36 S.Ct. 453, 60 L. ed. 779 (1915) that a state tax on the lessee of Indian oil lands was void. This was followed by the decision in Group No. 1 Oil Corp v. Bass, 283 U. S. 279, 51 S. Ct. 432, 75 L. ed. 1032 (1930) that a federal tax was valid when imposed on the lessee of state oil lands, with the tenuous distinction that under the state law the lease was regarded as a present sale of the oil and gas in place. Surely the ultimate burden in these two situations will fall equally on the respective governments. However, the Court did return to the doctrine of the Gillespie Case in the decision in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815 (1931), only to repudiate it more forcibly in Burnet v. A. T. Jergins Trust, 288 U. S. 508, 53 S. Ct. 439, 77 L. ed. 925 (1932), on the basis that the burden on public use was greater where the United States was protecting its wards, the Indians, than in the situation where the states were leasing their lands.

[43]283 U. S. 570, 575, 51 S. Ct. 601, 603, 75 L. ed. 1277 (1930). See also Trinity Farm Co. v. Grosjean, 291 U. S. 466, 471, 54 S. Ct. 469, 470, 78 L. ed. 918 (1933), where Mr. Justice Butler, while holding valid a state excise tax on gasoline sold to the United States because at most a burden which is consequential and remote, and not necessary, immediate or direct, stated: "Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." This language is inconsistent and wholly irreconcilable with the decision on the facts.

> shall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits."[44]

This language of Mr. Justice Holmes pointed the way toward further limitation on immunity in the cases that followed. For, it was during the 1930's that the federal government began its social program, with its corresponding economic and political expansion. This introduced conflicting problems, the increasing need for federal revenue and the necessity of protecting existing sources from the inroads of state enterprise on the one hand, and the threat to state revenues from federal-conducted business enterprise on the other hand.

There followed in rapid succession a number of cases in which the distinction evolved in *South Carolina v. United States*[45] was enlarged and the immunity of the states from federal taxation was drastically limited.[46] In addition, several far-reaching decisions were rendered, with respect to specific subjects or objects of taxation, which overruled earlier cases. Thus in *Graves v. New York ex rel. O'Keefe*[47] the Supreme Court held that a state could impose a non-discriminatory income tax on the salary of an attorney for the Federal Home Owners' Loan Corporation. Mr. Justice Stone assumed that the corporation itself was immune, but decided that an income tax on the employee's salary imposed no unconstitutional burden on the corporation. He specifically stated that state as well as federal employees are within the scope of the decision. *Collector v. Day*[48] was overruled by name and

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[44]277 U. S. 218, 223, 48 S. Ct. 451, 453, 72 L. ed. 837 (1927).

[45]199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905).

[46]Compare for language and decision: Ohio v. Helvering, 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307 (1933); Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. ed. 291 (1934); Helvering v. Therrell, 303 U. S. 218, 58 S. Ct. 539, 82 L. ed. 758 (1937); Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1937); Allen v. Regents, 304 U. S. 439, 58 S. Ct. 980, 82 L. ed. 1448 (1927).

[47]306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927 (1938).

[48]11 Wall. 113, 20 L. ed. 122 (1870). Though this case was overruled on its facts, its doctrinal concept of reciprocal immunities was undisturbed. Expressly overruled also was New York ex rel. Rogers v. Graves, 299 U. S. 401, 57 S. Ct. 269, 80 L. ed. 306 (1936).

Dobbins v. Commissioners[49] by implication.

Fortunately for the theory of reciprocity, most of the sweeping relaxations of immunity were applied alike to federal and state governments. In other cases the immunity was further limited with some discrimination against the states.[50] However, the most drastic encroachment upon the reciprocity theory occurred as a result of those cases which refused to apply to federal instrumentalities the distinction between proprietary and governmental functions.

