

## REPUDIATION OF INTERGOVERNMENTAL TAX IMMUNITY IN ANGLO-AMERICAN FEDERATIONS

The doctrine of intergovernmental tax immunity has no express constitutional basis, but is wholly the product of judicial construction.<sup>1</sup> It traces ultimately to expressions in *McCulloch v. Maryland*,<sup>2</sup> where the United States Supreme Court invalidated a discriminatory state statute which singled out transactions of the Federal government as a subject of taxation. The correctness of the strict holding of that case is unquestioned; but the extensive opinion, which constituted virtually a monograph on the science of government, abounded in *dicta* (including the aphorism that "the power to tax involves the power to destroy"), the repercussions of which could not then have been foreseen. That case involved federal immunity from state taxation. The converse situation was presented by *Collector v. Day*,<sup>3</sup> which propounded a broad principle of implied reciprocal tax immunity even as to non-discriminatory levies. This doctrine has since met with severe criticism,<sup>4</sup> and its scope has been limited drastically.<sup>5</sup> It has been deemed applicable only where the function involved was strictly or essentially governmental,<sup>6</sup> and has been repudiated where no direct burden was placed on the government,<sup>7</sup> and where the person assessed was an independent

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1. See *McCulloch v. Maryland* (U. S. 1819) 4 Wheat. 316; *Graves v. New York* (1939) 59 S. Ct. 595; 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 989; Cooley, *Taxation* (4th ed. 1924) 217, sec. 90.

2. (U. S. 1819) 4 Wheat. 316.

3. (U. S. 1870) 11 Wall. 113.

4. Department of Justice, *Taxation of Government Bondholders and Employees: The Immunity Rule and the Sixteenth Amendment* (1938) 84; Willis, *Constitutional Law* (1936) 236; Freedman, *Government-Owned Corporations and Intergovernmental Tax Immunity* (1938) 24 WASHINGTON U. LAW QUARTERLY 46; Comment (1932) 7 St. John's L. Rev. 143; Boudin, *Taxation of Governmental Instrumentalities* (1933) 22 Geo. L. J. 1, 254; Harrow, *Some Aspects of the Taxation of Federal and State Instrumentalities* (1935) 10 St. John's L. Rev. 45; Watkins, *The Power of the State and Federal Governments to Tax One Another* (1937) 24 Va. L. Rev. 475; Comment (1938) 36 Mich. L. Rev. 1422; Comment (1938) 37 Mich. L. Rev. 88.

5. See chronological collection of cases in Wasserman, *Reciprocal Tax Immunity, Its Rise and Fall* (1939) 62 N. J. L. J. 125.

6. *Ambrosini v. United States* (1902) 187 U. S. 1; *South Carolina v. United States* (1905) 199 U. S. 437; *Indian Motorcycle Co. v. United States* (1930) 283 U. S. 570; *Ohio v. Helvering* (1933) 292 U. S. 360; *Helvering v. Gerhardt* (1938) 304 U. S. 405; Comment (1936) 21 Va. L. Rev. 120; Note (1936) 49 Harv. L. Rev. 1323.

7. *Willcuts v. Bunn* (1930) 282 U. S. 216; *Burnet v. Jergins Trust* (1932) 288 U. S. 508; *Helvering v. Mountain Products Corp.* (1938) 303 U. S. 376; *Helvering v. Bankline Oil Co.* (1938) 303 U. S. 362; Comment (1938) 12 Temple L. Q. 403; Comment (1938) 11 Tex. L. Rev. 120.

