To paraphrase the Wisconsin court in *In re Incorporation of Village of N. Milwaukee,*[23] the sum and substance of the law is this: land may be added to the city if the circuit court thinks best. The statute does nothing less than vest in the court the powers of a third house of the legislature. The legislature has passed the law, it has been signed by the governor, and is on the statute books, but before it can go into operation the judge of the circuit court must decide if he agrees with the law making body. The decision is not based upon certain specific facts which make the law operative, but upon the implanting of a general feeling of public welfare in the mind of the judge. Accordingly, the 1949 Indiana Annexation Act, insofar as it makes annexation turn upon an exercise of legislative discretion by the circuit court, violates the separation of powers doctrine of the state as specified in Article III, Section I of the Indiana Constitution.

TAXATION

THE TANGIBLES—INTANGIBLES DISTINCTION

For thirty years after its adoption the Due Process Clause of the Fourteenth Amendment was not interpreted as limiting the states' power to tax.[1] First utilized in 1905 to strike down an *ad valorem* tax on tangible personalty kept out of the state, it was soon extended to forbid a death tax in the same circumstance. Then came its further extension to prevent multiple death or *ad valorem* taxes on intangibles. A subsequent narrowing of the Fourteenth Amendment not only removed most of the recently-imposed limitations on the power to tax intangibles, but also appeared to forecast the abolition of the restraints on taxation of tangibles.

In 1943, a citizen of Wisconsin died in that state leaving property located in Wisconsin, Illinois and Florida. In computing the tax base for an emergency inheritance tax on the estate, Wisconsin included the value of the tangible personality located in Illinois and Florida. This inclusion was held to infringe the Due Process Clause. *Treichler v. Wisconsin,* 338 U. S.

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conferred upon the courts. However, these powers are not of a nature to be definitely classified in any division of the government. Thus, the courts have been authorized to acknowledge deeds, to solemnize marriages, and to certify to the qualifications of notary publics. These acts, while not strictly of a judicial nature, are not the "function of another" branch of the government. *See* Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N. E. 496 (1914); Indianapolis v. Barnett, 172 Ind. 472, 132 N. E. 165 (1909); City of Terre Haute v. Evansville & Terre Haute R. R., 149 Ind. 174, 46 N. E. 77 (1897); Board, etc. v. First Nat'l Bank, 71 Ind. App. 290, 124 N. E. 768 (1919).

23. 93 Wis. 616, 67 N. W. 1033 (1911).

1. Prior to 1902, states' taxes had been declared invalid for lack of jurisdiction, but not on the ground that the tax violated due process. St. Louis v. Wiggins Ferry Co., 11 Wall. 423 (U. S. 1870); Northern Central Railway Co. v. Jackson, 7 Wall. 262 (U. S. 1869).

251 (1949). In not placing the states' power to tax tangibles and intangibles on the same constitutional basis, the court ignored much of its recent dicta.[2]

While intangibles are property rights which are valuable only insofar as legally enforceable, tangibles are physical things which are valuable per se. But an owner has the same property in each, the totality of rights which comprise legal ownership. In the United States Supreme Court's vacillations between permitting any state to levy a tax when it has power to enforce the payment and limiting the taxing power to a single state, an unwarranted distinction between taxation of tangibles and intangibles has become a pawn for use in support or derogation of multiple taxation.[3]

Prior to 1905, the state of the owner's domicile was held constitutionally empowered to levy either a death or an *ad valorem* tax measured by the entire value of both tangible and intangible property wherever located.[4] The owner also could be taxed by a state wherein the property was located or a person against whom a property right existed was domiciled.[5] In 1905, the Court, in *Union Refrigerator Transit Co. v. Kentucky*,[6] first construed the Fourteenth Amendment as allowing only the state of situs to impose an *ad valorem* tax on tangibles. Although the desire to avoid multiple taxation was the real basis for the decision,[7] the Court refused to apply a similar constitutional restriction against taxation of intangibles. From the assertion that intangibles are held secretly, the Court reasoned that intangibles escape taxation entirely more often than they are taxed twice, and that the non-

2. That only Mr. Justice Black dissented in the *Treichler* case is rather surprising. See the opinion of Mr. Justice Frankfurter in Northwest Airlines v. Minnesota, 322 U. S. 292 (1944); the opinion of Mr. Justice Reed, in which Mr. Justice Burton concurred, in Greenough v. Tax Assessors, 331 U. S. 486 (1947).

