

Sec. 8—Powers of Congress

Cl. 1—Power To Tax and Spend

state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons.”⁵⁷⁴

The second attempt to formulate a general doctrine was made in *New York v. United States*,⁵⁷⁵ although the failure to muster a majority to concur with any single opinion leaves the standard in doubt. In *New York*, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the states. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination *vel non* against state activities the test of the validity of such a tax. They found “no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.”⁵⁷⁶ In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier case to the effect that “the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it.”⁵⁷⁷

Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed “the sovereign States on the same plane as private citizens,” and made them “pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by

⁵⁷⁴ 304 U.S. at 419–20.

⁵⁷⁵ 326 U.S. 572 (1946).

⁵⁷⁶ 326 U.S. at 584.

⁵⁷⁷ 326 U.S. at 589–90.