> * * * But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax.

This decision, indicating clearly the distinction between the income before its payment by the government and after its receipt by the taxpayer, was followed with respect to a state tax similarly imposed upon an Indian with a certificate of competence. *Leahy* v. *State Treasurer,* 297 U. S. 420.

The notion that a tax upon the receipts derived from the government is an interference with the transaction is contradicted by the established rules that the net income or the gross receipts of the government contractor may be taxed, *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *James* v. *Dravo Contracting Co.,* 302 U. S. 134; and that the net income of the lessee may be taxed, *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376. If the conceptual dogma that a tax imposed with respect to income realized from a government transaction is an interference with that transaction were good law, neither of these taxes could be sustained. It is significant that this reason for extending tax immunity has been advanced only once [84] since the decision in *Metcalf & Eddy* v. *Mitchell.*

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[84] *Indian Motocycle Co.* v. *United States,* 283 U. S. 570. 579.

3. *The Salary Cannot Now Be Said to Share the Immunity of its Source.*—The opinion in *Collector* v. *Day* finally suggested that since the state judicial office as such was beyond the reach of the federal taxing power, so, too, was the salary paid the state judge. In other words, the compensation in the hands of the state officer shared the immunity of its source. While no earlier case seems to have articulated such a theory, some five of the subsequent decisions of the Court have adopted a similar premise.[85]

Since these decisions, however, the doctrine that to tax the income is equivalent to taxing the source has expressly been rejected by the Court. In *New*

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[85] In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, 618, the Court held the interest on municipal bonds "could not be taxed because of want of power to tax the source." In *Gillespie* v. *Oklahoma*, 257 U. S. 501, 506, the Court said that "the same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases." In *Northwestern Insurance Co.* v. *Wisconsin*, 275 U. S. 136, it said (p. 140): "Certainly since *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal."

In *Long* v. *Rockwood*, 277 U. S. 142, 147, the Court again implied that to tax the royalties derived from patents was the equivalent to taxing the patent itself. This thought was repeated in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 400–401: "Here the lease to the respondent was an instrumentality of the State * * *. To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself."

York ex rel. Cohn v. *Graves,* 300 U. S. 308, the Court upheld the New York income tax imposed upon its residents with respect to rents derived from real estate located in other States. After pointing out that the tax is a necessary payment for the privilege of living in organized society, it said (pp. 313, 314):

> Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. * * *.
>
> Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property.

Pollock v. *Farmers' Loan & Trust Co.* was distinguished as, and limited to, a decision that a tax upon net income was a direct tax requiring apportionment; "the Court did not rest its decision upon the ground that the tax was a tax on the land" (p. 315).[86] Similarly in *Guaranty Trust Co.* v. *Virginia,* 305 U. S. 19, the Court sustained a tax on

[86] The intergovernmental tax immunity cases were dismissed, apparently not with approval, but with the statement that in them "it was thought that the tax, whether on the instrumentality or on the income produced by it, would equally burden the operations of government" (p. 315).

the income of a trust of personal property situated in another state; whatever the situs of the trust, and even though the income was taxed there, it was received in Virginia and could also be taxed there.

That the Court has thoroughly rejected the doctrine that a tax on income is a tax on its source is further demonstrated by the decision in *Hale* v. *State Board,* 302 U. S. 95. There state legislation, declaring that its bonds shall not be taxed, was held not to be infringed by an income tax on the bond interest. The ruling in the *Cohn* case was reaffirmed (pp. 106–107) and the Court further explained the nature of the income tax (p. 108):

> * * * the tax complained of by appellants is not laid upon the obligation to pay the principal or interest created by the bonds, at all events within the meaning of the contract of exemption. The tax is laid upon the net results of a bundle or aggregate of occupations and investments. Under a statute so conceived and framed a man may own a quantity of state and county bonds and pay no tax whatever. The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed.

See also, *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 313–316.

In addition to an express disavowal of this ground for extending immunity, the Court has refused to apply the reasoning in a variety of comparable situations. The net income tax upon the government contractor is not held to be invalid as a tax upon the contract. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. Even a gross income tax upon the contractor, reaching every payment as it is made, is similarly held not to be an invalid tax upon the contract.[87] The net income tax upon the government lessee has been sustained without thought that the lessee itself was thereby subjected to taxation. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376.

It is, therefore, not surprising that most of the decisions which have adopted this reasoning as a basis for extending immunity have been overruled or weakened in authority. *Gillespie* v. *Oklahoma* and *Burnet* v. *Coronado Oil & Gas Co.* were expressly overruled in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376. *Long* v. *Rockwood* was expressly overruled in *Fox Film Corp.* v. *Doyal,* 286 U. S. 123. *Northwestern Insurance Co.* v. *Wisconsin* is weakened by the decision in *James* v. *Dravo Contracting Co.,* 302 U. S. 134.[88]

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[87] *James* v. *Dravo Contracting Co.*, 302 U. S. 134. (Both the majority and the minority opinions agreed on this point. 302 U. S. at 149, 164.)

[88] The basis for the *Northwestern* decision was that a "license fee" imposed upon insurance companies is not a franchise tax but a tax upon its revenues since it was measured by gross rather than by net income.

We urge, therefore, not only that *Collector* v. *Day* is irreconcilable with the subsequent decisions of this Court, and not only that the rule of immunity there announced has no practical justification, but also that each of the reasons for the decision which were advanced or suggested in that opinion has been rejected in the later tax immunity decisions.

F. THE IMMUNITY OF THE GOVERNMENT OFFICER CAN BE SUPPORTED BY NO OTHER REASON

We have shown that each of the three reasons, advanced or suggested in *Collector* v. *Day,* 11 Wall. 113, as justification for the decision of immunity, has been rejected in the subsequent decisions of this Court.

1. The only other reason which the Court seems ever to have articulated as an explanation for a decision extending exemption from a nondiscriminatory tax to a private person is that the economic burden of the tax might be passed on to the government.[89] Oddly enough, this simple reason for invalidating taxes upon private persons who deal

[89] In this examination no note will be taken of the various formulae by which the Court expresses the conclusion it has reached. These statements, however useful as a formulation of the judgment, contribute nothing to its explanation. Examples are: the tax is a direct or merely an indirect burden on the government (*Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222); a substantial or only a remote interference with the functions of government (*Railroad Co.* v. *Peniston*, 18 Wall. 5, 36); or a threat, or none, to the independence of the national or state governments (*Helvering* v. *Powers*, 293 U. S. 214, 225.

with the Government has been adopted in only three cases. In *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 448, the Court advanced as one of two grounds for its decision that, if the income of the government officer were taxed, his compensation would perforce be increased by the government. In *Gillespie* v. *Oklahoma,* 257 U. S. 501, 506, the Court said that a tax upon the income of the government lessee was invalid because, "stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards." And Chief Justice Marshall in *Weston* v. *City Council of Charleston,* 2 Pet. 449, 468, gave some emphasis to the admission of counsel that the discriminatory tax involved in that case would affect the terms on which the government borrowed. But apart from these cases no opinion of the Court has placed its decision of immunity upon this ground.[90]

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[90] Indeed, in *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 519, Justice Moody, writing for the Court, said: "The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence."

