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CONSTITUTIONAL LAW - TAXATION - THE GERHARDT DECISION AND INTERGOVERNMENTAL TAX IMMUNITY

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CONSTITUTIONAL LAW — TAXATION — THE GERHARDT DECISION AND INTERGOVERNMENTAL TAX IMMUNITY — Recent decisions handed down by the United States Supreme Court this last term have to a large extent fulfilled the anticipations aroused by *James v. Dravo Contracting Co.*[1] of an enlargement of the governmental powers to impose non-discriminatory taxes.[2] *Allen v. Regents of the University System of Georgia*[3] held valid the application of a general federal admissions tax to admissions to athletic contests conducted under the auspices of the regents of the University of Georgia, a state university. *Helvering v. Mountain Producers Corp.*[4] decided that a lessee under an oil and gas lease of state school lands was not entitled to immunity, as a state instrumentality, from federal taxation in respect to income derived from operations under the lease. *Helvering v. Gerhardt*[5] upheld the imposition of a federal tax (under the general income tax law) on salaries received by employees of the Port of New York Authority, a corporation created as a state agency to construct and operate transportation and terminal facilities in a certain district.

Though a state of confusion undoubtedly still exists in this field of tax exemptions,[6] these cases have eliminated certain inconsistencies and, to some degree, clarified the law and the fundamental principles underlying intergovernmental tax immunities.

Prior to the *Gerhardt* decision, no one definite test had been set

[1] 302 U. S. 134, 58 S. Ct. 208 (1937); commented on in the same issue of this REVIEW at page 78, supra, and in 51 HARV. L. REV. 707 (1938); 12 TEMPLE L. Q. 256 (1938); 86 UNIV. PA. L. REV. 308 (1938); 24 VA. L. REV. 455 (1938); 23 WASH. UNIV. L. Q. 280 (1938).

[2] See 51 HARV. L. REV. 707 (1938).

[3] 304 U. S. 439, 58 S. Ct. 980 (1938).

[4] 303 U. S. 376, 58 S. Ct. 623 (1938).

[5] 304 U. S. 405, 58 S. Ct. 969 (1938).

[6] See notes 7 and 8, infra.

up by the Court whereby to determine the validity of taxes imposed by either the federal or state governments upon the functions or instrumentalities of the other.[7] Due to the variety of tests (together with the fact that most of the tests adopted were too variable), a state of confusion brought on by a number of obviously inconsistent decisions prevailed.[8] Some cases lay down the rule that, so far as taxation by the federal government is concerned, immunity of the states turns primarily on the type of function performed.[9] Another line of cases

[7] See South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905); Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342 (1910); Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218, 48 S. Ct. 451 (1928); Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469 (1934); Graves v. Texas Co., 298 U. S. 393, 56 S. Ct. 818 (1936); Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171 (1934); Brush v. Commr. of Int. Rev., 300 U. S. 352, 57 S. Ct. 495 (1937); Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125 (1931).

[8] See cases cited in note 7, supra. See also Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171 (1921); Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 51 S. Ct. 432 (1931); Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443 (1932); Burnet v. A. T. Jergins Trust, 288 U. S. 508, 53 S. Ct. 439 (1933); Liggett & Myers Tobacco Co. v. United States, 299 U. S. 383, 57 S. Ct. 239 (1937); People v. Graves, 299 U. S. 401, 57 S. Ct. 269 (1937); Commissioner v. Ten Eyck, (C. C. A. 2d, 1935) 76 F. (2d) 515; Railroad Co. v. Peniston, 18 Wall. (85 U. S.) 5 (1873) (Albany Park District Commission exempt); Ambrosini v. United States, 187 U. S. 1, 23 S. Ct. 1 (1902); Mallory v. White, (D. C. Mass. 1934) 8 F. Supp. 989 (pathologist of Boston City Hospital exempt); Galveston v. United States, (Ct. Cl. 1935) 10 F. Supp. 810 (income of city owned dock taxable); Jamestown & Newport Ferry Co. v. Commr., (C. C. A. 2d, 1930) 41 F. (2d) 920 (income of city owned ferry company exempt); 51 HARV. L. REV. 707 at 709-713 (1938); 1 N. J. L. REV. 98 (1935); 23 WASH. UNIV. L. Q. 280 (1938).

