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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*,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of JAMES B. O'KEEFE, *Respondent*.

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

BRIEF OF THE STATE OF MISSOURI
as Amicus Curiae

STATEMENT

There are thousands of persons in the State of Missouri who are employees of corporations or agencies created by the Government of the United States, including a substantial number of employees of the Home Owners' Loan Corporation. If this cause should be decided adversely to the State Tax Commission of New York, it will deprive the State of Missouri of very substantial revenues under its income tax law.

For several years the Attorney General of Missouri has concerned himself with the problem of the liability of employees of certain types of federal instrumentalities for Missouri in-

come taxes, and last year obtained an adjudication by the Supreme Court of Missouri that the income of a joint employee of the several units of the United States Farm Credit Administration is subject to Missouri income taxes. *State ex rel. Baumann v. Bowles*, 115 S. W. (2nd) 805 (1938) so that the income of employees of the units of the Farm Credit Administration and similar federal instrumentalities are now being subjected to Missouri income taxes. If this decision of the Supreme Court of Missouri does not correctly interpret the Constitution of the United States, the Missouri officials have no desire to subject these employees of federal instrumentalities to state income taxation, but if, as the Attorney General of Missouri believes, the decision of the Supreme Court of Missouri is a correct exposition of the Constitution of the United States, and if this Court declares it so to be, the State does desire to continue to collect these income taxes. Because of its vital interest in the subject-matter of the case now before the Court and because of its firm conviction that the income of these employees is subject to state taxation, the State of Missouri, as a friend of the Court, respectfully submits its views for the consideration of the Court.

SUMMARY OF ARGUMENT.

This Court has consistently said that the immunity of state instrumentalities from federal taxation is co-extensive with the immunity of federal instrumentalities from state taxation, and since the state immunity has been limited to certain governmental instrumentalities, the federal immunity should be equally so limited in order that the reciprocal nature of the immunity may be maintained.

Neither the purpose, the function, nor the facts of creation, ownership and control by the United States of the Home Owners' Loan Corporation, should exempt the income of its employees from non-discriminatory state income taxes. The Home Owners' Loan Corporation carries out no essential, usual, traditional, or strictly governmental function of the national government, and therefore the principle of *South*

Carolina v. *United States* should be applied, and even if its function could be so designated, under *Helvering* v. *Gerhardt*, a state income tax on an employee of the Corporation would impose such a remote and indirect burden on the national government as to compel rejection of the claim of immunity.

ARGUMENT.

INTRODUCTION.

The issue before the Court is entirely a question of constitutional law, to be answered by an interpretation of the Constitution of the United States as construed by this Court. The subject-matter arises out of our dual form of government, state and federal, and concerns the doctrine of the exemption of instrumentalities of one of the two governments from undue burdens by the other, whether in the form of taxation or otherwise. The real and in fact the only questions in the case are: First, whether the Home Owners' Loan Corporation is "such an instrumentality of the federal government as to be immune from state taxation,"[1] and second, "even though the function be thought important enough to demand immunity from a tax upon the state itself,"[2] if the fact that this tax is laid upon individuals makes the burden passed on to the government so speculative and uncertain as to forbid recognition of the immunity.

"The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an implied limitation stems from *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819)."[3] The principle was first applied to the income of a federal employee in the case of *Dobbins* v. *The Commissioners of Erie County*, 16 Pet. 435 (1842), and was applied there to exempt from state taxation the income of a captain of a United States revenue cutter.

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1. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 404 (1937).
2. *Helvering* v. *Gerhardt*, 304 U. S. 405, 420 (1938).
3. *Id.* p. 411.

It was not until fifty years after Marshall had announced the doctrine, that it was declared equally applicable to federal taxation or burdens on state instrumentalities. In the case of *The Collector* v. *Day*, 11 Wall. 113 (1870), it was held that a federal income tax could not be imposed on a state probate judge, "for like reasons" that a state income tax could not apply to a federal officer.

For the next thirty-five years the doctrine was applied with equal force to state and federal taxation on the instrumentalities of the other government, and the cases for that period can be examined in vain for any indication that the governments are not on a parity as to their rights to tax each other, or that the doctrine of immunity, at least as to excise taxes, has any limitations or qualifications. Then, in 1905, this Court handed down its decision in the case of *South Carolina* v. *United States*, 199 U. S. 437, announcing that the principle of immunity is subject to a limitation and protects only the essential or strictly governmental functions of a state, a distinction marking a division between these functions and instrumentalities and those of a commercial or proprietary nature.

The Court has never announced any modification of the doctrine of *South Carolina* v. *United States*, *supra*, and many times has approved it. Also many times since that decision has the Court said that the immunity of a state or its instrumentalities from taxation by the federal government is equal and reciprocal to the exemption of the federal government and its instrumentalities from taxation by the states, but no case has ever expressly stated that the doctrine of *South Carolina* v. *United States*, *supra*, applies to the United States and its instrumentalities.

Thus the scope of this brief will cover two inquiries: First, is the income of every person working for every instrumentality authorized by Act of Congress immune from state income taxes, or, stated differently, does the doctrine of *South Carolina* v. *United States*, *supra*, apply to federal instrumentalities; and second, is the income of an employee of the Home Owners' Loan Corporation exempt from New York income taxes?

I.

NOT ALL PERSONS WORKING FOR EVERY INSTRUMENTALITY CREATED BY ACT OF CONGRESS ARE IMMUNE FROM STATE INCOME TAXES.

