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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 478

MARK GRAVES, JOHN J. MERRILL, AND JOHN P. HENNESSY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS

v.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF JAMES B. O'KEEFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The decision and opinion of the State Tax Commission of New York appear at R. 8–13. The opinion of the Appellate Division of the Supreme Court of New York (R. 45–50) is reported in 253 A. D. 91. The memorandum opinion of the Court of Appeals of New York (R. 1) is reported in 278 N. Y. 221.

JURISDICTION

Pursuant to remittitur from the Court of Appeals (R. 1), the judgment of the Supreme Court of New York was filed on August 19, 1938 (R. 2). The petition for a writ of certiorari was filed on November 18, 1938, and was granted on December 19, 1938. Jurisdiction rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer is an employee of the Home Owners' Loan Corporation who seeks refund of income tax paid to the State of New York on his salary for the year 1934. The questions are:

1. Whether the compensation is exempt under the state statute, and whether that question may be considered here. If not, the further questions are:

2. Whether the Home Owners' Loan Corporation exercises "proprietary" or "nonessential" functions.

3. Whether a government employee has any constitutional immunity from a net income tax upon his salary.

4. Whether the silence of Congress means that such a tax immunity can be claimed by federal employees.

STATUTE INVOLVED

Section 4 of the Home Owners Loan Act of 1933, as amended, is printed in the Appendix to the petition for a writ of certiorari (pp. 34–52).

The Tax Law of New York (c. 59, McKinney's Consolidated Laws) provides:

> SEC. 351. *Imposition of income tax.*—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * *
>
> * * * * *
>
> SEC. 357. *Net income defined.*—The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.
>
> * * * * *
>
> SEC. 359. *Gross income defined.* — The term "gross income":
>
> 1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, * * *.
>
> 2. Does not include the following items which shall be exempt from taxation under this article:
>
> * * * * *
>
> f. Salaries, wages and other compensation received from the United States of[1] officials or employees thereof, including persons in the military or naval forces of the United States.[2]

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[1] The word "of" is not in the consolidated Tax Law, but appears in the original act, L. 1919, c. 627, Sec. 359–2–f.

[2] Subdivision f was repealed by the Act of May 28, 1937, L. 1937, c. 719, but the repeal was effective only as of that date.

STATEMENT

The taxpayer filed a resident income tax return for the calendar year 1934 in which he reported a total net income of $2,908.54, upon which he paid a tax of $57.28 to the State of New York. Of his total income, $2,246.66 was salary received as an attorney employed by the Home Owners' Loan Corporation; if this salary were excluded, his taxable net income would be less than the $1,000 personal exemption and no tax would be due (R. 41). The taxpayer duly filed a claim for refund and a hearing was had before officials of the State Tax Commission (R. 8). The claim was denied (R. 8–13). On writ of certiorari, the Appellate Division, Third Department, annulled this determination, two judges dissenting. On appeal, the decision of the Appellate Division was affirmed by the Court of Appeals (R. 1).

The taxpayer received an oral appointment as examining attorney of the Home Owners' Loan Corporation at a salary of $2,400 per year; in 1934 he received payment for work commencing on January 25[3] (R. 17, 21). He took a prescribed oath of office (R. 19, 39), but was exempted from Civil Service and other acts regulating federal employment (R. 19, 32). The United States Employees'

[3] He started work on January 12, 1934, but was not paid for the period January 12–25 until 1935 (R. 17). This payment, of $80, apparently explains the mistaken statement in the opinion of the State Tax Commission that his salary was $80 a month (R. 9–10).

Compensation Commission has ruled that employees of the Home Owners' Loan Corporation are civil employees of the United States within the meaning of the Federal Employees Compensation Act (R. 40).

The taxpayer's duties consisted in examination of applications for loans, to see that they met the requirements of the Act and Regulations and to ensure that the Home Owners' Loan Corporation received a first lien on the property (R. 18). He worked from 9 to 5 on week days, and from 9 to 12 on Saturdays (R. 17).

SUMMARY OF ARGUMENT

I

The New York statute exempts "compensation received from the United States of officials or employees thereof." While we think it plain enough that the relator is exempted under this provision, the question seems to be one of state law, and thus to be beyond the power of this Court to decide in reviewing the decision of the state court on the federal question.

II

The Home Owners' Loan Corporation cannot be said to exercise "proprietary" or "nonessential" functions of the United States. The federal government can exercise only its delegated powers, and if the activity is constitutional it must by definition be governmental. Such is the clear teaching of the

decisions of this Court. *McCulloch* v. *Maryland,* 4 Wheat. 316, 432; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158–159; *South Carolina* v. *United States,* 199 U. S. 437, 451–452; *Helvering* v. *Therrell,* 303 U. S. 218, 223. Any other rule would seem to threaten calamitous consequences in the operations of the federal government and would reverse a century and a half of constitutional practice.

In this there is no departure from the rule that the doctrine of tax immunity protects the states and the nation alike. By the very nature of the constitutional system, a federal tax contains no danger for the states, who are represented in Congress, while this safeguard is absent in the case of a state tax. *McCulloch* v. *Maryland, supra,* 435–436; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, 416. So far as petitioners object that this gives the national government, in the exercise of its delegated powers, an ascendency over state governments, it is a sufficient answer that the supremacy clause of Article VI settled that question in 1789

The corporate nature of the H. O. L. C. is immaterial in this inquiry. Its stock is wholly owned by the United States and its functions are those of the Government alone. And since there is, and can be, no challenge to the constitutionality of the H. O. L. C. in these proceedings, its activities must be taken to be purely governmental and in all respects those of the United States itself.

III

The question, then, is whether an employee of the United States is exempt from a nondiscriminatory state income tax. Since Congress has not acted, the question relates only to the implications of the Constitution. We submit that there is no constitutional immunity from a tax such as this.

A. The Court has four times held an officer of a state or the federal government exempt from taxation by the other; it has never held an employee to be exempt. If there be a distinction between the tax status of employees and officers, no case stands in the way of our argument. But if, as we believe, no such distinction can be drawn, our position is contradicted by *Collector* v. *Day,* 11 Wall. 113. We ask that the decision there be reconsidered.

B. The decision was erroneous at the time it was decided. It ignored that, with knowledge of tax-immunity problems, the Constitution provided no relevant limitation upon the federal taxing powers. It reversed the reasoning of the prior decisions of this Court holding state taxes invalid solely because of the supremacy clause. It ignored Chief Justice Marshall's insistance that the representation of the states in Congress made unnecessary a constitutional protection. And it opened wide fields for unnecessary and unfair tax exemptions,

which the Court has since been required steadily to narrow.

C. *Collector* v. *Day* cannot be reconciled with the subsequent decisions of the Court. The opinion in *Helvering* v. *Gerhardt,* 304 U. S. 405, seems broad enough to reach all state employees; there is no reason to treat the officer differently. Independent contractors are subject to taxation on both their net and their gross income. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *James* v. *Dravo Contracting Co.,* 302 U. S. 134. In spite of express constitutional provisions, the states may impose a net income tax on interstate commerce and Congress may lay one on the exporting business. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Peck & Co.* v. *Lowe,* 247 U. S. 165. Perhaps equally important is the general trend in the decisions of the Court, which increasingly serve to limit the doctrine of immunity to its proper borders.

D. There is no practical justification for the immunity. The government officer or employee receives all the benefits of organized government and plainly should pay his share of its costs. The tax for a number of reasons contains no threat to the operations of Government: It is not certain that the government salary will be taxed at all if included in gross income. The exemption privilege operates in a variable and discrminatory manner. It is clear almost beyond dispute that few, if any, persons considering government work would have

their decision shaped by immunity or liability to income tax. Even if the exemption were to be reflected in the public treasury, there is doubt that such a bounty should be offered by one government to another. The requirement that the tax be nondiscriminatory eliminates any danger of interference with government operations.

E. Each of the three reasons advanced or suggested by the Court for the decision in *Collector* v. *Day* have subsequently been rejected: (1) The power to tax can no longer be thought to involve the power to destroy. In half a hundred cases the Court has sustained taxes which would be capable of destruction if pressed to discriminatory or oppressive limits, and the Court has expressly decided that the states could tax federal activities which they could not regulate or forbid. *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530; *New Brunswick* v. *United States,* 276 U. S. 547. (2) A nondiscriminatory net income tax can no longer be considered to be an interference with the governmental functions in which the officer or employee is engaged. (3) Finally, after the decisions in *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, and *Hale* v. *State Board,* 302 U. S. 95, the tax upon net income can no longer be thought to be a tax on the source of the income.

F. Only one other reason has been advanced in the decisions of the Court to support an immunity of a private person from a nondiscriminatory tax

because he deals with the Government. This is the fear that the economic burden of the tax might be passed on to the Government. But this no longer can be accepted as a ground for extending immunity from such a tax. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Helvering* v. *Gerhardt*, 304 U. S. 405, 418–419, 420–421. In any event, there is no discernible tendency for an income tax upon an officer or employee to increase the costs of government.

G. Finally, the reasons announced by the Court for denying a claim of immunity are fully applicable to the Government officer. The tax in question is nondiscriminatory and falls within the emphasis given this factor in the recent decisions of the Court. The necessity that the tax revenues be maintained finds fitting illustration in the case of the officer and employee, whose exemption deprives states and the nation of millions of dollars in annual tax revenues. The officer and the employee should in justice pay his share of the costs of the benefits of organized government which he receives. The tax, if indeed it has any effect upon the government, has one which at most is conjectural and remote.

H. Foreign federations with similar problems have first adopted and have then rejected the rule of *Collector* v. *Day*. In Canada the provincial courts at the outset unhesitatingly followed the

American cases. Then first the Privy Council and subsequently the Supreme Court of Canada abandoned the rule, and held the income of a government officer to be taxable. *Webb* v. *Outrim,* (1907) A. C. 81; *Abbott* v. *City of St. John,* 40 Can. Sup. Ct. 597. In Australia the provincial courts first held the government officer liable to taxation, as did the Privy Council in *Webb* v. *Outrim.* The Federal High Court, however, held to the contrary. *D'Emden* v. *Pedder,* 1 C. L. R. 92. Other cases reinforced the rule of reciprocal immunity of the High Court. But in 1920 this doctrine was cleanly reversed. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Itd.,* 28 C. L. R. 129. And in 1937 the High Court definitely announced its abandonment of the rule that a Government salary was immune from income taxation by the other government. *West* v. *Commissioner of Taxation,* 56 C. L. R. 657.

IV

Since the Constitution of its own force does not exempt the federal officer or employee from a nondiscriminatory income tax upon his salary, and since Congress has provided neither exemption nor liability, the only question remaining is whether an intention on the part of Congress to exempt the salary from such taxation is to be implied from its silence.

The doctrine developed in the somewhat analagous field of interstate commerce, that the silence of Congress may mean an intention that there be immunity from state regulation, has no application here. There is no corresponding practical utility in permitting the operation of state legislation to remain within the control of Congress; Congress has already a full power to return the subject to state control, since the immunity may at any time be waived. Even if the analogy were adopted, however, there should be no implied intention to exempt, since a nondiscriminatory net income tax upon federal salaries has no effect whatever on the operations of the United States.

The decisions of this Court have, in any event, settled the matter. In forty-odd cases the states have been permitted to tax private persons who dealt with the Government. In no case has the silence of Congress been thought to imply a desire that there be exemption; the decisions of immunity have been pitched on the Constitution alone. In many opinions the Court has expressly relied upon the failure of Congress to provide exemption as a reason why the tax should be sustained. And certainly if the gross receipts tax on the government contractor, sustained in *James* v. *Dravo Contracting Co.,* 302 U. S. 134, was not to be thought condemned by the silence of Congress, a tax so remote from the operations of government as an income

tax upon the salaries paid officers and employees is not to be thought forbidden by an implication derived from the silence of Congress.