contractor rather than a government employee.<sup>8</sup> Recently the Court has flatly overruled *Collector v. Day* and has probably abandoned the doctrine of implied reciprocal tax immunity by the decision in *Graves v. New York*.<sup>9</sup> That case involved a state income tax on the salary of an employee of the Home Owners' Loan Corp., which the Court stated was an agency of the Federal government employed in performing an essential governmental function. One may anticipate that, until the legislative base for permissible taxation is extended, no such claim of immunity will hereafter be sustained unless the tax involved is clearly discriminatory or unduly interferes with governmental operations. It must, however, be noted that the *Graves* case does not affect the holding of *McCulloch v. Maryland*. It is not proposed here to trace the history of intergovernmental tax immunities which has been treated elsewhere many times.<sup>10</sup> The outright rejection by the *Graves* case of this frequently criticized doctrine is in striking contrast with the slow and gradual development which has normally characterized the Anglo-American judicial process.<sup>11</sup> When an existing theory is economically undesirable and jurally untenable, the more drastic policy would seem preferable to the cautious approach characterized by distinctions and exceptions<sup>12</sup> and exemplified by the previous reciprocal tax immunity decisions. Of late, the Supreme Court has tended away from the traditional technique of oblique withdrawal and has frankly overruled doctrines which appeared to

8. *Metcalf and Eddy v. Mitchell* (1926) 269 U. S. 514; *James v. Dravo Contracting Co.* (1937) 302 U. S. 134; Comment (1937) 23 WASHINGTON U. LAW QUARTERLY 280; Note (1937) 51 Harv. L. Rev. 707; Note (1938) 15 Tenn. L. Rev. 247; Comment (1938) 12 Temple L. Rev. 514.

9. (1939) 59 S. Ct. 595.

10. 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 989; 2 Cooley *Taxation* (4th ed. 1924) 1286-1363, secs. 606-648; Note (1931) 17 ST. LOUIS L. REVIEW 38; Freedman, *Government-Owned Corporations and Intergovernmental Tax Immunity* (1938) 24 WASHINGTON U. LAW QUARTERLY 46; Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 Harv. L. Rev. 321, 472, 721, 932, and 32 Harv. L. Rev. 234, 374, 634, 902; Boudin, *The Taxation of Governmental Instrumentalities* (1933) 22 Geo. L. J. 1,254; Comment (1938) 6 U. of Chi. L. Rev. 679; Comment (1938) 36 Mich. L. Rev. 1422; Note (1937) 23 Va. L. Rev. 922; Hayes and Rothfield, *Constitutionality of a State Tax on Gross Income Derived from Contracts with the Federal Government* (1937) 3 John Marshall L. Q. 211; Watkins, *The Power of the State and Federal Governments to Tax One Another* (1938) 24 Va. L. Rev. 475; Hervey, *Judicial Delimitation of the Exemption of Federal Instrumentalities from State Taxation* (1938) 12 Temp. L. Q. 291; Note (1938) 6 Geo. Wash. L. Rev. 646.

11. See Holland, *Jurisprudence* (1910) 55; Cardozo, *The Nature of the Judicial Process* (1927) 142; Plucknett, *A Concise History of the Common Law* (1929) 302; Radin, *Anglo-American Legal History* (1936) 343.

12. Cardozo, *The Nature of the Judicial Process* (1927) 150.

it of doubtful soundness.<sup>13</sup> But even though one agrees with Mr. Justice Frankfurter that in an appropriate instance, such as the *Graves* case, overt repudiation is better than covert abandonment, he should not overlook the jurist's admonition in the concurring opinion that "A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation."<sup>14</sup>

The concept of intergovernmental tax immunity had a comparable historical development in Australia<sup>15</sup> and Canada,<sup>16</sup> the other principal federations within the common-law system. The relative rapidity with which the doctrine was abandoned in these jurisdictions merits examination.