If the principle of the immunity of instrumentalities of the United States from state taxation is equal and reciprocal to the immunity of state instrumentalities from federal taxation, then the cases defining and marking the limits of the immunity of instrumentalities of either government will also define the limits of the immunity of the instrumentalities of the other government. Therefore the first inquiry will be if the immunity has been declared to be equal and co-extensive.

A. This Court has said that the immunity is equal and reciprocal.

The first case squarely upholding the immunity of a state instrumentality from federal taxation was *The Collector* v. *Day*, 11 Wall. 113 (1870). The Court in that case said:

> "There is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation." 11 Wall. 127.

The Court considered that its decision was compelled by the earlier decision in *Dobbins* v. *The Commissioners of Erie County*, 16 Pet. 435 (1842), and after referring to that case as holding that the Constitution prohibited a state from taxing the income of an officer of the United States, said:

> "And we shall now proceed to show that, **upon the same construction of that instrument, and for like reasons,**[4] * * that government is prohibited from taxing the salary of the judicial officer of a State." 11 Wall. 124.

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[4]Unless otherwise indicated, the emphasis in all quotations in this brief is attributable to counsel.

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), the Court said:

> "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." 157 U. S. 584.

In *Ambrosini* v. *United States*, 187 U. S. 1 (1902), the Court said:

> "The general principle is that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government." 187 U. S. 7.

In *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926), Mr. Justice Stone made it very plain that the exemption is absolutely reciprocal:

> "The very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of a state government, **and in a similar manner** to limit the powers of the states to tax the instrumentalities of the federal government. * * *
>
> "Just what instrumentalities **of either a state** or **the federal government** are exempt from taxation by the other cannot be stated in terms of universal application, but this Court has repeatedly held that those agencies through which **either** government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. * * *
>
> "When, however, the question is approached from the other end of the scale, it is apparent that not every

person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance, but recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the state; and it rests on the conviction that **each** government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other." 269 U. S. 521-523.

In *Willcuts* v. *Bunn*, 282 U. S. 216 (1931), the Court said:

"The familiar aphorism is 'that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the general government.' " 282 U. S. 225.

In *Indian Motocycle Co.* v. *United States*, 283 U. S. 570 (1931), the Court said:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and

> operations whereby the states exert the governmental powers belonging to them are **equally exempt** from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. * * *" 283 U. S. 575.

and further:

> "* * * the governmental agencies and operations of the **states have the same immunity from Federal taxation that like agencies and operations of the United States have from taxation by the states.**" 283 U. S. 577.

This case involved a state exemption from federal taxation, and evidently the reason for the decision was the case of *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218 (1928), which only differed from the *Indian Motocycle* case in that it involved a federal immunity from state taxation.

The case of *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393 (1932), also was based squarely on the earlier decision of *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922), differing from that case only in the government claiming exemption, and the overruling of these cases in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938), does not impair their interdependency. Probably the decision in the *Coronado* case shows more than any quotation of language declaring the equality of the immunity, that the Court has considered that each government stands on exactly the same footing as to immunity of its instrumentalities from taxation by the other government, and that a decision holding an instrumentality of one government exempt from taxation by the other was, at least until eight months ago, of itself complete and adequate authority for the decision of a reciprocal case involving the same kind of an instrumentality. Mr. Justice McReynolds in *Burnet* v. *Coronado Oil & Gas Co.*, *supra*, goes so far as to say that the case is "indistinguishable" from *Gillespie* v. *Okla-*

homa, supra (285 U. S. 398), and quotes what has been quoted above from *Indian Motocycle Co.* v. *United States* as to the equality and reciprocity of the principle of exemption.

In *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128 (1932), Chief Justice Hughes referred to "the principle of the immunity from state taxation of instrumentalities of the Federal Government, and of **the corresponding immunity** of state instrumentalities from Federal taxation—essential to the maintenance of our dual system * * *", and in *United States* v. *California*, 297 U. S. 175 (1936), Mr. Justice Stone said:

> "That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, **and is equally a restriction on taxation by either of the instrumentalities of the other.** Its nature requires that it be so construed as to allow to **each** government reasonable scope for its taxing power, * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it." 297 U. S. 184.

These cases show that the principle of immunity of the instrumentalities of the federal government from state taxation does not differ in quality or extent from the corresponding immunity of state instrumentalities from federal taxation.

The development of the theory of immunity during the last two years has been an active one. In *New York ex rel. Rogers* v. *Graves, supra*, the doctrine was not re-examined, the Court noting its recent exposition in the *Indian Motocycle Co.* case, *supra*, with approval. In *Brush* v. *Commissioner*, 300 U. S. 352 (1937), there is no suggestion that the immunity is not co-extensive. In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937) doubt is cast equally on the validity of cases upholding claims of exemption from state and federal taxes, and in discussing *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926), designated as a "pivotal decision," the Chief Justice said:

> "The reasoning upon which that decision was based is controlling here. * * * * *
>
> "While the Metcalf Case was one of a federal tax, the reasoning and the practical criterion it adopts are clearly applicable to the case of a state tax upon earnings under a contract with the Federal Government." 302 U. S. 156-7,

and Mr. Justice Roberts, in his dissenting opinion, based a conclusion on the premise that "if, as the court has always held, the immunity is reciprocal * * *" (p. 182).