3. Since death taxes are universally regarded as a tax on the transfer, the subject of the transfer should not affect the power to tax. Although *ad valorem* taxes are thought of as on property, property may be either the object of ownership or the rights of ownership. In the intangibles cases the rights of ownership may be taxed wherever benefited but the rights of ownership in a tangible are held insufficient to support a tax except at the situs because of the conceptual association of all rights of ownership with the object. See I BEALE, THE CONFLICT OF LAWS 545, 604 (1935); Lowndes, *State Taxation of Inheritances*, 29 MICH. L. REV. 850, 863 (1931).

4. Kirtland v. Hotchkiss, 100 U. S. 491 (1879); State v. Mickel, 63 N. J. L. 525, 42 Atl. 843 (1899); *see* Blackstone v. Miller, 188 U. S. 189, 204 (1903).

5. Blackstone v. Miller, 188 U. S. 189 (1903); Coe v. Errol, 116 U. S. 715 (1886).

6. 199 U. S. 194 (1905).

7. That the avoidance of multiple taxation was the real basis of the decision is evident in the Court's assertion that "the adoption of a general rule that tangible personal property in other states may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of . . . (enumerated) goods . . . when already taxed at the state of situs, but of that enormous mass of personal property belonging to . . . corporations, which might be taxed in the state where they are incorporated . . . when, in no other particular, they are subject to its laws and entitled to its protection." Union Refrigerator Transit Co. v. Kenucky, 199 U. S. 194, 210, 211 (1905).

domiciliary state is usually powerless to compel payment of the tax.[8] In a 1925 case, *Frick v. Pennsylvania*,[9] the Court abolished multiple death taxation of tangibles, regarding as controlling the previous *ad valorem* case, *Union Transit Refrigerator Co. v. Kentucky*.[10]

The constitutional distinction drawn between the power to tax tangible and intangible property was abolished in the 1929 term when the Court held that only the state of situs could impose a death or *ad valorem* tax on either.[11] However, in 1939, the Court, via *Curry v. McCanless*,[12] re-established double death and *ad valorem* taxation of intangibles, holding that any state might constitutionally tax if it could spell out the power to collect and a benefit or protection to the person or property rights of the taxpayer.[13]

Subsequent pronouncements of the court indicated that in the next tangibles case the actual situs test would be rejected in favor of the benefit and protection test, thus permitting multiple taxation. Chief Justice Hughes challenged maintaining different constitutional tests for the power to tax tangibles and intangibles on the same day that the benefit and protection test was adopted.[14] The broad dicta in the 1942 case of *Tax Commission v.*

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8. *Id.* at 205.

9. 268 U. S. 473 (1925).

10. The reason offered for not limiting the power to lay a death tax on intangibles, however, was that multiple taxation of them was too well established to be overturned, not that intangibles were held secretly. Blodgett v. Silberman, 277 U. S. 6, 10 (1928).

The problem of multiple taxation resulting from having a "double domicile" for purposes of taxation is not covered by this note. *In re* Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932).

11. Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83 (1929); Beidler v. South Carolina, 282 U. S. 1 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); *accord*, First National Bank v. Maine, 284 U. S. 312 (1932); *cf.* Graves v. Elliott, 307 U. S. 383, 387 (1939) (dissenting opinion). The rule applicable to tangibles, that only the situs could tax, was applied to intangibles by relegating to them a fictitious situs at the domicile of the owner. In vigorously dissenting, Justice Holmes insisted that "taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed. . . . The notion that the property must be within the jurisdiction puts the emphasis on the wrong thing." Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 97 (1929). Later he asserted, "I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." Baldwin v. Missouri, 281 U. S. 586, 595 (1930).

12. 307 U. S. 357 (1939). Greenough v. Tax Assessors, 331 U. S. 486 (1947) announced the application of the *Curry* test to *ad valorem* taxes. *Cf.* First National Bank v. Maine, 284 U. S. 312, 331 (1932) (dissenting opinion).

13. The court said that since rights for certain purposes are treated as being localized with their tangible subjects, a state's exclusive dominion over the object meant that only that state benefited the rights of ownership. Curry v. McCanless, 307 U. S. 357, 364 (1939).

