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unemployment compensation cases. These future cases are likely to be highly influential in determining whether the program will be successful in Louisiana. It must be remembered that the very foundation for unemployment compensation is the theory that a fund can be built up during "good times" in order to pay benefits during "bad times." It is significant that the program has never been put to a severe test, although there have been a few minor recessions. Nevertheless, a few states found themselves in difficulty during the relatively short recession of 1958, even though there had been a long period of prosperity before that time.¹²⁹ Hence it behooves the Louisiana agency, administrative tribunals, and courts to do their part in protecting the rights of future claimants to benefits during severe economic conditions through a diligent application of the safeguards embodied in the statute, while at the same time giving the statute a fair interpretation assuring benefits to those who presently have a lawful right to them according to the terms of the statute.

J. C. Parkerson

State Taxation of Private Interests in Federally Owned Property

The framers of the American Constitution viewed their handiwork as a union of sovereign states under a sovereign federal government.¹ Conceptually, the former are governments of broad reserved powers, while the latter is one of delegated, enumerated powers.² Although each of these governments is supreme in its sphere of authority,³ the limits of these spheres

129. This information was taken from a statement made by R. C. Goodwin, Director of the Federal Bureau of Employment Security, which was reported by the Associated Press and published in the Baton Rouge Morning Advocate of November 11, 1958. "Michigan had to borrow \$113 million from the federal government to take care of its fund requirements. Reserves of several other states — including Pennsylvania, Oregon, Delaware, Rhode Island, and West Virginia — have dwindled to a point where they too may need federal loans."

1. U.S. CONST. art. VI, par. 2; U.S. CONST. amend. IX-X, THE FEDERALIST Nos. 32 (Hamilton), 33 (Hamilton), 36 (Hamilton), 45 (Madison), and 46 (Madison).

2. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

in some areas are not clearly defined. Within this framework of dual sovereignty federal and state powers are frequently in conflict. The clash is acute in the field of taxation. State taxes frequently are levied upon subjects in which the federal government has a governmental interest. Federal taxes, similarly, sometimes strike near to state governmental operations. Although the constitutional problems in either situation are fundamentally alike, attention here will be directed only to taxes by states and their subdivisions.

The power of taxation reserved to the states is extensive, but it does not extend to the *means*, that is, agencies, activities, and property, employed by the federal government to execute the powers conferred upon it by the people.⁴ This is the doctrine of implied immunity of federal instrumentalities from state taxation, a principle firmly woven into the fabric of federal constitutional law.

Chief Justice Marshall is credited with the first judicial pronouncement of the doctrine of implied immunity in *McCulloch v. Maryland*⁵ in 1819. A Maryland state tax on notes issued by the Second Bank of the United States, an instrumentality of the United States, was held unconstitutional as an encroachment upon federal sovereignty. Since that decision the Supreme Court

Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, par. 2. . . "The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission. . . . If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired . . . and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429-430 (1819).

4. "The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. . . . The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429, 436 (1819).

5. See notes 3 and 4 *supra*.

has considered a panoramic variety of tax immunity cases with seemingly changeable and inconsistent results,⁶ but it has reiterated Chief Justice Marshall's pronouncement with unbroken consistency.⁷ While the formulation of the principle is clear and unquestioned, its full import and proper application in particular cases may be quite debatable.⁸ Opinions about which taxes transgress the bounds of federal immunity change with time and taxing techniques. "Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand."⁹

It seems that no adequate test for determining whether a given tax violates implied governmental immunity can be derived from the judicial decisions, for decisions have varied with the kinds of taxes,¹⁰ their objects or subjects,¹¹ and the legal relationships involved.¹² When state taxes have been found to be

6. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 633 (1945); Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757 (1945); Rice & Estes, *Sales and Use Taxes as Affected by Federal Governmental Immunity*, 9 VAND. L. REV. 204 (1956); Note, 14 LOUISIANA LAW REVIEW 696 (1954); Note, 39 MINN. L. REV. 195 (1955).