Under the British North American Act, 1867,<sup>17</sup> which is Canada's "Constitution," the powers of government are distributed between the provinces and the Dominion in a manner roughly analogous to the system prevailing in the United States.<sup>18</sup> There is the substantial difference, however, that the provinces possess only delegated powers, while the residuary power is vested in the Dominion.<sup>19</sup> Taxation of property belonging to the Dominion or to the provinces is expressly forbidden;<sup>20</sup> but, in other re-

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13. Of the several illustrations available the following are representative: *Fox Film Corp. v. Doyal* (1932) 286 U. S. 123, overruling *Long v. Rockwood* (1928) 277 U. S. 142; *West Coast Hotel Co. v. Parrish* (1936) 300 U. S. 379, overruling *Adkins v. Children's Hospital* (1923) 261 U. S. 525; *Erie Railroad Co. v. Tompkins* (1938) 304 U. S. 64, overruling *Swift v. Tyson* (U. S. 1842) 16 Pet. 1; *Rochester Telephone Co. v. Federal Communication Comm.* (1939) 59 S. Ct. 754, permitting judicial review of "negative" orders of administrative agencies; Note (1939) 24 WASHINGTON U. LAW QUARTERLY 591; Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions* (1932) 46 Harv. L. R. 361, 598, 795; Comment (1938) 5 U. of Chi. L. Rev. 697.

14. Concurring opinion in *Graves v. New York* (1939) 59 Sup. Ct. 595, 602.

15. Kennedy, *Essays in Constitutional Law* (1934) 115; Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345, 352; Moore, *The Constitution of the Commonwealth of Australia* (2d ed. 1910) 421.

16. Lefroy, *Canada's Federal System* (1913) 414; Kennedy, *Essays in Constitutional Law* (1934) 109; Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345, 348; See Mr. Justice Frankfurter's concurring opinion in *Graves v. New York* (1939) 59 S. Ct. 595, 603.

17. 30 Vict. c. 3.

18. (1867) 30 Vict. c. 3, secs. 91, 92, 93, 94, 95.

19. (1867) 30 Vict. c. 3, secs. 91 and 92; *Tennant v. Union Bank of Canada* [1894] A. C. 31; *Attorney General for Canada v. Attorneys General for the Provinces* [1898] A. C. 700; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 73.

20. (1867) 30 Vict. c. 3, sec. 125.

spects, the doctrine of reciprocal tax immunity must be derived, if at all, by implication.<sup>21</sup>

Imposition of a municipal income tax on the salary of a member of the Dominion Parliament was held invalid in 1878,<sup>22</sup> on the grounds of possible diminution of efficiency of Dominion officers and unwarranted interference with one government by another. *McCulloch v. Maryland* was referred to as a masterly solution of a similar problem in the "neighboring republic."<sup>23</sup> Indeed, there is reason to believe that then, and on other occasions, the great reputation and political wisdom of Marshall greatly impressed the judges and impelled them to an uncritical assent to his assertions.<sup>24</sup> The provincial courts elsewhere adopted this view,<sup>25</sup> and it became the established rule in Canada that provincial and local taxing power could not reach salaries of Dominion officials.<sup>26</sup>

Neither the Supreme Court nor the Privy Council was called on to consider the problem<sup>27</sup> until *Bank of Toronto v. Lambe* in 1887.<sup>28</sup> In that case plaintiff bank, a Dominion corporation, challenged a Quebec tax, the amount of which was determined by paid up capital and the number of its branches.<sup>29</sup> Insisting that the tax might impinge on the Federal banking control, the bank relied heavily on Marshall's proposition that "the power to tax involves the power to destroy." The Privy Council rejected this argument and sanctioned non-discriminatory provincial taxation of Dominion agencies. The doctrine of "necessary prohi-

21. *Bank of Toronto v. Lambe* (1887) 19 App. Cas. 575; *Abbott v. St. John* (1908) 40 Can. Sup. Ct. 597.

22. *Leprohon v. Ottawa* (1878) 2 Ont. App. 522; Moore, *The Privy Council and the Australian Constitution* (1907) 23 Law Q. Rev. 373; Haines, *Judicial Review of Legislation of Canada* (1914) 28 Harv. L. Rev. 565, 570.

