THE SUPREME COURT'S ROLE IN THE ADMINISTRATION OF GOVERNMENTAL TAX IMMUNITY

In the application of the doctrine of federal supremacy[1] two basic questions of intergovernmental taxation are presented: the extent of the Federal Government's power to tax state activities and the scope of the immunity of federal activities from state taxation. The law as to the first of these questions is, for all practical purposes, well settled,[2] for, though there was a period when reciprocal immunities from taxation were recognized,[3] the states today have lost any effective constitutional protection from federal taxation of their functions. The Federal Government has full tax powers exercisable at its discretion,[4] and any tax benefits which may be granted the states are attributable to political considerations on the part of Congress and not to any constitutional limitations on this taxing power.[5]

The more vital problem is that of the nature of the immunity of federal functions from state taxation. The Federal Government in order to operate properly must be free from state interference.[6] In the first case involving a state tax on a branch of the Federal Government the tax was distinctly discriminatory and clearly an attempt to challenge federal supremacy; the Court would not tolerate this direct interference.[7] Situa-

1. Mr. Chief Justice Marshall established the doctrine of federal supremacy in McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819).

2. For an excellent discussion of this problem see Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 FED. B.J. 3 (1950).

3. Collector v. Day, 11 Wall. 113 (U.S. 1871); Ambrosini v. United States, 187 U.S. 1 (1902); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); United States v. Baltimore & Ohio R.R., 17 Wall. 322 (U.S. 1873). See also the Court's determination of the separation of powers between state and federal governments in the Slaughter-House Cases, 16 Wall. 36 (U.S. 1873).

4. From the high point reached in Collector v. Day, 11 Wall. 113 (U.S. 1871), the Court slowly curtailed state immunities in the process of broadening the federal taxing power.

In pronouncing the limitation of immunity to strictly state governmental activities as distinguished from proprietory functions in South Carolina v. United States, 199 U.S. 437 (1905), the Court expressed fear that all the states might broaden their proprietory activities to take over more fields of private enterprise, thus withdrawing a large source of federal revenue. *Id.* at 454.

But the Court later proceeded to limit immunity by steps: Meteaif v. Mitchell, 269 U.S. 514 (1926) (withholding immunity from income received by private contractors for work on a state governmental project); Willcuts v. Bunn, 282 U.S. 216 (1931) (removal of immunity on capital gains on sale of municipal bonds); Helvering v. Gerhardt, 304 U.S. 405 (1938) (removal of immunity from the income of a state employee). Finally, the Court narrowed immunity to functions unique to a state, *e.g.*, only a state can own a statehouse; only a state can raise revenue by taxing. New York v. United States, 326 U.S. 572 (1946).

5. New York v. United States, *supra* note 4, at 583.

6. McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819); Osborn v. Bank of the United States, 9 Wheat. 738 (U.S. 1824).

7. McCulloch v. Maryland, *supra* note 6.

tions soon developed in which the effect of a state tax was not so distinct. A nondiscriminatory tax levied on the income of a federal employee was held an interference with the Federal Government[8] by the Court for the reason that it would necessitate higher compensation to secure competent officials to perform Government functions; the state income tax was held a tax on the source of the income, *i.e.,* the Federal Government.[9]

From this reasoning developed the "economic burden" test: Any state tax which ultimately burdened the Federal Government was to be held an unconstitutional interference on the part of the state.[10] Administration of this test naturally required the Court to look behind matters of form to determine the actual economic consequences of each tax. As a practical matter every state tax could conceivably be a burden, more or less remote, upon the Government. The components of every manufactured product purchased by the Government, for example, may possibly be taxed by the states either directly or indirectly; employees of a federal contractor may also be taxed and some effects of state taxes may be passed on to the Federal Government when it purchases commodities or services. Every new development in this area demanded solutions of intricate and complex problems of degree,[11] problems more properly re-