14. "The fundamental question is thus . . . whether securities, classed as intangibles, are necessarily and in all circumstances subject to a different rule from that obtaining in the case of tangible personal property. It is not perceived that there is a sound basis for such an invariable distinction, which is foreign to common thought and practical needs." Graves v. Elliott, 307 U. S. 383, 392 (1939) (dissenting opinion).

Aldrich,[15] expressing a desire to withdraw the judicial restraints on the states' power to tax, caused Mr. Justice Jackson to observe that "since the Due Process Clause speaks with no more clarity as to tangible than as to intangible property, the question is opened whether our decisions as to taxation of tangible property are not due to be overhauled."[16] In the only two tangibles cases to arise between 1939 and 1949, the state of incorporation was permitted, in one, to levy an *ad valorem* tax on all the planes of an interstate carrier;[17] the second allowed the state through which interstate barges passed to lay a tax.[18] Since the Court had previously applied the same tests to determine whether a state had power to lay death and *ad valorem taxes*,[19] it appeared that the constitutional distinction between the power to tax tangibles and intangibles would, once again, disappear.

In holding that only the state of situs could lay a death tax on tangibles, the Court in the *Treichler* case erroneously suggested that a single death tax was dictated by a proper application of the benefit and protection test that had been developed in the recent intangibles cases.[20] This view presumes that benefit and protection, for which the tax is the *quid pro quo* must run to the physical thing,[21] or that transfer at death can be benefited in only one state

15. "As stated by the minority in First Nat. Bank v. Maine, 'We can have no assurance that resort to the Fourteenth Amendment, as the ill-adapted instrument of such a reform, will not create more difficulties and injustices than it will remove.' (citations omitted) More basically, even though we believed that a different system should be designed to protect against multiple taxation, it is not our province to provide it." Tax Comm'n v. Aldrich, 316 U. S. 174, 181 (1942).

16. Tax Comm'n v. Aldrich, 316 U. S. 174, 201 (1942) (dissenting opinion). Other cases indicating that the Fourteenth Amendment restrictions on the states' power to tax tangibles would be relaxed were Greenough v. Tax Assessors, 331 U. S. 486 (1947); Central Hanover Bank & Trust Co. v. Kelly, 319 U. S. 94 (1943); Graves v. Schmidlapp, 315 U. S. 657 (1942); Pearson v. McGrew, 308 U. S. 313 (1939); Graves v. Elliott, 307 U. S. 383 (1939).

17. Northwest Airlines v. Minnesota, 322 U. S. 292 (1944). Since six of the seven other states through which the planes operated also imposed a tax, the result permitted multiple taxation. In dissenting, Mr. Justice Stone agreed that multiple taxation did not violate due process. He insisted that multiple taxation burdened commerce unduly and that the Commerce Clause should be used to strike down multiple taxes on interstate carriers.

18. The assessments were based on the ratio between the total number of miles of the company's lines in Louisiana and the total number of miles of the entire line. Ott v. Mississippi Valley Barge Co., 336 U. S. 169 (1949).

19. *Compare* Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905) *with* Frick v. Pennsylvania, 268 U. S. 473 (1925). *Compare* Curry v. McCanless, 307 U. S. 357 (1939) *with* Greenough v. Tax Assessors, 331 U. S. 486 (1947).

20. Treichler v. Wisconsin, 338 U. S. 251, 256 (1949); *cf.* note 13 *supra*.

The alignment of the members of the Court in the *Treichler* case may well indicate that no multiple taxation of tangibles is to be sanctioned. Northwest Airlines v. Minnesota, 322 U. S. 292 (1944), could easily be confined to its facts although it would in principle, require the sustaining of an *ad valorem* tax by the domiciliary state levied on out-of-state tangibles.

21. An inheritance tax is thought of as an exaction made in return for extending a privilege of transfer at death. Death tax cases therefore usually talk in terms of benefiting the transfer, not the property. Tax Comm'n v. Aldrich, 316 U. S. 174, 180 (1942);

even though the property and its owner are in different states. This despite the fact that the intangibles cases have held that a benefit and protection to the transfer, to the person, or to the property rights is sufficient to give the state extending it a power to tax,[22] and that a transfer at death is benefited both at the owner's domicile and where the right is enforcable.[23] Therefore, the dual standard remains.

