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Robert L. Howard

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STATE JURISDICTION TO TAX INTANGIBLES: A TWELVE YEAR CYCLE

ROBERT L. HOWARD*

Slightly more than a dozen years ago the United States Supreme Court began asserting quite vigorously the unconstitutionality of multiple state taxation of intangibles and denied the power of states to apply death transfer taxes to such property interests under circumstances previously recognized as constituting a basis for jurisdiction to tax. The cases embodying this doctrine evoked an extensive literature. The present writer contributed to the discussion, joining in the approval of the purpose, as a matter of tax policy, to get away from the undesirability of multiple state taxation, but questioned the soundness, as a matter of constitutional law, of the decisions by which the Court invalidated the taxes in question.

That position accepted in large part the point of view of the minority opinions of Justice Holmes, Brandeis, and Stone in Farmers Loan and Trust

*Professor of Law, University of Missouri. A.B. University of Missouri, 1917; A.M., 1918; LL.B., 1925; S.J.D., Harvard, 1933.

1. The principal cases of that period falling into this category were three. Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930), denied to the State of Minnesota the right to apply its inheritance tax to the transfer of Minnesota state and municipal bonds upon the death of their owner domiciled in New York, the bonds being kept at the owner's domicile. Baldwin v. Missouri, 281 U. S. 586 (1930), similarly denied the validity of an inheritance tax sought to be applied by Missouri to bonds and promissory notes kept in Missouri, and bank deposits in Missouri banks, the decedent owner dying domiciled in Illinois. The notes were made by residents of Missouri and secured by mortgages upon Missouri real estate. First National Bank of Boston v. Maine, 284 U. S. 312 (1932), asserting more vigorously than either of the preceding cases, and apparently as a matter of policy, that death transfer taxes may be imposed by one state only, leaving to the Court merely the matter of determining which state has the better right, held that shares of corporate stock may be subjected to such a tax only by the state of the owner's domicile, and denied validity to the tax imposed by the state of incorporation.

2. Howard, Recent Developments and Tendencies in the Taxation of Intangibles, 44 Univ. of Missouri Bulletin, Law Series, 5 (1931). (155)
Company v. Minnesota\(^3\) and Baldwin v. Missouri,\(^4\) later to be asserted even more vigorously in First National Bank of Boston v. Maine,\(^6\) and which now again may have become the accepted doctrine of the Supreme Court. In spite of the present apparent approval of this earlier doctrine, the decisions have by no means fully cleared away the confusion, and a reappraisal of the cases, together with some analysis of the latest Supreme Court pronouncement in this field of the law,\(^6\) now seems worthwhile.

The doctrine established by such cases as Union Refrigerator Transit Company v. Kentucky\(^7\) and Frick v. Pennsylvania\(^8\) restricting the taxation of tangible property, or its transfer on the death of the owner, to the state wherein such property is located has not been questioned.\(^9\) That doctrine, of course, is based on the proposition that, as in the case of land, only the one state is in a position to render the protection in return for which the tax is paid, consequently that state alone can be said to have jurisdiction to tax, and a tax without such jurisdiction is a deprivation of property without due process of law.\(^10\) Quite obviously the desire to get away from multiple state taxation was a not unimportant factor in the determination of these cases, but the Court talked primarily in terms of absence of jurisdiction based on an inquiry into the relationship of the taxing state to the subject of the tax.

In the other cases above referred to restricting the taxation of intangibles to a single state the Court shifted its basis of decision from absence of

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3. Supra Note 1
4. Ibid.
5. Ibid.
7. 199 U. S. 194 (1905).
9. Mr. Justice Jackson in his dissent in the case of State Tax Commission of Utah v. Aldrich, 316 U. S. 174, 201 (1942), raises a question as to whether the point of view of the majority in this most recent case may not call for a reconsideration of that doctrine.
10. In the case of land that doctrine was well established prior to the adoption of the Fourteenth Amendment on the ground that by the very nature of a tax as an enforced proportionate contribution to the support of government in return for protection afforded, a state not in a position to afford such protection had no basis for asserting jurisdiction to tax. Perhaps this was just another way of saying that a state cannot apply its laws to things outside its territorial jurisdiction. It is to be noted that Mr. Justice Holmes questioned the availability of the due process of law clause of the Fourteenth Amendment as a basis for so applying this doctrine as to deny the power of the owner's domicile to tax tangible personalty located in another state. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 211 (1905).
jurisdiction based on inability to render protection in return for the tax to a matter of policy—the undesirability of multiple state taxation. This shifting process was completed in First National Bank of Boston v. Maine\textsuperscript{11} in which Mr. Justice Sutherland, speaking for the majority, stated the matter in no uncertain terms. "We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only."\textsuperscript{12} The issue left for the Court's determination was which state had the better right, or which state did the Court think it would be more desirable to permit to tax. It is true that the opinion asserted, "The question remains: In which state, among two or more claiming the power to impose the tax, does the taxable event occur?" This, of course, implies an over-simplification of the so-called taxable event. The opinion admits that, as compared with tangibles, "in the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual situs. But . . . this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim \textit{mobilia sequuntur personam}." Then, says the Court, "\textit{Practical considerations of wisdom, convenience, and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the (owner's) domicile. . .}"\textsuperscript{13}

This, it is submitted, is the solution of the problem not by the process of judicial reasoning but by an arbitrary statement in the nature of a legislative fiat based solely on considerations of policy and desirability.

