
1-1-1983

Exemption of Government Securities vs. State Taxation of Bank Stock: A Legal Tug-of-War.

Thomas M. Schlenker

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>

 Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Thomas M. Schlenker, *Exemption of Government Securities vs. State Taxation of Bank Stock: A Legal Tug-of-War*, 14 ST. MARY'S L.J. (1983).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol14/iss3/8>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

Exemption Of Government Securities vs. State Taxation Of Bank Stock: A Legal Tug-Of-War

Thomas M. Schlenker

I. Introduction	757
II. Exemption of Government Obligations	760
III. Taxation of Bank Shares	762
A. Federal Authority	762
B. State Authority	766
IV. Resolving the Conflict	769
A. Law Prior to 1959 Amendment	769
B. The 1959 Amendment and Beyond	773
1. Montana	775
2. Texas	776
V. Current Status	783
VI. Conclusion	785

I. INTRODUCTION

Recently the law of banking and taxation has experienced a surge of litigation over the validity of taxes imposed upon shares of stock of banking corporations which, in their calculation, do not allow deduction of tax exempt governmental securities.¹ For years the validity of such taxes was upheld on the reasoning that a tax upon shares, while possibly indirectly affecting government securities, was a tax upon the personal property of the shareholder rather than upon the banking corporation's property, that is, the obligations themselves.² Nevertheless, the issue has been re-kindled in light of the later amendment to the statutory provisions ex-

1. See *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920 (Ga. 1982); *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913 (Mont. 1978); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909 (Mont. 1978); *Bank of Texas v. Childs*, 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

2. See, e.g., *Society for Sav. v. Bowers*, 349 U.S. 143, 148 (1955) (exception to immunity firmly imbedded in law); *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 115 (1902) (answer to contention is obvious, tax on shares may include government obligations); *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 583-84 (1865) (tax upon shares may include government obligations but tax upon property of corporation may not).

empting government obligations from taxation.³ It is now argued that under the language of the newer provisions,⁴ inclusion of government obligations, even in taxes levied against the shares, is unlawful.⁵

In recent cases, share taxes have been both supported and attacked on the basis of equal protection, discrimination, and failure to deduct government obligations in their assessment.⁶ This comment will discuss the latter: weighing the validity of the inclusion of government obligations in share taxes. In so doing, primarily two federal statutes will be examined: section 548 of title 12 which authorizes states to tax shares of national

3. See 31 U.S.C. § 742, *recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124)*. The first sentence of section 742 was enacted by Congress in 1862 and provides: "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or local or municipal authority." Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 345, 346. Section 742 was amended in 1959 to include the second sentence of the section which provides:

This exemption extends to every form of taxation that would require that either the obligations or interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622. The introductory phrase "[e]xcept as otherwise provided by law," (found in the 1976 edition of the United States Code, title 12, section 742) was not part of the law passed by Congress. See Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 345, 346. The phrase was included by the revisors of the Code in 1926. See *Ad Valorem Taxation of Bank Stock and the Federal Exemption Problem*, in TEX. BAR ASS'N, CORP., BANKING & BUS. LAW SEC. BULL. (Oct. 1982). The Texas court of appeals in *Bank of Texas v. Childs*, in part, based its decision on the phrase. See *Bank of Texas v. Childs*, 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1980), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

4. See 31 U.S.C. § 742 (1976). Section 742 was amended in 1959 to include the second sentence of the section. See *id.*; Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622.

5. See *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913, 914 (Mont. 1978); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 913 (Mont. 1978); Brief for Petitioners at 12, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*); Brief for the United States as Amicus Curiae in Support of Petitioners at 15-16, *American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*).

6. See, e.g., *Memphis Bank & Trust Co. v. Garner*, ___ U.S. ___, ___ 103 S. Ct. 693, 694-95, 74 L. Ed. 2d 562, 566 (1983) (challenged on basis of unlawful discrimination and Supremacy Clause violation); *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 923 (Ga. 1982) (challenged on validity of considering bonds); *Bank of Texas v. Childs*, 615 S.W.2d 810, 815-17 (Tex. Civ. App.—Dallas 1981) (challenged on inequality, discrimination, and exemption of securities), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

banks,⁷ and section 742 of title 31 which exempts government obligations from taxation.⁸ Analysis of the statutory provisions as well as of the issue in general is necessary in light of the Texas case, *Bank of Texas v. Childs*, which is currently on appeal to the United States Supreme Court.⁹ This case is of great importance because it is the first time in over twenty-five years that the Supreme Court has granted certiorari to determine the propriety of the inclusion of government obligations in the assessment of share taxes.¹⁰ The Court's decision is needed to settle this newfound uncertainty in state courts.¹¹ Furthermore, this comment will discuss impor-

7. See 12 U.S.C. § 548 (1976) (authority for taxing bank shares).

8. See 31 U.S.C. § 742, *recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124)* (provides exemption for government obligations).

9. See *Bank of Texas v. Childs*, 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). The *Bank of Texas v. Childs* case involves a complex litigation history. Following an adverse ruling in the trial court, the plaintiff bank appealed to the court of civil appeals. See *id.* at 813. The Texas court of appeals sitting in Dallas affirmed the trial court's decision which upheld the inclusion of government obligations among other bank assets in assessing the value of shares for share tax purposes. See *id.* at 813. Appeal was then made to the Texas Supreme Court which denied appellant's writ of error. See *Bank of Texas v. Childs*, 634 S.W.2d 2, 3 (Tex. Ct. App.—Dallas 1982, no writ) (opinion states writ refused on 615 S.W.2d 810). The case then returned to the Dallas Court of Appeals where, pursuant to TEX. REV. CIV. STAT. ANN. art. 1823 (Vernon 1964), appellants were granted their motion to stay the court's earlier mandate (issued in *Bank of Texas v. Childs*, 615 S.W.2d 810, 813 (Tex. Civ. App.—Dallas 1981)) which would be issued under Rule 507 of the Texas Rules of Civil Procedure. See *id.* at 3. The stay of mandate was granted in view of appellant's intention to file a petition for certiorari to the United States Supreme Court. See *id.* at 3. Certiorari was granted by the Supreme Court for determination of the question "whether a state's tax on bank shares computed on a bank's net assets with a deduction for the bank's real estate but without any deduction for its tax-exempt United States obligations, discriminates against those obligations in violation of the Borrowing clause of the Constitution." Petition for Writ of Certiorari at i, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (certiorari granted limited to Question One in petition). The parties names were changed in this latter appeal to *American Bank & Trust Co. v. Dallas County*. See *id.*

10. See *Society for Sav. v. Bowers*, 349 U.S. 143, 144-45 (1955) (last case in which Supreme Court ruled on inclusion of government obligations in share taxes). Since the Court's decision in *Bowers*, section 742, which exempts government obligations from taxation, has been amended. See Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622 (amendment added second sentence of section 742 which prohibits tax which considers government obligations in computation of tax).

11. Compare *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 926-27 (Ga. 1982) (holding inclusion of government obligations in share tax assessment lawful) and *Bank of Texas v. Childs*, 615 S.W.2d 810, 822 (Tex. Civ. App.—Dallas 1981) (share tax assessment may include government securities under present section 742), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) with *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913,

tant economic consequences for tax revenue which surround the inclusion or deduction of government obligations in share taxes.¹²

II. EXEMPTION OF GOVERNMENT OBLIGATIONS

The power of a state to obtain revenues for its operation is fundamental to the idea of sovereignty.¹³ Two methods commonly employed by states in collecting revenues are the imposition of duties and taxes and the borrowing of money on the credit of the nation.¹⁴ The stability and security of the nation in times of both war and peace depends upon this power to collect revenues.¹⁵ Therefore, careful consideration must be made when the federal government's power to borrow money on the credit of the nation becomes entwined with the right of the states to lay and collect taxes.¹⁶ Interference by the states with powers sovereign to the federal government was the subject of the Supreme Court's holding in *McCulloch v. Maryland*.¹⁷ The Court asserted that "the states have no power by taxation, or otherwise, to retard, impede, [burden], or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general

914 (Mont. 1978) (share tax not allowing deduction for government obligations unlawful) and *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912-13 (Mont. 1978) (under extended exemption of 1959 amendment to section 742, government obligations may not lawfully be included in assessment).

12. See BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, ANNUAL STATISTICAL DIGEST Table 7-3 (1974-1978) (federally insured banks on average hold 11% of investments in federal obligations); see also Bryan Eagle, Jan. 22, 1981, at 1A, col. 1 (Texas school districts collected \$47 million in 1979 taxes on bank stockholdings).

13. See, e.g., *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 458 (1829) (right of states to impose taxes is sovereign); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (taxation part of state's sovereignty); *United States v. Alberts*, 55 F. Supp. 217, 220 (E.D. Wash. 1944) (power to tax is basic incident of sovereignty); see also THE FEDERALIST No. 31, at 190 (A. Hamilton) (Modern Library College ed.) (power to obtain revenue essential means of answering national exigencies).

14. See *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 452 (1829) (two sources of revenue which are right of general government are duties and borrowing on credit of nation). These powers are found in the United States Constitution, article 1, section 8, clauses 1 and 2.

15. See *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 452 (1829) (safety of nation depends upon free exercise of these powers); *La Croix v. United States*, 11 F. Supp. 817, 821 (W.D. Tenn. 1935) (power to tax given to pay public debts, provide for common defense and general welfare during peace or disaster).

16. See *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 459-60 (1829) (state may not interfere with right of federal government to borrow money); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (extent of limitation by Constitution of state's right to tax is question of construction).

17. 17 U.S. (4 Wheat.) 316 (1819). In this historic case, the Supreme Court held that a state has no power to tax a branch of the Bank of the United States. See *id.* at 436.

government."¹⁸

In *Weston v. City Council of Charleston*,¹⁹ the Supreme Court applied its holding in *McCulloch v. Maryland* to invalidate a city ordinance which imposed a tax on stock of the United States.²⁰ In *Weston* it was held that a tax on government stock was a tax "on the contract"—that is, a tax on the government's power to borrow money on the credit of the United States—and as such was repugnant to the Constitution.²¹ The *Weston* rule, which was aimed at protecting the borrowing power of the United States, was derived from the Borrowing²² and Supremacy Clauses²³ of the Constitution, and the constitutional doctrines announced in *McCulloch v. Maryland*.²⁴ Some thirty years later this rule was embodied in the first of a succession of federal statutes.²⁵ The statutory version

18. *Id.* at 436.

