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TAXATION AND THE SUPREME COURT

1937 Term

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Taxation continues to head the field among contenders for the attention of the Supreme Court of the United States. At the 1937 Term, the Court delivered opinions in nearly sixty tax cases—an increase over the volume of business transacted the previous year, though still below the peak of the year previous to that.¹

In stark political drama, the 1937 term failed to measure up to its immediate predecessors. Plans to pack the Court petered out. No National Recovery Acts were invalidated; no plans for the relief of agriculture purged. If the Court and the New Deal failed to compose their differences, they were, at least, less vocal about them. The 1937 term was the usual humdrum of judicial business, with a single significant exception.

The cast of judicial thought is changing. This is less apparent from any single case than from increasing fluidity in the decisions as a whole, which marks a transitional period. There is a perceptible drift away from familiar landmarks, many of which bid fair to disappear entirely in the next few years. Judicial history is on the march! Let him who has temerity, tell where it will come to rest!

I. THE FEDERAL SPENDING POWER

In a group of cases, significant in their failure to touch off the political dynamite with which they were freighted, the Supreme Court conferred a left-handed blessing upon the New Deal by reaffirming the

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1. Excluding orders, memorandum opinions, petitions for certiorari and rehearings, and counting as single cases opinions where several cases were consolidated and disposed of simultaneously, fifty-six tax cases were decided at the 1937 term, as contrasted with forty-seven cases at the 1936 term and more than sixty cases at the term before that.

stand taken in *Frothingham v. Mellon*.² *Alabama Power Co. v. Ickes*³ involved a suit by a private power company to enjoin the Public Works Administrator from making loans to municipalities to build power plants in competition with the private company. Without passing upon the constitutionality of these loans, the Court affirmed the decrees of the lower tribunals denying the injunctions. Mr. Justice Sutherland speaking for his associates, with the exception of Mr. Justice Black,⁴ declared that as a federal taxpayer, the complainant lacked title to contest the expenditure of federal funds. Nor could it complain of the loans because its business would be damaged by the competition of municipal plants since the company's franchise was not exclusive and the municipalities were legally empowered to build such plants. "Can any one who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain an action to enjoin the loan? An affirmative answer," said Mr. Justice Sutherland, prefacing his own answer in the negative, "would produce novel and startling results."⁵

In dealing with the problem of the standing of federal taxpayers to restrain federal expenditures, the Court did not explicitly undertake to distinguish *United States v. Butler*,⁶ where it was held that a federal taxpayer could contest the expenditure of federal funds. Presumably, the distinction would be that adverted to in the *Butler* case in distinguishing *Frothingham v. Mellon*: a taxpayer can contest federal expenditures, if he can show that the sum exacted from him is earmarked for the very expenditure which he questions.

*Duke Power Co. v. Greenwood County*⁷ and *California Service Co. v. Redding*⁸ reaffirmed the decision in *Alabama Power Co. v. Ickes*.

II. INTERGOVERNMENTAL IMMUNITIES

Reform with respect to the doctrines of intergovernmental immunities is long overdue. With the rise in the tax burden magnifying existing inequalities in the tax system, any type of exemption becomes less tolerable. Intergovernmental exemptions, moreover, in an era of increasing governmental activity threaten a suicidal circle, by which the expansion of government constantly narrows the sources on which it depends for sustenance. Faced with an imperative choice between the pressing practicalities of modern government's fiscal necessities and the judicial ideology of independent state and federal sovereignty, the Court

2. 262 U. S. 477 (1923).

3. 302 U. S. 464 (1938).

4. Who preferred to concur separately, albeit silently.

5. 302 U. S. at 480.

6. 297 U. S. 1 (1936).

7. 302 U. S. 485 (1938).

8. 304 U. S. 252 (1938).

at the last term quietly, but with emphasis, indicated the direction of its sympathies. It attacked the problem of intergovernmental immunities, however, with the subtle pricks of a rapier rather than the candid forthrightness of a bludgeon. The significance of these decisions must be sought in nuances of emphasis and their cumulative weight, rather than in blunt repudiation of time hallowed error. A heady new wine ferments in the old bottles. The ancient doctrinal shells remain pretty well intact.

The first case to raise the problem of intergovernmental immunities at the 1937 term was distinguished by a notable brief filed by the Solicitor General of the United States. In *James v. Dravo Contracting Co.*,⁹ in addition to a problem of territorial jurisdiction, referred to at another point in this article,¹⁰ the Court was faced with the constitutionality of a state tax upon gross receipts of a contractor with the United States. The Dravo Contracting Company, a Pennsylvania corporation, was engaged in the construction of locks and dams in navigable rivers in West Virginia for the Federal Government. West Virginia, under a statute imposing an annual privilege tax on the privilege of doing business within the state, assessed the company on a percentage of its gross receipts from these contracts. At the suit of the company, a three judge federal court enjoined the tax, and an appeal was prosecuted to the Supreme Court. The Solicitor General of the United States appeared in behalf of the tax. To appreciate the somewhat anomalous position of the Solicitor General, it may be helpful to consider the possible alternatives open to the Court on the appeal.

The doctrine forbidding state and federal taxes against federal and state activities is not a rigid absolute. To provide escape from the rigors of its own logic, the Supreme Court has equipped it with several safety valves. Briefly, these may be denominated the doctrine of governmental function and the doctrine of incidental burden. A federal tax on the sale of liquor by a state, for example, is perfectly valid.¹¹ Although this casts as much of a burden on the state, which is diverting its liquor revenues to general governmental purposes, as a tax on a state judge or the interest from state bonds, it is not a tax on a governmental activity. Again, a federal or state tax upon the testamentary transmission of state or federal securities,¹² or on a corporate franchise measured by net income from such securities,¹³ or upon gains from their sale,¹⁴ is constitutional. The burden of such taxes upon govern-

9. 302 U. S. 134 (1937), 86 U. OF PA. L. REV. 308 (1938).

10. *Infra* pp. 28-30.

11. *South Carolina v. United States*, 199 U. S. 437 (1905); *Ohio v. Helvering*, 292 U. S. 360 (1934).

12. *Greiner v. Lewellyn*, 258 U. S. 384 (1922).

13. *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911).

14. *Willcuts v. Bunn*, 282 U. S. 216 (1931).

ment is indirect, incidental or speculative. The choice of terms is immaterial. The Court likes them all.

Following traditional techniques, the tax in the *Dravo* case might have been sustained, either on the theory that the construction of locks and dams by the Federal Government was not an essentially governmental function, or on the ground that the burden of the tax was on the contractor and any incidental effect on the Federal Government was legally irrelevant. The Solicitor General, however, had seen the Court talk in these terms before without making any substantial or lasting inroads on the doctrines of governmental immunity. He proposed a third approach: general nondiscriminatory taxes which are not formally assessed against a state or the Federal Government cannot be utilized to destroy state or federal sovereignty and are, therefore, constitutional. The motive of the Solicitor General in arguing for the validity of a state tax on income received from the Federal Government was not altruistic. A precedent sustaining the West Virginia statute on this ground would also be a precedent for federal taxes on state activities.

Of the three alternatives presented to it, the Court adopted that which did least damage to its previous holdings. The Solicitor General's argument was predicated upon the historical fallacy that inter-governmental immunities were designed as a prophylactic against discriminatory taxes. It is true that *McCulloch v. Maryland*¹⁵ involved a discriminatory tax, but neither Marshall nor his successors put the decision on that ground. In its historical evolution, the doctrine of governmental exemption derives from the notion that the power to tax is the power to destroy and forbids federal and state taxes upon state and federal functions regardless of degree or discrimination. It is worth remarking, however, that although the Court did not accept the thesis of the Solicitor General, they refrained from explicit repudiation, coming to the result for which he contended by a more orthodox approach.

It would have been difficult to assert that the Federal Government in building locks and dams was not engaged in a governmental undertaking. Apart from the character of the enterprise itself, it is by no means clear that the distinction between governmental and proprietary functions applies to the activities of the Federal Government. It is possible that being a government of limited powers anything within the periphery of the constitutionally authorized activities of the National Government is necessarily governmental. The simplest method, therefore, of sustaining the West Virginia tax, which the majority of the Court adopted, was to say that the formal incidence of the tax was upon the contractor rather than upon the governmental contractee, and any burden cast upon the Federal Government was remote and specu-

15. 4 Wheat. 316 (U. S. 1819).

lative. There is, or at least at the time the *Dravo* case was decided, there was, a recognized distinction¹⁶ between a tax on the income of a governmental officer or employee and a tax upon the income of an independent contractor with a governmental unit. Although it is difficult to see any marked economic difference between the two, since there seems to be as much likelihood of the burden of the tax being shifted to government in one case as in the other, the distinction existed and furnished a convenient handle in deciding the *Dravo* case. A possible flaw in this reasoning, however, lay in the fact that the *Dravo* case involved a tax on gross income rather than net income. The case which sustained a tax upon the income of an independent contractor involved a net income tax.¹⁷ There is a line of cases involving interstate commerce,¹⁸ to the effect that, although a tax upon net income from such commerce does not burden interstate commerce, a gross income tax, being closer to the source of the income, does. In taking the step from a net income tax to a gross receipts tax upon compensation received by an independent contractor with a governmental unit, the majority of the Court simply brushed aside the commerce cases as inapposite and took a position with respect to the taxation of governmental agencies, which, if sincerely persisted in, may lead to about the same results as those which would be achieved under the Solicitor General's formula. The traditional technique in determining whether a tax, nominally not upon government but upon some independent subject, burdens government, has been to decide the question a priori fashion in a judicial vacuum from which economic and factual considerations are meticulously excluded. Questions of tax shifting are determined by a sort of cloudy metaphysics which determines the final incidence of the tax from the type of tax. In the *Dravo* case the Court put the problem of proving that the tax really burdened the Federal Government squarely up to the taxpayer. The Court refused to speculate as to whether a tax burdens government. This must be convincingly proved by the proponent who asserts its lack of constitutionality.

