

NOTES

TAXABILITY BY THE ISSUING GOVERNMENT OF BONDS
WITH TAX-EXEMPTION FEATURES

Exemption from taxation of state and national government securities in the United States rests upon two general bases. The first is the constitutional basis established as a result of *McCulloch v. Maryland*.¹ In that case, the United States Supreme Court through Chief Justice Marshall laid down the doctrine that the Constitution of the United States impliedly prohibits taxation by the states of instrumentalities of the federal government. Later cases sustained the doctrine as applied to taxation by the federal government of instrumentalities of the states.² That this doctrine extends to exempt bonds of the federal government and its agencies from state taxation³ and to exempt the bonds of the several states and their instrumentalities from taxation by the federal government⁴ is firmly established. This form of exemption has often been criticized.⁵ Constitutional amendments have been proposed for its abolition.⁶ To date none of them has been successful. The second basis of exemption is what might be described as one of local policy. This is the basis on which securities issued by either branch of the government are exempt from taxation by the branch issuing them. This type of exemption is sometimes expressly stated in state constitutions⁷ or implied

1. (1819) 4 Wheat. 316, 4 L. ed. 579.

2. *Collector v. Day* (1871) 11 Wall. 113; 20 L. ed. 122. *Indian Motorcycle Co. v. United States* (1931) 283 U. S. 570, 51 S. Ct. 601, 75 L. ed. 1277.

3. *Weston et al. v. City of Charleston* (1829) 2 Pet. 449, 7 L. ed. 481; *Northwestern Mutual Life Ins. Co. v. Wisconsin* (1927) 275 U. S. 136, 48 S. Ct. 55; 72 L. ed. 202.

4. *Pollock v. Farmers' Loan and Trust Co.* (1895) 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759.

5. *Twentieth Century Fund, Inc., Facing the Tax Problem*, (1937) p. 303; Martin, *The Social Aspects of Tax Exemption* (1936) 183 *Annals of the American Academy* 48; Withers, *The Menace of Tax-Exempt Bonds* (1935) 141 *The Nation* 241; Lozier, *The Policy of Exempting Government Bonds from Their Just Share of Tax Burdens Is Un-Democratic, Un-Republican, Un-American and a Vicious Form of Governmental Favoritism* (1934) 78 *Cong. Record* 10738.

6. Proposed House Joint Res. 175 (1933) 77 *Cong. Rec.* 2960; Proposed Senate Joint Resolution 68 (1934) 78 *Cong. Rec.* 69; Proposed House Joint Resolution 219 (1934) 78 *Cong. Rec.* 168; Proposed Senate Joint Resolution 150 (1935) 79 *Cong. Rec.* 9743; *New York Times*, June 20, 1935, p. 2: 5.

7. See, e. g., Va. Const., art. XIII, sec. 183.

therefrom.⁸ In the case of securities of the federal government and more often in the case of state securities, the exemption is found in a general statute⁹ or in a specific statute under which particular securities were issued.¹⁰ The purpose behind such exemptions is that of facilitating the borrowing process by making the purchase of the bonds more attractive to the potential investor,¹¹ with a corollary purpose of enabling the state to borrow money at a lower rate of interest by virtue of the tax-exemption feature.¹² That this second purpose is best accomplished in this manner is somewhat doubtful in view of the consequent loss in taxes to the issuing government.¹³ This type of exemption has been attacked because of its effect of nullifying, at least in part, the purpose of progressive income tax rates,¹⁴ and because of the advantage afforded by it to the wealthy taxpayer at the expense of the taxpayer of small or moderate means.¹⁵ It is proposed here to discuss some of the problems which would be involved under the United States Constitution in an attempt on the part of the United States or the state governments to abolish this second type of exemption, that is, exemption by the issuing government. No attempt will be made to treat the inter-governmental exemption based upon *McCulloch v. Maryland*.¹⁶

I

Insofar as obligations of the states are concerned, two provisions of the United States Constitution would be involved in an attempt on the part of a state to abrogate the exemption from taxation extended to outstanding bonds, namely, the "contract"

8. *Droll v. Furnas Co.* (1922) 108 Nebr. 85, 187 N. W. 876, 26 A. L. R. 543. Additional cases holding to same effect are cited in Note (1923) 26 A. L. R. 547, 552.

9. See, e. g., Tenn. Code (1932) secs. 1086-1088.

10. See, e. g., Iowa Code (1935) sec. 6944, subd. 22 (Exemptions of State Soldiers' Bonus Bonds); Federal Farm Mortgage Corp. Act (1934) 48 Stat. 349, 369, (1934) 12 U. S. C. A. sec. 1020 (f) (Exemption of Federal Farm Mortgage Corporation Bonds).

11. Shoup, *Tax Exemption* (1934) 14 *Encyc. of Social Sciences* 528, 529; Rowe, *The Burden of Tax Exemption of Government Bonds* (1926) 16 *American Economic Review* 653.

12. Martin, *op. cit. supra*, note 5. See also articles cited *supra*, note 11.

13. Hinrichs, *The Cost of Tax-Exempt Securities* (1926) 41 *Pol. Sci. Quar.* 271; Shoup, *op. cit. supra*, note 11; Martin, *op. cit. supra*, note 5.

14. Twentieth Century Fund, Inc., *op. cit. supra*, note 5; Shoup, *op. cit. supra*, note 11.

15. Shoup, *op. cit. supra*, note 11; Rowe, *op. cit. supra*, note 11.

16. (1819) 4 *Wheat.* 316, 4 *L. ed.* 579. Lowndes, *Taxing the Income from Tax-Exempt Securities* (1938) 32 *Ill. L. Rev.* 643 contains an exhaustive discussion of this phase of the problem.

clause¹⁷ and the "due process" clause.¹⁸ The former would be the more important provision in this matter. The due process clause would probably offer no more protection than the contract clause insofar as this question is concerned.¹⁹

The "contract" clause provides that "no state * * * shall * * * pass any * * * law impairing the obligation of contracts."²⁰ Before the Fourteenth Amendment this provision was the most important single restraint in the Constitution upon state power²¹ insofar as the number of cases before the United States Supreme Court was concerned. Although its importance has been overshadowed in recent years by the Fourteenth Amendment, it still occupies an important position as a curb upon state action.²² Notwithstanding its importance, little is known of the actual purpose of the framers in placing it in the Constitution or of the field which they intended it to cover.²³ The reports of the debate in the convention throw little light upon the matter.²⁴ In the *Federalist* Hamilton spoke of it as designed to prevent hostility among the states arising from their "atrocious breaches of moral obligation and social justice,"²⁵ and Madison declared that "laws impairing the obligation of contracts are contrary to the first principles of the social compact and to every principle of sound justice" and that the provision was adopted as a result of a demand of the people for reforms which would "banish speculation on public measures, inspire a general prudence and industry, and give a regular course of the business of society."²⁶ These declaration throw but little light upon the scope of the field in which the framers intended the clause to operate.

