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Constitutional Law--Federal Immunity--National Banks Immune from State Taxation (First Agricultural National Bank of Berkshire County v. State Tax Commission, U.S. 1968)

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RECENT DECISION

CONSTITUTIONAL LAW — FEDERAL IMMUNITY — NATIONAL BANKS IMMUNE FROM STATE TAXATION. Appellant, a national bank, applied to the State Tax Commission for an emergency regulation exempting it from the recently enacted sales and use taxes. Instead, the regulation promulgated, which was held valid by the Supreme Judicial Court of Massachusetts, stated that the bank was subject to the taxes. The United States Supreme Court, in reversing the decision, *held* that 12 U.S.C. § 548 exclusively prescribed the means by which a state could tax a national bank and thereby rendered appellant immune from the taxes in question. *First Agricultural National Bank of Berkshire County v. State Tax Commission,* ..... U.S. ..... (1968).

Although the United States Constitution provides that all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States" [1] and the Constitution specifically enumerates those powers which are vested in the Congress,[2] many conflicts have arisen in those areas where both the state and federal governments have sought to exercise their respective powers. This problem has been further complicated by the implied expansion of the congressional powers under the constitutional provision that it "make all laws which shall be necessary and proper" for carrying into execution the powers enumerated.[3] When considering the solutions to such disputes it should be borne in mind that the Constitution, and the laws of the United States promulgated thereunder, "shall be the supreme Law of the Land." [4] One area in which this conflict of powers became apparent early in our history was the states' power to tax an instrumentality of the federal government.

One of the first and most important decisions to be rendered in this area was *McCulloch v. Maryland.*[5] The constitutional question arose when Maryland imposed a stamp tax on the issuance of notes by any bank established within the state without the authorization of said state. When McCulloch, a cashier at the Maryland branch of the Bank of the United States, issued notes on behalf of the bank without complying with the requirements of the statute, the state brought an action to recover certain penal-

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[1] U.S. CONST. amend. X.
[2] U.S. CONST. art. I, § 8.
[3] *Id.*
[4] U.S. CONST. art. VI.
[5] 17 U.S. (4 Wheat.) 316 (1819).

ties which were provided for in the act. The United States Supreme Court, in reversing the state court's decision which held the tax valid, viewed the case as involving two basic issues: (1) had Congress the constitutional power to incorporate the bank; and (2) can the bank and its branches be taxed by the states? In answer to the first issue, the Court determined that the government, being entrusted with certain vital powers, *e.g.*, to lay and collect taxes, to borrow money, to regulate commerce, and to raise and support armies, must also be entrusted with ample means for their execution. Those means were provided for by the power to make all laws which shall be "necessary and proper" for carrying into execution the powers of Congress.[6] Mr. Chief Justice Marshall, speaking for the Court, concluded that the creation of the bank was not only an appropriate mode for exercising the powers of Congress, but also that it was "a convenient, a useful, and essential instrument in the prosecution of [the government's] fiscal operations. . . ." [7]

The Court then proceeded to the second issue, and it was reasoned that the federal government, being sovereign, could not be burdened by the states in any way. Relying on the principle that the powers of the federal government were not granted by the states but, rather, by the people of all the states, the Court concluded that the federal government owed no tax, duty or excise to any state for any privilege conferred or benefit received.[8] It was further reasoned that if such power existed in the states at all, it could be used to interfere substantially with, or even destroy, the activities of the national government.[9] Referring to the Supremacy Clause of the Constitution, the Chief Justice reasoned that it was the very essence of supremacy that the federal government "remove all obstacles to its action within its own sphere, and . . . modify every power vested in subordinate governments, as to exempt its own operations from their own influence." [10] In accordance with these views, the Maryland statute was found to be unconstitutional and void.

Five years later, in *Osborn v. Bank of the United States*,[11] the Court was given an opportunity to re-examine its holding in *McCulloch*. One significant issue which was treated more thoroughly in this case than in *McCulloch* was whether the national bank actually was a federal instrumentality. The defendant contended

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[6] *Id.* at 411-12.

[7] *Id.* at 422.

[8] *Id.* at 434-35; *see* Comment, *Immunity of State and Federal Instrumentalities from Taxation: A Broad or a Narrow Construction?*, 17 TUL. L. REV. 100, 108 (1942).

[9] 17 U.S. (4 Wheat.) at 427.

[10] *Id.* at 427.

