

In 1939, *Collector v. Day* was expressly overruled.¹¹ Nevertheless, the problem of reconciling state and national interest still confronts the Court occasionally, and was elaborately considered in *New York v. United States*,¹² where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a state. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that “[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it.”¹³ Justices Frankfurter and Rutledge found in the Tenth Amendment “no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.”¹⁴ Justices Douglas and Black dissented, saying: “If the power of the Federal Government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have.”¹⁵

Federal Police Power.—A year before *Collector v. Day* was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils.¹⁶ The Court did not refer to the Tenth Amendment. Instead, it asserted that the “express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.”¹⁷ Similarly, in the *Employers’ Liability Cases*,¹⁸ an act of Congress making every carrier engaged in interstate commerce liable to “any” employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a closely divided Court, without explicit reliance on the Tenth Amend-

¹¹ *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939). The Internal Revenue Service is authorized to sue a state auditor personally and recover from him an amount equal to the accrued salaries which, after having been served with notice of levy, he paid to state employees delinquent in their federal income tax. *Sims v. United States*, 359 U.S. 108 (1959).

¹² 326 U.S. 572 (1946).

¹³ 326 U.S. at 589.

¹⁴ 326 U.S. at 584.

¹⁵ 326 U.S. at 595. The issue was canvassed, but inconclusively, in *Massachusetts v. United States*, 435 U.S. 444 (1978).

¹⁶ *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1870).

¹⁷ 76 U.S. at 44.

¹⁸ 207 U.S. 463 (1908). See also *Keller v. United States*, 213 U.S. 138 (1909).