The possible argument that Congress by its silence has accepted the rule of immunity announced in *Collector* v. *Day,* 11 Wall. 113, as applied to federal officers and employees, cannot be allowed. Although applicable with respect to immunities declared under the commerce clause (see *Gwin, White & Prince, Inc.* v. *Henneford,* No. 75, October Term, 1938, decided January 3, 1939), there is no corresponding responsibility on the part of Congress to provide the applicable rule in the case of the immunity claimed by the federal employee. Moreover, it hardly can be expected that Congress would waive the immunity of federal officers and employees so long as *Collector* v. *Day* was thought to bar a corresponding tax upon those of the states; however undesirable the immunity might be, there would have been no occasion for Congress to accentuate the unfair privileges enjoyed by state officers and employees. The Court, in any event, has not found any adoption by Congress of the rule announced in overruled cases, *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, or of the rule theretofore thought to follow from decisions in analogous cases, *James* v. *Dravo Contracting Co., supra.*

ARGUMENT

I

THE TAXPAYER'S EXEMPTION UNDER THE STATE STATUTE

It seems desirable at the outset to dispose of the question which arises under Section 359–2–f of the Tax Law of New York (McKinney, c. 59). That section provides that "the term 'gross income' * * * Does not include the following items which shall be exempt from taxation under this article: * * * Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

We think it plain enough that an employee of the Home Owners' Loan Corporation is an employee of the United States, and that the H. O. L. C. is simply a branch of the Government which has been created in corporate form.

However, the exemption is a privilege extended by the state statute and the scope of the privilege is a question which relates to the construction of that statute. There is involved no question of the extent of the jurisdiction or rights granted the United States,[4] since the statute relates only to the tax liability of the employee. It seems to follow that the

[4] Compare *Mason Co.* v. *Tax Commission*, 302 U. S. 186, 197; *United States* v. *Perkins*, 163 U. S. 625, 630–631.

construction of Section 359–2–f is a question of state law.[5]

The state court did not consider this state question. The taxpayer was denied exemption by the Tax Commission, both because there was no constitutional immunity and because there was no statutory exemption (R. 13). The Appellate Division reversed, and was affirmed by the Court of Appeals only because of the supposed error of the Tax Commission in the decision of the question under the federal constitution; the state question was not considered.[6] It results that the state ground, inde-

[5] It may be argued that the application of Section 359–2–f is a federal question because the statute intended to adopt the federal rule as to what constitutes an employee of the United States. This probably was the intention of the legislature, since there is no reason why the State would wish to make an independent determination of the relationship of the United States to federal employees; further, the opinions of the Attorney General of New York construing this section have relied exclusively upon federal cases and statutes. Op. A. G., 1919, p. 306; Op. A. G., 1920, p. 204; Op. A. G., 1933, p. 261. But, even if there were this adoption of the federal rule, the question apparently remains one of state law. *Miller's Executors* v. *Swann*, 150 U. S. 132, 136–137; *Louisville & Nashville R. R.* v. *Western Union Tel. Co.*, 237 U. S. 300, 303; see *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 507; but compare *Mackenzie* v. *Hare*, 239 U. S. 299.

[6] Neither the majority of the Appellate Division nor the Court of Appeals wrote an opinion but entered *per curiam* decisions which merely cited *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401 (R. 45, 1). In that case, the Appellate Division, 3d Dept., stated that the relator had not invoked Section 359–2–f, and decided only the constitutional question. *People ex rel. Rogers* v. *Graves*, 245 A. D. 452, affirmed without opinion, 271 N. Y. 543.

pendent and adequate to support the judgment, was not decided by the state court. This Court, therefore, has jurisdiction to review the case. In this review, if it agrees with our position on the federal questions, it will reverse the cause and remand it for consideration of the state question in the state court; if it concludes that the relator has a constitutional immunity against taxation, the decision of the state court should be affirmed. *Virginia* v. *Imperial Coal Co.,* 293 U. S. 15, 16–17; *Grayson* v. *Harris,* 267 U. S. 352, 358; *International Steel Co.* v. *Surety Co.,* 297 U. S. 657, 665–666. But, since the Court considers only federal questions on review of state courts,[7] it will not consider whether the judgment might be supported by the exemption granted by Section 359–2–f, a question of state law.[8]

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[7] *Murdock* v. *City of Memphis*, 20 Wall. 590; *Detroit & Mackinac Ry.* v. *Paper Co.*, 248 U. S. 30, 31; *Missouri ex rel.* v. *Public Service Commission*, 273 U. S. 126, 131.

[8] If, however, the Court should feel the question of the exemption of the state statute to be a federal question (whether because of the analysis suggested in footnote 5, *supra*, or for other reasons), it should then consider the scope of Section 359–2–f. Section 237 (b) of the Judicial Code (U. S. C., Title 28, Sec. 344) permits review on certiorari whether the federal claim be sustained or denied. Ay federal claim adequately raised in the state court should thus be available to the respondent in support of the decision sustaining him on one ground. A contrary rule would make the jurisdiction of this Court depend upon the accident of whether or not the state court chose to make cumulative or unnecessary rulings in its opinion, and would be incongruous with the rule applicable to decisions of the lower federal courts. See *Langnes*

We proceed, therefore, to consideration of the question of the taxpayer's immunity without regard to the exemption of the state statute. We shall urge that there is no such immunity. If our views are accepted, it will result that the cause must be remanded to the state court for further proceedings, which will include determination of the scope of the statutory exemption.

II

THE HOME OWNERS' LOAN CORPORATION DOES NOT EXERCISE "PROPRIETARY" OR "NONESSENTIAL" FUNCTIONS

Much of petitioners' brief is directed, somewhat obliquely, to the proposition that the relator is taxable because the Home Owners' Loan Corporation exercises functions which are proprietary or which are not essential to the operations of the United States. As we read their argument, it accepts *Helvering* v. *Gerhardt,* 304 U. S. 405, as settling that the income of some government employees may be taxed, restricts this holding to employees outside the regular governmental departments, and then expands it to have equal application to federal employees. We agree with petitioners' conclusion that the relator is taxable, but take emphatic issue

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v. *Green*, 282 U. S. 531, 538–539; *Stelos Co.* v. *Hosiery Corp.*, 295 U. S. 237, 239. Compare *New York* v. *Kleinert*, 268 U. S. 646, 650–651; *Virginian Ry.* v. *Mullens*, 271 U. S. 220, 227–228; *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 229.

with the reasons which they suggest for this conclusion.

We think that the taxing power of the state has precisely the same scope whatever the federal function which is urged to be affected, and that there can be no place for an argument that any federal function is "proprietary," or is not "essential" to the operations of the United States. This conclusion is compelled (a) by constitutional theory, (b) by the decisions of this Court, and (c) by the practical necessities of a federated government.

A. ALL DELEGATED POWERS ARE GOVERNMENTAL, AND ESSENTIAL TO THE OPERATIONS OF THE UNITED STATES

Some of the older opinions contained intimations that the state immunity from taxation related only to "governmental functions."[9] This qualification was definitely established, by a divided Court, in *South Carolina* v. *United States,* 199 U. S. 437. The State had established dispensaries for the exclusive sale of liquor, and the Court sustained the imposition of the federal license tax. The Court assumed that the federal government could not, through taxation, "prevent a State from discharging the ordinary functions of government" (p. 451). But for fear "the National Government would be largely crippled in its revenues" (p. 455),

[9] Clifford, J., dissenting in *United States* v. *Railroad Co.*, 17 Wall. 322, 333–335; *Ambrosini* v. *United States*, 187 U. S. 1, 7–8; White, J., dissenting in *Snyder* v. *Bettman*, 190 U. S. 249, 255.

the Court denied the claim for immunity, placing some reliance upon the fact that functions such as these could not have been contemplated by the framers of the Constitution (p. 456).

The doctrine has been applied or considered in eight subsequent decisions of this Court.[10] Most of the opinions which explain the doctrine are pitched on the practical fear that the expanding activities of the states would otherwise result in the withdrawal of fields of revenue to the point that the federal taxing power might largely be crippled.[11] The only other explanation which has been advanced is that the activity is essentially private or proprietary in character and so cannot be governmental.[12]

We are not here concerned with the philosophic adequacy of these explanations. It is sufficient

[10] *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172; *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214; *Brush* v. *Commissioner*, 300 U. S. 352; *Helvering* v. *Therrell*, 303 U. S. 218; *Helvering* v. *Gerhardt*, 304 U. S. 405; *Allen* v. *Regents*, 304 U. S. 439; cf. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401.

[11] *South Carolina* v. *United States*, *supra*, 454, 455, 457; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173; *Helvering* v. *Powers*, 293 U. S. 214, 225; *Helvering* v. *Therrell*, 303 U. S. 218, 224; *Helvering* v. *Gerhardt*, 304 U. S. 405, 417; *Allen* v. *Regents*, 304 U. S. 439, 452, 453.

[12] *South Carolina* v. *United States*, *supra*, 463; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172; *Ohio* v. *Helvering*, 292 U. S. 360, 368–369; *Brush* v. *Commissioner*, 300 U. S. 352, 372; *Helvering* v. *Gerhardt*, 304 U. S. 405, 416; *Allen* v. *Regents*, 304 U. S. 439, 452.

that they can have no application to activities of the United States.

The Constitution delegates to the central government certain enumerated powers. Congress can exercise no power not granted. By definition, therefore, if the federal activity is constitutional, it lies within the delegated powers. And if the Constitution delegates a given power to the Federal Government it cannot be said that this power is not governmental, that it is proprietary, or that it is not essential to the operations of the United States. That question is one which was settled when the Constitution was adopted and cannot be reexamined now.

The states, on the other hand, have all the residuary powers of government. As we read the later decisions of this Court, there is no field of commercial or industrial activity forbidden to the states or their political subdivisions by the Federal Constitution.[13] The exercise of the state powers in this regard, whether to a limited degree or to their fullest extent, may well be essential to the welfare of the state and its citizens. But any wide exercise of the unlimited powers of the states to displace private enterprise would raise a serious question as to federal revenue sources if immunity were to follow every state activity.[14] This practical basis of

[13] *Jones* v. *City of Portland*, 245 U. S. 217; *Green* v. *Frazier*, 253 U. S. 233.

[14] See, particularly, *South Carolina* v. *United States*, *supra*, 454; *Helvering* v. *Gerhardt*, 304 U. S. 405, 416.

the rule is absent when the activities are those of the Federal Government, undertaken under its delegated powers. It is true that the scope of federal activities under the delegated powers have considerably expanded in recent years. But the comparatively greater readiness of Congress to waive immunity, which this Court has noted (*infra,* p. 33), shows the threat to the revenue of the states not to be formidable.

B. THE DECISIONS OF THIS COURT FORBID APPLICATION OF THE DOCTRINE TO FUNCTIONS OF THE UNITED STATES

No one of the nine cases which consider the doctrine of proprietary or nonessential functions has applied it to functions of the United States. Many decisions make it plain beyond dispute that there can be no such segregation of the federal activities.

In *McCulloch* v. *Maryland,* 4 Wheat. 316, 432, Chief Justice Marshall refused to distinguish between the privately operated Bank of United States and the purely "governmental" functions of the United States. "If the states may tax one instrument," he said, "employed by the government in the execution of its powers, they may tax any and every other instrument." In *Van Brocklin* v. *Tennessee,* 117 U. S. 151, the Court held that the states could not tax lands acquired by the United States on their sale for delinquent federal taxes; it said (pp. 158–159):

> The United States do not and cannot hold property, as a monarch may, for private or

> personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defence and general welfare of the United States." Constitution, art. 1, sect. 8, cl. 1; *Dobbins* v. *Erie County Commissioners,* 16 Pet. 435, 448. * * *

This reasoning has been followed with specific reference to the doctrine of proprietary or nonessential functions of states. In *South Carolina* v. *United States, supra,* 451–452, the Court directly said:

> Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging *the ordinary functions of government,* just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of *all the powers* conferred upon it. [Italics added.]

This rudimentary distinction between the functions of the federal and the state governments is still recognized. Such is the clear teaching of *Helvering* v. *Therrell,* 303 U. S. 218, 223, where the Court said:

> The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; * * *

> Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties * * *

The Minnesota court, in *Geery* v. *Minnesota Tax Commission,* 282 N. W. 673, recently reached the same conclusion. It held the salary of an officer of a federal reserve bank immune from State taxation, despite the decision in *Helvering* v. *Gerhardt,* 304 U. S. 405, because "the distinction between the immunity granted to federal delegated powers, and that given to the essential governmental duties exercised by the states seems clear."

