that the term "secondarily liable" was not used in its technical sense but was merely intended to indicate those persons whose liability on an obligation is other than that of principal debtor.

There appear to be no reasons of policy for excluding co-makers from Section 103. Contract clauses spelling out the liability of the principal debtor indicate that it makes little real difference to loan companies whether the obligation is secured by a co-maker or by another type of surety. In view of the many variations on the suretyship relation, however, loan companies ordinarily designate *uncompensated* security parties as co-makers since this type of surety is specifically and narrowly defined by statute, and confusion and uncertainty is thus avoided. But this mere convenience in terminology should not lead to a substantial difference in result and should not bar accommodation makers from the group protected by Section 103. Furthermore, when it is considered that a compensated surety may be protected by Section 103, it becomes even more difficult to support a result whereby an accommodation maker, who by definition derives no benefit from the obligation incurred, is not protected. And finally, the practice of interpreting the act liberally justifies the inclusion in Section 103 of all persons who, though not named, are situated similarly to those specifically covered.

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Taxation—Immunity from Sales Tax of Contractors under Construction Contracts with United States—[United States].—On the order of "cost-plus-a-fixed-fee" contractors the plaintiff, an Alabama lumber dealer, sold building materials to be used in the construction of an army camp in the same state. Pursuant to a state statute imposing a tax on the gross retail sales price of tangible personal property, the plaintiff was assessed on the basis of these sales. The assessment was protested, the United States intervened on behalf of the plaintiff, and an appeal was taken to the state courts. On certiorari from the United States Supreme Court to the Supreme Court of Alabama, held, that the immunity of the Government implied from the Constitution did not extend to the cost-plus-a-fixed-fee contractors, since they and not the United States Government had purchased the materials; and that the plaintiff could have exacted the tax from the contractors and is therefore subject to the assessment, despite the fact that under the construction contract the Government had agreed to pay all costs

(1931), states that, "The contracts of the surety, guarantor and indorser are all accessory, but the former is primarily liable while the two latter are only secondarily liable."

21 Thus, for example, the instrument involved in Modern Industrial Bank v. Zaentz, 177 Misc. 133, 135, 29 N.Y.S. (2d) 969, 973 (Munic. Ct. 1941), provides that "... the undersigned... provide such additional co-makers, guarantors or sureties as shall be satisfactory to the holder... that the holder thereof may accept other co-makers, guarantors, sureties... ."

20 Note 8 supra.


2 This conclusion is inferred from the Court's opinion. See discussion accompanying notes 21 and 22 infra.
of the contractors, since Congress had not granted them immunity from state taxation. *Alabama v. King & Boozer.*

The doctrine of implied governmental immunity from taxation has been in great confusion since the recent Supreme Court case of *Graves v. New York ex rel. O'Keefe.* That decision, concerned with the immunity of the salary of an employee of the HOLC from state income taxes, is open to several interpretations. First, the test for granting immunity might be whether the tax, by the wording of the statute, is imposed on the Government rather than on the person—a test of directness. From the Court's statement that the income tax "is measured by income which becomes the property of the taxpayer," it may follow that these employees are to be classified with private contractors, whose property is not impliedly immune from taxation. This interpretation

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3 62 S. Ct. 43 (1941).


5 306 U.S. 466 (1939).

6 This test was first stated by the Court in *James v. Dravo Contracting Co.,* 302 U.S. 134, 149, 160 (1937), where a tax on the gross income of a private contractor working for the Government was upheld, although it was recognized that the actual burden of the tax could be shifted to the Government.


8 The Court indicated that employees and contractors are alike, in that both "deal" with the Government, when it stated that it is not enough to invalidate a tax "that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other." Ibid., at 483 n. 3.