The majority opinion in the *Dravo* case was read by the Chief Justice on behalf of himself, Justices Brandeis, Stone, Cardozo and Black. A lengthy dissent was entered by Mr. Justice Roberts in which Justices McReynolds, Sutherland and Butler concurred. The dissent is principally noteworthy, perhaps, because it was written by Mr. Justice Roberts, whose precise position in these cases is somewhat ob-

16. The distinction may have been repudiated in *Helvering v. Gerhardt*, 304 U. S. 405 (1938), *infra* pp. 11-15.

17. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 (1926).

18. The majority opinion cites *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326 (1887); *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292 (1917); *United States Glue Co. v. Oak Creek*, 247 U. S. 321 (1918); and *Fisher's Blend Station v. Tax Comm.*, 297 U. S. 650 (1936).

scure.¹⁹ Mr. Justice Roberts regretted that the majority should undertake to overrule "sub silentio, a century of precedents, and to leave the application of the rule uncertain and unpredictable."²⁰ As the majority magnified the fact that the taxpayer was an independent contractor and minimized the distinction between a tax on net and gross income, Mr. Justice Roberts felt that the fact that the taxpayer was an independent contractor was not material since the tax was on gross income, and he found a perfect parallel in the commerce cases.

There was an interesting dictum in the *Dravo* case touching the problem of whether the power to tax is the power to destroy. To quote the Chief Justice: "There is the further suggestion that if the present tax of 2 per cent. is upheld, the state may lay a tax of 20 per cent. or 50 per cent. or even more, and make it difficult or impossible for the government to obtain the service it needs. The argument ignores the power of Congress to protect the functions of the national government and to prevent interference therewith through any attempted state action."²¹ The Chief Justice might have dismissed the suggestion as fantastic. If a state cannot levy a discriminatory or selective tax against the Federal Government, there is little substance in the suggestion that it may levy a suicidal general tax in order to paralyze federal functions. As a practical matter, the power to levy discriminatory or selective taxes may be the power to destroy. The power to levy general nondiscriminatory taxes certainly is not. The Chief Justice's suggestion, however, plumbs the vitals of the doctrine of intergovernmental immunities. Is this something which rests upon legislative action? Where there has been no affirmative legislative action, is it based upon the silence of the legislature—that is, on legislation enacted through the failure to legislate? If the immunity rests upon legislative sanction, can it be extended indefinitely? Can it be waived entirely? There are practical as well as theoretical problems here. Mr. Justice Roberts made a comment anent the suggestion of the Chief Justice. "No one denies," said Mr. Justice Roberts, "the competence of Congress to waive the immunity in whole or in part. But this is the reverse of saying the power to tax federal means and operations exists in the state subject to veto by Congress of any exorbitant exercise of the power. And it may be pertinent to suggest that,

19. Mr. Justice Roberts, for example, wrote a dissenting opinion in *Brush v. Commissioner*, 300 U. S. 352, 374 (1937), which reads very much like the majority opinion in the *Dravo* case. He was with the majority in *Helvering v. Gerhardt*, 304 U. S. 405 (1938), which, although clearly in conflict with *Brush v. Commissioner*, leaned heavily on the *Dravo* case. If one may venture to speculate as to what is in Mr. Justice Roberts' mind, it would appear that he favors preserving the traditional immunity of the Federal Government from state taxes although he is not averse to cutting down the immunity of the states from federal taxes.

20. 302 U. S. at 161.

21. *Id.* at 160.

if, as the court has always held, the immunity is reciprocal,²² the state legislatures by a parity of reasoning ought to have the power to prohibit federal taxes upon state operations if they be deemed immoderate."²³

The *reductio ad absurdum* of the doctrine of intergovernmental immunities curiously enough was reached in an opinion written by Mr. Justice Holmes, in which the Court held that a state income tax upon the income of a lessee of Indian lands was unconstitutional.²⁴ As a corollary to this decision, it was further held that the application of the federal income tax to the income of a lessee of state school lands was also invalid.²⁵ The essential unsoundness of these cases was demonstrated in the succeeding decisions distinguishing them. Thus, it was held that the income of a lessee of a Texas oil and gas lease of state school lands was taxable under the federal income tax²⁶ because under Texas law such a lease really amounts to a sale of subsurface minerals to the lessee, and that an oil and gas lessee of public lands in California was taxable upon his income from the lease under the federal income tax,²⁷ for no very discernible reason at all. Happily the Court has put an end to both doctrine and distinctions. In *Helvering v. Mountain Producers Co.*,²⁸ it was held that the income of a lessee of Wyoming school lands was subject to the federal income tax. In *Helvering v. Bankline Oil Co.*,²⁹ it was held that the lessee of lands belonging to the state of California was subject to the federal income tax. The Chief Justice delivered the opinion of the Court in both cases.³⁰ *Gillespie v. Oklahoma*³¹ and *Burnet v. Coronado Oil & Gas Co.*³² were explicitly overruled. An interesting sidelight on the substantiality of the distinctions deriving from those decisions may be seen from the dissent of Justices McReynolds and Butler in the *Mountain Producers Co.* case, and their concurrence in the *Bankline* case. Presumably the reason for their concurrence was that they felt the

22. But does Mr. Justice Roberts believe that it is reciprocal? See *supra* note 19.

23. 302 U. S. at 181. *Silas Mason Co. v. Tax Commission*, 302 U. S. 186 (1937), was decided at the same time as the *Dravo* case. It involved a similar question and reached the same result.

Atkinson v. State Tax Commission of Oregon, 303 U. S. 20 (1938), adds a minor footnote to the decision in the *Dravo* case. The tax involved was a state tax upon the net income of a contractor with the United States. In a per curiam opinion, in which Mr. Justice Cardozo did not participate, the tax was held valid and constitutional. Clearly the decision in the *Atkinson* case was concluded by *James v. Dravo Contracting Co.* Since the Oregon tax, however, was a tax upon net rather than gross income, even the dissenters in the *Dravo* case could with clear conscience affirm its constitutionality.

24. *Gillespie v. Oklahoma*, 257 U. S. 501 (1922).

25. *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 (1932).

26. *Group No. 1 Oil Corporation v. Bass*, 283 U. S. 279 (1931).

27. *Burnet v. A. T. Jergins Trust*, 288 U. S. 508 (1933).

28. 303 U. S. 376 (1938).

29. 303 U. S. 362 (1938).

30. Justices Cardozo and Reed did not participate in either of these decisions.

31. 257 U. S. 501 (1922).

32. 285 U. S. 393 (1932).

Bankline case was within the distinction in the *Jergins* case³³ since the lease was a lease of California lands.

The *Mountain Producers Company* and *Bankline* cases take on added significance in conjunction with the decision in *James v. Dravo Contracting Co.* In overruling the *Gillespie* and *Coronado* cases, the Chief Justice emphasizes the doctrine enunciated in the *Dravo* case to the effect that the proponent of the unconstitutionality of a tax must be prepared to establish that it burdens a governmental function by something more forthright than speculation. "Immunity from non-discriminatory taxation," declared the Chief Justice, "sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others, who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote."³⁴

The *Dravo* case and the cases overruling the immunity of income of lessees of governmental lands escaped from the doctrines of inter-governmental exemptions by the route of indirect or incidental burden. Several cases illustrate the functioning of the safety valve denominated the governmental function doctrine.

In *Helvering v. Therrell*,³⁵ the Court disposed of four cases in a single opinion.³⁶ All of them involved the problem of whether the federal income tax imposed an unconstitutional burden on a state function. In two of the cases, the Commissioner had ruled that the compensation of state liquidators of Florida banks, which was paid out of the assets of the liquidated banks, was subject to the federal income tax. The third case involved the compensation of a person employed as legal counsel by the Insurance Department of New York in connection with the liquidation of an insurance company. The Commissioner again had ruled that his compensation, which was paid out of the assets of the insurance company, was subject to the federal income tax. The last case turned on the taxability of the salary of an attorney in the Pennsylvania Department of Justice, who had been loaned by that department to the Secretary of Banking for legal work relating to closed banks, and whose salary was paid by the Secretary out of the assets of the banks. As in the other cases, the Commissioner had ruled his income taxable. The Court, in an opinion by Mr. Justice McReynolds,

33. *Burnet v. A. T. Jergins Trust*, 288 U. S. 508 (1933).