8. Dobbins v. Commissioners, 16 Pet. 435 (U.S. 1842).

9. *Id.* at 448-449. See note 12 *infra.*

10. A state privilege tax on a dealer for storing gasoline later sold to the Federal Government was held invalid. Graves v. Texas Co., 298 U.S. 393 (1936). The Court, in indicating how much the tax would burden the Government if collected, noticed several points from the Government's brief. The total increase in cost of gasoline to the United States Government in Alabama would amount to $143,145.54; if all the other states were allowed a similar tax there would be a total increase in cost of $4,479,661.40 per year. The Navy Department would also have had to pay the tax on its purchase of 273,354,228 gallons of fuel oil in 1934. *Id.* at 395, n.1.

State income tax on royalties received from patents was held invalid as a tax upon the patent right itself. Long v. Rockwood, 277 U.S. 142 (1928). State tax on the privilege of a citizen's selling gasoline measured by the number of gallons sold could not be assessed on sales to the Federal Government. Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928). State income tax on a federal lessee of Indian lands was disallowed as an interference with the Government's power to lease lands. Gillespie v. Oklahoma, 257 U.S. 501 (1922). See also Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916), and Choctaw, O. & G.R.R. v. Harrison, 235 U.S. 292 (1914). But see note 12 *infra.*

11. Property owned by a private person and used by him in performing services for the Federal Government was always taxable by state and local governments levying ad valorem property taxes. Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949); Smith v. Davis, 323 U.S. 111 (1944); Choctaw, O. & G.R.R. v. Mackey, 256 U.S. 531 (1921); Gromer v. Standard Dredging Co., 224 U.S. 362 (1912); Central Pacific R. R. v. California, 162 U.S. 91 (1896); Thomson v. Union Pacific R.R., 9 Wall. 579 (U.S. 1870). However, the Court would not allow the state to tax the privilege of a person's doing business measured by the amount of gasoline sold to the Government. Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928). Perhaps the privilege tax was more of a burden on the Government; however, the contractor would probably pass on to the

solved by a legislature; the test was much too cumbersome and difficult of application for a court. Since it was not feasible for the Court to adhere strictly to this test, it soon limited federal immunity in cases in which the "burden" was too remote or not definitely fixed.[12] There was also a question of whether the individual employee or contractor should be freed from his duty of supporting the state and local government merely because of the fact that he contracted with or was employed by the Federal Government. These individuals were afforded the same protection and services by those governments as other members of the community.[13] Decisions on these matters were increasingly recognized to be of a legislative nature.[14]

The most significant problems today are those concerning the cost-plus-a-fixed-fee contract under which the Federal Government assumes any tax liability the contractor may incur. It was the Court's refusal to use the "economic burden" test in cases involving cost-plus contracts that marked the complete abandonment of that test, and, with its demise, the Court ushered in the "legal incidence" concept.[15] Under this test judicial

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Federal Government as much of the tax burden in the one case as in the other, accepting a lower profit in both instances when competition demanded.

12. In 1928 the Court held that a state tax on the income from royalties from patents was prohibited. Long v. Rockwood, 277 U.S. 142 (1928). However in Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), the court expressly overruled *Long* v. *Rockwood* and upheld a state tax on the gross receipts from copyrighted motion pictures, stating that the effect upon the functions of the Federal Government by such a tax, if any, were too remote to warrant consideration.

The states were permitted to tax the lessees of Indian lands in Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938), and the theory that a tax on income is legally and economically a tax on its source (the Government in these cases) was overruled in Graves v. New York, 306 U.S. 466 (1939). Two cases, Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928), and Graves v. Texas Co., 298 U.S. 393 (1936), forbidding state tax on private contractors for business done for the Federal Government, were both distinguished and limited to their particular facts in James v. Dravo Contracting Co., 302 U.S. 134, 152 (1937), before being expressly overruled in Alabama v. King & Boozer, 314 U.S. 1, 9 (1941).

"The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract." James v. Dravo Contracting Co., 302 U.S. 134, 159 (1937).