[9] Magill, "Tax Exemption of State Employees," 35 YALE L. J. 956 (1926); Stoke, "State Taxation and the New Federal Instrumentalities," 22 IOWA L. REV. 39 (1936); Thurston, "Government Proprietary Corporations," 21 VA. L. REV. 351 (1935); South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905); Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171 (1934); Brush v. Commr. of Int. Rev., 300 U. S. 352, 57 S. Ct. 495 (1937); Flint v. Stone Tracy Co., 220 U. S. 107, 31 S. Ct. 342 (1910).

Some doubt, however, is evident in the cases as to whether the determining factor toward tax exemption is the "usual" (or "fundamental") governmental function, or the "essential" governmental function criterion. (See cases cited above.) It is, of course, possible that these "differences in phraseology" in the language of the Court "must not be too literally contradistinguished," that in none of the cases do the terms indicate "an exclusive or rigid delimitation." (See Justice Sutherland's opinion in the Brush case, supra, 300 U. S. at 362.) It is suggested, however, that a careful reading of the facts to which the different adjectives are made applicable would prove that they are not at all used interchangeably or as synonyms. [Certainly the connotations are different. Compare the Brush case, supra, and Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172 (1926); see 23 VA. L. REV. 922 (1937); 24 CAL. L. REV. 110 (1935); and cases cited above.] But if they are, the fluidity of such a test is indicative of the narrowness of distinctions which have prevailed in this particular section of the

emphasizes the so-called primary incidence test, which, before the instant case, seemed the best possibility for a successful limitation of the intergovernmental tax immunity doctrine.[10] These cases indicate that the instrumentalities of one government are immune from taxation by the other where the *effect* of such taxation is the interference with or impairing of efficiency in performing the functions whereby the instrumentality is to serve that government. Where no *direct burden* is placed upon the instrumentality and the influence of the tax upon the exercise of the function is only remote, the tax is valid in the absence, of course, of discrimination.[11]

The resultant confusion due to the application of different rules and theories to substantially the same fact situations and the consequent distinction of apparently inconsistent decisions upon specious grounds has to some extent been eliminated by the *Allen, Gerhardt, and Mountain Producers Corp.* cases.

The *Allen* case,[12] upholding the constitutionality of the federal admissions tax as applied to admissions to athletic contests conducted by a state university, emphasized the distinction between governmental and proprietary functions. Although recognizing that education is an essential governmental function and hence immune from federal taxation, the decision holds that collecting admissions for football games at state universities is a mere business transaction by which the state derives revenues for its educational activities and so not exempt. In view of the ease by which the Court could have found that education is not confined to the improvement and cultivation of the mind, but also extends to the development of one's physical faculties,[13] and

intergovernmental immunities field. Compare Gillespie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171 (1921), Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 51 S. Ct. 432 (1931), Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443 (1932), and Burnet v. A. T. Jergins Trust, 288 U. S. 508, 53 S. Ct. 439 (1933). The unsatisfactoriness of such subtleties makes apparent the need for a more rigid and workable test.

[10] Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172 (1926); Willcuts v. Bunn, 282 U. S. 216, 51 S. Ct. 125 (1931). See dissent in Weston v. Charleston, 2 Pet. (27 U. S.) 449 at 479 (1829); Railroad Co. v. Peniston, 18 Wall. (85 U. S.) 5 at 30 (1873); Educational Films Corp. v. Ward, 282 U. S. 379, 51 S. Ct. 170 (1931).

[11] 23 VA. L. REV. 922 at 933 (1937). Compare, however, the attitude of the Court in Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466 at 471, 54 S. Ct. 469 (1934); Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218 at 222, 48 S. Ct. 451 (1928).

[12] Allen v. Regents of the University System of Georgia, 304 U. S. 439, 58 S. Ct. 980 (1938).

[13] See German Gymnastic Assn. v. City of Louisville, 117 Ky. 958 at 961, 80 S. W. 201 (1904): "Education is not confined to the improvement and cultivation of the mind. . . . It likewise may consist in the development of one's physical faculties.

thus that the athletic contests sponsored by the university were an integral part of the governmental educational function[14] and as such exempt from federal taxation,[15] the trend toward limitation of the tax immunity doctrine is patently obvious in the decision.

The *Mountain Producers Corp.* case, overruling *Gillespie v. Okla-*

. . . The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength." The case held that the appellant gymnastic association was an institution of education, and exempt from taxation. See also 36 MICH. L. REV. 627 at 633 (1938).