19. 27 U.S. (2 Pet.) 449 (1829).

20. *See id.* at 469. In *Weston*, the Court considered a South Carolina tax imposed upon stock of the Bank of the United States. Viewing the Bank of the United States as an "instrument essential to the fiscal operations of the government," the Court construed the tax as one upon government stock. *See id.* at 469.

21. *See id.* at 469. By "contract" the Court was referring to the contract made by the government to borrow money on the credit of the nation. *See id.* at 467.

22. *See* U.S. CONST. art. I, § 8, cl. 2. The clause provides that the Congress shall have the power "to borrow money on the credit of the United States." *Id.*

23. *See* U.S. CONST. art. VI, cl. 2. The clause states:

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

Id.

24. *See* *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 469 (1829); *see also* *Society for Sav. v. Bowers*, 349 U.S. 143, 144 (1955).

25. *See* Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 345, 345-46; Act of Mar. 3, 1863, ch. 73, § 1, 12 Stat. 709-10; Act of Mar. 3, 1864, ch. 17, § 1, 13 Stat. 13; Act of June 30, 1864, ch. 172, § 1, 13 Stat. 218; Act of Jan. 28, 1865, ch. 22, § 1, 13 Stat. 425; Act of Mar. 3, 1865, ch. 77, § 2, 13 Stat. 468-69; Act of July 14, 1870, ch. 256, § 1, 16 Stat. 272; Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622. For the current form of these statutory provisions see 31 U.S.C. § 742, *recodified as amended* by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124). The first sentence of section 742 was promulgated by Congress in 1862 and provided: "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 345, 346. 31 U.S.C. was not enacted into positive law until 1982. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, 1982 U.S. CODE CONG. & AD. NEWS (96 STAT.) 877, 945-46. BEFORE A TITLE OF THE CODE IS ENACTED INTO POSITIVE LAW BY CONGRESS, SECTION 204(A) OF TITLE 1 PROVIDES THAT ITS PROVISIONS ARE ONLY PRIMA FACIE EVIDENCE OF THE LAWS OF THE UNITED STATES. *See* 1 U.S.C. § 204(a) (1976). Where a title of the Code has been enacted into positive law, the text becomes legal evidence of the laws contained therein. *See id.*; *see also* *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). While the

of this rule exempts all United States stocks, bonds, treasury notes, and other government obligations from state or municipal or local taxation.²⁶ The purpose of this exemption is to prevent the imposition of taxes which diminish in any degree the market value or investment attractiveness of obligations issued by the United States to secure necessary credit.²⁷

III. TAXATION OF BANK SHARES

A. Federal Authority

Authority for state ad valorem taxation²⁸ of national banks and their shares of stock is provided by title 12, section 548 of the United States Code.²⁹ By authority granted under section 548, states were permitted to develop individual methods for taxing national bank shares provided they met certain requirements.³⁰ A state could enact any one of four optional

unenacted 31 U.S.C., section 742 included the introductory phrase, "[e]xcept as otherwise provided by law," that phrase was never a part of the act passed by Congress, but rather was inserted when the section was codified in 1926. Compare Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 345, 345-46 (introductory phrase not included) with 31 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (including introductory phrase inserted by revisors in 1926 general revision of Code). The second sentence to section 742 was added by amendment in 1959. See Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622 (codified as amended at 31 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124)). This was part of an act aimed at increasing the investment attractiveness of government bonds in an effort to reverse the downward trend of their sales. See 1959 U.S. CODE CONG. & AD. NEWS (73 Stat.) 2769. In the newly enacted title 31 of the Code, section 742 is reformulated "without substantive change" at section 3124. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 877, 945-46 (to be codified at 31 U.S.C. § 3124).

26. See 31 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124).

27. See *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 675 (1950); *Smith v. Davis*, 323 U.S. 111, 117 (1944).

28. See *Board of Supervisors v. Farmers Nat'l Bank*, 168 S.W.2d 371, 373 (Ky. 1942) (tax on shares of stock of banks and trust companies is ad valorem tax). An "ad valorem tax" is a tax imposed upon the value of property. See *In re City of Enid*, 158 P.2d 348, 352 (Okla. 1945); *State v. Wynne*, 134 Tex. 455, 466, 133 S.W.2d 951, 957 (1939).

29. See 12 U.S.C. § 548 (1976). The original version of this provision was derived from the National Bank Act, ch. 106, § 41, 13 Stat. 99, 111 (1864) and from Act of Feb. 10, 1868, ch. 7, 15 Stat. 34.

30. See 12 U.S.C. § 548 (1976). While section 548 authorized states to tax bank shares, it provided that a tax on national bank shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks" Act of Mar. 4, 1923, ch. 267, 42 Stat.

methods of taxation so long as the tax was within the parameters of section 548.³¹ In 1969 Congress amended section 548 and substituted the following language:

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.³²

The 1969 amendment to section 548³³ removed the provision that prevented taxes on national bank shares from being assessed at a rate greater than that used in assessing other moneyed capital.³⁴ Congress

1499. The purpose of this restriction was to prevent a state from creating an unequal and unfriendly competition with national banks by favoring shareholders in state banks or individuals interested in private banking and engaged in investment operations. *See First Nat'l Bank v. Anderson*, 269 U.S. 341, 347-48 (1926); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 106 (1923); *Palmer v. McMahan*, 133 U.S. 660, 667 (1890); *Mercantile Bank v. New York*, 121 U.S. 138, 155 (1887).

31. *See National Bank Act*, ch. 106, § 41, 13 Stat. 99, 111 (1864); Act of Feb. 10, 1868, ch. 7, 15 Stat. 34; Act of Mar. 4, 1923, ch. 267, 42 Stat. 1499; Act of Mar. 25, 1926, ch. 88, 44 Stat. 223. The optional methods of taxation were: (1) a tax on the shares, (2) a tax including dividends in gross income of the owner, (3) a tax on the bank association on their net income, or (4) a tax on the association according to or measured by their net income. Act of Mar. 25, 1926, ch. 88, 44 Stat. 223.

32. 12 U.S.C. § 548 (1976).

33. *See Act of Dec. 24, 1969*, Pub. L. No. 91-156, § 4, 83 Stat. 434, 435, *amending National Bank Act*, ch. 106, § 41, 13 Stat. 99, 111 (1864) and Act of Feb. 10, 1868, ch. 7, 15 Stat. 34.

34. *See National Bank Act*, ch. 106, § 41, 13 Stat. 99, 111 (1864); Act of Feb. 10, 1868, ch. 7, 15 Stat. 34; Act of Mar. 4, 1923, ch. 267, 42 Stat. 1499; Act of Mar. 25, 1926, ch. 88, 44 Stat. 223. Prior to amendment in 1969, section 548 provided that taxes on shares should "not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks" *See Act of Mar. 4, 1923*, ch. 267, 42 Stat. 1499. As used in the statute, the term "other moneyed capital" refers only to capital employed in substantial competition with the banking or investment business of national banks and does not include bonds, notes, or other evidences of indebtedness held by individuals merely as personal investments not made in competition with banks. *See First Nat'l Bank v. Anderson*, 269 U.S. 341, 350 (1926); *Mercantile Bank v. New York*, 121 U.S. 138, 154-57 (1887). The objective sought by Congress in its enactment of the *National Bank Act* was to establish a system of national banking institutions that would give uniformity and security to the currency and expedite operations of the United States Treasury. *See Mercantile Bank v. New York*, 121 U.S. 138, 154 (1887). At the time of the Act's passage, the capital of banks was furnished entirely by private individuals. *See id.* at 154. As agencies of the government for the execution of its powers, neither banks nor their capital (total assets), however invested, were taxable by states absent the consent of Congress. *See id.* at 154. Limited consent was provided in section 548 subject to its restrictions. In establishing the confines of state taxation it was deemed necessary by Congress to prevent states from imposing burdens which would discourage individuals from freely investing their capital in national banks. *See id.* at 154. Had

deemed unnecessary the provision affording national banks protection from state discrimination for several reasons.³⁵ While national banks were at one time instrumentalities of the federal government, today there is no longer justification for such immunity.³⁶ Further, Congress questioned the success of the former provision at achieving equality between state and national banks.³⁷ Following the amendment, state and national banks were considered the same for tax purposes.³⁸

An early question which arose under section 548 was whether a tax on a bank's shares is the equivalent of a tax on that bank's property.³⁹ In the case of *Van Allen v. The Assessors*⁴⁰ the Supreme Court answered this question rendering an opinion which has been followed for over a century.⁴¹ In *Van Allen*, a New York statute, which taxed shares of national banks but imposed no comparable tax on state banks, was held not to conform to the limitations prescribed by section 548.⁴² Under the facts in *Van Allen*, both nationally and state chartered banks were taxed; however, national banks were taxed on their shares whereas state banks were taxed on their capital.⁴³ Because banks' assets in the form of government

such discrimination been allowed, citizens would have been more apt to invest their capital in private or corporate state banking institutions enjoying more favorable tax treatment under state laws. *See id.* at 154-55.

35. *See Lake County Nat'l Bank v. Kosydar*, 305 N.E.2d 799, 802 (Ohio 1973); S. REP. NO. 530, 91st Cong., 1st Sess. 2, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 1594, 1595.

36. *See S. REP. NO. 530, 91st Cong., 1st Sess. 2, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 1594, 1595.*

37. *See id.* at 1595.

38. *See* 12 U.S.C. § 548 (1976) (national bank to be treated as bank organized or existing under laws of state).

39. *See Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 583-84 (1865).

40. 70 U.S. (3 Wall.) 573 (1865).

41. *See, e.g., Society for Sav. v. Bowers*, 349 U.S. 143, 147 (1955) (shareholder's interest in corporation is separate property interest from corporation's ownership of property); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 114 (1923) (*Van Allen* rule settled law in that Court); *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 114-15 (1902) (separate individuality of shareholder and corporation recognized in *Van Allen* followed by Court).

42. *See Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 581 (1865).