13. Though the purpose of granting federal immunity is to prevent undue interference by the states, the necessary consequences of the immunity is to benefit the employees by relieving them from contributing their share to the financial support of the local government. Also the Federal Government may be enabled to engage employees at salaries lower than those paid for like services by other employers. See Graves v. New York, 306 U.S. 466, 483 (1939).

14. For discussion of the change of attitude in this area see Spahr, *The Leave-It-To-Congress Trend in the Constitutional Law of Tax Immunities,* 95 U. OF PA. L. REV. 1 (1946). See also Powell, *The Waning of Intergovernmental Tax Immunities,* 58 HARV. L. REV. 633, 655 (1945); 40 MICH. L. REV. 457, 459 (1942).

15. In Alabama v. King & Boozer, 314 U.S. 1, 8 (1941), the Court said: "The Government, rightly, we think, disclaims any contention that the Constitution, unaided

review is limited to a determination of what party and object is, as a matter of form, taxed by the state.[16] Neither the Government nor its property may be the formal subject of the tax, for in the absence of permissive congressional action, the Constitution, by negative implication, prohibits the states' taxing the Federal Government or its property.[17] The role of the Court has been restricted to applying this formal test and invoking constitutional protection only when the Federal Government is directly taxed. Any further protection for Governmental functions or any waiver of the basic constitutional immunity are matters for the legislature.[18] This is analogous to the power of Congress to authorize the states to regulate commerce.[19]

Congress can either grant or withhold immunity from state taxes.[20]

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by congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government."

16. In an early case, the Court said: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." Alabama v. King & Boozer, *supra* note 15, at 9. The Court later qualified this statement by saying, "The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction." Kern-Limerick Inc. v. Scurlock, 347 U.S. 110, 121 (1954).

In United States v. Allegheny County, 322 U.S. 174 (1944), a private contractor had leased some Government equipment for use in fulfilling a Government contract. Pennsylvania levied an ad valorem tax on all the property in the contractor's plant including the federal property. Though the lessee was the formal taxpayer, the Court did not allow the tax on the Government property. However, the state can still tax the privilege of a contractor's doing business and measure the tax by property of the Government, even though by the terms of the contract the Government pays all taxes. There is no constitutional immunity for, technically, the incidence of the tax is on the private contractor and the subject of the tax is the contractor's privilege of doing business. Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953).

17. Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954); United States v. Allegheny County, 322 U.S. 174 (1944); Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 32 (1939); Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

18. The Court states in one case: "We do not imply, by this decision, that Congress does not have power to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action. The question whether immunity shall be extended in situations like these is essentially legislative in character." Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 365 (1949).

19. See Leisy & Co. v. Hardin, 135 U.S. 100 (1890); In re Rahrer, 140 U.S. 545 (1891). In the *Leisy* case the Court invalidated a state statute regulating the sale of liquor in interstate commerce. Congress then authorized the states to regulate or prohibit the sale of liquor. This latter statute was not questioned in the *Rahrer* case which upheld a state law enacted pursuant to congressional authorization.

20. "Congress may curtail an immunity which might otherwise be implied . . . or enlarge it beyond the point where, Congress being silent, the Court would set its limits." Helvering v. Gerhardt, 304 U.S. 405, 411 n.1 (1938).

For instances where Congress has enlarged the scope of immunity see General Electric Co. v. Washington, 347 U.S. 909 (1954); Dameron v. Brodhead, 345 U.S. 322 (1953); Carson v. Roane-Anderson Co., 342 U.S. 232 (1952); Lawrence v. Shaw, 300 U.S. 245 (1937). For a case in which Congress waived Governmental immunity see Board of County Comm'rs v. United States, 105 F. Supp. 995 (Ct. Cl. 1952).