[14] A number of cases have considered the question whether physical education and athletics are included within the scope of educational activities and thus governmental functions to determine liability for damages, power of eminent domain, and tax exemption. See Spencer v. School District No. 1, 121 Ore. 511, 254 P. 357 (1927); Anderson v. Board of Education, 49 N. D. 181, 190 N. W. 807 (1922); State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484 (1912) (in which the school district was held to have the power of eminent domain to acquire lands for athletic purposes); People v. Pommerening, 250 Mich. 391, 230 N. W. 194 (1930); German Gymnastic Assn. v. City of Louisville, 117 Ky. 958, 80 S. W. 201 (1904). See 36 MICH. L. REV. 627 at 631 (1938) and cases cited therein.

[15] Of course to hold the tax invalid, the Court would have had to deal with the contention that the tax is not on the state, but on the ticket purchaser, that the state is a mere collection agent for the federal government. This indisputable argument could have been evaded on the authority of Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218, 48 S. Ct. 451 (1928), in which the Court held invalid a state tax to be paid by the seller of gasoline in so far as sales to the federal government were concerned; Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 601 (1931), in which a federal tax, declared by the statute to be payable by the seller in respect to sales to a municipality, was held invalid; and Graves v. Texas Co., 298 U. S. 393 at 401, 56 S. Ct. 818 (1936), in which a state tax on the storage and withdrawal of gasoline was held to be inapplicable to gasoline ultimately sold to the United States government, evidently based upon the ultimate incidence or "practical effect" of the tax.

But see Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469 (1934) (excise tax on gasoline used in the construction of levees under a contract with the national government sustained); Wheeler Lumber Bridge & Supply Co. v. United States, 281 U. S. 572, 50 S. Ct. 419 (1930) (tax on transportation measured by transportation charges held not directly to affect sales of supplies to a county); Liggett & Myers Tobacco Co. v. United States, 299 U. S. 383, 57 S. Ct. 239 (1937); James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208 (1937). Compare the apparently indistinguishable gross receipts tax upon a government contractor sustained in the Dravo case and the excise on sales to a municipality held invalid in the Motocycle case. Yet the Dravo case, in which a general privilege tax on all persons engaging in the contracting business in West Virginia was held to apply also to receipts derived by the Dravo Contracting Co. (engaged in construction work on federal projects) from the federal government, recognized the continuing force of the Panhandle case and those of similar nature, but as "limited to their particular facts." See dissents in Panhandle & Indian Motocycle cases.

In Justice Reed's concurring opinion of the Allen case, 304 U. S. at 456, he says:

homa[16] and *Burnet v. Coronado Oil & Gas Co.*,[17] accomplished much in the way of clarification by expunging tenuous distinctions. In the *Gillespie* case a divided Court held that a lessee of restricted Indian mineral lands, the title to which was in the United States, need not pay a general income tax laid by a state upon all its citizens taxing income from whatever source. It proceeded on the theory that a lease of land dedicated to the support of a governmental agency is an instrumentality of government, that a tax on the lease is invalid since it is a tax upon the power to lease and could be destroyed by that power and that hence a tax on the income from the lease is also invalid. The *Coronado Oil & Gas Co.* case involved a state "instrumentality" of the same kind as the federal "instrumentality" involved in the *Gillespie* case, and it is probable that the decision in the *Coronado* case would have been otherwise were it not for the authority of the other. The *Coronado* case, though holding invalid a federal tax on the net income from the oil lands dedicated to the support of public schools and leased from the state, conceded that the doctrine of the *Gillespie* case should be limited to "circumstances closely analogous."[18]

Shortly before the decision in the *Coronado* case, the Court decided *Group No. 1 Oil Corporation v. Bass*,[19] in which a similar federal "instrumentality" was held subject to state taxation. The decision was based, however, on one of the hypertechnical distinctions without real difference which are so prevalent in this branch of the law.[20] So the question before the Court in the *Coronado* case was whether to follow the tenuous distinction enunciated in the *Group No. 1* case and thus reinforce the *Gillespie* decision, or look to the substance and follow the *result* in the *Group No. 1* case. The majority chose the first possibility; the minority, anticipating the *Mountain Producers* case, thought the *Gillespie* case ought to be overruled and the holding in the *Group No. 1* case followed.