7. See note 6 *supra*.

8. The lack of unanimity among the Justices in the cases involving the immunity doctrine illustrates this basic disagreement. For example, the Supreme Court was closely divided in the following cases: *Detroit v. Murray Corp.*, 355 U.S. 489 (1958), 5-4; *United States v. Detroit*, 355 U.S. 466 (1958), 7-2, two of the seven majority concurred; *United States v. Township of Muskegon*, 355 U.S. 484 (1958), 7-2; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), 6-3; *S.R.A. Inc. v. Minnesota*, 327 U.S. 558 (1946), two justices wrote concurring opinions on this issue; *United States v. Allegheny County*, 322 U.S. 174 (1944), 7-2; *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), 5-4; *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218 (1928), 5-4; *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), 6-3.

9. *United States v. Allegheny County*, 322 U.S. 174, 176 (1944).

10. See *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *United States v. Allegheny County*, 322 U.S. 174 (1944); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Helvering v. Mountain Producers Corporation*, 303 U.S. 376 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932); *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218 (1928); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Plummer v. Coler*, 178 U.S. 115 (1900); *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886).

11. See *Detroit v. Murray Corporation*, 355 U.S. 489 (1958); *Werner Machine Co. v. Director of Division of Taxation*, 350 U.S. 492 (1956); *S.R.A., Inc. v. Minnesota*, 327 U.S. 558 (1946); *United States v. Allegheny County*, 322 U.S. 174 (1944); *Fox Film Corporation v. Doyal*, 286 U.S. 123 (1932); *Willcuts v. Bunn*, 282 U.S. 216 (1931); *Greiner v. Lewellyn*, 258 U.S. 384 (1922); *United States v. Perkins*, 163 U.S. 625 (1896); *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842); *Weston v. Charleston*, 27 U.S. (2 Pet.) 449 (1829).

12. Compare *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952); *Standard Oil Company of California v. Johnson*, 316 U.S. 481 (1942); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926).

levied upon federal property, instrumentalities, functions, and activities, they have been struck down under the implied immunity doctrine,¹³ but to make this finding has been often difficult. Confronted by this uncertainty about state taxing power but strongly pressed by an increased need for revenue, states have sought new subjects for taxation. To validate these efforts, examined in the light of the implied immunity doctrine, finer, more difficult distinctions among legal relationships are inevitable.¹⁴ Recognizing the serious need of the states and their vital interest in taxation, the Supreme Court only reluctantly invalidates state taxes, even though the levies have an impact upon or affect matters in which there is a federal governmental interest.

In its many decisions, from *McCulloch v. Maryland* to the present, involving the doctrine of intergovernmental immunity from taxation the Supreme Court has tried to avoid any impairment of that doctrine or reticence in its application. The immunity of the State or Nation itself, its possessions, activities, and institutions, has been sustained and emphasized. The more difficult issues arise, however, when a *delegated* immunity is claimed by those who deal economically with the government. By virtue of their relationship in dealing with and performing services for the federal government in its proper functions, its immunity is claimed to extend, *i.e.*, to be *impliedly delegated*, to them.¹⁵ Nevertheless in increasingly numerous instances the immunity has been denied and the taxes sustained. What the court has denied is tax immunity for the contractor's own property,

13. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952); *Pittman v. Home Owners' Loan Corporation*, 308 U.S. 21 (1939); *Graves v. Texas Company*, 298 U.S. 393 (1936); *City of New Brunswick v. United States*, 276 U.S. 547 (1928); *Clallam County v. United States*, 263 U.S. 341 (1923); *Owensboro National Bank v. Owensboro*, 173 U.S. 664 (1899); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In connection with *Carson v. Roane-Anderson Co.*, *supra*, see 67 STAT. 575 (1953), 42 U.S.C. 1809.

14. "The application of the principle which denies validity to . . . a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system." Chief Justice Hughes in *James v. Dravo Contracting Co.*, 302 U.S. 134, 150 (1937).

15. Chief Justice Marshall having expounded the principle in *McCulloch v. Maryland* that properties, functions, and instrumentalities of the Federal Government are immune from state taxation, "[I]n the course of time [the Supreme Court] held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government." *United States v. Allegheny County*, 322 U.S. 174, 176 (1944).

profits, or purchases, distinguishing between taxation of private interests and taxation of governmental interests. This distinction, although it is sometimes difficult, is fundamental to the sound application of the immunity doctrine.¹⁶