[11] 22 U.S. (9 Wheat.) 738 (1824).

that the bank was "originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its . . . principal object." [12] However, the Court determined that the bank was created for national purposes only, was of vital importance to the government, and was, therefore, a government instrumentality entitled to the same immunity as had been extended in *McCulloch*.[13] Mr. Chief Justice Marshall made it clear that if the "character" of the bank were different, the result would be otherwise.[14] Thus, although this decision further confirmed the national bank's right to immunity, this tax immunity was seemingly unavailable if grounded solely upon the mere "casual circumstances" of being employed by the government in the transaction of fiscal affairs.[15]

As the political debates over the treatment of national banks grew more frequent and heated, Congress began to enact more legislation in this field in an attempt to clarify the functions of the banks as well as to insure their safety from the taxing powers of the states. The principal statutes were the National Bank Acts of 1863 [16] and 1864.[17] In addition to specifically prescribing the duties and obligations of these banks, and the means for their creation, the statute expressly provided four methods in which Congress would allow the states to tax a national bank, any one of which was to be in lieu of all others.[18] This section, coupled with the principles laid down in the two previously mentioned cases, gave rise to a long line of decisions which held that these means of taxation were the only ones which could be levied against the national banks.[19]

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[12] *Id.* at 859.

[13] *Id.* at 858-60.

[14] *Id.* at 858-59.

[15] *See* Plous & Baker, McCulloch v. Maryland *Right Principle, Wrong Case*, 9 STAN. L. REV. 710, 725-26 (1957).

[16] Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

[17] Act of June 3, 1864, ch. 106, 13 Stat. 99.

[18] Originally Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111. Found today in 12 U.S.C. § 548 (1964), and it provides:

> The legislature of each State may determine and driect . . . the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or a holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income. . . .
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> 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of all others. . . .
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> 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State. . . .

[19] *See* Bank of California Nat'l Ass'n v. Richardson, 248 U.S. 476 (1919); Mercantile Nat'l Bank v. City of New York, 121 U.S. 138 (1886); Rosenblatt v. Johnston, 104 U.S. 462 (1881). *See also* People *ex rel.* Hanover Nat'l Bank v. Goldfogle, 234 N.Y. 345, 137 N.E. 611, *cert. denied*, 261 U.S. 620 (1922).

In *Owensboro National Bank v. Owensboro*,[20] the Supreme Court was faced with the question of whether these statutes had so altered the "character" of a national bank as to render it taxable by the states. Relying on these statutes and the constitutional groundwork laid down in *McCulloch* and *Osborn*, the Court concluded that the tax levied by the state on the intangible property of the bank was invalid. While the relationship of the national bank to the federal government under the Civil War statutes was not as close as it had been under the charters with which the Court had earlier dealt, it was apparent that national banks were still considered federal instrumentalities completely immune from state taxation, if for no other reason than that these banks were at all times engaged in the inherently governmental function of issuing currency. Apparently relying on the unequivocal language of *Owensboro*, subsequent cases assumed the immunity from taxation of national banks, and no longer considered the issue of whether such immunity was justified.[21]

However, national banks were not the only institutions which claimed to be tax-exempt instrumentalities of the federal government. In *Railroad Co. v. Peniston*,[22] a subdivision of the state of Nebraska imposed a tax on the property of the Union Pacific Railroad, a company chartered by Congress. The railroad was owned by private individuals but was assisted by the Congress through grants and loans. The government appointed two of its directors, and certain of its operations were subject to federal supervision. It was further provided that the railroad would transmit dispatches for the government and transport mail, troops and munitions, supplies and public stores whenever so required. The Court conceded that the railroad was an agent of the United States government and was "employed, in the legitimate service of the government, both military and postal . . ."[23] but denied that the railroad was immune from taxation:

> It is . . . manifest that exemption of Federal agencies from State taxation is dependent . . . upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve

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[20] 173 U.S. 664 (1899).

[21] *See, e.g.*, Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); First Nat'l Bank v. Hartford, 273 U.S. 548 (1927); First Nat'l Bank v. Anderson, 269 U.S. 341 (1926). In these cases the Court was concerned with state taxation of shareholders of a national bank under congressional permission conditioned upon the non-discriminatory application of such taxes. It was assumed that national banks were immune from state taxation absent congressional consent. *See* Rollman, *Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes*, 38 N.D.L. REV. 26, 27 (1962); 68 DICK. L. REV. 469, 470 (1964).

[22] 85 U.S. (18 Wall.) 5 (1873).