Helvering v. *Therrell*, 303 U. S. 218 (1938), *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362 (1938), and *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938), all involving federal taxes, bring the review up to May of 1938 with the reciprocal nature of the immunity presumably intact, when in *Helvering* v. *Gerhardt*, 304 U. S. 405, the Court, in a case not involving federal immunity from state taxation, offered, by way of a dictum in a footnote, the proposition that the immunity was not necessarily reciprocal, although expressly refraining from inquiry whether federal immunity rests on a different basis from state immunity, and whether, or to what degree, it is more extensive. 304 U. S. 411. Thus the only declaration of non-reciprocity to date is couched in exceedingly equivocal terms.

B. The limitation on the principle of immunity is equally applicable to the United States as to the States.

Under Point IA, *supra*, cases were cited to show that this Court has considered the principle of immunity as applied to state and federal instrumentalities as being reciprocal and coextensive. It has already been noted that since 1905 there has been a well-defined limitation or restriction on this principle of immunity, established by *South Carolina* v. *United States*, *supra*. This limitation has been well stated in *Indian Motocycle Co.* v. *United States:*

> "Of course, the reasons underlying the principle mark the limits of its range. Thus * * * it * * * has been held where a state departs from her usual governmental func-

> tions and 'engages in a business which is of a private nature' no immunity arises in respect of her own or her agents' operations in that business." 283 U. S 576.

It is true that the language just quoted sets out the immunity in terms of state immunity from federal taxation, but in that case the Court was dealing only with state immunity, and there is nothing in the language of the opinion, or in any opinion of this Court dealing with a state tax which counsel have discovered, which says that the same limitation does not apply to the immunity of federal instrumentalities, and such an inference cannot be drawn without running counter to the cases cited under Point IA above. If, then, the immunity is equal and reciprocal and applies with like force and to the same extent to state and federal governments, is not an argument that the federal immunity is unlimited but the state immunity limited to certain kinds of activities, contrary to all these cases just mentioned and in conflict with the often-expressed doctrine that the immunity is corresponding and equal? Although, as stated, no case squarely states that the principle of *South Carolina* v. *United States*, *supra*, applies to the United States, nonetheless that it does so apply is implicit in many decisions of this Court.

1. It is sometimes argued that the principle of *South Carolina* v. *United States* can from its nature only apply to state immunity from federal taxation and not to federal immunity from state taxation, because the United States is a government of enumerated powers, and, therefore, anything the United States Government does, must, of necessity, be governmental and therefore immune from state taxation; that the states have unlimited sovereignty except as it is curtailed by the United States Constitution, and therefore can engage in either private or governmental activities, whereas the United States, as a government of enumerated powers, has no unrestricted sovereignty and is confined to the exercise of governmental powers delegated to it by the Constitution. But this is only another way of saying that the principle of immunity from taxation is one thing and has certain limits as applied

to the states, and is another thing, unrestricted and without limits, as applied to the United States, and it can only be correct if the statements in all of the cases under Point IA above were ill-considered and incorrect. For example, when *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401 (1937), came before this Court, the Court had before it a case thirty years old, holding that the acquisition and establishment of the Panama Canal by the federal government was a valid exercise of constitutional powers, *Wilson* v. *Shaw*, 204 U. S. 24 (1907), and the opinion in the *Rogers* case shows that the Panama Railroad Company was acquired as a part of the original canal project. If the contention that the doctrine of *South Carolina* v. *United States* does not apply to the United States is correct, and that any constitutional federal enterprise must, of necessity, be governmental and therefore tax exempt, this Court could, in the *Rogers* case, have merely referred to *Wilson* v. *Shaw*, *supra*, and held that the enterprise having been held constitutional, it necessarily followed that it was a governmental instrumentality and exempt from state taxation. There seems to be no other possible explanation for the Court's unanimous opinion in the *Rogers* case but that the Court recognized that not all constitutional federal enterprises are necessarily tax exempt, and that the limitation on the principle of immunity established in *South Carolina* v. *United States* applies to the federal government as well as to the states.

The Court evidently found it necessary in the *Rogers* case to satisfy itself that the Panama Railroad Company was a necessary adjunct of a vital federal instrumentality created under the national defense and commerce powers in the Federal Constitution, before it was willing to hold the income of one of the Railroad Company's employees exempt from state taxation. An illustration of the same situation is found in *Federal Land Bank of St. Louis* v. *Priddy*, 295 U. S. 229 (1935), in which the Court analyzed at some length the relationship of the Federal Land Banks and Joint Stock Land Banks to the United States, when it had been held fifteen years before, in *Smith* v. *Kansas City Title & Trust Co.*,

255 U. S. 180 (1921), that the act creating the banks was constitutional. Here also the Court seemingly recognized that not every constitutional federal enterprise is withdrawn from state taxation, and that only those of an essential or strictly governmental character are so withdrawn.

Attention is also directed to a statement in *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209 (1936). The Court in that case was considering the Reconstruction Finance Corporation. Its decision turned entirely on the meaning of a federal statute which made it unnecessary for it to consider whether that corporation was such an essential federal instrumentality as to be exempt from state taxation, but the point was touched by the Court when it said:

> "We assume, **though without deciding even by indirection,** that within M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another." 297 U. S. 211.

Surely the Court, in choosing this language, carefully avoided any decision as to the essential governmental or non-governmental character of the Reconstruction Finance Corporation, and intentionally left open the question of the applicability of the doctrine of *South Carolina* v. *United States* to federal instrumentalities.