Dissenting opinions have, however, occasionally referred to the uncertainty that the tax declared invalid by the majority would have resulted in increasing the costs or lowering the revenues of the Government. *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 615, 618; *National Life Ins. Co.* v. *United States,* 277 U. S. 508, 528; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 637; *Missouri* v. *Gehner,* 281 U. S. 313,

To whatever extent that this factor has influenced these or other decisions, it can no longer be accepted as a ground for extending tax immunity. In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160, the Court expressly held, in response to the Government's concession that the gross receipts tax on its contractor would result in substantially increased costs to the Government:

> But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. * * * Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. * * * But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government.

In *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, the Court, in sustaining a tax upon the net income of a government lessee, recognized that one of the two grounds of the decision in the *Gillespie* case was the fact that the government might be forced to accept lowered rentals for its wards, but nonetheless overruled that decision. Finally,

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331; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 581; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 127; *Graves* v. *Texas Co.*, 298 U. S. 393, 406.

the opinion in *Helvering* v. *Gerhardt,* 304 U. S. 405, repeatedly stresses the fact that any supposed increase in cost to the government is immaterial to the validity of the tax. It said (pp. 420–421):

> Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise * * * the price of labor and materials.

The opinion also lists (pp. 418–419) a dozen cases where "taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state." Again, it is said (p. 422):

> The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

2. It seems clear enough, therefore, that the mere fact that the income tax might serve some-

what to increase the cost of employing officers by the government will not stand as a sufficient reason for which to declare it unconstitutional. But it should once more be emphasized (see *supra,* pp. 74–80) that the net income on the salary of the officer or employee will in no sense require the government to offer higher salaries in order to obtain its servants, and accordingly will have no discernible tendency to increase the costs of government.

G. THE REASONS FOR DENYING A CLAIM FOR IMMUNITY ARE FULLY APPLICABLE TO THE GOVERNMENT OFFICER

The final step in the estimate of the present authority of *Collector* v. *Day,* 11 Wall. 113, seems appropriately to be a summary examination of the reasoning on the basis of which the Court has denied tax immunity to private persons who deal with the government. It will be seen that, just as there remains no valid reason for extending the immunity, so virtually every reason which this Court has advanced for denying exemption is completely applicable to the government officer or employee.

1. *Absence of Discrimination.*—In 1862 the Court expressly rejected the argument that a nondiscriminatory state property tax might be applied to federal securities.[91] For sixty-five years after that case the Court ignored the presence or the absence of a discriminatory element in the challenged tax. If the Court did not again expressly reject it as a

[91] *Bank of Commerce* v. *New York City,* 2 Black 620.

test of validity,[92] it also failed to rely upon the absence of discrimination in any decision sustaining a tax assailed as an interference with the government operations.

But, in *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, decided in 1926, the Court sustained the federal income tax as applied to one who performed services for states and municipalities under contract. The decision was placed partially on the ground that "The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals" (p. 524). Within the next two or three years, the absence of discrimination was relied upon by the dissenting justices in three cases.[93] And in the decisions since 1931, the Court has mentioned or stressed this factor in numerous decisions. In five opinions strong and recurrent emphasis has been placed on the nondiscriminatory nature of the tax.[94] In addition, some reliance has been placed upon this factor in eight other decisions.[95]

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[92] Compare *Johnson* v. *Maryland*, 254 U. S. 51, 55.

[93] *Long* v. *Rockwood*, 277 U. S. 142, 149, 150; *National Life Insurance Co.* v. *United States*, 277 U. S. 508, 530; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 638; see also the dissent in *Brush* v. *Commissioner*, 300 U. S. 352, 375, 378.

[94] *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226, 227, 229; *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 3, 4, 5; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 384, 385, 386, 387; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413, 420; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493, 494, 495, 496.

[95] *Denman* v. *Slayton*, 282 U. S. 514, 520; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392; *Fox Film Corp.* v. *Doyal*, 286

The importance of the element of discrimination rests not only on the fact that a discriminatory tax is designed, or necessarily serves, as a discouragement against entering into the transaction with the government. In addition, to grant exemption from a nondiscriminatory tax serves, so far as the benefit is passed on to the government, to give it an advantage over private persons. The protection of governmental functions hardly can require that a positive bonus be conferred. As the Court said in *Helvering* v. *Gerhardt,* 304 U. S. 405, 421:

> The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. * * *

The increasing frequency with which the Court has emphasized the nondiscriminatory operation of the taxes indicates that it is a factor of considerable significance.

2. *Maintenance of tax sources.*—Perhaps the most frequently expressed reason for denying a claim of tax exemption is the necessity that the sources of tax revenues be maintained. In some sixteen cases, extending from 1867 through the last

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U. S. 123, 131; *Indian Territory Oil Co.* v. *Board,* 288 U. S. 325, 327; *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508, 514; *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 23; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 149, 157.

Term, the Court has stressed the importance that the doctrine of implied immunity against taxation be confined to limits sufficiently narrow to prevent the attrition of sources of governmental revenue.[96] The Court, for example, in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 384, 385, undertook the reexamination of *Gillespie* v. *Oklahoma*, 257 U. S. 501, "in the light of the expanding needs of State and Nation." This reexamination was introduced with reference to the "principle, buttressed by the most cogent considerations, that the power to tax should not be crippled." And in *Helvering* v. *Gerhardt*, 304 U. S. 405, 416, the Court said—

> any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity

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[96] *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632, 638–639; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 591–592; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30–31, 33; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 549; *South Carolina* v. *United States*, 199 U. S. 437, 455, 463; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524; *Willcuts* v. *Bunn*, 282 U. S. 216, 225; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 283; *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291, 294, 295; *Helvering* v. *Powers*, 293 U. S. 214, 225; *United States* v. *California*, 297 U. S. 175, 184; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 150; *Allen* v. *Regents*, 304 U. S. 439.

is thrown upon the national government with benefit only to a privileged class of taxpayers.

The necessity that the tax revenues of the states and the nation be maintained finds fitting illustration in the case of the government officers and employees. Numbering many hundreds of thousands, their exemption from the state and federal income taxes costs millions of dollars in annual revenue.[97] Added to this direct diminution of the tax revenues is the collateral expense of voluminous litigation as to the existence of a constitutional immunity. More intangible, but probably at least as disturbing, is the effect of so inequitable an exemption upon what might be called taxpayer morale. The man who fills out a tax return is not apt to be so scrupulous as might otherwise be the case if he considers that his neighbor, a government employee with a comparable income, is to pay no tax whatever.

