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Intergovernmental Tax Immunity: New Life

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NOTE

INTERGOVERNMENTAL TAX IMMUNITY: NEW LIFE?

A recent United States Supreme Court decision has breathed new life into the waning and shrunken doctrine of intergovernmental tax immunity, at least with respect to federal immunity. Finding no express constitutional basis but resting on the enunciations of *McCulloch v. Maryland*,[1] the doctrine exempts from state taxation the means and instrumentalities used by the federal government to maintain its proper functions. This immunity, after reaching its broadest implications at the turn of the twentieth century and being reciprocally applied to many state activities during that period, was virtually throttled by the 1940's. However, it has now apparently been given fresh impetus by *Kern-Limerick, Inc. v. Scurlock*.[2]

The importance of this latest pronouncement, which granted federal immunity from a state sales tax to contractors designated as Government purchasing agents who were constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract, must be viewed against the background of historic intergovernmental tax immunity developments and projected against the probable economic and political effects.

1. 4 Wheat. 316 (U.S. 1819).
2. 347 U. S. 110 (1954).

Historic Development of the Immunity Doctrine

Following the *McCulloch* decision, which struck down a discriminatory tax levied against the United States Bank, the Court held unconstitutional further discriminatory tax legislation directed against the bank,[3] and ruled invalid a tax on bonds and notes and other intangibles, including obligations of the United States, where the ordinance exempted state obligations as well as stock in both state banks and the United States Bank.[4] Later non-discriminatory taxes were also struck down as the growing immunity doctrine rendered invalid a Pennsylvania tax applying to "all offices and posts of profit" when levied against the captain of a federal cutter,[5] as well as a New York tax on bank assets, when applied to capital invested in United States securities.[6]

From immunizing instrumentalities of the Federal Government against state taxation, the Court proceeded to take steps to guard states against economic encroachment by the Federal Government. In *Collector v. Day*,[7] it ruled that the Federal Government could not apply its income tax statute to the salary of a state officer and later exempted interest paid on municipal bonds from federal income levies.[8]

From a high tide of immunity for both federal and state activities and agencies, the Court began to retreat, or perhaps advance, first by permitting New York to collect inheritance taxes on property bequeathed to the United States,[9] and then by permitting the Federal Government to apply a succession tax to property willed to a local government.[10] The theory, which thus worked to narrow the immunity, now grown far beyond the probable confines envisaged at the time of the *McCulloch* decision, was that this was not a tax upon the property itself but a tax on the right to succeed to the property—an exercise of sovereignty which affected the property before it passed by the will.[11]

But the immunity doctrine received its sharpest restriction through application of the "proprietary function" test propounded

3. Osborn v. United States, 9 Wheat. 738 (U.S. 1824).
4. Weston v. City Council of Charleston, 2 Pet. 448 (U.S. 1829).
5. Dobbins v. Commissioners of Erie County, 16 Pet. 435 (U.S. 1842).
6. Bank of Commerce v. New York City, 2 Black 620 (U.S. 1862).
7. 11 Wall. 113 (U.S. 1870).
8. Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 158 U. S. 601 (1895).
9. United States v. Perkins, 163 U. S. 625 (1896).
10. Snyder v. Bettman, 190 U. S. 249 (1903).
11. *See id.* at 254; United States v. Perkins, 163 U. S. 625, 628-629 (1896); see also Plummer v. Coler, 178 U. S. 115 (1900).

in *South Carolina v. United States*,[12] where a state liquor dispensary system was held not to be exempt from federal taxation on the ground that this was an example of a state carrying on a private type business. However, tax immunity to state activities which were governmental in character was reserved. The proprietary-governmental dichotomy became further entrenched in 1934 when it was again applied to a state liquor monopoly.[13] The Court there rejected the interesting argument that *South Carolina v. United States* was no longer controlling for since that decision the Eighteenth Amendment took traffic in liquor out of the category of legitimate private business, and its repeal made a governmental function of the liquor business, when conducted by a state.[14] In the same year it was decided that the federal income tax could properly be assessed against the salaries of the members of the board of trustees of a state-operated railroad[15] on the ground that operating such a railroad was not a usual state governmental function.