Perhaps as significant as the express statements of this Court is the fact that the opinions uniformly speak of the doctrine in terms of state functions only, and that no one of the cases dealing with the doctrine of proprietary or nonessential functions speak of this limitation upon tax immunity as reciprocal.

The only possible exception to this statement is *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401. From that opinion can be drawn an implication that the Court viewed the question for decision as whether the Panama Railroad was exercising governmental or proprietary functions. But the opinion is at least equally capable of a construction

such that the issues discussed related to the constitutionality of the undertaking, or was designed to bring the case within the rule of *Clallam County* v. *United States,* 263 U. S. 341, 345. We shall not stop to weigh the opposing inferences, since it is clear that the construction which accords with all other decisions in the field must be adopted in preference to that which contradicts them.

C. THE PRACTICAL CONSEQUENCES OF A DECISION THAT THE UNITED STATES EXERCISES PROPRIETARY OR NONESSENTIAL FUNCTIONS

In addition to the plain dictates of constitutional theory and the decisions of this Court, the proposition advanced by petitioners must be rejected because of the alarming if not catastrophic consequences which would result from its adoption.

The difficulties would only to a limited degree be traced to the added tax burdens. While the Federal instrumentality which we here suppose to be described as proprietary would not have the added protection of taxation by its own representatives (see *infra,* pp. 31–33), it may be supposed that its functions would not be embarrassed by the added cost of a nondiscriminatory tax, imposed on all persons alike. The problem is very likely not unduly accentuated by the fact that the Federal instrumentality would ordinarily be operating on a nation-wide scale, and forced to take into reckoning the diversified taxes of 48 states.

The really serious danger in petitioner's position lies in the field of substantive regulation. If a

Federal activity were ever characterized as proprietary or nonessential, such as to subject it to state taxation, there is no readily apparent theory why it would not also be subject to the regulatory laws of the several states.[15] To subject the United States, in the performance of its constitutional functions, to the laws of the several states is an unthinkable result, and one so clearly unconstitutional that we need not dwell on the interference with or, indeed, the complete frustration of many federal activities which would result.[16] The complete reversal of constitutional history, and of the express mandate of Article VI, cannot be accomplished by pointing to a vague demarcation of governmental powers into proprietary and essential. Whatever the activity, so long as it be constitutional, it is removed from the field of state laws by the unmistakable provision that "the laws of the United States * * * shall be the supreme law of the land."

Finally, one need only point to the national banks, the Federal Reserve Banks, the diversified operations of the institutions under the control of

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[15] The Federal taxing power, although equally bulwarked by the supremacy clause, does not reach as far as the Federal regulatory powers. See *Board of Trustees* v. *United States*, 289 U. S. 48; *United States* v. *California*, 297 U. S. 175.

[16] The cases cited in footnote 15, *supra*, show that there is no comparable problem with respect to state functions, which are subject, whatever their nature, to the Federal regulatory powers.

the Farm Credit Administration, the United States Postal Savings System, and the other institutions under the control of the Federal Home Loan Bank Board, to indicate the startling implications of petitioners' argument (see Br. 12, Pet. 28) that the banking or lending activities of the United States are to be characterized as proprietary or nonessential.[17] Congress could, of course, expressly immunize these institutions from state control and state taxation (see *infra,* pp. 34–35). But it needs no elaboration to show that such a course has never been thought necessary and that the practical difficulties in the way of foreseeing all of the varying forms of state regulation or taxation would make the process intolerably unsatisfactory.

D. PETITIONERS MISTAKE THE NATURE OF "RECIPROCAL" TAX IMMUNITY

Throughout the brief of petitioners there runs the main thread of their argument; it consists in the proposition that the doctrine of tax immunity is reciprocal, and that a tax immunity or liability with respect to one government, or with respect to those who deal with it, applies automatically to the taxing power of the other government. We do not

[17] The brief for the United States, intervenor, in *Loomis* v. *First Federal Savings and Loan Association*, No. 277, this Term (dismissed on motion for petitioners, January 16, 1939) lists and classifies (pp. 11–15) some 38 separate financial agencies of the United States, comprising about 15,000 separate corporations or organizations, with assets of about $44,000,000,000.

take issue with the principle that tax immunity is reciprocal. We insist, however, that the loose concept of reciprocity cannot be wrenched from the cases in which it was used and made into a mechanical test by which to determine tax immunity or liability. The reciprocity can take form only under the Constitution, and its operation must be shaped by the differences which the Constitution sets up between the States and the nation. See *Geery* v. *Minnesota Tax Commission,* 282 N. W. 673, 674.

Of the eighty-odd opinions on tax immunity since the decision in *Collector* v. *Day,* 11 Wall. 113, the term "reciprocal" has been used, so far as we have found, in only one opinion.[18] On the other hand, we recognize that many opinions speak of the tax immunity doctrine as applicable to *either* government,[19] or reason that the immunity relating to the one applies for the same reason to he other government.[20] This is explained, typically, by the doc-

[18] *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466, 471.

[19] *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *United States* v. *California*, 297 U. S. 175, 184; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128; *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291, 294; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 577; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389.

[20] *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 157; *Indian Motocycle Co.* v. *United States*, *supra*, 577, 579; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 521; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 527; *Snyder* v. *Bettman*, 190 U. S. 249, 254–255; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 584–586.

trine that the independence of the state governments in their spheres is equally important, and equally assured by the Constitution, as is the independence of the Federal Government.[21] We accordingly assume that petitioner's plea for a strictly "reciprocal" tax immunity is based upon the recognized doctrine which ensures "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system" (*Helvering* v. *Powers,* 293 U. S. 214, 225).

When the doctrine is phrased in this more accurate language, it offers much less support to the bold position of petitioners. The doctrine of tax immunity is fully reciprocal so far as it affords mutual protection to the state and national governments within their respective spheres. But this by no means is the equivalent of saying that a particular type of tax must necessarily and automatically be given the same treatment without consideration of whether it be imposed by the federal or by a state government. The federal government acts through the representatives of all the states, but it has no representative in the state legisla-

[21] *James* v. *Dravo Contracting Co., supra,* 150; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 400; *Indian Motocycle Co.* v. *United States, supra,* 575; *Educational Films Corp.* v. *Ward, supra,* 392; *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Metcalf & Eddy* v. *Mitchell, supra,* 523; *Ambrosini* v. *United States, supra,* 7; *Plummer* v. *Coler,* 178 U. S. 115, 118; *Pollock* v. *Farmers Loan & Trust Co., supra,* 584; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 31.

tures. Thus, by the very nature of our constitutional system, a federal tax cannot have the same threat to state activities that a state tax might be supposed to have with regard to federal activities. In consequence of this basic concept of a federated system, the framers of the Constitution provided in Article VI that the acts of Congress should be the supreme law of the land. This was, as Madison put it in the Convention, because "Experience had evinced a constant tendency in the States to encroach on the federal authority," and, again, because "The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest." [22] There was, accordingly, no dissent whatever in the Convention at the insertion of the supremacy clause.[23]

Petitioners' assertion that the necessary preservation of mutual independence means a mechanical reciprocity is contradicted by a century and a half of constitutional history and by numerous decisions of this Court.

First, it is well to recall some of the salient facts of our constitutional practice. There is no more reason to suppose a mechanical identity of taxing powers than of regulatory powers. Yet under its commerce power the United States may deal with the states and their instrumentalities as with pri-

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[22] Farrand, *Records of the Federal Convention*, I, 164; II, 27.

[23] *Ibid.*, II, 22.

vate persons. *Board of Trustees* v. *United States,* 289 U. S. 48; *United States* v. *California,* 297 U. S. 175; see *United States* v. *Village of Hubbard,* 266 U. S. 474; *New York* v. *United States,* 257 U. S. 591. The states, in the exercise of their police powers, have no comparable authority over the activities of the United States. *Tennessee* v. *Davis,* 100 U. S. 257; *In re Neagle,* 135 U. S. 1; *Ohio* v. *Thomas,* 173 U. S. 276; *Boske* v. *Comingore,* 177 U. S. 459; *Johnson* v. *Maryland,* 254 U. S. 51; *Arizona* v. *California,* 283 U. S. 423, 451–452. The states, of course, have no power either to control or to tax the banking institutions of the United States. But the converse does not obtain. *Veazie Bank* v. *Fenno,* 8 Wall. 533. The state judicial power does not extend to instrumentalities of the United States. *Knox Loan Association* v. *Phillips,* 300 U. S. 194, 202–203. But the federal bankruptcy power overrides conflicting state laws. *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 228; *New York* v. *Irving Trust Co.,* 288 U. S. 329, 333; compare *United States* v. *Bekins,* 304 U. S. 27.

More directly in point are the many decisions of this Court which flatly contradict petitioners' assumption that mutual independence means a precisely equivalent scope to the federal and state taxing powers.

In both the first and the latest of its tax immunity cases the Court has expressly recognized the different basis, and the contrast in dangers of

abuse, between the federal and the state taxing power. In *McCulloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall unequivocally rejected the contention that the taxing powers were on a precise parity. He said (pp. 435–436):

> It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part

> on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

The Court in *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, quoted this extract from *McCulloch* v. *Maryland,* and, in the light of 120 years of constitutional history, reaffirmed and amplified the reasoning of Chief Justice Marshall.[24] It said (p. 412):

> In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national

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[24] In a sense the discussion was dictum, for the Court said (p. 415):

"We need not stop to inquire how far, as indicated in *McCulloch* v. *Maryland, supra,* the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. * * *"

> instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.

Again, at a later point, this thought was repeated.[25] Finally the Court suggested that, in the case of a federal as opposed to a state instrumentality, the intention of the legislature may be controlling, for Congress might "curtail an immunity which might otherwise be implied * * * or enlarge it beyond the point where, Congress being silent, the Court would set its limits" (pp. 412–413).

The practical effect of the varying constitution of the national and state legislatures is well evidenced, as this Court noted in *Helvering* v. *Gerhardt, supra,* 417, in the fact that Congress has frequently waived the immunity relating to federal

[25] The Court said (p. 416): "the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other."

activities;[25a] we know of no comparable waiver by a state.

The opinions in the *McCulloch* and *Gerhardt* cases find ample support in the immunity cases which fill the books between 12 Wheaton and 304 United States. We have shown that the doctrine which denies tax immunity to proprietary or nonessential functions is inapplicable to federal instrumentalities (*supra,* pp. 18–26). A succeeding point develops the indisputable fact that every immunity case which was decided prior to *Collector* v. *Day,* in 1870, was based solely upon the supremacy clause of Article VI, and that none contained any hint of a reciprocal immunity (*infra,* pp. 52–54). Story entertained no doubt but that Congress could tax state instrumentalities although the states could not tax federal instrumentalities, *Constitution,* I, Sec. 1053.

Even since *Collector* v. *Day* was decided, numerous cases have recognized that the doctrine of immunity is grounded at least in part on the supremacy clause.[26] Equally significant is the fact that

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[25a] A number of such waivers are collected in the Brief for Respondent in *State Tax Commission* v. *Van Cott*, No. 491, this Term (p. 52–53).

[26] *Missouri* v. *Gehner*, 281 U. S. 313, 321; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 221; *Long* v. *Rockwood*, 277 U. S. 142, 147; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 613; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 117; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *South Carolina* v. *United States*, 199 U. S. 437, 451–452; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41.

many other cases have expressly recognized the power of Congress to create a tax immunity which would not be implied in its silence and have held the taxpayer liable because Congress had provided no immunity.[27] Still other cases have extended tax immunity, in part at least, in obedience to the Congressional provision.[28] None has ever suggested that these doctrines were applicable to state instrumentalities or to persons dealing with states.