Although little is known of the actual purpose and intent of the framers, the conditions which probably caused the insertion

17. United States Constitution, Art. 1, Sec. 10.

18. United States Constitution, Amendment XIV.

19. See discussion *infra* as to effect of the "due process" clause of the Fifth Amendment as applied to congressional action.

20. United States Constitution, Art. 1, Sec. 10.

21. See *Murray v. Charleston* (1878) 96 U. S. 432, 448, 24 L. ed. 760.

22. *Ibid.*

23. "It is remarkable that the very important clause was passed over almost without comment during the discussion preceding the adoption of that instrument, though since its adoption, no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy." Cooley, *Constitutional Limitations* (8th ed. 1927) 554.

24. 2 Farrand, *The Records of the Federal Convention* (1937) 439; 5 Elliot's *Debates* (1863) 485. See Johnson, *The Contract Clause of the United States Constitution* (1928) 16 Ky. L. J. 222.

25. *The Federalist*, No. 7.

26. *Ibid.* No. 44.

of the clause and to which Hamilton and Madison referred are well-known.²⁷ Following the Revolutionary War, the plight of debtors had become drastic. To alleviate conditions, state legislatures had passed numerous "stay laws" intended for the relief of debtors. The general purpose of such laws was to postpone the payment of debts or in some cases even to wipe them out completely. Widespread retaliation had sprung up among the states. No creditor could be sure what the obligations owed him would be worth a day in advance, or when he could expect to collect them. Mr. Justice Sutherland, dissenting in the Minnesota Mortgage Moratorium Case,²⁸ declared that the clause was "meant to foreclose state action impairing the obligation of contracts *primarily and especially* in respect of * * * action aimed at giving relief to debtors *in case of emergency*."²⁹ Historical considerations lend ample support to this view.³⁰

Whether or not the framers of the constitution intended the clause to apply to contracts entered into by the state is not known.³¹ That they did not expect that it would some day be applied to contracts made by the states with regard to taxation seems highly probable. Writing in the *Federalist*, Hamilton declared that, except for duties on imports, the states retained absolute and unqualified power and authority in raising their own revenue and that any attempt on the part of the national government to abridge them in the exercise of this power would be "a violent assumption of power, unwarranted by any article or clause of its constitution."³² This statement soon proved to be erroneous.³³

Whatever the intent of the framers³⁴ as to the application of

27. Bancroft, *History of the Formation of the Constitution of the United States* (1882) 228 et seq.; Warren, *The Making of the Constitution* (1928) 5, 553; Beard, *An Economic Interpretation of the Constitution of the United States* (1913) 31; Madison, Preface to Debates in the Convention of 1787, in 3 Farrand, *op. cit. supra*, note 24 at 539, 584.

28. Home Building and Loan Ass'n v. Blaisdel (1934) 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413.

29. See 290 U. S. at 465; see also Edwards v. Kearzey (1878) 95 U. S. 595, 24 L. ed. 793.

30. *Supra*, note 27.

31. W. R. Davis, who was a member of the Convention, declared in the debates in the North Carolina Convention that the clause refers merely to contracts between individuals and did not give the federal government any power to interfere with state securities. 3 Farrand, *op. cit. supra*, note 24 at 349.

32. The *Federalist*, No. 32.

33. McCulloch v. Maryland (1819) 4 Wheat. 316, 4 L. ed. 579.

34. The intent of the framers would not, in any event, have been controlling in the applications of the clause. Cf. dissent of Mr. Justice Black in Connecticut General Life Insurance Co. v. Johnson (1938) 58 S. Ct. 436,

the clause to state obligations, in 1810 in the case of *Fletcher v. Peck*³⁵ the Supreme Court held that it applied to contracts to which a state was a party. Two years later the court held that a contract by a state contained in a grant of land by it, exempting the land from taxation, was included within the prohibition of the clause.³⁶ No consideration was given to the special nature of the subject of the contract, that is, the power of taxation.

In 1819 the *Dartmouth College Case*³⁷ decided that a corporate charter granted by a state, when accepted and acted upon by the corporation, became a contract which the state could not alter by virtue of the prohibition of the contract clause. The decision opened a wide field for contractual exemptions from taxation. Thereafter provisions granting exemption from taxation were frequently inserted in corporate charters. In 1830 the Supreme Court held that a mere grant of charter constituted no implied exemption from taxation.³⁸ Marshall, in a *dictum*, reaffirmed in negative language that a state could contract away its power of taxation, but added that abandonment of the power should never be presumed.³⁹ Soon the court began to apply to corporate charters the doctrine of strict construction against the grantee under a public grant,⁴⁰ which shortly became important in construing grants of exemption from taxation contained in corporate charters.⁴¹

In 1853 the exact question of whether a contract, the subject matter of which was the method and amount of taxation which might be imposed by a state, was within the contract clause was for the first time directly presented to the Supreme Court. Ohio had chartered a state bank by a statute providing that the bank should pay the state a specified portion of its earnings in lieu of all other taxes. A subsequent statute taxing the bank the same as all other property was attacked as invalid under the contract clause; but acceptance of the charter by the bank and

440, 82 L. ed. (adv. op.) 457, 462 as to effect which intent of framers and historical consideration have had upon the scope of the Fourteenth Amendment as construed by the court.

35. (1810) 6 Cranch 87, 3 L. ed. 162. This is the first case in which the United States Supreme Court held a state law void because it conflicted with the United States Constitution.