The denial of immunity from federal taxation on the theory that the particular state functions involved had the earmarks of similar enterprises conducted for private gain was later extended to admission charges to football games of a state university,[16] similar charges for use of a municipal beach,[17] and then to a state owned and operated business of bottling and selling mineral waters.[18]

While these last cases sustained a federal tax levied directly on a state or municipal enterprise or activity, the Court has never upheld a tax assessed directly on a federal enterprise by a state.[19] However, the sweep of immunity of federal instrumentalities did become limited to some extent. Withdrawn[20] were exemptions of income from copyrights and patents granted only four years pre-

12. 199 U. S. 437 (1905).
13. Ohio v. Helvering, 292 U. S. 360 (1934).
14. See *id.* at 369.
15. Helvering v. Powers, 293 U. S. 214 (1934).
16. Allen v. Regents, 304 U. S. 439 (1938).
17. Wilmette Park Dist. v. Campbell, 338 U. S. 411 (1949).
18. New York v. United States, 326 U. S. 572 (1946). The Court maintained that the proprietory test was outmoded, concluding that the real test was whether or not a federal tax would result in undue interference with a state's exercise of its power, and argued that Congress can assess revenue from any source not uniquely capable of being earned only by a state, even if the incidence falls on the state. *See id.* at 580-584.
19. See, *e.g.*, Mayo v. United States, 319 U. S. 441 (1943); see also Van Brocklin v. Tennessee, 117 U. S. 151 (1886). However, Congress may by statute permit direct taxation on a federal instrumentality, but the tax will be invalid unless levied in conformity with the federal statute. Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95 (1941).
20. Fox Film Corp. v. Doyal, 286 U. S. 123 (1932).

viously,[21] and enterprises strictly private in nature but operated under license from the United States were deemed not to be governmental instrumentalities and thus not entitled to the federal tax immunity.[22]

A similar limiting of the scope of this immunity is pointed up within other areas of specific revenue measures in the broad picture of taxation and exemptions. *Gillespie v. State of Oklahoma*,[23] exempting from state taxation a private individual's income arising from oil produced on Indian land leased from the United States, and *Burnet v. Coronado Oil and Gas Co.*,[24] holding the federal income tax inapplicable to income derived by a lessee from state lands, were both expressly overruled by a decision which held that the Federal Government could tax income of a private company whose interest was derived through a lessee of state lands.[25]

As to taxation of the salaries of government employees, the doctrine of *Collector v. Day* held sway for nearly 70 years, being followed for the last time in a holding that the Federal Government could not tax the income of a city water system official because providing water was an essential city function.[26] Two years later this area of immunity was erased when the Court sustained a state income tax applied to the salary of an employee of a federal agency.[27] The final step was taken in 1939 when by statute the federal income tax base was defined to include salaries of state and local officers and employees,[28] the states being given the corresponding right to levy taxes on salaries of federal officers and employees.[29]

In the area of sales, use and excise taxes the tendency of the court to restrict immunity was nearly as late in its development as in the field of salaries. The Court ruled in a series of cases extending from 1928 to 1936[30] that sales or excise taxes could not be collected if the burden fell directly on a government immunized

21. Long v. Rockwood, 277 U. S. 142 (1928).
22. Federal Compress Co. v. McLean, 291 U. S. 17 (1934); Broad River Power Co. v. Query, 288 U. S. 178 (1933).
23. 257 U. S. 501 (1922).
24. 285 U. S. 393 (1932).
25. Helvering v. Mountain Producers Corp., 303 U. S. 376 (1938).
26. Brush v. CIR, 300 U. S. 352 (1937).
27. Graves v. New York *ex rel.* O'Keefe, 306 U. S. 466 (1939).
28. 53 Stat. 574 (1939), 26 U. S. C. § 22(a) (1952). The statute was upheld in a test case brought by a justice of the Illinois Supreme Court. Gunn v. Dallman, 171 F. 2d 36 (7th Cir. 1948), *cert. denied*, 336 U. S. 937 (1949).
29. 53 Stat. 575 (1939), 5 U. S. C. § 4a (1952).
30. Panhandle Oil Co. v. Knox, 277 U. S. 218 (1928); Graysburg Oil Co. v. Texas, 278 U. S. 582 (1929); Indian Motocycle Co. v. United States, 283 U. S. 570 (1931); Graves v. Texas Co., 298 U. S. 393 (1936).