The only restriction on Congress in this area is that the Government activity involved must be within the scope of Congress' constitutional powers. The power of Congress to extend these immunities beyond the narrow limits of self-executing constitutional immunity stems from its power to make any laws necessary for exercising its delegated powers.[21] The determination of tax immunity policy is a matter uniquely legislative because it involves a balancing of the states' needs for revenue against any possible detriment to the various federal activities. This is a problem for that body most representative of the states and most able to develop a flexible and consistent overall policy.[22] The Federal Government should be unrestrained in the exercise of its proper functions, but, on the other hand, a large federal contract, bringing thousands of workers into an area, will throw a heavy burden on state and local governments. New homes will be built requiring expansion of local physical facilities and increased police and fire protection. If the federal contractor and his property are granted tax immunity, the contractor may benefit from local and state government services without cost to him. Further, if existing industries in the area which would ordinarily bear the brunt of local taxation were immunized when under a federal contract, the local government would be deprived of its largest source of revenue. The benefits accruing from the infusion of large amounts of capital into an area may, however, greatly outweigh the burdens. The increased amount of money circulating in the area may be taxed every time it changes hands;[23] all business will improve if unemployment is lowered and a strong economy will allow heavier taxation.

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21. U.S. CONST., ART. I, § 8, cl. 18. McCulloch v. Maryland, 4 Wheat. 316, 426 (U.S. 1819); Carson v. Roane-Anderson Co., 342 U.S. 232, 234 (1952); Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95, 102, 103 (1941); Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 33 (1939).

22. For an insight into the approach of Congress to the problems in this area see congressional debates on the question of whether certain Government contracts would result in a burden or benefit to state and local governments. 88 CONG. REC. 2835, 3464 (1942); 86 CONG. REC. 7528, 7535 (1940).

Mr. Justice Douglas in a dissenting opinion recently noted: "When the Congress deliberates over this problem, as it often has, it does not worry about passing of title or other legal technicalities. The Congress debates whether as a matter of policy, including the need of the states for revenue, the holder of a cost-plus government contract should be immunized from state taxation." Kern-Limerick v. Scurlock, 347 U.S. 110, 126 (1954).

Congress gave consideration in one situation to a showing of immense increase in revenue collected by the states of California and Missouri due, in part at least, to greatly increased federal expenditures in those states. Also given weight was the fact that failure to extend immunity in this case would cost the Federal Government two to three billion dollars a year. 88 CONG. REC. 2835 (1942).

23. Representative Cochran pointed out that in Missouri and California there was greatly increased revenue from sales taxes levied on the purchases of skilled and unskilled labor, who received approximately 50 percent of the heavy national defense expenditure in those two states. (See note 22 *supra*.) 88 CONG. REC. 2835 (1942).

At times Congress will grant immunity and provide payments in lieu of taxes to compensate the state and local governments.[24] In these situations, if taxation were allowed, the state and local governments might be unduly benefitted at the expense of the other states;[25] but, if no compensation were provided, a state might be severely handicapped. The use of "in lieu" payments allows the Federal Government and not the various states to determine what is a reasonable compensation.

If the states consider themselves unduly deprived of revenue by any legislative action in granting immunity, they can effectively exert pressure on Congress. When Congress extended immunity to parties contracting with the Atomic Energy Commission,[26] the state governors, feeling the danger to the states from loss of revenue, passed a resolution at their annual convention requesting that the immunity be repealed.[27] Upon reconsideration and after hearing from the Bureau of the Budget[28] and the AEC itself,[29] Congress amended the Act to exclude express im-

24. For example, Congress required TVA to pay a certain percentage of the gross receipts from the sale of power for each fiscal year to state and local governments in the TVA area in lieu of tax money. 48 STAT. 66 (1933), as amended, 54 STAT. 66 (1940), 16 U.S.C. § 831 (1) (1952).

In the Atomic Energy Act of 1946 the Commission was authorized to make payments in lieu of property taxes to render financial assistance to those states and localities in which the Commission acquired property previously taxable by the state and local governments. 60 STAT. 765 (1946), 42 U.S.C. § 1809 (b) (1952), as amended, 67 STAT. 575 (1953), 42 U.S.C. § 1809 (b) (Supp. 1954).