The views of the minority in the *Gillespie* and *Coronado* cases at-

"Respondents, being merely collectors of tax moneys, are not entitled either to enjoin collection of these moneys or to pay and sue to recover them." The question immediately arises whether the federal government can force the state to become a collector of taxes, to perform such services against its will. Query: if the state refused to collect the tax, and in fact did not collect it, would the Court go so far as to hold the state responsible as if in conformity with the statute it had collected the tax?

[16] 257 U. S. 501, 42 S. Ct. 171 (1921); 1 UNIV. CHI. L. REV. 657 (1934).

[17] 285 U. S. 393, 52 S. Ct. 443 (1932); 1 UNIV. CHI. L. REV. 657 (1934); 49 HARV. L. REV. 1323 at 1324 (1936).

[18] Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 at 398, 52 S. Ct. 443 (1932); 1 UNIV. CHI. L. REV. 657 (1934).

[19] 283 U. S. 279, 51 S. Ct. 432 (1931).

[20] The distinction was that in the Gillespie case there was a *lease* of the oil rights, while in Group No. I, a Texas oil lease was looked upon as a *sale* of the oil beneath the land.

tained an ascendancy in *Burnet v. Jergins Trust*[21] (which shows promise of permanency in the recent *Mountain Producers* case). There a federal tax on the lessee of oil and gas rights on municipal land used for water supply and other civic purposes, the city receiving a percentage of the proceeds from the sale of the oil and gas removed, was held valid. The Court read into the dictum of the *Coronado* case the implication that before the circumstances are sufficiently analogous to the *Gillespie* case to necessitate a similar result, the lands must be exclusively dedicated to the support of a definite and strictly governmental purpose.[22]

In reaching the decision in the *Mountain Producers* case that a lessee under an oil and gas lease of state school lands is not entitled to immunity, as a state instrumentality, from federal taxation in respect to income derived from operations under the lease, Chief Justice Hughes placed some weight upon the authority of *Willcuts v. Bunn*,[23] *James v. Dravo Contracting Co.*,[24] and *Metcalf and Eddy v. Mitchell*,[25] all of which are so-called independent contractor cases. The *Willcuts* case decided that gains derived by a dealer from the sale of municipal bonds not issued at a discount are subject to the general federal income tax. In the *Metcalf* case, the Court refused to extend the exemption from federal income tax to an engineer who claimed immunity on the theory that he received his income from a state or municipality as compensation for services rendered in the construction of water works: "one who is not an officer or employee of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state. . . ."[26] These independent contractor cases were cited by the Court as authority for the statement that the power to tax must not be crippled by extending intergovernmental tax exemptions to include non-discriminatory taxes which throw no direct burden upon the governmental instrumentality, and have only a remote influence upon the exercise of the functions of government.

The controlling rule, as stated by Chief Justice Hughes (evidently an acceptance of the primary incidence test), is

[21] 288 U. S. 508, 53 S. Ct. 439 (1933).

[22] "In view of the dubious foundation of the *Gillespie* case and of the immunity from state and federal taxation it grants to large private incomes, it would seem more desirable to follow the suggestion of the dissenting justices in Burnet v. Coronado Oil & Gas Co. and overrule the Gillespie case, rather than follow the method of the [Jergins Trust] case of limiting it by tenuous distinctions which will lead to further litigation." 1 UNIV. CHI. L. REV. 657 at 658 (1934).

[23] 282 U. S. 216, 51 S. Ct. 125 (1931).

[24] 302 U. S. 134, 58 S. Ct. 208 (1937), commented on in this issue at page 78, supra.

[25] 269 U. S. 514, 46 S. Ct. 172 (1926).

[26] Ibid., 269 U. S. at 526.

"that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote." [27]

The *Gerhardt* [28] decision, overruling in so far as inconsistent *Brush v. Commissioner of Internal Revenue*,[29] which had distinguished, speciously, *Helvering v. Powers*,[30] held valid the federal income tax as pertaining to the salary of an official of the New York Port Authority on the theory that "the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." [31] Justice Stone felt that

"So much of the burden of the tax laid upon respondents' income as may reach the state is but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the Federal government." [32]

The *Powers* case, which subjected the income of a state-appointed

[27] Helvering v. Mountain Producers Corp., 303 U. S. 376 at 386, 58 S. Ct. 623 (1938).