9 The Court early distinguished between taxation upon the governmental operation of a governmental agent and taxation upon the property of the agent. See *McCulloch v. Maryland,* 4 Wheat. (U.S.) *316,* *436* (1819). This distinction was later applied using the terms "governmental" and "proprietary" in cases involving taxes on railroads which, because of agreements with the Government, were said to be "governmental agents" and therefore free from state taxation upon their governmental operations but not upon their property. Railroad Co. v. Peniston, 18 Wall. (U.S.) 5 (1873); Thomson v. Pacific R., 9 Wall. (U.S.) 579 (1869); cf. *Indian Motorcycle Co. v. United States,* 283 U.S. 570 (1931), restricted to its particular facts in *James v. Dravo Contracting Co.,* 302 U.S. 134, 151 (1937). The "governmental-proprietary" distinction has been completely abandoned, but the railroad cases are analogous, on their facts, to more recent contractor cases where the Court implies no tax immunity even though the tax is passed on to the Government through increased costs. *James v. Dravo Contracting Co.,* 302 U.S. 134 (1937); *Trinityfarm Construction Co. v. Grosjean,* 291 U.S. 466 (1934), rehearing den. 292 U.S. 604 (1934); *Baltimore Shipbuilding and DRY Dock Co. v. Baltimore,* 195 U.S. 375 (1904). A wholly owned governmental instrumentality, however, can have only governmental interests and is immune from state taxation. *Federal Land Bank v. Bismarck Lumber Co.,* 62 S. Ct. 1 (1941); *Pittman v. HOLC,* 308 U.S. 21 (1939); *Ashwander v. TVA,* 297 U.S. 288 (1936); *Phillipsborn and Cantrill, Immunity from Taxation of Governmental Instrumentalities,* 26 Georgetown L. J. 543, 544 n. 3 (1938). But see *United States v. Brown,* 41 F. Supp. 838, 840 (Fla. 1941). Immunity was accorded to a private corporation which produced planes only for the Government during the first World War. *Clallam County v. United States,* 263 U.S. 341 (1923); cf. *Boeing Airplane Co. v. Com'n,* 153 Kan. 712, 113 P. (2d) 110 (1941). This holding can be distinguished from private contractor cases on the ground
seems to indicate that the Court has abandoned its traditional classification of such employees as governmental instrumentalities. Second, the Court has indulged in language of economic burden, implying that the test is whether the incidence of the tax is, as a matter of fact, on the Government. Under this view Government employees must retain their instrumentality status inasmuch as the Court has refused to apply the incidence test in a case involving private contractors. And third, the Graves case is open to the interpretation that the Court will no longer recognize constitutional immunity for governmental instrumentalities. Although the Court there recognized an immunity for the HOLC to the extent of the specific statutory grant, it said that “its real property is subject to tax to the same extent as other real property,” presumably because the real property was not included in the congressional grant of immunity, and despite the fact that property of the Government has always been held free from tax.

More specifically as regards instrumentalities, the Court said that the “silence of Congress implies immunity no more than does the silence of the Constitution.” Pittman v. HOLC may strengthen this view, for it may well be argued that the Court in that case would not have found for the first time that Congress had power to grant tax immunity to the HOLC when the operation taxed would clearly have been within the doctrine of constitutional immunity, unless that doctrine were no longer accepted. Since the Court has often indicated that in tax immunity matters there is no distinction between Government and governmental instrumentality, it would follow that if

11 "... the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 481 (1939).
12 "But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax." James v. Dravo Contracting Co., 302 U.S. 134, 160 (1937).
13 Nichols, op. cit. supra note 4, at 445-46.
17 308 U.S. 21 (1939), noted in 39 Col. L. Rev. 1418 (1939); 38 Mich. L. Rev. 738 (1940).
18 The tax was on the recording of mortgages, an operation which was necessary to the proper functioning of the HOLC and, therefore, a governmental operation. Note 9 supra.
19 The Pittman case may mean only that there was no need to imply a constitutional immunity since Congress had granted immunity to the HOLC which the Court has long indicated that Congress has the power to do. Thomson v. Pacific R., 9 Wall. (U.S.) 579, 588-89 (1869); see Helvering v. Gerhardt, 304 U.S. 405, 411 n. 1 (1938).
20 The Court has said "... all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation." Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 477 (1939); see Pittman v. HOLC, 308
instrumentalities have no immunity apart from statutory immunity, the Government itself has none. Constitutional immunity would thus be entirely replaced by the doctrine that immunity can be created only by Congress.

By granting certiorari in the instant case, the Court eliminated this confusion at least to the extent of assuming a constitutional immunity from state taxation for the Federal Government. The Government did not even argue that the contractors were general agents or instrumentalities of the United States; the question considered by the Court was whether cost-plus-a-fixed-fee contracts constitute the Government or the contractors the "real" purchasers. This consideration was relevant only on the assumption that, if the Government itself was the real purchaser, a buyers' sales tax could not be imposed. A buyers' sales tax would be permissible, however, if the contractors were the purchasers even though the actual burden of the tax were ultimately borne by the Government. If the Court had not operated on this assumption, it would not have entered into so minute a consideration of the terms of the contract for the purpose of determining the real purchasers. The instant case reaffirms the doctrine that at least a tax placed directly on the Government will be declared unconstitutional.