The primary reason offered for maintaining different tests of the states' power to tax tangibles and intangibles, that intangibles are held secretly,[24] is not persuasive. It is said that one consequence of their being held secretly is that multiple taxation of them occurs infrequently.[25] Since all intangibles must be reported for tax purposes during the administration of an estate, this justification is wholly fallacious with reference to death taxes.[26] While intangibles frequently do escape *ad valorem* assessment,[27] so do bank notes and coins which are classified as tangibles.[28] The other consequence of sequestering intangibles, that none but the state of domicile will be able to enforce collection,[29] is an equally invalid basis for the distinction. Compulsory disclosure by the debtor, refusal to extend the protection of the courts to untaxed intangibles, and garnishment are possible ways of assuring

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First National Bank v. Maine, 284 U. S. 312, 326 (1932); *cf.* Treichler v. Wisconsin, 338 U. S. 251, 256 (1949).

22. Greenough v. Tax Assessors, 331 U. S. 486, 493 (1947); Northwest Airlines v. Minnesota, 322 U. S. 292, 294 (1944); Curry v. McCanless, 307 U. S. 357, 366-370 (1939).

23. Tax Comm'n v. Aldrich, 316 U. S. 174 (1942).

In Graves v. Elliot, 307 U. S. 383 (1939), the Court held that the unexercised power of revocation of a trust of bonds held in Colorado was the equivalent of a testamentary disposition and hence New York was allowed to impose a death tax on the estate. New York could not have conferred a greater benefit on the testator had the corpus of the trust been bank notes which are regarded as tangibles. *Cf.* Graves v. Schmidlapp, 315 U. S. 657 (1942); Pearson v. McGrew, 308 U. S. 313 (1939).

24. "One reason that state taxation of a resident on his intangibles is justified is that when the taxpayer's wealth is represented by intangibles, the tax gatherer has difficulty in locating them and there is uncertainty as to which taxing district affords benefits or protection to the actual property that the intangible represents." Greenough v. Tax Assessors, 331 U. S. 486, 492 (1947); Curry v. McCanless, 307 U. S. 357, 364 (1939); Union Transit Refrigerator Co. v. Kentucky, 199 U. S. 194, 205 (1905).

25. See note 24 *supra.*

26. *See, e.g.,* IND. STAT. ANN. (Burns 1933) §§ 6-2401, 6-2407. The statute could as effectively require the reporting of tangibles for death taxation.

27. In 1930, the assessment of money, stocks, bonds, net credits, notes, and mortgages in Chicago was $4,654,000. A determined collection drive in 1930 resulted in a 1931 assessment of $90,410,000. LELAND, *Classified Property Tax* in PROPERTY TAXES SYMPOSIUM 97 (1939). See HAYGOOD, *Over-All Tax Limits In West Virginia* in PROPERTY TAXES SYMPOSIUM 48 (1939).

28. In Blodgett v. Silberman, 277 U. S. 6 (1928), bank notes and bonds were kept in a safety deposit box outside the state of domicile; the domiciliary state was held empowered to tax the bonds but was precluded from taxing the bank notes. In Senior v. Braden, 295 U. S. 422 (1935), a trust certificate, which certainly is no more difficult to sequester than a stock certificate, was held exempt from taxation at the owner's domicile because it represented an interest in land located outside the state.

29. Cases cited note 24 *supra.*

assessment and collection in the non-domiciliary state. Imposing liability on corporations that transfer untaxed stock of a non-resident has been used as a device to enforce payment.[30] Even assuming that those things classed as intangibles escape more frequently, deficiencies in assessment and collection are not defensible reasons for drawing inflexible constitutional distinctions.[31] Sequestration should be a challenge to legislative, not judicial, imagination.

The results flowing from applying the distinction further emphasize its inadequacy. Limiting taxation of tangibles to the state of situs restricts the states' sources of revenue. Comparatively, owners of intangibles are discriminated against.[32] The utilization of the distinction and its peculiar classifications have caused important rights to turn on verbal distinctions.[33] By limiting multiple taxation through restrictions on taxation of tangibles, the movement for corrective legislation has been retarded. Since the Court has recognized that the Due Process Clause does not prohibit multiple taxation,[34] the avoidance of that consequence does not justify sacrificing the logic of the benefit and protection test.

