

## Immunity from Federal Income Tax by State Instrumentalities

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eight times on the entire chain, not only on those in individual states, resulting in a severe duplication of taxes.<sup>38</sup>

The Federal Trade Commission spent seven years and over one million dollars to find out whether or not chain stores are worth while. Recently the Commission filed its final report with the United States Senate and the following paragraph from that report sums up the Commission's final conclusion :

"Such a policy (taxing away the chain's savings in prices), however would involve destruction of the chain's ability to make lower prices than independents and would provoke wide protest from consumers. Any tax on chain stores which substantially lessens their ability to undersell independents is open to the same practical objection. If ability to undersell based on greater efficiency or on elimination of credit and delivery costs is destroyed by taxation, it is the consuming public which will really pay the tax and not the chain."<sup>39</sup>

Legislatures should be cautious lest a confiscatory tax placed on chain stores be too easily passed on to the consumer. It should however be indicated that the first expression of the people's desire at a public election in this oft mooted question of *chain store v. local store*, resulted in a definite majority vote against discriminatory chain-store taxation.<sup>40</sup>

HENRY R. KAPLAN.

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IMMUNITY FROM FEDERAL INCOME TAX BY STATE  
INSTRUMENTALITIES.

"\* \* \* an avalanche of decisions by tribunals great and small is producing a situation where a citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more."<sup>1</sup>

Constantly expanding governmental needs, changes in the economic structure, and new ideals of social policy necessitate readjustment and experimentation in tax decisions. Ordinary difficulties of obtaining funds to operate governmental machinery are complicated

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<sup>38</sup> *Ibid.*

<sup>39</sup> Final Report of the Federal Trade Commission, under Senate Resolution 224. 70th Cong., 1st Sess., Government Printing Office.

<sup>40</sup> California Election of 1936—Chain store statute, passed 1935, rejected in public referendum.

<sup>1</sup> BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924) 4.

in this country by conflicting claims of state and nation, and by constitutional molds developed for other times and other problems. These difficulties coupled with the ever present reluctance of the taxpayer assure a constant flow of tax litigation.<sup>2</sup>

In a recent Supreme Court case<sup>3</sup> the question arose as to whether the salary of petitioner, as Chief Engineer of the Bureau of Water Supply of the City of New York, was a part of his taxable income for the purposes of the Federal Income Tax Law. The majority opinion<sup>4</sup> made the answer depend upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from federal taxations, and as a necessary corollary, "fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."<sup>5</sup>

The constitutional immunity of state instrumentalities from federal taxation is implied from the nature of the federal system and the relationship within it of state and national governments, and is usually 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,<sup>6</sup> 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.<sup>7</sup>

In view of the relation between the state and federal governments, the Supreme Court of the United States has decided that neither of said governments can impose a tax on the valid means employed by the other government in executing its constitutional powers, since thereby, the one government would be given power to control and

<sup>2</sup> Note (1934) 47 HARV. L. REV. 1209.

<sup>3</sup> *William Whitlock Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

<sup>4</sup> By Mr. Justice Sutherland. Although there are only two dissenting justices, the case is not as strong as it appears since Mr. Justice Stone and Mr. Justice Cardozo straddled the whole problem. This leaves only five justices agreeing with the majority opinion. Mr. Justice Stone's opinion follows: "We concur in the result upon the ground that the petitioner has brought himself within the terms of the exemption prescribed by Treasury Regulation 74, article 643, which for the purposes of this case may be accepted as valid, its validity not being challenged by counsel for the Government.

In the absence of such a challenge no opinion is expressed as to the need for revision of the doctrine of implied immunities declared in earlier decisions.

We leave that subject open."

<sup>5</sup> *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 57 Sup. Ct. 269 (1937).

<sup>6</sup> See *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 522-524, 46 Sup. Ct. 172 (1926).

