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Recent Developments in the Law of State Taxation of Instrumentalities of the Federal Government

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SAMUEL BRECKENRIDGE NOTE PRIZE AWARDS

The Samuel Breckenridge prize of fifteen dollars for the best note in the issue of April, 1931, of the ST. LOUIS LAW REVIEW was awarded to Tobias Lewin for his note on *The History of Government Property in Minerals in the United States.* Noel F. Delporte, who wrote on *Benefit as Legal Compensation for the Taking of the Property Under Eminent Domain,* received the prize for the June, 1931, issue. The ten dollar prize for the best note of 1930-31, was awarded to Thomas G. Jeffrey for his note entitled *The Federal Trade Commission's Power With Reference to Stock Acquisitions,* which appeared in the December, 1930, issue. The committee of members of the bar which awarded the prizes for volume sixteen consisted of Messrs. Charles H. Luecking, C. Sidney Neuhoff and Frank P. Aschemeyer.

Notes

RECENT DEVELOPMENTS IN THE LAW OF STATE TAXATION OF INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT

The problem of the proper scope of the Constitutional doctrine prohibiting the States from taxing instrumentalities of the Federal Government is one which has caused sharp legal debate from the foundation of the United States. Chief Justice Marshall attempted to settle it once and for all in his celebrated decision in *McCulloch v. Maryland,*[1] which is a short treatise on the general political theories he thought were involved, rather than an opinion on the particular facts of the case. Yet, the correct application of the principle is still being disputed and the justices of the Supreme Court of the United States frequently are unable to agree. In order to understand the present scope and philosophic basis of the doctrine, it is necessary to appreciate exactly how far the Courts have gone in the several distinct fields to which it applies.

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1 (1819) 4 Wheat. 316.

The simplest class of cases involving this principle is that of taxes on property directly owned and used by the United States. Congress apparently entertained some doubt as to the tax-exempt status of such property, as it imposed conditions to protect it in the Acts admitting many of the earlier states into the Union.[2] After an exhaustive review of the authorities, the Supreme Court held the first attempt to levy such a tax unconstitutional in *Van Brocklin v. Tennessee*.[3] This conclusion was based on the fact that such property is obviously essential to the exercise of the Federal functions and upon the twin Marshallian dogmas that the Federal Government is supreme within its own sphere and that the power to tax involves the power to destroy.[4]

Closely similar questions are involved in the consideration of the validity of State taxation of lands which the United States has allotted to its Indian wards. Here the land is obviously an instrumentality of the Federal power in promoting the financial and cultural progress of the Indian. In the typical instance the Indian has only a very restricted power of alienation and has not legal title to the land.[5] A tax on the Indians with respect to their interest in the land is void.[6] When the land is leased to others for exploitation, the lessee is not subject to a tax on his gross production of minerals,[7] an income tax on his profits from working the lease,[8] or even to a personal property tax on ore already mined, but held in storage on the leased land.[9] However, in 1928 the Supreme Court unanimously ruled that a lessee of land bought by the Secretary of the Interior for an Indian out

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[2] The first such provision was in the Act authorizing the admission of Louisiana in 1811 (2 Stat. 642), applying to lands alone. Similar provisions were inserted in the Acts for the admission of Alabama (1814, 3 Stat. 492), Arkansas (1836, 5 Stat. 51), and Michigan (1836, 5 Stat. 49). The more common type protected both the lands and property of the United States, as in the Missouri Act (1820, 3 Stat. 457). In a few cases there was no such provision, as in the Maine Act (1820, 3 Stat. 544) and the Texas joint resolution (1845, 9 Stat. 108). The independent validity of such provisions is very doubtful in view of the decision in Coyle v. Smith (1911) 221 U. S. 559.

[3] (1885) 117 U. S. 151.

[4] McCulloch v. Maryland, above.

[5] Therefore a state inheritance tax upon land passing between Indians is void. Childers v. Beaver (1926) 270 U. S. 555.

[6] The Kansas Indians (1866) 5 Wall. 737.

[7] Choctaw and Gulf R. R. v. Harrison (1914) 235 U. S. 292.

[8] Gillespie v. Oklahoma (1921) 257 U. S. 501 (Pitney, Brandeis, and Clarke dissented).