In *Federal Land Bank v. Bismark Co.* the Court held that a state tax on purchases made by a Federal Land Bank for property improvements was invalid, and rejected the argument that this function of the bank was proprietary rather than governmental:

> "The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental... It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."[51]

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[49]16 Pet. 435, 10 L. ed. 1022 (1842). Also overruled by implication, Brush v. Commissioner, 300 U. S. 352, 57 S. Ct. 495, 81 L. ed. 691 (1936). The Court in effect extended the results reached in Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. ed. 291 (1934) and Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1937). Compare, Helvering v. Mountain Producers Corp., 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907 (1937) overruling Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1921) and Burnet v. Coronado Oil and Gas Co., 285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815 (1931). See also Helvering v. Baulcline Oil Co., 303 U. S. 362, 58 S. Ct. 616, 82 L. ed. 897 (1937).

[50]Compare, Board of Trustees v. United States, 289 U. S. 48, 53 S. Ct. 509, 77 L. ed. 1025 (1932); Graves v. Texas Co., 298 U. S. 393, 56 S. Ct. 818, 80 L. ed. 1236 (1935); Liggett & Myers Co. v. United States, 299 U. S. 383, 57 S. Ct. 265, 81 L. ed. 301 (1936); James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155 (1937).

[51]314 U. S. 95, 102, 62 S. Ct. 1, 5, 86 L. ed. 65 (1941). Accord, New York ex rel. Rogers v. Graves, 299 U. S. 401, 57 S. Ct. 269, 80 L. ed. 306 (1936); Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 60 S. Ct. 15, 84 L. ed. 11 (1939). See also May v. United States, 319 U. S. 441, 63 S. Ct. 1137, 87 L. ed. 1504 (1942) which on its facts is the strongest case which has arisen for the application of the proprietary as against governmental distinction to the federal government. The Court held a state inspection tax could not be imposed on fertilizer sold by the United States for soil conservation purposes because this was a governmental activity. Is a state's program to protect its natural resources of mineral water any less a governmental function? While rejecting the distinction between proprietary and governmental functions as applied to the federal government, the Court enlarged the application of the distinction as to state instrumentalities in Helvering v Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1937). Compare, Brush v. Commissioner, 300 U. S. 352, 57 S. Ct. 495, 81 L. ed. 691 (1926), where the Court pointed out that the law as to suability in tort of municipalities must be applied with caution as a test to determine the extent of state activities which are subject to federal taxation because the law on this problem is subject to wide conflicts of opinion.

The Court went on to hold that Congress can thus prescribe tax immunity for an agency it creates under its power to protect the means for carrying out the functions of government.[52]

Though rejecting the proprietary versus governmental distinction as applied to the federal government, the Supreme Court did restrict federal immunity in *Alabama v. King and Boozer*[53] where it was held that a state sales tax can be validly applied to material bought by a contractor under a cost plus contract with the federal government, even though the additional cost is admittedly passed on to the government.[54] The Court indicated that in appropriate circumstances the same rule would be applied to the state governments, and refused to consider the question of whether Congress can, in the absence of constitutional immunity, confer immunity where the economic burden of the tax is passed on to the federal government.

The doctrine of federal supremacy and the constitutional ability of the federal government to tax state instrumentalities with no corresponding reciprocity, received considerable emphasis in dicta, but no decision was rendered upholding the validity of federal taxation on the basis of this distinction alone. Mr. Justice Stone's comment in *Graves v. New York ex rel. O'Keefe* indicates the trend of judicial thought and affords a prediction for the future:

> "The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation in the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the

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[52]In Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927 (1938) the Court employed the same language but refused to decide the question whether Congress can confer immunity beyond the constitutional immunity of federal agencies which the Courts have implied. See also dictum by Mr. Justice Stone in Helvering v. Gerhardt, 304 U. S. 405, 411, n. 1, 58 S. Ct. 969, 971, n. 1, 82 L. ed. 1427 (1937): "Congress may curtail an immunity which might otherwise be implied, Van Allen v. The Assessors, 3 Wall. 573 or enlarge it beyond the point where, Congress being silent, the Court would set its limits." This leaves for future decision the problem of to what extent Congress can by affirmative action either restrict or enlarge the immunity of the federal government as distinguished from its agencies in a manner inconsistent with that implicit in the Constitution. It also leaves undecided the effect of silence on the part of Congress upon immunity of agencies which it has created.

[53]314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3 (1941).