The distinction between private and governmental interests was invoked to invalidate a county tax assessment in 1944 in a milestone decision by the Supreme Court, *United States v. Allegheny County*.¹⁷ The Mesta Machine Company contracted with the United States Government for the production of large field guns. Valuable special machinery was furnished to Mesta by the Government at a rental of one dollar under a leasing arrangement. The machinery was bolted on concrete foundations in Mesta's plant, but was to remain the property of the United States. Allegheny County then revised Mesta's assessment for ad valorem real property taxes to include the leased machinery. The government had agreed to reimburse Mesta for state or local taxes if Mesta was compelled to pay them. The Supreme Court of Pennsylvania upheld the assessment on the ground that it was immaterial who held legal title, for the machinery constituted a part of the mill for purposes of assessment. It held that the assessment was not against the United States but against Mesta which was operating its mill for private purposes.¹⁸ Reversing the decision, the United States Supreme Court held that the tax was imposed upon property owned by the United States, and "that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."¹⁹ That Mesta had a beneficial interest in the property was acknowledged. The state or county having made no effort to segregate Mesta's interest and tax it, the court specifically reserved opinion on the question whether a right of possession and use could be taxed.²⁰ Perhaps the willingness of the

16. *Id.* at 186.

17. *Ibid.*

18. *Id.* at 180.

19. *Id.* at 189.

20. "Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold interest is subject to some qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. . . . But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property,

Court to strike down this tax assessment stemmed from a desire to avoid impediments to the existing war effort to which these contractual arrangements were vital.

In 1947 the Supreme Court of California held that the "possessory interests" in real property of a lessee of two United States-owned shipyards was taxable as a *species of property*, an estate for years.²¹ The taxpayer operated both shipyards pursuant to "Facilities Contracts" for their construction and "Vessel Construction Contracts." Although the United States appeared as intervener in the case, the decision was not appealed to the United States Supreme Court. The decision was based upon a California statute²² which provided for taxation of possessory interests arising out of leases of tax-exempt real property. The

including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment." *Id.* at 186-187.

As early as 1819 the possibility of state taxation of private interests in federal property or activities was suggested but not decided. At the end of his opinion in *McCulloch v. Maryland*, Chief Justice Marshall stated: "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is . . . unconstitutional." 17 U.S. (4 Wheat.) 316, 435 (1819).

21. *Kaiser Co. v. Reid*, 30 Cal.2d 610 (1947).

22. CAL. REV. & TAX. CODE § 104. "Real estate" and "real property." "Real estate" or "real property" includes:

"(a) The possession of, claim to, ownership of, or right to the possession of land.

"(b)

"(c) Improvements.

§ 105. "Improvements." 'Improvements' includes: (a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone & telegraph lines."

§ 107. "Possessory interests: As security for taxes: Leasehold estates in gas, petroleum, etc. 'Possessory interests' means the following: (a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person. (b) Taxable improvements on tax exempt land.

"Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. . . ."

The California statute was amended in 1957: § 107.1. (Added by Stats. 1957, Ch. 2111, § 1).

"A possessory interest, when arising out of a lease of exempt property, consists of the lessee's interest under such lease and is hereby declared to be personal property within the meaning of Section 14 of Art. XIII of the Constitution of the State of California.

"The full cash value of such possessory interest is the excess, if any, of the value of the lease on the open market, as determined by the formula contained in the case of *De Luz Homes, Inc. v. County of San Diego* (1955), 45 Cal.2d 546, over the present worth of the rentals under said lease for the unexpired term thereof.

"A possessory interest taxable under the provisions of this section shall be assessed to the lessee on the same basis or percentage of valuation employed as to other tangible property on the same roll."

court decided that the immunity doctrine furnished no justification for exempting plaintiff's *private* possessory interest in the shipyards from bearing its fair share of local taxes.²³

It is a well-established proposition that Congress has power to waive any implied immunity of federal property or relationships from state or local taxation,²⁴ but an express waiver of immunity avoids consideration of the narrow, basic question whether a state may tax a lessee's or private user's interest in federal property in the absence of congressional action. The Supreme Court squarely faced this crucial issue for the first time in three decisions rendered on the same day in early 1958.