34. *Helvering v. Mountain Producers Co.*, 303 U. S. 376, 386 (1938).

35. 303 U. S. 218 (1938).

36. Justices Cardozo and Reed did not participate in this decision.

sustained the rulings of the Commissioner in all four cases on the ground that the taxpayers were not engaged in performing an essentially governmental function for the state. "The compensation of the taxpayers," said Mr. Justice McReynolds, "was paid from corporate assets—not from funds belonging to the state. No one of them was an officer of the state in a strict sense of that term. The business about which they were employed was not one utilized by the state in the discharge of her essential governmental duties. The corporations in liquidation were private enterprises, their funds were the property of private individuals." ³⁷

Allen v. Regents of University System ³⁸ also involved the problem of what are governmental functions of a state. The majority of the Court refused to adopt the sporting attitudes of Justices McReynolds and Butler and held that athletic contests sponsored by state universities are not an integral part of the state educational program so as to be immune from the federal admissions tax. The decision is an interesting reflection upon the irrationality of the whole doctrine of intergovernmental immunities. There are two possible arguments for exempting athletic contests conducted by state educational institutions from federal taxes. One is that these contests are part of the educational process itself. To tax them is as direct an interference with a governmental function as an excise tax on the lectures given by the instructors in a state university would be. An obvious weakness in this argument is that participation in intercollegiate contests, which are worth taxing, is restricted to a narrow class of professional athletes. Only as a spectacle are they educational for the bulk of the student body. Most universities do, however, use football receipts for intramural contests and minor sports in which a wider segment of the undergraduate community takes part. Some institutions have even shown themselves so insensible to the true needs of higher learning that they have diverted football receipts to such sterile purposes as building classrooms or paying the salaries of their professors. It might be argued, therefore, that intercollegiate exhibitions whose proceeds are used to support educational programs should be entitled to the same immunity as education itself. A tax on such contests puts the same drain on the state's purse as a tax on the strictly educational undertakings of the state. Nevertheless, the Court held to the established view that the Federal Government may tax the nongovernmental activities of the states, regardless of how the proceeds from these activities are used. In other words, if the activity is not governmental, the actual burden of the tax is immaterial. This is, of course, a sensible result only from the initial postulate that the whole doctrine of intergovern-

37. 303 U. S. at 225.

38. 304 U. S. 439 (1938).

mental immunities is unsound, that any sacrifice of logic and consistency is justified in order to escape from it.

In addition to the substantive point, *Allen v. Regents of University System* posed an interesting procedural problem. The tax in question was the federal admissions tax, which is imposed upon the person who buys a ticket rather than upon the seller, although under the law the seller is charged with the responsibility of collecting the tax for the Federal Government. At first, the respondent, a corporation having jurisdiction over the University of Georgia and Georgia School of Technology, collected the tax in connection with the athletic contests sponsored by those institutions, and after paying it over to the Treasury, made a claim for a refund. This claim was rejected on the ground that the tax had been paid by the persons purchasing the tickets and the respondent had no status to claim a refund. The respondent then had a stipulation printed on the tickets to the effect that the admissions tax was not legally due, and that it would be retained by the universities as part of the price of admission unless it was finally determined that the tax was due. Taxes collected under this provision were segregated into separate funds by the two universities, who refused to pay them over to the federal collector. The collector retaliated by making assessments against the universities, filing liens, issuing warrants and levying against the accounts. The respondent in turn filed this suit in a federal court praying an injunction against collection of the tax.

The objection made to this form of proceeding, which seemed valid to Mr. Justice Reed and Mr. Justice Stone, was that the action would not lie because it was a suit to enjoin collection of a federal tax, which is forbidden by statute.³⁹ Pending the suit, moreover, the original collector had died and the further complication had arisen as to whether his successor could be substituted as defendant in his stead. The lower courts decided the procedural questions in favor of the respondent, and the Supreme Court affirmed their decisions in this respect. Mr. Justice Roberts pointed out that the successor to the original collector could be substituted in the suit, because, although not privy to the original proceedings, he would press the collection of the tax in the future unless he were enjoined from doing so. With respect to enjoining the tax under the statute, Mr. Justice Roberts held that, since there was no adequate remedy at law and the statute only covered cases where the remedy at law was adequate, the action would lie.

Although nearly everyone agreed with everyone else at some point in *Allen v. Regents of University System*, the Court was not in complete agreement on any aspect of the case. Mr. Justice Roberts, the Chief Justice, and Mr. Justice Brandeis thought that the district court had jurisdiction to enjoin the tax, but that the tax itself was consti-

39. 14 STAT. 476 (1867), 26 U. S. C. A. § 1543 (1934).

tutional. Mr. Justice Butler and Mr. Justice McReynolds agreed that the district court had jurisdiction to entertain the suit, but felt that the tax was unconstitutional. Mr. Justice Reed and Mr. Justice Stone felt that the tax was constitutional, but denied the jurisdiction of the district court to entertain the suit for injunction. The precise opinion of Mr. Justice Black is obscure.⁴⁰

The attack on the doctrine of intergovernmental immunity initiated in *James v. Dravo Contracting Co.* reached its climax in *Helvering v. Gerhardt*,⁴¹ which was distinguished by a brilliant opinion by Mr. Justice Stone and an interesting concurrence by Mr. Justice Black. Over the dissent of Justices Butler and McReynolds, the majority of the Court⁴² held that the federal income tax could be constitutionally applied to the salaries of employees of the New York Port Authority. Briefly, Mr. Justice Stone, who delivered the opinion of the Court, held that, since the application of the federal income tax to the salaries of the employees of the Port Authority would not prevent the Port Authority from performing its functions, it was constitutional. Part of his opinion is remarkably candid. With engaging frankness, he admitted at the outset that the doctrine that state activities are immune from federal taxes did not originate in *McCulloch v. Maryland* and that Marshall in deciding that case had in mind a doctrine of federal supremacy, which, while denying the states the right to tax federal functions, certainly carried no implication of corresponding disability on the part of the Federal Government. He then went on to point out that the doctrine of state immunity from federal taxes came into the law with *Collector v. Day*,⁴³ as an aftermath of the war between the states, when the Court feared federal encroachment upon the states, as much as Marshall had feared state encroachment upon the Federal Government. Following Marshall's conception that the Federal Government is in more active peril from hostile state action than the states are from the Federal Government because the states are protected from oppressive federal action by the fact that the federal legislature is composed of their representatives, Mr. Justice Stone stressed the point that the National Government merits a greater measure of protection. Along the same line, he emphasized, also, that the exemption of federal functions from state taxes redounds to the benefit of the nation as a

40. He concurred in Mr. Justice Reed's opinion that the district court did not have jurisdiction to entertain the suit for injunctive relief, and he also concurred in the opinion of Mr. Justice Roberts which denied the injunction. However, he did not concur in the opinion of Mr. Justice Reed insofar as it approved the reasoning of the majority on the substantive merits of the asserted immunity. It seems unlikely that Mr. Justice Black's position on this point was the same as that of Mr. Justice Butler and Mr. Justice McReynolds. Presumably he felt that the majority was not sufficiently hostile in its attitude toward intergovernmental immunity. Mr. Justice Cardozo did not participate in this decision.

41. 304 U. S. 405 (1938).

42. Justices Cardozo and Reed did not participate in this decision.

43. 11 Wall. 113 (U. S. 1870).

whole, while state immunity from federal taxes merely aids the citizens of the protected state. Mr. Justice Stone tucked another interesting suggestion away as a footnote: "It follows that in considering the immunity of federal instrumentalities from state taxation two factors may be of importance which are lacking in the case of a claimed immunity of state instrumentalities from federal taxation. Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation."⁴⁴ One would infer from this that the immunity of federal instrumentalities from state taxation depends on the intention of Congress to confer this immunity, rather than direct constitutional inhibition, although this intention presumably may be expressed either by silence or affirmative legislation.⁴⁵

In outlining in detail the scope of federal immunity from state taxation, Mr. Justice Stone's interests went beyond a page of political economy or accurate reporting of judicial history, all too frequently garbled by his associates. He built up federal immunity in order to tear down that of the states. All of this was a preface to show that state immunity is not a coextensive corollary of federal exemption. The question of state immunity, said Mr. Justice Stone, ". . . was not one of interference with a granted power in a field in which the federal government is supreme, but a limitation by implication on the granted federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence."⁴⁶ Mr. Justice Stone concluded that only those federal taxes are forbidden which interfere with a necessary function which the states were exercising at the adoption of the Constitution. Moreover, the tax must be a real and substantial burden upon the exercise of such a state function. In speaking of the particular tax in issue, Mr. Justice Stone emphasizes this point: "A nondiscriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which

44. 304 U. S. at 411, n. 1.

45. In this connection it is interesting to notice Mr. Justice Stone's confirmatory rationalization of *McCulloch v. Maryland* on the ground that ". . . it was thought that the state tax in question was so inconsistent with Congress's constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to federal bank notes." 304 U. S. at 411, n. 1.

46. *Id.* at 414.