3. *Payment for benefits received.*—Another reason which has on occasion been advanced to sus-

[97] The Treasury Department has estimated that 25 percent of the 2,600,000 officers and employees of state governments would be subject to the federal income-tax laws if their supposed immunity were removed, and that their total tax payments would increase the federal revenues by about $16,000,000 per year. Statement of Hon. John W. Hanes, Hearings Before Special Senate Committee on Taxation of Government Securities and Salaries, Jan. 18, 1939, pp. 10–11. No estimate has been made of the increased state revenues which would result.

tain a challenged tax is that the person who chances to deal with the Government, equally with all other citizens, should make his just contribution to the expenses of the government which seeks to impose the tax. This ground of decision we have already discussed (*supra,* pp. 73–74). Plainly the government officer or employee enjoys the benefits of living under the other government equally with all other persons. Common fairness would seem to require that he contribute his share to its costs.

4. *Conjectural effect upon the Government.*— The Court has on numerous occasions sustained a challenged tax because, having a due regard to the fact that the test is the practical effect of the tax,[98] it was unable to conclude that its impact on the government with which the taxpayer dealt would be real and substantial.[99] Thus, in *Helvering* v.

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[98] *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30–31; *Plummer* v. *Coler*, 178 U. S. 115, 135–136, 138; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523–524; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392; *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291, 294; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 516; *Graves* v. *Texas Co.*, 298 U. S. 393, 401; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 152; *Helvering* v. *Gerhardt*, 304 U. S. 405, 420–421.

[99] *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30–31, 36–37; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 598; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 126; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524, 525; *Willcuts* v. *Bunn*, 282 U. S. 216, 226; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 328; *Burnet* v.

Mountain Producers Corp., 303 U. S. 376, 386, the Court said that immunity from nondiscriminatory taxation "cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects."

We have already shown that the net income tax on the salary of the government officer or employee in all probability will have no effect whatever on the public treasury; it certainly will not be disputed that any possible effect of the tax is extremely conjectural (see *supra*, pp. 74–80).

5. *Taxpayer Seeking a Private Profit.*—This is the only ground of decision leading to a denial of tax immunity which is not as fully applicable to the government officer as to any private person claiming exemption. This reason for refusing exemption has been mentioned in a number of opinions, commonly in terms which emphasize that the taxpayer is not a part of the government but instead a private entrepreneur or investor.[1] The

A. T. Jergins Trust, 288 U. S. 508, 516; *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 3; *Helvering* v. *Therrell*, 303 U. S. 218.

[1] *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382; *Clallam County* v. *United States*, 263 U. S. 341, 345; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 525; *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291, 294; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 130; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 369; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 386. See, also, *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 514; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 157. See also *Helvering* v. *Gerhardt*, 304 U. S. 405, 423, 424.

government officer is, of course, a part of the government while performing his official duties; to that extent this ground for denying the exemption is inapplicable. But it is equally true that the income tax is not laid on the performance of his official duties, but on the salary after it has left the public treasury and has been devoted to his personal ends. See *Dyer* v. *City of Melrose,* 215 U. S. 594; *Choteau* v. *Burnet,* 283 U. S. 691.

Accordingly even this ground of decision has some application here. Every other reason for holding taxable the private person who has dealings with the government is fully applicable to the officer or employee. Every reason which would lead to his exemption from a nondiscriminatory tax has been rejected by this Court. There is no practical reason for extending the immunity. We respectfully submit, therefore, that the rule exempting the officer or employee from a nondiscriminatory net income tax on his salary should be abandoned.

H. FOREIGN FEDERATIONS WITH SIMILAR PROBLEMS HAVE FIRST ADOPTED AND THEN REJECTED THE RULE OF *COLLECTOR* v. *DAY*

The experience of two other federated systems, which have been forced to wrestle with the problems of taxation as between central and local governments deserves especial emphasis. In both Canada and Australia the law of intergovernmental tax immunity has started with a rigorous appli-

cation of the doctrine of *Collector* v. *Day,* 11 Wall. 113, and has subsequently made a sharp departure. The later developments have extended virtually to the point of a complete abolition of every exemption of a private person which is based on an implied immunity from a nondiscriminatory tax. The course of decision in each of these jurisdictions will briefly be summarized.

1. Canada

The Canadian federation is governed by the British North America Act, 1867, 30 & 31 Vict., c. 3. In broad outline, the constitutional basis for the rules of intergovernmental tax immunity is similar to that of the United States. Section 125 expressly provides that "No Lands or Property belonging to *Canada* or any Province shall be liable to Taxation," but there is no provision relating to the immunity of private persons who deal with the Dominion or the provincial governments. Legislative power is distributed between the Dominion and provincial governments in a manner analogous to that obtaining in the United States (Secs. 91, 92), except that the central government is given the limited residuary power "to make Laws for the Peace, Order, and good Government of *Canada,* in relation to all Matters not * * * assigned exclusively to the Legislatures of the Provinces." [2]

[2] The Privy Council has confined the residuary clause to cases of extraordinary emergency or peril. See *Hodge* v.

There is no express provision, but the supremacy of dominion laws is settled doctrine.[3]

a. *Early Immunity.*—The provincial courts, in which the questions of intergovernmental tax immunity first arose, unhesitatingly followed the American cases.

The leading case in accepting this rule was *Leprohon* v. *City of Ottawa,* 2 Ont. App. 522 (1878), holding the municipal income tax, authorized by provincial legislation, *ultra vires* when applied to the salary received by a member of the Dominion Parliament. This result was placed partly on the grounds that otherwise "the salary fixed by the proper authority of the Dominion Government would be subject to reduction by Provincial authority" (p. 526), and that the tax would impair the efficiency of the federal servants who would, *pro tanto,* be underpaid (p. 528). But each

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The Queen, 9 App. Cas. 117 (1883); *Attorney General for the Dominion* v. *Attorney General for Alberta*, (1916) 1 A. C. 588; *In re Board of Commerce Act*, (1922) 1 A. C. 191; *Toronto Electric Commissioners* v. *Snider*, (1925) A. C. 396. Compare *Russell* v. *The Queen*, 7 App. Cas. 829 (1882).

[3] Section 91, giving powers to the dominion, declares the legislative authority of the Parliament to be exclusive "notwithstanding anything in this Act," and further declares that any matter coming within any of the enumerated classes shall not be deemed to come within those matters assigned exclusively to the provincial legislatures. See *Tennant* v. *Union Bank of Canada*, (1894) A. C. 31; *Attorney General for Canada* v. *Attorneys General for the Provinces*, (1898) A. C. 700.

of the opinions makes plain that the American cases were the decisive factor.