[9] Jaybird Mining Co. v. Weir (1926) 271 U. S. 609. McReynolds dissented on the ground that the Federal instrumentality is only remotely affected, while Brandeis dissented on the ground that property of a private corporate agent of the U. S. had never before been held exempt.

of the profits from his allotment lands was subject to the Oklahoma gross-production tax, even though the Indian's power to aliene this land was as restricted as his power over his allotment lands. The Court speaking by Justice Stone said: "What governmental instrumentalities will be held free from State taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them." The Court then found that an exemption was not required, as the purpose of Congress in authorizing such purchases was to train the Indians for citizenship.[10] The test used appears logically somewhat unsatisfactory since it makes the purpose of Congress when the statute was passed rather than the present function of the instrumentality the criterion of its tax-exempt status. However, this does obviate the practical difficulties which would arise if the tax status of existing instrumentalities would have to be determined anew each time it was thought Congress had changed its views as to their function.

It is sometimes more convenient for the government to perform its functions through corporations chartered under Federal statutes, but wholly or partially privately owned and controlled, than to do the work directly. The two banks of the United States were the first instances of this practice. The cases of *McCulloch v. Maryland*[11] and *Osborne v. The Bank*[12] determined that the only tax which a state could impose on such a corporation was a tax upon its real estate, although the individual shareholders could be taxed upon the value of their shares of stock. When the National Banking System was founded, Congress enacted Marshall's decisions into statute law by exempting the National Banks from all state taxation with two exceptions. The shares could be taxed by the state wherein the bank was located, but could not be assessed at a greater rate than that paid by other "moneyed capital," and the real estate of the bank was subject to taxation at the same rate as other real property.[13] In *National Bank v. Commonwealth*[14] it was decided that a state might require a national bank to pay the tax as agent for its shareholders, provided it was allowed to reimburse itself from them. However, the State must be careful not to tax the bank itself on the value of its stock, the form rather than the substance of the tax determining its validity. The greatest difficulty has come in interpreting the provisions designed to

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[10] Shaw v. Gibson-Zahniser Oil Corp. (1928) 276 U. S. 575; *cf.* South Carolina v. U. S. (1905) 199 U. S. 437, holding that the U. S. may tax non-governmental instrumentalities of a state.

[11] (1819) 4 Wheat. 316.

[12] (1824) 9 Wheat. 737.

[13] (1864) 13 Stat. 99, 110-112; (1868) 15 Stat. 34.

[14] (1869) 9 Wall. 353.

guard against discrimination by the states. "Moneyed capital" has been held to mean "capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money . . . as in banking."[15] The essential element is competition with one or more phases of the business of a national bank.[16] However the law is not to be applied with a rigid technicality and it does not render a state statute invalid unless it exempts "large and substantial" amounts of other moneyed capital.[17] The mere fact that different modes of assessment were used does not invalidate the law unless there was actual discrimination.[18] In 1923 Congress amended the National Banking Act by inserting a new provision forcing the states to choose whether they would continue to tax the shares of the banks as before, or include the dividends from the shares in the income tax upon the holder, or levy a tax against the bank on its net income. It was provided that these taxes should not be discriminatory. The state's power to tax the bank's real estate was not taken away.[19] A second amendment in 1926 allowed the imposition of a tax on the banks "according to or measured by their net income." Under this clause "net income" was defined to mean "net income from all sources"[20] and hence reaches income whose non-taxable source would exempt it from an ordinary state income tax. This tax does not prevent the state including dividends from the bank in the stockholder's taxable income. Deposits in national banks are subject to state personal property taxes and the bank may pay them as agent for its depositors.[21] This tendency towards permitting freer state taxation of national banks is highly reasonable in view of the lesser direct aid given the Federal Government by them since the creation of the Federal Reserve System. Such legislation avoids the dangers inherent in allowing changes in established statutes by mere judicial action and yet allows all taxes which the states might reasonably levy. The federal reserve banks, which are much more closely connected with the functioning of the Government than the national banks ever were, are totally exempt from all forms of state taxation.[22] The federal land banks and federal intermediate credit banks are subject to state

[15] Mercantile Bank v. New York (1887) 121 U. S. 138.

[16] Aberdeen Bank v. Chehallis County (1896) 166 U. S. 440.

[17] First National Bank of Garnett v. Ayers (1894) 160 U. S. 660.

[18] San Francisco National Bank v. Dodge (1904) 197 U. S. 70. There is a thorough collection of all the cases on this subject in 12 U. S. C. A. 369-417.