from the taxing power of another even if such sales or excise taxes were originally paid by a private interest.[31]

In *Panhandle Oil Co. v. Knox*[32] and *Graves v. Texas Co.*[33] it was ruled that the state excise and privilege taxes upon the dealers involved were unconstitutional because the sales were directly to the Federal Government[34] and the Court chose to equate this type of tax with the imposition of an economic burden.[35] This test of an economic burden, "real and not imaginary,"[36] when applied in other tax areas had resulted in the upholding of a tax on the sale of municipal bonds[37] and income taxes imposed upon government officials.[38] But upon a finding of a burden, at least two types of indirect taxes had also been declared unconstitutional.[39]

In 1937, in *James v. Dravo Contracting Co.*,[40] a gross receipts tax on an independent contractor working for the United States was upheld on the ground that the contractor was not a government instrumentality, and the suggestion was made that, in any event, the economic burden might not have fallen on the United States.[41] By 1941, the ultimate impact of the economic burden was not considered paramount, for in *Alabama v. King & Boozer*[42] the Court overruled *Graves v. Texas Co.*[43] and upheld a sales tax on materials purchased by a contractor working for the United States on a cost-plus contract. In a companion case, the Court evolved the theory of legal incidence, namely that a tax whose incidence falls on a private contractor may not be deemed constitutionally bad as a tax directly on the Federal Government even

31. See Justice Stone's dissent in Indian Motocycle Co. v. United States, 283 U. S. 570, 580-583 (1931) in which he suggests that realistic economics compel the conclusion that conditions of the market may force the burden to remain with the seller or even shift back to the producer, rather than to the buyer or consumer.

32. 277 U. S. 218 (1928).

33. 298 U. S. 393 (1936).

34. However, in Trinityfarm Construction Co. v. Groshean, 291 U. S. 466 (1934), the Court upheld an excise tax on gasoline sold to a Government contractor.

35. See *supra* note 31.

36. Willcuts v. Bunn, 282 U. S. 216, 234 (1937).

37. Willcuts v. Bunn, *supra* note 36.

38. Graves v. New York *ex rel.* O'Keefe, 306 466 (1939); Helvering v. Gerhardt, 304 U. S. 405 (1938).

39. Indian Motocycle Co. v. United States, 283 U. S. 570 (1931) (a manufacturer's excise tax on a motorcycle sold to a municipality held invalid); Panhandle Oil Co. v. Knox, 277 U. S. 218 (1928) (a gasoline excise tax collected from the seller held invalid as to sales made to the United States).

40. 302 U. S. 134 (1937).

41. *Id.* at 159.

42. 314 U. S. (1941).

43. 298 U. S. 393 (1936).

though the economic burden of the tax falls on the United States.[44]

However, *Alabama v. King & Boozer* may be distinguished from *Panhandle Oil Co. v. Knox* and *Graves v. Texas Co.* in that in the former case the sales were to independent contractors, while in the latter cases the sales were directly to governmental instrumntalities. But in another recent decision,[45] a tax on the storing of government-owned gasoline under a contract by which the United States assumed liability for all state taxes was held valid as attaching not to the worth of the government property but to the privilege of storing the gasoline.[46]

Apart from the problem of whether or not an implied immunity attaches in any particular instance, Congress has the power to grant specific immunity from state taxation to any federal agency or activity.[47] Further, where Congress has remained silent and has not declared affirmatively that an instrumentality carrying out governmental action will not be subject to state or local taxation, the inherent immunity continues.[48]

The Court recently affirmed recognition of the immunity-granting power in Congress by holding invalid a sales and use tax applied to Government contractors working on Atomic Energy Commission projects[49] because the statute exempting "activities" of the Commission[50] was deemed sufficiently broad to embrace these types of contracts. However, this section has since been amended to remove specifically this exemption.[51]

Thus *Kern-Limerick, Inc. v. Scurlock,* the latest pronouncement in the area of governmental tax immunity looms as important, particularly in the area of sales levies, because it may indicate a reversal in the general trend, judicial and statutory, to restrict immunity. The case was distinguished from *Alabama v. King & Boozer* on grounds that by reason of the *Kern-Limerick* contract

44. See Curry v. United States, 314 U. S. 14, 18 (1941). The Court said that if the economic burden fell on the United States, it was there because the Federal Government accepted it by the terms of the contract.