2. It is sometimes suggested, probably on the basis of some of Chief Justice Marshall's strongest Federalist opinions, that the United States is not precisely a dual sovereignty form of government, but that because the Constitution is the supreme law of the land, that where a conflict arises between state and federal sovereignty, it must always be resolved in favor of the federal government. Because that conception is so widespread, we pause for a moment to meet it.

Such an argument was advanced in the case of *The Collector* v. *Day*, *supra*, and answered by the Court as follows:

> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality". 11 Wall. 126.

As recently as *Brush* v. *Commissioner*, 300 U. S. 352 (1937), the principle of equality was enunciated:

> "So long as our present form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its sphere is independent of the states'." 300 U. S. 364.

No power of a government is more important to its independence and very existence than the taxing power:

> "The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." *Nicol* v. *Ames*, 173 U. S. 509, 515 (1899).

How can a state be independent if its taxing power is unduly curtailed? Of course it is curtailed by the principle of *M'Culloch* v. *Maryland*, but it should not be curtailed any more than that principle, as limited and modified in *South Carolina* v. *United States*, requires.

As the Chief Justice cautioned in *Willcuts* v. *Bunn*, 282 U. S. 216, 231 (1931) in referring to the principle of *M'Culloch* v. *Maryland:*

> "It must be remembered that we are dealing not with any express constitutional restriction, but only with an asserted implication."

Thus, if the principle of inter-governmental immunity from taxation is reciprocal, and this can only be true if the limi-

tation of *South Carolina* v. *United States* applies to the immunity of both governments, how can the conclusion be escaped, either logically or on the basis of the reasons behind the rule, that if the United States can tax state instrumentalities which are not essentially governmental, the states can also tax instrumentalities authorized by the United States which are likewise not essentially governmental?

3. Finally, this Court has held that the states can impose property or excise taxes on certain agencies and instrumentalities of the federal government. These cases can be divided into three classes:

(a) Corporations created by the United States to carry out essential governmental functions; (b) Corporations utilized by the United States to carry out essential governmental functions; and (c) Agencies licensed, chartered and supervised by the United States for the public benefit.

(a) Corporations created by the United States to carry out essential governmental functions.

In *Railroad Co.* v. *Peniston*, 18 Wall. 5 (1873) the Congress had created the Union Pacific Railroad Company for the purpose of transporting government messages and mail, and especially for the important war-time purpose of transporting troops and munitions. By its charter the United States was to have the prior right to the services of the company and was to receive a certain percentage of its earnings under certain conditions. Part of its land and capital were furnished by the federal government so that these purposes could be accomplished, and the United States given a lien on the railroad property for security. The Court said:

> "Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?" 18 Wall. 32.

The Court held that it was not so exempt and laid down the following principle which has never been repudiated:

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." 18 Wall. 36.

In *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 (1922), the defendant had been created by an Act of Congress and given very broad powers for mobilization and control of the United States Merchant Marine during the war. The Court held that this creation and the delegation of these powers did not so identify it with the United States as to require suit against the corporation to be brought in the Court of Claims. And compare *United States* v. *Strang*, 254 U. S. 491 (1921), involving the same government corporation.

(b) Corporations utilized by the United States to carry out essential governmental functions.

In *Thomson* v. *Pacific Railroad*, 9 Wall. 579 (1869), the Court had before it a state-chartered corporation having the same powers and under the same obligations as a federal agent, as the Union Pacific Railroad Company before the Court in *Railroad Co.* v. *Peniston*, *supra*, and the Court held that the fact that this state corporation was employed as a federal agency and instrumentality, could not exempt it from state taxation.

In *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375 (1904), the plaintiff's principal function was to service ships of the United States government free of charge, and for this purpose and under this arrangement the federal government deeded some of its property to the company under an arrangement whereby, in the event of default, the property should revert to the United States. The Court held

that under these circumstances a claim for immunity from state taxation could not be maintained. Compare *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466 (1934), where it was held that the plaintiff, which was employed in the building for the United States government of flood control levees, could not escape state taxation because the effect of a state sales tax on the United States government would be too remote to warrant immunity.

In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), it was held that the company was liable for a tax on the privilege of engaging in the business of contracting, based on gross receipts from the United States, for which it was constructing locks and dams in the navigable rivers of the United States.

(c) **Agencies licensed, chartered and supervised by the United States for the public benefit.**

In *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17 (1934), the plaintiff sought immunity from state taxation on the ground of its deriving its right to do business under a license granted by the United States, by which it was strictly regulated. The Court held that the principle of immunity could not be invoked. So also was the claim of immunity denied in the cases of *Broad River Power Co.* v. *Query*, 288 U. S. 178 (1933), involving a licensee of the Federal Power Commission, rigidly supervised by that body, and in *Susquehanna Power Co.* v. *State Tax Commission*, 283 U. S. 291 (1931), involving a licensee of the Federal Power Commission building a dam on the navigable waters of the United States.

These three classes of cases carry out the principle announced so clearly by the Chief Justice in *James* v. *Dravo Contracting Co.*, *supra*, that not every person employed by the United States to carry out a constitutional aim of that government can, by virtue of his connection with the government, claim an immunity from state taxation. These cases will be discussed in more detail under Point II. They show that creation by, charter or regulation by, or utilization as an agent by, the federal government, does not of itself confer comprehensive tax immunity, even though the power under

which the corporation is created and utilized be such a vital federal power as the war power dealt with in the *Peniston* case.