It is true that the Court suggests, in referring to the case of bonds, certificates of indebtedness, notes, bank deposits, \textit{et cetera}, involved in cases previously decided, as well as corporate stock here involved, that "there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax."\textsuperscript{14} That language may seem to imply a recognition that this matter of relationship should be a controlling factor but any actual consideration of it is entirely lacking in the cases. The best of these cases to demonstrate the Court's complete absence of consideration for those relationships previously recognized as furnishing a basis for taxation is Baldwin v. Missouri.\textsuperscript{15} To take

\begin{itemize}
  \item 11. 284 U. S. 312 (1932).
  \item 12. \textit{Id.} at 328.
  \item 13. \textit{Id.} at 328, 329, 330, 331. Italics supplied.
  \item 14. \textit{Id.} at 329, 330.
  \item 15. 281 U. S. 586 (1930).
\end{itemize}
a single item involved in that case, promissory notes, made by Missouri residents and secured by mortgages upon Missouri realty, were being kept more or less permanently in Missouri. When the decedent owner died domiciled in Illinois, leaving, by will, all of her property, including these Missouri notes, to her son, also domiciled in Illinois, it was necessary to take out ancillary letters of administration in Missouri, comply with Missouri laws, and secure an order of a Missouri probate court, to get possession of the notes and complete their transfer in accordance with the terms of the will. How it is possible to say that "there was wanting, on the part of" Missouri "any real taxable relationship to the event which is the subject of the tax" is hard to see, and the Court did not attempt it in that case. The problem was brushed off with the statement that "the bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. . . . As they were not within Missouri for taxation purposes, the transfer was not subject to her power." 16 No effort was made to deny that they were present in Missouri for purposes of administration and that the probate court of Lewis County exercised its jurisdiction in this respect. No mention was made of previous cases, such as Wheeler v. Sohmer, 17 directly contrary. Primary reliance was rested on the doctrine then recently asserted that intangibles like tangibles should be subject to death transfer taxes in only one state, and that, the state of the owner's domicile.

The statement that the notes "were not within Missouri for taxation purposes" gives rise to interesting speculation as to what might have happened with respect to property taxation. Suppose these notes were being held by the ancillary administrator in Missouri on tax day. Could they not properly be assessed to him for purposes of property taxation? They were not then technically the property of the decedent, neither did they yet belong to her heirs or legatees, nor to the administrator in Illinois. Not only were the paper evidences present in Missouri, but also the legal owner, with the power of control in Missouri law, and the necessity of invoking the help of a Missouri court to make any disposition of the property. If creditors were found in Missouri the property would never come into possession of the administrator in Illinois. So far from the absence of a general taxing juridic-

16. Id. at 593.
17. 233 U. S. 434 (1914). This case was not cited in the brief on behalf of the state.
tation here furnishing the basis for denying power to impose the inheritance tax, the assumption of such absence seems unfounded. Of course, it is conceivable that the Court, had that issue been presented to it, might have denied, by mere fiat again, that Missouri could impose such a property tax because, according to the then prevailing doctrine of the Court, only one state could tax, and the state of the decedent’s domicile might have been designated as the one.

If the problem here presented be approached from the standpoint of jurisdiction on the part of a particular state to tax rather than from that of securing relief from the undesirable aspects of multiple state taxation, the result arrived at by the Court would seem to be impossible. It is a problem of constitutional power of the state based on the facts of relationship. After all, jurisdiction to tax, or constitutional power to tax, would seem to be nothing more than the presence of such a relationship between the taxing state and the property or event taxed that the imposition of the tax is not purely an arbitrary extortion. The Court, of course, was not inquiring in these cases whether there existed relational facts as a basis for the state’s jurisdiction to tax, as it was in *Union Refrigerator Transit Company v. Kentucky* and *Frick v. Pennsylvania* in the case of tangible property, but first determined as matter of abstract policy that taxation by two states at the same time was so far arbitrary in itself as to be violative of due process. This left in each case the lesser problem of determining which state had the better basis for its claim of power to tax and in each case presented to it the Court was satisfied to allow the fiction *mobilia sequuntur personam* to control. Such a determination by a court apparently concerned about the preservation of states rights is difficult to understand. At one fell swoop it destroyed a wide range of previously recognized taxing power of the states by calling from out the void of the due process clause an *ipse dixit* of invalidity and for no better judicial reason than that, as matter of policy, the majority of the Court considered the taxes undesirable. Had the policy responsible for these Supreme Court decisions been embodied in legislation,

18. 199 U. S. 194 (1905).
20. "But it seems to me that if that result is to be reached it should be reached through understanding among the States, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law' when logic, tradition, and authority have united to declare the right of the state to lay the now prohibited tax." Mr. Justice Holmes dissenting in *Baldwin v. Missouri*, 281 U. S. 586, 596 (1930). Italics supplied.
by the process of the states' reciprocal exemption statutes or otherwise, it might well have commanded universal applause. But from the highest court in the land without constitutional justification, other than by a further questionable inflation of the already over-expanded concept of due process, it not only marked an unwarranted judicial encroachment upon state power, but it helped to lay the ground work for the bitter Supreme Court crisis of a few years later.

During the past half-dozen years or so the Supreme Court has been engaged in the process of restoring to the states, bit by bit, some of the taxing powers of which they had thus been deprived. The case of State Tax Commission of Utah v. Aldrich,21 decided in 1942 and expressly overruling First National Bank of Boston v. Maine22 regarding the taxation of the transfer of shares of stock by the state of the corporate domicile on the death of a non-resident shareholder, appears possibly to have the purpose of more or less completely repudiating the whole doctrine involved in the other restrictive cases23 of the period under discussion. It may also have had the effect of restoring to their former status Blackstone v. Miller24 and any cases which had been silently overruled, such as Wheeler v. Sohmer.25 This case appears to return to the doctrine universally adhered to prior to 1930, looks upon state jurisdiction to tax or constitutional power to tax again as a problem in factual relationship, and carefully examines the relation of the taxing state to the subject of the tax without regard to the fact that the same property interest may or may not be subject to the taxing power of some other state.