The doctrine of tax immunity is, indeed, equally applicable to both the states and the nation, so far as it protects the independence of each within their respective spheres. But to argue that this means a precise equivalence in the scope of the taxing powers is to ignore the words of the Constitution, making the federal laws supreme, to disregard the basic differences between the representation in the national as compared to the local legislatures, and to avoid the teaching of numerous decisions of this Court. Petitioners' simple syllogism is that the tax liability of proprietary or nonessential activi-

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[27] *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *Trotter* v. *Tennessee*, 290 U. S. 354; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, 129; *Shaw* v. *Oil Corporation*, 276 U. S. 575, 578–579; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Goudy* v. *Meath*, 203 U. S. 146, 149–150; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 121, 125; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589, 592. See *infra*, pp. 126–131.

[28] *Lawrence* v. *Shaw*, 300 U. S. 245; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; see Justices Brandeis and Stone, concurring, *Miller* v. *Milwaukee*, 272 U. S. 713, 716.

ties of the states means a similar liability on the part of more or less comparable federal functions. It cannot be accepted by this Court without introducing a revolutionary concept into the doctrine of tax immunity and a catastrophic innovation into the constitutional history of the nation.

E. THE CORPORATE FORM OF THE HOME OWNERS' LOAN CORPORATION IS IMMATERIAL TO ITS STATUS AS A BRANCH OF THE UNITED STATES GOVERNMENT

Petitioners do not seem to argue that the status of the Home Owners' Loan Corporation is altered by the fact that it is a separate corporation (though see Br. 18). It is plain that no such proposition could be maintained.

The Home Owners' Loan Corporation was created by the Federal Home Loan Bank Board pursuant to Section 4 of the Home Owners' Loan Act of 1933.[29] It is declared to be an instrumentality of the United States. (Subd. (a).) Its entire capital stock was subscribed by the Secretary of the Treasury. (Subd. (b).) Its bonds are guaranteed as to principal and interest by the United States. (Subd. (c).) For a period of three years it could exchange its bonds for mortgages on urban homes, the mortgages to be amortized within a period of 15 years and to bear in-

[29] C. 64, 48 Stat. 128, as amended, Act of April 27, 1934, c. 168, 48 Stat. 643; Act of June 27, 1934, Secs. 402, 506, c. 847, 48 Stat. 1246; Act of May 28, 1935, Secs. 11, 17, c. 150, 49 Stat. 293.

terest not to exceed 5 per cent. (Subd. (d).) It could also make cash loans secured by a first mortgage. (Subd. (e).) Any surplus after liquidation of the Corporation is to be paid into the Treasury. (Subd. (k).) The Federal Reserve Banks may purchase Corporation bonds, rediscount notes secured by these bonds, and serve as fiscal agents of the Corporation.[30] The Corporation is authorized to purchase Federal Home Loan Bank bonds [31] and shares of federal savings and loan association,[32] and was directed to subscribe to the entire capital stock ($100,000,000) of the Federal Savings and Loan Insurance Corporation.[33]

The activities of the H. O. L. C. are plainly those of the United States, and "this is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account". *Clallam County* v. *United States,* 263 U. S. 341, 345. It is settled beyond question that the functions of the United States which are carried on through corporations have, unless waived by Congress, expressly or by implication, every constitutional immunity which attaches to those directly undertaken by the ordinary departments of the Government. See *McCulloch* v. *Maryland,* 4 Wheat, 316, 421–422; *Smith* v. *Kansas City*

[30] Sec. 4 of Act of April 27, 1934, *supra*, note 29.

[31] Sec. 9 of Act of April 27, 1934; Sec. 17 of Act of May 28, 1935, *supra*, note 29.

[32] Sec. 17 of Act of May 28, 1935, *supra*, note 29.

[33] Sec. 402 (b) of Act of June 27, 1934, *supra*, note 29.

Title Co., 255 U. S. 180, 208; *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 408.

This argument is developed in considerable detail, with respect to the Reconstruction Finance Corporation and Regional Agricultural Credit Corporation in *State Tax Commission* v. *Van Cott,* No. 491, this Term (pp. 25–40). Except for differences of detail, we think it equally applicable here and accordingly refer the Court to that brief if a more elaborate discussion be desired.

F. THE CONSTITUTIONALITY OF THE HOME OWNERS' LOAN CORPORATION IS NOT UNDER QUESTION HERE

So long, then, as the Home Owners' Loan Corporation is a constitutional exercise of the powers delegated to Congress, there can be no thought that its activities are proprietary or nonessential.

Petitioners do not challenge the constitutionality of the Home Owners' Loan Corporation.[34] Nor, in view of the recognition of its validity by the New York legislature,[35] would they have authority

[34] This question was raised or suggested in the specification of errors of their petition (p. 10) although it was not discussed in the accompanying brief. This specification of error has been abandoned in the brief on the merits (p. 5).

[35] L. 1934, c. 115, amending Sec. 278 of c. 50 of the Consolidated Laws provided that trustees, executors, administrators, banks, insurance companies, conservators, liquidators, and domestic corporations might at any time without order of court or other authority exchange mortgages for H. O. L. C. bonds, to be held "as authorized and lawful investments for any and all purposes."

to do so. And, apart from their absence of authority, they show no injury sufficient to give them standing to challenge the validity of the Home Owners' Loan Corporation.[36]

Since the constitutionality of the H. O. L. C. has not and cannot be challenged in this proceeding, it follows that it must be taken to function in exercise of the powers granted to Congress[37] and cannot be said to be proprietary or nonessential in their nature.

III

THE GOVERNMENT OFFICER OR EMPLOYEE HAS NO CONSTITUTIONAL IMMUNITY AGAINST THE INCLUSION OF HIS SALARY IN THE BASIS OF A NET INCOME TAX

We have shown that the Home Owners' Loan Corporation is a branch of the United States Government, and that its operations have the same constitutional protection against state action that those of any of the regular departments have. The question, then, is whether an employee of the United States is exempt from a state income tax imposed on his salary.

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[36] The loss in tax revenues, due to any immunity of the relator, would not arise from the operations of the H. O. L. C. but from the supposed attributes attaching to one employed by the United States. *Kay* v. *United States*, 303 U. S. 1, 6–7, 8, seems to settle that, constitutional or not, the H. O. L. C. is a part of the Government.

[37] As set out at length in the brief for the respondent in *Kay* v. *United States*, No. 61, October Term, 1937, pp. 64–102, the H. O. L. C. activities are an exercise of the fiscal and general welfare powers granted to Congress.

Whether there is such an exemption may, in one view, be largely a question of Congressional intention. See *Helvering* v. *Gerhardt,* 304 U. S. 405, 411–412. There is undoubted power in Congress to waive any immunity which could otherwise be claimed by an officer or employee of the United States.[38] Congress also has power to extend immunity to those who deal with the United States or its instrumentalities in cases where they would otherwise be taxable (*supra,* p. 35).

But here Congress has not acted either to exempt the officers and employees of the United States from state taxation or to make them liable. In the silence of Congress, the question reduces itself to the force of the Constitution alone.[39] We submit that the implications of the Constitution do not carry to the point that the salary paid by the United States to its officers and employees is ex-

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[38] *Van Allen* v. *The Assessors*, 3 Wall. 573, 583, 585; *People* v. *Weaver*, 100 U. S. 539, 543; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 525–526; *British-American Co.* v. *Board*, 299 U. S. 159; *Helvering* v. *Gerhardt*, *supra*, 417; cf. *United States* v. *Bekins*, 304 U. S. 27, 52.

[39] A later section discusses whether the silence of Congress can be construed to mean either an intention that the officer or employee should be exempt or an intention that he should be taxable (*infra*, pp. 121–134). Since this speculation as to the interpretation of Congressional silence requires a prior decision as to the force of the Constitution alone, the discussion must necessarily be postponed.

empt from a nondiscriminatory state tax upon the net income received by its citizens. We shall set out at length the reasons which we think compel this conclusion.

A. THE CASES WHICH INDICATE THAT THE OFFICER OR EMPLOYEE IS EXEMPT

In four cases the Court has held that a government officer is exempt from income taxation on his salary. No decision of this Court has held an employee of either the federal or the state governments to be exempt from income taxation on his salary. In its latest decision in this field the Court seems to have been careful to point out that the taxpayers were employees rather than officers. *Helvering* v. *Gerhardt,* 304 U. S. 405, 410, 415, 424. While we can see no reason why there should be a difference in result between officers and employees (see *infra,* pp. 64–65), it may be that the Court will feel the two cases not to be on the same footing. If this view were adopted, our argument would be contradicted by no decision of the Court, as the relator is plainly an employee rather than an officer of the Home Owners' Loan Corporation.

Since, however, we are unable to find any satisfactory grounds upon which to distinguish the tax liability of the employee and the officer, we shall proceed upon the assumption that the four cases dealing with officers are equally applicable to employees. Three of these afford no obstacle to our

position here; the fourth cannot satisfactorily be distinguished.

Dobbins v. *Commissioners of Erie County,* 16 Pet. 435, held a state tax invalid as applied to a federal officer. The statute directed the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom" (p. 445). The tax was not strictly an income tax, although this factor was supposed to enter into the discretion of the assessors; the statute was in truth a tax upon an office, to be roughly measured by income.[40] While the practical effect might be much the same as an income tax, and while the Court viewed the emoluments rather than the office as taxable, the fact remains that the tax was in terms directed at a plainly exempt subject, an office of the United States. *See Helvering* v. *Gerhardt,* 303 U. S. 405, 413. The statute, moreover, had a flavor, at least, of discrimination, in that the income from rents and investments was not taxed.

Two later decisions may briefly be disposed of. In *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, the Court held that a state could not constitutionally tax the salary paid an officer of the Panama Railroad Company. None of the parties questioned the immunity of an officer of the United States, and the only question considered was

[40] The statute (Laws 1833–1834, Act No. 232, Sec. 4), included the offices under the head of "the following real and personal property."

whether the officer of this Government-owned corporation was entitled to the immunity supposed to attach to an officer of the United States. Much the same comment applies to *Brush* v. *Commissioner,* 300 U. S. 352, where the Court held the salary of a New York City water engineer exempt from the Federal income tax. That decision, in addition, has since been confined to a holding under a Treasury Regulation which is no longer in force. *Helvering* v. *Gerhardt,* 304 U. S. 405, 422–423.

However, in *Collector* v. *Day,* 11 Wall. 113, decided in 1870, the Court held a nondiscriminatory federal tax on net income to be invalid as applied to the salary of a state judge. That decision is contrary to our position here, since it would follow *a fortiori* that a state tax which included a federal salary would be invalid. *Collector* v. *Day* has six times been cited by this Court for the proposition that the compensation of a government officer or employee is immune from an income tax imposed by the other government.[41] But, other than the

[41] *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 177–178; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 484; *South Carolina* v. *United States,* 199 U. S. 437, 453; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158; *Evans* v. *Gore,* 253 U. S. 245, 255; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 521. The decision was recognized but not necessarily approved in *Helvering* v. *Gerhardt,* 304 U. S. 405, 414–415, 417, 424.

The decision has been cited for more general propositions in eleven cases. *Plummer* v. *Coler,* 178 U. S. 115, 118; *Ambrosini* v. *United States,* 187 U. S. 1, 7; *Willcuts* v. *Bunn,*

two cases discussed above, it has been followed in no other decision of this Court.[42] See *Helvering* v. *Gerhardt,* 304 U. S. 405, 422.

Our argument accordingly will be directed to *Collector* v. *Day.* We respectfully submit that this decision: (1) was an unwarranted extension of the doctrine established in *McCulloch* v. *Maryland,* 4 Wheat. 316; (2) cannot be reconciled with the subsequent decisions of this Court; (3) is supported by no practical justification; (4) proceeded from premises which have since been rejected; (5) can be supported by no other reason which this Court has advanced for a decision of immunity; (6) is condemned by the reasons the Court has announced in denying unfounded claims for tax immunity; and (7) established a rule which has first been adopted and then found unworkable by other federated governments having closely comparable problems.

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282 U. S. 216, 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 392; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 400; *Board of Trustees* v. *United States,* 289 U. S. 48, 59; *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466, 471; *Ohio* v. *Helvering,* 292 U. S. 360, 368; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 294; *Brush* v. *Commissioner,* 300 U. S. 352, 364.

