

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

States securities or the income derived therefrom.²²⁴ The designation of a tax is not controlling.²²⁵ Where a so-called “license tax” upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.²²⁶

Taxation of Government Contractors.—In the course of his opinion in *Osborn v. Bank of the United States*,²²⁷ Chief Justice Marshall posed the question: “Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.”²²⁸

Today, the question insofar as taxation is concerned is answered in the affirmative. Although the early cases looked toward immunity,²²⁹ in *James v. Dravo Contracting Co.*,²³⁰ by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that “[I]t is not necessary to cripple [the state’s power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.”²³¹ A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax’s validity that

²²⁴ *Provident Inst. v. Massachusetts*, 73 U.S. (6 Wall.) 611 (1868); *Society for Savings v. Coite*, 73 U.S. (6 Wall.) 594 (1868); *Hamilton Company v. Massachusetts*, 73 U.S. (6 Wall.) 632 (1868); *Home Ins. Co. v. New York*, 134 U.S. 594 (1890); *Werner Machine Co. v. Director of Taxation*, 350 U.S. 492 (1956).

²²⁵ *Macallen Co. v. Massachusetts*, 279 U.S. 620, 625 (1929).

²²⁶ *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 275 U.S. 136 (1927).

²²⁷ 22 U.S. (9 Wheat.) 738 (1824).

²²⁸ 22 U.S. at 867.

²²⁹ The dissent in *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937), observed that the Court was overruling “a century of precedents.” See, e.g., *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (voiding a state privilege tax on dealers in gasoline as applied to sales by a dealer to the Federal Government for use by Coast Guard). It was in *Panhandle* that Justice Holmes uttered his riposte to Chief Justice Marshall: “The power to tax is not the power to destroy while this Court sits.” *Id.* at 223 (dissenting).

²³⁰ 302 U.S. 134 (1937).

²³¹ 302 U.S. at 150 (quoting *Willcuts v. Bunn*, 282 U.S. 216, 225 (1931)).