New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system. Even though to some unascertainable extent, the tax deprives the states of the advantages of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states." ⁴⁷

Mr. Justice Black in concurring in the majority opinion argued that the Sixteenth Amendment should be reinterpreted according to its literal wording to authorize a federal tax upon income "from whatever source derived." That is, Mr. Justice Black again makes the argument, repeatedly rejected by the Court,⁴⁸ that the Sixteenth Amendment not merely relieves Congress from the necessity of apportioning an income tax because of the source of the income, but grants a new substantive power to tax income which, prior to the amendment, Congress was powerless to reach. In advocacy of this view, Mr. Justice Black pointed out the endless confusion which has arisen in taxing the compensation of state employees in determining what is and what is not a governmental function. He did not point out, however, that his solution was much broader than the problem which he posited. While eliminating the difficulty connected with taxing the compensation of state employees, it would also allow the Federal Government to tax income from state securities. While this may be a desirable result, it is difficult to imagine any process of interpretation of the Sixteenth Amendment which would authorize the states to impose similar taxes against the Federal Government. This too may be defensible, but it will probably be hard to persuade the Court to assent to an interpretation of the Sixteenth Amendment which seems so frankly partisan.

Justices Butler and McReynolds dissented largely upon the solid ground of precedent. It is difficult to refute the wistful statement of Mr. Justice Butler in reference to the decision of the circuit court of appeals, which had held the taxpayers exempt: "As they stood when the cases now before us were in the Circuit Court of Appeals, our decisions required it to hold that the salaries paid by the Port Authority to respondents are not subject to federal taxation." ⁴⁹ It now seems impossible, for example, to distinguish the instant case from *Brush v. Commissioner*,⁵⁰ where only a year ago the Court held that the salary of the chief engineer of a municipal waterworks was immune from the federal income tax. Mr. Justice Stone's distinction was far from ingenuous. "In *Brush v. Commissioner*," said Mr. Justice Stone, "the

47. *Id.* at 420.

48. *Brushaber v. Union Pacific R. R.*, 240 U. S. 1 (1916); *Peck & Co. v. Lowe*, 247 U. S. 165 (1918); *Evans v. Gore*, 253 U. S. 245 (1920).

49. 304 U. S. at 430.

50. 300 U. S. 352 (1937).

applicable treasury regulation upon which the Government relied exempted from income the compensation of 'state officers and employees', 'for services rendered in connection with the exercise of an essential governmental function of the State.' The sole contention of the Government was that the maintenance of the New York City water supply system was not an essential governmental function of the state. The Government did not attack the regulation. No contention was made by it or considered or decided by the Court that the burden of the tax on the state was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity. If determination on that point was implicit in the decision it must be limited by what is not decided."⁵¹ There can scarcely be any question that the determination that Congress had no constitutional power to tax the salary of the taxpayer in *Brush v. Commissioner* was more than implicit in that decision. It was as explicit as it well could be. Although Mr. Justice Stone and Mr. Justice Cardozo limited their concurrence in the majority opinion to the ground that the case did not go further than disallowing the tax on the basis of the Regulations, the majority of the Court frankly put their decision on the constitutional ground. The importance of Mr. Justice Stone's distinction of the *Brush* case is, of course, that he did not distinguish the case at all. He flatly overruled it.

The full implications of *Helvering v. Gerhardt* will appear only in the further course of decision. It looks as though the Court might be willing to tolerate the application of the federal income tax to the salaries of all state employees. Following the reasoning of the case logically, it would appear to admit of a tax even on the salary of a state judge although the Court like a good military strategist leaves open a possible line of retreat. Thus, in speaking of *Collector v. Day*, Mr. Justice Stone said: "As was pointed out in *Metcalf & Eddy v. Mitchell* . . . there may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of it would threaten such interference with the functions of government itself as to be considered beyond the reach of the federal taxing power. If the tax considered in *Collector v. Day*, *supra*, upon the salary of an officer engaged in the performance of an indispensable function of the state which cannot be delegated to private individuals, *may* be regarded as such an instance, such is not the case presented here."⁵²

It is possible then that the salaries of some state officers, such perhaps, as the governor of a state, members of the legislature, or state judges are immune from the federal income tax although the way is

51. 304 U. S. at 422.

52. *Id.* at 424.

open to extend the tax even to these officials. On the other hand, one should notice that *Helvering v. Gerhardt* does not necessarily strip federal officeholders of their immunity from state taxes. Pretty clearly Congress can by affirmative legislation preserve or create such immunities. It is also open for the Court to find from the silence of Congress legislative intent to this effect. Unless the Court finds such an intent, however, it is difficult to see why the reasoning of the *Gerhardt* case that an income tax on a governmental employee does not burden the governmental employer would not extend to a state income tax on a federal employee.

III. INTERSTATE COMMERCE

The usual group of cases involving state taxation of interstate commerce was enlivened by a novel doctrine propounded by Mr. Justice Stone. In *Western Live Stock v. Bureau of Revenue*,⁵³ Western Live Stock, a partnership, published in New Mexico a trade journal which circulated there and in other states. For the privilege of engaging in business in the state, New Mexico imposed upon the company a tax which was measured by a percentage of gross receipts from advertising. The publishing company contended that the tax placed an unconstitutional burden on interstate commerce. Mr. Justice Stone, writing for the majority,⁵⁴ pointed out that the negotiation and execution of the advertising contracts by persons in different states did not constitute interstate commerce. Instead of pausing at this point, however, he went on to assume that the advertising contracts contemplated interstate performance; that is, that it was an essential condition that the publication circulate outside of New Mexico. On this assumption, he still found the tax valid. Since the business of preparing, printing and publishing the magazine was all carried on in New Mexico, the tax was in "form and substance, an excise conditioned on the carrying on of a local business."⁵⁵ The tax upon this privilege could be measured by gross receipts from the advertising contracts, because "so far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate commerce is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax."⁵⁶ At this point Mr. Justice Stone's thought appeared to be that the advertisers paid principally for publishing the advertisements and that part of the contract price paid for the interstate circulation of the magazine was too

53. 303 U. S. 250 (1938), 86 U. of PA. L. REV. 787.

54. Mr. Justice Cardozo did not participate in this decision. Justices McReynolds and Butler dissented.

55. 303 U. S. at 257.

56. *Ibid.*

small or at least too indefinite to make a tax upon the entire receipts from the contracts a burden on interstate commerce. There was, however, "an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellant's New Mexico business by circulation of the magazine interstate is taxed, it cannot be taxed again elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. . . . The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."⁵⁷ The principle, which Mr. Justice Stone had in mind, is elaborated at an earlier point in his opinion: "Local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on commerce burdens of such a nature as to be capable in point of substance of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."⁵⁸

In *Coverdale v. Arkansas-Louisiana Pipeline Co.*,⁵⁹ Mr. Justice Reed adopted Mr. Justice Stone's argument to sustain a Louisiana tax upon the production of mechanical power generated by engines connected with compressor units used to propel gas in an interstate pipeline.⁶⁰ The generation of power by the engines was held to be a local activity, distinct from interstate commerce, though admittedly closely connected with commerce. Moreover, the tax could not be imposed by more than one state. "It is true," said Mr. Justice Reed, "that each state through which a pipeline passes could lay a tax on the use of engines for the production of power but that would not be multiple taxation 'merely because interstate commerce is being done' as discussed in *Western Live Stock v. Bureau of Revenue*. . . . It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business."⁶¹

57. *Id.* at 260.

58. *Id.* at 255.

59. 303 U. S. 604 (1938).

60. Mr. Justice Cardozo did not participate in this decision. Mr. Justice McReynolds dissented.

61. 303 U. S. at 612.

In the *Western Live Stock* and the *Coverdale* cases, the multiple taxation test was used to sustain taxes related in some way to interstate commerce. In *J. D. Adams Mfg. Co. v. Storen*,⁶² it was invoked to invalidate the Indiana gross income tax as applied to the circumstances of that case. The J. D. Adams Mfg. Co. was an Indiana corporation which manufactured goods in Indiana, a portion of which were disposed of by interstate sales. The company argued that the application of the Indiana gross income tax to the receipts from these sales was unconstitutional, and the Court with the exception of Mr. Justice Black sustained this contention.⁶³ Mr. Justice Roberts, writing for the majority, first examined the nature of the tax and concluded that it was a gross income tax on the privilege of receiving gross income. Starting from that premise, he concluded that the tax was not upon the local privilege of carrying on a manufacturing business, but upon the receipts from interstate sales, and was unconstitutional. "The vice of the statute as applied to receipts from interstate sales," said Mr. Justice Roberts, "is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."⁶⁴

Mr. Justice Black, in his dissent, raised some interesting problems in connection with the multiple taxation test devised by the majority of the Court to test the burden of a tax upon interstate commerce. It is obvious that this test is derived to some extent from the cases under the due process clause, which, in connection with state jurisdiction to tax, have held that multiple taxation was forbidden by the Fourteenth Amendment. There is, however, a substantially different problem in connection with jurisdiction to tax and the power of a state to tax interstate commerce. When multiple taxation is forbidden under the due process clause, this does not mean that the particular subject of the tax cannot be taxed at all, but that the tax will be limited to one state. Mr. Justice Black points out that the logical consequence of denying a state power to tax interstate commerce because of the danger of multiple taxation is not to restrict the tax to one state, but to deny the tax to any state. It is arguable that it is about as bad for inter-

62. 304 U. S. 307 (1938).