[19] (1923) 42 Stat. 1499, 12 U. S. C. sec. 548.

[20] (1926) 44 Stat. 223, 12 U. S. C. sec. 548.

[21] Clement National Bank v. Vermont (1913) 231 U. S. 20.

[22] (1913) 38 Stat. 258, 12 U. S. C. sec. 531.

taxation upon their real estate alone, while their bonds, mortgages, and debentures are declared by Statute to be "instrumentalities of the Federal Government" and exempt from all state taxes.[23]

Aside from banks, the Federal Government has chartered relatively few corporations which operate within the United States. Where the stock of these corporations is privately owned, the property and income of the corporation may be taxed, just as though it were state incorporated, but the state cannot include the value of its franchise from the United States in such property nor levy a franchise tax on the corporation's exercise of its functions within the state. The tax on the property or income of such instrumentalities (chiefly the Pacific railroads) is considered "too remote" in its effect on their purpose to render it invalid.[24] Where the stock of the corporation is wholly owned by the United States, the states cannot tax any of its property or income, for the Supreme Court in taxation cases refuses to pay attention to the corporate fiction and realistically treats the property as if it were owned directly by the United States.[25] By analogy the fact that a person is operating a business under a Federal license does not exempt him or his property from taxation,[26] although the state cannot impose another license tax.[27]

Privately owned property being used to execute a contract with the United States[28] or under control of the United States through the exercise of the war powers (as the railroads under the Federal Railroad Administration)[29] is not thereby exempted from state taxation. The same is true of property under control of officers of the United States courts by virtue of receivership[30] or bankruptcy proceedings.[31] However, the state cannot levy a license tax upon the carrying on of an enterprise in fulfilment

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23 (1916) 39 Stat. 380, 12 U. S. C. sec. 931; (1923) 42 Stat. 1459, 12 U. S. C. sec. 1111; Smith v. Kansas City Title & Trust Co. (1920) 255 U. S. 180; Federal Land Bank v. Crosland (1923) 261 U. S. 374.

24 Thomson v. Union Pacific Railroad (1869) 9 Wall. 579; Railroad Co. v. Peniston (1873) 18 Wall. 5; Central Pacific Railroad Co. v. California (1895) 162 U. S. 91.

25 Clallam County v. U. S. (1923) 263 U. S. 341, but such companies are not closely enough connected with the sovereignty of the U. S. to be exempt from suit. Sloan Shipyards Corp. v. U. S. Emergency Fleet Corp. (1921) 258 U. S. 249.

26 Thompson v. Kentucky (1908) 209 U. S. 340; Susquehanna Power Co. v. State Tax Commission of Maryland (1931) 51 S. Ct. 434.

27 Moran v. New Orleans (1883) 112 U. S. 69.

28 Baltimore Shipbuilding Co. v. Baltimore (1904) 195 U. S. 375.

29 St. Louis-San Francisco Ry. v. Middlekamp (1920) 256 U. S. 226.

30 Stevens v. New York & O. M. R. Co. (C. C. S. D. N. Y. 1875) Fed. Cas. 13,405.

31 Swarts v. Hammer (1904) 194 U. S. 441.

of a contract with the Federal Government,[32] nor even impose a tax upon articles sold to the United States.[33]

The Constitution of the United States directly authorizes the Federal Government to grant patents and copyrights.[34] The purpose of a patent is to encourage the publication of discoveries by giving the inventor an exclusive right for a limited period to produce the article as a reward for his labor.[35] The Supreme Court of the United States has likened it to a Federal franchise. It is true that in this case (*Long v. Rockwood*,[36] holding invalid a state income tax including royalties from patents in taxable income) Justices Holmes, Brandeis, Stone, and Sutherland dissented on the grounds that a patent was not a federal instrumentality and that in any event a reasonable tax should be allowed. Justice Holmes' view that patents and the like are merely private privileges and not instrumentalities of the Federal Government seems to overlook the fact that they are virtually declared to be the latter by the reasons assigned in the United States Constitution authorizing them. However, they are clearly less closely connected with the governmental functioning than many other of the means the government uses in achieving its purposes, and the doctrine announced in *Shaw v. Gibson-Zahniser Oil Corporation*[37] might have been applied so as to render them subject to reasonable state taxes on the ground that the purpose of Congress in creating them did not require their exemption in the absence of express statutory provisions. Patents or licenses under patents cannot be included in the valuation of the property of their holder for the state general property tax.[38] Stock issued by a corporation in return for patents or licenses under them cannot be taxed, for this would actually amount to a

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[32] Williams v. Talladega (1912) 226 U. S. 404. Non-payment might lead the state to prevent performance. The state may collect a license tax before the contractor serves private individuals.