[23] *Id.* at 32.

the government as they were intended to serve it, or does hinder the efficient exercise of their power.[24]

The *Peniston* decision was an obvious departure from the rationale set forth in *McCulloch* and *Osborn*. Although the railroad was considered a federal agency, that fact alone was not sufficient to confer immunity from state taxation. The Court looked further to the nature of the tax and its actual effect upon the activities the agency performed for the federal government. Thus, the cases clearly distinguished institutions like the national banks which were thought so much an arm of the federal government as to be inherently immune[25] from institutions related to the operation of the federal government which were taxable upon a showing that their federal activities would not be substantially hindered.[26]

One of the most recent cases in which the question of immunity arose was *Department of Employment v. United States*.[27] The litigation concerned a Colorado unemployment compensation tax which, by statute, could be levied on charitable institutions.

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[24] *Id.* at 36.

[25] *See* Maricopa County v. Valley Nat'l Bank, 350 U.S. 357 (1943), where the Court found the Reconstruction Finance Corporation to be an immune instrumentality. It is clear that a state cannot constitutionally levy a tax directly against the United States Government or its property without Congressional consent. United States v. Allegheny County, 322 U.S. 174 (1944).

It is interesting to note that the courts had some difficulty in deciding whether the tax immunity granted to a governmental instrumentality should be extended to include the employees thereof. In New York *ex rel.* Rogers v. Graves, 299 U.S. 401 (1937), the Court granted the same tax immunity to salaried employees as it gave to the Panama Railroad Co., the tax-exempt employer. However, this question was finally laid to rest in Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939), where the Court overruled the previous case, finding no reason to extend this immunity to the employee. *See also* State Tax Comm'r v. Van Colt, 306 U.S. 511 (1939).

[26] In recent years, the Supreme Court has been liberal in allowing such taxation. *See, e.g.*, Alabama v. King & Boozer, 314 U.S. 1 (1941) (allowing a state tax on the purchase of lumber by a contractor who was constructing an army camp for the United States on a "cost-plus" basis); James v. Dravo Contracting Co., 302 U.S. 134 (1937) (upholding a state gross receipt tax levied against a contractor in the service of the federal government to construct locks and dams for the improvement of navigation); Broad River Power Co. v. Query, 288 U.S. 178 (1933) (a tax on the production and sale of electric power by a company created and operated under the Federal Water Power Act was upheld). Of substantial import is the Court's reasoning that "the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government." United States v. City of Detroit, 355 U.S. 466 (1957).

[27] 385 U.S. 355 (1966).

This tax was levied against the local chapter of the National Red Cross and a refund of the taxes paid, along with injunctive relief against further enforcement, was sought on the ground that the Red Cross is entitled to complete immunity as a federal government instrumentality. The Court, although stating that "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality,"[28] held that the Red Cross was clearly such an instrumentality.[29] The Court discussed fully the nature of the Red Cross, its functions, organization and importance to the government, and concluded that because of its relationship with the government and the public, it met the requisites for such immunity.[30] It is interesting to note that the Court, in rendering its opinion, drew an analogy between the Red Cross and the national bank:

> In those respects in which the Red Cross differs from the usual government agency . . . the Red Cross is like other institutions—*e.g.*, national banks—*whose status as tax-immune instrumentalities of the United States is beyond dispute.*[31]

But is this status of being a tax-immune instrumentality truly beyond dispute? Recently, the Court of Appeals of New York, as did the Supreme Judicial Court of Massachusetts in the instant case, re-examined this question in *Liberty National Bank & Trust Co. v. Buscaglia.*[32] After discussing the great changes which have taken place, both in the nature and functions of the national banks, the Court unanimously concluded that the national banks were no longer deserving of immunity from state taxation as a federal instrumentality.

In the instant case[33] the Supreme Court, for practically the first time in seventy years, was given the opportunity to re-

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[28] *Id.* at 358-59.

[29] *Id.*

[30] The Court pointed out that the Red Cross was chartered by the Congress in 1905, that it was subject to governmental supervision and regular financial audits and that the President appoints its principal officer and seven of its forty-nine Governors. It was further pointed out that, in addition to private contributions, the Red Cross receives substantial material assistance from the federal government. The Court also discussed the important functions of the Red Cross in relation to our armed forces, to our states in times of disaster, and to the fulfillment of our national and international commitments (*e.g.*, the Geneva Convention). Based upon these facts, the Court found that the Red Cross is virtually "an arm of the Government." *Id.* at 359.