36. *New Jersey v. Wilson* (1812) 7 Cranch 164, 3 L. ed. 303.

37. *Trustees of Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 4 L. ed. 629.

38. *The Providence Bank v. Billings* (1830) 4 Pet. 514, 7 L. ed. 939.

39. See 4 Pet. at 561.

40. *Proprietors of the Charles River Bridge v. Proprietors of Warren Bridge* (1837) 11 Pet. 420, 9 L. ed. 773.

41. See cases *infra*, notes 77 and 78.

payment of the specified sum were held to constitute a contract binding upon the state.⁴² In the opinion of the court, the power of taxation could properly be made the subject of a contract by the state, which, by contracting against taxation, did not contract away any part of its sovereign power to choose the subjects of taxation but merely exercised that power. Dissenting opinions urged that the power of taxation was a part of the state's sovereign power, which could not be made the subject of a contract so as to be vested in an irrevocable charter of a corporation and placed beyond the reach of future legislatures.⁴³ Subsequent cases adhered, although somewhat grudgingly at times,⁴⁴ to the majority position.⁴⁵ Attempts to overthrow it have failed.⁴⁶ The only inroads upon it have been by virtue of the doctrine of strict construction; the principle itself still stands. The wisdom of placing the power of taxation in a category separate and apart from the power of eminent domain and the police power, insofar as the power of a state to contract with respect thereto is concerned, is doubtful. Contracts by which a state undertakes not to exercise the latter two powers relate, it is held, to such an attribute of sovereignty that a state may not contract against their exercise.⁴⁷ The power of taxation seems as much an attribute of sovereignty as the power of eminent domain and the police power, and its exercise as necessary to the continued existence of the state as the other two.

Whatever the soundness of the rule, its existence when the property involved in the exemption contract is bonds issued by a state or municipality⁴⁸ is clear.⁴⁹ Difficult problems may

42. *The Piqua Branch of the State Bank of Ohio v. Knoop* (1853) 16 How. 369, 14 L. ed. 977. See Zumbalen, *The Federal Constitution and Contract Exemption from Taxation* (1932) 17 *ST. LOUIS LAW REVIEW* 191, for a discussion of the Supreme Court decisions in the matter.

43. See 16 How. at 393.

44. "The power of taxation is an attribute of sovereignty, and is essential to every independent government. If the point were not already adjudged, it would admit of grave consideration, whether the legislature of a state can surrender their power, and make its action in this respect binding upon its successors, any more than it can surrender its police power or its power of eminent domain." Mr. Justice Field in *Minot v. Philadelphia, etc. R. Co.* (1874) 18 Wall. 206, 226, 21 L. ed. 888.

45. *Dodge v. Woolsey* (1856) 18 How. 331, 15 L. ed. 401; *Wright v. Louisville and Nashville R. Co.* (1915) 236 U. S. 687, 35 S. Ct. 475, 59 L. ed. 788.

46. *Washington University v. Rouse* (1869) 8 Wall. 439, 19 L. ed. 498; see dissent of Mr. Justice Miller, 8 Wall. at 443.

47. *West River Bridge v. Dix* (1848) 6 How. 507, 12 L. ed. 535; *Pennsylvania Hospital v. Philadelphia* (1917) 245 U. S. 20, 38 S. Ct. 35, 62 L. ed. 124; *Stone v. Mississippi* (1880) 101 U. S. 814, 18 L. ed. 403.

48. The contract clause applies to contracts entered into by municipalities with state authority. *United States ex rel. Hoffman v. Quincy* (1867)

of course arise in application. Such are the problems, first, of whether or not there is any contract at all and, second, as to the scope of the exemption contained in the contract.

Obviously, if there be no contract, there can be no impairment of its obligation. Determining when a contract effecting an exemption from taxation exists may not always be simple. The word "contracts" in the constitutional provision "is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. Mutual assent, expressed or implied, to its terms is of its very essence."⁵⁰ The presence of assent to exempt bonds from taxation and of consideration must be determined upon inspection of the constitution and general laws of the state with regard to taxation and of the statute under which the specific bonds were issued. When there is no express exemption, the rule is the same as that applied where a corporate charter granted by the state contains no express exemption from taxation,⁵¹ that is, that no implied agreement to grant any exemption will be recognized.⁵² Some courts have questioned this view on the ground that any attempt of a state or a municipality to tax its obligations is inconsistent with the obligation assumed;⁵³ and several state courts have held, as a matter of local statutory construction rather than of constitutional law, that in the absence of any intent of the state legislature expressed in the statutes to tax the state's bonds the presumption is that they were intended to be exempt.⁵⁴ Others take a contrary posi-

4 Wall. 535, 18 L. ed. 403; *Murray v. City Council of Charleston* (1878) 96 U. S. 432, 24 L. ed. 760. Likewise, a city ordinance passed in pursuance of authority granted by the state is a law within the meaning of the contract clause. *Northern Pacific R. Co. v. Minnesota* (1908) 208 U. S. 583, 28 S. Ct. 341, 52 L. ed. 630.

49. *Orr v. Gilman* (1902) 183 U. S. 278, 22 S. Ct. 213, 46 L. ed. 196; *Hale v. Iowa State Board of Assessment and Review* (1937) 302 U. S. (adv. op.) 95, 58 S. Ct. (adv. op.) 102, 82 L. ed. (adv. op.) 66. Tax exemption clauses have no extraterritorial effect. Therefore when tax-exempt state bonds acquire a situs in a state other than that of issue, the state of situs is not precluded by the contract clause from levying a tax upon the bonds. *Appeal Tax Court of Baltimore v. Patterson* (1878) 50 Md. 354.

50. *Crane v. Hahlo* (1922) 258 U. S. 142, 146, 42 St. Ct. 214, 66 L. ed. 514; *Louisiana v. New Orleans* (1883) 109 U. S. 285, 288, 3 S. Ct. 211, 27 L. ed. 936.

51. *The Providence Bank v. Billings* (1830) 4 Pet. 514, 7 L. ed. 939.