Subsequently, dominion officials were held exempt from provincial income taxation,[5] from provincial poll taxes,[6] and from garnishee or other actions of creditors.[7]

b. *Abandonment of Collector* v. *Day.*—But in the meantime, the Privy Council had given clear indication that it would not encourage the transplanting of the American doctrine. *Bank of Toronto* v. *Lambe,* 12 App. Cas. 575, was decided in 1887. There the bank, taken to be incorporated by the Dominion under the express authorization of

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[4] Spragge, C., expressed "high appreciation" of the "great merits and value" of the American cases, and said that their "principle is, if anything, more free from difficulty in its application to our constitution, than to that of the United States" (pp. 529, 530). Hagarty, C. J., could see "no practical difference in the principles governing" the tax immunity problems in each jurisdiction (pp. 532–533). Burton, J., devoted the bulk of his opinion to summarizing the "long course of well considered decisions" (p. 541) of this Court. Patterson, J., based his decision "upon the authority of the eminent American jurists which has settled the question in the neighbouring republic" (p. 567).

[5] *Ex parte Owen*, 20 N. B. 487 (1881); *Ackman* v. *Town of Moncton*, 24 N. B. 103 (1884); *Coates* v. *Town of Moncton*, 25 N. B. 605 (1886); *Ex parte Burke*, 34 N. B. 200 (1896); compare *Bucke* v. *City of London*, 10 Ont. L. R. 628 (1905), holding retired pay taxable.

[6] *Regina* v. *Bowell*, 4 B. C. 498 (1896).

[7] *Evans* v. *Hudon*, 22 L. C. Jur. 268 (1877); *Ex parte Killam*, 34 N. B. 530 (1898).

Section 91,[8] resisted the payment of a Quebec tax on banking, measured by the amount of paid-in capital and the number of branches. The tax was challenged on the ground, among others, that the power to tax involved the power to destroy the bank and the power of the Dominion to create banks, but the Privy Council categorically rejected this argument (pp. 585–587).[9]

The implications of the *Bank of Toronto* case were pressed further by the Privy Council in *Webb* v. *Outrim,* (1907) A. C. 81 (see infra, pp. 115–116), where it held an officer of the Australian Commonwealth subject to state income taxation.

It is not surprising, then, that in *Abbott* v. *City of St. John,* 40 Can. Sup. Ct. 597 (1908), the Supreme Court of Canada, with one judge dissenting, held an officer of the Dominion to be subject to a provincial tax on his income. The several opinions relied in part on *Webb* v. *Outrim,* but rather more on the broad proposition that the Dominion officer should not be exempt from "a general undiscriminatory tax upon the incomes of residents"

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[8] In fact, the Bank of Toronto was incorporated in 1855 by the then parliament of Canada. 12 App. Cas. at 580.

[9] This refusal to follow the reasoning of *McCulloch* v. *Maryland* has been continued in subsequent cases. *Brewers & Maltsters' Ass'n* v. *The Attorney General,* (1897) A. C. 231; *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.,* (1920) A. C. 184; cf. *Lymburn* v. *Mayland,* (1932) A. C. 318; *City of Halifax* v. *Lyall & Sons Co.,* 65 D. L. R. 305 (1922); *John Deere Plow Co.* v. *Wharton,* (1915) A. C. 330; *Great West Saddlery Co.* v. *The King,* (1921) 2 A. C. 91.

(p. 607) because he, as all others, should pay his share of the costs of provincial government: "The Dominion is and has always been able to keep in respectable condition all her civil servants and not to make them dependent on the bounty of any one part of the Dominion * * *" (pp. 612–613). It was recognized that the tax was no interference with the functions of the Dominion, since "no attempt is made to seize or appropriate the income itself, or to anticipate its payment" (p. 616) and the power expressly granted by Section 92 to fix the salaries of Dominion officers was "a subject as far removed as possible" from "the fiscal burdens incident to provincial or municipal citizenship" (p. 618). While *Collector* v. *Day* was not cited, *McCulloch* v. *Maryland* was distinguished, in part, on the authority of *Webb* v. *Outrim* (p. 608) and in part because of the "history leading up to" its decision (p. 613). The reasoning of the *Leprohon* case was expressly disavowed (pp. 614, 619).

The converse situation was presented in *Caron* v. *The King,* (1924) A. C. 999, and the Privy Council held the Dominion income tax applicable to a cabinet minister in a provincial government. Expressly approving the arguments developed in *Abbott* v. *City of St. John,* the Court added (p. 1006):

> * * * the Parliament of Canada could not exercise its power of taxation so as to destroy the capacity of officials lawfully appointed by the Province.

> But the Income Tax Acts * * * are not discriminating statutes. They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to, the source from which their annual means are derived.

Following these decisions, it has frequently been held that both the Dominion and the provinces may tax the salaries paid the officers of the other.[10]

2. Australia

The Commonwealth of Australia Constitution Act of 1900, 63 & 64 Vict., c. 12, is quite similar to the United States Constitution, so far at least as the present questions are concerned. The Commonwealth exercises delegated powers, while the states retain all powers not granted (Secs. 51, 107). The Commonwealth legislation is supreme.[11] There is an express prohibition against taxing, without

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[10] *Dugas* v. *MacFarlane*, 18 W. L. R. 701 (1911); *Re County Court Judges Income Tax*, 25 O. W. R. 600 (1914); *City of Toronto* v. *Morson*, 37 O. L. R. 369 (1916); *Attorney-General for Manitoba* v. *Harper*, 42 Man. 569 (1934); *Worthington* v. *Attorney General of Manitoba*, (1936) S. C. R. 40, (1936) 1 D. L. R. 465; *Forbes* v. *Attorney General of Manitoba* (1937), 1 D. L. R. 289; *The Judges* v. *Attorney General for Saskatchewan*, 54 T. L. R. 464 (P. C., 1937).

[11] The Commonwealth legislation prevails in case of conflict (Sec. 109), and is declared binding over all persons in the Commonwealth (Sec. 5).

the government's consent, the property either of the Commonwealth or of the states.[12]

a. *Early Confusion.*—The problem of intergovernmental tax immunity has proved no easier for the Australian than for the American and Canadian courts. Indeed, due to the fact that prior to 1907 appeal to the Privy Council could be taken directly from state courts,[13] there was, for a brief period, a welter of contradictory decisions which exceeds that known in either of the other federations.