This process of return to the earlier doctrine, or the vindication of the minority viewpoint in the restrictive cases of the 1930-32 period, appears to have had its inception some five years before in such cases as First Bank Stock Corporation v. Minnesota26 and Schuylkill Trust Company v. Pennsylvania.27 In the former of these two cases the Court sustained a property tax at the business situs of shares of stock in a foreign corporation owned by

22. 284 U. S. 312 (1932).
24. 188 U. S. 189 (1902), expressly overruled by Farmers Loan and Trust Co. v. Minnesota.
25. 233 U. S. 434 (1914), silently overruled, it would seem, by Baldwin v. Missouri.
27. 302 U. S. 506 (1938).
a shareholder domiciled in a third state. The facts that the corporate domicile had already taxed and that the state of the shareholder's domicile might assert a right to tax were regarded as unimportant in an opinion written by Mr. Justice Stone. The opinion seemed to be in full accord with Justice Stone's earlier assertions that the problem was solely one of considering the relation of the taxing state to the property being taxed and that nothing in the Constitution required that taxation be restricted to a single state. It is true, however, that the question of which state should take precedence in the matter of taxation when business situs was involved had never been decided, and if the doctrine of restriction to a single state was to prevail there was much to be said for preferring business situs.28

As a matter of fact, in the preceding year the Court had sustained business situs as a basis for taxation in the case of *Wheeler Steel Corporation v. Fox*,29 and indicated that in such a case there is to be recognized an exception to the restrictive rule as to taxation of intangibles only at the domicile of the owner. It is not specifically determined that the corporate domicile might not also tax, and the language of the opinion leaves it less than clear whether this is to be an exception to the general rule that only one state can tax, or merely to that part of the rule which recognized the superior right of the domiciliary state. That the latter was probably intended is indicated by the dissenting opinion in the case of *Curry v. McCanless*30 three years later where Mr. Justice Butler reasserted the doctrine that only one state can tax and expressly asserted that business situs should prevail over domicile. Mr. Chief Justice Hughes, who wrote the opinion in the *Wheeling* case, concurred in this opinion.

The *Schuylkill Trust Company* case, sustaining a tax at the corporate domicile upon shares of stock owned by a non-resident, adds to the belief that the Court was beginning to weaken in its support of the unitary theory

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28. See Howard, *Recent Developments and Tendencies in the Taxation of Intangibles*, 44 UNIVERSITY OF MISSOURI BULLETIN, LAW SERIES, 5, 25-29 (1931). It may well be noted here that some students of this problem did not share this view, as evidenced by the following statement: "It is submitted that multiple property taxation as between the states will have to go and that so far as business situs and other doctrines . . . permit such taxation, they will have to be abolished or at least radically remodeled." Brown, *Multiple Taxation by the States—What is Left of it?* 48 HARV. L. REV. 407, 430-31 (1935).
29. 298 U. S. 203 (1936). This case and *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937), made it clear that business situs was to remain as a basis for taxation of intangibles.
of state taxation of intangibles. In an opinion by Mr. Justice Roberts, referring to the property interest of the shareholder, it is asserted that "the property right so represented is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state," citing the First Bank Stock Corporation case. It is of some interest that no mention was made of First National Bank of Boston v. Maine, decided six years earlier, though the doctrines of the two cases are hardly consistent.

The belief that the Court may have been ready to modify its adherence to the restrictive doctrine of the 1930-32 cases by the time the above cases came up for decision gains some support from the obvious confusion and difficulty arising from the application of that doctrine. These began to manifest themselves the year following First National Bank of Boston v. Maine in the case of Burnet v. Brooks. There were involved facts substantially identical with those in Baldwin v. Missouri except that the decedent was an alien who died domiciled abroad and the problem had to do with the application of the federal estate tax rather than a state inheritance tax. The securities involved were being kept in New York but were not connected with any business conducted there on behalf of the decedent. The Court pointed out that the federal statute involved was passed several years before the cases of the 1930-32 period limiting state power to tax and

32. There were no dissent in either of these cases, but Mr. Justice Butler did not participate in consideration of the First Bank Stock Corporation case.
33. It is true that of these two cases involving shares of corporate stock the earlier concerned itself with an inheritance tax while the later dealt with a property tax, but there would seem to be no basis for believing that the Court meant to make this a ground of distinction. One writer of that period, however, did suggest that these last mentioned cases indicated a recognition by the Court of a wider basis for property taxes than for inheritance taxes. Comment, Commercial Dom- icile and Multi-State Property Taxation of Intangibles, 16 Texas Law Review 227, 230-31 (1938). A similar suggestion was carried on page VIII of the Introduction to the Second Edition of Magill and Maguire's Cases on Taxation (1936). This was eliminated from the Third Edition in 1940. This would be to reverse the situation that had prevailed at an earlier day. The present writer has preferred to believe instead that these cases indicated a purpose on the part of the Court to curtail or depart from the doctrine against multiple state taxation which it had enunciated in the cases of the 1930-1932 period.
34. 288 U. S. 378 (1933).
35. The property consisted of bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and of a domestic municipality, stock in a foreign corporation, and a deposit in a New York bank.
at a time when the doctrine was well established that presence of the paper evidence was sufficient basis for the taxation of such securities, and that the statute in terms embracing all property "situated in the United States" must be construed to include them. The Court then asserted that these securities must be regarded as being "within the jurisdiction of the United States," and expressly recognized that "jurisdiction may exist in more than one government . . . based on distinct grounds." The contention that the due process clause of the Fifth Amendment as applied to the federal government had the same force as that of the Fourteenth with respect to the states and that cases like Baldwin v. Missouri and First National Bank of Boston v. Maine required a denial of the federal taxing power in this case was rejected by the Court. In doing so, Mr. Chief Justice Hughes formulated a rationalization of the doctrine asserted in those cases not previously announced.