In concluding under Point I, counsel submit that there is a principle of immunity of certain instrumentalities of one government from taxation by the other; that the principle is corresponding and has the same scope and extent in its application on the one hand to state instrumentalities, and on the other hand to federal instrumentalities; that since the principle of immunity, as applied to state instrumentalities, only exempts from taxation essential governmental instrumentalities, a tax on which would be a direct and substantial burden on the state in exercising its essential governmental functions, so also the exemption from state taxation only applies to essential governmental instrumentalities of the United States, a state tax on which would unduly burden the essential governmental functions of the United States. There thus remains to be considered only the question of whether or not the Home Owners' Loan Corporation is such an essential governmental instrumentalitity of the United States that a state income tax on relator's salary derived from that corporation would unduly burden the Government of the United States in carrying out some strictly governmental function.

II.

THE INCOME OF AN EMPLOYEE OF THE HOME OWNERS' LOAN CORPORATION IS NOT EXEMPT FROM STATE INCOME TAXES.

A. The rule of immunity with its limitation defined.

It is easy enough to make a statement of the general rule of inter-governmental immunity from taxation. But it is not so easy to state the limitation on the rule in any such terms as will render easy the solution of each case. As stated by Mr. Justice Stone in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 522, 523 (1926):

> "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application.
> * * *

> "Experience has shown that there is no formula by which that line may be plotted with precision in advance, but recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation."

And as said in *Burnet* v. *Jergins Trust*, 288 U. S. 508, 516 (1933):

> "The application of the doctrine of implied immunity must be practical (Union P. R. Co. v. Peniston, 18 Wall. 5, 31, 36, 21 L. ed. 787, 791, 793) and should have regard to the circumstances disclosed."

Several tests have been used by this Court to distinguish governmental instrumentalities which are exempt from taxation from those which are not. These tests are discussed in *Brush* v. *Commissioner*, 300 U. S. 352, 361 (1937), as follows:

> "The phrase 'governmental functions,' as it here is used, has been qualified by this court in a variety of ways. Thus, in South Carolina v. United States, 199 U. S. 437, 461, 50 L. ed. 261, 268, 26 S. Ct. 110, 4 Ann. Cas. 737, it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In Flint v. Stone Tracy Co., 220 U. S. 107, 172, 55 L. ed. 389, 421, 31 S. Ct. 342, Ann. Cas. 1912B, 1312, the immunity from taxation was related to the *essential* governmental functions of the state. In Helvering v. Powers, 293 U. S. 214, 225, 79 L. ed. 291, 295, 55 S. Ct. 171, we said that the state 'cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend.' And immunity is not established because the state has the power to engage in the business

> for what the state conceives to be the public benefit. Ibid. In United States v. California, 297 U. S. 175, 185, 80 L. ed. 567, 573, 56 S. Ct. 421, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged." (Court's emphasis.)

The Court then goes on to say that for the purposes of that case the only inquiry will be whether the activity there in question constituted "an essential governmental function within the proper meaning of that term," but this is not further explained, and this statement sheds very little light on what is meant as the true test.

In *Helvering* v. *Therrell*, 303 U. S. 218 (1938), those state instrumentalities which are declared exempt from federal taxation are defined as those used in the discharge of the state's "essential" governmental duties, and in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938), it is declared that where a private person seeks immunity from federal taxation because of his work for a state, the burden on the state must be "direct and substantial," not "indirect and remote," to support the immunity.

If the doctrine of immunity is reciprocal, including a coetaneous limitation on it based on the nature of the function performed, only these cases dealing with the limitation on the principle of immunity, all of them being cases on state immunity, are relevant, because, to date, there has been no case holding that the nature of the function performed is or is not decisive on immunity from state taxation. Certainly the doctrine of *South Carolina* v. *United States*, *supra*, has never been decided not to apply to federal instrumentalities.

B. Various attributes of the Home Owners' Loan Corporation as affecting tax immunity.

1. Public purpose and welfare.

Let it be assumed, for the purpose of argument, that the Home Owners' Loan Corporation is a constitutional activity of the federal government, and that the Congress created

it solely for the public welfare and benefit. Does this public purpose itself confer an immunity on its employees from state income taxation?

If the doctrine of immunity is reciprocal, the case of *Helvering* v. *Powers*, 293 U. S. 214 (1934), answers the question. In that case the Commonwealth of Massachusetts had taken over the street railway company in Boston, and the Act providing for public operation created a board of five trustees to be appointed by the governor, with the advice and consent of the Council, for ten-year terms, who were to be sworn before entering upon their duties. That the Commonwealth was operating the road was made clear by the duty of the Commonwealth to stand any operating deficits.

The Act under which the railroad had been taken over had been attacked as one not for a public purpose, and if it had not been for a public purpose it would have been declared unconstitutional, but this Court in *City of Boston* v. *Jackson*, 260 U. S. 309 (1922), sustained it as one enacted for a public purpose, and the Supreme Judicial Court of Massachusetts, at the time of the *Powers* case, had already "characterized the 'public operation' as 'undertaken by the Commonwealth not as a source of profit, but solely for the general welfare.' *Boston* v. *Treasurer*, 237 Mass. 403, 113 N. W. 390, supra." 293 U. S. 222. The Chief Justice said:

> "The trustees are the administrative agents of the Commonwealth in this enterprise, and we may assume, as the Circuit Court of Appeals has held, that the trustees come within the general category of 'public officers' by virtue of their appointment by the Governor, with the advice and consent of the Council, and their tenure and duties fixed by law." 293 U. S. 222-3.