[42] *Collector* v. *Day* has, of course, been followed in a large number of decisions of the lower federal courts and of the state courts. In a field so voluminous and so shifting as the tax immunity of private persons who have business relations with a government, we feel that no useful purpose would be served by examination of the decisions of courts of inferior authority.

B. THE DECISION IN *COLLECTOR* v. *DAY*

Although *Collector* v. *Day* has been narrowly confined, it has never been overruled in the 69 years which have followed its decision. It seems well, therefore, that in asking its reconsideration we make our arguments on a broad front, even at the cost of digression from the particular case before the Court. For example, even though this case involves a state tax on a federal employee, the authority of *Collector* v. *Day* cannot properly be gauged unless it be noted that it made a sharp and unwarranted departure from the federal supremacy basis of the earlier decisions.

1. *The Constitutional Background.*—Since the Articles of Confederation did not provide a power of taxation for the central government, the problem as to the scope of the national taxing power did not arise. However, the records show that on at least one occasion the Continental Congress was faced by the problem of discriminatory state taxation of the compensation paid by the Congress to its officers.[43] New Jersey in 1779 imposed a specific tax of £1,000 to £10,000 (in the discretion of the assessors) upon the Quartermaster General and the two Assistant Quartermasters General in the Continental Army.[44]

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[43] The legislation and the proceedings in the Congress were called to our attention through the courtesy of Mr. Irving Brant.

[44] 14 Journ. Cont. Cong. 931; 15 *id.* 1198; see 10 *id.* 210.

The heated and frequent protests[45] of the taxpayers, thus singled out for a special tax, produced only suggestions that they place themselves on the mercy of New Jersey. Three reports of special committees,[46] favoring nondiscriminatory taxation but condemning this tax and recommending that New Jersey be requested to repeal it, seem not to have been acted on.[47]

Thus, the problems of intergovernmental tax immunity were known to some at least of the framers of the Federal Constitution.[48] Yet, there was no provision for immunity of persons who deal with the Federal Government or with the States. Indeed, in Section 8 of Article I, the Constitution provided an unqualified power in Congress "to lay and collect Taxes," and in Article VI declared that the laws of the United States "shall be the supreme Law of the Land." Nothing in the debates in the Constitutional Convention or in the ratifying con-

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[45] June 18, 1779, 14 Journ. Cont. Cong. 744; June 24, 1779, 14 *id.* 787; July 7, 1779, 14 *id.* 807; Oct. 20, 1779, 15 *id.* 1198.

[46] Report of June 28, 1779, 14 Journ. Cont. Cong. 779–780; Report of July 8, 1779, 14 *id.* 807–808; Report of August 6, 1779, 14 *id.* 930–933.

[47] A motion to refer to committee the last letter of Charles Petit, Assistant Quartermaster General, stating that he had been called upon to pay £1,000 tax, was defeated by a vote of 7 states to 4. 15 Journ. Cont. Cong. 1199.

[48] Three of the signers of the Constitution (John Langdon, Roger Sherman, and John Dickinson), as members of the Congress, also voted on the motion to refer the letter of Charles Petit (footnote 47, *supra*) to committee, less than eight years before. 15 Journ. Cont. Cong. 1199.

ventions gives support to any implied immunity from the operation of the federal taxing power. On the contrary, the debates in the ratifying conventions [49] are filled with statements (directed, of course, to other issues) that the power of Congress to tax was unlimited.[50]

2. *Origin of the Doctrine: Discriminatory Taxation.*—Whatever the silence of the Constitution, the Court by 1819 found it necessary to create a doctrine of an implied intergovernmental tax immunity. This was done in *McCulloch* v. *Maryland,* 4 Wheat. 316. The doctrine was fashioned in order to protect an important federal policy from complete frustration at the hands of dissident states. The Bank of United States was established in 1816; within three years eight states had enacted laws designed to penalize the bank or to expel its branches from their territory.[51] The Maryland legislation provided that, if any bank established a branch office in the State without state authority,

[49] The debates in the federal convention are silent.

[50] See (references being to volume and page of Elliot's Debates, 2d ed.) Bodman (II, 60), Sedgwick (II, 60), and Choate (II, 79) of Massachusetts; Elsworth (II, 191) of Connecticut; Madison (III, 260) and Nicholas (III, 244–245) of Virginia; Williams (II, 330) and Smith (II, 337) of New York; McKean (II, 535–536) of Pennsylvania; Spencer (IV, 75) and Goudy (IV, 93) of North Carolina. See, also, Hamilton, *Report on Manufactures* (Hamilton's Works, III, 192); Message of President Monroe (Richardson, *Messages and Papers of the Presidents*, II, 165); Story, *Constitution*, I, Secs. 933–936, 942.

[51] Warren, *The Supreme Court*, I, 505–506.

it must issue notes only in specified denominations and only on stamped paper to be purchased at prescribed rates from the Treasurer of the Western Shore; alternatively, the branch office could gain exemption from these requirements by the payment in advance of $15,000 a year. In an action against the cashier, the State recovered judgment in the state court for the statutory penalties.

A distinguished array of counsel presented the cause to this Court. Webster, appearing for the bank, argued that if this tax were sustained there would be no limit to the interference with federal operations by state taxation save the discretion of the states, and that the power to tax necessarily involves the power to destroy (p. 327). Pinkney emphasized that a tax on the issuance of notes was a tax on the life of the Bank (p. 399). He further stated, without contradiction, that the tax was directed exclusively at the Bank of the United States; there was no other branch office in Maryland and state banks were forbidden to establish branches (p. 392).

None of the counsel questioned Webster's emphatic insistence that the Bank could be destroyed if the state were empowered to enact any tax.[52] All six of the counsel united in assuming that the one question for decision was whether or not the

[52] See Attorney General Wirt (p. 361) and Pinkney (p. 391), appearing for the Bank; and Hopkinson (pp. 347–348), Jones (p. 371), and Attorney General Martin (p. 376), counsel for Maryland.

states had a power which might completely frustrate the activity of a federal agency within their respective borders.

The Court unanimously declared the tax to be invalid. The major premise of the decision, not unnaturally, was that assumed by all of the counsel in argument. Speaking of the Bank, Chief Justice Marshall said "that the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied" (p. 427). Again, he stated "that the power to tax involves the power to destroy" is a proposition "not to be denied" (p. 431). With this assumption as to the nature of the power of taxation, it was necessary only to look at the constitutional provision that the laws of the United States should be supreme (p. 426) in order to conclude that no instrumentality of the Federal Government could be taxed by any of the states.[53]

Five years later, in *Osborn* v. *United States Bank,* 9 Wheat. 738, the Court again considered a tax designed to penalize the Bank of United States. Ohio, in 1819, had passed an act which recited that

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[53] The extent to which the discriminatory nature of the Maryland tax may have affected the decision of the Court is indicated by its dictum as to the permissible types of taxation. Chief Justice Marshall said (pp. 436–437):

"This opinion * * * does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

the Bank was doing business contrary to a state law and accordingly imposed an annual tax of $50,000 for each office maintained within the state; the legislature authorized the state officials to distrain upon the property of the Bank in order to collect the tax (p. 740). The decision in *McCulloch* v. *Maryland* was plain authority for the invalidity of the tax.

The next case which arose also presented a tax which contained elements of discrimination against the United States. The ordinance considered in *Weston* v. *City Council of Charleston,* 2 Pet. 449, imposed a tax of 25 cents on each $100 of the balance of bonds, notes, and insurance stock, which paid a net interest over the indebtedness of the taxpayer on which he paid interest. The statute specified that there was to be included the six and seven per cent issues of United States stock, but excepted South Carolina stock and the stock of South Carolina banks and of the Bank of the United States. Counsel for Weston stressed (p. 452) that the statute was not imposed upon all public funds but upon specified stock of the United States; counsel for Charleston admitted (p. 460) that the tax might well prejudice this particular stock in the market. Chief Justice Marshall, writing for a divided Court, held that the rule of *McCulloch* v. *Maryland* was equally applicable to this case. The tax necessarily affected the terms of and the power to make the loan (p. 468); since the power to tax was unlimited, if it existed at all (pp.

465–466), it could not constitutionally operate upon the borrowing power of the Federal Government (p. 464).

The doctrine of intergovernmental tax immunity was thus set on its course by these three decisions. In each of them the Court was protecting a federal function from a discriminatory tax either designed to make impossible its performance or which to some extent singled out transactions of the Federal Government for contribution to the tax revenues of the State. With the results in these cases none can quarrel; plainly not only the Federal Government but those who deal with it must be protected against discriminatory taxation by the states.

However, it must be admitted that the decisions were not placed on the ground of discrimination. The constitutional doctrine of the day dealt in terms of black and white: either there was complete power or no power whatever. Counsel for Maryland in *McCulloch* v. *Maryland* agreed with counsel for the Bank that if there were a power to tax it could be exercised in any manner; they offered only confidence in the "discretion and forbearance" of the states as protection for federal functions.[54] Chief Justice Marshall, in declaring a complete absence of power, said (*McCulloch* v. *Maryland, supra,* 430):

> We are not driven to the perplexing inquiry, so unfit for the judicial department,

[54] Jones, for Maryland, footnote 52, *supra.*

> what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.

Accordingly he rejected in forthright terms the suggestion of Justice Johnson, dissenting in *Weston* v. *City Council of Charleston,* that the tax should be sustained because "conceived in the spirit of fairness, with a view to revenue, and no masked attack upon the powers of the general government" (p. 472). The Chief Justice said (pp. 465–466):

> Can anything be more dangerous, or more injurious, than the admission of a principle, which authorizes every state and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power, at their discretion? If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe.

Given this reasoning, it is not surprising that the Court reached the same result in the subsequent cases where the element of discrimination was absent.

3. *Federal Supremacy; 1819–1870.*—The Court in *McCulloch* v. *Maryland* placed its decision squarely on the "great principle" that "the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and

laws of the respective states, and cannot be controlled by them" (p. 426). The opinion never deviates from the simple proposition that the states cannot tax federal instrumentalities because the Constitution declares the federal law, under which the instrumentality is created, to be supreme over the laws of the states. Thus, Chief Justice Marshall said (pp. 427, 432, 433):

> It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. * * *
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> The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. * * * The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

The plain implication of this reasoning is that the state instrumentalities have no corresponding immunity against federal taxation. The Court, as we have shown (*supra,* pp. 31–32), accepted the implication.

For the next fifty years the Court followed the course so clearly marked out in *McCulloch* v. *Maryland.* Prior to the Civil War the Court in three other cases held state taxes on federal instrumentalities to be invalid. *Osborn* v. *United States Bank, supra,* held invalid an Ohio tax directed at the Bank of the United States; *Weston* v. *City Council of Charleston, supra,* struck down a tax on specified issues of United States securities; and *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, held a federal officer exempt from a state tax, roughly measured by income, on his office. Each decision was expressly placed on the ground of the constitutional supremacy of the Federal Government.[55]

During and immediately after the Civil War the Court held invalid a number of state taxes on the capital or assets of corporations where no deduction was made for the United States securities held. The ground of these decisions, again, was the supremacy of the laws and instrumentalities of the United States over state taxing statutes.[56]

4. *Collector* v. *Day.*—Prior to 1870 the doctrine of tax immunity rested upon unassailable grounds. The Federal Constitution, plainly enough, contemplated independence between the central and the local governments. That independence was incom-

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[55] 9 Wheat. at 868; 2 Pet. 466–468; 16 Pet. at 447–450.

[56] *Bank of Commerce* v. *New York City,* 2 Black 620, 632–634; *Bank Tax Case,* 2 Wall. 200; *The Banks* v. *The Mayor,* 7 Wall. 16, 25; *Bank* v. *Supervisors,* 7 Wall. 26.

patible with any tax levy by the one government upon the other. Taxes are compulsory exactions from a subject and the power to tax the other government itself may well be said to be forbidden by necessary implication. The independence of the national and state governments was equally incompatible with discriminatory taxation by the one government of persons who dealt with the other. Once a power to discriminate were conceded, the agencies of both the national and the local governments would truly be forced to look only to the "discretion and forbearance"[57] of the other. To this extent an immunity from taxation may fairly be said to be implied from the general structure of the Constitution.