63. Mr. Justice Cardozo did not participate in this decision. Mr. Justice McReynolds concurred with the majority in holding that the tax imposed an unconstitutional burden on interstate commerce; however, he dissented from the majority's view that the tax did not impair the obligation of a contract.

64. 304 U. S. at 311.

state commerce to be freed from taxation every place as to be subjected to a multiple tax burden by many places. The answer to this may be that a tax on interstate commerce which could be imposed by more than one state may be upheld, if it is apportioned to the amount of interstate activity in that state, so that theoretically at least the sum of all such taxes will not exceed the amount of a single tax. From a purely mechanical point of view, however, apportionment is no simple matter as the cases on jurisdiction to tax demonstrate.⁶⁵ Applied concretely where goods are manufactured in Indiana and sold to a buyer in other states, what proportion of the receipts from such sales are properly allocable to Indiana? It is true that the same problem has been faced in jurisdiction to tax, but it is doubtful whether the results there have been so pleasing that it is desirable to extend the techniques developed in that connection.

It may be important to notice that in all of these cases the multiple taxation test may have been merely a makeweight rather than the substantial basis of decision. In the *Western Live Stock* case, after pointing out that the tax was on a local activity and the burden on interstate commerce was "remote and attenuated", the Court said that "an added reason" for sustaining the tax was that it could not result in multiple taxation. In the same vein, Mr. Justice Reed pointed out in the *Coverdale* case that the tax was upon a local activity, distinct from interstate commerce. Finally in the *Storen* case, the Court held that the tax was upon interstate commerce directly—upon interstate sales, not upon a local activity of manufacturing, which would appear to dispose of the case without resort to the multiple taxation test. In an earlier case at the same term, *Puget Sound Stevedoring Co. v. Tax Commission*,⁶⁶ the Court held that a Washington tax on the privilege of engaging in business activities within the state could not constitutionally be applied to the appellant, who was doing a stevedoring business there. The tax was measured by a percentage of the gross income from the business. The appellant was engaged in loading and unloading vessels engaged in interstate commerce and in supplying stevedores to such vessels which wished to do their own loading and unloading. Mr. Justice Cardozo, speaking for a unanimous Court, held that the tax as applied to gross income from stevedoring was unconstitutional although it might validly be applied to the business of furnishing stevedores to ships doing their own loading. In the first, but not the second situation, the Court said that the appellant was engaged in interstate commerce. It is certainly arguable that the tax burdened interstate commerce to the same degree in the one case as in the other since there

65. E. g.: *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *Union Tank Line v. Wright*, 294 U. S. 275 (1919); *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113 (1920); *Hans Rees' Sons v. North Carolina*, 283 U. S. 123 (1931).

66. 302 U. S. 90 (1937).

was as much likelihood that it would be shifted to the vessels engaged in such commerce in both instances. It may also be noteworthy that, although the tax, which was forbidden, could have been imposed only by Washington, since that was the only state where the appellant was operating, the Court simply applied the formal test of whether the tax was directly upon interstate commerce.

There were two other cases on state taxation of interstate commerce although in one of them, *Henneford v. Northern Pacific Railway Co.*,⁶⁷ a decision on the constitutional issue was diverted by a procedural difficulty.⁶⁸

*Atlantic Refining Co. v. Virginia*⁶⁹ involved the constitutionality of a fee measured by authorized capital stock, which was exacted by Virginia from a foreign corporation for the privilege of doing an intrastate business there. In sustaining the action of the state court, the Court said that the fee did not burden interstate commerce nor deny the company due process or equal protection. Mr. Justice Brandeis, speaking for a unanimous Court, said that the entrance fee was not a tax, but compensation for the privilege of doing local business within the state. Since the state was free to withhold the privilege, it could exact the fee; and the measure of the fee was immaterial. Even if the United States Constitution granted foreign corporations the privilege of entering a state to do a local business, nothing showed that the fee exacted in this case was unreasonable or a burden on interstate commerce. It was not a tax on property in other states because authorized capital stock bears no necessary relation to the property owned by the corporation, and the exaction is for the privilege of doing business within the state, not upon the property of the company. Nor, said Mr.

67. 303 U. S. 17 (1938).

68. The Northern Pacific Railroad sued in a federal court to enjoin the enforcement of the Washington use or "compensating" tax as applied to materials purchased by the company without, and transported within, the state for the necessary maintenance of the railroad. The company contended that the tax (which is imposed on the "use" of property within the state in cases where a sales tax could not be imposed to "compensate" for the loss of sales tax) violated the due process clause of the Fourteenth Amendment and the commerce clause of the Federal Constitution. The lower court granted a permanent injunction against the tax, which with penalties amounted to \$2,044.88 at the time the suit was initiated. An appeal was prosecuted to the Supreme Court. In a per curiam opinion, in which Mr. Justice Cardozo did not participate, the Court reversed the judgment with directions to dismiss the bill for want of jurisdiction. Although the Court said that there was equitable jurisdiction to enjoin the tax since the statute prohibited any action to recover the tax except as therein provided, and there was no provision for a suit at law in a federal court, the action failed because the jurisdictional amount of \$3,000 was not shown. The only damages the taxpayer would suffer from the failure to entertain the suit would be the sum of the tax and penalties, which amounted to but \$2,044.88. The Court refused further to allow the complainant to amend the record to show that due to the accrual of taxes since the action was started, more than \$3,000 was involved. Although the denial of the request to amend was technically correct, it is difficult to see any common sense justification for a rule, which simply makes the taxpayer start the suit all over again, and, aside from the added expense to courts and the litigants, prolongs the suspense surrounding the constitutionality of the law.

69. 302 U. S. 22 (1937).

Justice Brandeis, was it arbitrary to measure the fee by authorized but unissued capital stock: "The value of the privilege acquired is obviously dependent upon the financial resources of the corporation—not only upon the capital possessed at the time of its admission to do business, but also upon the capital which it will be in a position to secure later through its existing authority to issue additional stock. Obviously, the power inherent in the possession of large financial resources is not dependent upon, or confined to, the place where the assets are located." ⁷⁰

IV. OBLIGATION OF CONTRACTS

A common objection against a state tax, which seldom meets with any measure of success, is that it impairs the obligation of a contract. The factual situation in *Hale v. State Board of Assessment and Review* ⁷¹ is fairly typical. Iowa, and local units of government in Iowa, prior to the passage of a personal income tax in that state, issued bonds, which were declared to be exempt from taxation. Later Iowa adopted a personal income tax, and the problem arose as to whether the interest from these bonds was subject to the tax. The Supreme Court affirmed a decision of the supreme court of Iowa, upholding the taxability of the interest from the bonds. An interesting part of Mr. Justice Cardozo's opinion consists of a dissertation on the nature of an income tax. Assuming, without deciding, that the statutes exempting the bonds created contracts, Mr. Justice Cardozo further followed the state court's construction of the statutory immunity by limiting it to ad valorem taxes on the bonds. He then proceeded to discuss the legal nature of an income tax to see whether the state court's ruling that it was an excise, not within the statutory exemption, was reasonable. He concluded that it was. After briefly reviewing state decisions which had held that income taxes are and are not direct taxes on property, Mr. Justice Cardozo turned to the Supreme Court cases, which he found "forbid us to stigmatize as unreasonable the classification of a tax upon net incomes as something different from a property tax, if not substantially an excise." ⁷² The *Pollock* case, ⁷³ which held that a federal income tax was a direct tax upon income producing property, and as applied to interest on governmental securities, a direct burden on governmental borrowing power, was distinguished by limiting it strictly to a decision on apportionment and intergovernmental immunities. On the affirmative side, Mr. Justice Cardozo analysed the nature of an income tax: "The tax complained of by appellants is not laid upon the obligation to pay the principal or interest created by the bonds, at all events within the meaning of the contract of exemption. The tax is

70. *Id.* at 30.

71. 302 U. S. 95 (1937).

72. *Id.* at 106.

73. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895).

laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed.”⁷⁴

Justices Sutherland, McReynolds, and Butler dissented. Mr. Justice Sutherland, who wrote the dissenting opinion, declared that the Iowa statutes exempted the bonds from all taxes. The obligation to pay interest is part of the obligation of the bond and taxing the interest impaired the contracts of exemption. “If a tax falls upon the bond and lessens its proceeds, either in respect of principal or interest,” bluntly declared Mr. Justice Sutherland, “it is a tax on the bond, and cannot be made something else by resort to the vocabulary or by employing some circuitous method of imposing it.”⁷⁵

The tax in the *Hale* case was a net income tax, and Mr. Justice Cardozo’s remarks in sustaining the tax seem to have been directed specifically to the fact that it was on net rather than gross income. Nevertheless in *J. D. Adams Mfg. Co. v. Storen*, the Court held, against the dissent of Mr. Justice McReynolds, that the *Hale* case was authority for upholding the application of the Indiana gross income tax to bonds and notes of municipal corporations of Indiana, which had been issued as tax-exempt prior to the passage of the tax in question. The Court again accepted the construction of the state court which limited the exemption of the bonds to ad valorem taxes, and without further discussion cited the *Hale* case for the proposition that the Indiana tax was not a direct tax on the bonds.