[33] Panhandle Oil Co. v. Mississippi (1928) 277 U. S. 218 (Holmes, Brandeis, Stone and McReynolds dissented). This decision seems to stretch the doctrine to the breaking point where the tax is reasonable and non-discriminatory. Surely, the purveyors are not exempt from all state taxation; yet all taxes would equally inevitably enter the ultimate cost to the U. S.

[34] Art. 2, Sec. 8, clause 8.

[35] Grant v. Raymond (1832) 6 Pet. 218.

[36] (1928) 277 U. S. 142. It has long been admitted that patented articles are, when made, subject to the police power of the state and may be taxed by it. Paterson v. Kentucky (1878) 97 U. S. 501; Weber v. Virginia (1880) 103 U. S. 344. Justice Holmes' dissenting opinion seems in places to confuse the patents and the articles made under them.

[37] *Cf.* text and ftn. 10, above.

[38] Long v. Rockwood, above.

tax upon the patents themselves.[39] Although the Court assumed *arguendo* in *Educational Films Corp. v. Ward*[40] that copyrights are to be treated in the same manner as patents, there seems to be no direct authority on their tax-exempt status. Obviously, patents and copyrights are very closely similar and should be treated alike.

Bonds and other securities issued by the United States are the only other important type of federal instrumentality. In *Weston v. Charleston*[41] Chief Justice Marshall delivered the opinion of the Court that any attempt by the state to tax such securities either by including them in the valuation of the personal property of their owner or by taxing the interest received from them would interfere with the Federal power to borrow money and hence was void. This principle has been followed repeatedly and generally recognized ever since, although the states have at times attempted to evade its application.[42] The loss of this tax exemption at the present time would probably not seriously curtail the Federal Government's borrowing power, although it would certainly increase somewhat the interest rate that would have to be paid. This status was fixed at a time when the United States did not enjoy its present superlative credit rating and when Secretaries of the Treasury were frequently at their wits' ends to raise funds. Yet the principle has continued so long in application that it would be more fitting to change it by Congressional action setting forth the terms of securities to be issued in the future than by a judicial reversal of policy. In this case it would probably be best to allow the interest from the bonds to be included in the state income tax while continuing to exempt the bonds from the general property tax which, in some states,

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[39] Commonwealth v. Westinghouse El. & Mfg. Co. (1892) 151 Pa. 265, 24 Atl. 1107; Edison Electric Ill. Co. v. Brooklyn (1898) 156 N. Y. 417, 51 N. E. 269.

[40] (1931) 282 U. S. 379. *Cf. infra*, the discussion as to franchise taxes.

[41] (1829) 2 Pet. 449.

[42] A tax levied against a bank on its capital stock, which was to be assessed at its net asset value without deducting U. S. bonds before the net assets were reckoned, was held bad as being clearly a tax upon the bonds. The Bank Tax Cases (1864) 2 Wall. 200. A more ingenious scheme was that adopted by a recent Missouri statute providing for the taxation of insurance companies on their net worth, which was defined as being their gross assets less their liabilities and the legal reserves they must have, but the deduction for legal reserves was to be reduced in the proportion their non-taxable assets bear to their taxable assets. This law was also held bad on the theory that the assessment would be greater if tax exempt securities were held than otherwise. Missouri Ins. Co. v. Gehner (1930) 281 U. S. 313 (Stone, Brandeis, and Holmes dissented on the grounds that allowing any deduction at all was a favor and that the proportion scheme was reasonable as the bonds were liable for the debts due or to be due).