43. *See id.* at 581. A share of stock is distinguishable from the capital of the corporation issuing such stock. A share of stock represents an undivided proportional interest in the corporation which entitles the owner to participate in the management, share in the dividends and profits, and receive a pro rata part of the corporation's assets or proceeds upon dissolution. *See Alphin v. Wade*, 116 S.W. 667, 668 (Ark. 1909); *In re Willis' Estate*, 203 P.2d 91, 93 (Calif. 1949); *Markle v. Burgess*, 95 N.E. 308, 309 (Ind. 1911); *Hayes v. St. Louis Union Trust Co.*, 298 S.W. 91, 97 (Mo. 1927); *Presnall v. Stockyards Nat'l Bank*, 151 S.W. 873, 876 (Tex. Civ. App.—Texarkana 1912), *aff'd*, 109 Tex. 32, 194 S.W. 384 (1917). "Capital" may be used in various contexts but here refers to the assets of the corporation. *See State v. Board of Assessors*, 18 So. 753, 753-54 (La. 1895) ("capital" in broadest meaning refers to actual assets); *Pace v. Pace Bros. Co.*, 63 P.2d 590, 591 (Utah 1936) ("capital" as used in statute construed to mean assets). When applied to banking, the term capital does

bonds were included in the tax on national bank shares, yet excluded as exempt from the tax on capital of state banks,⁴⁴ national banks were taxed at a greater rate.⁴⁵

The Court in *Van Allen* went further in its discussion to hold that a bank whose capital is wholly invested in government obligations may be taxed on its shares; that such a tax is not a tax on the bank's capital and, therefore, not prohibited by federal statute.⁴⁶ In so holding, the Court reasoned that taxes upon a bank's capital and taxes upon a bank's shares involved two separate and distinct property interests.⁴⁷ The corporation is vested with legal ownership of the bank's real and personal property.⁴⁸ Accordingly, it can deal with the bank's property as individuals deal with their private property.⁴⁹ A different property interest was said to exist in the shareholder.⁵⁰ Although shareholders are undoubtedly interested in the property of the corporation as they may derive individual benefits or losses from variations in the property's value, they are not the legal owners of that property.⁵¹ The property interest of a shareholder entitles him instead to participate proportionately in the net profits derived from the employment of the bank's capital.⁵² It was this property interest that the Court found to be the subject of New York's bank share tax.⁵³

not include the interests of shareholders. See *New York v. Commissioners of Taxes*, 71 U.S. (4 Wall.) 244, 258 (1866). In referring to the entire assets of a bank, the term "capital" is not synonymous with "capital stock" which represents only the amount derived from the issuance of shares. While "capital stock" is fixed, "capital" includes all assets whether represented by monies received from the issuance of stock, surplus, undivided profits, or other property owned by the bank, and may vary according to its profits and losses. See *West v. City of Newport News*, 51 S.E. 206, 208 (Va. 1905).

44. See 31 U.S.C. § 742, *recodified as amended* by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (statute exempting government obligations from taxation).

45. See *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 581 (1865) (capital referring to assets).

46. See *id.* at 582-84. In its opinion the Court in *Van Allen* used the term "capital" rather than "assets"; however, the Court appears to be referring to banks' assets. See *id.* at 582-84. A tax against a bank's capital is imposed upon assets owned by the banking corporation and is assessed against the corporation as the owner of such property. A tax upon shares of stock is a tax imposed upon the interests of the stockholder evidenced by the certificates of stock. See *id.* at 584.

47. See *id.* at 584.

48. See *id.* at 584.

49. See *id.* at 584.

50. See *id.* at 584.

51. See *id.* at 584.

52. See *id.* at 584.

53. See *id.* at 584.

B. State Authority

Through passage of article 7166,⁵⁴ the Texas Legislature incorporated the provisions of 12 U.S.C., section 548 in an effort to protect both national and state banks from discriminatory taxes.⁵⁵ In 1982, article 7166 was replaced by substantively similar provisions of the Texas Property Tax Code.⁵⁶ Under the old article 7166 and the corresponding sections in the Property Tax Code banks are taxed on their shares of stock.⁵⁷ The stock is appraised by subtracting the market value of the bank's real property from the actual cash value of the stock.⁵⁸ Valuation of the shares

54. See Act of March 31, 1885 Tex. Gen. Laws, ch. 111, § 2a, at 106, 9 H. GAMMEL, LAWS OF TEXAS 726 (1898). Article 7166 was repealed by Act of June 13, 1979, 1979 Tex. Gen. Laws, ch. 841, § 6(a)(1), at 2329.

55. *Primm v. Fort*, 57 S.W. 972, 972 (Tex. Civ. App.—1900, no writ).

56. See TEX. TAX CODE ANN. §§ 21.09, 22.06, 23.11, 25.14 (Vernon 1982). Ad valorem taxation of bank stock is permitted under Texas law. See *id.* § 21.09. In determining the assessed value of bank stock the market value of real property owned by the bank shall be subtracted from the actual cash value of the bank stock. See *id.* § 23.11. The term "actual cash value" means fair market value or the fair or reasonable cash price the property would bring in the market in the ordinary course of business, and not at a forced sale. See *Dailey v. Foster*, 134 P. 206, 208 (N.M. 1913). "Actual cash value," "fair market value," and "market value" are synonymous. See *Britven v. Occidental Ins. Co.*, 13 N.W.2d 791, 793 (Iowa 1944); *Butler v. Aetna Ins. Co.*, 256 N.W. 214, 218 (N.D. 1934). For taxation purposes, stock may be listed alternatively in the name of the bank as agent for its stockholders. See TEX. TAX CODE ANN. § 25.14 (Vernon 1982).

57. See TEX. TAX CODE ANN. §§ 11.02, 21.09, 22.06, 23.11, 25.14 (Vernon 1982) (amending TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960)). Section 11.02 of the Property Tax Code provides that banks may be listed as agent for the stockholders for purposes of paying the tax. See *id.* § 11.02. Under the old article 7166 unpaid taxes created a lien upon the shares and a bank was prohibited from either paying any dividend to a shareholder in default or transferring on its books any share whose owner was in default. See Act of March 31, 1885 Tex. Gen. Laws, ch. 111, § 2a, at 106, 9 H. GAMMEL, LAWS OF TEXAS 726 (1898), repealed by, Act of June 13, 1979, 1979 Tex. Gen. Laws, ch. 841, § 6(a)(1), at 2329. Although article 7166 made no reference to payment of the tax by banks as agent for shareholders such payment was a common means of protecting the market attractiveness and transferability of the shares of stock. See *Ad Valorem Taxation of Bank Stock and the Federal Security Exemption Problem*, in TEX. BAR ASS'N, CORP. BANKING & BUS. LAW SEC. BULL. 8-10 (Oct. 1982). Although the Texas share tax is assessed against shareholders, banks are given no statutory right to be reimbursed where the bank pays the tax as agent for the shareholder. See TEX. TAX CODE ANN. §§ 11.02, 21.09, 22.06, 23.11, 25.14 (Vernon 1982) (amending TEX. REV. CIV. STAT. ANN. art. 7166 (Vernon 1960)) (statutes do not make reference to right of reimbursement); cf. *Society for Sav. v. Bowers*, 349 U.S. 143, 151 (1955) (bank's right to reimbursement considered to determine whether tax was against share or property of bank).

58. See TEX. TAX CODE ANN. § 23.11 (Vernon 1982). Shares are taxed for the difference between their actual cash value and the proportionate amount per share at which the bank's real estate is assessed. See *City of Abilene v. Meek*, 311 S.W.2d 654, 657 (Tex. Civ. App.—Eastland 1958, writ ref'd); TEX. ATT'Y GEN. OP. NOS. WW-439 (1958), O-2406 (1940). The actual cash value of the stock is its fair market value. See TEX. ATT'Y GEN. OP. NO. O-

is based upon their book value which is determined by adding the bank's capital accounts, that is the capital stock, capital surplus, and undivided profits.⁵⁹ Although intangible property is generally exempted from taxa-

3563 (1941). The deduction of the value of a bank's real estate required by section 23.11 of the Property Tax Code in assessing share taxes does not exempt such real estate from taxation, but rather requires it to be rendered by the bank for taxation separately. *See Bank of Texas v. Childs*, 615 S.W.2d 810, 823 (Tex. Civ. App.—Dallas 1981), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). Real estate is, therefore, deducted to protect it from double taxation. *See Engelke v. Schlenker*, 75 Tex. 559, 561, 12 S.W. 999, 1000 (1890); *Rosenburg v. Weekes*, 67 Tex. 578, 583-84, 4 S.W. 899, 900 (1887).

59. *See City of Abilene v. Meek*, 311 S.W.2d 654, 657 (Tex. Civ. App.—Eastland 1958, writ ref'd) (statute stating shares taxed for difference between actual cash value and proportionate amount per share at which real estate assessed is capable of one construction); *City of Marshall v. State Bank of Marshall*, 127 S.W. 1083, 1084 (Tex. Civ. App.—1910, writ ref'd) (tax on stock, surplus, and undivided profits valid if against shares but not against bank); TEX. ATT'Y GEN. OP. NO. V-315 (1947) (capital, surplus, and undivided profits of bank not taxable but shares taxable on such basis); STATE PROPERTY TAX BOARD, GENERAL APPRAISAL MANUAL FI-1, FI-3 to FI-5 (1983). As used above the term "capital stock" refers to the total amount received from the issuance of the shares of stock. *See West v. City of Newport News*, 51 S.E. 206, 208 (Va. 1905). "Surplus" refers to an "excess in the aggregate value of assets of a corporation over the sum of its liabilities including capital stock" which "is treated by the corporation as permanent capital." *Willcuts v. Milton Dairy Co.*, 275 U.S. 215, 218 (1927). "The term 'undivided profits' designates such part of the excess as consists of profits neither distributed as dividends nor carried to the surplus account." *Id.* at 218. It should be understood that where the market value of shares may be determined from either recent sales of the stock or valuations made for gift, estate, or inheritance tax purposes, such method of valuation is to be used. *See STATE PROPERTY TAX BOARD, GENERAL APPRAISAL MANUAL FI-1, FI-2 to FI-3, FI-5 (1983)*. Under the market value method, assessment of shares would be made as follows:

Shares outstanding	50,000
Market value per share	x \$200
	\$10,000,000
Assessment ratio	x 60%
	\$ 6,000,000
Less assessed value of real estate	-1,200,000
Stockholder's assessment	\$ 4,800,000

Id. at FI-7. Where, however, the market value cannot be determined because of lack of trading, the "book value" method may be used in the assessment. *See id.* at FI-3. The book value of the shares is achieved by first summing the amounts appearing on the bank's December 31 call statement listed under capital, surplus, and undivided profits (bank's "capital accounts") and adding to that figure the bank's taxable reserves (i.e., reserves for contingencies). *See id.* at FI-3. The total capital is then multiplied by the jurisdiction's assessment ratio. *See id.* at FI-3. Finally, the assessed value of the bank's real estate (carried under the heading bank premises, furniture, and fixtures) is deducted to prevent double taxation. *See id.* at FI-3. For example the following call statement would be prepared:

**THE THIRD NATIONAL BANK
OF BLANK, TEXAS**

In the State of Texas at the close of business on December 31, 19____. Published in response to a call made by the comptroller of the currency, under Title 12, United States Code, Section 161.