23. Patterson, J., in *Leprohon v. Ottawa* (1878) 2 Ont. App. 522, 567.

24. Higgins, *McCulloch v. Maryland in Australia* (1905) 18 Harv. L. Rev. 559. The point made is that both the Canadian and Australian Courts may have been so affected.

25. *Evans v. Hudson* (1877) 22 Lower Can. Jur. 268; *Ex parte Owen* (1881) 20 N. B. R. 487; *Ackman v. Moncton* (1884) 24 N. B. R. 103; *Coates v. Moncton* (1886) 25 N. B. R. 605; *Ex parte Burke* (1896) 34 N. B. R. 200; *Regina v. Bowell* (1896) 4 B. C. R. 498; *Ex parte Kilam* (1898) 34 N. B. R. 530.

26. Kennedy, *Some Aspects of Canadian and Australian Constitutional Law* (1930) 15 Corn. L. Q. 345; Kennedy, *Essays in Constitutional Law* (1934) 109-112.

27. Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 74.

28. 12 App. Cas. 575; Kennedy and Wells, *The Law of the Taxing Power in Canada* (1931) 65; Kennedy, *Essays in Constitutional Law* (1934) 109.

29. Quebec Act (1882) 45 Vict. c. 22.

bition" was unequivocally repudiated, *McCulloch v. Maryland* characterized as inconsistent with British constitutional law,<sup>30</sup> and the provincial parliaments' plenitude of power in the performance of their legal functions held not to be restricted by consideration of potential abuse. The maxim of Marshall was summarily dismissed on the basis of alleged constitutional differences. In *Abbot v. St. John*,<sup>31</sup> decided in 1908, the Canadian Supreme Court concurred in this disapproval of the earlier Canadian rule and sustained the City of St. John in its imposition of an income tax on the salary of a Dominion Customs Officer. The doctrine of implied reciprocal immunity from non-discriminatory taxes was negated without distinguishing earlier cases in the provincial courts, and exemption of Federal employees from bearing a share of the costs of local government was stigmatized as gross injustice. Davies, J., casually dismissed the potential abuse doctrine with the remark that "if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power."<sup>32</sup> Another justice stated: "No attempt is made to seize or appropriate the income itself, or to anticipate its payment."<sup>33</sup> It was accordingly held that the tax involved no real interference with the Dominion government and that the Dominion's power over the salaries of the Dominion official had no appreciable connection with "the fiscal burdens incident to provincial or municipal citizenship."<sup>34</sup> Thus, the Canadian Supreme Court scotched decisively, within little more than twenty-five years after its inception, the emerging recognition by provincial courts of the "implied prohibition" doctrine of reciprocal tax immunity. Inter-governmental taxes may now be levied<sup>35</sup> subject, of course, to

30. Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 *Corn. L. Q.* 345; Kennedy, *Essays in Constitutional Law* (1934) 109.

31. 40 *Can. Sup. Ct.* 597; Lefroy, *Canada's Federal System* (1913) 417; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 75.

32. (1908) 40 *Can. Sup. Ct.* 597, 607.

33. MacLennan, J., 40 *Can. Sup. Ct.* at 616; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 75.

34. Duff, J., 40 *Can. Sup. Ct.* at 618.

35. Lefroy, *Canada's Federal System* (1913) 411; Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 *Corn. L. Q.* 345; Kennedy and Wells, *The Law of the Taxing Power in Canada* (1931) 79; Kennedy, *Essays in Constitutional Law* (1934) 109-115. This point is illustrated by several cases of state taxation of Dominion corporations: *Brewers' & Maltsters' Ass'n v. The Attorney General* [1897] *A. C.* 231; *Workmen's Compensation Board v. Canadian Pac. Ry.* [1920]

the specific constitutional provisions previously mentioned, and to the continuing rule prohibiting discriminatory taxes<sup>36</sup> or taxes calculated to assist in provincial exclusion of Dominion corporations.<sup>37</sup>

