

CL. 2—Supremacy of the Constitution, Laws, and Treaties

The Doctrine of Federal Exemption From State Taxation

McCulloch v. Maryland.—Five years after the decision in *McCulloch v. Maryland* that a state may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn v. Bank of the United States*.²⁰⁸ In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was “contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court.”²⁰⁹ To which Marshall replied: “It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance.”²¹⁰ Secondly, the appellants relied “greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government. . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors.”²¹¹ Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the government were entitled to immunity from taxation upon such transactions.²¹² Thus, not only was the decision of *McCulloch v. Maryland* reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

Applicability of Doctrine to Federal Securities.—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in *Weston v. Charleston*,²¹³ where Chief Justice Marshall also found in the Supremacy Clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation.²¹⁴ A modified version of this section remains on the

²⁰⁸ 22 U.S. (9 Wheat.) 738 (1824).

²⁰⁹ 22 U.S. at 865.

²¹⁰ 22 U.S. at 865.

²¹¹ 22 U.S. at 866.

²¹² 22 U.S. at 867.

²¹³ 27 U.S. (2 Pet.) 449 (1829), followed in *New York ex rel. Bank of Commerce v. New York City*, 67 U.S. (2 Bl.) 620 (1863).

²¹⁴ Ch. 73, 37th Cong., 3d Sess., 12 Stat. 709, 710 (1863).