"The limits of State power," said the Chief Justice, "are defined in view of the relation of the States to each other in the Federal Union," and, referring to the preceding cases, "these decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State, and that jurisdiction to tax was restricted accordingly." No basis for any such restriction on the national taxing power was found to exist. Thus, since the Court had asserted that the property was "within the jurisdiction of the United States," and "was property within the reach of the power which the United States by virtue of its sovereignty could exercise," all by virtue of the presence of the securities in New York, the tax properly could be applied.

The Court persisted in this opinion in talking in terms of jurisdiction which it had ceased to talk about in the state tax cases of Farmers Loan and Trust Company v. Minnesota, Baldwin v. Missouri, and First National Bank of Boston v. Maine. The reason for this shift in approach was obvious. It must talk in terms of jurisdiction here. Jurisdiction to tax being nothing more or less than the existence of such a power of control over, or other relation to, the property as to make it not arbitrary or unreasonable to assert the taxing power, the approach here was necessarily in terms of jurisdiction. Then if the United States bears such a relation by virtue of

36. 288 U. S. at 396 (1933).
37. Id. at 399.
38. Id. at 401. Italics supplied.
39. Id. at 396.
the presence of the paper evidence as to give it jurisdiction to tax the transfer occasioned by the death of the owner, the same relation would seem also to give New York a similar jurisdiction, since it is the law of New York and not federal law that must be invoked in effectuating the transfer. By a like process of reasoning, and by every meaning ever attributed to the term jurisdiction prior to 1930, whether based on concepts of power to control, or of benefits, protection, or opportunity afforded, Missouri must have had jurisdiction in the case of Baldwin v. Missouri. The Court did not here deny that New York had such jurisdiction and presumably its right to tax would have been recognized since no other state had any claim of a right to tax. Neither did the Court in Baldwin v. Missouri determine that Missouri lacked the basis of jurisdiction to tax. It did not talk in terms of jurisdiction but solely in terms of policy and desirability, in the language, not of a Court, but of a legislature, and decreed that only one state may tax. In Burnet v. Brooks the Court reverted to the language of jurisdiction and told us for the first time in clear terms that constitutional jurisdiction of one state to tax does not exist if another state has a better claim, since only one state may tax. According to the analysis the Court made of jurisdiction in this case, Missouri was properly denied the right to tax, having no jurisdiction, in Baldwin v. Missouri, although the paper evidence was in the state, as well as the debtor and the security in the case of the promissory notes. But under the facts in Burnet v. Brooks, the paper evidence alone being within the state, apparently New York would have jurisdiction to tax, because it is only the existence of a better claim on the part of a sister state that defeats such jurisdiction and no other state there had any claim.40 If a decedent died domiciled abroad leaving in the hands of a resident agent in State One certificates of stock in a corporation domiciled in State Two, presumably the Court would decide as between States One and Two which had the better claim and allow a tax accordingly,41 although the owner's

40. State courts have followed this theory but no case presenting it has come before the Supreme Court of the United States. See In re Estate of McCreery, 220 Cal. 26, 29 P. (2d) 186 (1934), and In re Estate of John Lloyd, 185 Wash. 61, 52 P. (2d) 1269 (1936).

41. In the light of the doctrine of Burnet v. Brooks the decision of First National Bank of Boston v. Maine would not preclude this result. There is no question of subordinating the tax claim of the owner’s domicile to either of these states since the owner was not domiciled in a sister state. In In re Estate of McCreery, 220 Cal. 26, 29 P. (2d) 186 (1934), the Supreme Court of California placed such an interpretation upon Burnet v. Brooks and sustained an inheritance tax by that state where shares of stock in a California corporation were involved, the
domicile in a sister state would defeat jurisdiction in either. In a similar
fashion it would appear that a bank deposit or other debt owing to a creditor
domiciled abroad might be subjected to a death transfer tax in the state
of the debtor's domicile after the doctrine of Blackstone v. Miller,42 despite
the fact that that case was unreservedly overruled in a case where the
owner's domicile was a sister state.43

The result, it is submitted, is that the concept of jurisdiction is scram-
bled, if not beyond recognition, at least beyond the possibility of clear and
logical application. The concept as applied prior to 1930 and in Burnet v.
Brooks purports to be based on the factual relationship of the taxing gov-
ernment to the subject of the tax. But in the latter case identically the
same factual relationship would give rise to state jurisdiction to tax in one
case and not in another, dependent on the place of domicile of the non-resi-
dent decedent.

It would have been much simpler and more consistent with realities
if the Court had admitted that a state situated as was Missouri in the
case of Baldwin v. Missouri did have jurisdiction, but had frankly stated that
as matter of policy and desirability, and to prevent conflict among the states
and injustice to taxpayers, the Court had assumed the authority to decree
that it is unlawful for more than one state to tax and that it had decided
that in such a case where the decedent owner was domiciled within the
country only the state of domicile would be permitted to tax, or possibly
business situs in preference to domicile in appropriate cases. To have made
such a frank admission, of course, would have been to admit that the Court
was functioning in other than an orthodox or traditional judicial capacity.
This it was unwilling to do.