*New York Rapid Transit Corporation v. New York*⁷⁶ presented another case where a taxpayer argued ingeniously, but unsuccessfully, that a tax impaired the obligation of a contract. In 1917 the City of New York and the New York Municipal Railway Corporation, the predecessor in interest of the appellant, the New York Rapid Transit Corporation, entered into a contract for the operation of part of the city’s transit system. Relevant portions of the contract provided that the corporation should pay all taxes upon its property and taxes incurred in connection with the operation of the railways, and for the disposition and allocation of the gross receipts from the enterprise between the contracting parties. Later the city imposed a franchise tax upon the New York Rapid Transit Corporation measured by a percentage of gross receipts. The corporation contended that this im-

74. 302 U. S. at 108.

75. *Id.* at 111.

76. 303 U. S. 573 (1938).

paired the obligation of the contract with the city. Mr. Justice Reed, however, speaking for a unanimous bench,⁷⁷ refused to find any impairment. There was no explicit provision in the contract exempting the corporation from the tax, and the Court refused to imply such exemption from the provision for sharing the gross receipts, on the theory that the tax gave the city more than its contractual share of these receipts, and, therefore, violated the provision for sharing. "In effect," said Mr. Justice Reed, "the corporation is urging that a constructive condition should be incorporated in the contract, by speculation as to what the parties must necessarily have intended, despite the long standing rule that exemptions must be 'clear and unmistakable.' "⁷⁸

V. JURISDICTION TO TAX

Since the famous *Dorrance* cases, in which both Pennsylvania and New Jersey successfully maintained that Dr. Dorrance had been a domiciliary and assessed death taxes against his estate on that basis,⁷⁹ lawyers and tax officials have been casting about for some solution for the problem of double domicile. For a time, it seemed possible that the Federal Interpleader Act⁸⁰ might afford relief. The Supreme Court, however, in *Worcester County Trust Co. v. Riley*,⁸¹ foreclosed this possibility. In that case the executor of Robert Hunt sought to interplead the state officers charged with the administration of the death tax acts of California and Massachusetts in the Federal District Court for Massachusetts. Alleging that it was legally impossible for Hunt to have been domiciled in both states at the time of his death, but that these officials would claim that he was domiciled there, the petitioner asserted that unless the court granted relief, both states would proceed to tax the decedent's intangibles with the result that there would be multiple taxation and a deprivation of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment. The district court granted an interlocutory injunction, which was vacated by the circuit court of appeals. In a unanimous opinion written by Mr. Justice Stone, the Supreme Court affirmed the judgment of the circuit court of appeals on the ground that the suit was a suit against the states themselves, which was forbidden by the Eleventh Amendment. The petitioner had argued that the suit was against the state officers as individuals since their action would result in double taxation

77. Mr. Justice Cardozo did not participate in this decision.

78. 303 U. S. at 594.

79. *Dorrance v. Martin*, 116 N. J. Eq. 204, 172 Atl. 503 (1934), *cert. denied*, 298 U. S. 678 (1935); *Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932), *cert. denied sub nom.*, *Dorrance v. Pennsylvania*, 287 U. S. 660 (1932). See Ohlander, *Double Inheritance Taxation* (1936) 14 TAX MAG. 387, 390, 448, for a concise history of the litigation in the state courts and before the Supreme Court by which Dr. Dorrance's representatives sought unsuccessfully to avoid one of these taxes.

80. 49 STAT. 1096 (1936).

81. 302 U. S. 292 (1937), 86 U. OF PA. L. REV. 306 (1938).

forbidden by the Fourteenth Amendment, and therefore the conduct of one set of officials was necessarily unconstitutional. In support of this contention, petitioner cited cases like *First National Bank v. Maine*,⁸² which had said that double death taxation was forbidden by the Fourteenth Amendment. Mr. Justice Stone met this contention by distinguishing those cases on the ground that they held a state statute providing for double taxation to be unconstitutional while the taxing acts of California and Massachusetts contained no such proviso. Double taxation in a case like the one before the Court, said Mr. Justice Stone, could only result from judicial determinations by the courts of California and Massachusetts that the decedent was domiciled in those states. Against "conflicting decisions upon the same issue of fact" which "do not necessarily connote erroneous judicial action," the Federal Constitution guarantees no relief. "Neither the Fourteenth Amendment nor the full faith and credit clause," continued Mr. Justice Stone, "requires uniformity in the decisions of different states as to the place of domicile, where the exertion of state power is dependent upon domicile within its boundaries. . . . Hence it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States."⁸³

In view of the Court's attitude in the *Dorrance* cases, *Worcester Trust Company v. Riley* appears to cut off any relief in the federal courts in these double domicile cases. Although many lawyers will be reluctant to accept this conclusion, the only solution seems to lie with the state legislatures. A uniform state statute defining domicile would be open to the same vagaries of judicial interpretation as judicial definitions themselves. A practicable solution for the problem might lie in state legislation providing for arbitration by some impartial tribunal or by representatives of the interested states when a conflict of this kind arises.

The type of multiple taxation sanctioned by the *Worcester County Trust Co.* case is peculiarly unappealing since it appears to rest upon the canonization of judicial fallibility rather than any articulate philosophy. *Schuylkill Trust Company v. Pennsylvania*⁸⁴ allows another type of multiple taxation, which is more defensible. This is the second time that this case has come before the Court. In a previous opinion,⁸⁵ the Court held that a Pennsylvania tax upon shares of trust companies was unconstitutional because it discriminated against federal securities and imposed an unauthorized tax upon shares of stock in national banks. The discrimination against federal securities lay in the fact that

82. 284 U. S. 312 (1932).

83. 302 U. S. 292, 299 (1937).

84. 302 U. S. 506 (1938), 86 U. OF PA. L. REV. 556.

85. *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113 (1935), Note (1936) 84 U. OF PA. L. REV. 758.

such securities were not afforded the same exemptions as shares of stock in Pennsylvania corporations, which had either been previously taxed or which it was the policy of the state to exempt from taxation. The failure of the state statute, in computing the tax base, to exclude stock in national banks which had already been taxed directly to the trust company was held to constitute a tax not authorized by statute.⁸⁶ As an additional ground for invalidating the tax, the trust company urged that the tax was unconstitutional since it applied to the shares of nonresident stockholders. The Court, however, refused to pass upon this point since it had already held the tax bad on other grounds.

After this decision, the Pennsylvania courts reconstrued their statute to exclude national bank stock and to afford federal securities the same proportionate exemptions as accorded stock of Pennsylvania corporations. The trust company, however, again appealed to the Supreme Court. One ground of appeal was that the state courts had disregarded the Court's mandate by reconstruing their statute and reassessing a tax, rather than by dismissing the action entirely. The Court, however, easily disposed of this contention on the ground that it was competent for the state court to reconstrue the state statute as an expression of the state legislature's intention to tax what it could tax constitutionally, rather than what it could not constitutionally tax. It brushed aside as beyond its province the argument that the state courts were legislating, rather than interpreting, the action of the state legislature.

The trust company also contended that even as it has been reconstrued the tax was unconstitutional. This argument was based upon two points. Federal securities were not excluded entirely from the tax base, but were granted merely the same proportional exemption as exempt stocks of state corporations. Alleging that the tax was in reality a tax upon the underlying assets of the trust companies rather than upon their shares, the appellant contended that this was an unconstitutional tax upon the proportion of federal securities which was still left in the tax base. The Court, however, found that the tax was on the shares and that it was not unconstitutional since federal securities were not discriminated against. Foreseeing this possibility, the appellant had tried to establish a discrimination against federal securities in that national bank stock was excluded entirely from the tax base. To this, Mr. Justice Roberts, who delivered the opinion for a unanimous Court, replied that "The inability of a State to measure a tax by certain assets exempted by federal law does not preclude it from reckoning in the tax base all those it can reach."⁸⁷

86. 44 STAT. 223 (1926), 12 U. S. C. A. § 548 (1934).

87. 302 U. S. at 514.

Having sustained the reconstrued statute as constitutional against the objections that it was a direct tax upon federal securities or an indirect but discriminatory tax against such obligations, the Court was forced to consider the jurisdictional point which it had passed over on the former appeal. Here there was a surprising unanimity. The state was held to have jurisdiction to tax the shares of nonresident stockholders. Moreover, this decision was coupled with an urbane dictum that their shares might also be taxed by another state. There was little discussion of the basis of jurisdiction in Pennsylvania. After pointing out that the state constitution reserved the right to alter corporate charters granted by the state, and that "every stockholder acquired his shares with full knowledge that his interest in the corporation was subject to regulation and taxation," Mr. Justice Roberts continued: "Moreover, the shares represent a property interest, an aliquot proportion of the whole corporate assets. The shareholders, whether domestic or foreign, depend for the preservation and protection of this property upon the law of the state of the corporation's domicile. The property right so represented is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that state; and this notwithstanding the ownership of the stock may also be a taxable subject in another state."⁸⁸ The principal reliance of the Court in this phase of its opinion was on *Corry v. Baltimore*,⁸⁹ which sustained a somewhat similar Maryland tax upon shares of stock in domestic corporations belonging to nonresidents. The full significance of the opinion, however, lies in the cases which the Court did not cite rather than in those which it did. Nowhere is there any recognition of the line of cases stemming from *Safe Deposit & Trust Co. v. Virginia*⁹⁰ through *National Bank v. Maine*,⁹¹ which held that double taxation of intangibles violates the due process clause of the Fourteenth Amendment. Nor in discussing the *Corry* case does the Court refer to *Susquehanna Power Company v. State Tax Commission*,⁹² a decision postdating the *Corry* case, which involved the same Maryland statute and which had some significant things to say about the earlier decision.