[54]The Court overruled expressions to the contrary in Panhandle Oil Co. v. Knox, 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857 (1927), and in Groves v. Texas Co., 298 U. S. 393, 56 S. Ct. 818, 80 L. ed. 1236 (1935). Accord, Penn Dairies Inc. v. Milk Control Commission, 318 U. S. 261, 63 S. Ct. 617, 87 L. ed. 748 (1942).

other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning . . . ."[55]

The decision of *Helvering v. Gerhardt*[56] introduced a new school of thought, a "leave it to Congress" attitude in delineating the scope of the states' immunity from federal taxation. In holding that the salaries of employees of the Port Authority of New York were taxable by the federal government, on the basis that such tax did not preclude any function essential to the continued existence of the State government and that the burden was speculative and uncertain, Mr. Justice Stone emphasized that federal taxation of state enterprises is subject to political restraints which will prevent abuses, because of the fact that Congress is composed of representatives from the states.[57] While the decision as shown went off on other grounds this argument for political rather than judicial handling of the problem has received increasing support from constitutional authorities.[58]

With this background, the 1946 decision of *New York v. United States*[59] appears as a logical application of precedent. The controversy was initiated when the federal government sought to collect a soft drink excise tax[60] on mineral waters bottled at Saratoga Springs by an

[55]306 U. S. 466, 477, 59 S. Ct. 595, 597, 83 L. ed. 927 (1938). See also Mr. Justice Frankfurter's concurring opinion in which he makes a sharp attack on the doctrine of implied immunities and disputes the contention that they are correlative. Accord, Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1937).

[56]304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1937).

[57]Mr. Justice Stone speaking of the opinion of Chief Justice Marshall in McCulloch v. Maryland stated: "He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse." 304 U. S. 405, 412, 58 S. Ct. 969, 971, 82 L. ed. 1427 (1937). The same reasoning was expressed by Mr. Justice Frankfurter in New York v. United States, 326 U. S. 572, 582, 66 S. Ct. 310, 314, 90 L. ed. 265 (1946): "After all, the representatives of all the States, having, as the appearance of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities."

[58]Powell, The Remnant of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 757, 804: "It would seem incontestable that fairness demands reciprocity between the states and the United States. It does not follow, however, that such reciprocity must have a constitutional foundation. Senators and representatives chosen from the states ought to be duly mindful of state interests." Accord, Spahr, The Leave-It-To-Congress Trend In The Constitutional Law of Tax Immunities (1946) 95 U. Pa. L. Rev. 1. See also Dowling, Constitutional Developments In Five War Years (1946) 32 Va. L. Rev. 461.

[59]326 U. S. 572, 66 S. Ct. 310, 90 L. ed. 265 (1946).

[60]Revenue Act of 1932 § 615 (a) (5), 47 Stat, 169, 264, 26 U. S. C. A. 614 (1932).

agency of the State of New York, which had acquired title to the springs as part of its conservation program. The springs were operated by the Saratoga Springs Authority, a public benefit corporation of the State, and the profit from the bottled mineral water was used to defray partially the expense of operating the springs, the remainder of these expenses being met by legislative appropriations.[61] The state claimed immunity from federal taxation on the basis that in conserving its natural resources it was engaged in the exercise of a usual, traditional and essential government function and not a proprietary enterprise. The problem was of sufficient importance that forty-five states were given leave to file briefs *amici curiae.*

Mr. Justice Frankfurter announced the decision of the Court. He quickly disposed of the case on the basis of *South Carolina v. United States,*[62] holding that soft drinks are in the same category as hard drinks and thus the federal tax can validly be applied to the mineral water.[63] But in view of the interest manifested by the forty-five states filing briefs, he saw fit to give the problem further consideration.