In the first of those cases²⁵ the United States Government had entered into contracts with two manufacturers for the production of airplanes, parts, and subassemblies for delivery to the Air Force. Murray Corporation was a subcontractor for the delivery of airplane parts, subassemblies, and nondurable tools to the prime contractors at fixed prices. The Air Force contracting officer approved the subcontracts, which specified that title

23. *Kaiser Co. v. Reid*, 30 Cal.2d 610, 629 (1947). The California Supreme Court recently held, however, that taxation of a contractor's possessory interest or right to use *personal property* owned by the United States was invalid. It was recognized that a private possessory interest in or right to use government-owned personal property may be made the subject of a nondiscriminatory tax measured by the value of the property used, even though the economic burden falls on the United States. The statute providing for taxation of private interests in tax-exempt property applied only to real property and the court considered the question whether such a tax on possessory interests in tax-exempt personalty should be adopted as one for legislative determination. *General Dynamics Corporation and Aerojet-General Corporation v. County of Los Angeles*, 330 P.2d 794 (Cal. 1958).

24. *Offutt Housing Company v. County of Sarpy*, 351 U.S. 253 (1956). See also *United States v. Allegheny County*, 322 U.S. 174 (1944); *Graves v. New York*, 306 U.S. 466 (1939). In *Offutt Housing Co. v. County of Sarpy* the Supreme Court sustained the application of Nebraska's "personal property" tax to a builder-lessee's interest in a Wherry Military Housing Project. The lease provided for construction of the housing project by the lessee and subsequent operation and leasing by him of units to authorized Air Force personnel. This lease arrangement was authorized by Acts of Congress, 61 STAT. 774, 5 U.S.C. § 626s-3 (1947), and 63 STAT. 570, 576 (1949). Section 6 of the former act provided that "the lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation." 61 STAT. 776, 5 U.S.C. § 626s-6 (1947). The New Mexico Supreme Court followed the *Offutt Housing Co.* case in deciding *Kirtland Heights, Inc. v. Board of County Commissioners of Bernalillo County*, 326 P.2d 672 (N.M. 1958). Factually, the two cases are almost identical. An ad valorem real property tax was levied in the *Kirtland Heights* case, but both cases arose under the same congressional statutes and the same type of federal lease. The impact of the *Offutt Housing Co.* and *Kirtland Heights* decisions upon the immunity principle is cushioned by two significant features: (1) the state taxes imposed upon the lessees' interests were ordinary personal and real property taxes; and (2) Congress had specifically authorized taxation of lessees' interests in that type of federal property, i.e., had waived any immunity that interest enjoyed. See *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 585 (1865).

25. *Detroit v. Murray Corporation*, 355 U.S. 489 (1958).

to all parts, materials, inventories, work in process, and non-durable tools acquired or produced in performing the subcontracts should vest in the government. The City of Detroit and Wayne County, Michigan, each assessed Murray Corporation's personal property for taxation.²⁶ This assessment included in its valuation materials acquired and work in process in respondent's possession in performance of the subcontracts. The Supreme Court held that the tax did not infringe the federal government's constitutional immunity, since the tax was imposed *upon the possessory interest* in government property instead of the property itself, even though (1) the tax was styled a "personal property tax," and (2) the statute did not expressly tax the person in possession for the privilege of possessing tax-exempt property.

In its analysis the court expressly assumed that the United States had full title to the property.²⁷ Although the taxes were

26. The following statutory provisions were involved in this case: 6 MICH. STAT. ANN. § 7.1: "Property subject to taxation. Section 1. . . . That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.

§ 7.10: "Annual Assessment. Sec. 10. An assessment of all the property in the state, liable to taxation, shall be made annually in the several townships, villages and cities thereof by the supervisors of the several townships and wards, or in villages and cities where provision is made in the acts of incorporation or charter for some other assessing officer, then by such assessing officer, as hereinafter provided."

Charter of the City of Detroit, Tit. VI, c. II, § 1. "All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value. . . ."

Id., Tit. VI, c. iv, § 1. "All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed . . . [and] the owners or persons in possession of any personal property shall pay all taxes assessed thereon.

Id. § 7. "In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same, in an action of assumpsit as for moneys paid out and expended for his benefit, or may deduct the amount from any rent due or to become due to the person who should have paid such tax.

Id. § 26. "On and after the twenty-sixth day of August in each year . . . the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. . . . All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien.

Id. § 27. "All city taxes upon personal property . . . in addition to being a lien upon the property assessed shall become a debt against the owner from the time of the listing of the property for assessment, and shall remain a debt against the owner of the property or his estate after his death, until the same are paid."

The provisions of the Charter of the City of Detroit are taken from the dissenting opinion of Mr. Justice Whittaker, *Detroit v. Murray Corp.*, 355 U.S. 489, 525, n. 11 (1958).

