Indian lands was overruled in 1949. The first of these cases, *Choctaw & Gulf R.R. v. Harrison*,[274] held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next, the Court held the lease itself a federal instrumentality immune from taxation.[275] A modified gross production tax imposed in lieu of all ad valorem taxes was invalidated in two *per curiam* decisions.[276] In *Gillespie v. Oklahoma*,[277] a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the state was held inapplicable to oil produced on restricted Indian lands.[278] In harmony with the trend to restricting immunity implied from the Constitution to activities of the government itself, the Court overruled all these decisions in *Oklahoma Tax Comm'n v. Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity.[279]

Summation and Evaluation

Although *McCulloch v. Maryland* and *Gibbons v. Ogden* were expressions of a single thesis, the supremacy of the national government, their development after Marshall's death has been sharply divergent. During the period when *Gibbons v. Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch v. Maryland* was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch v. Maryland*. Today, the application of the Supremacy Clause is becoming, to an ever increasing

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[274] 235 U.S. 292 (1914).

[275] Indian Oil Co. v. Oklahoma, 240 U.S. 522 (1916).

[276] Howard v. Gipsy Oil Co., 247 U.S. 503 (1918); Large Oil Co. v. Howard, 248 U.S. 549 (1919).

[277] 257 U.S. 501 (1922).

[278] Oklahoma v. Barnsdall Corp., 296 U.S. 521 (1936).

[279] 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found to stem from early rulings that tribal lands are themselves immune. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was Shaw v. Oil Corp., 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in Board of County Comm'rs v. Seber, 318 U.S. 705 (1943).