He began his more detailed analysis with another sharp attack on equivalence in the implications of taxation immunity of the state and federal governments, using language similar to that employed in his concurring opinion in *Graves v. New York ex rel. O'Keefe,*[64] and basing his philosophy on the dissenting opinion of Mr. Justice Bradley in *Collector v. Day.*[65] He re-emphasized his belief in the invalidity of the notion of reciprocal inter-governmental immunity with the observation that "the considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities."[66] After pointing out that the distinction between governmental and proprietary functions was too shifting and intangible a basis for determining the extent of federal taxing power, he noted that

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[61]A brief history of the Springs is given in the opinion. Prior to the acquisition by the state, private operations had substantially diminished the flow due to excessive pumping. The purpose of the state in purchasing the property was to conserve the Springs for beneficial operation. The sale of mineral water and profits from operation of the property as a health resort were never sufficient to defray the operating costs.

[62]199 U.S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905).

[63]Thus affirming the decisions of the two lower federal courts, 140 F. (2d) 608 (C. C. A. 2d, 1944); 48 F. Supp. 15 (N. D. N. Y. 1942).

[64]306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927 (1938).

[65]11 Wall. 113, 20 L. ed. 122 (1870).

[66]326 U. S. 572, 577, 66 S. Ct. 310, 312, 90 L. ed. 265 (1946).

the trend of decision favored limitation on immunity. He then proposed his test of immunity—"But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." And he indicated only two specific instances of uniqueness—"Only a State can own a Statehouse; only a State can get income by taxing."[67]

The approach used by Mr. Justice Frankfurter is significant in three aspects: one, it strongly emphasizes federal supremacy in the tax field and reiterates federal immunity; two, it proposes a limitation on state immunity which will completely destroy the balance between our dual governments unless equally applied to federal instrumentalities; and, three, it rejects the test based on the distinction between proprietary and governmental activity to determine taxability of state instrumentalities.[68]

Mr. Justice Rutledge concurred in this opinion with the restriction that "before a federal tax can be applied to activities carried on directly by the states, the intention of Congress to tax them should be stated expressly and not drawn merely from general wording of the statute applicable ordinarily to private sources of revenue."[69] He then expressed grave doubts that Congress intended such taxation here, but acquiesced in the result of the decision on the authority of *South Carolina v. United States.*

In a concurring opinion, Chief Justice Stone, joined by Justices Reed, Murphy, and Burton, stated that the decision was supported by precedent, but regarded as untenable the various criteria used in past cases to limit the taxing power of Congress. However, he felt that the national government may not constitutionally lay a non-discriminatory tax on every class of property and activities of states and individuals alike:

"But our difficulty with the formula, now first suggested as of-

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[67]326 U. S. 572, 582, 66 S. Ct. 310, 314, 90 L. ed. 265 (1946).

[68]However, on the basis of two other opinions in the case, one concurring with and one dissenting from the Frankfurter opinion, Professor Dowling regards the principal case as an encouraging indication of concern for the maintenance of substantial state authority: "The opinions by Mr. Chief Justice Stone and Mr. Justice Douglas reveal more concern over the preservation of the states in this federal system and the continued operations of local government than I can recall for the past eight years or more; it is refreshing to observe that they were speaking for six members of the Court." Dowling, Constitutional Developments in Five War Years (1946) 32 Va. L. Rev. 461, 466.

[69]326 U. S. 572, 585, 66 S. Ct. 310, 315, 90 L. ed. 265 (1946).

fering a new solution for an old problem, is that a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government."[70]

As a substitute, Chief Justice Stone proposed that "the effect of the immunity on the national taxing power is to be determined not quantitatively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation,"[71] and each case must be decided on its own facts balancing the burden on the state government against the restriction on federal taxing power.

Mr. Justice Douglas in his dissenting opinion, concurred in by Mr. Justice Black, goes to the root of the evil by advocating the overruling of *South Carolina v. United States*[72] and the line of decisions predicated thereon, and reestablishment of the doctrine of concurrent taxing powers and reciprocal immunities of the state and federal governments. He points out that the power to tax is an effective form of regulation, "and no more powerful instrument for centralization of government could be devised. For with the federal government immune and the States subject to tax, the economic ability of the federal government to expand its activities at the expense of the States is at once apparent."[73] His argument is clinched by pointing out that the danger of the expanded program of state activities drying up sources of federal revenue is as remote as the spectre of socialism, and such expansion has in fact increased the tax potential of the federal government.