The Chief Justice further said, holding that the income of the trustees was not exempt from federal income taxes:

> "The State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions

> and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, **and that they are undertaken for what the State conceives to be the public benefit,** does not establish immunity. * * * The necessary protection of the independence of the state government is not deemed to go so far." 293 U. S. 225.

In the original case establishing the limitation on the principle of immunity, *South Carolina* v. *United States*, a similar situation existed, because prior to the decision in that case the Supreme Court of the United States had upheld the South Carolina Liquor Monopoly Act against attacks based on the claim that the act was not one for a public purpose. *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438 (1898). And compare *Ambrosini* v. *United States*, 187 U. S. 1 (1902).

These cases will show, it is submitted, that merely because a government has power to engage in an activity, and does engage in an activity, and does engage in it for what admittedly the government conceives to be the public benefit and welfare, is not a decisive factor in determining tax immunity. Doubtless, if the South Carolina Liquor Monopoly Act and the Boston Elevated Railway Public Operation Act had not been regarded by this Court as for public purposes, their validity would not have been sustained, as otherwise the taxes which were necessary to be paid to support them would not have been validly levied, and in fact, this was the basis of the attacks on their validity. In the same way, the State of Missouri does not hesitate to admit that the Congress conceived the Home Owners' Loan Corporation for what it considered to be the public welfare and for public purposes. This, however, should not mean that its employees are exempt from state income taxes.

2. The agency test—direction and control by the United States.

The true test for determining tax immunity could hardly be based on whether or not the instrumentality claiming the exemption is technically an agent of the government, acting

on behalf of the government and under its direction and control. This important question of constitutional law would seem to rise above the confines of the law of principal and agent, and certainly such a test cannot be reconciled with the cases. How can it be reconciled with *Railroad Co.* v. *Peniston*, 18 Wall. 5 (1873), where the Court said:

> "Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of government, both military and postal, does it necessarily follow that its property is exempt from State taxation?" 18 Wall. 32.

and where the Court answered this question in the negative? To the same effect is *Thomson* v. *Pacific Railroad*, 9 Wall. 579 (1869). Also compare *United States* v. *Strang*, 254 U. S. 491 (1921), involving the United States Shipping Board Emergency Fleet Corporation, which was admittedly an agent of the United States.

In *South Carolina* v. *United States*, Mr. Justice Brewer opened the opinion of the Court with the following statement:

> "The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business **and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors.**" 199 U. S. 447.

In the American Law Institute's *Restatement of the Law of Agency*, agency is defined as follows:

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Section 1 (1).

Agency, and the agency test of tax immunity, have nothing to do with whether the entity acting as agent was created by the principal. They have only to do with, first, the agent acting under the direction and control of the principal, and second, the agent acting on behalf of the principal. But these factors of themselves have nothing to do with immunity from taxation of the agent, as the cases just cited show. Apparently no point was even made in *South Carolina* v. *United States*, *supra*, that the mere fact that the agency relationship existed was sufficient to confer immunity, but then, in *Railroad Co.* v. *Peniston*, *supra*, the point was squarely made as the Court stated in the quotation above, and it was squarely answered that agency does not mean tax immunity.

How could any other rule be adopted? Rigid governmental supervision has no reasonable connection with tax immunity. If it had, how would fit into the picture cases like *Susquehanna Power Co.* v. *State Tax Commission*, 283 U. S. 291 (1931), and *Broad River Power Co.* v. *Query*, 288 U. S. 178 (1933), involving rigidly supervised licensees of the Federal Power Commission, or *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17 (1934), involving a government supervised warehouseman? What of the Board of Trustees of the Elevated Railway in *Helvering* v. *Powers*, 293 U. S. 214 (1934), who were certainly agents of the Commonwealth in every sense of the word? (and let it be noted here that even if the Railway Company in that case could have been regarded as a continuing private enterprise, its trustees certainly were public officials). How would all of the other entities rigidly supervised and regulated by the government fit into this theory, like the railroads, the banks, and the stock exchanges?

The State of Missouri does not deny that the Home Owners' Loan Corporation acts, in a sense, as an agent of the United States. It owes its very existence to an Act of Congress, but do not also the agents and licensees in the cases which have been cited in this point also owe their existence to Acts of Congress? If no other case on the subject had been decided except *Helvering* v. *Powers*, *supra*, is not that case the plainest possible illustration of an agent of the Commonwealth

in every sense of the word, appointed by the governor and taking oath as a public official, and yet held subject to federal income taxes? And if it be asserted that because the Home Owners' Loan Corporation is to some extent supervised by officials appointed by the President of the United States, this confers tax immunity on its employees, how can be explained the presumed absence of tax exemption of employees of a railroad subject to the supervision of the Interstate Commerce Commission, or a stock exchange under the supervision of the Securities and Exchange Commission?

3. Creation by the government—corporations.

There is no doubt of the right of the federal government to exercise its powers through corporations which it creates, but the fact that a corporation owes its existence to the United States, acting through an Act of Congress, has nothing to do with the immunity of that corporation's employees from state taxes.