[28] Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969 (1938), supra, note 5.

[29] 300 U. S. 352, 57 S. Ct. 495 (1937).

[30] 293 U. S. 214, 55 S. Ct. 171 (1934).

[31] Helvering v. Gerhardt, 304 U. S. 405 at 424, 58 S. Ct. 969 (1938). In a recent petition for rehearing of the Gerhardt case, the counsel for the employees of the New York Port Authority sought to have the decision limited so as to prevent its retroactive operation. In a memorandum in reply to the petition for rehearing, Solicitor General Jackson declared that "The earlier rule [as to when exempt] was far from clearly defined" and that there "has been no square overruling of any earlier case, and petitioners' reliance on their understanding of the law was in the face of the Government's persistent contentions to the contrary." The memorandum also states that the appropriate remedy for any hardship lies with Congress, noting that "the subject is one which has received the attention of the past Congress and may be expected to be presented at the next Congress." 6 U. S. LAW WEEK 52-53 (Sept. 20, 1938). The petition for rehearing was denied. Ibid., 145 (Oct. 11, 1938).

[32] 304 U. S. 405 at 424. See TAXATION OF GOVERNMENT BONDHOLDERS AND EMPLOYEES 67 (1938), a Department of Justice publication, wherein it is stated that Justice Stone's opinion proceeds on the broad front that the federal, in contrast to the

trustee of the Boston Elevated Railway to federal taxation, decided that while petitioners were public officers, they were engaged in a function not normally governmental, so that neither the enterprise they managed, nor their salaries as state officers were withdrawn from the scope of the federal taxing powers. The test here enunciated seems to be based upon the rather doubtful distinction between proprietary and usual or fundamental governmental functions. The result of this case illustrates the unreliability of differentiation on a basis that is essentially historical, as it would seem that the petitioners were logically as much entitled to exemption as those officials engaged in traditionally governmental functions.[33] The saving grace of this test is that, if strictly adhered to, consistent results should be obtained.

The *Brush* case exempted from income tax the compensation of the chief engineer of the bureau of water supply of New York City on the ground that the city water works was an *essential* governmental function of the state. This case, as well as *People v. Graves*[34] denying the validity of a tax on the general counsel of the Panama Railroad, a New York corporation entirely owned by the United States, might have been decided otherwise on the authority of the *Powers* case.[35] The *Gerhardt* case, after definitely establishing a two-fold test for the

state, taxing power is supreme; moreover, that there is little need for constitutional limitation since Congress is subject to self restraint, in that it taxes its own constitutents. This would seem to be a denial of the reciprocity of immunity doctrine first enunciated in Collector v. Day, 11 Wall. (78 U. S.) 113 (1870), and qualified in South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905), and a harkening back to Chief Justice Marshall's decision in McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316 (1819). See Boudin, "The Taxation of Governmental Instrumentalities," 22 GEORGETOWN L. J. 1 (1933), 254 (1934); Stoke, "State Taxation and the New Federal Instrumentalities," 22 IOWA L. REV. 39 (1936); Crewe, "Sidelights on Intergovernmental Exemptions," 11 TAX MAG. 210 at 211 (1933); 81 UNIV. PA. L. REV. 194 (1932); 1 N. J. L. REV. 98 (1935).

[33] See 33 MICH. L. REV. 1283 at 1284 (1935).

[34] 299 U. S. 401, 57 S. Ct. 269 (1937).

[35] See 50 HARV. L. REV. 980 at 981 (1937).

The tax immunity rule as stated in South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905), and in the Powers case is equally applicable to the federal government. But the troublesome converse problem of whether there is a corresponding limitation on the immunity from state taxation of federal instrumentalities still remains open. The essential argument against the application of this limitation on immunity to federal government activities is that since the federal government is one of limited powers, Congress has no general authority to create corporations or to establish enterprises except as a means of executing some governmental power; hence every legitimate instrumentality created by the federal government is, ipso facto, governmental in nature; or, in other words, while a state may engage in proprietary undertakings, the federal government cannot without proceeding ultra vires. 49 HARV. L. REV. 1323 at 1326 (1936); Stoke, "State Taxation and the New Federal Instrumentalities," 22 IOWA L. REV. 39 (1936); 23 VA. L. REV. 922 (1937). And so if a function is con-

determination of tax exemptions, states that the Court did not consider whether the burden of the tax on the state in the *Brush* case was so indirect or conjectural as to be but an incident of the coexistence of the two governments, and therefore not within the constitutional immunity. But if a determination of that point is implicit in the decision, to that extent the *Brush* case is limited by the *Gerhardt* decision.