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

46. The Court distinguished United States v. County of Allegheny, 322 U. S. 174 (1944), where a property tax as applied to government-owned machinery leased to the taxpayer was held invalid on the ground that the property was the measure of the tax.

47. Pittman v. Home Owners' Loan Corp., 308 U. S. 21 (1939); Federal Land Bank v. Crosland, 261 U. S. 374 (1923); Smith v. Kansas City Title & Trust Co., 255 U. S. 180 (1921).

48. See Mayo v. United States, 319 U. S. 441 (1943).

49. Carson v. Roane-Anderson Co., 342 U. S. 232 (1952), *followed in* General Electric Co. v. State, 347 U. S. 909 (1954), *reversing* 42 Wash. 2d 411, 256 P. 2d 265 (1953).

50. 60 Stat. 765 (1946), 42 U. S. C. § 1809(b) (1952).

51. 67 Stat. 575, 42 U. S. C. A. § 1809(b) (Supp. 1953).

the contractor acted only as a purchasing agent, and title was to vest in the United States directly from the vendor of the materials, thus making the Government the disclosed purchaser,[52] while in the *King & Boozer* contract, title was to vest in the Federal Government only after delivery of the materials and inspection.[53] Thus while the United States bore the economic burden of the state tax in each case, the incidence of the tax in *King & Boozer* fell on the contractor and not on the United States.[54]

Political and Economic Results

Yet the fundamental problems of intergovernmental tax immunity, and the concern now is primarily with the immunity granted the Federal Government, may not be so much legal as economic and political. Any sound tax policy involves more than the hell-or-high-water attainment of particular revenue goals; it requires a careful consideration of all the effects of a particular tax, including its likely repercussions on consumption, investment, production, employment and income.[55]

The immunities from state and municipal property and sales taxes are producing, and may further generate, significant economic effects on state and municipal economies. In 22 states, federal exemption from state property taxation is embodied in constitutional or statutory provisions. Thus these states could not tax federal property without constitutional or statutory revisions even if Congress consents to such taxation.[56] In the other 26 states, constitutions and statutes either are silent or specifically provide for taxing federal property when Congress consents. Of these latter states, 17 have taken the necessary action to permit taxation by repealing constitutional and statutory prohibitions between 1945 and 1950.[57]

The amount of revenue thus denied to states[58] and municipalities is at least partially suggested when it is realized that the United States owns one-fourth of the total land area of the 48 states and

52. See Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 119-121 (1954).
53. See *id.* at 118, 119.
54. See *id.* at 112.
55. See Buckler, *The Theory of Business Taxation* in Taxation and Business Concentration 249-252 (1952); Anderson, Taxation and the American Economy 3, 4 (1951).
57. See note 47 *supra* and text thereto.
57. Federation of Tax Administrators, Research Rep. No. 28 (Jan. 1950). Maryland has now repealed the federal agencies' exemption in its sales tax statute. Laws Md. 1954, c. 31.
58. States, in particular, continue to face the problem of spending in excess of income. 18 Tax Administrators News 49, 50 (May, 1954).

the District of Columbia.[59] A 1953 report of the New York City Tax Commission points out that the value of property in that city which was exempt from taxation rose from $4.5 billions in 1935 to $7 billions in 1953, an increase of 53 per cent, while the value of taxable real estate increased only about 20 per cent, from $16.6 billions to almost $20 billions. Of the property thus beyond tax range, the federal exemption accounted for $351.6 millions in 1953, an increase of 78 per cent from the 1935 figure of $197.6 millions.[60]

Defense industry has brought a new complication to the problem of federal immunity from state and local taxes, particularly property taxes, and was the subject of a complaint from the General Appraisal Committee of the National Association of Assessing Officers, who reported that reduction of the state or municipal tax base may more than offset any benefits from the presence of a defense industry.[61] Charging that the provisions of many defense industry contracts are withdrawing from local governments sources of revenue they desperately need, the group objected to the terms of some of those contracts whereby upon first payment by the Federal Government for equipment, title to both the machinery and raw material passes to the United States, adding to the exempt category. The committee proposed that Congress be asked to authorize both full state and local property taxation and recommended an end to the Defense Department practice of taking title to factories and warehouses, thus exempting them from local property taxes.[62]