It seems that the very reason that the United States sometimes acts through corporate *media* is to divorce the corporation from the United States Government. In *United States* v. *McCarl*, 275 U. S. 1, 8 (1927), the Court said:

> "Indeed, an important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States."

Compare also *United States* v. *Strang*, 254 U. S. 491 (1921), and *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375 (1904). The very idea of creating the corporations seems to be to keep them from being too closely identified with the government. Thus the fact that the Home Owners' Loan Corporation was created by the United States and chartered under an Act of Congress should have nothing to do with its immunity from state taxes.

4. Government ownership of corporations.

The stock of the Home Owners' Loan Corporation is owned by the United States, subscribed for by the Secretary of the Treasury. But stock ownership in a corporation, whether it be created by the government or not, has nothing to do with tax immunity. The stockholders are not the corporation.

In *Federal Land Bank of St. Louis* v. *Priddy*, 295 U. S. 229 (1935) it was contended that government ownership of the stock of a Federal Land Bank made the bank exempt from the service of process. Mr. Justice Stone disposed of the argument as follows:

> "But the liability to judicial process cannot be thought to fluctuate with the varying amount of the government investment. See Sloan Shipyards Corp. v. U. S. Shipping Bd. Emergency Fleet Corp., 258 U. S. 549, 566." 295 U. S. 232n.

The same principle would seem to apply in *Railroad Co.* v. *Peniston*, 18 Wall. 5 (1873), and *Thomson* v. *Pacific Railroad*, 9 Wall. 579 (1869), where the United States held a mortgage lien on the properties of the companies. Also compare *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U. S. 375 (1904), in which it was held that the fact that the United States had a right to have the property revert to its ownership under certain conditions was insufficient to confer tax exemption. And if any further consolidation of this argument is necessary, it is only necessary to quote from Chief Justice Marshall in *The Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat. 904, 907-908 (1824):

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives it descends to a level with those with whom it associates itself, and takes

> the character which belongs to those associates, and to the business which is to be transacted. * * * As a member of a corporation, a government never exercises its sovereignty. * * *
>
> "The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

Thus the ownership by the United States of the stock of the Home Owners' Loan Corporation cannot confer on its employees tax immunity.

5. Exemption by Act of Congress.

Section 1463 (c) of the Home Owners' Loan Act of 1933 (June 13, 1933, c. 64, sec. 4, 48 Stat. 129, as amended), which purports to confer certain tax exemptions in connection with the Home Owners' Loan Corporation, contains the following:

> "The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

It is submitted that this statute does not confer any exemption from income taxation on relator for two reasons: First, because the Congress cannot withdraw from the state taxing power a subject which is not so withdrawn by the Constitution, and second, even if the Congress did have such a power, this statutory exemption not only does not exempt

relator's income from taxation, but, by implication, says that such income is taxable.

As to the first of these points, the United States and the states are sovereign governments, and the taxing power of each is only curtailed by the United States Constitution. In other words, except in so far as the Constitution curtails the state taxing power, it could not be said that the state is an independent sovereign if the Congress could go further than the Constitution goes in withdrawing certain subjects from state taxation. Unless the Constitution, as interpreted by this Court, forbids the tax, what right has the Congress to forbid it?

As to the second point, even assuming that the Congress could withdraw from the state taxing power a subject which the Constitution of the United States does not so withdraw, the federal statute above quoted militates against relator. The statute exempts only the Corporation's "franchise, its capital, reserves and surplus, and its loans and income." Under familiar principles, the inclusion of certain named subjects in a statute impliedly excludes others not named, and this is especially true of statutes creating exemptions from taxation, which are strictly construed against those claiming them. *Vicksburg, Shreveport & Pacific R. Co.* v. *Dennis*, 116 U. S. 665 (1886); *Heiner* v. *Colonial Trust Co.* 275 U. S. 232 (1927).

Thus if it was necessary for the Congress explicitly to declare an exemption from taxation, and if such an exemption could be declared which would enlarge the exemption compelled under the Constitution, this statute excludes the exemption claimed by relator.

6. *Immunity of the instrumentality does not necessarily confer immunity on its employees.*

Until the decision in *New York ex rel. Rogers* v. *Graves, supra*, there was some question whether the immunity of the governmental instrumentality necessarily compelled the immunity from income taxes of income received from it by its employees. Cf. *Metcalf & Eddy* v. *Mitchell, supra.* In the *Rogers* case that question was presumably settled with the following language:

> "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." 299 U. S. 408.

In *Brush* v. *Commissioner*, *supra*, the Court, after stating the question to be if the water system was created and conducted in the exercise of the city's governmental functions, said:

> "If so, its operations are immune from federal taxation and, **as a necessary corollary,** 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.' " 300 U. S. 360.

However, in *Helvering* v. *Gerhardt*, *supra*, the Court, "expressing no opinion whether a Federal tax may be imposed upon the Port Authority itself," decided that a tax could be imposed upon the income of its employees, rejecting the principle announced in the quotations from the *Rogers* and *Brush* cases. Thus immunity of the income of employees of a governmental instrumentality no longer follows from immunity of the instrumentality itself, and even if the Home Owners' Loan Corporation is deemed non-proprietary and essentially governmental, relator is not for that reason necessarily immune from the state tax in the case at bar. If the *Gerhardt* case could be decided as it was, without deciding if the Port Authority itself was immune, the instant case can likewise be decided adversely to the asserted immunity, without deciding if the Corporation is immune. Considerations of remoteness between a tax on employee income and the burden on the employer are surely of equal relevance for state and federal instrumentalities. By hypothesis, remoteness disregards the nature of the function, and the suggested difference between the factors determining a supposed difference between state and federal instrumentalities is confined to the nature of their functions only.