ASSETS		LIABILITIES	
Cash & due from banks	\$10,000,000	Demand deposits	\$22,000,000
U. S. Treasury & Government	1,000,000	Time and savings deposits	12,000,000
Securities	500,000	Deposits of U. S. Government	200,000
Obligations of States and political subdivisions	1,000,000	Deposits of States and political subdivisions	1,000,000
Loans	30,000,000	Deposits of commercial banks	1,000,000
Bank premises, furniture and fixtures	2,000,000	Certified and officers' checks	200,000
Other Assets	<u>500,000</u>	Other liabilities	<u>600,000</u>
TOTAL ASSETS	<u><u>\$45,000,000</u></u>	TOTAL LIABILITIES	<u><u>\$37,000,000</u></u>

RESERVES

Reserve for contingencies	\$ 1,000,000
------------------------------	--------------

CAPITAL ACCOUNTS

Common Stock-total par value (50,000 shares)	\$ 3,000,000
Surplus	2,000,000
Undivided profits	<u>2,000,000</u>

TOTAL CAPITAL ACCOUNTS	\$ 7,000,000
-----------------------------------	---------------------

TOTAL LIABILITIES RESERVES AND CAPITAL ACCOUNTS	<u><u>\$45,000,000</u></u>
--	-----------------------------------

tion by section 11.02 of the Property Tax Code, an exception is made for stock in banking corporations.⁶⁰

IV. RESOLVING THE CONFLICT

A. Law Prior to 1959 Amendment

Following its decision in *Van Allen*, the Supreme Court examined a succession of cases to determine whether deduction had to be made for government obligations in the computation of state bank share taxes.⁶¹

Under the "book value" method shares would be assessed as follows:

Capital Accounts	
Common Stock	\$3,000,000
Surplus	2,000,000
Undivided profits	<u>2,000,000</u>
	\$7,000,000
Reserve for contingencies	<u>1,000,000</u>
	\$8,000,000
Total capital	\$8,000,000
Assessment ratio	x 60%
	<u>\$4,800,000</u>
Less assessed value of real estate	<u>-1,200,000</u>
Shareholders assessment	\$3,600,000

Id. at FI-6, FI-8. Where the book value of stock does not equal the market value of stock, the assessor may adjust the book value accordingly. *See id.* at FI-8. Should government obligations be required to be deducted in the assessment, such holdings would be deducted along with the bank's real estate yielding a final assessment of \$2,600,000.

60. *See* TEX. TAX CODE ANN. § 11.02 (Vernon 1982). The Act of May 31, 1979, 1979 Texas General Laws, chapter 302, article 3, section 1, at 686 (enacting article 7150.6), was repealed by the Act of June 13, 1979, 1979 Texas General Laws, chapter 841, section 6(f)(1), at 2330-31 (enacting the new Tax Code), and recodified at section 11.02 (1979 Texas General Laws, chapter 841, section 1, at 2233-34). Statutes such as article 7150.6 (repealed) and current section 11.02, allowing bank stock to be taxed yet exempting other intangible property, have been challenged on equal protection grounds. *See* *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181, 185 (1933) (legislature did not exceed power to make reasonable classification by providing exemption or different tax basis for property and shares of building and loan associations, mortgage companies, etc.).

61. *See, e.g.,* *Society for Sav. v. Bowers*, 349 U.S. 143, 153 (1955) (tax against mutual savings bank measured by amount of capital, surplus or reserve, and undivided profits without deduction of government obligations and without right of reimbursement by depositors held void as tax on federal obligations); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 117 (1923) (tax considered to be against shares rather than bank assets and did not require deduction of government obligations); *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 114-15 (1902) (tax against shares not against property of bank with emphasis on separate

Through its decisions in these cases, the Court delineated the factors which rendered inclusion of government securities in the assessment of the taxes to be either valid or invalid.⁶² According to the Court, the propriety of the inclusion depended largely upon the type of property interest actually subjected to the tax.⁶³ This distinction between the property interest of a bank in owning its assets and the property interest of a shareholder in respect to that banking corporation was well stated by the *Van Allen* Court.⁶⁴ From *Van Allen* until the 1959 amendment to 31 U.S.C. section 742,⁶⁵ the rule could be easily stated. If the tax was im-

property interests).

62. See *Society for Sav. v. Bowers*, 349 U.S. 143, 151-52 (1955) (bank's right of reimbursement by shareholders vital to show tax against shares instead of property); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 111-13 (1923) (emphasizing difference in property interests of bank and of shareholders stated in *Van Allen*).

63. See *Society for Sav. v. Bowers*, 349 U.S. 143, 151 (1955). In *Bowers*, the Court noted that the true nature of the tax must be determined regardless of the characterization given to it by state courts. See *id.* at 151. In an earlier decision the Supreme Court stated that "where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). The mere disguise of a tax will not preclude the Court from examining its propriety in light of its true nature. See *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 321 (1930). In *Gehner*, the Court stated that "[n]either ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States." *Id.* at 321.

64. See *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 583-84 (1865). In *Van Allen* the Court noted that a tax on shares is not the equivalent of a tax on a bank's capital. Legal ownership of all real and personal property of the bank is in the corporation. See *id.* at 584. As owner of the property the corporation is free to deal with the property "as absolutely as a private individual can deal with his own." *Id.* at 584. The bank is in such dealings, however, subject to the power restraints of its charter. See *id.* at 583-84. A tax against shares of a bank reaches a different property interest. A shareholder's interest entitles him to participate in the net profits of the bank earned through the investment of its capital. Such benefits are received by the shareholder in proportion to the number of shares owned—ownership of the shares being comparable to holdings of any other properties by that individual. See *id.* at 584. It should be noted that where a tax is upon the shares as personal property of the stockholder, mere payment of the tax by the bank as agent for the stockholder does not alter the nature of the tax but constitutes an effort by the bank to protect the attractiveness and transferability of the shares of stock. See *Ad Valorem Taxation of Bank Stock and the Federal Security Exemption Problem*, in *TEX. BAR ASS'N, CORP. BANKING & BUS. LAW SEC. BULL.* 8-10 (Oct. 1982).

65. Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622. Prior to the 1959 amendment, section 742 consisted of the following language: "§ 742. Exemption from Taxation. Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." 31 U.S.C. § 742 (1958), amended by 31 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (amendment added second

posed upon a corporation with respect to either its property or capital stock, obligations of the federal government had to be deducted in assessing the value of such property.⁶⁶ Conversely, if the tax was levied against the corporation's shares owned by stockholders, those government obligations could be included in assessing the shares' value.⁶⁷ Thus in both *Van Allen v. The Assessors*⁶⁸ and *Cleveland Trust Co. v. Lander*⁶⁹ the Court held that even though a tax was imposed upon corporate shares whose value was measured by the corporation's net assets⁷⁰ which included federal obligations, the tax was not construed as upon the assets of the corporation.⁷¹ In other cases, however, the Supreme Court has, in considering other state statutes, required the deduction of government obligations from the bank's assets in valuing the shares for taxation purposes.⁷² In these cases deduction of government obligations was required because the Court reasoned that either: (1) the state statute discriminated against federal obligations,⁷³ or (2) the tax was actually a tax on the bank's assets

sentence to section 742).

66. See *Society for Sav. v. Bowers*, 349 U.S. 143, 146 (1955); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 106-07 (1923); *Home Sav. Bank v. Des Moines*, 205 U.S. 503, 510 (1907); *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 114-15 (1902); *Palmer v. McMahon*, 133 U.S. 660, 666-67 (1890); *Mercantile Bank v. New York*, 121 U.S. 138, 148 (1887); *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 581 (1865); *Bank Tax Case*, 69 U.S. (2 Wall.) 200, 208-09 (1864).

67. See *Society for Sav. v. Bowers*, 349 U.S. 143, 147 (1955); *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 117 (1923); *Home Sav. Bank v. Des Moines*, 205 U.S. 503, 510 (1907); *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 114 (1902); *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 588 (1865). Further, a state may, in levying a tax against shareholders, require its payment by the corporation as collecting agent. See *Corry v. Baltimore*, 196 U.S. 466, 472 (1905).

68. 70 U.S. (3 Wall.) 573 (1865).

69. 184 U.S. 111 (1902).

70. See *Commonwealth v. Union Trust Co.*, 27 A.2d 15, 17 (Pa. 1942) (net assets arrived at by subtracting liabilities from gross assets).

71. See *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 114-15 (1902) (emphasizing "separate individuality" of trust company and shareholders); *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 584 (1865) (tax on stock is not tax on capital of bank because of separate property interests); see also *Palmer v. McMahon*, 133 U.S. 660, 667 (1890) (shares may be taxed to owners at actual value without regard to investment of capital (assets) in government securities); *New York v. Commissioner of Taxes*, 71 U.S. (4 Wall.) 244, 255-56 (1866) (follows *Van Allen* rule without further consideration). But see *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 589-93 (1865) (Chase, C.J., dissenting) (tax upon shares is actual though indirect tax on bonds which frustrates purpose of exemption).