27. *Id.* at 492, n. 2.

styled "personal property taxes," the court purported to look "through form and behind labels to substance," to the application and practical operation of the taxes.²⁸ They were imposed only upon Murray Corporation and were not levied directly against the United States or its property.²⁹ The court did not consider this an effort to hold United States property accountable, for Michigan exempted all United States public property from taxation.³⁰ To invalidate state or local taxes by the mere form or label of the statute would be submission to rule by empty formalisms, the court reasoned, and the constitutionality of taxes would then hinge upon the mere addition or omission of a few words to the taxing statutes.³¹ The taxes as applied were laid upon the corporation *as possessor* of the tax-exempt property, and the Court noted that "lawful possession of property is a valuable right when the possessor can use it for his own personal benefit."³² As taxes on possession alone they surmounted the traditional tests of constitutionality. They were not discriminatory, economically burdensome, or obstructive in relation to the federal government.³³

In the second case³⁴ the United States owned an industrial plant in Detroit, Michigan. The government leased a portion of its plant to the Borg-Warner Corporation at a stipulated annual rent for use in Borg-Warner's private manufacturing business. The lease allowed Borg-Warner to deduct from the rent any taxes paid by it under the tax act involved here or any similar statute subsequently enacted, reserving to the government the right to

28. *Id.* at 492. The court cited *Capitol Greyhound Lines v. Brice*, 399 U.S. 542 (1950); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940).

29. 355 U.S. 489, 492 (1958).

30. 6 MICH. STAT. ANN. 7.7 (1950).

31. 355 U.S. 489, 493 (1958).

32. *Ibid.* Preceding the quoted sentence, the court said: "We see no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a State from taxing possession in such circumstances." The court analogized this tax to one on the storage of gasoline by a corporation for the United States, sustained in *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953). The tax in that case was measured by the *quantity* of government gasoline stored, while the tax here was measured by the *value* of the property possessed. The court observed that "a tax on storage is not intrinsically different from a tax on possession, at least where in both instances the private party is holding the property for his own gain."

33. 355 U.S. 489, 494-495 (1958). In his dissenting opinion, Mr. Justice Frankfurter made a chart-type comparison of the circumstances and facts of the instant case with those of *United States v. Allegheny County*, 322 U.S. 174 (1944), and could see no material distinction. He regarded the tax as one on federal property, rather than on possession. *Id.* at 500-502.

34. *United States v. Detroit*, 355 U.S. 466 (1958).

contest the validity of such taxes. The Michigan statute in question taxed a private party using tax-exempt real property in a business conducted for profit to the same extent as though he owned the property.³⁵ A tax was assessed against Borg-Warner measured by the value of the federal property leased at the rate used for calculating real property taxes. On appeal by Borg-Warner and the United States, the Supreme Court held that a private party using tax-exempt federal real property in its private business may be subjected constitutionally to taxation to the same extent as if he owned the property.

The Court considered that its decision fell within the framework of principles of intergovernmental tax immunity enunciated in *McCulloch v. Maryland* and followed in the significant decisions on this subject. It expressly reaffirmed and adhered to those principles,³⁶ including the propositions that taxes are not invalid merely because part or all of the economic burden of the taxes rests upon the government and that taxes which discriminate against the government or persons with whom it deals are unconstitutional.³⁷ The tax in question was not discriminatory. A weighty consideration for sustaining the tax was its nature or character. Analogizing it to a use tax,³⁸ the Court characterized it as a privilege tax for the beneficial use of tax-exempt

35. 6 MICH. STAT. ANN. § 7.7(5). "Taxation of exempt real property used privately in connection with business conducted for profit; exceptions. Section 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: Provided, however, That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

§ 7.7(6) "Same; manner of assessment and collection; taxes not to become lien; recovery in *assumpsit*."

"Sec. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of *assumpsit*."

36. 355 U.S. at 472-473. See *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

37. The court was impressed by the fact that any taxes due under the statute were the personal obligation of the private lessee or user. The owner was not liable for their payment, nor was the property itself subject to any lien if they remained unpaid. *Id.* at 469. The court observed: "The class [of taxpayers] defined is not an arbitrary or invidiously discriminatory one." *Id.* at 473.

38. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

property, as distinguished from a tax on the property itself, measured by the value of the government property used. The choice of beneficial use as a subject for taxation is clearly permissible.³⁹ Numerous cases have confirmed the proposition that a state may measure a tax imposed on a valid subject of state taxation by taking into account government property which is itself tax exempt.⁴⁰

In the third case⁴¹ the United States owned a manufacturing plant at Muskegon, Michigan. Continental Motors Corporation was granted a right to use the plant in performing several supply contracts with the government. Use of the plant was to be rent-free, but Continental Motors agreed not to include any part of the cost of the facilities in the price of goods supplied. The Township of Muskegon assessed a tax against Continental Motors for its use of tax-exempt property in its private business measured by the value of the exempt property used.⁴² The court held that local taxation of a user of tax-exempt federal property under a permit to use the property in performing contracts with the government is constitutional.

This case differs factually from the preceding one in two respects: (1) Continental Motors used the property under a "permit" instead of a formal lease, and (2) Continental Motors used the property in performing contracts with the government instead of its private business.⁴³ Whether the party using the property was designated a "lessee" or not was believed to be immaterial to the result. The Court reasoned that to decide the opposite would rest tax immunity upon a mere stroke of the draftsman's pen. The crux of the Court's opinion, however, was its conclusion that the use of the property in performing government contracts was not a controlling factor, for Continental Motors was still using the property in its own private enterprise, which, at the moment, happened to be selling goods to the United States. Even in the presence of the generous "permit" arrange-

39. *Ibid.*; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *Curry v. United States*, 314 U.S. 14 (1941); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933).

40. See, for example, *Pacific Co. v. Johnson*, 285 U.S. 480 (1932); *Educational Films Corporation of America v. Ward*, 282 U.S. 379 (1931); *Plummer v. Coler*, 178 U.S. 115 (1900); *Home Insurance Co. of New York v. State of New York*, 134 U.S. 594 (1890).

41. *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

42. The tax statute involved in this case was the same statute at issue in *United States v. Detroit*, *supra* notes 34 and 35.

43. The court said: "We do not believe that either fact compels a different result." 355 U.S. at 486.

ment and the supply contracts, there was still an absence of those elements of control or assimilation that would make Continental Motors a servant, activity, or instrumentality of the United States Government.⁴⁴

Evaluation of the effect of these later decisions on the doctrine of implied governmental tax immunity is complicated by the array of dissenting and concurring opinions. The *Detroit v. Murray Corporation* decision caused most of the dispute.⁴⁵ The dissenters argued strongly that this was an ad valorem tax on the property of the government without purporting to segregate the value of the leasehold estate from the government's estate in fee.⁴⁶ "In effect . . . the dissenters equate the *measure* of the tax with the *subject* of the tax . . . [but] the Court finds that the Government's property here was simply the *measure*, and not the *subject* matter, of a tax which was in effect imposed on the *privilege of possessing property* used for private gain."⁴⁷ (Emphasis added.)

The *subject* of a property tax is the property taxed. In excise taxes it is the activity, event, privilege, or specific property right taxed, while the income accrued or received is the subject of an income tax. The *measure* of a tax is the base, value, or yardstick to which the tax rate is applied. For example, the subject of a real property tax is the real property, and the measure of the tax is the value of the property. The subject of sales taxes, which are excise taxes, is the making of a sale or the privilege of making a sale, and the measure is the sale price of the object sold.⁴⁸ According to the current and apparently settled application of the intergovernmental immunity doctrine, tax-exempt federal property cannot be made the *subject* of a state tax.⁴⁹ The same property, on the other hand, may be used as the *measure* of a tax on a properly segregated subject. Whether the chosen tax subject is a proper, *i.e.*, constitutional, one is a frequently de-

44. *Ibid.*

45. The court split five to four in *Detroit v. Murray Corporation*, 355 U.S. 489 (1958); and seven to two in *United States v. Detroit*, 355 U.S. 466 (1958), and *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

46. See dissenting opinion of Mr. Justice Whittaker in *United States v. Detroit*, 355 U.S. 466, 482-483 (1958).

47. Concurring and dissenting opinion of Mr. Justice Harlan, 355 U.S. 505, 507-508.

48. HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 17 (1952).

49. See the following cases discussed *supra*: *Detroit v. Murray Corporation*, 355 U.S. 489 (1958); *United States v. Detroit*, 355 U.S. 466 (1958); *United States v. Township of Muskegon*, 355 U.S. 484 (1958); *United States v. Allegheny County*, 322 U.S. 174 (1944). See also cases cited in note 11 *supra*.

bated question. A much disputed issue, also, is whether the property involved in a given case is in reality the subject or the measure of the tax. The dispute is clearly illustrated by the three Michigan cases in which a majority of the Supreme Court recognized that in the exercise of its discretion Michigan had chosen a subject, the *beneficial use* of property, that was properly within the state taxing power, even though tax-exempt property was used as the measure.