The Supreme Court of Victoria was the first to speak. In *Wollaston's Case,* 28 V. L. R. 357 (1902), it held a Commonwealth official subject to the state income tax and completely rejected the doctrine of implied immunity. The American cases were distinguished on the grounds that the Australian constitution was more easily amended, and that the Crown had power to disallow either commonwealth or state legislation. Two years later the High Court of the Commonwealth reached precisely the opposite conclusion in *D'Emden* v. *Pedder,* 1 C. L. R. 91. It held that a federal officer could not be subjected to a state stamp tax upon a receipt for his salary. The American cases were

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[12] Section 114 provides: "A State shall not, without the consent of the Parliament of the Commonwealth, * * * impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

[13] See *Webb* v. *Outrim,* (1907) A. C. 81, 91–92.

said to be regarded "not as an infallible guide but as a most welcome aid and assistance." The tax was regarded as an interference with the power of the Commonwealth to perform its functions and to pay its officers. The Federal High Court reached the same result in *Deakin* v. *Webb,* 1 C. L. R. 585, and reversed the Victoria court, which had refused to follow the analogy of *D'Emden* v. *Pedder*. Relying upon the American cases, the court held the state unable to apply its income tax to the salary of a Commonwealth official. It refused to certify the case to the Privy Council.[14] This decision was followed by the Tasmanian court.[15] And, in a case involving regulatory powers, the High Court held that the principle of *D'Emden* v. *Pedder* served to make the federal arbitration act inapplicable to employees of state railways.[16]

The principle of reciprocal immunity was accordingly established in the High Court. The Victoria Court, in *Outrim's Case,* 30 V. L. R. 463 (1905), felt bound by the High Court doctrine and held the salary of a Commonwealth official to be exempt from the state tax. However, the court

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[14] 10 Argus L. R. 258 (1904). Such certification was necessary for appeal in Commonwealth constitutional questions. See Section 74 of Commonwealth of Australia Constitution Act, *supra.*

[15] *King* v. *Bowden*, 1 Tas. L. R. 149 (1905).

[16] *Federated Railway Service Ass'n* v. *New South Wales Railway Ass'n*, 4 C. L. R. 488 (1906).

granted leave to appeal not to the High Court but to the Privy Council. That court, in *Webb* v. *Outrim,* (1907) A. C. 81, refused to accept the reasoning of the Commonwealth High Court and reversed. The opinion, by the Earl of Halsbury, disposes of the affirmative case in a paragraph: the state has the power to tax and the Commonwealth Act contains no such restriction on this power as was sought by Outrim (p. 87). The balance of the opinion is devoted to distinguishing the American cases, for "no one would speak lightly of the authority of such a judge as Marshall C. J." (p. 88). The controlling distinction was found in the fact that the legislation of an Australian state required, in theory, the assent of the Crown,[17] and "when it is assented to, it becomes an Act of Parliament," not subject, as was American legislation, to be invalidated because unconstitutional (pp. 88–89). This supposed theoretical supremacy, or parity, of the state legislation seems quite inadmissible as a distinction of the American cases: (1) the Commonwealth legislation is, as in America, supreme over state legislation; (2) it does not distinguish *Collector* v. *Day,* and the other American cases extending an immunity against federal taxation, which were cited to the Court; (3) it does not permit the decision that discriminatory taxes

[17] 18 & 19 Vict., c. 55, Sec. III. This power has little if any practical significance. See Warner, Problems of Australian Federation, p. 3.

are *ultra vires,* which the Privy Council would undoubtedly hold.[18]

However, the High Court of Australia in turn refused to follow the decision of the Privy Council. In *Baxter* v. *Commissioner of Taxation,* 4 C. L. R. 1087 (1907), it held the New South Wales income tax inapplicable to the salary paid a federal officer. The High Court was held not to be bound by decisions of the Privy Council in cases arising from state courts and the opinion in *Webb* v. *Outrim* was declared to contain nothing to cause a reconsideration of the earlier decisions of the High Court. Then, as a final gesture of defiance, the High Court refused to allow a certificate for appeal to the Privy Council.

The intolerable situation caused by this conflict of doctrine led the High Court in *Flint* v. *Webb,* 4 C. L. R. 1178 (1907), to suggest remedies. There it held the Victoria income tax inapplicable to a Commonwealth employee and again denied a certificate for appeal to the Privy Council. Chief Justice Griffiths suggested that the Commonwealth waive the immunity of federal employees; three justices suggested that the Parliament of the Commonwealth eliminate the right of appeal from state courts to the Privy Council in constitutional cases. Both suggestions were adopted.[19] Because the leg-

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[18] Compare *John Deere Plow Co.* v. *Wharton,* (1915) A. C. 330; *Great West Saddlery Co.* v. *The King,* (1921) 2 A. C. 91.

[19] Commonwealth Salaries Act, 1907; Judiciary Act, 1907.

islation waiving immunity made the question one of small importance, the Privy Council refused leave to appeal, on an application made directly to it, in the *Baxter* and *Flint* cases.[20]

b. *Removal of Immunity.*—The legislation removing the immunity of federal salaries was sustained in *Chaplin* v. *Commissioner of Taxes,* 12 C. L. R. 375 (1911). But, in cases not covered by this legislation, the doctrine of intergovernmental immunity was a problem which the courts alone were forced to work out. The litigation of the next decade showed a gradually accelerating tendency to eliminate all immunity of private persons from nondiscriminatory taxation.[21]

Finally, in 1920 the High Court, in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.,* 28 C. L. R. 129, cleanly swept away the doctrine of an implied and reciprocal immunity. The union was engaged in an industrial dispute with the steamship company and other employers throughout the Commonwealth, including a num-

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[20] *Commissioners of Taxation* v. *Baxter, Webb* v. *Flint,* (1908) A. C. 214.

[21] *Heiner* v. *Scott,* 19 C. L. R. 381 (1914); *Attorney General of New South Wales* v. *Collector of Customs,* 5 C. L. R. 818 (1908); *Commonwealth* v. *New South Wales,* 25 C. L. R. 325 (1918); *Attorney General for Queensland* v. *Attorney General for the Commonwealth,* 20 C. L. R. 148 (1915); *Federated Engine Drivers Ass'n* v. *The Broken Hill Co., Ltd.,* 12 C. L. R. 398, 415 (1911); *Federated Engine Drivers Ass'n* v. *The Broken Hill Co., Ltd.,* 16 C. L. R. 245 (1913); *Federated Municipal Employees Union* v. *City of Melbourne,* 26 C. L. R. 508 (1919).

ber of state departments and enterprises; the question was whether the Commonwealth arbitration act applied to the state employers. The court, in a five to one decision, held the act applicable. The reasoning of the opinion, and the emphatic nature of the court's repentance, are instructive (pp. 151, 156, 157):

> The ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere: that is pure legal construction. But once their true meaning is so ascertained, they cannot be further limited by fear of abuse. * * * the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. * * *
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> * * * * *
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> So far as any observation in that case [*D'Emden* v. *Pedder*] can be regarded as favouring a reciprocal doctrine creating invalidity of Commonwealth legislation by reason of State Constitution or legislation, that observation must be considered as unwarranted by the Constitution and overruled.
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> * * * * *
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> It is apparent that if, as we have stated, the true basis of *D'Emden* v. *Pedder* is the supremacy of Commonwealth law over State law where they meet on any field, there can be no possible reciprocity. Mutual supremacy is a contradiction of terms.