If there was any doubt that the Court was receding from the 1930-32
restrictive doctrine in 1937 and 1938 with the decision of First Bank Stock
Corporation v. Minnesota and Schuylkill Trust Company v. Pennsylvania,
that doubt was set at rest by the majority opinions of Mr. Justice Stone in

stock certificates being kept in California, the British owner having died domiciled
abroad.
42. 188 U. S. 189 (1902). Such was the holding of the Supreme Court of
Washington in In re Estate of John Lloyd, 185 Wash. 51, 52 P. (2d) 1269 (1936).
43. Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930). As
previously noted, supra p. —, the recent case of State Tax Commission of Utah
v. Aldrich, 316 U. S. 174 (1942), may have restored Blackstone v. Miller to good
standing.
Curry v. McCanless and Graves v. Elliott in 1939. These cases involved the application of state inheritance taxes to intangibles held in trust, where both the state of the trustee’s domicile where the paper evidences were kept, and the state of the settlor’s domicile sought to tax. In the one case the settlor, besides retaining the life income from the trust property, and reserving a rather complete power to direct the handling of such property, gave to herself a general power of appointment to dispose of the property by will. In the other a power of revocation was reserved in the settlor. In the latter case a tax by the settlor’s domicile was sustained, although a tax by the state of the trustee’s domicile had already been collected. In the former the right of both states to tax was clearly recognized in an opinion reversing the declaratory judgment of the Supreme Court of Tennessee, the state of the settlor’s domicile, to the extent that it had denied the power of Alabama, the state of the trustee’s domicile, to tax.

While there was no attempt in these cases to overrule any earlier cases, the opinion in the McCanless case purported to limit the restrictive doctrine of the 1930-32 cases to the specific matters to which it had been applied in those cases, and expressly denied the possibility of saying “that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons... those interests may be too diverse in their relationships to various taxing jurisdictions to admit of unitary treatment without discarding modes of taxation long accepted and applied before the Fourteenth Amendment was adopted, and still recognized by this Court as valid.” Such a con-

44. 307 U. S. 357 (1939).
45. 307 U. S. 383 (1939). The Court had undergone extensive changes in personnel, but the four justices remaining of the majority in First National Bank of Boston v. Maine dissented in both of these cases. Today, 1943, Mr. Justice Roberts alone remains of the group.
46. 307 U. S. 357, 373. The more recent case of Graves v. Schmidlapp, in its nature something of a companion case to Curry v. McCanless and Graves v. Elliott, sustained a New York tax on the exercise, by a domiciled resident, of a general testamentary power of appointment of which he was the donee under the will of a resident of Massachusetts, the property appointed being intangibles held by trustees under the donor’s will. This case is based on the assertion of a power to tax the transfer of intangibles on the death of the owner at his domicile. The Court states that “his transfer... by virtue of the exercise of a donated power instead of that derived from ownership, stands on the same footing,” and, indicating a purpose to limit or depart from the rule of immunity from taxation of intangibles in more than one state asserts that “it has been held that they may be constitutionally taxed there (at owner’s domicile) even though in some instances they may be subject to
elusion is, of course, inevitable when the problem of state jurisdiction to tax is approached on the basis of a careful consideration of the relation of the taxing state to the subject of the tax, rather than from the abstract theory of desirability and policy. The broad doctrine asserted in *Burnet v. Brooks* that one state's jurisdiction to tax is limited by that of another considered to have a better claim seems to be fully repudiated. In referring to that case, Mr. Justice Stone asserted, "If the 'due process' of the Fifth Amendment ... does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, ... the Fourteenth can hardly be thought to make us do so here..." 47 As a matter of fact, the whole approach to the problem and the tenor of the opinion throughout is inconsistent with the doctrine of the earlier restrictive cases which purport to be limited rather than overruled. This limiting effect may have been shortly acquiesced in by the whole Court. In the unanimous opinion of Mr. Chief Justice Hughes in *Massachusetts v. Missouri* 48 it was asserted that "the validity of each claim [of the two states to apply their inheritance taxes to the transfer of the same trust property] is wholly independent of that of the other and, in the light of our recent decisions, 49 may constitutionally be pressed by each State without conflict in point of fact or law with the decision of the other." 50

By way of dictum in his opinion in the case of *Curry v. McCanless*, Mr. Justice Stone reasserted the doctrine of *Cream of Wheat Co. v. County of Grand Forks* 51 to the effect that "taxation of a corporation by a state where

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47. *Id.* at 369, 370. Other language in the same opinion leads to the same conclusion. Referring to the various bases of the taxing power, such as control, benefit, and protection, the opinion asserts that "it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently there are *many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." *Id.* at 368. Italics supplied. And again it is pointed out that where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to treat such intangibles as having a situs for taxation at the domicile, "but when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the taxgatherer there, the reason for a single place of taxation no longer obtains." *Id.* at 367.


49. Citing *Curry v. McCanless* and *Graves v. Elliott*.

50. 308 U. S. 1, 15, 16.