like Missouri, is so high as to discourage seriously any investment in bonds if a tax is to be paid upon them.[43] Even at present a state can levy an inheritance tax on the full value of a deceased person's estate, although it contains tax exempt bonds, as this tax is theoretically on the privilege of transfer rather than on the property transferred.[44] Moreover, when the bonds are owned by a corporation, its stockholders may be assessed the full value of their shares, even though this value is swelled because of the corporation's tax-exempt bonds, for the corporate fiction acts as an insulation so as to validate the tax.[45] Although the state can generally tax the shareholder's income, even though part of it is derived from bond interest, it cannot do so when the Court believes the real purpose and effect of the tax is to reach income which should be tax exempt because the statute allows the shareholder to deduct from his return income on which the corporation has already paid an income tax.[46] It was held during the Civil War period that "greenbacks" were mere credit instruments and exempt from state taxation,[47] but a statute adopted in 1894 allows national bank notes and all forms of notes, certificates, or coins issued by the United States and intended to circulate as money to be taxed by the states as money on hand.[48] A check or warrant issued by the United States, but intended to be cashed at once may be taxed as money on hand, for it is not used by the government to borrow money, as bonds are.[49] However, a mere debt due from the United States, whether represented by a certificate of indebtedness[50] or not,[51] cannot be taxed as this would interfere with the Federal Government's obtaining credit. A bond issued by a municipality of a territory is to be treated as though it were issued by the United States as far as tax exemption is concerned.[52]

The most difficult part of our problem is presented when the bonds, patents, or copyrights are held by a corporation and the

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[43] The present tax rate in the City of St. Louis is \$2.71 per hundred and it is notorious that many citizens evade the tax on their bonds.

[44] Plummer v. Coler (1900) 178 U. S. 115.

[45] Van Allen v. The Assessors (1865) 3 Wall. 573.

[46] Miller v. Milwaukee (1927) 272 U. S. 713. For further illustration of this principle, *cf.* Macallen Co. v. Massachusetts, *infra.*

[47] Bank v. Supervisors (1868) 7 Wall. 26.

[48] (1894) 28 Stat. 278, 31 U. S. C. sec. 425.

[49] Hibernia Savings & Loan Society v. San Francisco (1905) 200 U. S. 310.

[50] The Bank v. The Mayor (1868) 7 Wall. 16.

[51] Astoria Light, Heat & Power Co. v. Cantor (1923) 236 N. Y. 417, 141 N. E. 901.

[52] Farmers and Mechanics Savings Bank v. Minnesota (1913) 232 U. S. 516.

state endeavors to impose a franchise tax upon the corporation. At first the Supreme Court took the view that such a tax could only be a flat sum or at most be measured by the nominal value of the corporation's capital;[53] but in *Hamilton Co. v. Massachusetts*[54] a franchise tax based upon a percentage of the excess of the fair market value of the corporation's stock over the value of its real estate and machinery was upheld, although the company had large holdings of United States bonds.[55] This view has been steadily followed ever since.[56] The next step was to uphold an annual license tax based upon the dividends paid in the preceding year. This was done in 1890 in the case of *Home Insurance Co. v. New York,*[57] although much of the income of the company, out of which dividends were paid, was derived from Federal bonds. The final step was to allow the franchise tax to be measured by the net income from all sources, whether these sources would in themselves be taxable or not. This was foreshadowed by the *Home Insurance Co.* opinion, but the cases upholding such taxes are really based upon *Flint v. Stone Tracy*[58] (upholding a United States corporate excise tax measured by total net income, when the United States had no power to levy an income tax). However, such a tax cannot be measured by a percentage of the gross income of the corporation. Such a tax is held to be a direct tax as it is not a reasonable measure of the benefits derived from the use of the corporate form and obviously is more directly a burden on tax-exempt income.[59] In 1929 the Supreme Court threw doubt upon the whole theory supporting the validity of excises measured by net income from all sources by holding a Massachusetts tax, which was in the usual form of a franchise tax and which had repeatedly been held to be a franchise tax by the Massachusetts Supreme Court, to be invalid. However, a careful reading of the majority opinion in *Macallen Co. v. Massachusetts*[60] shows that the majority reached its conclusion on grounds which did not involve a reversal of *Flint v. Stone Tracy,* although they cited it as "extreme." It was premised that the Supreme Court could not be controlled in its interpretation of the real effect of a state statute by any mere form of words or by the decisions of the state Supreme Court. The majority then determined that the legis-

[53] Bank of Commerce v. New York City (1862) 2 Bl. 620.

[54] (1867) 6 Wall. 632.

[55] Inevitably the market value of the stock would in the long run reflect these bond holdings, although it might not do so at any particular time.

[56] National Leather Co. v. Massachusetts (1928) 277 U. S. 413.