<sup>7</sup> *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110 (1905); *Helvering v. Powers*, 293 U. S. 214, 55 Sup. Ct. 171 (1934); *United States v. California*, 297 U. S. 175, 56 Sup. Ct. 421 (1936); see *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 173, 29 Sup. Ct. 458 (1909) (explaining *South Carolina v. United States*, *supra*).

burden the operation of the other.<sup>8</sup> This principle, however, seems incorrectly applied in the present case since the tax in question is in no way a *burden* on the state or its agents.<sup>9</sup> "A federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of the other, and must accord with the implied federal requirement that state and local government functions be not *burdened* thereby. So long as our present dual form of government endures, the states, it must never be forgotten, are as independent of the general government as that government within the sphere is independent of the states."<sup>10</sup> It is to that high end that the courts have recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other.<sup>11</sup>

The case of *Metcalf and Eddy v. Mitchell*<sup>12</sup> points out the difficulties, as cases arise within the doubtful zone, of drawing the line which separates the activities which are 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 on 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 states, 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 influence by the other."<sup>13</sup> One who is not an officer or employee of the state does not establish exemption from federal income tax merely by showing that his income was received as compensation for services rendered under a contract with the state, when it does not appear that the tax impairs in any substantial manner his ability to discharge his obligations to the state or the ability of the state or its subdivisions to procure the service of private individuals to aid them in their undertakings. The very nature of our constitutional system of dual sovereign governments is such as to impliedly prohibit the federal government from taxing the

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<sup>8</sup> *McCulloch v. Maryland*, 17 U. S. 316, 4 L. ed. 579 (1819); *Dobbins v. Commissioner of Erie County*, 41 U. S. 435, 10 L. ed. 1022 (1842); *Collector v. Day*, 78 U. S. 113, 20 L. ed. 122 (1870); *Smith v. Short*, 40 Ala. 385 (1867).

<sup>9</sup> (1900) 14 HARV. L. REV. 155 on *United States v. Owens*, 100 Fed. 70 (E. D. Missouri, 1900).

<sup>10</sup> *Collector v. Day*, 78 U. S. 113, 124, 20 L. ed. 122 (1870); *Texas v. White*, 74 U. S. 700, 19 L. ed. 227 (1868) ("The preservation of the states and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government").

<sup>11</sup> *Collector v. Day*, 78 U. S. 113, 127, 20 L. ed. 122 (1870).

<sup>12</sup> 269 U. S. 514, 46 Sup. Ct. 172 (1926).

<sup>13</sup> *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 523, 46 Sup. Ct. 172 (1926).

instrumentalities of a state government.<sup>14</sup> Just which instrumentalities of either a state or of the federal government are exempt from taxation by the other cannot be easily stated in terms of universal application. But the Supreme Court has held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other.<sup>15</sup>

In *Helvering v. Powers*,<sup>16</sup> the court said that the state "cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* (italics ours) government functions and to which, by reason of their nature, the federal taxing power would normally extend." 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. The provisions of the Revenue Act of 1934<sup>17</sup> for taxing income derived "from compensation for personal service \* \* \* of whatever kind and in whatever form paid," is broad enough to embrace the compensation of state officers if not constitutionally immune. Constitutional immunity of the compensation of a state officer from federal taxation is not a necessary result of his being a state officer; it depends on the nature of the political activities assigned to him and upon whether they come within the fundamental reason for denying federal authority to tax, *viz.*, necessary protection of the independence of national and state governments in their respective spheres in our constitutional system.

In the aforementioned Supreme Court case of *Brush v. Commissioner of Internal Revenue*,<sup>18</sup> the court said "We are of course quite able to say that certain functions exercised by a city are clearly governmental \* \* \* while others are just as clearly private or corporate in character \* \* \*. But between these two opposing classes there is a zone of debatable ground within which the cases must be put upon

<sup>14</sup> See as to federal taxation of state instrumentalities, *Collector v. Day*, 78 U. S. 113, 20 L. ed. 122 (1870); *United States v. Railroad Co.*, 84 U. S. 822, 21 L. ed. 597 (1872); *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673 (1895); *Ambrosini v. United States*, 187 U. S. 1, 23 Sup. Ct. 1 (1902); *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342 (1911).

<sup>15</sup> *Weston v. The City Counsel of Charleston*, 27 U. S. 449, 7 L. ed. 481 (1829) (its obligations sold to raise public funds); *Dobson v. Commissioners of Erie County*, 41 U. S. 435, 10 L. ed. 1022 (1842) (employment of officers who are agents to administer its laws); *United States v. Railroad Co.*, 84 U. S. 322, 21 L. ed. 597 (1872) (its investment of public funds in the securities of private corporations, for public purposes); *Ambrosini v. United States*, 187 U. S. 1, 23 Sup. Ct. 1 (1902) (surety bonds exacted by it in the exercise of its police power). All these are so intimately connected with the necessary functions of the government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it. See *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673 (1895); *Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 171 (1922).

<sup>16</sup> 293 U. S. 214, 225, 55 Sup. Ct. 171 (1934).