There can be no legitimate question but that the Supreme Court is rapidly revising its earlier position with respect to multiple state taxation of intangibles under the Fourteenth Amendment. It is still difficult to forecast the extent of that revision although it seems worth while to review briefly the present situation.

Starting with *Safe Deposit & Trust Co. v. Virginia*, and continuing through *First National Bank v. Maine*, the Supreme Court in em-

88. *Id.* at 516.

89. 196 U. S. 466 (1905).

90. 280 U. S. 83 (1929).

91. 284 U. S. 312 (1932).

92. 283 U. S. 297 (1931).

phatic and definite language declared that double state taxation of intangibles was forbidden by the Fourteenth Amendment. A possible loophole, which was left open by those decisions, involved the doctrine of a business situs. The cases which held that intangibles were taxable only at the domicile of the owner admitted the possibility of a tax some place else in the case of a business situs, and failed to foreclose specifically the possibility of an additional tax in such a situation at some other place. At the 1935 and 1936 terms, taxes on debts⁹³ and shares of stock⁹⁴ were allowed on the basis of a business situs. The first of these cases hinted that this tax was exclusive. The intimations in the second were that it was not. This is possibly the break with the previous doctrine that the Fourteenth Amendment forbids double taxation of intangibles. The *Schuylkill* case goes still further, however, because there is no mention of the business situs doctrine. It reads like the cases in the days before the line of decisions terminating with *First National Bank v. Maine*, when the prevailing view was that the Fourteenth Amendment did not forbid double taxation of intangibles and corporate domicile was held to afford jurisdiction for a tax upon shares of stock. It is significant that the basis of the decision in the *Schuylkill* case is *Corry v. Baltimore*, a case decided before the era when it was held that double taxation was forbidden by the Fourteenth Amendment. It is true that the *Corry* case has been reaffirmed⁹⁵ in recent years; but the ground of affirmance was not the broad ground of the *Schuylkill* case that shares of stock may be taxed at the corporate domicile regardless of a tax some place else, but that the tax provided for by the Maryland statute was not really a tax upon shares of stock, but upon corporate assets, so that there was no possibility of double taxation of the stock. The intimation in the case, which approved *Corry v. Baltimore*, is that a double tax on shares of stock is forbidden rather than permissible.⁹⁶ As construed by the *Susquehanna* case (although not as originally decided), the *Corry* case would be a precedent against, rather than in favor of, the result in the *Schuylkill* case.

Schuylkill Trust Company v. Pennsylvania suggests two interesting possibilities. One is that the Court is about to revise its position of the early thirties, throw overboard the doctrine that the Fourteenth Amendment forbids double taxation of intangibles, and revert to the view that the Fourteenth Amendment does nothing of the kind. This would be a radical break with recent decisions, but it would involve no more strenuous somersaulting than those decisions themselves, nor show a more slighting regard for precedent. This may seem an extreme interpretation of the *Schuylkill* case; but in view of the changed

93. *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 (1936).

94. *First National Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937).

95. *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 297 (1931).

96. See Lowndes, *The Passing of Situs* (1932) 45 HARV. L. REV. 777, 781, 782.

personnel and attitude of the Court since *First National Bank v. Maine* was decided, and the additive factor that those cases were decided over the bitter protest of the so-called liberal wing of the Court, it is a possibility not lightly to be dismissed. There is, of course, a second possibility. The cases which held that the Fourteenth Amendment forbade double taxation of intangibles were all death tax cases.⁹⁷ It is possible that the Court will preserve the results in those cases by limiting the dicta therein to death taxes. It is significant, however, that usually there has been little distinction from the point of view of jurisdiction to tax between death taxes and property taxes. The *Susquehanna* case, moreover, which involved a property tax seemed to accept the dicta in the death tax decisions at their face value by failing to take this line of distinction.

An interesting aspect of Mr. Justice Roberts' opinion is the reference to the reserved power of Pennsylvania over the corporate charter as a reason for allowing the state to impose the tax. If the basis of a tax upon shares of stock at the corporate domicile is the power of the state to alter the corporate charter, the *Schuykill* case could easily be distinguished in a case involving a tax on a debt or a corporate bond at the debtor's domicile. If, on the other hand, the basis of the tax on corporate stock is the assistance which the corporate domicile gives to the stockholder in enforcing his rights, it will be much harder to deny a tax on a debt by the debtor's domicile.

Another interesting decision on jurisdiction to tax was somewhat overshadowed by an extraordinary dissent by Mr. Justice Black. In *Connecticut General Life Insurance Company v. Johnson*⁹⁸ California had imposed a tax on insurance companies doing business within the state for the privilege of doing business there, which was measured by a percentage of the premiums received upon business done within the state. To avoid double taxation, premiums paid for reinsurance in other corporations licensed to do business in California were deductible, being taxed to the reinsurer. The plaintiff was a Connecticut corporation, licensed in California, which had received reinsurance premiums from other corporations authorized to do business in California. Although the risks which were reinsured were policies on the lives of California citizens, the reinsurance contracts were entered into in Connecticut; and premiums and losses were payable there. The plaintiff contended that California lacked jurisdiction to tax these premiums and that the attempt to do so violated due process. The majority of the

97. This might be open to question. The first case which intimated that the Fourteenth Amendment forbade double taxation of intangibles was *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83 (1929), a property tax case. It is arguable, however, that the statement to this effect was dictum and the first case which held that the Fourteenth Amendment prohibits multiple taxation of intangibles was *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930), a death tax case.

98. 303 U. S. 77 (1938), 86 U. OF PA. L. REV. 543, 554.

Court, speaking through Mr. Justice Stone,⁹⁹ sustained this contention on the ground that the reinsurance contracts "involved no transactions or relationship between appellant and those originally insured, and called for no act in California."¹⁰⁰ Although the decision is doctrinally understandable, it will probably have the practical effect of forcing California to tax all premiums received by a company doing business there on lives of California citizens, without any deduction for reinsurance, which looks less equitable than taxing the reinsurance premiums to the reinsurer, who actually bears the risk of the policy and gets the substantial benefits of the premiums.

In his dissent, Mr. Justice Black contended that a corporation is not a person, entitled to the protection of the due process clause of the Fourteenth Amendment. From a practical point of view, it is a little difficult to see why the stockholders of a corporation should not be afforded constitutional protection with respect to their investments. What difference does it make whether a person holds property individually, by way of partnership, or through the medium of a corporation? Mr. Justice Black's dissent probably comes about fifty years too late to have any appreciable effect upon the law. To say that a corporation is a person within the due process clause of the Fourteenth Amendment is not to put undue emphasis upon an artificial legal creation, but merely to disregard the legal fiction in favor of the individuals whose investments are at stake.

Jurisdiction to tax typically turns upon the adjustment of conflicting claims of two or more states. A different sort of problem was pressed repeatedly upon the Court at the last term—one that is by no means new, but which recent trends in government endow with novel significance. Throughout the Union the Federal Government has acquired land within the territorial confines of the several states. The recent expansion of federal activities leading to an increase in these "federal islands" raises an acute problem with respect to the states' power to tax within them.

The first case to raise this question at the 1937 term was *James v. Dravo Contracting Co.* As we have seen in another connection,¹⁰¹ the Dravo Contracting Company was a Pennsylvania corporation which was engaged in constructing locks and dams for the Federal Government in West Virginia. West Virginia imposed a tax upon the gross income from the contracts with the United States, against which the company protested on two grounds. One, which was decided adversely to the company, was that the tax imposed an unconstitutional burden upon a federal function. The other, in point in this connection, was

99. Mr. Justice Cardozo did not participate in this decision.

100. 303 U. S. at 81.

101. *Supra* p. 3.

that West Virginia lacked territorial jurisdiction to impose the tax. The Company's activities, from which the income was derived, consisted partly of the fabrication of parts and materials used in the construction of the locks and dams at its plant in Pennsylvania, and partly of work done within the territorial boundaries of West Virginia. The work done in West Virginia was performed in the beds of the rivers in which the locks and dams were being built, on property acquired by the Federal Government on the banks of the rivers, and on property leased by the company for the accommodation of its equipment. The Court said that West Virginia lacked jurisdiction to tax the income from the work done in Pennsylvania because this came from activities performed wholly outside the state. The rest of the work was carried on in West Virginia, so the only question was whether it was performed on land so completely under federal control as to exclude the exertion of the state's taxing power.