52. See *Murray v. City Council of Charleston* (1878) 96 U. S. 432, 24 L. ed. 760.

53. See *Hartman v. Greenhow* (1881) 102 U. S. 672, 683, 26 L. ed. 271. *Mayor of Macon v. Jones* (1881) 67 Ga. 489; *State ex rel. Louisiana Improvement Co. v. Board of Assessors* (1902) 111 La. 986, 36 So. 91.

54. *Penick v. Foster* (1907) 129 Ga. 217, 58 S. E. 776, 12 Ann. Cas. 346; *State ex rel. Du Parte v. Board of Assessors* (1883) 35 La. Ann. 65; *National Surety Co. v. Stavkey* (1919) 41 S. Dak. 356, 170 N. W. 582.

tion.⁵⁵ Though there is no express contract of exemption, an attempt of a state or municipality to tax its bonds and deduct the amount before payment of the interest to the holder violates the contract clause.⁵⁶

An express provision for exemption of bonds from taxation does not necessarily establish an agreement or assent on the part of the state to a contractual exemption. Such provision might be regarded as only an expression of legislative policy and not an intention to contract.⁵⁷ A provision in a constitution or statute granting in general terms an exemption with regard to all bonds issued by the state might well be so construed, especially if no reference were made on the face of the bond itself to the exemption. Thus viewed, such a provision could be repealed by the legislature at will, as there would be no contract.⁵⁸

A provision of a state constitution or statute may not amount to a contract protected by the contract clause because the essential element of consideration is lacking, *e. g.*, if the exemption is a mere gratuity. An exception statute enacted after bonds had been issued would very likely be held to amount to a mere gratuitous exemption.⁵⁹ Thus far the Supreme Court has refused to work a contract out of a mere gratuitous exemption in other connections.⁶⁰ There would seem to be no valid reason for not applying the same rule to exemptions with regard to bonds. However the courts' desire to place and keep the states' credit upon a high plane⁶¹ might lead them to work out a contract where state bonds are involved, whereas under similar circumstances in other connections they might hold the exemption a mere gratuity, supervening policy considerations inclining them more

55. *State National Bank v. City of Memphis* (1906) 116 Tenn. 641, 94 S. W. 606, 8 Ann. Cas. 22.

56. *Murray v. City Council of Charles* (1878) 96 U. S. 432, 24 L. ed. 760.

57. See *Hale v. Iowa State Board of Assessment and Review* (1937) 302 U. S. (adv. op.) 95, 100, 58 S. Ct. 102, 82 L. ed. 66. Cf. *Wisconsin and Michigan Ry. v. Powers* (1903) 191 U. S. 379, 386, 24 S. Ct. 107, 48 L. ed. 229.

58. *Wisconsin and Michigan Ry. Co. v. Powers* (1903) 191 U. S. 379, 24 S. Ct. 107, 48 L. ed. 229.

59. Cf. *Tucker v. Ferguson* (1875) 22 Wall. 527, 22 L. ed. 805; *Hall College v. South Orange* (1916) 242 U. S. 100, 37 St. Ct. 54, 61 L. ed. 170 (grant of exemption to corporation after charter had been issued and accepted held to be a mere gratuity).

60. *Christ Church v. Philadelphia* (1861) 24 How. 300, 16 L. ed. 602; *Welch v. Cook* (1879) 97 U. S. 541, 22 L. ed. 805.

61. Cf. language of Strong, J., in *Murray v. Charleston* (1878) 96 U. S. 432, 449, 24 L. ed. 760; 96 U. S. 449; see also Mr. Justice Sutherland's dissent in *Pacific Co. v. Johnson* (1932) 285 U. S. 480, 501, 52 S. Ct. 424, 76 L. ed. 883.

readily to work out a legal obligation from what they considered a moral obligation.

Again, the state constitution may prohibit the legislature from making the alleged contract. In Missouri, for instance, the constitution contains a list of property which shall be exempt from taxation⁶² without mention of state bonds and, by a further provision, makes all other exemptions void.⁶³ The Attorney-General of Missouri has declared that any attempt of the legislature to exempt state bonds from taxation would be unconstitutional under these provisions.⁶⁴ Should the courts follow this view, no contract of exemption protected by the Federal Constitution could exist with regard to Missouri bonds.⁶⁵ But the Supreme Court may determine for itself whether the legislature is empowered under the state constitution to grant the claimed exemption in the form of a contract.⁶⁶

Where the exemption is statutory, the additional question of the effect of a general provision in force when the bonds were issued and the exemption granted and giving the legislature power to repeal or amend all statutes may be presented. Insertion in corporate charters or general statutes of a provision reserving to the state the power to repeal or amend⁶⁷ has been one of the most effective means employed to avoid the result of the *Dartmouth College Case*.⁶⁸ The Supreme Court has held that a general statute making all statutes subject to amendment or repeal unless a contrary intent was plainly expressed therein

62. Mo. Const., art. X, sec. 6.

63. Mo. Const., art. X, sec. 7.

64. Opinion of the Attorney General, June 31, 1933, Prentice-Hall Mo. Tax Service, sec. 31405. The Tennessee Supreme Court said that under similar constitutional provisions, any attempted exemption of Tennessee bonds would be invalid. *State National Bank v. City of Memphis* (1906) 116 Tenn. 641, 94 S. W. 606, 8 Ann. Cas. 22.

65. See *Taylor v. Thomas* (1875) 22 Wall. 479, 22 L. ed. 789; *New York ex rel. Gallatin National Bank v. Commissioners of Taxes and Assessments* (1877) 94 U. S. 415, 24 L. ed. 164; *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1908) 208 U. S. 583, 28 S. Ct. 341, 52 L. ed. 360.

66. *Northwestern University v. Illinois* (1879) 99 U. S. 309, 25 L. ed. 387; *Louisville and Nashville Ry. v. Palmer* (1883) 109 U. S. 244, 3 S. Ct. 193, 27 L. ed. 922.

67. *The Pennsylvania College Cases* (1872) 13 Wall. 190, 20 L. ed. 550; *Miller v. New York* (1873) 15 Wall. 478, 21 L. ed. 98; *Missouri Pacific Ry. Co. v. Kansas ex rel. Taylor* (1909) 216 U. S. 262, 30 S. Ct. 330, 54 L. ed. 472. The states' reserved power to alter or repeal may not, however, be employed to destroy or impair any vested right. Although the contract clause would not apply in such situation, the Fourteenth Amendment would. See *Phillips Petroleum Co. v. Jenkins* (1936) 297 U. S. 629, 56 S. Ct. 611, 80 L. ed. 943.