25. Naturally, due to the concentration of industry in certain parts of the country, differences in climate, and other significant factors, Government contracts cannot be equally apportioned among the states. See Powell, *supra* note 14, at 653.

26. 60 STAT. 765 (1946), 42 U.S.C. § 1809 (b) (1952). See General Electric Co. v. Washington, 347 U.S. 909 (1954); Carson v. Roane-Anderson Co., 342 U.S. 232 (1952).

27. See Resolution Adopted by the Governors' Conference, 44th Annual Meeting, Houston, Tex., June 29-July 2, 1952, in SEN. REP. No. 694, 83rd Cong., 1st Sess., —— (1953). The main reason presented by the governors in urging repeal of express congressional immunity was that such immunity would seriously interfere with state and local powers of taxation.

28. The Bureau of the Budget reported that, whatever may have been the considerations involved when the Atomic Energy Act was adopted in 1946, no compelling reason then existed for reserving to the AEC a greater immunity from state and local taxation than that given to federal agencies and instrumentalities generally. *Id.* at ——.

29. Representatives of the AEC stated that retention of immunity was desirable from the viewpoint of the Commission, but they acknowledged that there might be overriding considerations of policy in the field of federal-state-local fiscal relationships which they could not evaluate. The Commission did indicate that repeal of this immunity would increase the cost of the program several million dollars annually, and that the Commission's immunity was not like an exemption for an existing industry which had been contributing to the support of local and state governments. Here the extent to which these activities had exempted previously taxable operations was overshadowed by the creation of vast new economic activity where none existed before.

The cost of supplying the additional public services and facilities required because of this program had been largely borne by the Federal Government. The Commission finally contended that local governments burdened by the advent of new industry would be better protected by the in lieu payments than taxation. *Id.* at ——.

munity.[30]

If Congress remains silent, the departments of the executive branch have the power to extend immunity by wording their contracts so that the legal incidence of the state tax will fall on the Government or on its property;[31] then the tax can not be collected. The department acting within its authority cannot be attacked for intentionally contracting so as to conserve federal funds[32] since it is to be expected that, without a contrary mandate from Congress, the department will always exercise its discretion in the best interests of the Federal Government. The executive departments engaging directly in various activities, would not have to pay the state taxes;[33] but usually the departments will not have necessary facilities and must enlist the services of private businesses. This difference in methods should not give the states a windfall. Several questions of policy that ultimately affect state revenues are left to the discretion of the executive branch. In the exercise of this discretion it has been exepressly requested to contract with small business whenever possible.[34] When in lieu payments are substituted for state taxation, the executive may be empowered to determine the amount of those payments.[35]

When Congress has failed to act, and the executive has contracted with the intent of avoiding state tax laws, the states may challenge the scope of the executive's authority.[36] This problem requires judicial resolution; the courts and ultimately the United States Supreme Court are necessarily called upon to keep the other branches of the Government within their proper sphere. This is another function of the Court in the field of intergovernmental taxation, but here, also, the Court's role is

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30. 60 STAT. 765 (1946), 42 U.S.C. § 1809 (b) (1952), as amended, 67 STAT. 575 (1953), 42 U.S.C. § 1809 (b) (Supp. 1954).

31. "But since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself." Kern-Limerick Inc. v. Scurlock, 347 U.S. 110, 122 1954).

32. *Ibid.*

33. Mayo v. United States, 319 U.S. 441 (1943); New York *ex rel.* Rogers v. Graves, 299 U.S. 401 (1937).

34. 62 STAT. 21 (1948), 41 U.S.C. § 151 (b) (1952).

35. The AEC was granted authority to give in lieu payments in the amounts, at those times, and upon terms it deemed appropriate. The Commission was not to make payments exceeding what would have been payable if the property had remained in private hands in the condition in which it was when acquired except in certain instances of increased burden upon the state. 60 STAT. 765 (1946), 42 U.S.C. § 1809 (b) (1952), as amended, 67 STAT. 575 (1953), 42 U.S.C. § 1809 (b) (Supp. 1954).