The High Court refused a certificate for appeal to the Privy Counsel (29 C. L. R. 406) and that court, for want of jurisdiction in the absence of a certificate, denied a leave for appeal addressed directly to it.[22]

On the authority of the *Engineers Case,* the High Court in *Davoren* v. *Commonwealth Commissioner of Taxation,* 32 C. L. R. 616, 29 A. L. R. 129 (1923), held that the Commonwealth income tax could be applied to state officers.[23]

Finally, in *West* v. *Commissioner of Taxation,* 56 C. L. R. 657 (1937), the High Court made its definitive pronouncement. West, a retired Commonwealth officer, was subjected to income taxation by New South Wales on his pension. The Commonwealth Salaries Act, 1907, permitting state taxation of salaries, did not cover pensions. The Financial Emergencies Act, 1931, in Section 19 provided that the Governor-General by regulation might fix the maximum state taxation of salaries and pensions; he had not acted. The six justices, in separate opinions, sustained the tax. None of them doubted that "general undiscriminatory State income tax laws" were "not inconsistent with Federal laws relating to such salaries or pensions." [24]

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[22] *Minister for Trading Concerns* v. *Amalgamated Society of Engineers*, (1923) A. C. 170.

[23] See, also, *Stuart-Robertson* v. *Lloyd*, 47 C. L. R. 482 (1932); *Pirrie* v. *McFarlane*, 36 C. L. R. 170 (1925).

[24] Latham, C. J. (p. 668); see also Rich (p. 674), Dixon (p. 678) and Evatt (pp. 687, 709–710), JJ.

None doubted that the Australian constitution was well rid of "the elusive doctrine of the immunity."[25] Indeed, Justice Evatt said (p. 699):

> Although, therefore, the attempt of *Griffith, C. J.* to enunciate the rule of non-interference ended in disaster, this was due, perhaps, to over-anxiety as to the dangers which confronted the newly established Commonwealth. These dangers were greatly, and, as we would now suppose, even absurdly exaggerated. For instance, how the Commonwealth itself could possibly be injured because its officers had to bear the same taxation burdens as their fellow citizens, it is almost impossible to appreciate.

The court differed only on the speculative question as to whether the Commonwealth supremacy reached to the point that the Parliament might affirmatively provide for immunity from taxation on salaries. The majority of the court thought it could;[26] Justice Evatt thought there was no such power.[27] But the failure affirmatively to provide

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[25] Starke, J. (pp. 676–677); see Evatt, J. (p. 684):

"At first glance this claim of immunity from the operation of legislation of a State which imposes taxes upon all incomes and pensions indifferently, would appear to be extremely novel, not to say daring. But a number of prior decisions of this court negative such appearance, and some reference must be made to

"'Old, unhappy, far-off things
And battles long ago.'"

[26] Latham, C. J. (pp. 672–673); Rich, J. (p. 674); Starke, J. (p. 677); McTiernan, J. (p. 714).

[27] Pp. 684, 685, 702, 703, 709.

such an exemption was taken by all to mean that the pensions were taxable.

It results that there is no longer a doctrine of reciprocal immunity in Australia and that the private person can claim immunity from nondiscriminatory taxation only (1) if he derives his claim from the Commonwealth, not a state, and (2) if the Commonwealth Parliament has affirmatively provided for his immunity. This doctrine is not a rule of immunity, implied from the nature of a federated system, but is purely one of federal supremacy.

In Australia, then, as in Canada, the earlier rules of immunity have almost if not entirely disappeared. There are some differences in constitutional theory which might prevent these cases from being completely analogous to the American problems, even though the earlier rule of immunity was based on the American cases. But the experience of these jurisdictions is compelling evidence that there is no practical reason why a federated nation requires a rule of tax immunity for private persons, and that the operation of such a rule may sometimes prove so unsatisfactory that its abandonment follows hard on the heels of its adoption.

IV

CONGRESS HAS NOT GRANTED IMMUNITY, AND IT IS NOT TO BE IMPLIED FROM THE SILENCE OF CONGRESS

We have shown that the Constitution of its own force does not exempt the government officer or employee from an income tax on his salary.

But, since the tax is a state tax and since the employee is a federal employee, his tax liability or immunity cannot be determined without consideration of the further question of Congressional action. This question at the present time is not free from difficulty and the Court could, we believe, reasonably reach either conclusion as to the Congressional intention. Under these circumstances an express declaration by Congress would, of course, provide the most satisfactory answer.

1. Congress has provided neither immunity nor liability. Nowhere in the statute books is there a provision which either provides or waives immunity of federal officers and employees from state income taxation.

Nor do the statutes relating specifically to the Home Owners' Loan Corporation reach this problem. Section 4 (c) of the Home Owners' Loan Act of 1933 does not touch the question of the tax liability of officers and employees. It merely provides:

> The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possesion thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be

> exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed.

Congress quite plainly did not intend to cover the entire field of tax liability or exemption by this provision.[28] The bond exemption was enacted, one supposes, to give express notice to prospective purchasers; the other provisions relate solely to the activities and property of the Corporation itself. The Congressional intention as to the tax liability or immunity of the officers and employees cannot be gathered even by remote implication.[29]

It results that Congress has remained wholly silent. This, we submit, must close the inquiry; if there is no statutory provision, the case is governed by the Constitution alone.

2. We recognize, however, that in the somewhat analogous field of interstate commerce there has developed a doctrine which reads meaning into the silence of Congress, and finds immunity or liability to taxation or regulation according as Congress is supposed by its silence to have intended. The doc-

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[28] Compare, in regard to the comparable provision in the Reconstruction Finance Corporation Act, *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209, 214–215, with Sen. Rep. No. 1545 and House Rep. No. 2199, 74th Cong., 2d Sess.

[29] If one were to argue that the specification of one form of taxation excluded others, he would reach a stalemate, since the section provides both specific exemptions and specific waivers of immunity.

trine has been criticized by constitutional theorists,[30] but has an important practical utility, in that it permits enforcement of the implied prohibitions of the commerce clause without stripping Congress of the power to commit the matter to state control if this seems to it to be desirable in the national interest. There is, however, no such need for an analogous doctrine in the field of tax immunity. The scope of the state taxing power is not limited by a delegation of an exclusive power to Congress, so the state taxing act which does not offend against the Constitution itself stands in no need of the bulwark of a Congressional approval to be implied from its silence. In addition, while the implications of the Constitution and such tax exemptions as may be provided by Congress set a limit to the state power, these limitations may, quite without regard to any doctrine of Congressional silence, be waived or eliminated by Congress. There is, therefore, no necessity to find an implied support or condemnation of the state tax in the silence of Congress, for Congress has in any event full power to make such adjustments as seem desirable.

If, however, the analogy of the commerce clause is to be applied to the problems of tax immunity, and affirmative implications drawn from the silence of Congress, we submit that this silence should not be construed to mean immunity.