68. (1819) 4 Wheat. 518, 4 L. ed. 629.

prevented a provision contained in a corporate charter, that property of the corporation should be forever free from taxation, from becoming a contract within the meaning of the constitution.⁶⁹ The effect, if any, of special policy considerations, such as the upholding of the states' credit,⁷⁰ involved where the state bonds rather than corporate charters are concerned is of course conjectural. There is, however, a more than remote possibility that the court might be induced to take a different view. While an exemption provision on the face of the bond itself would probably not be affected by such a general repeal provision, a nice question might arise if both the exemption provision and reference to the general repeal statute appeared on the face of the bond. A claimed exemption contract based only upon a provision in a general exemption statute might, even if the court should regard such a provision as contractual,⁷¹ be deemed subject to the general repeal statute.

At one time, the question whether a suit to enforce the exemption after it had been abrogated was not a suit against a state, so that under the Eleventh Amendment the judicial power of the United States did not extend to cover the matter,⁷² might have proved troublesome. It is now familiar law, however, that a suit against a state official attempting to act under an unconstitutional law is not a suit against the state.⁷³

Thus far no case of attempted total abrogation by a state of the tax-exemption expressed in its bonds has been presented. Instead the question principally litigated has been whether some particular form of taxation when applied to tax-exempt bonds violates the contract into which the state has entered. To present

69. *Covington v. Kentucky* (1899) 173 U. S. 231, 19 S. Ct. 383, 43 L. ed. 678; see also *Tomlinson v. Jessup* (1873) 15 Wall. 454, 21 L. ed. 204; *Citizens National Bank v. Kentucky* (1910) 217 U. S. 443, 30 S. Ct. 530, 54 L. ed. 832.

70. *Supra*, note 61.

71. *Cf.* cases cited *supra*, note 57.

72. This problem caused a great deal of trouble to the Court in the Virginia Tax Cases. *Antoni v. Greenhow* (1883) 107 U. S. 769, 2 S. Ct. 91, 27 L. ed. 468; *Poindexter v. Greenhow* (1885) 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185; *Allen v. Baltimore & Ohio R. Co.* (1885) 114 U. S. 311, 5 S. Ct. 925, 29 L. ed. 200; dissenting opinion at 114 U. S. 330, 5 S. Ct. 962, 29 L. ed. 207. These cases involved attempts on the part of bondholders to force the state to accept coupons from its bonds in payment of taxes as the state had contracted to do. The right to maintain such actions was upheld, although there were strong dissents to the effect that the suit was one in reality against the state itself of which the federal courts could not take jurisdiction under the Eleventh Amendment.

73. See cases *supra*, note 72; *Ex parte Young* (1908) 209 U. S. 123, 28 S. Ct. 441, 52 L. ed. 714.

a question under the Federal Constitution, the law imposing the contested levy must have been enacted subsequent to the contract of exemption; for if the levy is attempted under a pre-existing statute, there has been no law passed after the contract which impairs its obligation.⁷⁴

The decisions of the Supreme Court construing exemptions in state and municipal bonds have followed somewhat the same general lines as those construing exemptions in corporate charters. Although the court has been somewhat more prone to uphold exemptions in bonds,⁷⁵ still the dislike of contractual exemption from taxation reflected in the doctrine of strict construction is found in both classes of cases.⁷⁶ In the corporate charter cases that doctrine has been most frequently applied in determining what property was within the exception.⁷⁷ The bond cases raise no question as to what property is involved. The question is usually whether the particular form of taxation is included in the exemption—a question which has also arisen in the charter exemption cases.⁷⁸ When an exemption is in general terms, for example, "All bonds by this state or by any municipality within the state shall be exempt from taxation," the rule of strict construction has been applied by the Supreme Court to exclude from the operation of the exemption any tax which does not fall directly upon the bonds. So, in determining the value of the estate for purposes of the state succession tax, inclusion of the value of state bonds exempt under such a provision, found among the property belonging to decedent, has been held not to violate the contract clause.⁷⁹ Relying upon a previous holding that a state might, in levying a succession tax, include federal bonds owned by a decedent in determining the value of his estate,⁸⁰ the court reasoned that the tax was not upon property but upon the privilege of passing property after death.

74. Cf. *St. Paul, etc. R. Co. v. Todd Co.* (1892) 142 U. S. 282, 12 S. Ct. 281, 35 L. ed. 1014; *Munday v. Wisconsin Trust Co.* (1920) 252 U. S. 499, 40 S. Ct. 365, 64 L. ed. 684.

75. See note 61, *supra*.

76. See *Hale v. Iowa State Board of Assessment & Review* (1937) 302 U. S. (adv. op.) 95, 58 S. Ct. (adv. op.) 102, 82 L. ed. (adv. op.) 66; *Jefferson Branch Bank v. Skelly* (1862) 1 Black 436, 17 L. ed. 173; *The Providence Bank v. Billings* (1830) 4 Pet. 514, 7 L. ed. 939.

77. See *Jetton v. University of the South* (1908) 208 U. S. 489, 28 S. Ct. 375, 52 L. ed. 584; *Ford v. Delta & Pine Land Co.* (1897) 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590; *Baker Judicial Interpretation of Tax Exemption Statutes* (1929) 7 Tex. L. Rev. 385.

78. See *St. Louis v. United Railways Co.* (1908) 210 U. S. 266, 28 S. Ct. 630, 52 L. ed. 1054.

79. *Orr v. Gilman* (1902) 183 U. S. 278, 22 S. Ct. 213, 46 L. ed. 196.