The effect of the *Kern-Limerick* decision on sales tax collections must be viewed against the recital that in 1953, sales and gross receipts taxes accounted for the biggest share of state revenue —more than $6 billion of the $10.5 billion total tax take.[63] In 1951, when 28 states were imposing a sales tax, revenues accounted for $2 billions; furthermore, three additional states began to impose sales taxes in 1952.[64] The importance of sales taxes is further emphasized by a study which found that during the period of 1941 to 1947, sales taxes moved from second to first in revenue

59. Guandolo, *Federal Payments to States and Local Governments Respecting Property of the United States,* 101 U. of Pa. L. Rev. 509 (1953).
60. 89 America 95 (April 25, 1953).
61. 67 American City 109 (May, 1952).
62. *Ibid.*
63. Business Week, Sept. 26, 1953, p. 134. For an account of 1953 state sales tax revisions see Tax Policy, Nov.-Dec., 1953, pp. 33-36.
64. Federation of Tax Administrators, Research Rep. No. 33, Trends in State Finance 12 (1951).

importance, while property taxes, although continuing to account for a large share, dropped from third to sixth.[65]

The sales tax is also of growing importance to municipalities, for while once they were virtually wholly financed by ad valorem taxes, the cities have now moved into the area of sales, wage and income taxes following state and federal leads in broadening their tax base.[66] In 1908, the larger cities received more than one-third billion dollars, or 82 per cent of total revenue, from property taxes. In 1954, the general property tax yielded $2.5 billions, but this was only 39 per cent of the total receipts.[67]

A concrete example of the effect of this loss of revenue, on a restricted scale, was presented by *Carson v. Roane-Anderson Co.*[68] Within four months after the Court upheld the federal statutory exemption for Atomic Energy Commission contractors, the State of Tennessee had received claims for tax refunds from such contractors amounting to nearly $3 millions.[69] An estimate by the AEC itself on December 26, 1951, prior to the *Roane-Anderson* decision, put the sales and use taxes and business and occupation taxes then in controversy in the various states with AEC installations at $5.5 millions and estimated the annual accrual rate of disputed tax assessments at over $5 millions.[70] Governor Langlie of Washington has estimated the refund required of his state under the AEC contractors' immunity at $1.2 millions and said it would be multiplied many times if the exemption were to be extended to sub-contractors.[71] Langlie also pointed out that the *Roane-Anderson* decision threatened the state's right to collect various payroll taxes which furnished security benefits to those employed on AEC projects in that state.[72]

The loss of a large part of the sales tax revenue to the states through the *Kern-Limerick* decision, should it prove to be a "Pandora's box," could be a serious blow to local financial structures, particularly in those areas which have heavy concentrations

65. The Tax Foundation, Recent Trends in Major State Taxes 1941-1947, 7, 8 (1948). The study also indicates that property taxes are the least affected by economic conditions and sales taxes are less sensitive than individual or corporate income levies.

66. Mississippi is the latest to extend to its municipalities the right to impose a sales tax. 18 Tax Administrators News 41 (April, 1954).

67. Moak, *State and Local Taxes*, 27 Current History 97, 101 (Aug., 1954).

68. 342 U. S. 232 (1952).

69. *Hearings before the Joint Committe on Atomic Energy*, 82d Cong., 2d Sess. 31 (1952).

70. *Id.* at 19.

71. *Id.* at 22.

72. *Ibid.*

of Government construction, since defense spending still requires 13 per cent of the nation's goods and services, compared to 41 per cent in 1944, and 14 per cent in 1952, mid-periods in World War II and the Korean conflict.[73] The budget for 1955 calls for a total of $37.5 billions in military spending, including $1.1 billions for new military construction and $1.6 billions for construction already begun.[74] While no present breakdown is available to show the concentration of spending, 1951 figures reveal that seven states then received half of the $8.3 billions spent for plant construction while the South got a major portion of the $4.2 billions in military post and camp construction for that year.[75]

The Treasury Department has recognized this threat to state and local revenues and in a 1942 letter opposing a bill to exempt from state and local taxation the sale, purchase, storage, use or consumption of personalty used to fulfill defense contracts, told the House Ways and Means Committee:

> ". . . If Congress were to exempt defense contractors from this type of state taxation it would seriously interfere with the revenue-raising ability of taxing authorities which depend on such taxes for substantial revenues. For as our national economy is converted from a peacetime to a war economy, an ever-increasing proportion of goods and supplies will be sold for the ultimate use of the government, thereby reducing the volume of business activity intended to be tapped by such state transaction taxes. All transactions of purchase, particularly those through a contractor, represent economic activity carried on in some state and local environment. They all require the usual amount of state and local government services."[76]

A projection of the possible effect of such immunity for defense contractors may be gained by reference to a Tennessee estimate that if the exemption from sales taxes granted AEC contractors had, in 1952, been given to all armed forces contractors, it would have cost that state $2 millions yearly in sales and use taxes—the equivalent of 10 per cent of the total sales tax collections and two per cent of total revenues.[77]

The political considerations involved in such immunity are pointed up in an exchange of correspondence on the proposal, later approved,[78] to end the immunity for AEC contractors. Lewis L. Strauss, Chairman of the Atomic Energy Commission, claimed

73. U. S. News & World Report, July 9, 1954, pp. 62-65.
74. Business Week, Feb. 27, 1953, pp. 28, 29.
75. U. S. News & World Report, Aug. 17, 1951, p. 24.
76. *Hearings, supra* note 70, at 23, 24.
77. *Id.* at 32.
78. See note 51 *supra.*

the AEC activities brought new operations to areas of economic drought,[79] in arguing for continued special immunity for such AEC contractors. But he conceded that under some circumstances this tax immunity does or could reduce states' revenues without reducing their burdens and recognized that justification for ending such immunity might be found in "overriding considerations of Federal-State-local fiscal policy."[80]

The attitude of the present administration is set out in a companion letter, also addressed to the Joint Congressional Committee on Atomic Energy, from Rowland Hughes, Assistant Director of the Bureau of the Budget, in which he says, after recognizing that AEC's stand favoring retention of the statutory tax immunity had some economic validity:

> "At the same time, the Bureau of the Budget is of the opinion that considerations of Federal-State-local fiscal policy should be decisive in matters of this kind. Our review of budget estimates and legislative proposals has made us acutely aware that the exemption from State and local taxes which is afforded most Federal property and operations and to some contractors for the Federal government, has been used, often successfully, in support of other substantial claims for Federal payments. This bureau has endeavored to contribute to policies and practices which would lessen the impact of the Federal tax exemption upon the State and local governments, so that the needs for special types of financial assistance to them would be held to a minimum and the financial independence of these governments would be strengthened."[81]

This policy statement followed resolutions adopted by the 44th Annual Governor's Conference (1952) and by the National Association of Tax Administrators (1953) requesting revision of the AEC statute to eliminate such tax immunity.[82]

Conclusion

The solution to the restricted tax immunity problem raised by the *Kern-Limerick* case is predictable: it will undoubtedly be resolved either by express congressional action making such contractors liable for state and municipal taxation, or the terms of the Government contracts—provisions which heretofore have given the United States title directly from the vendor and have made the contractors purchasing agents for the Government[83]—will be

79. Sen. Rep. No. 694, 83d Cong., 1st Sess. 4, 5 (1953).
80. *Id.* at 6.
81. *Id.* at 6, 7.
82. *Id.* at 3, 4.
83. See notes 52-54 *supra* and text thereto.

changed to bring them within the assessment area, providing there is sufficient economic and political pressure for such taxation.

But the basic solution to the troublesome immunities problem, which arises in part from the fact that the state and Federal Government are overlapping one another in their quest for revenue, is grounded in understanding the fundamental concepts underlying proper division of the burden of taxation together with an adaptation of the taxing system to fit the varying needs of the different units of government.[84]

Studies of intergovernmental taxing problems are already underway and others are scheduled by both the states and the Federal Government.[85] They are surely long overdue because our economy, already hard pressed by the burden of federal taxes, must satisfy further state and local needs from a total revenue take which already exceeds 25 per cent of the national income, said to be the danger point in taxation.[86] At least one solution to partially ease the squeeze on the states may lie in state imposition of an excise tax based upon the net income of the proprietary activities, as well as an ad valorem tax on the real property of any federal, state or local agency.[87] Other devices for sound revenue distribution, oft-used and oft-suggested for more extensive implementation, are subvention and tax sharing.[88] Federal tax grants were estimated in 1952 at $2.7 billions or about 12 per cent of total state and local revenues.[89] In 1950, grants to the states alone accounted for $2 billions, which was 17 per cent of the total state revenues.[90]

