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Taxing Authority in Federal Areas

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SUMMARY

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Taxing Authority in Federal Areas

The federal government and state governments exercise concurrent taxing powers within the United States. Article I, Section 8, Clause 1 of the Constitution—the Taxing and Spending Clause—provides Congress with the power to lay and collect taxes; and Article IV, Section 3, Clause 2 of the Constitution—the Property Clause—provides Congress with the power to make needful rules and regulations concerning federal areas. States generally have taxing jurisdiction over land within their geographical limits, including federal areas.

The federal government can obtain exclusive taxing jurisdiction over a specific area within a state's geographical limits, leaving a state with no residual taxing power over activities taking place there. The federal government can obtain exclusive taxing jurisdiction over a specific parcel within a state's geographical limits if (1) the federal government excepted the parcel from the state's taxing jurisdiction at the time of the state's admission into the United States; (2) the federal government acquired the parcel with the state's consent for any purpose described in Article I, Section 8, Clause 17 of the Constitution—the Enclave Clause; or (3) the federal government acquired the parcel without the state's consent, but the state later conveyed, and the federal government accepted, exclusive taxing jurisdiction over the parcel. Even when the federal government does not obtain exclusive legislative jurisdiction over a federal area, any federal legislation concerning the federal area necessarily overrides conflicting state laws pursuant to Article VI, Clause 2 of the Constitution—the Supremacy Clause.

Regardless of whether a state has taxing jurisdiction over a federal area, the federal government and its instrumentalities remain immune from state taxes under the intergovernmental tax immunity doctrine. The Supreme Court has applied the intergovernmental tax immunity doctrine to invalidate state taxes that impair the federal government's sovereignty and to preserve the Constitution's system of dual federalism. Congress has passed laws that effectively waive federal immunity by expressly permitting certain types of state taxes on federal employees and in federal areas.

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Taxing Jurisdiction in Federal Areas

The federal government and state governments exercise concurrent powers of taxation within the United States.[1] The Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises" under Article I, Section 8, Clause 1, and to make "needful" rules and regulations "respecting" federal areas pursuant to Article IV, Section 3, Clause 2—the Property Clause.[2] In general, states retain legislative jurisdiction over land within their geographical limits, including federal areas.[3]

Under certain conditions, the federal government exercises exclusive taxing jurisdiction over a federal area, leaving a state with no residual taxing power over the federal area.[4] The federal government can obtain exclusive taxing jurisdiction over a specific parcel within a state's geographical limits if (1) the federal government excepted the parcel from the state's taxing jurisdiction at the time of the state's admission into the United States;[5] (2) the federal government acquired the parcel by purchase, condemnation, or donation with the state's consent for any purpose described in Article I, Section 8, Clause 17 of the Constitution—the Enclave Clause;[6] or

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[1] Van Brocklin v. Tennessee, 117 U.S. 151, 155 (1886) ("While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to, and may be controlled by, the Constitution of the United States."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819) ("That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied.").

[2] Cong. Rsch. Serv., *Powers Over Places Purchased*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C17-2/ALDE_00001081/ (last visited May 10, 2022); Cong. Rsch. Serv., *Property Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C2-1-1/ALDE_00001172/ (last visited May 10, 2022).

[3] *See* U.S. CONST. amend. X; Kleppe v. New Mexico, 426 U.S. 529, 545 (1976); James v. Dravo Contracting Co., 302 U.S. 134, 138 (1937); *see also McCulloch*, 17 U.S. (4 Wheat.) at 425.

[4] *See, e.g.*, Humble Pipe Line Co. v. Waggonner, 376 U.S. 369, 372 (1964); Surplus Trading Co. v. Cook, 281 U.S. 647, 656 (1930).

[5] *Surplus Trading Co.*, 281 U.S. at 651; *see* Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 526–27 (1885) ("But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause, inadvertence perhaps, or over-confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made.").

[6] U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power . . . To exercise *exclusive Legislation* in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, *and other needful Buildings*." (emphasis added)); *see Dravo Contracting Co.*, 302 U.S. at 142; *Surplus Trading Co.*, 281 U.S. at 650–52. The Supreme Court has interpreted the phrase "other needful Buildings" broadly and held that the phrase "includes whatever structures are found to be necessary in the performance of the functions of the Federal Government." *Dravo Contracting Co.*, 302 U.S. at 143; *see* Arlington Hotel v. Fant, 278 U.S. 439, 455 (1929) (holding that a hospital and hotel located in a national park were "other needful Buildings"); *c.f.* Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529–30 (1938) ("The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by [the Enclave Clause].").