[31] *Id.* at 360 (emphasis added).

[32] 21 N.Y.2d 357, 235 N.E.2d 101, 288 N.Y.S.2d 33 (1967), *rev'g* 26 App. Div. 2d 97, 270 N.Y.S.2d 871 (4th Dep't 1966).

[33] First Agricultural Nat'l Bank v. State Tax Comm'n, ... U.S. ..... (1968), *rev'g* ..... Mass. ....., 229 N.E.2d 245 (1967).

evaluate the arguments regarding such immunity. When Massachusetts put its sales and use tax in effect, the appellant, one of the ninety national banking associations in the state, immediately requested a ruling from the tax commission that it would be exempt. Nothing was heard from the commission for the next two months during which appellant paid some $575.66 in taxes to vendors on purchases of tangible personal property needed for its continued operation. Finally, the commission announced that national banks would be subject to the tax, whereupon appellant found it impossible to purchase goods unless it promised to reimburse the vendors for the tax. The bank sought declaratory relief from the state courts, but the regulation was held to be valid.

The Supreme Court, in reversing the state court's holding, premised its opinion on what it termed the firmly established proposition "that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national banks." [34] In other words, the Court refused to reexamine the status of the national banks as federal instrumentalities, and, relying on such cases as *McCulloch* and *Owensboro*, determined that unless Congress has passed legislation permitting the tax in question, a national bank would be immune therefrom. The Court then quoted from its opinion in *Department of Employment v. United States* [35] where, in dictum, it was stated that the bank's status as a tax-immune instrumentality was "beyond dispute."

The Court next turned to the abundance of federal legislation in the banking field, looking primarily at 12 U.S.C. § 548 as the section on which this case depends. The statute allows state taxation of national banks in any one of four specified ways.[36] In order to determine whether the act was meant to exclude all other forms of taxation, the Court examined the Congressional records of 1864 (the year in which it was originally passed) and concluded that it was the intent of the legislature that it be exclusive.[37] After this determination, the majority traced the history of the enactment to gain support for its conclusion and culminated with the fact that in 1950 a bill was sent to the Senate Subcommittee on Banking and Currency which expressly permitted the levying of state sales and use taxes on national banks.[38] Since Congress refused

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[34] ..... U.S. at .....

[35] 385 U.S. 355 (1966).

[36] 12 U.S.C. § 548 (1964); for text thereof *see supra* note 18.

[37] What was actually said were reverberations of the principles laid down in *McCulloch* and *Osborn* and all that was proven was that Congress was very much concerned with the implementation of these doctrines.

[38] *See Hearings on S. 2547 before the Subcomm. on Federal Reserve Matters of the Senate Comm. on Banking & Currency*, 81st Cong., 1st Sess., 9 (1950).

to pass the proposed amendment, the Court was certain that no such tax could be said to have been authorized by Congress. Thus, the majority concluded that as the law exists today the tax must be held invalid as against national banks, and if any change is to be made in the future, it must emanate from the Congress.[39] The Court thereafter briefly dealt with the contention that this was a tax on the vendor rather than the purchaser, deciding that the intent was clearly to pass the tax on to the vendee and, therefore, the legal incidence of the tax was on the national bank.

The three dissenting justices strongly disagreed with the majority's assumption that the national bank was a federal instrumentality and that the Constitution, therefore, prohibited the levying of such a tax on appellant. The dissent argued that the Court should have decided the constitutional question in order that section 548 be properly interpreted, and further added that had such a course been taken, new life would not have been given to this "largely outmoded doctrine." [40]

It was noted that almost all the decisions rendered which involved national banks were decided in accordance with the principles of *McCulloch*, *Osborn*, and *Owensboro*, and that very little effort was devoted in subsequent cases to question whether the banks were still federal instrumentalities. The dissent, however, compared the banks involved in the three leading cases with the national bank of today, and reached the conclusion that it is no longer deserving of such immunity. There is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality,[41] but certain basic factors have evolved through the years on which the Court has placed reliance.[42] In applying these factors the dissent was firmly convinced that the bank was not deserving of the immunity, especially in the light of the trend in Supreme Court decisions toward restricting "the scope of immunity [from taxes] of private persons seeking to clothe themselves with governmental character." [43]

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[39] ..... U.S. at .....

[40] *Id.* at .....

[41] Department of Employment v. United States, 385 U.S. 355, 358-59 (1966).