72. See *Society for Sav. v. Bowers*, 349 U.S. 143, 154 (1955).

73. See *Schuykill Trust Co. v. Pennsylvania*, 296 U.S. 113, 120 (1935) (statute authorizing tax on shares of trust company which excluded value of securities already taxed or exempted from tax discriminated against government securities); cf. *Werner Mach. Co. v. Director of Div. of Taxation*, 350 U.S. 492, 493-94 (1956) (corporate franchise tax measured by capital stock, capital surplus, and undivided profits did not discriminate against federal

disguised as a tax on the shareholders' interests.⁷⁴

Further analysis of the Court's opinions prior to the 1959 amendment indicates that what the Court prohibited was a tax *upon* the federal obligations.⁷⁵ Where the tax was assessed against shares whose value was measured by corporate assets including government obligations, the tax was not deemed *upon* the obligations despite the possibility of indirect effects.⁷⁶ It was this indirect effect which generated the dissent in *Van Allen*.⁷⁷ Even before the 1959 amendment, however, it was well established that a corporation could not be taxed on its holdings in federal securities as part of its property.⁷⁸ Such property was exempt to the corporation just as to an individual.⁷⁹

The holdings in the previously mentioned cases, although presenting

obligations since tax remained same when composition of assets varied). *But cf.* TEX. TAX CODE ANN. §§ 21.09, 23.11 (Vernon 1982). Unlike the New Jersey tax in *Werner*, the Texas bank shares tax does not remain constant as the character of corporate assets are varied, since any real estate owned by the bank is deducted in computing the tax. *See id.*

74. *See* *Society for Sav. v. Bowers*, 349 U.S. 143, 154 (1955) (held tax to be against bank; tax was against depositors in name only); *Home Sav. Bank v. Des Moines*, 205 U.S. 503, 511 (1906) (tax paid by banks for own debt not as agent for stockholders).

75. *See, e.g.,* *Society for Sav. v. Bowers*, 349 U.S. 143, 148, 154 (1955) (tax against mutual savings bank and savings and loan association actually one upon banks, thus void for not deducting obligations of government); *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 116 (1935) (construing Pennsylvania statute to impose tax on shares rather than upon securities owned by corporation which require deduction); *Home Sav. Bank v. Des Moines*, 205 U.S. 503, 510 (1907) (tax upon corporation's property requires exemption of government securities); *see also* *Owensboro Nat'l Bank v. Owensboro*, 173 U.S. 664, 678 (1899) (commenting had *Van Allen* Court considered shares to be equivalent of securities invested in by bank, tax would have been held invalid).

76. *See* *Home Sav. Bank v. Des Moines*, 205 U.S. 503, 519 (1907). The Court called attention to its strict observance of the distinctions set forth in the *Van Allen* rule. Although the Court has approved taxes which may indirectly affect United States securities, such approval will not be given absent a finding that the tax is levied against a property interest which is "entirely distinct and independent from those securities." *Id.* at 519.

77. *See* *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 588-603 (1865) (Chase, C.J., dissenting). The dissenting opinion expresses the view that the tax against bank shares, although indirect, creates an actual burden upon government bonds. *See id.* at 589 (Chase, C.J., dissenting). Accordingly, the dissenters reason that such a tax is a tax on the power to borrow money on the credit of the United States and as such impairs the value of the obligations. *See id.* at 591-94 (Chase, C.J., dissenting).

78. *See* *Society for Sav. v. Bowers*, 349 U.S. 143, 146 (1955) (tax based upon inclusion of federal obligations is invalid if directed against bank or its property); *Provident Inst. v. Massachusetts*, 73 U.S. (6 Wall.) 611, 630 (1867) (government securities exempt from tax levied directly on holder or upon capital stock); *People v. The Commissioner*, 71 U.S. (4 Wall.) 244, 247 (1866) (capital of bank cannot be taxed upon any measure or computation which includes United States securities).

79. *See* *Provident Inst. v. Massachusetts*, 73 U.S. (6 Wall.) 611, 629 (1867) (immunity from taxation exempts securities from taxes levied directly on holder and on capital stock of bank investing in securities).

two distinct rules, are based upon factual differences which produce virtually the same result.⁸⁰ This observation is supported by the Court's own language in *Society for Savings v. Bowers*:

The result is that when, as is usually the case, the shareholder tax is measured solely by corporate asset values, such a tax is difficult to distinguish from a tax imposed upon the corporation itself, so far as the practical impact of the two types of taxes upon corporate-owned federal obligations are concerned.⁸¹

The *Bowers* Court noted, however, that this exception to the general immunity of government obligations was one "firmly embedded in the law."⁸²

B. *The 1959 Amendment and Beyond*

In 1959 Congress amended 31 U.S.C., section 742, the statute exempting government obligations from taxation, by adding the following sentence:

80. *Compare* Home Sav. Bank v. Des Moines, 205 U.S. 503, 510-11, 521 (1907) (deduction of government obligations must be made where tax is upon property of corporation; tax upon shares must be more than in name only to be upheld without deduction) *with* Cleveland Trust Co. v. Lander, 184 U.S. 111, 114-15 (1902) (tax upon shares although determined by value of bank's property and capital is upon shareholder's interest). A tax upon a corporation measured by the value of its shares is the effectual equivalent of a tax upon shareholders in respect to their shares. The two taxes are equivalent in the respect that the burden of a tax levied against the corporation although initially paid by the corporation will eventually fall upon the shareholders in proportion to the number of shares owned. *See* Home Sav. Bank v. Des Moines, 205 U.S. 503, 519 (1906). The Court noted in its decision in the *Home Savings Bank* case, however, that the question was one of power rather than economics. *See id.* at 519. Although the two taxes produce similar economic effects they are not equivalent in law; the state has the power to levy one but not the other. *See id.* at 519; *see also* Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 677 (1899). In *Owensboro*, Mr. Justice White, in delivering the Court's opinion stated:

To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock in the names of the stockholders.

Id. at 677; *see also* Missouri *ex rel.* Missouri Ins. Co. v. Gehner, 281 U.S. 313, 321 (1930) (ingenuity of statutory form may not deprive individual of exemption).

81. *Society for Sav. v. Bowers*, 349 U.S. 143, 148 (1955).

82. *Id.* at 148.

This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be *considered, directly or indirectly, in the computation of the tax*, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.⁸³

In amending section 742, Congress did not alter the language that existed prior to the amendment.⁸⁴ Instead, it added a further provision which arguably was intended to expand the protection already given.⁸⁵ Because all of the Supreme Court decisions involving the inclusions of United States obligations in bank share taxes were decided prior to the amendment, they provide only limited help in post-amendment analysis. Such decisions, therefore, must be examined in the context of their issuance—preamendment law.

Since the passage of the 1959 amendment,⁸⁶ two opposing lines of decisions have developed in state court jurisdictions. Both Texas and Georgia have upheld bank share taxes which do not deduct government obligations from the bank's net assets.⁸⁷ The Supreme Court of Montana, how-

83. Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 621 (emphasis added). The 1959 amendment to section 742 forms the second sentence of that section. The amendment was part of H.R. 9035 which, as stated in the Senate report on the bill, "makes a number of changes in the laws relating to savings bond interest rates and other aspects of debt management." S. REP. NO. 909, 86th Cong., 1st Sess. 1, reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2769, 2769. For reference to the 1959 amendment to section 742 and other accompanying provisions, see Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 621.

84. Compare Act of Feb. 25, 1862, ch. 33, § 2, 12 Stat. 345, 346 (original language of act) with Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 621 (no alteration of previous language).

85. See, e.g., *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 926 (Ga. 1982) (argument by bank that amendment extended exemption to require deduction of obligations from share tax rejected by court); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 913 (Mont. 1978) (court thought Congress intended to prevent state interference with exemption statute by enacting "all inclusive prohibition" against taxation of government obligations); *Bank of Texas v. Childs*, 615 S.W.2d 810, 817 (Tex. Civ. App.—Dallas 1981) (bank and shareholders unsuccessful in argument that amendment extended exemption to apply to bank share taxes), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982); see also Brief For Petitioners at 12, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). But see *Ad Valorem Taxation of Bank Stock and the Federal Security Exemption Problem*, in TEX. BAR ASS'N, CORP. BANKING & BUS. LAW SEC. BULL. 8-12 (Oct. 1982) (Congress intended to exempt interest of government bonds not expand exemption on obligations themselves).

86. See Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 621, 622.

87. See *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 927 (Ga. 1982); *Bank of Texas v. Childs*, 615 S.W.2d 810, 822 (Tex. Civ. App.—Dallas 1981), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

ever, has held that such deduction must be made under the present section 742 in order for a share tax to be constitutional and valid under that section.⁸⁸

1. *Montana*

In two recent cases, *First Security Bank v. Montana Department of Revenue*⁸⁹ and *Montana Bankers Association v. Montana Department of Revenue*,⁹⁰ the Supreme Court of Montana has considered section 742 to require the deduction of governmental obligations from net assets in determining bank share taxes.⁹¹ In the *Montana Bankers Association* case, the Montana court first noted the line of Supreme Court cases issued prior to the 1959 amendment.⁹² The Montana court felt, however, that the language of that subsequent amendment "speaks for itself," it being "clear, unambiguous, direct and certain."⁹³ Accordingly, the Montana court read the post-amendment section 742 to prohibit not only a tax "upon" government obligations, but also a tax which "considers" the obligations in its computation.⁹⁴ In both of the Montana cases the court found that the bank share taxes did "consider" obligations of the United

88. See *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913, 914 (Mont. 1978); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 913 (Mont. 1978).

89. 580 P.2d 913 (Mont. 1978).

90. 580 P.2d 909 (Mont. 1978).

91. See *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913, 914 (1978); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 913 (Mont. 1978).

92. See *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 911-12 (Mont. 1978) (noting consistent holding by Court in cases of *Van Allen* through *Bowers* were rendered before 1959 amendment).

93. *Id.* at 912.

94. See *id.* at 913. In reaching this conclusion the Montana Supreme Court rejected the argument advanced by the Department of Revenue that because section 742 is an exemption statute it must be strictly construed against the taxpayer. See *id.* at 912. The Montana court supported its holding with legislative history of the 1959 amendment. See *id.* at 912. For reference to the legislative history of the amendment see H.R. REP. No. 1148, 86th Cong., 1st Sess. 8 (1959) and S. REP. No. 909, 86th Cong., 1st Sess. 8 (1959), reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2769, 2773. Unlike the Montana court, the Texas court of appeals in *Bank of Texas*, in its original opinion, stated that it would not look to legislative history having found the statute's language clear and unambiguous. See *Bank of Texas v. Childs*, 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981) (original opinion withdrawn), cert. granted sub nom. *American Bank & Trust Co. v. Dallas* — U.S. —, 103 S.Ct. 291, 74 L. Ed. 2d 276 (1982). The court's original opinion may be found in *Petition For Writ of Certiorari*, at 44a, 50a, *American Bank & Trust Co. v. Dallas County*, cert. granted, — U.S. —, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*); see also *Bank of Texas v. Childs*, No. 20660 (Tex. Civ. App.—Dallas 1980) (available March 1, 1983, on LEXIS, States Library, Tex. file).