It may be that a federal sales tax, shared with the states and imposed at a rate sufficient to permit abolition of state and municipal sales taxes, or at least sufficient to maintain local revenues if federal immunity is expanded, offers a possible solution. But such a legislative policy would be open to the criticism leveled at the present state and local sales tax programs: that they are regres-

84. See U. S. Treasury Dep't, Federal-State-Local Tax Coordination 3 (1952).

85. 17 Tax Administrators News 88, 89 (Aug., 1953).

86. Arnold, *State and Local Taxing Capacity* in The Limits of Taxable Capacity 110-112 (1953).

87. See Sen. Doc. No. 86, 75th Cong., 1st Sess. V-VIII (1937).

88. See generally, Blough, *The Relative Place of Subventions and Tax Sharing* in Tax Relations Among Government Units 83 (1938).

89. U. S. Treasury Dep't, Federal-State-Local Tax Coordination 5 (1952).

90. The device of tax sharing which is widely used on the state-local level has been stalled on the federal-state level primarily because the states are unwilling to surrender further revenue sources and taxing power to the Federal Government, although probable complication in sharing of intrastate revenues is often assigned as another reason. *Id.* at 6.

sive measures, cutting into consumer spending to a greater extent than income taxes raising the same amount of revenue.[91] Because of the susceptibility of taxes to being shifted, a claim perhaps most often applied to sales taxes, it is demonstratively possible for the contractor to shift the burden to the United States and thus to the taxpayers of the nation as a whole, making them bear a particular state's sales tax. As noted previously, this may not always be the case.[92] But sales taxes are also charged with resembling trade barriers, changing patterns of consumption and causing alterations in the total amounts of expenditures in the economy,[93] although of course a federal sales tax would not be open to the trade barrier accusation.

Perhaps the most detailed proposal to resolve property tax exemptions was embodied in a bill which died in committee in the 82d Congress.[94] It would, in brief, permit taxation of Federal Government property acquired after specified cut-off dates. Included are provisions for tax equivalent payments and transition payments for property exempt under the bill; consent to taxation of property held pending disposition after being acquired in connection with loans or contracts of insurance or guaranty; and provisions permitting taxation of property leased or sold under conditional sales contracts to private persons. Major exemptions would apply to federal office buildings, penal and welfare institutions and similar instrumentalities. This plan represents a compromise between those who would favor complete abolition of federal tax immunity and those who feel such immunity desirable and necessary. Even this proposal, however, would solve only those conflicts of economic and political interest in the area of property taxation, leaving untouched the area of sales and use taxation where perhaps the effect, at least as to revenue, is more painful to state and local governments.

These solutions all lie in the area of legislation. Perhaps what is needed is a complete evaluation of the entire problem of taxation, its overlappings and its immunities, with a resulting overall program worked out by the states and the Federal Government. But until such legislation can be drafted, and a difficult task it will

91. See, *e.g., Kimmel,* Taxes and Economic Incentives 150, 151 (1950).

92. *Id.* at 131-134; Anderson, Taxation and the American Economy 72-79 (1951).

93. Jacoby, *Sales and Use Taxes as Barriers to Trade—Interstate and Intrastate* in Tax Barriers to Trade 189, 190 (1941).

94. See Guandolo, *Federal Payments to States and Local Governments Respecting Property of the United States,* 101 U. of Pa. L. Rev. 509, 511-513 (1953).

surely be, it would appear sound policy for the courts to continue to restrict federal tax immunity, as has apparently been the waveringly-consistent policy until the *Kern-Limerick* case.

As Judge Clark has argued: "The immunity of the sovereign from taxation would seem to belong to the legal philosophy of the Middle Ages . . . and be as unsuited to modern conditions as the immunity from suit. . . ."[95] Perhaps this is stronger language than the problem requires, and furthermore it appears impossible to destroy completely a doctrine so deeply rooted. Yet the economic conditions of today appear to justify its judicial and legislative restriction, if not its abolition.

95. United States v. Hoboken, 29 F. 2d 932, 940 (D. N.J. 1928).