The development of this phase of the law in Australia has been characterized by confusion.<sup>38</sup> The Commonwealth of Australia Constitution Act of 1900,<sup>39</sup> patterned more or less intentionally after the Constitution of the United States,<sup>40</sup> delegates specific powers to the Commonwealth and leaves the residuary powers in the states.<sup>41</sup> As under the British North American Act, only taxation of governmental property is expressly forbidden.<sup>42</sup> Divergence of view as to tax immunity of instrumentalities was manifested from the outset. In 1904, the High Court of Australia upheld exemption of salaries of Commonwealth offices from state taxation,<sup>43</sup> citing *McCulloch v. Maryland* and distinctly recognizing the doctrine of implied immunity. The corollary exemption of state agencies from federal taxation was likewise recognized.<sup>44</sup> The views expressed in *McCul-*

A. C. 184; and see Mr. Justice Frankfurter's concurring opinion in *Graves v. New York* (1939) 59 Sup. Ct. 595, 603.

36. *Halifax v. Lyall & Sons Co.* (1922) 65 D. L. R. 305; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 75.

37. *John Deere Plow Co. v. Wharton* [1915] A. C. 330; *Great West Saddlery Co. v. The King* [1921] 2 A. C. 91; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 75.

38. *Higgins, McCulloch v. Maryland in Australia* (1905) 18 Harv. L. Rev. 559; Moore, *The Privy Council and the Australian Constitution* (1907) 23 Law Q. Rev. 373.

39. (1900) 63 and 64 Vict. c. 12.

40. Sweetman, *Australian Constitutional Developments* (1925) 337; Warner, *Introduction to Some Problems of Australian Federalism* (1933)

2. The truth of this assertion was recognized by the Australian judiciary in *Australasian Temperance and General Mutual Life Assurance Co., Ltd. v. Howe* (1922) 31 C. L. R. 290, 330.

41. (1900) 63 and 64 Vict. c. 12 secs. 51, 107; *Higgins, McCulloch v. Maryland in Australia* (1905) 18 Harv. L. Rev. 559; Moore, *The Constitution of The Commonwealth of Australia* (2d ed. 1910) 65; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 77.

42. (1900) 63 and 64 Vict. c. 12, sec. 114.

43. *D'Emden v. Pedder* (1904) 1 C. L. R. 91; Moore, *The Constitution of the Commonwealth of Australia* (2d ed. 1910) Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345; Kennedy, *Essays in Constitutional Law* (1934) 117; Comment (1907) 20 Harv. L. Rev. 494.

44. *Deakin v. Webb* (1904) 1 C. L. R. 585, 10 A. L. R. 237; Moore, *The Privy Council and the Australian Constitution* (1907) 23 Law Q. Rev. 373; Moore, *The Constitution of the Commonwealth of Australia* (2d ed. 1910) 428. Later cases illustrating the application of this doctrine either to states or to the Commonwealth: *Municipal Council of Sydney v. Commonwealth* (1904) 1 C. L. R. 208; *Roberts v. Ahern* (1904) 1 C. L. R. 406; *Commonwealth v. New South Wales* (1906) 3 C. L. R. 807; *The Federated Almalgamated Government Ry. and Tramway Serv. Ass'n v. The New South*

*loch v. Maryland, Collector v. Day*, and their satellite decisions, were thus incorporated into the Australian constitutional fabric.<sup>45</sup> On the other hand, in *Wollaston's case*,<sup>46</sup> the Supreme Court of Victoria rejected the doctrine, remarking that the Crown's check on legislation obviated the dangers against which the American courts had to guard.