[42] The more general tests are: whether they have been so incorporated into the government structure as to become instrumentalities of the United States; or whether they are arms of the Government deemed by it essential for the performance of governmental functions, and are integral parts of a governmental department and share in fulfilling the duties entrusted to it.

Some of the more specific factors taken into consideration are: whether it is organized for private profit; whether the government exercises substantial control over its operations; whether it was organized to effect a specific governmental function; and whether the government gives it financial aid. ..... U.S. at .....

[43] Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 352 (1949).

The Second Bank of the United States, the bank dealt with in *McCulloch* and *Osborn*, if scrutinized today, would probably be found to meet the criterion necessary to be held an instrumentality[44]: the United States owned twenty percent of its stock; the President appointed five of its twenty-five directors while the Government, as a shareholder, participated in the election of the remainder; all public funds were deposited in the bank; the bank was required to transmit funds for the government without charge; it issued currency which was established as the legal tender for all debts owing to the Government; and the bank acted as the fiscal agent of the United States. Even the national bank considered in *Owensboro* was more meritorious of immunity than the present-day bank. That bank was authorized to issue currency which was established as the legal tender for all debts owed to or by the federal government. In addition, this currency was to be secured by the bank's deposit of United States bonds with the Treasury Department.[45]

But what great governmental functions do the present-day national banks perform? The dissent found that they perform no significant fiscal services for the federal government. By 1935, the power of national banks to issue currency had ceased. Most of their duties are now handled by the Federal Reserve banks.[46] Moreover, legislation was enacted to prohibit the government from discriminating between national banks and banks under the Federal Reserve System[47] (of which the greater portion of state banks are

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[44] *But see* Plous & Baker, *supra* note 15, at 718, 725, where the authors note that throughout the opinion in *McCulloch*, Chief Justice Marshall made no mention of the essentially private character of the bank. The authors felt that the Chief Justice erred in identifying the bank as synonymous with the sovereign itself. The authors noted the private ownership of the bank and that it was a profit-making enterprise during the life of which the government earned $6,100,000, while the bank itself earned $6,600,000 directly attributable to its association with the federal government.

[45] ..... U.S. at .....

[46] For an interesting discussion of the *McCulloch* case as it might be applied today, see Plous & Baker, *supra* note 15, at 728-30, where the authors contend that the *McCulloch* reasoning would be better applied today to the Federal Reserve System, which they feel meets all the requirements for such immunity. Although the stock is owned by private member banks, all seven members of the Board of Governors are selected by the President. It is also pointed out that although the Reserve earns sufficient income to cover operating expenses, pay dividends to members and contribute to a surplus fund and to the U.S. Treasury, the profit aspect is purely incidental to the System's major function. Unlike the United States Bank considered in *McCulloch*, the purpose of the Reserve is that of the public interest in orderly economic growth and a stable currency. The authors feel that the national bank was not the best choice for the Chief Justice to have established such an important principle of law.

[47] 12 U.S.C. § 265 (1964).

members).[48] No difference could be found between the state and national banks, both being privately owned and controlled, both existing for private profit, and both performing the same tasks. Likewise, there could be found no reason why the national bank should be entitled to immunity from state taxation as a federal instrumentality.

The dissenting justices then turned to section 548, upon which the majority based its decision. Admitting that there is substantial precedent for the statutory interpretation that the methods of taxation specified are exclusive, the justices noted that this interpretation is correct only under the constitutional premise of *Owensboro*. Since that premise was rejected by the dissent, they asserted that the section should be freshly examined. The statute, specifying the four means of taxation and holding that any one imposed be in lieu of all others, was found by the dissent to have been merely intended to insure the competitive equality of national banks by preventing the states from subjecting them and their shareholders to multiple taxation on the same income.[49] And this was the sole purpose for its enactment.

The section never expressly provided that the taxes prescribed were exclusive. Under the earlier constitutional premise, it could have been argued that Congress saw no need to state specifically in section 548 that national banks were immune from state taxation except as the section permitted, but under the dissent's finding no such contention could be supported. Moreover, the tax which is here in question was non-existent when the section was adopted. The dissent concludes that the courts "should be reluctant to interpret a statute having such narrow scope as section 548 in terms has as encompassing such a broad prohibitory application." [50]

As the responsibilities of state and local governments in our complex society require the expenditure of rapidly increasing amounts of money, the states have had to resort to new and more comprehensive forms of taxation. Although the amount involved in the instant case was insignificant, the states are nevertheless being deprived of an abundant source of revenue by the Court's continuation of this outmoded constitutional immunity doctrine.