An important factor leading to the conclusion that the *Gerhardt* case is a landmark in the intergovernmental tax immunity field is that it definitely establishes the test to be applied in determining the taxability of individuals and of state activities. It would seem that the test is the twofold one of primary incidence as to taxes on individuals, and the type of function as to taxes on state activities, the exempt types of state activities being those which are essential or indispensable to the functioning of the state government.

> "The [test], dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially absorbed by private persons."[36]

It is advanced that the Court would have been well justified in retaining a more technical test than that of the essential governmental

stitutional, it is necessarily a governmental (as distinguished from usual, corporate, or proprietary) function.

The answer is to the effect that though the creation of an instrumentality be constitutional as incidental to the exercise of a constitutional function, yet this does not render all functions performed, ipso facto, *governmental* in the *usual* or *traditional* sense of the word in which it is obviously used in the South Carolina case. A national function can be constitutional and yet not governmental or *usual*. 23 VA. L. REV. 922 (1937). The theory of the opinions written by Justice Sutherland in People v. Graves, 299 U. S. 401, 57 S. Ct. 269 (1937), and Brush v. Commr., 300 U. S. 352, 57 S. Ct. 495 (1937), seems to be that enterprises constitutionally undertaken by the United States are necessarily governmental and hence immune from state taxation, while those state enterprises only are immune which are *essential* functions of government. Such a theory conflicts, however, with the much asserted doctrine of reciprocity of tax immunity of state and federal instrumentalities.

[36] Helvering v. Gerhardt, 304 U. S. 405 at 419-420, 58 S. Ct. 969 (1938).

function, since this test is not rigid enough to achieve consistent decisions. Inasmuch as the definition of what is essential varies with the individual and political philosophy of the judge, two substantially similar fact situations may reach different and inconsistent conclusions under such a test. Our government is daily broadening its scope to include activities and functions which have hitherto been thought of as proprietary or corporate functions.

> "Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." [87]

An unchanging line of demarcation between essential and non-essential governmental functions is impossible, and the result of the retention of such test will be a repetition of the already abundant dubious and tenuous distinctions conjured up in an attempt to distinguish inconsistent decisions.

Justice Black, in his frank concurring opinion, states:

> "*From time to time*, this Court has relied upon a doctrine evolved from *Collector v. Day*,[88] under which incomes received from State activities thought by the Court to be non-essential are held taxable, while incomes from activities thought to be essential are held non-taxable. The opinion of the Court in this case refers to that doctrine. Application of this test has created a 'zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial "inclusion and exclusion."' ... Under this rule the tax status of every state employee remains uncertain until this Court passes upon the classification of his particular employment. The result is a confusion in the field of intergovernmental tax immunity which I believe could be clarified by complete review of the subject." [89]

Justice Black's opinion is revolutionary in the suggestion that the entire field of tax immunity be opened up and reexamined from the very beginning of the doctrine with the intent and purpose of eliminating inconsistent decisions and clarifying the law of intergovernmental tax immunities. It would also seem advisable to establish a technical test to "preserve the immunity within limits set by precedents not

[87] Justice Black's concurring opinion in Helvering v. Gerhardt, ibid., at 427.

[88] 11 Wall. (78 U. S.) 113 (1870).

[89] Helvering v. Gerhardt, 304 U. S. 405 at 425-426, 58 S. Ct. 969 (1938) (italics added).

lightly to be overruled,"[40] and to restrict the immunity from undesirable expansion.[41] If it were possible to thrust aside *all* precedent in this field,[42] it is suggested that the constitutional prohibition against discriminatory taxation should be the only limitation placed upon the governmental power of taxation.

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[40] See 51 HARV. L. REV. 707 at 716 (1938).

[41] The test should also be one that will not engender inconsistencies. This thought led to the suggestion of a rigid, technical test rather than an elastic and indefinite one.

[42] See 35 COL. L. REV. 301 (1935) and 33 MICH. L. REV. 1283 (1935), in both of which the test suggested is that the tax be held invalid only upon the showing of actual discrimination against or interference with the government claimed to be prejudiced.