States in its computations and, therefore, violated section 742 by failing to provide a deduction for those obligations.⁹⁵

2. Texas

The most recent case advancing the viewpoint of Texas courts on the bank share tax-government obligation question is *Bank of Texas v. Childs*.⁹⁶ In this case, a state banking corporation and its shareholders brought suit against Dallas County, its tax assessor-collector, and the Board of Equalization seeking mandamus, declaratory, and injunctive relief from the imposition of a bank share tax which failed to deduct government obligations in determining the value of the bank's net assets.⁹⁷

In *Bank of Texas*, the court's original opinion was withdrawn and replaced with a second opinion in which the court reversed its earlier views.⁹⁸ In its first opinion, the court of appeals followed the decisions of the Montana Supreme Court,⁹⁹ holding that the county's tax plan, adopted under the authority of Texas article 7166¹⁰⁰ was illegal due to its failure to properly assess the taxable value of the shares.¹⁰¹ In adopting the Montana court's logic, the Texas court of appeals found the clarity and unambiguity of the language used by Congress in the 1959 amendment to foreclose any need to resort to legislative history for further support of its holding.¹⁰² These views, however, were later abandoned when the court issued a second opinion upon motions for rehearing.¹⁰³ Among

95. See *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913, 914 (Mont. 1978); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912-13 (Mont. 1978).

96. 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981), cert. granted sub nom. *American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

97. See *id.* at 810.

98. See *id.* at 823 (original opinion withdrawn).

99. See *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913, 914 (Mont. 1978); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 913 (Mont. 1978).

100. See Act of March 31, 1885 Tex. Gen. Laws, ch. 111, § 2a, at 106, 9 H. GAMMEL, LAWS OF TEXAS 726 (1898) (article 7166), repealed by 1979 Tex. Gen. Laws, ch. 841, § 6(a)(1), at 2329.

101. See *Bank of Texas v. Childs*, 615 S.W.2d 810, 822 (Tex. Civ. App.—Dallas 1981) (original opinion withdrawn), cert. granted sub nom. *American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). The court's original opinion was never published but may be found in *Petition For Writ Of Certiorari* at 45a, 50a, *American Bank & Trust Co. v. Dallas County*, cert. granted, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*).

102. See *Petition for Writ of Certiorari*, at 49a, *American Bank & Trust Co. v. Dallas County*, cert. granted, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*).

103. See *Bank of Texas v. Childs*, 615 S.W.2d 810, 812 (Tex. Civ. App.—Dallas 1981), cert. granted sub nom. *American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). The Dallas Court of Appeals issued its second opinion

other things, this later opinion held that: (1) the local tax plan was legal despite its failure to deduct government securities from bank assets,¹⁰⁴ and (2) did not discriminate against federal securities.¹⁰⁵ On appeal, the Texas Supreme Court denied plaintiffs' application for writ of error. Subsequently, the court of appeals stayed its mandate pending appeal by plaintiffs to the United States Supreme Court.¹⁰⁶ Certiorari was granted by the Court to determine whether the Texas bank shares tax violated section 742 by valuing shares without deducting tax-exempt government obligations owned by the bank.¹⁰⁷

While the court of appeals initially followed the Montana Supreme Court,¹⁰⁸ it was subsequently persuaded by further examination of section 742 that the Montana decision was unsound.¹⁰⁹ The basis for such a conclusion was the Montana court's inattention to the introductory phrase of section 742: "Except as otherwise provided by law."¹¹⁰ In *Bank of Texas*,

based in part on its finding that reliance upon the Montana court's decision was faulty due to that court's failure to consider the introductory phrase of 31 U.S.C., section 742, which read: "[e]xcept as otherwise provided by law" See *id.* at 817.

104. See *id.* at 822. Following the *Van Allen* rule the tax was against the shares owned as personal property by shareholders and thus did not require deduction of government securities. See *id.* at 817.

105. See *id.* at 823. A reasonable classification was found for taxing banks on their shares while not taxing other corporations in a similar fashion. See *id.* at 815-16.

106. See *Bank of Texas v. Childs*, 634 S.W.2d 2, 3 (Tex. Ct. App.—Dallas 1982, no writ) (plaintiffs entitled to injunctive relief under TEX. REV. CIV. STAT. ANN. art. 1823 (Vernon 1964) which empowers courts of appeals to issue writs "necessary to enforce the jurisdiction of said court").

107. See *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). A second question was presented to the Supreme Court in the petition for writ of certiorari. This question was "whether a state's tax on bank shares computed on a bank's net assets with a deduction for the bank's real estate but without any deduction for its tax-exempt United States obligations, discriminates against those obligations in violation of the Borrowing Clause of the Constitution." Petition for Writ of Certiorari at i, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*). Certiorari was not granted for determination of the second question. See *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 276 (1982).

108. See Petition for Writ of Certiorari at 44a, 49a-50a, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). For the Montana court's decision followed by the court of appeals, see *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912 (Mont. 1978).

109. See *Bank of Texas v. Childs*, 615 S.W.2d 810, 817 (Tex. Civ. App.—Dallas 1981), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

110. See *id.* at 817. The departure by the court of appeals from the Montana holding was further based upon the Montana court's failure to recognize section 548 of title 12 as an exception under that phrase. See *id.* at 817. The Texas court called attention to a congressional intent to broaden rather than restrict its consent given to the taxation of national

this phrase was said to resolve any conflict between the exemption of United States obligations and the taxation of banking corporation shares.¹¹¹ The court of appeals considered the consent to taxation of shares in national and state banks given by section 548 of title 12 an exception "otherwise provided by law" within the meaning of section 742 of title 31.¹¹²

This reasoning by the court of appeals, however, is erroneous.¹¹³ Although the phrase "[e]xcept as otherwise provided by law," is included in the language at section 742, such language was never part of the statutory version passed by Congress.¹¹⁴ The inclusion of this phrase rests solely upon an inadvertent act by the codifiers.¹¹⁵ Accordingly, the holding in *Bank of Texas* loses credence because where the Statutes at Large are inconsistent with the United States Code, the Statutes at Large must prevail.¹¹⁶ Unless the Code has been enacted as positive law, it serves only as

banks. See *id.* at 817 n.5; see also S. REP. NO. 530, 91st Cong., 1st Sess. 1, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 1594.

111. See *Bank of Texas v. Childs*, 615 S.W.2d 810, 819 (Tex. Civ. App.—Dallas 1981), cert. granted sub nom. *American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

112. See *id.* at 819. In considering this issue the Supreme Court of Georgia has concluded that title 12, section 548, and title 31, section 742, are in harmony with or without inclusion of the introductory phrase. See *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 926 (Ga. 1982); see also *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 115 (1902) (finding no want of harmony between sections 548 and 742).

113. See *Ad Valorem Taxation of Bank Stock and the Federal Security Exemption Problem*, in TEX. BAR ASS'N, CORP, BANKING & BUS. LAW SEC. BULL. 8-11 (Oct. 1982); Brief For Petitioners at 21, *American Bank & Trust Co. v. Dallas County*, cert. granted, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*); Brief For The United States As Amicus Curiae In Support Of Petitioners at 18-19, *American Bank & Trust Co. v. Dallas County*, cert. granted, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*).

114. Compare Act of Feb. 25, 1862, ch. 33, 12 Stat. 345, 346 (first sentence of 12 U.S.C. § 742) amended by Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622 (added second sentence of 12 U.S.C. § 742) with 31 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (included language "[e]xcept as otherwise provided by law") repealed by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 ("Except as otherwise provided by law" omitted). See also 31 U.S.C.S. § 742 (Lawyers' Coop. 1979) (printed without introductory language).

115. See *Ad Valorem Taxation of Bank Stock and the Federal Security Exemption Problem*, in TEX. BAR ASS'N, CORP, BANKING & BUS. LAW SEC. BULL. 8-11 (Oct. 1982). The phrase was inserted by the revisors of the 1926 version of the unenacted 12 U.S.C. § 742. See *id.*; see also 12 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (language pertinent to discussion unchanged from 1926).

116. See, e.g., *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (as prima facie evidence of laws, Code cannot prevail over Statutes at Large when inconsistent); *Nashville*

prima facie evidence of the law.¹¹⁷ Further support for the argument that the introductory phrase was never intended to be a part of title 31 is provided by the fact that Congress deleted the phrase when it enacted and recodified title 31 in 1982.¹¹⁸ For these reasons, title 12, section 548, and title 31, section 742, when read together, do not provide authority for concluding, as did the *Bank of Texas* court, that Congress consented to the taxation of bank shares whose value is in part determined by a bank's holdings in government obligations.¹¹⁹

A closer examination of the two sections indicates that following the 1959 amendment Congress expanded its protection to government obligations and thus rendered inclusion of government securities in a bank shares tax invalid.¹²⁰ This argument centers upon Congress' use of the word "considered" in the amendment.¹²¹ While before 1959, only taxes "upon" government securities were prohibited,¹²² after that date a tax was also invalid if it "considered" those securities.¹²³ Determination of what effect Congress intended the amendment to have should begin with the amendment's language.¹²⁴ And "unless otherwise defined, words [of a

Milk Co. v. Carnation Co., 355 U.S. 373, 379-80 (1958) (in case of inconsistency, underlying statute must prevail over Code); *Stephan v. United States*, 319 U.S. 423, 426 (1943) ("the Code cannot prevail over the Statutes at Large when the two are inconsistent").

117. See 1 U.S.C. § 204(a) (1976) (declaring Code to be prima facie evidence of laws of United States). Where a title of the Code has been enacted by Congress into positive law, the text becomes legal evidence of the laws contained therein. See *id.*; see also *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

118. Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 ("Except as otherwise provided by law" omitted). This section has been enacted and recodified in 31 U.S.C.A. § 3124 (West Supp. 1982). See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124).

119. Cf. Brief For Petitioners at 23, *American Bank & Trust Co. v. Dallas County*, cert. granted, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1976) (originally styled *Bank of Texas v. Childs*).

120. See *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 911 (Mont. 1978).

121. See Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622.

122. See, e.g., *Society for Sav. v. Bowers*, 349 U.S. 143, 154 (1955) (tax invalid because actually on banks themselves); *Home Sav. Bank v. Des Moines*, 205 U.S. 503, 510 (1907) (deduction must be made if tax upon corporation's property); *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 583 (1886) (tax valid because not on property but rather on separate interest of shareholder).

123. See 31 U.S.C. § 742, recodified as amended by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (exemption extends to taxes which consider obligations in calculation).

124. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 56 (1979) (analysis starts with language of act); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (language is starting point for construction of statute); *TVA v. Hill*, 437 U.S. 153, 173 (1978) (ordinary meaning of statute's language cannot be ignored); see also Frankfurter, *Some Reflections On The*

statute] will be interpreted as taking their ordinary, contemporary, common meaning."¹²⁵ Since there was no special definition given by Congress¹²⁶ the amendment should be interpreted in light of the ordinary meaning of the word "considered"—"taken into account."¹²⁷ This ordinary meaning is the same as that which has been used by the Supreme Court and other courts in describing the computation of share taxes.¹²⁸ Furthermore, it is clear from the method of computation used to calculate Texas share taxes that government securities are "considered" within both the statutory and ordinary meaning of the word.¹²⁹

The chief argument against the contention that deduction must be made for government securities is not that they are not "considered" in the tax, but rather, that the 1959 amendment was not intended to expand the exemption.¹³⁰ The amendment of section 742 in 1959 was a part of

Reading Of Statutes, 47 COLUM. L. REV. 527, 528 (1947) ("Though we may not end with the words in construing a disputed statute, one certainly begins there.").

125. *Perrin v. United States*, 444 U.S. 37, 42 (1979) (statement noted as being fundamental canon of statutory construction); *see, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *Burns v. Alcalá*, 420 U.S. 575, 580-81 (1975) (ordinary meaning given to statute absent persuasive contrary authority); *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 465 (1968) (words of statute given ordinary meaning absent contrary persuasion).

126. *See* 31 U.S.C. § 742, *recodified as amended* by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124) (no special definition given in statute); S. REP. NO. 909, 86th Cong., 1st Sess. 8, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2769, 2773 (no special definition given in legislative history).

127. OXFORD ENGLISH DICTIONARY 859 (1971); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 484 (unabridged ed. 1969) ("taking into account"); FUNK & WAGNALL'S STANDARD DESK DICTIONARY 136 (1969) ("to take into account").

128. *See, e.g., Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 111 (1923) (capital, surplus, and undivided profits considered in valuation of shares); *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 913 (Mont. 1978) (failure to deduct government securities in assessing value of shares renders securities "considered" under meaning of statute); *Midland v. Midland Nat'l Bank*, 607 S.W.2d 303, 304 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (all assets on balance sheet "included and considered" in arriving at value of shares).

129. *See Engelke v. Schlenker*, 75 Tex. 559, 561, 12 S.W. 999, 1000 (1890) (citing *Rosenburg v. Weekes*) (method of valuation of shares would include in calculation holdings in government obligations); *Rosenburg v. Weekes*, 67 Tex. 578, 584, 4 S.W. 899, 900 (1887) (value of shares determined by value of bank's franchise, capital, and property of all kinds); *City of Abilene v. Meek*, 311 S.W.2d 654, 657 (Tex. Civ. App.—Eastland 1958, writ ref'd) (real estate subtracted from total value of shares); TEX. ATT'Y GEN. OP. NO. V-315 (1947) (shares taxed on basis of personal property of bank and capital, surplus, and undivided profits of bank and other personal property less the value of the bank's real estate).

130. *See Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 926 (Ga. 1982) (court rejected view that amendment was intended to overrule *Van Allen* and its progeny); *Bank of Texas v. Childs*, 615 S.W.2d 810, 821-22 (Tex. Civ. App.—Dallas

H.R. Bill 9035 which was designed to make government obligations more attractive to investors.¹³¹ This bill was drafted in response to a request by President Eisenhower for legislation to curb the downward trend of sales of government securities.¹³² Accordingly, the second sentence was added to section 742.¹³³

In the Senate report on the bill the following statements were made:

Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U.S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing "gross income" upon which taxable net income is determined. The bill (Sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require

1981) (legislative history shows amendment intended to exempt interest not change law as to share taxes), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982). In the appeal to the Supreme Court, respondents contend that the legislative history only clarifies section 742 so as to make interest on government obligations exempt. Because share taxes are unmentioned in the reports, it is argued that laws concerning share taxes were not meant to be altered. See Brief In Opposition For Respondents The City Of Dallas at 7-9, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*); Brief In Opposition For Respondents Dallas County at 16-21, *American Bank & Trust Co. v. Dallas County*, *cert. granted*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (originally styled *Bank of Texas v. Childs*). But see H.R. REP. No. 1148, 86th Cong., 1st Sess. 8 and S. REP. No. 909, 86th Cong., 1st Sess. 8, reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2769, 2773.

131. See S. REP. No. 909, 86th Cong., 1st Sess. 1, reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2769, 2769. The overall purpose of H.R. 9035 was to increase the marketability of federal securities. See *id.* at 2769. In order to achieve that purpose the bill made the following changes: (1) it increased interest rates on certain government obligations, (2) amended sections of the Internal Revenue Code to provide for the tax free exchanges of certain government obligations, (3) made it clear that both the principal and interest of United States obligations are exempt from taxes except as provided, (4) lessened restrictions on the issuance of obligations of the United States to government trust funds, and (5) relieved the liability to the U.S. government of agents who erroneously paid U.S. bonds. See *id.* at 2769.

132. See 105 CONG. REC. 10163-64 (1959) (request for legislation by President Eisenhower). The Senate report on the bill noted that sales of Series E and H savings bonds had declined ten percent during the first eight months of 1959. Redemptions for those eight months were thirteen percent above the previous year's rate and part of a worsening trend. See S. REP. No. 909, 86th Cong., 1st Sess. 3, reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2769, 2770-71. The Senate recognized the importance of keeping a large portion of the federal deficit in form of government bonds as a means to check inflation through the absorption of funds which would otherwise be competing for consumer goods in the marketplace. See *id.* at 2770.

133. See Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622.

either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, except nondiscriminatory franchise taxes (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes.¹³⁴

The more restrictive view of the amendment's intent is supported by the language in the heading preceding the explanation of the amendment: "CLARIFYING EXEMPTION OF U.S. OBLIGATIONS FROM STATE OR LOCAL TAXATION."¹³⁵ Did Congress mean to do more than make it clear that interest on federal obligations was exempt? Arguably, Congress did intend to do more than make it clear that interest on government obligations was exempt from taxation.¹³⁶ In the amendment both "the obligation" and "the interest thereon" were declared exempt when considered in the computation of any tax.¹³⁷ The exceptions to this broad protection were specifically provided as being nondiscriminatory franchise taxes, estate taxes, and inheritance taxes.¹³⁸ In addition, the rationale behind exceptions for these taxes can easily be seen because in all three instances the tax is upon an interest other than the obligation itself.¹³⁹

134. S. REP. No. 909, 86th Cong., 1st Sess. 8, reprinted at 1959 U.S. CODE CONG. & AD. NEWS 2769, 2773.

135. See *id.*

136. See *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912-13 (Mont. 1978) (language of statute and legislative history supported holding that Congress sought to enact "all inclusive" prohibition against any state tax which considers obligations in computation). It seems questionable that the entirety of the amendment's language was directed at the exemption of interest earnings. For years the Court had held that the exemption provided under 31 U.S.C. § 742 extended to the interest as well as the principal of United States obligations. See *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 671, 675-76 (1950) (recognizing exemption of interest on U.S. securities); cf. *Federal Prod. Corp. v. Norberg*, 429 A.2d 447, 448 (R.I. 1981) (proceeds from sale of government securities properly deducted by taxpayer from business corporation tax). In *Norberg*, a taxpayer was assessed a deficiency which resulted from the administrator's inclusion of the entire proceeds and interest derived from the sale of federal securities in his computation of the Business Corporation Tax. See *id.* at 448. The Supreme Court of Rhode Island concluded that this was an indirect tax on federal securities and, as such, invalid. See *id.* at 449; see also *Macallen Co. v. Massachusetts*, 279 U.S. 620, 629 (1929) ("what cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result") (quoting *Fairbank v. United States*, 181 U.S. 283, 294 (1901)).

137. See Act of Sept. 22, 1959, Pub. L. No. 86-346, tit. I, § 105(a), 73 Stat. 621, 622.

138. See *id.*

139. See *id.* The 1959 amendment excludes from its prohibition franchise taxes, estate taxes, and inheritance taxes, all three of which were previously recognized as taxes under which government obligations could be considered. Before the amendment the Supreme Court upheld corporate franchise taxes which included government securities in measuring the value of the corporation for purposes of the tax because such tax was not upon the property but upon the privilege of doing business. See, e.g., *Werner Mach. Co. v. Director of Taxation*, 350 U.S. 492, 494 (1956) (upholding tax because not imposed directly upon prop-

Therefore, it is important to note that while Congress provided exceptions for franchise, estate, and inheritance taxes, it provided no such exception for share taxes.¹⁴⁰ The argument that the amendment requires deduction of government securities is thus supported by the amendment's language and is consistent with the Act's overall design of increasing the marketability and investment attractiveness of government obligations.

V. CURRENT STATUS

The *Bank of Texas* case is still unsettled, and while the foregoing analysis leads this writer to conclude that government obligations may not be included in the assessment of a share tax, any prediction of the Supreme Court's ruling is conjectural.¹⁴¹ The recent case *Memphis Bank & Trust Co. v. Garner*¹⁴² may indicate, however, that the Supreme Court is inclined to give precedence to the exempt nature of United States securities.¹⁴³ Although the case admittedly involves a question of discrimination rather than of a share tax,¹⁴⁴ the Court called attention to the long established Congressional intent to prevent taxes which diminish the value or

erty of corporation); *Educational Films Corp. v. Ward*, 282 U.S. 379, 389 (1931) (tax upon franchise privilege proper although government obligations included); *Provident Inst. v. Massachusetts*, 73 U.S. (6 Wall.) 611, 631 (1867) (tax upon privileges conferred by charter, not upon property of corporation). *But cf. Macallen Co. v. Massachusetts*, 279 U.S. 620, 634 (1929) (evidencing some inconsistency in decisions); Comment, *Share Tax, Franchise Tax and Federal Bonds—The Schuylkill Trust Co. Case*, 84 PA. L. REV. 758, 764-66 (1936). Estate and inheritance taxes were upheld on the basis that such a tax is on the property's transfer rather than the property itself. *See Billings v. Illinois*, 188 U.S. 97, 104 (1903) (tax upon transfer of estate and derived from state's power to create and limit estates and impose conditions upon transfer); *Plummer v. Coler*, 178 U.S. 115, 130-31 (1900) (tax not upon property but upon right of disposition by will or descent); *United States v. Perkins*, 163 U.S. 625, 629-30 (1896) (inclusion of government obligations permissible because tax imposed upon legacy before reaching hands of legatee under will); *Cahn v. Calvert*, 159 Tex. 385, 390, 321 S.W.2d 869, 872 (1959) (tax upon privilege of succession rather than property).