The immunity accorded federal officers and bondholders from nondiscriminatory state taxation upon the office or the bonds did not rest upon the implications of the Constitution. It was, instead, placed squarely on Article VI. The persons dealing with the United States were engaged in a transaction entered into in exercise of a federal function. Since this function was supreme over state laws, the transaction could no more be taxed, in the absence of Congressional consent,[58] than could the

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[57] Jones, for Maryland, in *McCulloch* v. *Maryland*, *supra*, 371.

[58] Under many circumstances, of course, the silence of Congress is to be construed as a consent to the tax. In the first half of the 19th century, when men were not accustomed to viewing governmental powers in terms of degrees, the si-

United States itself. The economic burden of the tax, the immediacy of its impact on the federal treasury, or its nondiscriminatory nature, is each irrelevant to the fundamental lack of power of a state taxing statute to reach an activity declared by the Constitution itself to be supreme.

The doctrine of intergovernmental tax immunity as it stood in 1870 was, accordingly, built on sound foundations. Its principles were intelligible and, indeed, obviously true. Its rules were simple and capable of almost automatic application. But in that year this Court decided *Collector* v. *Day,* 11 Wall. 113.

Day was judge of the Court of Probate and Insolvency for the County of Barnstable, Massachusetts. He was assessed, under the Civil War income tax, upon his salary, paid out of the State Treasury.[59] The tax, in the amount of $16.50 for 1866 and $45 for 1867, was paid under protest. This Court held the collection illegal, Justice Bradley dissenting and Chief Justice Chase not sitting.

The majority opinion, by Justice Nelson, followed a simple syllogism: Its major premise was the observations in the earlier cases, that the power

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lence of Congress most probably would mean prohibition. Today, when the spreading effect of any governmental act is more explicitly recognized, the silence of Congress would indicate a consent to taxation of private persons which did not interfere with the performance of governmental functions. See *infra,* pp. 121–134.

[59] No. 329, December Term, 1870, R. 5.

to tax involves the power to destroy and might wholly defeat the operations of government (pp. 122–124). The minor premise was that the state governments had the same independence from the national government that the latter had from the states (pp. 124–126). From this it followed that, just as a federal office had been held immune from state taxation in *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, so the salary of a state officer was immune from federal taxation.

Neither premise of the syllogism was sound, and each was contradicted by the prior decisions of this Court.

First, the power of federal taxation does not involve the power to destroy the state governments with whom the taxpayers might be connected. We need not develop, at this point, the proposition that no nondiscriminatory tax on a private person can threaten a destructive interference with the operations of government.[60] For it is plain that each of the preceding cases followed the understanding of Chief Justice Marshall that any danger latent in the power of a state to tax those who deal with the Federal Government consists in the fact that the tax is imposed by an external government, and is not laid upon the constituents of the legislators (*supra,* pp. 31–33).

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[60] Such taxes had been held invalid, because of federal supremacy, when imposed by the states. See *supra*, p. 54.

So far as the second premise of the decision is concerned, the states quite plainly cannot have the same independence from the exercise of federal powers that the national government has from the exercise of state powers. Article VI, by establishing the supremacy of laws of the United States, operates to produce this result in two ways: First, the federal tax is a law of the United States, and by the Constitution itself is made the supreme law of the land. Second, the immunity which had been established against state taxation was not a vague implication to be derived from a federated government but was riveted tightly to the supremacy clause. Every preceding opinion of the Court had placed the decision of immunity squarely and unequivocally upon federal supremacy (*supra,* pp. 52–54). Justice Nelson necessarily misapplied these decisions and recast the whole law of tax immunity when, by use of generalities as to mutual independence, he completely escaped the force of Article VI.

In addition to the affirmative argument, the opinion in *Collector* v. *Day* contains two rebuttal arguments. Each, so far as it meets the issue it professes to raise, is unsound.

Justice Nelson offered two escapes from the supremacy clause. The first (p. 126) simply begged the question by the statement that the two governments were upon an equality. The second (pp. 126–127) was more intricate, and rested on the proposition that there was no federal supremacy

over the states with respect to "an original inherent power never parted with." So far as this has meaning, it is that the laws of the United States are not supreme when they conflict with the state laws or functions undertaken under the powers reserved to the states, and thus makes the Constitution stand for *state* supremacy.

Justice Nelson, finally, found *Veazie Bank* v. *Fenno,* 8 Wall. 533, strong support for the proposition that the power to tax involves the power to destroy, but no authority for federal supremacy in the field of the reserved rights of the states (pp. 127–128). The tax in the *Veazie Bank* case was highly discriminatory against state banks and might not have been sustained under the taxing power alone.[61] However this may be, the case was unmistakable authority for federal supremacy. As Justice Nelson himself points out in *Collector* v. *Day,* the power to authorize banks to issue notes "had been exercised by the States since the foundation of the government" (p. 128).

The dissenting opinion of Justice Bradley has, we submit, far the better of the case. He stayed close to the reasons for tax immunity which had been developed during the preceding half century, and said (pp. 128–129):

> the general government has the same power of taxing the income of officers of the State

[61] The opinion, however, emphasizes the taxing power more than the currency power, which was advanced as the second ground of decision.

> governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. * * * The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. * * *

The remainder of the dissenting opinion (p. 129) forecast with distressing accuracy the experience of the coming years:

> In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. * * * How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. * * *

We submit, therefore, that *Collector* v. *Day* was based on a misunderstanding of the prior law of

tax immunity, that it was not an application of the earlier cases but a contradiction of their results and a reversal of their reasoning. This would perhaps not be a serious indictment if the result had been sound. But instead it stood in flat opposition to Article VI of the Constitution and inaugurated confusion and contradiction which, we believe, have not been equalled in any field of constitutional law.

The tax immunity decisions of this Court for the succeeding sixty years have, in general, been an effort to restrict the implications of *Collector* v. *Day* to reasonable bounds. The result has been litigation in immense volume, with each new case, so long as *Collector* v. *Day* stood unreversed, contributing as much to the uncertainty as to the clarification of the law. We think that the subsequent decisions of this Court cannot be reconciled with *Collector* v. *Day* and have expressly rejected both the reasons advanced in that opinion for the decision and any other reason which has elsewhere been advanced to support such a result. We feel justified, therefore, in asking that the law be clarified and that the doctrine of tax immunity expressly be placed upon the sound basis which it had prior to *Collector* v. *Day* and to which it has in fact been returned by the more recent decisions of this Court.

C. *COLLECTOR* v. *DAY* CANNOT BE RECONCILED WITH THE SUBSEQUENT DECISIONS OF THIS COURT

Our position goes farther than the bare proposition that *Collector* v. *Day* was wrongly decided in

1870. The decision, in addition, seems to us to be irreconcilable with the subsequent decisions of this Court in indistinguishable or closely analogous fields.

1. *The State Employee.*—In *Helvering* v. *Gerhardt,* 304 U. S. 405, the Court seems finally to have decided that the employees, as contrasted with the officers, of state and local governments can claim no immunity upon federal taxation of their salaries. The taxpayers there were, respectively, a construction engineer and assistant general managers of the Port of New York Authority. The Court held their salaries taxable under the federal income tax laws. The opinion proceeded on a broad front. The federal, in contrast to the state, taxing power is supreme; moreover, there is little need for constitutional limitation, since Congress is subject to self-restraint, in that it taxes its own constituents (pp. 412, 416). By granting immunity "beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers" (p. 416). While the state might possibly be affected by the tax,[62] "the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without

[62] "In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself."

affording any corresponding tangible protection to the state government" (p. 420). The taxpayers are citizens of the United States, and bound to contribute to its support (p. 420). Even if the states should have to raise their salaries, the tax "does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states" (p. 420). To insure its continued existence, "it is not ordinarily necessary to confer on the state to a competitive advantage over private persons" (p 421)

The decision seems fully applicable to all employees of the states and their political subdivisions. While the taxpayers there were not, in the strictest sense, employed by the State itself, this did not seem to influence the decision. Indeed, the entire discussion in the opinion, apart from the introductory statement of facts, contains only one reference to the fact that the taxpayers were employed, not by a state but by the Port of New York Authority. This reference follows the distinction of *Brush* v. *Commissioner,* 300 U. S. 352, and its limitation, on the ground of the Treasury Regulation then in force (p. 423). The fact that the taxpayers were not, strictly, employees of the state was used merely to show that they would have been taxable even under the Regulations to which the *Brush* case was confined.[63] The affirmative reasoning of the Court is directed entirely to state employees generally.

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[63] The Court said (p. 423): "If the regulation be deemed to embrace the employees of a state owned corporation such as the Port Authority, it was unauthorized by the

Every reason, it will be noted, which is advanced by the Court to refuse immunity to the employee seems equally applicable to the officer. Allowing immunity to either an officer or an employee "is at the expense of the sovereign power of the nation to tax" (p. 416). In either case the tax is "collected not from a state treasury but from individual taxpayers" (p. 418). The tax on the state officer, equally with one on the employee, presents a situation where "the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state" (p. 420). Whether officers or employees, "The taxpayers enjoy the benefits and protection of the laws of the United States" and "are under a duty to support its government" (p. 420). In either case, "Even though, to some unascertainable extent," the states lose "the advantage of paying less than the standard rate," the tax "does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states" (p. 420).

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statute. But we think it plain that employees of the Port Authority are not employees of the state or a political subdivision of it within the meaning of the regulation as originally promulgated—an additional reason why the regulation, even before the 1938 amendment, was ineffectual to exempt the salaries here involved."

We can see no basis upon which to distinguish the taxability of the employee from that of the officer. Each performs his duties in the exercise of state functions. Each is necessary if the work of government is to go on. Each is paid out of the state treasury. The distinction between the officer and the employee, at the most, consists in the facts that the officer ordinarily fills a position created by statute, takes an oath of office, and has a title, while the employee will infrequently meet all of these requirements. But not one of these points of differentiation has relevance to the question of tax immunity. It is wholly immaterial whether the formula to describe an invalid tax is phrased in terms of economic burden on the state, interference with its employment contracts, or a tax imposed with respect to state payments. Each explanation of the immunity is as fully applicable to the employee as to the officer.

It cannot, of course, be said that the opinion of the Court in *Helvering* v. *Gerhardt* is as fully applicable to the federal officer or employee as it is to that of the state. The emphasis placed upon Article VI, upon the states' representation in Congress, and upon the restriction of immunity to activities essential to the preservation of the existence of the states, are inapplicable in the case of a federal officer or employee. But perhaps the major part of the opinion covers federal as well as state officers and employees. If exemption were granted, the

federal as well as the state employees would constitute a privileged class of taxpayers. The tax, in either case, has only a remote and speculative effect upon the public treasury. As the state employee enjoys the benefits of federal citizenship, so the federal employee enjoys those of state citizenship. It seems plain enough, therefore, that the opinion in *Helvering* v. *Gerhardt* is incompatible with any constitutional immunity from a net income tax, whether that of an officer or employee, and whether he serves the state or nation.

2. *Independent Contractors.*—In *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, the Court held that the United States could tax the net income of a partnership which arose from its services as consultant to states and municipalities in connection with water supply and sewage disposal systems. The opinion emphasized that the taxpayer was not a part of the governmental organization but an independent contractor (p. 524), that the tax was nondiscriminatory (p. 524), and that there was no reason to believe that the imposition of such a tax would occasion any substantial interference with the functions of the governments for which the taxpayer performed services (p. 525). This rule has since been followed without qualification. *General Construction Co.* v. *Fisher,* 295 U. S. 715; *Atkinson* v. *State Tax Commission,* 303 U. S. 20; cf. *Helvering* v. *Therrell,* 303 U. S. 218. And in *James* v. *Dravo Contracting Co.,* 302 U. S. 134, the scope of the contractor's immunity was still further nar-

rowed, so that the federal contractor was held liable to a state gross receipts tax.