51. 253 U. S. 325 (1920).
it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles."\(^{52}\) This issue was more directly raised in the case of Newark Fire Insurance Co. v. State Board of Tax Appeal\(^{53}\) decided the same day as Curry v. McCanless and Graves v. Elliott but the Court divided four to four on the matter. The New Jersey courts had held that the capital stock paid in and accumulated surplus here involved had acquired a business situs in New York on the same theory of commercial domicile employed in Wheeling Steel Corporation v. Fox\(^{54}\) but nevertheless sustained the tax at the place of incorporation. Mr. Justice Reed, speaking for four members of the Court, applied a presumption based on *mobilia sequuntur personam* that the state of domicile could tax, and gave some consideration to the idea that maybe if business situs were shown to exist the corporate domicile might not be able to tax, but saved himself the necessity of deciding that question by finding that business situs was not sufficiently established. The opinion of Mr. Justice Frankfurter, also representing the views of four members of the Court, squarely reasserted the doctrine of the *Cream of Wheat* case as a sufficient basis for sustaining the tax, regardless of business situs in another state. The effect of these cases has been to leave uncertain the status of that doctrine. It is, of course, entirely consistent with the apparent purpose to return to the earlier doctrine of allowing more than one state to tax. In fact, the asserted purpose to limit the application of the restrictive doctrine to the specific facts of past cases, as so clearly set forth in *Curry v. McCanless*, would seem to be more fully consistent with the acceptance of the *Cream of Wheat* doctrine than with its rejection. In no case heretofore has the Court denied to the state of incorporation the power to tax the intangible assets of a corporation, whatever their relation to another state may have been. To do so now would be to extend, rather than to limit, the restrictive doctrine. However, if the return to the earlier doctrine is not to be complete, and if the court should see fit to deny the right of both domicile and business situs to tax concurrently, it would seem that the actual facts responsible for the concept of business situs as a basis for taxation should prevail over the fiction which attributes to all intangibles a taxable situs within the jurisdiction of the domiciliary state.

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52. 307 U. S. 357, 368.
53. 307 U. S. 313 (1939).
To what extent the restrictive doctrine of the 1930-32 cases setting up an immunity against the taxation of intangibles by more than one state has now been modified or repudiated is something less than entirely clear. The cases of 1939, particularly Curry v. McCanless, in refusing to apply the doctrine to the trust property then before the Court, indicated the strong probability that it was not to be extended beyond the specific application of past cases. This was done in opinions fundamentally inconsistent with any continued recognition of the doctrine as theretofore applied, but no cases were overruled. More recently the apparent goal of complete repudiation has been much more closely approached, though only one of the restrictive cases has been expressly overruled.

The case of State Tax Commission of Utah v. Aldrich called for consideration only of the problem of taxation by the state of the corporate domicile upon a transfer by death of the non-resident owner of shares of stock, the certificates of which were being kept at the owner’s domicile and transferred on the stock transfer books kept outside the state of the corporate domicile. The determination of this issue required a reconsideration of the exact problem dealt with in First National Bank of Boston v. Maine ten years before. Taking the position that the latter case was inconsistent with the principles responsible for the decisions in Curry v. McCanless and Graves v. Elliott, and regarding those principles as sound, the Court had no alternative but to overrule the First National Bank of Boston case. In doing so the opinion of Mr. Justice Douglas clearly recognized that the basic doctrine of that case was identical with that responsible for the decisions in its companion cases of Farmers Loan and Trust Co. v. Minnesota and Baldwin v. Missouri. Thus the Aldrich case, as previously suggested with respect to the Curry and Graves cases, would seem to carry an implied repudiation of the whole doctrine responsible for all of the restrictive cases of the 1930-32 period. It is worthy of note that the opinion in this case refutes the over-simplification of the taxable event found in the restrictive cases as a means of confining taxation to a single state, and asserts that in view of the relations of the shares of stock and their non-resident owner to the corporate domicile it is not possible to “say with the majority in First

56. 316 U. S. 174 (1942).
National Bank of Boston v. Maine, . . . that a 'transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state,' so as to preclude Utah from imposing a tax on this transfer." 57 Perhaps the most important utterance of the whole opinion is the simple, wholesome statement that "even though we believed a different system should be designed to protect against multiple state taxation, it is not our province to provide it." 58 The opinion employed language broad enough to indicate the general application of its principles. "There is no constitutional rule of immunity from taxation of intangibles by more than one state. . . . we restore these intangibles to the constitutional status which they occupied up to a few years ago." 59

On the basis of such language, it seems quite clear that the Court is repudiating the whole of the restrictive doctrine of the 1930-32 cases and returning to the principles which, except for the dozen years just past, have been recognized throughout our history.

Perhaps the more general language of Mr. Justice Frankfurter's opinion, giving broad recognition to the practical aspects of both present day business transactions and present day taxation problems, makes this even clearer.

"Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State, as well as of the nation. It does so because the transaction in its entirety may receive the benefits of more than one government. And the exercise by the States of their Constitutional power to tax may undoubtedly produce difficult political and fiscal problems. . . . But whether a tax is wise or expedient is the business of the political branches of the government, not ours. Considerations relevant to invalidation of a tax measure are wholly different from those that come into play in justifying disapproval of a tax on the score of political or financial unwise." 60

57. Id. at 180, 181.
58. Id. at 181. "To do so," said Mr. Justice Douglas, "would be to indulge in the dangerous assumption that the Fourteenth Amendment 'was intended to give us carte blanche to embody our economic and moral beliefs in its prohibition.' Mr. Justice Holmes, dissenting, Baldwin v. Missouri, 281 U. S at 595 (1930), . . . It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation."
59. Id. at 181, 182.
60. Id. at 183, 184.
Both opinions appear to make it abundantly clear that the matter of correcting the admitted evils of multiple state taxation is now to be returned to its proper place of state control "through uniform and reciprocal legislation, through action by the States under the Compact Clause . . . , or through whatever other means statesmen may devise, for distributing wisely the total national income for governmental purposes between the States and the Nation." An awareness of both the impossibility and the impropriety of successfully handling this matter by judicial action is emphasized by a further sentence in Mr. Justice Frankfurter's opinion. "But even if it were possible to make the needed adjustments in the fiscal relations of the States to one another and to the federal government through the process of episodic litigation—which to me seems most ill-adapted for devising fiscal policies—it is enough that our Constitutional system denies such a function to this Court."