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[30] See, *e. g.*, Biklé, *The Silence of Congress*, 41 Harv. Law Rev. 200; Powell, *The Still Small Voice of the Commerce Clause*, 3 Selected Essays on Constitutional Law 931.

The line of demarcation in the commerce-clause cases is that which divides subjects requiring in their nature a national uniformity of regulation from those as to which local regulation might apply. *Kelly* v. *Washington,* 302 U. S. 1, 14; *Minnesota Rate Cases,* 230 U. S. 352, 399–400; *Cooley* v. *Board of Wardens,* 12 How. 299, 319. If this formula were adapted to the problems of tax immunity, it would seem to divide state taxes upon Federal instrumentalities or those who deal with the United States into two classes: those taxes the economic burden of which would largely be borne by the United States and those which had no such effect upon the Federal Government. Phrased in less precise terms, the silence of Congress might be supposed to condemn taxes which were a direct burden on the operations of the United States and to sanction those which had only an indirect or remote influence.

Measured by these standards, it seems clear enough that the silence of Congress should not be taken to mean an immunity of its officers and employees from nondiscriminatory state income taxation. We have already shown (*supra,* pp. 74–80) that the amount of the government salary is not certain to be reflected in the income tax paid; that the value of the exemption privilege varies according to the income of the officer or employee; that it is quite unlikely that the tax immunity bounty attached to government service plays an appreciable part in the decision of one considering gov-

ernment work; and that the government will receive little or none of the benefit of the privilege. Under such circumstances it hardly can be thought that the government would largely bear the burden of the nondiscriminatory net income tax upon its officer or employee, or that the tax would be a direct burden on its operations. By the same token, there is no occasion to impute to the silence of Congress an intention that there be exemption. Indeed, if the United States is in no manner affected by the tax, a Congressional desire for immunity would seem the equivalent of intending merely to bestow a bounty unrelated to the Federal functions and at the cost of the state revenues. We know of neither reason nor precedent to support a belief that Congress would intend any such result.

In short, nothing less than affirmative legislation should be allowed as a token of a Congressional intention to penalize the revenue systems of the states for the sole benefit of a privileged class of taxpayers. That this class consists of officers and employees of the United States is wholly immaterial unless it be shown, as we are confident it cannot be, that the tax burden would adversely affect the operations of the United States.

3. The conclusion that Congress can not be assumed to have intended that federal officers and employees be exempt from a nondiscriminatory state tax on net income finds ample support in the decisions of this Court.

The Court has permitted state taxation of private persons who dealt with the United States in forty-odd cases. In most of these the tax has been sustained without thought that the silence of Congress might be taken to mean immunity; in others the Court has expressly relied on the failure of Congress to provide immunity as showing the validity of the tax. We have found no case where the silence of Congress has been construed as an expression of a Congressional intention that there be exemption; cases reaching a conclusion of immunity in the absence of legislation have relied on the Constitution alone.

In many of these cases the United States would more probably bear some part of the economic burden of the tax than is the case with a net income tax on salaries. The taxes which have been held valid include, for example, gross and net income taxes on government contractors,[31] property taxes on agents and contractors,[32] and sales taxes on their

[31] *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Mason Co.* v. *Tax Commission*, 302 U. S. 186; *Atkinson* v. *Tax Commission*, 303 U. S. 20; *General Construction Co.* v. *Fisher*, 295 U. S. 715; see *Alward* v. *Johnson*, 282 U. S. 509; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319.

[32] *Choctaw O. & G. Railroad Co.* v. *Mackey*, 256 U. S. 531; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S. 412; *Central Pacific Railroad* v. *California*, 162 U. S. 91; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Thomson* v. *Pacific Railroad*, 9 Wall. 579.

transactions,[33] a bequest to the United States,[34] an inheritance tax on the transfer of federal securities,[35] and corporate franchise taxes which included the value of United States bonds in their measure.[36] Other cases are listed in the margin.[37] If the silence of Congress did not mean an unexpressed intention to exempt in these cases, it is difficult to understand that it should have a different interpretation in the case of a tax so remote from the functions of government as the net income tax upon an officer or employee.

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[33] *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466; *Tirrell* v. *Johnston*, 293 U. S. 533.

[34] *United States* v. *Perkins*, 163 U. S. 625.

[35] *Plummer* v. *Coler*, 178 U. S. 115.

[36] *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632.

[37] Property tax on officer: *Dyer* v. *City of Melrose*, 215 U. S. 594; tax on shares of corporations holding federal bonds: *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; *National Bank* v. *Commonwealth*, 9 Wall. 353; *People* v. *Commissioners*, 4 Wall. 244; property tax on lessee: *Taber* v. *Indian Territory Co.*, 300 U. S. 1; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325; *Wagoner* v. *Evans*, 170 U. S. 588; *Thomas* v. *Gay*, 169 U. S. 264; income and franchise taxes on licensee: *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Educational Films Corp.* v. *Ward*, 282 U. S. 379; property tax on licensee: *Broad River Power Co.* v. *Query*, 288 U. S. 178; *Susquehanna Co.* v. *Tax Commission (No. 1)*, 283 U. S. 291; income and property taxes on Indians: *Leahy* v. *State Treasurer*, 297 U. S. 420; *Shaw* v. *Oil Corporation*, 276 U. S. 575; *Goudy* v. *Meath*, 203 U. S. 146; lands purchased by guardian with War Risk Insurance benefits: *Trotter* v. *Tennessee*, 290 U. S. 354.

The guiding principle, which explains this consistent refusal to interpret the silence of Congress to mean a legislative purpose to exempt, has been set forth in *Shaw* v. *Oil Corporation,* 276 U. S. 575. The Court there contrasted a property tax on lands, purchased by an Indian ward out of oil royalties, with taxes from which exemption had been granted because of the implications of the Constitution. It said (p. 578) that the lands "are not such instrumentalities of the government as will be declared immune from taxation in the absence of an express exemption by Congress." Although, the Court continued (p. 581), "Congress may protect them for state taxation, [they] will nevertheless be subject to that taxation unless Congress speaks."