The development of the constitutional principle took a peculiar course at this point by reason of a rule of appellate practice which permitted a state supreme court to certify appeals to either the High Court of the Commonwealth or the Privy Council.<sup>47</sup> After the State of Victoria adopted the view of the High Court and reversed its own prior holding,<sup>48</sup> a case in point was appealed to the Privy Council in 1907. In this case, the doctrine of implied immunity against non-discriminatory intergovernmental taxation was rejected.<sup>49</sup> The court stressed the fact that the tax did not interfere unduly with governmental operations and was not discriminatory. The *dictum* in *McCulloch v. Maryland*, which had previously been followed, was declared inappli-

Wales Ry. Traffic Employees Ass'n (1907) 4 C. L. R. 488; *The King v. Barger* (1908) 6 C. L. R. 41; *Commonwealth v. M'Kay* (1908) 6 C. L. R. 72; *The King v. Sutton* (1908) 5 C. L. R. 789; *Attorney General for New South Wales v. Collector of Customs* (1908) 5 C. L. R. 818. These statutes went beyond mere taxation.

45. See cases cited supra, note 44; Higgins, *McCulloch v. Maryland in Australia* (1905) 18 Harv. L. Rev. 559; Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345; Kennedy, *Essays in Constitutional Law* (1934) 115; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 77-80.

46. (1902) 28 Vict. L. R. 357; Moore, *The Privy Council and the Australian Constitution* (1907) 23 Law Q. Rev. 373; Moore, *The Constitution of the Commonwealth of Australia* (2d ed. 1910) 424; see Comment (1907) 20 Harv. L. Rev. 494.

47. This is not expressly set out in the Constitutional Act of 1900, but was established by *Webb v. Outtrim* [1907] A. C. 81, as a matter of construction of 63 and 64 Vict. c. 12, secs. 73, 74. Its propriety is frequently challenged: see Moore, *The Privy Council and The Australian Constitution* (1907) 23 Law Q. Rev. 373; Wickersham, *The Police Power, A Product of the Rule of Reason* (1914) 27 Harv. L. Rev. 297, 302; Haines, *Judicial Interpretation of the Constitution Act of the Commonwealth of Australia* (1917) 30 Harv. L. Rev. 595; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 77, n. 292.

48. *Webb v. Outtrim* [1905] Vict. L. R. 463.

49. *Webb v. Outtrim* [1907] A. C. 81; Comment (1907) 20 Harv. L. Rev. 494; Moore, *The Privy Council and the Australian Constitution* (1907) 23 Law Q. Rev. 373; Moore, *The Constitution of the Commonwealth of Australia* (2d ed. 1910) 427; Wickersham, *The Police Power, A Product of the Rule of Reason* (1914) 27 Harv. L. Rev. 297; Haines, *Judicial Interpretation of the Constitution of the Commonwealth of Australia* (1914) 30 Harv. L. Rev. 595; Kennedy, *Some Aspects of the Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345, 355; Kennedy, *Essays on Constitutional Law* (1934) 118; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 79.

cable because of an asserted fundamental difference in the American and Australian constitutional systems, to wit, the check of the Crown over the Australian legislative process.<sup>50</sup>

If this decision had been followed, it would have eliminated the doctrine from Australian constitutional law within three years after its acceptance. The Australian High Court, however, did not find the reasoning of Halsbury, who had spoken for the Privy Council, to be persuasive and adhered to its former position.<sup>51</sup> The consequence was confusion, the High Court staunchly supporting the American rule and the Privy Council rejecting it.<sup>52</sup>

As a solution, the High Court in 1907 suggested federal legislation which would abolish appeal from state courts to the Privy Council and divest Federal employees of immunity from state income taxation.<sup>53</sup> Statutes embodying both recommendations were enacted in 1907,<sup>54</sup> and judicially sustained shortly thereafter.<sup>55</sup>

While the taxation of incomes of governmental employees was thus removed from controversy, other aspects of the immunity of instrumentalities doctrine continued to plague Commonwealth-State relations for several years,<sup>56</sup> until the doctrine was finally disavowed in its entirety by the High Court in *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.*<sup>57</sup> That case, which involved a conflict between state and federal statutes,<sup>58</sup> might well have been decided on more limited grounds. However, the Court declared its adherence to the canon of liberal construction, without resort to implications, as a principle of

50. [1907] A. C. at 89.