When confronted by this unique issue, which had been expressly reserved in *United States v. Allegheny County*⁵⁰ in 1944, the Supreme Court indicated a willingness to continue its restraint on the broad sweep of immunity doctrine language and to draw the line between the taxable and the immune with more precision. In sustaining the taxes in the three Michigan cases the Supreme Court stepped quite near the outer boundary of state taxing power within the principle of intergovernmental tax immunity. There may be merit to the argument that the court stepped even *beyond* that boundary.⁵¹ Certainly the readiness of the Court to go beyond the language and label of a taxing statute in one of the cases and sustain the application of an ordinary personal property tax to a mere possessory interest in federal property, the legislature having included no such provision in the statute, is questionable.⁵² The purported justification for that approach is that the court is concerned with the *application*, *i.e.*, administration, of state tax statutes rather than the language in which they are couched, for it is from their application that controversies arise. Their practical effect and operation are the primary considerations. Absolute precision and perfection in statutory language are not required. This justification, however, blinds itself to the fact that when the language of a statute designates *property* as its subject, without reference to beneficial use or possessory interests, validation of its application to subjects not included within its terms is tantamount to a judicial change of labels. The judicially chosen label then is used to determine constitutionality. In effect, the tax assessor's authority is enhanced beyond that given by the legislature, and taxation of a subject that the legislature could have taxed, but did not, is allowed. A further effect is that the judiciary takes the initiative on an issue that more properly should be reserved for legis-

50. 322 U.S. 174 (1944). Note 20 *supra*.

51. See Time, March 17, 1958, p. 18.

52. Note 23 *supra*.

lative decision.⁵³ The court is confronted by a dilemma. Its choice must turn upon what it conceives to be a sound, realistic analysis of the facts and application of constitutional and legal principles.

The view one takes of these arguments must not omit consideration of the crucial distinctions between the subject and measure of a tax and between private interests and governmental interests. It is submitted that in drawing these distinctions the court can make its reasoning more convincing by emphasizing that a private possessory interest in tax-exempt property is a form of personal property to which an ordinary personal property tax is properly applicable.⁵⁴

Presupposing the proper application of the constitutional doctrine of implied governmental immunity and the constitutionality of the taxes, sound policy factors also support the decisions that deny tax immunity to lessees or private users of government or other tax-exempt property. A large segment of the federal governmental functions is conducted by contracts with individuals or corporations. This is notably true of military defense preparation. In states where the volume of government contract business is large, exemption of the private interests of possessors and users of government property deprives the state governments of significant tax revenues. The use of leases or contracts to avoid a fair share of the state or local tax burden is discouraged.

It is highly debatable whether these later decisions represent a deviation from established principles. Considering the attempt to segregate and tax a proper subject, a sound conclusion is that the intergovernmental immunity doctrine continues unimpaired, but that its farthest boundary is more clearly marked. The effect is that in those states where government property is used extensively by private enterprise a new source of revenue is now freed from uncertainty.⁵⁵

53. Note 23 *supra*.

54. See *Kaiser Co. v. Reid*, 30 Cal.2d 610 (1947); note 32 *supra*.

55. Pursuant to a new Massachusetts law, Mass. Gen. Laws ch. 59, § 3D, enacted in 1958, leasehold interests in real estate and buildings owned and leased by the federal government in that state are now subject to taxation *to the extent permitted by Congress*. The new statute was enacted to overcome a Massachusetts Supreme Judicial Court decision that, although federal legislation allowed taxation of certain leasehold interests, there was no Massachusetts statutory authority for such taxation. *Squantum Gardens v. Assessors of Quincy*, 140 N.E.2d 482 (Mass. 1957). The New York Legislature sought to take advantage of this potential source of revenue when it passed A.B. 4268 (1958), *State Tax Review*, March 31,

A speculative inquiry at this point injects uncertainty into the problem again. It raises the question whether Congress in the exercise of its constitutional powers can make the interest of a lessee, possessor, or user of federal property, currently considered to be within state taxing power, immune from state or local taxes. Since the Court concluded that the beneficial use of tax-exempt government property is a proper subject for state or local taxation, it would seem to follow that Congress cannot preclude taxation of that privilege or interest without exceeding its constitutional limits within the dual sovereignty principle. Whether it follows or not depends upon the effect of an interplay of constitutional propositions.