<sup>17</sup> §§ 212 (a), 213 (a), and 1928 §§ 21, 22 (a).

<sup>18</sup> *William Whitlock Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

one side or the other of the line by what this court has called the gradual process of historical and judicial inclusion and exclusion."<sup>19</sup> The court went on to say that although the power to tax is the power to destroy,<sup>20</sup> the courts cannot prevent the lawful exercise because of the fear that it may lead to disastrous results. *The remedy is with the people by the election of their representatives.*<sup>21</sup>

The true distinction is between the attempted taxation of those operations of the state *essential* to the execution of its governmental functions, which the state alone can do, and those activities which are of a private character. With the former, the United States may not interfere by taxing agencies of the state in carrying out its purposes; whereas the latter, although regulated by the state, and exercising delegated authority such as the right of eminent domain, are not removed from the field of legitimate federal taxation.<sup>22</sup> Therefore, so-called public service corporations are not exempt from taxation. In the *Brush* case, Mr. Justice Sutherland contended that the operation of a water system was a governmental function and that the salaries of its employees were immune from federal taxation. He first pointed out the distinction between local law as regards the liability for torts of employees in governmental positions, and the taxing power, by showing that the liability is imposed in tort cases "\* \* \* to escape difficulties in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations."<sup>23</sup>

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<sup>19</sup> *Continental Bank v. Rock Island Ry.*, 294 U. S. 648, 55 Sup. Ct. 595 (1935). Compare *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616 (1877); *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 51 Sup. Ct. 587 (1931) (The state of Maryland undertook to tax the issues of notes of a bank of the United States. The Court held that this was a tax on the means used by the general government to execute one of their powers, and that the sovereignty of the state did not extend to those means).

<sup>20</sup> *McCulloch v. Maryland*, 17 U. S. 316, 4 L. ed. 579 (1819).

<sup>21</sup> *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342 (1911).

<sup>22</sup> *Railroad Co. v. Peniston*, 85 U. S. 5, 21 L. ed. 787 (1873). The majority opinion of *Brush v. Commissioners of Internal Revenue*, 300 U. S. 352, 57 Sup. Ct. 495 (1937) cited this case and disapproved of it on this point.

<sup>23</sup> *City of Trenton v. State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923) (The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents.) See *Harris v. District of Columbia*, 256 U. S. 650, 41 Sup. Ct. 610 (1921) and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of police power, or in the performance of such municipal faculties as the erection and maintenance of a City Hall and Courthouse, the protection of the City's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse

Cases do not decide, but plainly suggest, that municipal water works created and operated to supply the needs of a city and its inhabitants are public works, and their operation is essentially governmental in character.<sup>24</sup> The opinion in the *Brush* case<sup>25</sup> declares "that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which water is put \* \* \*. Certainly the maintenance of public

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and care for the dump where it is deposited. See *Winona v. Botzet*, 169 Fed. 321 (C. C. A. 8th, 1909). See also: *Brantman v. Canby*, 119 Minn. 396, 138 N. W. 671 (1912) (recovery permitted for gas explosion where city furnished gas to inhabitants); *Pettingill v. Yonkers*, 116 N. Y. 558, 22 N. E. 1095 (1889) (recovery permitted for injury sustained by excavation in street to lay mains); *Watson v. Needham*, 161 Mass. 404, 37 N. E. 204 (1894) (damages recovered for breach of contract by water commissioner to furnish water for plaintiff's boiler, resulting in injury to plaintiff's vegetables in greenhouse heated thereby); *Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570 (1908) (City held liable for death by drowning in conduit forming a part of City Work's System). This is not, however, an action for personal injuries sounding in tort, but a proceeding which seeks in effect to determine whether immunity from federal taxation, in respect of the activities in question, attaches in favor of a state-created municipality—an objective so different in character from that sort in a tort action as to suggest caution in applying as the guide to a decision in the former a local rule of law judicially adopted in order to avoid a supposed injustice which would otherwise result in the latter. *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 579, 51 Sup. Ct. 601 (1931) (held that the sale of motorcycles to a municipal corporation for use in its police service is not subject to federal taxation, because the maintenance of such a service is a governmental function. The decision rests on a broad consideration of the implied constitutional immunity arising from the dual character of our national and state governments). We have some decisions in the states which affirm the liability of a municipality for personal injury resulting from the negligence of its police officials under the circumstances presented in the particular cases dealt with. See *Herron v. Pittsburgh*, 204 Pa. St. 509, 54 Atl. 311 (1903); *Jones v. City of Sioux City*, 185 Iowa 1178, 170 N. W. 445 (1919); *Twist v. City of Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850 (4th Dept. 1899). Compare *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. 442 (1887), with *Altwater v. Mayor of Baltimore*, 31 Md. 462, 467 (1869). The rule in respect of municipal liability in tort is a local matter; and whether it shall be strict or liberal or denied altogether is for the state which created the municipality alone to decide. *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012 (1889).