The instant case does not, however, eliminate the confusion in regard to the tax immunity of governmental instrumentalities. If the Court is to be taken at its word that there is no distinction between Government and governmental instrumentality, there must also be a constitutional immunity for instrumentalities. It is not impossible, however, that the Court recognizes a distinction between Government and instrumentality, the former operating under a constitutional immunity, the latter being immune only when Congress specifically grants an immunity. Such a doctrine would be difficult to apply, however, and would necessitate an arbitrary classification of functions.


22 There can be no doubt in the instant case that the Government must pay the tax, since it must pay all the costs of the contractors. There may have been some doubt whether the Government would ultimately pay the tax in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 480 et seq. (1939).

23 Note 20 supra.

24 This may not be the only instance of such a distinction; cf. Keifer & Keifer v. RFC, 306 U.S. 381 (1939), where, perhaps under special circumstances, a federal instrumentality is said not to be free from suit unless Congress says so; it is presumed, however, that the Government itself remains free from suit. Pritchett, The Paradox of the Government Corporation, 1 Public Administration Rev. 381, 385-86 (1941).

25 The difficulty of classification is illustrated by post exchanges, located at Army and Navy posts and created by direction of the secretaries of the departments under authority conferred by Congress. Conlon, op. cit. supra note 4, at 607-8. These exchanges have been held to be governmental instrumentalities and therefore immune from a state license tax. United States v. Query, 37 F. Supp. 972 (S.C. 1941), aff'd per curiam 121 F. (2d) 631 (C.C.A. 4th 1941), cert. den. 62 S. Ct. 295 (1941).
The Federal Government wishes to circumvent these state sales taxes without extending the principles of tax immunity now established. More recent contracts have not allowed for state and local taxes, though earlier ones did,26 and department heads have attempted to claim immunity for the contractors,27 thus indicating that the War and Navy Departments hope to avoid such taxes.28 The Treasury and the Department of Justice, however, have been seeking in general to restrict the immunity doctrine,29 presumably in the hope of soon being allowed to tax income from state and municipal bonds.30 Any exemption31 as large as that desired by the War and Navy Departments would, however, create a strong feeling in the states that their bonds should remain free from taxation. Thus the various departments appear to be working at cross purposes.

But if circumvention is sought, at least three possible methods are available. First, even under the present contracts the Government, if it so desires, can furnish the contractors with materials, and, to take advantage of the Government's constitutional immunity, the War and Navy Departments themselves could make the desired purchases. Second, since a major point of the Court's decision rested on the fact that the Government was not bound to pay the costs at the time of the contractors' purchases, a removal of this objection by allowing the contractors to bind the Government conclusively32 would perhaps be sufficient to constitute the Government the "real" purchaser