36. See Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954). The state court in this case had held that the Navy Department was not authorized to buy materials or equipment for the construction of an ammunition dump and that the private contractor was the purchaser who could be taxed. The Supreme Court held that the state's interpretation of the Procurement Act was too restrictive, and disallowed the tax. *Ibid.*

almost completely one of defining the limits of the various departments' statutory authority.[37] Actually, Congress, through its appropriations power, holds a much more effective check against any abuse of executive authority. Congress has also set up its own policing system through the Comptroller General who has the duty to report annually to Congress any unauthorized contracts.[38]

Litigation in this area today involves no basic constitutional problems but represents merely an administration of the legal incidence test through the application of general contract and state tax law. At first, cost-plus contracts were written without regard to the form necessary to make the Government or its property the object taxed.[39] The states were thus allowed to tax contractors even though the cost of the tax was ultimately imposed on the Government by the terms of the contracts.[40] To insulate itself from state taxation the Government made itself the purchaser of materials needed for performance of a cost-plus contract thus precluding the imposition of state sales taxes.[41]

With the purpose of capturing as much federal revenue as possible the states revamped their tax laws to tax the Government indirectly.[42] For example, Tennessee replaced the prohibited direct levy upon the Government's property[43] with a tax on the privilege of storing federally-

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37. Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954). The Court centered its consideration on the extent of the authority Congress had resided in the Navy Department to contract.

38. 42 STAT. 25 (1921), 31 U.S.C. § 53 (c) (1952).

39. This was readily apparent in the situation involved in Alabama v. King & Boozer, 314 U.S. 1 (1941). There, Alabama attempted to tax lumber sold for construction of an army camp. The state sales tax was one imposed on the purchaser and the sole defense by the Government was that it was the real purchaser by the terms of the cost-plus contract. The Supreme Court held the contractor was the actual purchaser since the Government was not obligated to pay for the lumber at the time of purchase but only after acceptance in writing by the Contracting Officer. *Id.* at 13.

40. For other instances of Government failure to protect itself in the contracting process see Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); Curry v. United States, 314 U.S. 14 (1941).

41. Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954). The Court distinguished Alabama v. King & Boozer, 314 U.S. 1 (1941), on the ground that the Government was bound by the purchase of the contractor without need of acceptance by the Government Contracting Officer.

42. Commentators had early recognized the possibility of an indirect tax from application of the legal incidence test: "It would be possible however, for the states to thwart the Federal Government's efforts at tax avoidance by changing from a buyer's to a seller's sales tax, since, as the present case [Alabama v. King & Boozer] establishes, the test for governmental immunity is whether the tax is placed 'directly' on the Government." 9 U. OF CHI. L. REV. 351, 356 (1942).

43. See United States v. Allegheny County, 322 U.S. 174 (1944); Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

owned gasoline.[44] The tax was measured by the amount of Government gasoline that was stored. Technically this type of tax is not on Government property,[45] and, with the courts recognizing the distinction, the states were able to circumvent the constitutional bar against a direct tax of federal property.[46] The executive department was educated to insure against a recurrence of this result in the instant case by leasing the tanks instead of merely contracting for storage space.[47]

Since it is clear that the Federal Government cannot be taxed as a purchaser,[48] some states currently impose a sales tax on retailers. In determining the basis for the tax the sellers have to include receipts from sales to immune federal agencies.[49] The burden of the tax falls on all

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44. During World War II the Federal Government contracted to store part of its gasoline in storage tanks owned by Esso Standard Oil. The Government gasoline was expressly exempted from all state storage and use taxes. The Government agreed to assume liability of Esso for any state taxes. The Court held that Tennessee was not levying a tax on Government property but on Esso's privilege to store gasoline; the tax was thus collectable. Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953).