<sup>24</sup> DESERT LAND ACT, c. 107, 19 STAT. 377; *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 677 (1905); *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655 (1907); *Power Co. v. Cement Co.*, 295 U. S. 142, 55 Sup. Ct. 725 (1935); *cf. New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184 (1881); *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. 471 (1905); *Houck v. Little River District*, 239 U. S. 254, 36 Sup. Ct. 58 (1915); *cf. Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529 (1908); *Ashton v. Cameron County District*, 298 U. S. 513, 56 Sup. Ct. 892 (1936) (definitely holding it to be a governmental function). Compare *Bingham v. United States*, 296 U. S. 211, 56 Sup. Ct. 180 (1935); *Columbus v. Mercantile Trust Co.*, 218 U. S. 645, 31 Sup. Ct. 105 (1910); *German Alliance Insurance Co. v. Home Water Co.*, 226 U. S. 220, 33 Sup. Ct. 32 (1912); *Dunbar v. City of New York*, 251 U. S. 516, 40 Sup. Ct. 250 (1920).

<sup>25</sup> *William Whitlock Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

schools, a fire department, a system of sewers, parks and public buildings, to say nothing of other public facilities and uses, calls for the exercise of governmental functions. And so far as these are concerned the water supply is a necessary auxiliary, and therefore partakes of their nature."<sup>26</sup> However, the dissenting opinion in this case<sup>27</sup> by Mr. Justice Roberts, and concurred in by Mr. Justice Brandeis, seems to be the more logical according to our present economic and social conditions. "It seems to me," says Mr. Justice Roberts, "that reciprocal rights and immunities of the national and state governments may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exaction of one must not discriminate against the means and instrumentalities of the other and must not directly *burden* (italics ours) the operation of the other. To state these canons otherwise: an exaction by either government which hits the means of instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens, or if the burden of the tax be palpable and direct rather than hypothetic and remote. Tested by these criteria the imposition of the challenged tax was lawful."<sup>28</sup> Thus the test suggested by Mr. Justice Roberts is whether the tax will be a burden on the municipality or its agents. There is ample authority to support the view, aside from its practical importance. A few cases on this point should be considered.

*Willcuts v. Bunn*,<sup>29</sup> is typical on the question of burden. The Revenue Act of 1924 imposed an income tax upon profits derived from the sale of personal property.<sup>30</sup> The plaintiff sold at a net profit certain municipal bonds owned by him. Upon this net profit, less net loss suffered on the resale of similar bonds, a tax was assessed. The

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<sup>26</sup> New York *ex rel.* Rogers v. Graves, 299 U. S. 401, 57 Sup. Ct. 269 (1937).

<sup>27</sup> William Whitlock Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

<sup>28</sup> Metcalf and Eddy v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172 (1926) ("If the water works of New York City were operated by a private corporation under a public franchise and if the petitioner had a like position with the corporation there could be no question that the imposition of a federal income tax measured by his compensation would be justified. If petitioner, instead of holding a so-called official position under the Municipal Government of New York City, was consulted from time to time with respect to its water problems, his compensation would be subject to income tax. He is put into the untaxable class upon the theory that as an official of the municipality, he is an instrumentality of the state, and to tax him upon his salary is to lay a burden on the state government, which, however trifling, is forbidden by the implied immunity of the state from the burdens imposed by the United States"). In reason and in logic it is difficult to differentiate the present case from that of a private citizen who furnishes goods, performs work, or renders services to a state or a municipality under a contract, or an officer or employee of a corporation which does the same.

<sup>29</sup> 282 U. S. 216, 51 Sup. Ct. 125 (1931) discussed in (1931) 44 HARV. L. REV. 651.