The benefit and protection test would lead to multiple taxation; but if we assume the desirability of single taxation, there are available extra-constitutional means of securing this result. Reciprocal credit statutes have been suggested as a solution, but the tax hunger of the states plus their relatively unequal economic positions point to the inadequacy of this remedy.[35] Exclusive Congressional occupation of the death tax field with return grants to the states has also been proposed.[36] Apportionment of the tax between

30. Rhode Island Trust Co. v. Doughton, 270 U. S. 69 (1926). More extensive use of public records, *e.g.*, income tax returns, and increased cooperation among tax assessors have also been suggested as means of increasing assessment. NOONAN, *Personal Property Tax Administration* in PROPERTY TAXES SYMPOSIUM 242 (1939).

31. In Newark Fire Ins. Co. v. Board of Tax Appeals, 307 U. S. 313, 323 (1939), Mr. Justice Frankfurter said, "Wise tax policy is one thing; constitutional prohibition quite another. . . . The adjustment of such relationships with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts."

32. Mr. Justice Jackson well shows the magnitude of this prejudicial discrimination in Tax Comm'n v. Aldrich, 316 U. S. 174, 191-195 (1942) (dissenting opinion).

33. See note 28 *supra; cf.* Chief Justice Hughes, dissenting in Graves v. Elliott, 307 U. S. 383, 387 (1939).

34. Curry v. McCanless, 307 U. S. 357 (1939). "Whether or not due process under the Fourteenth Amendment forbids state taxation of acts, transactions, events or property is essentially a practical matter and one of degree, depending upon the existence of sufficient factual connections, having economic and legal effects, between the taxing state and the subject of the tax." Mr. Justice Rutledge, dissenting in Greenough v. Tax Assessors, 331 U. S. 486, 501 (1947).

35. Faught, *Reciprocity in State Taxation*, 92 U. OF PA. L. REV. 258 (1944); Freedman, *Multiple State Taxation*, 24 NOTRE DAME LAW. 41 (1948).

36. Bittker, *Taxation of Out-of-State Tangible Property*, 56 YALE L. J. 640, 668 (1947).

the states rendering a benefit has been shunned by the Court on the grounds that no workable basis for apportionment could be worked out.[37] However, *ad valorem* taxation on interstate railroads is on such a basis, and the formula for apportionment is far from being realistically connected to the actual benefit conferred.[38] Admittedly, measurable trackage of a railroad gives a rough standard for tax apportionment that is wholly lacking with reference to intangibles. Yet, a requirement that states benefiting intangibles share a single tax equally would often be as nearly related to the actual benefit extended as is the tax under the unit rule.[39] It is probable that Congressional action compelling states to so limit their taxation would be upheld.[40] Regardless of the merits or shortcomings of multiple taxation, the judicially created distinction between the power to tax tangible and intangible property is not a proper device to use in regulating state taxation and should be abolished.

37. Curry v. McCanless, 307 U. S. 357, 369 (1939); *cf.* Northwest Airlines v. Minnesota, 322 U. S. 292, 297-300 (1944).

38. In Nashville, Chattanooga & St. Louis Railway v. Browning, 310 U. S. 362 (1940), Tennessee was allowed to use as the tax base for an *ad valorem* tax that percentage of the total value of the railroad company which the mileage in Tennessee bore to the railroad's total mileage. That this ratio was quite unrelated to the benefit and protection extended to the company was evident when the amount of traffic on the road was considered. The main line trackage in Tennessee produced $541 per mile in 1937 while that outside Tennessee produced $1,293 per mile. While branch lines, which handled only 4.4% of the gross ton miles comprised 38% of the road, 75% of the branch line miles were in Tennessee. Brief for Petitioner, pp. 16, 17, Nashville, Chattanooga & St. Louis Railway v. Browning, *supra; cf.* Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891).

39. See note 38 *supra.*

40. *See, e.g.,* Tax Comm'n v. Aldrich, 316 U. S. 174, 181 (1942); Newark Fire Ins. Co. v. Board of Tax Appeals, 307 U. S. 313, 323 (1939); *cf.* Northwest Airlines v. Minnesota, 322 U. S. 292, 301 (1944) (concurring opinion); Baldwin v. Missouri, 281 U. S. 586, 596 (1930) (dissenting opinion).