[57] (1890) 134 U. S. 594.

[58] (1911) 220 U. S. 107.

[59] Northwestern Insurance Co. v. Wisconsin (1927) 275 U. S. 36.

[60] (1929) 279 U. S. 620.

lative history of this particular tax (the former law included only income which would be taxable directly) evinced a desire to reach the illegal end of taxing income from United States bonds by seemingly legal means; hence, in reality this was a direct tax and void as such. Justices Holmes, Brandeis, and Stone dissented because they could see no such ulterior purpose in the law and strongly believed in the general validity of franchise taxes measured by total net income. In 1931 a New York Statute,[61] almost identical in wording, but with a slightly different legislative history, was declared in *Educational Films Corp. v. Ward*[62] to be a franchise tax and valid even though it included income from copyrights. Three justices who had been with the majority in the *Macallen* case dissented on the ground that the two cases could not be distinguished.[63] The paradoxical results possible by the application of the franchise tax doctrine and the rigid regard for the legal as distinguished from the economic incidence of the tax is shown by the contrasting results in *Long v. Rockwood* and *Educational Films Corp. v. Ward.* In the former a tax including the income from royalties on patents was invalid, even though the royalties were only a part of the taxpayer's income. In the latter a tax measured by net income which was wholly derived from royalties from copyrights was upheld. Yet, on the whole it is clearly best that the state franchise tax be graduated according to the benefits derived from the privilege of using the corporate form and the total net income is probably the best pragmatic measure of these benefits.

The justices of the Supreme Court seem to be divided as to what is the proper theory on which to place the exemption of Federal instrumentalities. The vast majority of cases are decided upon a consideration of the precedents without any consideration of the theory underlying these earlier decisions. These precedents virtually all trace back to Chief Justice Marshall's opinions in *McCulloch v. Maryland, Osborne v. The Bank,* and *Weston v. Charleston.* Marshall was untroubled by any apparent necessity to set any limits to the tax-exempt status of Federal instrumentalities. If the thing in question was a Federal instrumentality, that was enough; it was exempt. The modern justices are not so fortunate. The functions of the Federal Government have expanded greatly, thereby creating great masses of property and securities whose exemption means

[61] Laws of N. Y. 1929, c. 385.

[62] (1931) 282 U. S. 379.

[63] One of the justices who was in the majority in the Macallen case was also in the majority in the Educational Films Corp. case, while the other two of the majority justices in the former case were no longer on the Court when the latter was decided.

heavier taxation against such other property as the state can reach. The recognition that some Federal instrumentalities do not need tax exemption to achieve their purpose and will not receive it unless Congress expressly declares that they shall is a step in solving this problem which was made by a unanimous Court.[64] Justice Stone would restate the rule on the entire subject, making it far less sweeping in its protective scope:

> Each government in order that it may administer its affairs within its own sphere must be left free from undue interference by the other. . . . Hence, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with a minimum of interference with each other, and that limitation cannot be so varied and extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it.[65]

In recent dissenting opinions Justices Holmes and Brandeis have urged that the true test is the reasonableness of the tax, as in cases involving interstate commerce.[66] It would seem that in practice this would lead to the same result as the criterion proposed by Justice Stone. These views have not yet been adopted by the Court as such in any case involving state taxation of Federal instrumentalities, although the quoted passage expressing Justice Stone's view is part of the opinion of the Court in upholding a Federal income tax on an alleged state agent.

However sharp the theoretical conflict, the current trend of the decisions does not seem to be towards an upset of what has long been conceived to be the law on this subject. Direct taxes on almost all Federal instrumentalities are still bad. A properly drawn franchise tax may still be measured by net income from all sources. The Court does seem to be more vigilant than formerly in seeking out and prohibiting attempts to reach tax-exempt securities by the misuse of legal forms of taxation.[67]

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[64] Shaw v. Gibson-Zahniser Oil Corp., above, ftn. 10.

[65] Metcalf and Eddy v. Mitchell (1926) 269 U. S. 514, *l. c.* 523 and 524.

[66] Especially in Macallen Co. v. Massachusetts, Panhandle Oil Co. v. Mississippi, and Long v. Rockwood, above.

[67] Such zeal was clearly apparent in the Macallen Co. v. Massachusetts and Miller v. Milwaukee cases. It may be thought to have by now somewhat abated in the light of the decision in Educational Films Corp. v. Ward.