45. The Court distinguished the earlier cases disallowing a tax on federal property (*supra* note 44) on very technical grounds. It pointed out that in the *Allegheny* case the value of the federal property was, in part, the measure of the tax; and, in substance, that amounted to an ad valorem tax on Government property. The tax in *Esso,* the Court stated, was imposed because Esso stored the gasoline and was not on the worth of the Government's property. The tax was still graduated to the amount of gasoline stored. *Id.* at 499.

46. In cases involving state attempts to tax interstate commerce an analogous problem arises. Privilege taxes levied on the manufacturing process are permitted even though measured by the value of the goods produced and not allowing for the value of those goods which would be shipped in interstate commerce. These privilege taxes are permitted on the theory that it would be unfair for interstate business to escape paying its share for the advantages it receives from the state and local governments. American Manufacturing Co. v. St. Louis, 250 U.S. 459 (1919). See also Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927).

Although the construction of the state statute by the state court is binding on the Supreme Court, it is not determinative of whether the tax deprives the taxpayer of a federal right. This latter consideration turns, not on the characterization given the tax by the state, but on its operation and effect. Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946). Where a federal right is involved, the Court never considers itself bound by the state court's interpretation. United States v. Allegheny County, 322 U.S. 174 (1944); Carpenter v. Shaw, 280 U.S. 363 (1930).

The reason given above for allowing the privilege tax in the interstate commerce cases might not be applicable to the field of intergovernmental immunities. It can be seen that, however, in both situations the Court is able to extricate itself from a very difficult area by adopting the distinction between a tax on privilege as opposed to a direct tax.

47. Esso Standard Oil Co. v. Evans, 345 U.S. 495, 500 (1953).

48. See note 41 *supra.*

49. Federal Reserve Bank v. Dep't of Revenue, 339 Mich. 587, 64 N.W.2d 639 (1954). The Federal Reserve Bank in this case brought an action to question whether persons selling at retail were required, pursuant to a Michigan tax law, to include in the amount of their gross receipts, proceeds derived from sales to the Bank. The Federal Reserve Bank was expressly exempted from state taxes. 40 STAT. 1314 (1919), 12 U.S.C. § 531 (1952). The Michigan Supreme Court ruled that the statute was valid as imposing

purchasers, the Government paying its proportionate share. While the legal incidence of this tax is on a private party, the *subject* of the tax includes receipts from the Federal Government. Under the legal incidence test the subject of the tax must also be property of a private interest.[50] The question is whether receipts from the Federal Government in the hands of the seller maintain their immune status, and, if the Court decides that they do, a sales tax on these gross receipts would be uncollectable to the extent of that property. This tax on the seller's receipts is the most recent essay by the states to tax indirectly the Federal Government, and the validity of the attempt will ultimately have to be interpreted by the Supreme Court.[51]

The Court has adopted the legal incidence test to extricate itself from complex and involved policy decisions required under the earlier approach. The new test is easy to apply since matters of policy do not enter into the actual process of decision. The Court's role is limited to an interpretation of the contracts and the protection of the Government and its property from a direct state tax. Matters of policy are left to Congress and the executive although it is clear that the Court can make no decision without its having a marked practical effect on the employment of federal funds.[52] Constitutional questions are settled: Self-executing immunity extends only to the Federal Government, itself, and its property; the Court need only interpret legal arrangements to determine when these constitutional limits have been crossed. The formalistic approach taken by the Court should not engender much litigation since the aggrieved parties need look primarily to Congress for relief. If Congress has remained silent and the executive, through its contracts, properly invokes the Government's constitutional immunity, then the Court should enforce that policy. Through its approach the Court has left basic policy decisions for the proper branches of Government.

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a tax on one selling to the Government and not "on" the Government as a purchaser. This is comparable to the decision in *Kern-Limerick* distinguishing the *King & Boozer* case. In both situations the Government actually pays the tax.

The United States Supreme Court had held earlier that a state could not collect a tax on sales to the Federal Land Bank, an agency granted express immunity by Congress. Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95 (1941). The Michigan court saw the North Dakota Act as imposing the legal incidence of the tax on the purchaser while the Michigan Act imposed it on the seller. Federal Reserve Bank v. Department of Revenue, 339 Mich. 587, 601, 64 N.W.2d 639, 646 (1954).