140. *See* 31 U.S.C. § 742, *recodified as amended* by Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 945-46 (to be codified at 31 U.S.C. § 3124). Share taxes, like those taxes enumerated in the exception to section 742, had been held to be against a property interest apart from the securities themselves. *See Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573, 583-84 (1865). Nevertheless, Congress did not include share taxes as one of the exceptions to the exemption. *See id.*

141. *See Bank of Texas v. Childs*, 615 S.W.2d 810 (Tex. Civ. App.—Dallas 1981), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982) (arguments still unscheduled).

142. ___ U.S. ___, 103 S. Ct. 693, 74 L. Ed. 2d 562 (1983) (holding invalid Tennessee tax on net earnings of banks which includes as net earnings interest on U.S. obligations but not interest on state obligations).

143. *See id.* at ___, 103 S. Ct. at 695, 74 L. Ed. 2d at 566.

144. *See id.* at ___, 103 S. Ct. at 694, 74 L. Ed. 2d at 565 (Tennessee tax which exempts interest from state government obligations but not for United States obligations).

investment attractiveness of United States obligations.¹⁴⁵

The outcome of the present litigation will have consequences of economic and legal or academic importance.¹⁴⁶ While no two banks' capital accounts are the same in terms of composition, the great majority of banks are invested in United States obligations.¹⁴⁷ Therefore, a ruling by the Court requiring the deduction of the securities from bank assets for share tax purposes would certainly create added interest in those investment securities.¹⁴⁸ Although a decision requiring deduction of government obligations in the assessment of share taxes would produce declines in tax revenues especially for local school districts,¹⁴⁹ any resulting problem is easily remediable. It should be remembered that several exceptions were provided by Congress through its addition of the second sentence of section 742 in 1959.¹⁵⁰ Thus, the Texas Legislature could, by enacting a franchise tax applicable to banks, allow local taxing authorities to recoup potential losses in tax revenues resulting from the deduction of government obligations in share tax assessments.¹⁵¹

145. *See id.* at ___, 103 S. Ct. at 694, 74 L. Ed. 2d at 566 (quoting purpose of exemption stated in *Smith v. Davis*, 323 U.S. 111, 117 (1944)).

146. *See* Bryan Eagle, Jan. 22, 1981, at 1A, col. 1. In a report concerning the possible consequences of share tax litigation in the Bryan-College Station, Texas area, it was stated that a favorable ruling for the banks could mean a loss of approximately \$300,000 yearly in tax revenue for that area alone. *See id.* In 1979 school districts statewide collected approximately \$47 million in taxes on bank stockholdings or 2.29% of total school district taxes. *See id.* It must be remembered, however, that the share tax will not be abandoned altogether in the event of a ruling favorable to the banks; rather, the tax scheme will be required to provide deduction of government securities from the net asset figure used to assess the tax.

147. *See* TEXAS BANKING RED BOOK 948-87 (35th ed. Dallas 1982) (compilation of balance sheets of Texas bank holding companies). A table showing those institutions' holdings in government obligations appears at Appendix A of this comment.

148. *Cf.* TEX. TAX CODE ANN. § 23.11 (Vernon 1982) (real estate subtracted in determining value of shares). A deduction for United States securities would invariably increase their market attractiveness relative to other taxable investments.

149. *See* Bryan Eagle, Jan. 22, 1981, at 1A, col. 1 (school districts statewide collected \$47 million in 1979 taxes on bank stockholdings).

150. *See* Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 621. The 1959 amendment to this section prohibits the consideration of government obligations in the assessment of all taxes "except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." *Id.*

151. *See id.* (deduction of government obligations is not required of franchise taxes); *cf.* *Business Associations*, 66 VA. L. REV. 205, 212-13 (1980) (discussing similar measure taken by Virginia Legislature). In 1979 the Virginia Legislature repealed its banking corporation share tax substituting therefor a franchise tax sanctioned by section 742. *See* 1979 Va. Acts, ch. 693 (repealing VA. CODE §§ 58-465 to -485 (Cumm. Supp. 1979)). Originally, such repeal was conditioned upon a Supreme Court ruling requiring deduction of government obligations. *See* 1979 Va. Acts, ch. 693 (codified at VA. CODE § 58-485.20(3) (Cumm. Supp. 1979), repealed by VA. CODE §§ 58-485.01 to -485.018 (Cumm. Supp. 1982); *Business Associations*,

VI. CONCLUSION

The 1959 amendment to section 742 changed the law regarding the inclusion of government securities in the assessment of share taxes.¹⁵² Following the amendment, a tax is unlawful not only when it levies upon the exempt securities but also when it even considers them in assessing the tax.¹⁵³ The extended protection created through this change in language is consistent with the purpose of the Act of which the amendment was a part,¹⁵⁴ with the ordinary meaning of the word "consider,"¹⁵⁵ and with the original reason for exempting government obligations.¹⁵⁶ Accordingly, the holdings of the Montana Supreme Court are preferable to the holding in *Bank of Texas*.¹⁵⁷ Because of the Texas court of appeals's reliance upon the introductory phrase never included by Congress and a newfound consent said to be given by section 548, the holding in that case is questionable.¹⁵⁸ Whatever conclusion is to be reached by the Supreme Court in its

66 VA. L. REV. 205, 212-13 (1980). Because of an "emergency," however, the new tax was made effective from its date of passage irrespective of a ruling by the Court. See 1980 Va. Acts, ch. 578, cl. 4, amended by 1981 Va. Acts, ch. 432, cl. 2. It should be noted that the newly enacted Virginia franchise tax does require deduction of government obligations. See VA. CODE § 58-485.08(3) (Cumm. Supp. 1982).

152. See *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912 (Mont. 1978) (construing amendment to broaden exemption). *But see* *Bartow County Bank v. Bartow County Bd. of Tax Assessors*, 285 S.E.2d 920, 926 (Ga. 1982) (did not believe Congress intended to change *Van Allen* rule); *Bank of Texas v. Childs*, 615 S.W.2d 810, 817 (Tex. Civ. App.—Dallas 1981) (found consent for tax in section 548 in spite of section 742), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

153. See *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912 (Mont. 1978); see also Act of Sept 22, 1959, Pub. L. No. 86-346, 74 Stat. 622 (no tax other than franchise, estate, or inheritance tax shall consider United States securities in its assessment).

154. See S. REP. NO. 909, 86th Cong., 1st Sess. 1, reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2769, 2769 (purpose was to increase marketability and investment attractiveness of government securities).

155. See OXFORD ENGLISH DICTIONARY 859 (1971) ("taken into account"); WEBSTER'S THIRD NEW INT'L DICTIONARY 484 (unabridged ed. 1969) ("taking into account").

156. Compare *First Sec. Bank v. Montana Dep't of Revenue*, 580 P.2d 913, 914 (Mont. 1978) (following *Montana Bankers* case) and *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912 (Mont. 1978) (holding language of amendment prevented consideration) with *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 675 (1950) (purpose was to prevent taxes from diminishing obligations' value) and *Smith v. Davis*, 323 U.S. 111, 117 (1944) (to protect market value and attractiveness of obligations).

157. Compare *Montana Bankers Ass'n v. Montana Dep't of Revenue*, 580 P.2d 909, 912 (Mont. 1978) (holding supported by plain meaning of language and purpose for exemption) with *Bank of Texas v. Childs*, 615 S.W.2d 810, 817-22 (Tex. Civ. App.—Dallas 1981) (construction of statute given different meaning by court), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

158. See *Bank of Texas v. Childs*, 615 S.W.2d 810, 817-18 (Tex. Civ. App.—Dallas

consideration of the case on appeal, it will certainly be of interest to both taxing authorities and banks. The exact role played by government securities included in the assessment of bank share taxes is difficult to calculate due to each taxing authority's having a different tax rate.¹⁵⁹ Nevertheless, the issue involves important economic and legal issues which may in the near future be settled once again.

1981) (court finds section 742 to be exception within meaning of introductory phrase), *cert. granted sub nom. American Bank & Trust Co. v. Dallas County*, ___ U.S. ___, 103 S. Ct. 291, 74 L. Ed. 2d 276 (1982).

159. See TEX. TAX CODE ANN. §§ 21.09, 22.06 (Vernon 1982) (recognizing variety of possible taxing units).

1983]

COMMENTS

787

"APPENDIX A"

Summary of Bank Holdings in United States Obligations for 1981
 Information obtained from consolidated balance sheets
 published in TEXAS BANKING RED BOOK 948-87
 (35th ed. Dallas 1982).

Banking Corporation	Total Assets	Assets in Gov't Sec.	Percent
Allied Bankshares, Inc.	\$ 4,441,290,602	\$ 363,558,696	8.186
Austin Bankshares Corp.	1,079,429,000	75,278,000 *	6.974
Commercial Bankshares Corp.	85,906,381	19,412,826 *	22.597
Cullen Frost Bankshares Inc.	2,467,414,000	258,794,000 *	10.488
First Abilene Bankshares, Inc.	551,713,201	87,836,640	15.921
First Bankshares of Texas, Inc.	141,965,527	23,698,490	16.693
First City Bancorporation of Texas	14,291,097,000	667,664,000	4.672
First Freeport Corporation	107,496,508	18,834,700	18.528
First Texas Bancorp	174,340,965	17,820,796	10.222
First United Bancorporation, Inc.	2,440,327	206,185	8.449
First Western Bankshares Inc.	300,074,000	49,906,000	16.631
Independent Bankshares, Inc.	549,098,525	26,227,891	4.776
Southwest Bankshares, Inc.	5,253,324,000	311,062,000	5.921
Texas American Bankshares Inc.	4,043,362,000	211,320,000	5.236
Texas Commerce Bankshares	14,511,591,000	761,542,000	5.247
United Bankers Inc.	275,927,718	12,133,396	4.397
Victoria Bankshares, Inc.	655,852	20,927,718 +	7.575
		58,881 *	8.977
		44,491 +	7.240

* indicates holdings of treasury notes and government securities excluding government agency bonds, i.e., FHA, Federal Nat'l Mtg. Ass'n

+ indicates holdings in government agency bonds