In view of the failure of criteria in the past to delineate the scope of taxing power, it appears that the simple doctrine proposed by Mr. Justice Frankfurter is the solution to the problem, but only if the concurrent taxing power of federal and state governments is reinstituted and such immunities as exist under this rule are applied reciprocally.

It is undoubtedly true that Chief Justice Marshall regarded the federal taxing power as supreme, with constitutional immunity applying only to the federal government. Of need he must, at a time when such an attitude was necessary to preserve and strengthen the national government. And, as previously shown, when a balance of economic and political power was reached between federal and state govern-

[70]326 U. S. 572, 586, 66 S. Ct. 310, 316, 90 L. ed. 265 (1946).
[71]326 U. S. 572, 590, 66 S. Ct. 310, 318, 90 L. ed. 265 (1946).
[72]199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905).
[73]326 U. S. 572, 594, 66 S. Ct. 310, 320, 90 L. ed. 265 (1946).

ments this idea was repudiated, concurrent taxing power and reciprocal immunities becoming the judicial attitude. Yet, today, when the federal government has reached an unexcelled state of power and influence, the Supreme Court tends toward reinstitution of Marshall's concept, thereby facilitating the further development of centralized government.

The argument for the doctrine of federal taxation supremacy is based on the fact that the federal government is a government of enumerated powers. Thus, it is maintained that any lawful exercise of this power is a governmental function.[74] The answers of this contention appear obvious. The federal government is, in fact, conducting wide business enterprises which are purely proprietary in nature. Thus, the wording of the grants of enumerated powers is sufficiently broad to cover propriety as well as governmental functions. Furthermore, even though the states are governments of reserved powers, any activity conducted by the states in lawful pursuance of these powers is equally governmental or proprietary.[75] It follows that whatever immunity flows from the Constitution must be reciprocal.

The additional argument that taxation of the whole is different from taxation of a part is rather question-begging. Of necessity it is different, but the difference is an economic or political one and not judicial. As a practical matter the underlying danger is the same, the possible eventual destruction of one government by the other through uncurbed taxing power in one coupled with an immunity from taxation by the other. True, the power of taxation is not the power to destroy so long as the Supreme Court sits, but only so long as the court protects the states through a power of taxation and an immunity from taxation reciprocal with that of the federal government.

All arguments underlying the rule of taxation of state proprietary enterprises equally apply to taxation of national proprietary interests. If the states by entering the business field deprive the federal government of legitimate subjects of taxation, even to a greater extent is the federal government now depriving the states of sources of tax revenue. In both situations, if immunity existed, some taxing sources are eliminated, but on the other hand, new sources of taxable wealth and

[74]See a full development of this position by Stoke, State Taxation and the New Federal Instrumentalities (1936) 22 Iowa L. Rev. 39.

[75]See discussions on this side of the problem: Brown, Intergovernmental Tax Immunity: Do We Need a Constitutional Amendment? (1940) 25 Wash. U. L. Q. 153; Watkins, The Power of the State and Federal Governments to Tax One Another (1938) 24 Va. L. Rev. 475; Note (1936) 49 Harv. L. Rev. 1323.

property are incidentally created. The burden, economically and politically, is as great where the state is taxed as where the federal government is taxed.

The practical effect of the trend of decisions will not be immediately apparent in sweeping centralization of government.[76] For, after all, Congress, composed of peoples from the states, can at will restore the balance of providing in its enactments for exemption of the states from the application of federal taxation, or in the statutes creating federal instrumentalities provide for grants to the states affected in lieu of taxation, or provide for state taxation of the instrumentalities it creates. Furthermore, both Congress and the executive branch are equally, with the Supreme Court, guardians of the Constitution. But in the last analysis only the Supreme Court can prevent the ultimate full play of political and economic factors tending toward the complete overthrow of the balance of power between the states and the nation.

CARTER GLASS, III

[76]For a complete analysis of the recent cases in this field see: Powell, The Waning of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 633; Powell, The Remnant of Intergovernmental Tax Immunities (1945) 58 Harv. L. Rev. 757. See also Note (1946) 41 Ill. L. Rev. 139 on New York v. United States.