There are, of course, differences between the contractor and the officer. Typically, the contractor will have other business than that done for the government, he will not be a part of the regular governmental organization, and his employment will be temporary only. But these differences are irrelevant to the claim of tax immunity. The work done for the government is no less an important governmental function because done by a contractor rather than an officer or employee. His compensation is, equally with the officers, paid from the public treasury.[64] The government fixes the terms of the contract with the contractor as fully as with the officer. In short, there is no distinction between the contractor and the officer which is relevant to the reasons for granting an immunity against taxation. See *Helvering* v. *Curren,* 90 F. (2d) 620 (C. C. A. 2d).

3. *Interstate Commerce and Export Cases.*—The protection of interstate and foreign commerce against burdensome taxation by the States[65] has

[64] Indeed, since the contractor ordinarily accepts employment on the basis of bids in a rather fluid market, any effect of the tax is much more apt to be felt by the treasury than in the case of salaries paid officers, whose alternatives are fewer and whose calculation are less precise (see *infra*, pp. 76–79).

[65] This protection rests on the implication drawn from the power expressly given Congress to regulate interstate commerce and would seem to rank at least as high as the implication drawn generally from the nature of a federated system.

generally been assumed to be wholly analogous to the protection offered government instrumentalities.[66] In *James* v. *Dravo Contracting Co.,* 320 U. S. 134, 158, the Court held that the immunity granted interstate commerce was stricter,[67] and upheld a gross-receipts tax on the government contractor, although such a tax would be invalid as applied to interstate commerce. From this it should follow, at the least, that if a tax will be upheld with respect to income derived in interstate commerce, then it will be upheld with respect to income derived from the government.

It is settled that a gross-receipts tax upon transactions in interstate commerce is invalid [68] unless it is such as to be incapable of substantial duplication by other states.[69] Yet the Court has sustained a tax on the net income realized from interstate commerce. The reasoning of the Court in *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329, seems equally applicable to the tax on the government officer:

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[66] Mr. Justice Roberts, dissenting in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 182, lists thirteen decisions where the principles have been applied interchangeably.

[67] Compare *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505.

[68] *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, No. 75, October Term, 1938, decided January 3, 1939.

[69] *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, 612–613.

> Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.

The *Oak Creek* decision has consistently been followed.[70]

A similar course has been taken with respect to the power of Congress to tax exports. Instead of the constitutional implication which is said to restrict federal taxes which affect state or local governments,[71] this field is governed by an express prohibition.[72] Yet it is settled that Congress may tax the net income realized in the business of exporting. The reasoning of the Court in *Peck & Co.* v. *Lowe,* 247 U. S. 165, 174–175, is illuminating:

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[70] *Shaffer* v. *Carter*, 252 U. S. 37; *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413.

[71] See *Helvering* v. *Gerhardt*, *supra*, 416; *Willcuts* v. *Bunn*, 282 U. S. 216, 231.

[72] "No Tax or Duty shall be laid on Articles exported from any State." Article I, Section 9.

> It [Revenue Act of 1913] is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. * * *

If the net income tax does not burden interstate commerce or exportation, because it is imposed not on the transaction but only on the taxpayer's entire net income after its receipt, it is difficult to see why the same tax may not be imposed with respect to net income derived from the salary paid a government officer.

4. *The Trend of Decision.*—When *Collector* v. *Day* was decided, every prior decision had been in favor of immunity rather than taxability. Once the Court overcame the hurdle presented by the federal supremacy basis of the prior decisions, a decision of immunity readily followed. But the succeeding years have brought a marked change in emphasis in the law of tax immunity. The Court has increasingly recognized that "in a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to

be passed on economically" (*Helvering* v. *Gerhardt, supra,* 416–417). The mere fact that the government may to some extent be affected no longer serves to invalidate a nondiscriminatory tax laid upon a private person.

Thus, the one who exploits lands under lease from the government can claim no immunity. He is subject to property taxes on the machinery and equipment used in the operations. *Taber* v. *Indian Territory Co.,* 300 U. S. 1. He is subject to property taxes on the ore produced, at least if the portion representing the government royalty has been separated. *Indian Territory Oil Co.* v. *Board,* 288 U. S. 325; see *Forbes* v. *Gracey,* 94 U. S. 762; *cf. Jaybird Mining Co.* v. *Weir,* 271 U. S. 609. Once he was immune from taxation on the net income derived from the operations. *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393. But at the last Term this Court overruled these decisions, and the lessee is now fully subject to net income tax. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.

So, too, the officer is subject to a tax upon his property, even though it consist of the salary paid him and deposited in a bank. *Dyer* v. *City of Melrose,* 215 U. S. 594. Licensees of the government, too, are able to claim no immunity from property taxes. *Susquehanna Co.* v. *Tax Commission* (*No. 1*), 283 U. S. 291. The licensee, at least when a patentee, was once held immune from taxation on

his income, *Long* v. *Rockwood,* 277 U. S. 142, but this decision was unanimously reversed after only four years of life. *Fox Film Corp.* v. *Doyal,* 286 U. S. 123. The state or federal government may tax the transfer by will of property to the other. *United States* v. *Perkins,* 163 U. S. 625; *Snyder* v. *Bettman,* 190 U. S. 249. The manufacture of goods may be taxed by the United States even though they are sold to the state after manufacture, *Liggett & Myers Co.* v. *United States,* 299 U. S. 383, as may the transportation of goods to the government purchaser, *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572.

These cases, selected from diverse fields, illustrate the growing pragmatism in the tax immunity decisions of this Court.[73] We find them difficult, if not impossible, to reconcile with *Collector* v. *Day,* where the Court held a nondiscriminatory tax on the income of a state officer to be invalid without any inquiry whatever into the effect of such a tax, if any, upon the operations of the state.

D. THERE IS NO PRACTICAL JUSTIFICATION FOR THE IMMUNITY

If the immunity of the officer or employee from nondiscriminatory income taxation is to be measured by the pragmatic standards which have re-

[73] We do not wish to suggest that there are no unreversed decisions of this Court which hold a private person immune from nondiscriminatory taxation. This circumstance, however, does not destroy the clarity of the general trend which we have sketched above.

cently come to guide decision, we submit that it must be found to be baseless.

1. *The Propriety that the Officer or Employee Pay the Tax.*—The man who accepts a government office or employment does not lose his citizenship of the state or of the United States. He does not become isolated from the numberless benefits which the state and federal governments afford their citizens. Almost every advantage which each government secures for its people serves the officers and employees of the other as fully as the private citizen. As this Court said of the employees whose claim for immunity was considered in *Helvering* v. *Gerhardt,* 304 U. S. 405, 420, "The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government * * *."

The purpose of taxation is to insure that persons benefited by government make a just contribution to its cost: "Taxes are what we pay for civilized society * * *." *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308, 313. And the chief advantage of the net income tax is that it insures a more equitable distribution of these costs than is likely to be the case with other taxes. *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 559–560; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 582; see *Welch* v. *Henry,* No. 13, October Term, 1938 (p. 7), decided November 21, 1938. The guiding principle of net income taxation is that the cost of government

is thereby distributed according to the ability of each citizen to pay. The complete immunity which is offered the government officer, able to pay the tax and receiving the benefits of living under the other government, comes close to being a travesty on the principles of income taxation. It can be supported, in the silence of Congress, only if there be clear showing that the safety and independence of the federal or state government depend upon granting this privileged status to their officers.

2. *The Government is not Threatened by Taxation of Its Officer.*—The income tax upon the salary of a government officer or employee is a tax which is directed not at the government but at him alone. He pays excise taxes upon his transactions, and direct taxes on his property as a matter of course. There would seem to be no reason why an income tax alone should be held incapable of reaching him. The only practical reason which has ever been suggested is that it reduces the compensation paid him by the government and thus makes it more costly for it to obtain its officers. This speculation is, we submit, wholly unfounded.

a. In the first place it is by no means an invariable rule that the amount of the government salary will be reflected in the income tax paid. The net income tax is not laid upon each bit of income as it is received by the officer, but instead "the tax is laid upon the net results of a bundle or aggregate of occupations and investments. * * * The

returns from his occupations 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." *Hale* v. *State Board,* 302 U. S. 95, 108. Until it is first ascertained that the officer does not have deductible losses, personal exemptions, charitable contributions, and the like, sufficient to offset the government salary, the question of a tax on the compensation paid by the government does not even arise. And when the tax base includes other income as well as numerous deductions, credits, and exemptions, only an arbitrary allocation will permit one to say what proportion of the tax is attributable to the salary paid by the state.

Perhaps an even more important consideration is that under a progressive income tax the exemption of the government salary operates in a variable and discriminatory fashion. The low salaried employee whose income does not exceed the personal exemptions and earned income credits derives no benefit whatever from the exemption. The officer or employee who has no independent income, but has salary large enough to be taxable receives a moderate bounty, the amount of the tax as applied to his salary. The officer or employee who has an independent income receives a much larger bounty, equivalent to that percentage of his salary

which is represented by the maximum surtax rates applicable to his income. If, for an extreme example, the office holder has an independent income so large as to reach into the surtax brackets of 50 percent, the tax exemption privilege amounts to one-half or more of his government salary.

From this, two conclusions may readily be drawn. It is, in the first place, most difficult to see that performance of the government functions requires that a privilege be extended its officers and employees which is so variable and so irrelevant to any rational ground for immunity as is this. In the second place, the extent of the privilege varies in precisely inverse correlation to its only possible justification. If the privilege of tax immunity in truth has any tendency to permit the government to obtain services at bargain rates, then it would operate upon those to whom the salary offered was a matter of nice calculation. But the very ones who profit most by the privilege are those with large independent incomes to whom the amount of the salary is unimportant.

b. But even in the case of the officer whose income tax can directly be traced to the compensation received from the government, and who has no independent income, it is most doubtful that his liability to tax would have any effect whatever upon the salary which the state must pay to obtain his services.

Such, indeed, is the teaching of the economists, who state (subject to qualifications not applicable

here) that the burden of a personal income tax cannot be shifted but must ordinarily be borne by the taxpayer alone.[74] It seems worth while to spell out the considerations which lead to this conclusion, even though they are so much matters of common knowledge that controversy over them would be difficult to imagine.

The employment contract is notorious among economists for the inexactitude with which its terms are formulated.[75] The amount of the wages or salary is only one of many factors weighed by the man who contemplates a given employment. Often it will be far outweighed by other considerations. The nature of the work, whether pleasant or tedious, and the comparative prestige value of the occupation will frequently be the predominant element of his choice. The proximity of the employment to a home, and the comparative presence or absence of congenial surroundings, may sometimes be controlling. Whether the employment may be expected to lead to more attractive positions and its security of tenure will as often as not outweigh the salary offered.

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[74] Seligman, *Income Tax*, VII Encyclopedia of Social Sciences, 626–638; Plehn, *Public Finance* (5th Ed.), p. 320; Buehler, *Public Finance*, p. 240; Lutz, *Public Finance* (2d Ed.), p. 336.

[75] Dickinson, *Compensating Industrial Effort* (1937), pp. 7–8; Douglas, *The Reality of Non-Commercial Incentives in Industrial Life*, c. V. of *The Trend of Economics* (1924); Fetter, *Economic Principles* (1915), p. 203; Ely and others, *Outlines of Economics* (5th Ed., 1930), p. 431.

These considerations ensure that even in the business world the employment contract is not fixed by "the higgling and bargaining of the market place."[76] They are present in magnified form in the case of the public officer. His position will commonly have some degree of prestige. He may view it as a useful stepping stone, in or out of public office. The work will frequently have more interest for him than would alternative positions in private enterprise. Often, as in the case of civil service positions, there will be an assurance of tenure which would not elsewhere be duplicated.

It seems plain enough, therefore, that the fractional diminution in compensation which might be thought to be found in the income tax would rarely be a factor of appreciable weight in the decision of the man who considers taking public office. We venture the statement that, in looking over our common experience, none can recall a man who took public office or employment because of a supposed immunity from the income tax. In some, who weight their decisions with more precision than do most men, the factor may have lurked among the many reasons which shaped the choice. But even in these cases it would require a preternaturally careful analyst to say that, absent the immunity, the decision would have been otherwise.