50. See note 16 *supra*.

51. When Congress grants an express immunity as it has to the Federal Reserve Banks, its intention is clear. The decision in Carson v. Roane-Anderson Co., 342 U.S. 232 (1952), suggests that when Congress has granted an express immunity, the Court will give it a liberal construction. *Id.* at 236.

52. Either the state will collect a substantial sum or that amount will be available to the department for accomplishing its objectives. In Esso Standard Oil Co. v. Evans, 345 U.S. 495, 496 (1953), liability for over $4,000,000 rested on the Court's decision.

RADIO AND TELEVISION STATION TRANSFERS: ADEQUACY OF SUPERVISION UNDER THE FEDERAL COMMUNICATIONS ACT

Over five hundred radio and television stations were transferred in a recent twelve month period reflecting the increasing significance of transfers in regulation of the industry.[1] While the history of radio regulation traces back to 1910,[2] the first legislation controlling transfers was the Radio Act of 1927 which required "the consent in writing of the licensing authority."[3] The Communications Act of 1934 re-enacted this provision and added the "public interest" criterion as a basis for judging transfers.[4] Under this vague statutory mandate, the FCC has emphasized a number of factors in approving or disapproving transfer applica-

1. For purposes of this Note, "transfer" will refer to transfer and assignment of stations (which naturally includes the license), and transfers of construction permits. From September 1, 1953 to August 30, 1954, approximately 515 radio and television stations were transferred or assigned. *Broadcasting-Telecasting,* September 7, 1953 to August 30, 1954. This represents a fivefold increase over the number of transfers which occurred in 1939. 86 CONG. REC. 434-437 (1940).

In the early forties Herbert M. Bingham, member of the Federal Communications Bar Ass'n, had this to say: "[d]ue to economic growth and development of the industry, to the large investments made in individual stations, and to the value of such stations when established and placed in operation, it is no longer possible to deal with this subject [transfers] casually or as an incident to other subjects. The transfer section should be dealt with as one of the major licensing provisions of the act, of equal or greater in importance than other licensing provisions." *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5497,* 77th Cong., 2d Sess. 42 (1942).

2. The Ship Act of 1910, 36 STAT. 629 (1910), was the first attempt to regulate radio. It required passenger ships to be equipped with radio apparatus. The Act of 1912, 37 STAT. 302 (1912), was enacted principally to foster radio-telegraphy, and vested in the Secretary of Commerce power to grant licenses. The Radio Act of 1927, 44 STAT. 1162 (1927), created the Federal Radio Commission. This commission had more regulatory powers than did the Secretary of Commerce under former legislation. The act was held constitutional in City of New York v. Federal Radio Commission, 36 F.2d 115 (D.C. Cir. 1929), *cert. denied,* 281 U.S. 729 (1930). The Communications Act of 1934, 48 STAT. 1064, 47 U.S.C. § 151 *et seq.* (1934), shifted complete authority to regulate radio to the Federal Communications Commission.

For discussion of the early history and development of radio regulation, see SOCOLOW, THE LAW OF RADIO BROADCASTING § 25-54 (1st ed. 1939); EDLEMAN, LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 TO 1947 1-11 (1950); O'Leson, *History of Radio Regulation,* in RADIO ANNUAL 627-638 (1942).

3. 44 STAT. 1167 (1927).

4. 48 STAT. 1086, 47 U.S.C. § 310(b) (1934). While this provision represents the first application of "public interest" to transfer regulation, it was originally applied in regard to licenses in the Radio Act of 1927, 44 STAT. 1166 (1927).

This phrase "public interest, convenience or necessity" was adopted from public utility regnlation. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927,* 1 AIR L. REV. 295, 303-313 (1930); see Segal and Warner, *"Ownership" of Broadcasting "Frequencies": A Review,* 19 ROCKY MT. L. REV. 111, 115 (1947).