<sup>30</sup> 43 STAT. 267, 268 (1924), 26 U. S. C. § 954 (1926).



plaintiff paid under protest, and sued to recover the money paid. Judgment for the plaintiff was affirmed by the Circuit Court of Appeals.<sup>31</sup> *Certiorari* was granted by the Supreme Court. *Held, that since the imposition of the tax placed no substantial burden upon the borrowing power of the states, the assessment was valid.*<sup>32</sup> The problem of the application of immunity of state instrumentalities from federal tax burdens in this case may be approached from two angles. It may be said that the liability to the tax lessens to some extent the attractiveness of the bonds to a potential buyer and thereby interferes with the state's borrowing power, making the tax unconstitutional.<sup>33</sup> The fact that the tax is not upon money paid by the state does not necessarily make it valid.<sup>34</sup> But a similar possible diminution of salability has been allowed where inheritance taxes were levied, measured by the total value of an estate containing government securities.<sup>35</sup> Such a decision suggests the second approach—the *seriousness of the burden imposed*. Although the bonds do not enjoy a total immunity, the assessment seems the curtailment of a privilege rather than the imposition of a burden. The guaranteed return from the bonds is not thereby lessened. The incidence of the tax depends largely upon the vagaries of the money market. Moreover, the statute taken as a whole may be said to offset any burden it imposes by a provision that losses from resale may be deducted from taxable income.<sup>36</sup> The decision of the case may have significance aside from its facts in that a unanimous court joined in an opinion reaffirming the estate tax cases and resting frankly upon a consideration of the economic effect of the tax rather than upon absolute and conceptualistic reasoning.

In *Peck and Co. v. Lowe*,<sup>37</sup> the court upheld the constitutionality of a federal income tax upon net income derived mainly from exporting. The tax was sustained on the theory that a tax upon net income from exporting is sufficiently removed from the process of exporting to escape burdening it unduly.<sup>38</sup> Thus we can see that in its application to the rule developed from *McCulloch v. Maryland*<sup>39</sup> that the instrumentality of one sovereign must be immune from taxation by the other, the Supreme Court has varied between a doctrinal

<sup>31</sup> 35 F. (2d) 29 (C. C. A. 8th, 1929).

<sup>32</sup> Judgment was reversed in *Willcuts v. Bunn*, 282 U. S. 216, 51 Sup. Ct. 125 (1931).

<sup>33</sup> *Willcuts v. Bunn*, 35 F. (2d) 29, 30 (C. C. A. 8th, 1929), *rev'd*, 282 U. S. 216, 51 Sup. Ct. 125 (1931).

<sup>34</sup> *Long v. Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463 (1928).

<sup>35</sup> *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829 (1900); *Greiner v. Lewellyn*, 258 U. S. 384, 42 Sup. Ct. 324 (1922). But *cf. Macallen v. Massachusetts*, 279 U. S. 620, 49 Sup. Ct. 432 (1929). *Educational Films Corp. v. Ward*, 282 U. S. 379, 51 Sup. Ct. 170 (1931).

<sup>36</sup> 43 STAT. 269 (1924), 26 U. S. C. § 955 (1926).

<sup>37</sup> 247 U. S. 165, 38 Sup. Ct. 432 (1918).

<sup>38</sup> See Note (1934) 47 HARV. L. REV. 628, 652.

<sup>39</sup> See note 20, *supra*.

approach which tends to condemn the tax falling in any degree upon a government instrumentality, and an economic analysis which may condone the tax whose burden on the function is slight.<sup>40</sup>

*Powers v. Commissioner*<sup>41</sup> held immune from federal taxation the salary of a member of a board of trustees which managed a publicly operated street railway. The same court had shortly before granted immunity to the fees paid an auditor appointed by a state court pursuant to statutory authority, to hear evidence in a particular case.<sup>42</sup> The Board of Tax Appeals, accepting the test laid down by the Treasury Regulations,<sup>43</sup> had held that the taxpayer, although a public official, did not exercise an "essential governmental function" and was therefore liable for the tax.<sup>44</sup> The Court of Appeals for the First Circuit, however, rejected this standard, and held that the salary of a public officer is immune regardless of the function exercised. The court questioned the present validity of classical standards but declared that so judged, the operation of a street railway was not an essential governmental function. This seems clearly correct.<sup>45</sup> To sustain this position the court quoted an abridged passage from the opinion of the Supreme Court in the *Metcalf* case, to wit, "\* \* \* any taxation by one government of the salary of an officer of the other \* \* \* is prohibited."<sup>46</sup> But this very passage, in its entirety, as well as the decision in *South Carolina v. United States*<sup>47</sup> and *North Dakota v. Olsen*,<sup>48</sup> are the strongest precedent for the standard set up by the regulations. To hold that the state itself, while acting in a proprietary capacity, is taxable, but that the officials through whom it carries on these functions are not, would be an obvious absurdity. However, the decision seems correct on the alternative ground stated by the court: that the duties of the trustees, to the extent that they involved regulation of public utility rates and apportionment of deficits to be raised by taxation, were essential governmental functions, complying with the standard advocated by the government.<sup>49</sup>

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<sup>40</sup> *Developments in the Law of Taxation* (1934) 47 HARV. L. REV. 1209.