51. *Baxter v. Comm'r of Taxation* (1907) 4 C. L. R. 1087; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 79.

52. Moore, *The Privy Council and the Australian Constitution* (1907) 23 Law Q. Rev. 373; Moore, *The Constitution of the Commonwealth of Australia* (2d ed. 1910) 472; Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345, 355; Kennedy, *Essays in Constitutional Law* (1934) 119.

53. *Flint v. Webb* (1907) 4 C. L. R. 1178; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 79.

54. The issue of immunity of salaries of federal employees was covered by the Commonwealth Salaries Act, 1907, and the appellate issue by the Judiciary Act, 1907.

55. *Chaplin v. Comm'r of Taxes for South Australia* (1911) 12 C. L. R. 375.

56. Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 80.

57. (1920) 28 C. L. R. 129; Kennedy, *Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345, 356; Kennedy, *Essays in Constitutional Law* (1934) 120; Department of Justice, *Taxation of Government Bondholders and Employees* (1938) 81.

58. See (1900) 63 and 64 Vict. c. 12, sec. 109.

constitutional interpretation. The doctrine of immunity of instrumentalities was characterized as one of political exigency and expedience and not proper for judicial consideration. Admittedly, significant particular differences between the constitutional and judicial systems of Canada, Australia, and the United States exist;<sup>59</sup> nevertheless, they are sufficiently alike to make comparison worthwhile.<sup>60</sup> In all three, the implied immunity doctrine was adopted and, after a rather uneasy existence, was then abolished. This process, which in Australia required but sixteen years,<sup>61</sup> took thirty in Canada,<sup>62</sup> and nearly seventy in the United States.<sup>63</sup>

On the principle, heretofore mentioned,<sup>64</sup> that summary repudiation of a poorly conceived or formulated judicial doctrine is preferable to a policy of lingering attrition, the Australian and Canadian record in this connection is better than the American. It is to be hoped that we will not in other respects disregard the available constitutional experience of those federations and delay correction of our errors.

CARROLL J. DONOHUE.

### THE NEGATIVE ORDER DOCTRINE: ROCHESTER TELEPHONE CORPORATION v. UNITED STATES

On April 17, 1939, the "negative order doctrine"<sup>1</sup> was unexpectedly overruled by the Supreme Court, through Justice Frankfurter, after a concise review of its scope, effects, and value. In *Rochester Telephone Corp. v. United States*,<sup>2</sup> the Federal Communications Commission adjudged a telephone company in Rochester, N. Y. under the "control" of the New York Tele-

59. *Webb v. Outtrim* [1907] A. C. 81.

60. *Higgins, McCulloch v. Maryland in Australia* (1905) 18 Harv. L. Rev. 559; *Kennedy, Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345; *Kennedy, Essays in Constitutional Law* (1934) 109, 115; concurring opinion by Mr. Justice Frankfurter in *Graves v. New York* (1939) 59 S. Ct. 595, 603. This is illustrated in *Abel, Price Control by Government Competition in Anglo-American Federations* (1938) 23 WASHINGTON U. LAW QUARTERLY 459.

61. 1904 to 1920.

62. 1878 to 1908.

63. 1871 to 1939.

64. See *supra*, note 13.

1. For general discussion see Note (1938) 47 Yale L. J. 766; Note (1939) 6 U. of Chi. L. Rev. 277; Note (1934) 34 Col. L. Rev. 908; 2 Sharfman, *The Interstate Commerce Commission* (1931) 406-417; McGuire, *Judicial Reviews of Administrative Decisions* (1938) 26 Geo. L. J. 574; Rosenberry, *Power of the Courts to Set Aside Administrative Rules and Orders* (1938) 24 A. B. A. J. 279; Comment (1939) 52 Harv. L. Rev. 522.

2. (1939) 59 S. Ct. 754.