80. *Plummer v. Coler* (1900) 178 U. S. 115, 20 S. Ct. 829, 44 L. ed. 749; see *Greiner v. Lewellyn* (1922) 258 U. S. 384, 42 S. Ct. 324, 66 L. ed. 676 for

That the power of the federal government to levy upon the state bonds in question is not determinative of whether the tax levied by the state violates the exemption contract is made clear by *Hale v. Iowa State Board of Assessment and Review*.⁸¹ There the court held that a state income tax levied upon interest from bonds issued under general and specific tax-exemption statutes did not impair the exemption contract. Mr. Justice Cardozo, speaking for the Court, accepted the state court's view that an income tax was not in its nature a property tax and held that, by virtue of the rule of strict construction, the tax was not included in the exemption. The federal government could clearly not have levied upon the income from the bonds in question;⁸² but Cardozo declared that the court was concerned only with the effect and meaning of a particular contract of exemption "to be read narrowly and strictly. There is no room at such a time for the freer and broader methods that have been thought to be appropriate in the development of the doctrine of implied [intergovernmental] restraints."⁸³ Justices Sutherland, McReynolds, and Butler, dissenting on the ground that the exemption contract included all taxes,⁸⁴ seem to have had in mind the test of whether the subsequent law causes a diminution in value of the contract—a test sometimes applied in determining whether the contract clause has been violated,⁸⁵ but one not particularly helpful in a case like this.

Two other cases involving the question of what taxes are included in the exemption contract interestingly illustrate how decisions change with the court's personnel. *McCallen v. Massachusetts*⁸⁶ involved a statute levying a purported franchise tax, measured by the net income of domestic corporations. By the statutory definition income from United States securities and from state and municipal tax-exempt bonds was to be included in computing net income. The prior superseded statute did not include such income. The majority of the court, composed of

a similar holding as to inclusion of state bonds for purposes of federal estate tax.

81. (1937) 302 U. S. (adv. op.) 95, 58 S. Ct. (adv. op.) 102, 82 L. ed. (adv. op.) 66.

82. *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429, 584, 15 S. Ct. 673, 39 L. ed. 759; *National Life Insurance Co. v. United States* (1928) 277 U. S. 508, 48 S. Ct. 591, 72 L. ed. 968.

83. (1937) 302 U. S. (adv. op.) 95, 109, 58 S. Ct. (adv. op.) 102, 82 L. ed. (adv. op.) 66.

84. (1937) 302 U. S. (adv. op.) 95, 110, 58 S. Ct. (adv. op.) 102, 82 L. ed. (adv. op.) 66.

85. See *Bank of Mississippi v. Sharp* (1848) 6 How. 301, 12 L. ed. 447.

86. (1929) 279 U. S. 620, 49 S. Ct. 432, 73 L. ed. 874, 65 A. L. R. 866.

Mr. Chief Justice Taft and Justices Sutherland, VanDevanter, McReynolds, Butler, and Sanford, held that the tax, although in name an excise tax, was in reality a tax directly upon the bonds. It was therefore invalid as applied to the United States bonds because of the implied intergovernmental exemption and as applied to the state bonds because it impaired the obligation of contracts. The court relied rather heavily upon the non-inclusion of such income in the former tax statute, which fact, together with the reports of the legislative committee, was taken to indicate that the change of policy had been adopted for the purpose of subjecting the securities *pro tanto* to the burden of the tax.⁸⁷ The majority opinion mainly discussed the nature of the tax as affecting the federal securities and summarily concluded that the tax was contrary to the contract contained in the state bonds.⁸⁸ That conclusion, as the *Hale* case⁸⁹ remarked, was not demanded by the holding that the tax as applied to the United States bonds was invalid. Justices Stone, Holmes, and Brandeis, dissenting, viewed the tax as simply an excise tax which might be measured by the entire net income of the corporation, including that from the bonds, federal and state.⁹⁰

Three years later *Pacific Company v. Johnson*⁹¹ came before the Court. It involved a California statute levying a franchise tax upon corporations, measured by net income, which expressly included income from federal, state, and municipal bonds. State and municipal securities were exempt from taxation by the state constitution. The statute was attacked on the grounds that it violated the contract clause. The Supreme Court held that the tax was an excise tax, not a tax directly upon the bonds. Under the rule of strict construction the tax did not fall within the contractual exemption. The majority was composed of Justices Stone and Brandeis, who had dissented in the *McCallen* case,⁹² Mr. Chief Justice Hughes and Justices Roberts and Cardozo, who were not on the court at the time it was decided, and Mr. Justice McReynolds, who had been of the majority. Justices Sutherland, VanDevanter and Butler, who were among the majority in the *McCallen* case, dissented,⁹³ largely upon the author-

87. See 279 U. S. at 631.

88. See 279 U. S. at 634.

89. *Hale v. Iowa St. Bd. of Assessment and Review* (1937) 302 U. S. (adv. op.) 95, 58 S. Ct. (adv. op.) 102, 82 L. ed. (adv. op.) 66.

90. See 279 U. S. at 634.

91. (1932) 285 U. S. 480, 52 S. Ct. 424, 76 L. ed. 893.

92. (1929) 279 U. S. 620, 49 S. Ct. 432, 73 L. ed. 874, 65 A. L. R. 866.

93. See 285 U. S. at 456.

ity of that case, but also in reliance, as in the *McCallen* case,⁹⁴ upon legislative committee reports suggesting that the state was attempting to reach in some manner the exempt bonds.⁹⁵ The majority, however, viewed the operation of the tax rather than the motive which inspired it as the important factor in the determination of its validity.⁹⁶

The problem of construction involved in determining what taxes are included in the contract may of course be simplified by a statutory enumeration of the taxes to which the exemption shall apply. The doctrine against implied exemptions from taxation would then restrict the exemption to the taxes enumerated.⁹⁷ But if the exemption by its terms applied to all except certain specified taxes, *e. g.*, estate taxes, the doctrine of *expressio unius est exclusio alterius*, usually employed in the construction of statutes and contracts, might conceivably not be applied.⁹⁸

II

Since the contract clause does not apply to federal statutes,⁹⁹ the constitutional problems which would be involved in an attempt of Congress to abrogate tax-exemption clauses in federal securities¹⁰⁰ would arise under a different provision of the Con-

94. See 279 U. S. at 633.

95. See 285 U. S. at 498.

96. See 285 U. S. at 496.

97. See cases cited in notes 77 and 78, *supra*.

98. See *Phipps v. Commissioner of Internal Revenue* (1937) 91 F. (2d) 627; cert. denied, (1937) 302 U. S. (adv. op.) xxvi (No. 464), 58 S. Ct. 144, 82 L. ed. (adv. op.) 105. *Hamersley v. United States* (1936) 16 Fed. Supp. 768; cert. denied (1937) 300 U. S. 659, 57 S. Ct. 435, 81 L. ed. 868.