26 Conlon, op. cit. supra note 4, at 608.
27 Prior to the instant case in which Graves v. Texas Co., 298 U.S. 393 (1936), and Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928), were overruled, Alabama v. King & Boozer, 62 S. Ct. 45, 45 (1941), the War and Navy Departments and the Comptroller of the United States treated these cases as still having effect, although they were restricted to their specific facts in James v. Dravo Contracting Co., 302 U.S. 134 (1937). United States Navy Department, Bureau of Yards and Docks, Some Commentaries on "Cost-Plus-a-Fixed-Fee" Contractors 17 (1940).
28 It was estimated that these taxes would amount to $137,000,000 in 1942. Brief for the United States in the United States Supreme Court, Alabama v. King & Boozer, App. B, at 25–26. Since the estimate was made before this country entered the war, it is undoubtedly low.
30 It has been suggested that there is a way open to Congress to tax these securities if it so desired. Powell, Intergovernmental Tax Immunities, 8 Geo. Wash. L. Rev. 1213 (1940). But in 1933 Cordell Hull, then Senator, apparently thought a constitutional amendment necessary. Boudin, The Taxation of Governmental Instrumentalities, 22 Geo. L. J. 1 (1933).
31 That this exemption would be an innovation is evidenced by several cases in which state courts have upheld the application of taxes on sales to contractors for governmental purposes, Boeing Airplane Co. v. Com'n, 153 Kan. 712, 713 P. (2d) 110 (1941); Standard Oil Co. v. Fontenot, 4 So. (2d) 634 (La. 1941); Standard Oil Co. v. Lee, 145 Fla. 385, 199 So. 325 (1940), and to governmental instrumentalities, Federal Land Bank v. Bismarck Lumber Co., 70 N.D. 607, 297 N.W. 42 (1941), rev'd 62 S. Ct. 1 (1941); Federal Land Bank v. DeRochford, 69 N.D. 382, 287 N.W. 522 (1939); Western Lithograph Co. v. State Board of Equalization, 11 Cal. (2d) 156, 78 P. (2d) 731 (1938), indicating that the states dislike the immunity. The Alabama court alone has not allowed collection of the tax. King & Boozer v. State, 3 So. (2d) 572 (Ala. 1941), rev'd 62 S. Ct. 43 (1941); United States v. Curry, 3 So. (2d) 582 (Ala. 1941), rev'd 62 S. Ct. 48 (1941).
32 It is believed that the statutes authorizing cost-plus-a-fixed-fee contracts do not prohibit this. 53 Stat. 599, 591 (1939), 34 U.S.C.A. § 556 (Supp. 1940); 54 Stat. 676, 712 (1940), 41 U.S.C.A. §§ 129–32 (Supp. 1940). The present contract, however, did not permit the con-
and guarantee immunity. Third, although there is a limit beyond which Congress cannot go in granting immunity, it the work being carried on by these contractors is so vital to the needs of the Government that, since Congress could presumably create a governmental agency for the task, it could likewise constitute these contractors governmental instrumentalities and grant them specific tax immunity. It would be possible however, for the states to thwart the Federal Government's efforts at tax avoidance by changing from a buyers' to a sellers' sales tax, since, as the present case establishes, the test for governmental immunity is whether the tax is placed "directly" on the Government. The tax would probably be shifted to the buyer, but the fact that Government costs might be increased "would not invalidate the tax," and a tax which constitutes the seller a taxpayer instead of a mere tax collector, as he is under a buyers' tax, is sufficiently indirect to preclude governmental immunity.

Torts—Duty of Landlord toward Invitee or Licensee—[England].—The plaintiff, paying a business visit to a tenant, was injured when the elevator in the defendant tractors to bind the Government to pay. Before the Government became liable for the costs the approval of a Contracting Quartermaster was required.

31 Limitation on the taxing power "cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it." Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926); see Thomson v. Pacific R., 9 Wall. (U.S.) 579, 588 (1869).


35 Statutory immunity was denied to these contractors when the House refused to enact the Senate's amendment allowing the Secretary of the Navy to denominate contractors agents of the United States for purposes of the contract and to avoid all taxes. 86 Cong. Rec. 7518-19, 7527-35, 7648 (1940). Under Pittman v. HOLC, 308 U.S. 21 (1939), such a grant would seem valid, since the function is essentially governmental. The Court has indicated that Congress has power under the Constitution to grant a broader immunity than would be implied from the Constitution alone. Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 581 (1928); Thomson v. Pacific R., 9 Wall. (U.S.) 579, 589 (1869); see Helvering v. Gerhardt, 304 U.S. 405, 411 n. 1 (1938).

36 "Sales taxes" take two legal forms: 1) sales taxes technically upon the purchaser, the seller being considered merely a collector for the state, and 2) occupation, license, or privilege taxes upon the seller measured by his sales. Philipborn, Jr., The Illinois Supreme Court and the Retailers' Occupation Tax, 31 Ill. L. Rev. 741 (1937). A bare majority of the states have sellers' taxes. Brief for the United States in the United States Supreme Court, Alabama v. King & Boozer, App. B, at 29 et seq. The Alabama tax is a buyers' tax. King & Boozer v. State, 3 So. (2d) 572, 578 (Ala. 1941). A use tax could not be changed from a buyers' to a sellers' tax because it falls on the purchaser, and the states could not thwart the Government's avoidance of use taxes. Cf. Curry v. United States, 62 S. Ct. 48 (1942).


38 Note 36 supra.

39 A sellers' tax was apparently approved by the Court in the instant case when it specifically overruled Graves v. Texas Co., 298 U.S. 393 (1936), and Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928), note 20 supra. Cf. Western Lithograph Co. v. State Board of Equalization, 11 Cal. (2d) 156, 78 P. (2d) 731 (1938).