Unless the choice of the typical man considering public office is shaped by the prospect of tax im-

[76] Adam Smith, *The Wealth of Nations*, I, 27.

munity it can have no effect whatever on the government. Only so far as the best available candidates and applicants would refuse to serve because the salary, otherwise adequate, is too low when income taxation also is considered, will the government be under any compulsion or even inducement to raise salaries. If the officer will serve for a salary of $5,000, whether or not he must pay an income tax of $100, the government can have no concern with his liability to the tax.

c. We think that it is clear enough that the liability of the officer to income taxation will rarely, if ever, force the government to pay him a greater salary than if he were exempt. But, certainly, none will dispute that the effect upon the government is wholly speculative. The results of extending immunity are thus, on the one hand, to confer a certain and inequitable absolution to the federal or state officer from his duty to contribute to the costs of government in order, on the other hand, to offer an advantage to the other government which it is very unlikely ever to receive. The case falls well within the principle of *Willcuts* v. *Bunn,* 282 U. S. 216, 225, quoted and applied in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, 385, where the Court said the taxing power should not be crippled "where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government." In *Helvering* v. *Gerhardt, supra,*

the opinion is even more explicit. Speaking of the taxpayers there, and necessarily with equal application to all federal and state employees and officers, the Court said (p. 421):

> The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far.

d. But even if the compensation paid the government officer were certain to be reflected in his income tax, even if this were to make him more reluctant to take office, and even if the absence of tax immunity were certain to affect the public treasury, we are by no means persuaded that exemption should therefore be granted. If this were in truth the case, the effect would be to grant to the one government a bounty from the other, equivalent to laying the tax and refunding the proceeds to the employing government.[77]

As this Court has already said, in *Helvering* v. *Gerhardt, supra,* 421, "it is not ordinarily necessary to confer on the state a competitive advantage

[77] This procedure, it may be noted, would be much more efficient, and would produce much less inequitable dislocation of the tax system, than the present approach, which consists essentially of granting the exemption and hoping that some of its effects are felt by the employing government.

over private persons in carrying on the operations of its government" in order to protect "the continued existence of the state."

e. There remains only the fear, admittedly speculative, that the taxing government might impose an income tax so heavy that the other would be unable to fill its offices unless it could offer the additional bounty of tax immunity. But this fear is not only conjectural but is demonstrably unfounded.

No one doubts that a discriminatory tax would be forbidden by the implications of the Constitution. The question here relates only to a nondiscriminatory tax. It is inconceivable that either Congress or the states would impose a general income tax so high that persons would refuse to serve the state; by the same token it would be so high that they could no more profitably serve a private employer. Neither past history nor the direst prophecy of the future supposes that a representative legislature will tax the earned income of individuals at a prohibitive rate. If representation is not a sufficient protection against dangerous taxation, the whole theory of our government and national history must be recast.

E. THE REASONS ADVANCED FOR THE DECISION IN *COLLECTOR* v. *DAY* HAVE SUBSEQUENTLY BEEN REJECTED

The opinion in *Collector* v. *Day,* 11 Wall. 113, in addition to the argument that federal and state tax immunities were coextensive (discussed *supra,* pp.

26–36, 57–58), suggests three reasons why the implications of the Constitution forbade application of the income tax to the salary of a government officer. They are: (1) the power to tax involves the power to destroy (pp. 123, 124, 125, 127); (2) the tax represents an interference with the state function, in that case the administration of justice (pp. 122–123, 127); (3) the salary has the same immunity as its source, the office of judge (p. 123). Each of these reasons for holding a private person immune from a nondiscriminatory tax has been rejected in the subsequent decisions of this Court.

1. *The Power To Tax Is No Longer Thought To Involve the Power To Destroy.*—When *Collector* v. *Day* was decided the Court had several times repeatened Marshall's great dictum that the power to tax involves the power to destroy.[78] The subsequent decisions of the Court, notably during the first fifty years after the decision in *Collector* v. *Day,* have with some degree of consistency mentioned the premise that the tax upon the government instrumentality or on those who dealt with it involved the power to destroy it.[79] But measured

[78] *McCulloch* v. *Maryland*, 4 Wheat. 316, 427, 430, 431; *Weston* v. *City Council of Charleston*, 2 Pet. 449, 466; *Bank of Commerce* v. *New York City*, 2 Black 620; see also *Crandall* v. *Nevada*, 6 Wall. 35, 46.

[79] This statement has appeared in ten cases, only four of them subsequent to 1916. *United States* v. *Railroad Co.*, 17 Wall. 322, 327; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 155; *California* v. *Pacific Railroad*, 127 U. S. 1, 41; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *Williams* v. *Tal-*

against the subsequent development of constitutional history, the power to tax demonstrably does not involve the power to destroy.

A majority of the Court has never expressly rejected this doctrine. However, Justice Holmes in two dissenting opinions has taken direct issue with Chief Justice Marshall.[80] *Long* v. *Rockwood,* 277 U. S. 142, 150; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218. In the latter case he said (p. 223):

> In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court, which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates.

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ladega, 226 U. S. 404, 419; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522, 530; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 624, 628; *Missouri* v. *Gehner*, 281 U. S. 313, 321. See the dictum in *Home Insurance Co.* v. *New York*, 134 U. S. 594, 598, and Justice White, dissenting in *Snyder* v. *Bettman*, 190 U. S. 249, 259.

[80] In one or both of these opinions he has been joined by Justices Brandeis, Sutherland, and Stone.

The proposition that the power to tax is the power to destroy appears to be contradicted by half a hundred decisions of the Court. In 33 cases it has sustained taxes on persons who dealt with the Government which, if pressed to discriminatory and oppressive limits, might destroy the governmental function as fully as would the tax considered in *McCulloch* v. *Maryland*.[81] And in

[81] Property tax on contractor: *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Central Pacific Railroad* v. *California*, 162 U. S. 91; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362; *Choctaw O. & G. Railroad Co.* v. *Mackey*, 256 U. S. 531; property tax on employee: *Dyer* v. *City of Melrose*, 215 U. S. 594; property tax on lessee: *Thomas* v. *Gay*, 169 U. S. 264; *Wagoner* v. *Evans*, 170 U. S. 588; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325; *Taber* v. *Indian Territory Co.*, 300 U. S. 1; property tax on licensee: *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291; *Broad River Power Co.* v. *Query*, 288 U. S. 178; tax on sales or payments to contractor: *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319; *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466; *Tirrell* v. *Johnston* 293 U. S. 533; transportation tax, *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, or manufacturers' tax, *Liggett & Myers Co.* v. *United States*, 299 U. S. 383, on vendor; net income tax on contractor: *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *General Construction Co.* v. *Fisher*, 295 U. S. 715; *Atkinson* v. *State Tax Commission*, 303 U. S. 20; net income tax on employee, *Helvering* v. *Gerhardt*, 304 U. S. 405; net income tax on lessee: *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; net income tax on licensee: *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; gross receipts tax on contractor: *Alward* v. *Johnson*, 282 U. S.

17 other cases the Court has sustained taxes which might, if carried to similarly discriminatory and oppressive limits, serve to destroy an important or substantial field for operation of the governmental power.[82]

Moreover, the decisions of the Court have recognized that relatively simple distinction could be made between the power of taxation and that of destruction. In *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530, the Court sustained a tax upon the capital stock of a corporation considered

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509; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Mason Co.* v. *Tax Commission*, 302 U. S. 186; license tax on licensee: *Federal Compress Co.* v. *McLean*, 291 U. S. 17; property tax on Treasury check: *Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310.

[82] Tax on shares of corporations holding government bonds: *Van Allen* v. *The Assessors*, 3 Wall. 573; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113; tax on franchises of corporations holding government bonds or deposits: *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Manhattan Co.* v. *Blake*, 148 U. S. 412; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; cf. *Educational Films Corp.* v. *Ward*, 282 U. S. 379; estate or inheritance tax on legacies to the government: *United States* v. *Perkins*, 163 U. S. 625; *Snyder* v. *Bettman*, 190 U. S. 249; estate or inheritance tax on transfer of government bonds: *Plummer* v. *Coler*, 178 U. S. 115; *Greiner* v. *Lewellyn*, 258 U. S. 384; *Blodgett* v. *Silberman*, 277 U. S. 1; tax on profit from sale of government bonds: *Willcuts* v. *Bunn*, 282 U. S. 216; tax unreduced by interest charges for carrying government bonds: *Denman* v. *Slayton*, 282 U. S. 514.

a be a governmental agency; the tax was prorated according to miles of wire within the state, and the Court viewed it as one really on property. The Court, nonetheless, recognized that "the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there" (p. 548). The District Court had granted an injunction against the further prosecution of the company's business until the taxes had been paid. While sustaining the decision as to the taxes, the Court reversed the granting of the injunction. It said (p. 554):

> If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. * * *
>
> * * * we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery.

In *New Brunswick* v. *United States,* 276 U. S. 547, the Court considered the power of the State to impose property taxes upon real property formerly owned by the United States and sold to private persons; the Government had retained the title to

secure the unpaid balance of the purchase price. Since the purchasers were the equitable owners of the property, the tax was sustained. The Court also held the tax could be assessed against the full value of the lots, and could be enforced by sale. It said (p. 556) that—

> the City is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the [government] Corporation as security for the payment of the unpaid purchase money. * * *
>
> We conclude that, although the City should not be enjoined from collecting the taxes assessed to the purchasers by sales of their interests in the lots, as equitable owners, it should be enjoined from selling the lots for the collection of such taxes unless all rights, liens and interests in the lots, retained and held by the corporation as security for the unpaid purchase moneys, are expressly excluded from such sales, * * *

A similar doctrine obtains in the analogous field of interstate commerce, where nondiscriminatory state taxation is permissible, although prohibition of the transaction would be beyond state power, *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 513–514.

2. *The Tax Can No Longer Be Considered an Interference with the Government Function.*—It is not wholly clear whether the opinion in *Collector* v.

Day assigns an interference with the administration of justice by the State as a separate reason for exemption, relating to the actual taxes in issue, or whether it advances this reason as an alternative phrasing of the conjectured results, in terms of future and destructive taxes, of sustaining the power to tax. But, assuming it was thought that general, nondiscriminatory taxes were such as to interfere with the administration of justice, it is submitted that such a view cannot at this time be accepted by the Court.

In the first place, the federal income tax had no relation to the judicial process. Except so far as the Court felt that Judge Day could not properly decide the issues of his probate court with a mind troubled by thoughts of preparing and paying his personal tax returns, it seems impossible that it could have been feared that his tax liability would actually interfere with his conduct of litigation. It seems rather more probable that Justice Nelson meant that the tax threatened an interference with the contract of employment, or the incidents of the office. So viewed, this suggestion in the opinion in *Collector* v. *Day* finds some support in several other cases, in which a tax upon a private person has been said to represent an interference with the contract made by the government with the taxpayer.[83]

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[83] A property tax deemed to be upon government bonds, *Bank of Commerce* v. *New York City*, 2 Black 620, 633–634; *The Banks* v. *The Mayor*, 7 Wall. 16, 23–24; *Farmers Bank*

It is very hard to tell what is meant by the statement that the tax interferes with the contract. It plainly does not forbid the taxpayer to enter into or to execute the contract. It plainly does not regulate the terms of the contract or its performance. Its only interference seems to be any practical discouragement which the cost of the tax might have upon the taxpayer, with the result that his services might cost the government more. But this factor, as is shown in the next section, does not serve to make the tax an unconstitutional interference with the contract. The tax does no more than to subject the income of the taxpayer to the normal tax burdens, without any reference whatever to the fact that it originated in a transaction with the government.

The fallacy of the suggestion that the income tax is an interference with the contract of the government is well illustrated in *Choteau* v. *Burnet,* 283 U. S. 691. There the taxpayer was an Indian possessed of a certificate of competence; he derived income from the oil and gas leases made by the Secretary of the Interior for the benefit of the tribe. The Court sustained a federal income tax upon this income, and said (p. 697):

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v. *Minnesota*, 232 U. S. 516, 526; an income tax on government bonds, *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 586; a tax upon a government office, roughly measured by the salary paid, *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 448, 449, 450; and a tax upon sales to the government, *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 579.