99. Art. 10, Sec. 1 in terms applies to the states only. A motion made in the Constitutional Convention to put Congress under the same prohibition as the states with regard to contracts was not seconded. 2 Farrand, *op. cit.* *supra*, note 24 at 619. See *New York v. United States* (1922) 257 U. S. 591, 42 S. Ct. 239, 66 L. ed. 385.

100. The following United States securities are exempt, either wholly or in part, from federal taxation. Panama Canal Bonds (1909) 36 Stat. 117, (1927) 31 U. S. C. A. sec. 745; Postal Savings Bonds (1910) 36 Stat. 817, (1928) 39 U. S. C. A. sec. 760; Conversion Bonds (1913) 38 Stat. 269; Liberty Loan Bonds (1917) 40 Stat. 35, (1927) 31 U. S. C. A. sec. 746; (1917) 40 Stat. 291, (1927) 31 U. S. C. A. sec. 747; (1924) 43 Stat. 349, (1927) 31 U. S. C. A. sec. 748; (1926) 44 Stat. 122, (1927) 31 U. S. C. A. sec. 748 (a); Adjusted Service Bonds (1926) 49 Stat. 1101, (1928) 38 U. S. C. A. sec. 686 (c) (under Second Liberty Loan Act (1917) 40 Stat. 291, (1927) 31 U. S. C. A. sec. 747); Treasury Notes issued under Second Liberty Loan Act, *supra*; Treasury Bills and certificates issued under Second Liberty Loan Act (*supra*) (1929) 46 Stat. 19, (1927) 31 U. S. C. A. sec. 754; (1930) 46 Stat. 775, (1927) 31 U. S. C. A. sec. 754; Federal Farm Mortgage Corporation Bonds (1934) 48 Stat. 347, (1936) 12 U. S. C. A. sec. 1020f; (1934) 48 Stat. 360; Home Owners' Loan Corporation Bonds (1933) 48 Stat. 129, (1936) 12 U. S. C. A. sec. 1463 (c); obligations of Federal Home Loan Bank (1932) 47 Stat. 735, (1936) 12 U. S. C. A.

stitution. The problems would, however, be somewhat similar to those arising under a state statute affecting state bonds. The validity of the congressional action would depend upon the "due process" clause of the Fifth Amendment, which prevents, within limits, action by Congress which divests vested rights.¹⁰¹ Vested rights so protected may arise under either private contracts or contracts with the United States.¹⁰² The scope of its prohibition as to vested rights founded upon a contract is narrower than that of the contract clause as to state action affecting vested rights founded upon a contract.

The Fifth Amendment is by no means an absolute bar to congressional action impairing contractual obligations. That Congress may in the proper exercise of a governmental function pass a law which destroys or prevents the enforcement of private contracts is now fairly well established, although the question has occasioned much controversy.¹⁰³ What a proper exercise of a governmental function is has never been exactly defined. Apparently the matter is to be determined upon the particular facts of each case.¹⁰⁴ Due process is a much more flexible concept than the prohibition contained in the contract clause, and thus is likely to present a much less formidable obstacle to a favorable court than the contract clause.

In *Lynch v. United States*, Mr. Justice Brandeis said that the Fifth Amendment prevents congressional action which annuls contracts of the United States unless "the action taken falls within the federal police power or some other paramount power."¹⁰⁵ As with private contracts, the content of the phrase, "other paramount power," is undecided. The Gold Clause cases¹⁰⁶ indicate that congressional action which affects contracts between private parties and contracts with the United States may be valid as to the former and invalid as to the latter. There

1433; obligations of Reconstruction Finance Corporation (1932) 47 Stat. 9, (1927) 15 U. S. C. A. 610; obligations of Federal Deposit Insurance Corporation (1932) 49 Stat. 700, (1936) 12 U. S. C. A. sec. 264p.; obligations of United States Housing Authority (1937) 50 Stat. 898, (1928) 42 U. S. C. A. 1420.

101. See *Lynch v. United States* (1934) 292 U. S. 571, 579, 54 S. Ct. 840, 78 L. ed. 1434.

102. See the Sinking Fund Cases (1879) 99 U. S. 700, 25 L. ed. 496; (1886) 118 U. S. 235, 6 S. Ct. 1038, 30 L. ed. 173; *Hepburn v. Giswold* (1870) 8 Wall. 603, 19 L. ed. 513; The Legal Tender Cases (1871) 12 Wall. 457, 20 L. ed. 287; The Gold Clause Cases (1934) 294 U. S. 240, 55 S. Ct. 407, 79 L. ed. 885; 294 U. S. 330, 55 S. Ct. 432, 79 L. ed. 912.

103. The Legal Tender Cases, The Sinking Fund Cases, and The Gold Clause Cases, all cited *supra*, note 102.

104. *Ibid.*

105. (1934) 292 U. S. 571, 579, 54 S. Ct. 840; 78 L. ed. 1434.

106. See cases cited *supra*, note 102.

have been suggestions that Congress may not under any guise alter contracts entered into by the United States. Hamilton said that the promises of a government "may be justly considered as excepted out of its power to legislate, unless in aid of them";¹⁰⁷ and this view has been advanced by individual members of the Supreme Court but never accepted by the court as a whole.¹⁰⁸

*Choate v. Trapp*¹⁰⁹ held that a vested right in a tax exemption may arise under a contract with the United States. Congress had provided that land owned by Indian tribes and theretofore held in common should be divided among the members. The share of each allottee should remain untaxable in his hands for twenty-one years. Certain restrictions were imposed upon alienation. Acceptance by an Indian of a patent to his share was to operate as an assent on his part to the allotment of all the land of the tribe in accordance with the provisions of the act and as a relinquishment of his interest in other parts of the community proper. After the patents issued and before the expiration of twenty-one years, a statute was passed by Congress removing from certain lands the restrictions upon alienation and further providing that such land should thereafter be subject to taxation. Oklahoma undertook to tax the land. The Supreme Court held that the act of Congress constituted an offer by the United States, which, when accepted by each member by receipt of his patent, ripened into a contract. Relinquishment of the member's claim to the other land was held to be sufficient consideration to support the contract. The exemption from taxation was held to be a property right vested by virtue of the contract and protected from repeal by the Fifth Amendment.