Broadly, the answer to the question whether the taxing power of a state extends over federal land within a state's physical boundaries depends upon the jurisdiction which the Federal Government has acquired over such land. A state cannot, of course, do anything which will impede or defeat the purposes for which the Federal Government acquired such territory. Whether it may exercise jurisdiction, which does not go to this extent, depends upon the power which the state has reserved in connection with the property. Since title to the beds of the rivers where part of the work was being done had been retained by the state subject to a dominant servitude of the Federal Government, the Court held that the work done there could be taxed. With even less difficulty, the Court held that the state had territorial jurisdiction over the lands leased by the appellant for the accommodation of its equipment.

The more perplexing problem arose in connection with the lands along the river banks to which the Federal Government had acquired title. The state had consented to the acquisition of this land by a statute which in terms reserved concurrent jurisdiction over the property. Although the words of the grant apparently reserved to the state the power to tax, the difficulty was that this land had been acquired under Article I, Section 8, Clause 17 of the Federal Constitution which authorizes the Federal Government to exercise "exclusive legislation . . . over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." The Court pointed out that "other needful buildings" is to be given a latitudinarian construction which includes locks and dams, as well as structures like arsenals and the other specifically enumerated buildings. It was then faced with the problem of whether Congress must exercise "exclusive legislation",

which the Court conceded meant exclusive jurisdiction, over territory acquired under this provision of the Constitution. Contrary to what was probably the previously prevailing opinion, it was held that the United States does not necessarily acquire exclusive jurisdiction over land to which it gets title pursuant to Clause 17. The Chief Justice pointed out that the Federal Government may acquire title to land within a state by virtue of the consent of the state in accordance with the constitutional provision, or without the consent of the state by purchase or condemnation, which is not explicitly authorized by the Constitution. In the latter situations, the extent of the jurisdiction acquired by Congress depends upon what is ceded by the state, which is free to qualify its cession as it sees fit, subject, of course, to the overriding limitation that it cannot interfere with the congressional purposes in making the acquisition. The Chief Justice declared that there was no reason why a state which cedes land to the Federal Government under Clause 17 might not similarly qualify its grant of jurisdiction. Starting from the premise that Clause 17 did not necessarily carry with it exclusive jurisdiction, the Court naturally reached the conclusion that the reservation of concurrent jurisdiction by West Virginia meant that it retained territorial jurisdiction to tax the work done on the banks of the rivers. The Court was apparently unanimous in this part of the holding of the *Dravo* case, which seems to reach an eminently satisfactory result. With the increase of these "federal islands" within the states, a doctrine which would force exclusive jurisdiction upon the Federal Government would not only operate harshly on the states themselves, but it would probably mean that many areas would be left without adequate policing or legal protection.

*Silas Mason Co. Inc. v. Tax Commission*¹⁰² presented problems similar to those involved in the *Dravo* case. The validity of a Washington tax on gross income of contractors, who were engaged in building the Grand Coulee dam in the state of Washington under contracts with the Federal Government, was in issue. On the authority of the *Dravo* case, the Court held, without discussion, that the Washington tax did not impose an unconstitutional burden on a federal function, and turned its attention to the problem of territorial jurisdiction. The activities from which the income taxed was derived were carried on in three types of places, all of which were within the physical boundaries of the state. These were lands acquired by the United States: (1) from the state, (2) from individual owners, and (3) Indian tribal lands. The Court found that the control of the Federal Government over these lands did not exclude the state's power to tax and, consequently, that the tax was not lacking in territorial jurisdiction. With

102. 302 U. S. 186 (1937).

respect to the lands acquired from the state, the Chief Justice pointed out that in neither the state nor the federal statutes by which the cession was effected was there any provision for exclusive federal jurisdiction. Moreover, in connection with the lands acquired from private owners, the Court accepted the state court's interpretation of the state statutes that they did not grant exclusive federal jurisdiction. Beyond this, however, the Chief Justice pointed out that even if exclusive federal jurisdiction had been granted by the state, it had not been accepted by the United States, and the United States would not acquire exclusive jurisdiction unless it consented to do so.¹⁰³ Finally, the Court held that federal jurisdiction over the Indian tribal lands was not exclusive. Although the United States had always had title to these lands and could not acquire it by purchase or condemnation, exclusive legislative jurisdiction could only be obtained by cession from the state legislature; and there had been no such cession.

Atkinson v. State Tax Commission of Oregon, the third case in this series, retraced the ground covered by the *Dravo* and *Silas Mason* cases. The tax involved was a net income tax upon the income of a contractor with the Federal Government for the construction of the Bonneville dam in Oregon. The work contracted for was done in the bed of the Columbia River, on Bradford Island, and on a portion of the mainland, all of which were within the physical boundaries of Oregon. The objections urged against the Oregon tax paralleled those of the *Dravo* and *Silas Mason* cases: The tax was said to impose an unconstitutional burden upon a federal function and to lack territorial jurisdiction. The Court disposed of both of these objections in a per curiam opinion.¹⁰⁴ With respect to the problem of territorial jurisdiction, the Court held that the work done in the river bed was taxable since the state retained title to the land under the river. Moreover, although a state statute had granted exclusive jurisdiction to the Federal Government over the other land where the work was carried on, and this was acquired under the constitutional authorization of Article I, Section 8, Clause 17 of the Federal Constitution, the Court, following the *Dravo* case, held that the Federal Government had not necessarily acquired exclusive jurisdiction. Then, in accord with the dictum in the *Silas Mason* case, the Court pointed out that even though exclusive jurisdiction has been granted to the Federal Government by the state, the United States cannot be compelled to accept it against its will, and

103. "We know of no constitutional principle," said the Chief Justice, "which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interest." *Id.* at 207.

104. Since the tax was on net rather than on gross income, even the dissenters in the *Dravo* and *Silas Mason* cases agreed that it did not cast an unconstitutional burden on the Federal Government. See *supra* note 23. Mr. Justice Cardozo did not participate in this decision.

the Federal Government had not accepted exclusive jurisdiction over the land in question.

The cases on federal jurisdiction, which have been considered up to this point, are important because of their bearing upon the problem of whether the United States must exercise exclusive jurisdiction over territory acquired pursuant to the constitutional authorization of Article I, Section 8. The last case in the group raises the problem of exclusive federal jurisdiction over property acquired without explicit constitutional sanction. In *Collins v. Yosemite Park & Curry Co.*,¹⁰⁵ the plaintiff, the Yosemite Park & Curry Company, operated hotels, camps and stores in the Yosemite National Park under a contract with the Secretary of the Interior by which the plaintiff paid a percentage of its profits to the Secretary over and above a stipulated amount, in return for this privilege. The plaintiff sold liquor and beer and wines in connection with its projects at prices fixed by the Secretary. This action was brought to enjoin certain California officials from enforcing the California Alcohol Beverage Control Act with respect to the plaintiff's operations in the park. The lower court granted the injunction and an appeal was taken to the Supreme Court, which reversed the judgment. Mr. Justice Reed delivered the opinion of the Court, which was concurred in by all the justices with the exception of Mr. Justice McReynolds, who concurred separately, and Mr. Justice Cardozo, who did not participate in the decision.

Examining the statutes under which the Yosemite Park had been granted to the United States, Mr. Justice Reed found that exclusive jurisdiction had been ceded to the Federal Government, with the exception of certain reservations including the power to tax. He then pointed out that, although the Federal Government did not have power to acquire land for park purposes under Article I, Section 8, Clause 17 of the Federal Constitution, this section was not exclusive and did not prevent federal acquisition of title in other ways. Moreover, exclusive jurisdiction might be acquired over lands, title to which was taken apart from the explicit constitutional authorization. The exclusive jurisdiction acquired over the park territory prevented the regulatory phases of the California liquor law from applying to the plaintiff's business conducted there so that the California authorities could not enforce the licensing provisions of the law against it. However, the provisions of the act for excise taxes on the unit sales of liquor were true taxes, not regulations, and were separable from the rest of the statute so that they could be applied in the park territory. Mr. Justice Reed also held that these taxes did not burden a federal function, even though the United States shared in the profits from the sale of liquor in the park, because Congress had consented to the exercise of the state's taxing power.

105. 58 Sup. Ct. 1009 (1938).

There was one more point of significance in the opinion. Many grants to the Federal Government have vested it with exclusive jurisdiction over the property which has been granted. This is not always desirable. There is no apparent objection, however, to modifying these grants of exclusive jurisdiction by joint congressional and state action. In the *Collins* case, California had at one time ceded exclusive jurisdiction to the Federal Government over part of the park property. There were, however, later statutes, revising the earlier grants, which reserved some jurisdiction to California; the Court held that these were controlling since the state and the Federal Government could modify the earlier grants as they saw fit. It was under these later acts that California reacquired the power to tax which was successfully asserted in the *Collins* case.

These decisions as a whole are characterized by a wise flexibility, which leaves sufficient latitude for the states and the Federal Government to work out whatever adjustments with respect to their mutual jurisdictions over lands ceded to the Federal Government they may choose. Moreover, they allow different adjustments to be made later if it turns out that the initial arrangements are not working well. With the multiplication of "federal islands" in the states, there is bound to be friction. As far as lies within its power, however, the Supreme Court has left it open to Congress and the states to resolve these conflicts with a minimum of judicial interference.

[To be concluded.]