The requirement has been stated in many cases that there must be an express provision by Congress if a purpose to exempt a private person from an otherwise constitutional tax is to be assumed. The Court sustained a general business license tax on a federal licensee because "the national government has not assumed * * * to exercise any control over the taxation * * * by the state." *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 23. It sustained a tax on realty purchased with exempt benefits under the War Risk Insurance Act because "We see no token of a purpose to extend * * * immunity to permanent investments." *Trotter* v. *Tennessee,* 290 U. S. 354, 357. It overruled *Long* v. *Rockwood,* 277 U. S. 142, and sustained a state tax on copyright income in part because the Congress

did not "provide that the right, or the gains from its exercise, should be free of tax." *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127. The Court upheld a state tax on unrestricted Indian allotments because any intention of Congress to exempt "should be clearly manifested," and "no exemption is clearly shown by the legislation in respect to these Indian lands." *Goudy* v. *Meath,* 203 U. S. 146, 149. Recognizing the power of Congress to exempt the property of its agents from taxation, the Court sustained such a tax because "Congress did not see fit to do so here." *Central Pacific Railroad Co.* v. *California,* 162 U. S. 91, 125. Other cases similarly make express reference to the absence of a Congressional exemption, and, at least in part, for that reason sustain the challenged tax. *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319, 323–324; *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310, 315–316; *Plummer* v. *Coler,* 178 U. S. 115, 134–135; *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530, 548; *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 589, 592; *National Bank* v. *Commonwealth,* 9 Wall. 353, 363.

Finally, in *James* v. *Dravo Contracting Co.,* 302 U. S. 134, the Court sustained a gross receipts tax as applied to a contractor for the United States. Such a tax plainly bears with much greater force on the operations of the United States than does a net income tax on the government officer or employee. In the *Dravo* case the Government admitted

that the economic burden of such a tax would largely be passed on to the United States. Here it insists that sustaining the tax will result in no added cost to the United States. In that case, as here, Congress had made no provision for exemption or liability. Yet the Court sustained the tax, and expressly recognized the power of Congress to act if such taxation should prove burdensome or oppressive (pp. 160–161). It necessarily follows that the silence of Congress cannot be taken to imply a purpose to exempt from a tax so remote from the operations of government as is the net income tax on the salary of the officer or employee.

4. There remains only the possible argument that Congress has had full power to waive the supposed immunity from state taxation of its officers and employees (see *supra,* p. 40), and that it has not done so. In the field of interstate commerce the Court has found an implied acceptance by Congress of its rules, formulated under the commerce clause alone, in the fact that Congress has not acted. *Gwin, White & Prince, Inc.* v. *Henneford,* No. 75, October Term, 1938, decided January 3, 1939. Such an implied acceptance cannot, however, be found here.

In the first place, the responsibility of Congress is quite different with respect to intergovernmental tax immunity than it is with respect to interstate commerce. Under the commerce clause Congress has the implied duty to regulate, in order that trade may be free, and that the nation may be

a single economic society. A failure to act is quite likely therefore to betoken approval of the rules of the Court under the commerce clause. But whether or not the state is able to collect a nondiscriminatory net income tax from an officer or employee of the United States is a problem which primarily concerns the state and the taxpayer alone; as we have shown (*supra,* pp. 74–80), such a tax has no effect whatever on the operations of the United States. Congress may often waive an immunity which might otherwise be claimed by those who deal with it, and may choose expressly to waive immunities which could not in any event be claimed, but in either case it acts out of solicitude for state revenues and not, as under the commerce clause, in response to a duty placed on it by the Constitution.

In the second place, so long as *Collector* v. *Day,* 11 Wall. 113, stood unchallenged, the Federal Government was unable to impose its income tax upon the salaries of state officers and (as it was thought) employees. Even though such a tax did not burden the Government when applied to its officers and employees, Congress might well hesitate to eliminate only one-half of an unfortunate rule.[38] The protests of federal officers and employees at being

[38] The states, as this Court has noted in *Helvering* v. *Gerhardt,* 304 U. S. 405, 417, would have no corresponding inducement to waive the supposed immunity.

deprived of this privilege would come with much force when bulwarked by the charge that state officers and employees would retain their privileged status. And, if federal immunity were removed, this would serve only to accentuate the discriminatory and unfair privilege extended those who served the states.

Finally, two decisions of the Court make it plain that there is no implied approval by Congress if it fails to act after this Court has announced a rule of immunity. Congress did not waive the tax immunity of patent and copyright owners after the decision in *Long* v. *Rockwood,* 277 U. S. 142. But when that case was reversed in *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, the Court found no acceptance of its earlier doctrine and, indeed, relied upon the silence of Congress to show taxability (pp. 127, 129). Without here stopping to inquire how far the sales tax cases [39] pointed to a result contrary to that reached in *James* v. *Dravo Contracting Co.,* 302 U. S. 134, it may be said that the ruling in that case considerably, and wisely, contracted the limits of tax immunity from what they had earlier been thought to be. Yet the Court found no implication of Congressional approval of the older rule and again expressly referred to the power of Congress

[39] *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Graves* v. *Texas Co.,* 298 U. S. 393.

to grant exemption against unduly burdensome taxes of the nature there considered.

5. It is true that Congress, as this brief is filed, is devoting much time to a program which includes subjecting both federal and state officers and employees to income taxation by the other government. See Brief for Respondent in *State Tax Commission* v. *Van Cott,* No. 491, this Term (pp. 42, 49–59). Various statements made before committees, quoted in the brief cited above, discuss a "waiver" of the immunity of Federal officers and employees. But it is settled that such statements cannot be used to determine the intent of Congress. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493–494; cf. *Lapina* v. *Williams,* 232 U. S. 78, 90. Here the applicable committee report (H. Rpt. No. 26, 76th Cong., 1st Sess., pp. 2, 4), recommending the passage of the "Public Salary Act of 1939" speaks of providing an "express consent" to the taxation of federal salaries after December 31, 1938.

It results, therefore, that the failure of Congress to provide either tax exemption or liability cannot be construed as an approval of the immunity of federal officers and employees from a nondiscriminatory state income tax which includes the federal salary in its basis.

CONCLUSION

It seems that the operation of Section 359–2–f of the New York Tax Law, exempting the compensation of officers and employees of the United

States, is a question of state law and cannot be examined here.

We urge that there can be no doctrine denying the immunity of the United States to activities characterized as "proprietary" or "nonessential," and that the relator, an employee of the Home Owners' Loan Corporation, has the same immunity as that of any employee of the United States. Since Congress has not exempted federal officers and employees from state taxation, the question relates only to the force of the implied prohibitions of the Constitution.

We have urged that a nondiscriminatory tax on net income which includes the government salary in gross income has no relation to the functions of the government and serves only to give the government officer or employee an unfair and discriminatory advantage over private citizens, with whom he shares virtually all of the benefits of government. If this Court were to overrule *Collector* v. *Day,* 11 Wall. 113, as we request, it would make a most significant contribution to the orderly and equitable administration of the revenues of both the states and the nation. Such a decision would also eliminate confusion and contradiction from the law of tax immunity, and would measurably lessen the continuing stream of litigation, with all the consequent evils of delay and uncertainty, which must of necessity continue so long as the controlling decisions of this Court include, on the one hand,

Collector v. *Day,* and, on the other hand, the numerous decisions of recent years which each serve, to a greater or lesser extent, further to impair its authority.

For these reasons we agree with the conclusion of the Attorney General of New York and therefore respectfully submit that the decision of the court below should be reversed.

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