If the broad proposition of this case, that an exemption from taxation founded upon a contract with the United States is a vested property right protected by the Fifth Amendment, were followed, the problem as to tax-exempt provisions in United States bonds would be primarily whether the exemption was based upon a contract. If so, it would be protected against repeal except in the exercise of some "paramount power."¹¹⁰ However, several reasons suggest themselves for restricting the case to its specific facts and for not following it as to exemptions in United

107. 3 Hamilton, *Works* (1904) 518.

108. *Hepburn v. Griswold* (1870) 8 Wall. 603, 623, 19 L. ed. 513; Mr. Justice Strong's dissent in *Sinking Fund Cases* (1879) 99 U. S. 700, 731, 25 L. ed. 496.

109. (1912) 224 U. S. 665, 32 S. Ct. 565, 56 L. ed. 941.

110. *Lynch v. United States* (1934) 292 U. S. 571, 54 S. Ct. 840, 78 L. ed. 1434.

States bonds. First, *Choate v. Trapp*¹¹¹ involved a contract with Indians, and such contracts have been regarded as in a somewhat special category.¹¹² Second, no attempt to exercise the taxing power of the United States was in question, but rather the attempt of a state to exercise its power. The contract prevented a tax on the land. Such a contract could have little effect upon the taxing power of the United States. Not only has Congress never attempted to levy a land tax, but such a tax, being a direct tax, under the Constitution would have to be apportioned.¹¹³ On the other hand, a tax exemption in United States bond would seriously affect the national taxing power; for such exemptions extend to the interest as well as the principal,¹¹⁴ and the interest in the absence of the exemption would be subject to the income tax—the Federal Government's largest single source of revenue.¹¹⁵ However, the fact that the borrowing power was involved would probably have more weight with the court than all other factors in determining whether there was a vested right involved. The Court's desire to enforce promises made in connection with the borrowing power would tend strongly to lead it to regard the exemption as a vested right.

The arguments advanced against the existence of state power to contract for non-exercise of the power of taxation might be urged against the proposition that a vested right to an exemption may be acquired under a contract with the United States. Whether it would be more favorably received than have the objections raised with regard to state contracts is doubtful.

Any exemption from taxation to constitute a vested right would probably have to be based upon a contract as distinguished from a more gratuitous exemption. However, it would appear to be easy to derive contracts from the exemption clauses in federal bonds and securities, as such provisions are contained in the statutes under which the various obligations are issued¹¹⁶ and also on the face of the instruments.

Should the court conclude that the bondholder acquired a vested right, the doctrine that Congress can abrogate vested

111. (1912) 224 U. S. 665, 32 S. Ct. 565, 56 L. ed. 941.

112. See *Carpenter v. Shaw* (1930) 280 U. S. 363, 50 S. Ct. 121, 74 L. ed. 478.

113. U. S. Const., Art. I, Sec. 2, cl. 3; Art. I, Sec. 9, cl. 4.

114. See note 100, supra.

115. During the fiscal year ending June 30, 1937, income taxes accounted for \$2,157,526,981. The total revenue of the federal government for the period was \$5,293,840,237. President's Budget Message, N. Y. Times, Jan. 6, 1938, p. 12: 6.

116. See note 100, supra.

rights in the exercise of the police or some other paramount power¹¹⁷ would probably seldom be applicable. Normally abrogation of the exemption would involve an exercise, not of the police, but of the taxing power. There would be little reason for holding that a vested right in a contract of exemption from taxation could be acquired but that such right might be divested through exercise of the power of taxation. Possibly under certain circumstances, abrogation might be justified as an exercise of some power other than that of taxation, for example, the war power. The war power, if available as a basis for such action, would probably be a "paramount power" within Mr. Justice Brandeis' statement.¹¹⁸

Since Congress has never attempted to repudiate the exemption clauses in United States bonds, the Supreme Court has not been called upon to determine how far it might go in the matter.¹¹⁹ The problem thus far has been altogether one of construction. As to exemption clauses in federal bonds, the courts have applied the rule of strict construction. Thus the Supreme Court has held that tax-exempt United States bonds should be included in valuing decedents' estates for the purpose of computing the federal estate tax.¹²⁰ A provision exempting Liberty Bonds from all taxation as to principal and interest except estate and inheritance taxes does not include an exemption from gift taxes,¹²¹ which do not constitute a tax upon the bonds but upon the privilege of transferring them by gift. The maxim *expressio unius est exclusio alterius* has no application because the bonds would be subject to estate and inheritance taxes in the absence of any express provision to the contrary. Furthermore income received in the form of tax-exempt Liberty Bonds is subject to taxation by the federal government.¹²²

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117. *Lynch v. United States*, (1934) 292 U. S. 571, 54 S. Ct. 840, 78 L. ed. 1434.

118. *Ibid.*

119. Compare language of Mr. Justice Shiras in *Murdock v. Ward* (1900) 178 U. S. 139, 148, 20 S. Ct. 775, 44 L. ed. 1009 and that of Mr. Justice McReynolds in *National Life Insurance Co. v. United States* (1928) 277 U. S. 508, 521, 48 S. Ct. 591, 72 L. ed. 969.

120. *Murdock v. Wood*, *supra*, note 119, *Igleheart v. Commissioner of Internal Revenue* (1935) 77 F. (2d) 706.

121. *Phipps v. Commissioner of Internal Revenue* (1937) 91 F. (2d) 627; cert. denied (1937) 302 U. S. (adv. op.) xxvi, 58 S. Ct. (adv. op.) 144, 82 L. ed. (adv. op.) 105; *Hamersley v. United States* (1936) 16 Fed. Supp. 768; cert. denied, (1937) 300 U. S. 659, 57 S. Ct. 435, 81 L. ed. 868.

122. *District of Columbia v. Riggs National Bank* (1929) 30 F. (2d) 873.