Laws made pursuant to the Constitution are the supreme law of the land.⁵⁶ Under the "necessary and proper" clause of the Constitution Congress has broad power to make laws in execution of the powers and authority vested in the United States.⁵⁷ Congress has power also to make all needful laws for the regulation and disposition of its territories, possessions, and property.⁵⁸ State constitutions and laws in conflict with congressional laws cannot stand. Congress can choose the means by which its laws shall be administered.⁵⁹ Federal instrumentalities, activities, and functions created by Congress pursuant to the Constitution are immune from state interference by taxation or other means without congressional authorization.⁶⁰ If Congress chooses to execute federal functions through a contractor or lessee as an "instrumentality," "activity," or "agent," the states are powerless to tax them unless Congress waives immunity. Relevant circumstances, legislation, or the contractual relationship may place the contractor or lessee in one of those immune categories. The question whether this situation exists must be considered by the court in each case. Nevertheless, there are federal activities which in the absence of specific congressional consent may be affected by state regulations.⁶¹ The primary question here, how-

1958, p. 1; but a gubernatorial veto prevented its becoming law, *State Tax Review*, April 28, 1958, p. 1. The Ohio Supreme Court recently held that although the United States consented to state taxation of a party to whom it had leased a housing project, Ohio law did not provide for a tax on leasehold interests. *Franklin County v. Lockbourne Manor, Inc.*, 154 N.E.2d 147 (Ohio 1958).

56. U.S. CONST. art. VI, par. 2, quoted in note 3 *supra*.

57. U.S. CONST. art. I, § 8.

58. U.S. CONST. art. IV, § 3.

59. U.S. CONST. art. I, § 8, the "necessary and proper" clause; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

60. Cases cited in notes 13 and 24 *supra*.

61. *Mayo v. United States*, 319 U.S. 441, 446 (1943); *Standard Dredging Cor-*

ever, is whether Congress may simply extend the federal cloak of immunity over lessees or others who are not "instrumentalities," "activities," or "agents," without regard for the subject of the tax, merely because the government deals with them. Language in some decisions supports an affirmative answer. Perhaps Congress will not take such action, but, if it does, it is submitted that the probable answer by the Court will favor congressional power. In the words of Mr. Justice Black, "this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally. . . . Such complex problems are ones which Congress is best qualified to resolve."⁶²

In an era of extensive federal activity the Supreme Court is reluctant to inhibit the taxing power of the states. This power must be exercised carefully within the bounds of the principle of implied intergovernmental immunity. When state taxes tend to affect federal governmental operations or interests, close scrutiny is in order. Levying upon purely private interests is indispensable to their constitutionality in the absence of a congressional waiver of immunity. If the state has separated the private interest from the governmental interest in federal property and imposed its tax upon the private interest alone, the tax will be sustained, even though the economic burden or other effect of the tax is ultimately borne by the federal government. An additional, but narrow, path for avoiding the snares of the immunity doctrine has been charted for the states. For some it means increased revenue — for others, interesting theory. The extent of future utilization of this approach by the states cannot be forecast,⁶³ but in the absence of possible congressional prohibition a new taxing technique has been opened to them.

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poration v. Murphy, 319 U.S. 306 (1943); Alabama v. King & Boozer, 314 U.S. 1 (1941); California v. Thompson, 313 U.S. 109 (1941).

62. United States v. Detroit, 355 U.S. 466, 474 (1958). See Oklahoma Tax Commission v. Texas Company, 336 U.S. 342 (1949); Smith v. Davis, 323 U.S. 111, 116-119 (1944); Mayo v. United States, 319 U.S. 441, 446 (1943); Oklahoma Tax Commission v. United States, 319 U.S. 598, 606-607 (1943); Maricopa County v. Valley Bank, 318 U.S. 357, 361 (1943); James v. Dravo Contracting Co., 302 U.S. 134, 160-161 (1937).

63. See note 55 *supra*.