If there could be any serious doubt about the soundness of the principles responsible for the decision in the Aldrich case, it occurs to the present writer that a careful study of the rather vigorous dissenting opinion of Mr. Justice Jackson is well calculated to remove it. He begins with an admission that the problem is enmeshed in "something of a jurisdictional snarl" but appears to plead for stare decisis as a means of avoiding some unfortunate "impact on the very practical and concrete problems of states and taxpayers." He talks about what he calls "the older rule" ascribing a "fictional consequence to the domicile of a natural person" being overruled by "assigning a fictional consequence to the domicile of an artificial corporation," and says the new rule emphasizes the dominance of the corporation as the older did that of the individual. He apparently recognizes, however, that the decision of the majority in no way denies the power of the natural person's domicile to tax. How much importance he attaches to the seemingly irrelevant facts that the corporation had "but a fraction of its property and conducts only its formal corporate activities" within the taxing state is not clear. In like fashion one is left to wonder what weight to attach to the rather interesting and lengthy recital of Union Pacific history, or to the discussion of the place and function of the corporation in modern economic

61. Id. at 184. Concurring opinion of Mr. Justice Frankfurter.
62. Ibid.
63. This reference is to the so-called rule embodied in the opinion in First National Bank of Boston v. Maine.
enterprise. Perhaps all of this is intended to be merely introductory to the main body of the dissenting opinion which is primarily a discussion of legislative tax policy rather than a judicial evaluation of constitutional power. Anxiety over the question whether the possible "exhaustion of estates through multiplication of reports, returns, appraisals, litigation, counsel fees, and expenses ultimately makes for a sound fiscal policy or an enlightened social policy" would seem to be the proper concern of the legislator rather than the judge. The same may be said as to concern over the probable inability of many small stockholders to "afford professional counsel or evasion devices" that may be employed by the economically more fortunate in escaping the resulting tax burden.

The apparent concern over the fact that it is not the Harkness estate, "but the State of New York that will pay this tax to the State of Utah" seems equally irrelevant to the decision since that result flowed solely from the express provision of the New York statute allowing a credit against its tax for "any constitutionally valid estate or inheritance tax paid to any other state." In this connection it seems that Mr. Justice Jackson points to at least a partial answer to his problem when he refers to the fact that prior to the decision of First National Bank of Boston v. Maine thirty-seven states had enacted reciprocity statutes to relieve the hardships of this type of multiple state taxation. The fact that Utah was not among the thirty-seven hardly seems important in the determination of this case, as is also true of the further suggestion that an undetermined number of states may have repealed or modified their reciprocal exemption statutes during the past decade on the basis of the restrictive doctrine here being repudiated. To the expression of doubt as to the possible future usefulness of the due process clause in solving the problem of state jurisdiction to tax, it is sufficient to reply that its function would seem to be returned to that recognized for it prior to 1930. In so doing, one may not inappropriately suggest that the fears expressed by Mr. Justice Stone in his dissent in First National Bank of Boston v. Maine to the effect that "We can have no assurance that resort to the Fourteenth Amendment, as the ill-adapted instrument of such a reform, will not create more difficulties and injustices than it will remove," seem to have been justified when we consider the confusion evi-

64. 316 U. S. at 195 (1942).
65. Ibid.
66. 284 U. S. 312, 334 (1932).
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Exactly what Mr. Justice Jackson had in mind when he expressed the hope that the majority decision in the Aldrich case did not mean "that might always makes right in the matter of taxation" is far from clear. If, as appears from his subsequent discussion, he had in mind those situations where taxation formerly was sustained on the basis of benefits conferred, protection afforded, or relationship to the subject of the tax found to exist, his unfortunate characterization of might making right would give rise to small concern, except that the evils of multiple state taxation remain. Regrettable as the existence of those evils may be, that constitutes no justification for the Court assuming a power which constitutionally does not belong to it. As so well stated by Mr. Justice Frankfurter, "Wise tax policy is one thing; constitutional prohibition quite another. . . . When a tax appropriately challenged before us is not found to be in plain violation of the Constitution, our task is ended." Seldom does the reading of a dissenting opinion leave one so thoroughly reinforced in his belief in the soundness of the majority opinion as is true in this case. It goes far to convince the reader, if such be necessary, that the only basis for a dissent here, or for the majority doctrine of the restrictive cases of a decade earlier, is the traditional legislative consideration of policy and desirability. It is unfortunate that the Court did not feel disposed expressly to overrule Baldwin v. Missouri and Farmers Loan and Trust Co. v. Minnesota to complete the inevitable task which it would seem it must face at no distant date in the future. A task, incidentally, the possibility of which the dissenting opinion deeply deplored.

The whole dissenting opinion of Mr. Justice Jackson in this case reads much like an argument addressed to some legislative authority charged

67. 316 U. S. at 199 (1942).