There are approximately 13,804 commercial banks in the United States and 4,815 of these are national banks. Although the national banks comprise only one-third of the banks in number, the deposits in national banks total 171 billion dollars as compared to 139 billion dollars in the state banks.[51] These private institutions carry on vast businesses, earning huge profits, and engage in

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[48] *See* Hockley, *Our Baffling Banking System*, 52 VA. L. REV. 565, 566 (1966).

[49] ..... U.S. at .....

[50] *Id.* at .....

[51] *See supra* note 48.

numerous transactions which, if immunity is no longer required, would bring them under the taxing power of the states in which they operate. As recently as 1965, the Chase Manhattan Bank of New York City, the largest state member bank in New York and the third largest bank in the nation, saw fit to convert from a state charter to a national charter.[52] Should this simple statutory change entitle the bank to be immune from the City and State of New York taxes? The answer to this question, it is submitted, is an unequivocal no.

On the other hand, the scope of federal government activity has been greatly expanded and, today, the United States conducts much of its business through a substantial number of private parties.[53] The federal government has turned to the private sector of the economy to act as its agent in performing those ordinary services which are required but not within the realm of governmental operations. However, while states must not be permitted to hamper lawful activities of the federal government, private parties have sought to deprive the states of an important source of revenue on the sole ground that the federal government is a party to the transaction. This is carried even further in the case of the national bank where immunity from state taxation is sought on the ground that the bank *can* perform certain services for the government. For far too long the national banks have been granted this immunity, not on the basis of their relationship to the federal government, but rather on the holdings of a few cases which date as far back as a century and a half.

The courts have made it clear that the purpose of federal immunity from taxation is not to give special benefits to certain parties, but rather to preserve and protect valid functions of the federal government. The trend in the United States has been to reject immunizing those private parties who deal with the federal government from non-discriminatory state taxes, as a matter of constitutional law, even though the United States may bear the economic brunt of the tax, either by inclusion in the charge for the service or by reimbursement to a contractor as an item of cost.[54] In order that the national bank be granted immunity, the bank must prove that the imposition of the tax would impair a function of the federal government. This burden of proof is even more onerous in the light of the policy considerations which seek to preserve and expand wherever possible the right of the state to tax those within its borders.

In conclusion, what the majority has done by its refusal to pass upon the constitutional issues in this case is to deprive the

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[52] *Id.* at 568.

[53] *See* Rollman, *Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes*, 38 N.D.L. REV. 26, 30 (1962).

[54] *Id.*

states of a needed source of income to which they are entitled. And, even more important, it has given new life to a constitutional doctrine which is clearly outmoded and unfair. The Court has grabbed a statute and broadened its application to an extent never before intended in its attempt to avoid passing on the principal issue. It was hoped that the Court, when it agreed to hear this appeal, would take advantage of the opportunity to examine the federal immunity doctrine in the light of today's needs, of today's banking policy of fostering competitive equality, and of today's banking system and the metamorphosis that it has undergone since the Supreme Court last passed upon the issues here involved. Instead, the decision rendered was merely a verification that past law still applies regardless of new developments, and only the dissent realized the true impact that this opinion could have provided. Let us again hope that the Court, when and if it should decide to hear a case of similar import will re-evaluate its holding in the instant case and determine to take on the task of facing the constitutional issue squarely, as it should have done here.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — GAMBLER'S ASSERTION OF SELF-INCRIMINATION PRIVILEGE CONSTITUTES DEFENSE FOR VIOLATIONS OF FEDERAL WAGERING TAX STATUTES— Petitioner, convicted of violating the federal wagering tax statutes by conspiring to evade and wilfully failing to pay the annual occupation tax, and failing to register with the Internal Revenue Service as required by law, unsuccessfully argued to the trial court that these statutory requirements violated his fifth amendment privilege against self-incrimination. On certiorari, the United States Supreme Court reversed, *holding* that the provisions could not be utilized to impose criminal sanctions on persons who properly asserted the privilege as a defense for non-compliance. *Marchetti v. United States*, 390 U.S. 39 (1968).

In recent years, the fifth amendment privilege against self-incrimination [1] has become the center of a continuing controversy concerning the balance of individual liberties and public interest. A major aspect of this conflict has involved the application and enforcement of the Federal Gambling Stamp Tax.[2] This tax requires all professional gamblers to purchase an annual fifty dollar

[1] "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[2] INT. REV. CODE of 1954, §§ 4401-23, 6107.