<sup>41</sup> 68 F. (2d) 634 (C. C. A. 1st, 1934).

<sup>42</sup> *Commissioner v. Ogden*, 62 F. (2d) 334 (C. C. A. 1st, 1932); see Note (1925) 38 HARV. L. REV. 793, 796-798.

<sup>43</sup> U. S. TREASURY REGULATIONS 69, art. 88 (1926). The same provisions are contained in *id.* at 74, art. 643 (1933).

<sup>44</sup> *Leland v. Powers*, 26 B. T. A. 1381 (1932).

<sup>45</sup> See *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172, 31 Sup. Ct. 342 (1911); Note (1925) 38 HARV. L. REV. 793, 798-799. *Contra*: *Frey v. Woodworth*, 2 F. (2d) 725 (E. D. Mich. 1924) (holding the salary of an employee of a municipally owned street railway immune from federal taxation).

<sup>46</sup> *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 524, 46 Sup. Ct. 172 (1926).

<sup>47</sup> 199 U. S. 437, 26 Sup. Ct. 110 (1905) (held a state engaged in the liquor business subject to a federal license tax). See Note (1933) 47 HARV. L. REV. 321.

<sup>48</sup> 33 F. (2d) 848 (C. C. A. 8th, 1929); (1929) 43 HARV. L. REV. 329 (holding a state-owned bank liable for a federal capital stock tax).

<sup>49</sup> See Note (1934) 47 HARV. L. REV. 1209.

From what has been stated, it becomes evident that the difficulty of being consistent in the various decisions is due to the inconsistency with which the term *burden* is used by the courts. An arbitrary, if only tentative, test as to when a federal tax is a burden on a municipality, or its government, seems more desirable than the uncertain methods that have been employed in the past. This writer prefers the test of *actual harm*, rather than any theoretical possibility of disadvantage. An arbitrary yet definable test, as this one necessarily is, would be flexible enough to take care of changing social and economic conditions.

It seems as if courts should attempt to define the territorial limitations on the taxing power with reference to practical considerations rather than to any capricious conceptualism. As long as the tradition persists that conclusions in constitutional cases are decided from definitely pre-ordained constitutional principles rather than the exigencies of clashing individual and public interests, the active factors in a tax decision must remain more or less veiled behind an orthodox conceptualism. It is tremendously important, however, for the lawyer to pierce this barrier, and come to grips with the active determinants behind the course of decision.<sup>50</sup>

The Supreme Court will have an opportunity, at its present session, to pave the way toward federal taxation of the incomes of state employees, and state taxation of the earnings of federal workers. If the court supports the position of the federal government, outlined in a brief filed by Attorney General Cummings, it will probably provide the means for ending immunity now given the income from state and federal securities, without the necessity of a constitutional amendment. The Cummings Brief asks the court to overrule a number of its prior decisions and end the tax immunity accorded to those doing business with the state and federal governments. The same interpretation of the constitution that provides this immunity would likewise clarify the law on exemption of governmental salaries and bonds from dual taxation, and reversal in this instance logically would lead to reversal in the others.

SYDNEY SAXON.

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<sup>50</sup> *Some Aspects of the Taxation of Federal and State Instrumentalities* (1935) 10 ST. JOHN'S L. REV. 45 by Benjamin Harrow, is a splendid article discussing this problem from the viewpoint of the implication of the Sixteenth Amendment ("The Sixteenth Amendment states quite simply, that 'Congress shall have the power to lay and collect taxes on incomes, from whatever source derived.' As terms are used in common speech, this Amendment is quite inclusive and in the opinion of the writer, covers income from state instrumentalities \* \* \*. So far as the federal government is concerned, all methods should be attempted in a serious effort to restate the fundamental law of the land, that the federal sovereignty is supreme and that the Sixteenth Amendment means exactly what it says. The conclusion is then inescapable that the federal government may tax instrumentalities of the state").