7. *Other attributes as the basis of immunity.*

Except for a ruling that the doctrine of *South Carolina* v. *United States* applies to federal instrumentalities, every factor recited in recent decisions as destructive of immunity is present in the case at bar. The opening language of that part of the opinion in the *Dravo* case dealing with the burden on the Government of the tax there considered states: (1) "The tax is not laid upon the Government, its property or officers," (2) "the Tax is not laid upon an instrumentality of the Government," (3) "the tax is non-discriminatory," and (4) "the tax is not laid upon the contract of the Government." Each of these propositions is equally true in the case at bar. The tax in this case will no more increase the cost of government than the tax in the *Dravo* case. The burden on the Government is no more direct here than there. Here is concerned no burden on the borrowing power of the Government, and no question of a state officer as distinguished from an employee, which seemingly were regarded in the *Gerhardt* case as entitled to special consideration. The money for the payment of relator's compensation was presumably derived largely or wholly from private funds, furnished by purchasers of Home Loan Bonds, and not from public funds, a factor emphasized in *Helvering* v. *Therrell, supra*, and the ultimate security therefor rested on private homes, with the Corporation created for the benefit of a special class, those who own their own homes. The assistance of this class is certainly not an "essential" attribute of sovereignty, in the sense which would be considered decisive in a claim of a state instrumentality from federal taxation, under *Helvering* v. *Gerhardt*. It seems to follow, therefore, that unless every constitutionally created federal corporation, regardless of its purpose, or the nature of its function, is immune from state taxation, and unless an income tax immunity of the employees of every such corporation follows inevitably, and as a corollary to the immunity of the instrumentality, the income of relator is not exempt from the tax sought here to be assessed. Surely such a conclusion would make the dual concept of state and federal sovereignty more illusory than real, for if the federal tax power is more important to its

existence than conceptual and theoretical aspects of state immunity, as emphasized in the *Gerhardt* case, and if the remoteness of the burden is decisive, in the case of an individual claiming an exemption from a federal tax, are not these considerations equally important and relevant, and decisive, as applied to state sovereignty?

CONCLUSION.

South Carolina v. *United States* was decided at a time when certain states were engaging in activities which a few years before would have been considered extraordinary. Before that time the principle of immunity had been considered absolute and without qualification. The Court envisaged the situation thus:

> "The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co., No. 1*, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.
>
> "More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?
>
> "We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens

> will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.
>
> "Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government." 199 U. S. 454-455.

The true basis of the limitation established in that case was the fear that by engaging in untraditional activities the states would withdraw so many subjects from the federal taxing power as to cripple the federal government.

Now the situation is reversed. The federal government is now engaging in so many new activities in new fields that if their scope had been pointed out to one living at the turn of the century, he would doubtless have been far more astonished and fearful than was Mr. Justice Brewer when he wrote the opinion in *South Carolina* v. *United States* in 1905. Partial lists of federal corporations are contained in Van Dorn, *Government-Owned Corporations* (1926); Schmeckebier, *New*

Federal Organizations (1934); and Culp, *Creation of Government Corporations* (1935), 33 Mich. L. Rev. 473.

The Court could conceivably dispose of this case by holding that because the relator is an employee of an instrumentality of the United States, his income from that instrumentality is exempt from state taxation because there can be no constitutional federal enterprise which would not be unduly burdened by the imposition of a state income tax on the income of any of its employees. Surely such a result would be unfair to the states. It could also hold that there is no more necessity in the case at bar of deciding whether the instrumentality is, because of its function, exempt from state taxation than there was of deciding whether the Port Authority in the *Gerhardt* case was exempt, and that the tax could be assessed because of the remote and indirect burden of this income tax on the Government of the United States. This would seemingly eliminate entirely the immunity of an employee of a state or of the federal government from income taxes assessed by the other government, because if the decision should be placed on the ground of remoteness, the nature of the function of the instrumentality would be irrelevant. A third, and it is submitted, the fairest decision, and one which would be entirely consistent with all of the previous decisions of this Court, would be to hold that the doctrine of *South Carolina* v. *United States* applies equally to state and federal instrumentalities. This Court is almost thirty-four years has not found any necessity of revising the doctrine of *South Carolina* v. *United States* as applied to state instrumentalities, and if it is now declared to apply also to federal instrumentalities, no more difficulties in its application to future cases involving federal instrumentalities should arise than have arisen since 1905. If the federal government chooses to enter the field of private banking, then, if the states are sovereigns in the same sense in which the federal government is a sovereign, no reason of logic or precedent would seem to bar the application of non-discriminatory state income taxes to the income of employees of that instrumentality, and every argument which supported the

decision in *South Carolina* v. *United States* would be present, militating against the claim of immunity. Logic, precedent, and fairness to state sovereignty and to the states' need of revenue, comparable in every respect to the national government's need of revenue, impel a decision in favor of Petitioners.

ROY MCKITTRICK,
Attorney-General of the State of Missouri,
EDWARD H. MILLER,
Assistant Attorney-General,
Counsel for the State of Missouri; as Amicus Curiae.