A comment of Mr. Justice White in the case of Brushaber v. Union Pacific R. R. is quite appropriate in the present discussion. "...we cannot escape the conclusion that they [contentions relied upon] all rest upon the mistaken theory . . . that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing." 240 U. S. 1, 26 (1916).
with the responsibility of formulating a policy for eliminating the hardships expected to flow from possible multiple state taxation, rather than a judicial analysis of state taxing power under the Constitution. In this connection it may be suggested that one of the closing paragraphs of this rather remarkable dissenting opinion may well give rise to question as to just what is the proper function of the Supreme Court in our constitutional system.

"To read into the Constitution the Court's present concept of jurisdiction through charter granting, and to hold that it follows that the Constitution does not prohibit this tax, is to make new law quite as certainly as to adhere to the concept of jurisdiction according to the decedent's domicile and to hold that the Constitution does prohibit it." 69

If this sentence is meant to imply that each course is equally open to the court and that it is performing the same function in both instances, it is really an astonishing statement. Perhaps a complete and sufficient comment is best supplied by quoting a single sentence from the concurring opinion of Mr. Justice Frankfurter in the same case:

"To suggest that when this Court finds that a law is not offensive to the Constitution and that it must therefore stand, we make the same kind of judgment as when on rare occasions we find that a law is offensive to the Constitution and must therefore fall, is to disregard the role of this Court in our Constitutional system since its establishment in 1789." 70

This survey of the work of the United States Supreme Court in relation to state jurisdiction to tax intangibles throughout the brief period of a dozen years, with special emphasis upon the initial cases of the period and the latest pronouncement of the Court, deals with substantially a complete cycle in the handling of an important phase of our constitutional development, with the Court now seeming to have returned approximately to its point of original departure in 1930. That departure from traditional doctrine permitting broad scope to the taxing power of the states by promulgation of the doctrine of immunity in an attempted short cut to the solution of the troublesome problem of multiple state taxation, while having apparent practical merits, inevitably headed the Court for confusion and disaster from the standpoint of any consideration of sound constitutional principles. It launched the Court upon a program of invalidation of leg-

69. 316 U. S. at 201, 202 (1942).
70. Id. at 185.
islation in the exercise of so all-important a power as that of state taxation upon no better basis than economic desirability, "sound fiscal policy," or "an enlightened social policy," in apparent disregard of elementary constitutional principles and the traditional reluctance of our Supreme Court to strike down state legislation without a clear constitutional mandate. Two results then appeared to be inevitable, both of which have since come about.

That confusion would result from any attempt to apply this departure from long established tradition in all cases, despite the complicated relations of intangible property interests to various taxing jurisdictions, or despite the fact that "modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State..."\(^{71}\) appeared quite certain. As that anticipated confusion became a reality in cases that recognized the existence of jurisdiction to tax on the basis of the debtor and the paper evidence being present when the creditor resided abroad, but denied it under the same facts when the property interest was owned by the resident of a sister state, or in cases that involved the necessity of choosing between domicile of the owner and business situs, the unsoundness of any attempt to read into the Constitution the requirement that one state rather than the other must prevail became so obvious that ultimate repudiation became a certainty. That process of repudiation has now gone far. And while other cases may be required to complete the process and clarify the situation, there seems to be no reason to expect any turning back now. Once more the admittedly troublesome problem of multiple state taxation appears to be back before the only authority competent under our constitutional system to deal with it—the political branch of our state governments—to be worked out by further reciprocal exemption legislation, by interstate compact, "or through whatever other means statesmen may devise."\(^{72}\)

The second result that seemed foreordained from a persistence in the program of which the restrictive tax cases were a part was the constitutional crisis which had its culmination in the Supreme Court reorganization plan of 1937. That there was no justification for the over expansion of the due process clause of the Fourteenth Amendment as asserted by the Court in these and other cases of the same decade appears now to be fully recognized.

\(^{71}\) Id. at 183.
\(^{72}\) Id. at 184.
It is not altogether uncommon at present to hear the remark, even from lawyers, that states rights are being destroyed, and that a "subservient" or "rubber stamp" Supreme Court is participating in the process. This is hardly the place to launch a full scale-discussion of all of the aspects of this controversy. It is, however, appropriate to point out that so far as Supreme Court activity in the field of taxation is concerned, it was the restrictive decisions of 1930-32 that cast the doctrine of states rights upon the judicial scrap heap from which the present Supreme Court is gradually rescuing it. In those cases the Supreme Court, without any warrant in the Constitution, unembarrassed by the necessity of deciding between the conflicting claims of state and nation, and apparently unmindful of the fact that our form of government was being fundamentally changed in the process, read the views on fiscal policy entertained by a majority of the Court into the due process of law clause of the Fourteenth Amendment and took away from the states the power of taxation over a broad area theretofore unquestioned. If the states could be so deprived of their previously recognized constitutional power to tax, was there any reason to believe that state power in other fields long could remain intact if the policies embodied in state legislation "happen to strike a majority of this Court as for any reason undesirable?\(^{73}\) Fortunately, whatever may be the solution of the many and varied problems giving rise to inevitable conflicts between state and national power, this threat to state power has, for the time being at least, been removed. Whatever may or may not be the shortcomings of the present Supreme Court, an undue encroachment upon the legislative power of the states or the nation is not one of them. Having largely withdrawn the restrictive doctrines promulgated ten or a dozen years ago, the Court now appears certain to accord to the states that same free hand in the formulation of tax policy which they enjoyed prior to 1930.

\(^{73}\) 281 U. S. 586, 595 (1930). Mr. Justice Holmes' dissent in Baldwin v. Missouri.