(3) the federal government acquired the parcel without the state's consent, but the state later provides a cession of jurisdiction that the federal government accepts.[7]

When the federal government has obtained exclusive legislative jurisdiction, not subject to any state reservations, a state is prohibited "from exercising any legislative authority including its taxing power and police power in relation to the property and activities of individuals and corporations within the territory."[8] However, "state laws existing at the time of acquisition" may remain enforceable as long as there is no conflicting federal policy.[9]

The federal government can reserve exclusive taxing jurisdiction over a federal area from a new state's legislative jurisdiction upon the new state's admission to the United States.[10] Otherwise, when a state is admitted into the union, the federal government does not automatically have exclusive legislative jurisdiction over a federal area within a new state's geographical limits that it acquired prior to the new state's admission.[11] In general, upon a state's admission into the union, the legislative authority of the new state extends over federal areas within its geographical limits to the same extent as over private property, "save that the state could enact no law which would conflict with the powers reserved by the United States by the Constitution."[12]

The federal government's acquisition of title to land within a state's geographical limits "without more" does not withdraw the land from a state's jurisdiction.[13] "It must appear that the State, by

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[7] *See* Silas Mason Co. v. Tax Comm'n of Wash., 302 U.S. 186, 207–09 (1937); *see also* 40 U.S.C. § 3112 (requiring the United States to accept jurisdiction over land it acquires).

[8] *Silas Mason Co.*, 302 U.S. at 197; *see Fort Leavenworth R.R. Co.*, 114 U.S. at 537 ("The proposition which follows naturally from the [Enclave Clause], that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.").

[9] Paul v. United States, 371 U.S. 245, 268–69 (1963).

[10] *See Fort Leavenworth R.R. Co.*, 114 U.S. at 526–27 ("But in 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause, inadvertence perhaps, or over-confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made."); *see also Surplus Trading Co.*, 281 U.S. at 651; *Arlington Hotel Co.*, 278 U.S. at 446.

[11] Wilson v. Cook, 327 U.S. 474, 487–88 (1946); *Fort Leavenworth R.R. Co.*, 114 U.S. at 527.

[12] *Wilson*, 327 U.S. at 487; *see Surplus Trading Co.*, 281 U.S. at 650 (1930) ("Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.").

[13] *Surplus Trading Co.*, 281 U.S. at 650; *see id*. at 650 ("It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."); *see, e.g.*, *Wilson*, 327 U.S. at 487 (holding Arkansas retained taxing jurisdiction over a forest reserve it acquired at statehood that the federal government later acquired for use as a national forest); *Silas Mason Co.*, 302 U.S. at 207–09 (holding federal contractors living in camps on federal lands with their families while performing services under a federal contract were liable for a state occupancy tax because the federal government did not have exclusive taxing jurisdiction over land); James v. Dravo Contracting Co., 302 U.S. 134, 140–41 (1937) (holding that the federal government did not acquire exclusive taxing jurisdiction over lock and dam sites on the beds of the Kanawha and Ohio rivers in navigable waters within the exterior limits of West Virginia because West Virginia never transferred title to the federal government—West Virginia merely held a title burdened by a servitude); *Fort Leavenworth R.R.*, 114 U.S. 525 (holding a railroad business's property on a tract of land within a military reservation was subject to Kansas state tax because (1) the federal government did not except the military reservation land from

consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise."[14] In the absence of consent or cession, the federal government does not acquire exclusive taxing jurisdiction over a federal area and a state retains taxing jurisdiction.[15]

Article I, Section 8, Clause 17 of the Constitution—the Enclave Clause—authorizes Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." The Supreme Court has construed "exclusive Legislation" to be consistent with exclusive jurisdiction.[16] In *Humble Pipe Line Co. v. Waggonner*, the Court held that Louisiana could not impose an ad valorem tax on certain privately owned oil drilling equipment and pipelines situated on a tract of land ceded by the state as a donation to the federal government for use as an Air Force base.[17] Even though the federal government leased the right to exploit parts of the land for oil and gas and for an oil pipeline, the Court ruled that, except for Louisiana's reservations for service of civil process and the administration of criminal laws, the federal government acquired exclusive jurisdiction over the land pursuant to the Enclave Clause.[18]

When the federal government acquires land by purchase, condemnation, or donation for any purpose mentioned in the Enclave Clause without a state's consent, the federal government cannot obtain the benefits of the Enclave Clause, and its possession is that of an ordinary proprietor.[19] However, a state can complete "'exclusive' jurisdiction of the Federal Government over such an enclave by 'cession of legislative authority and political jurisdiction.'"[20] Thus, the federal government's jurisdiction can become exclusive when it acquires land by purchase, condemnation, or donation for any purpose mentioned in the Enclave Clause with a state's consent, or when it acquires land without a state's consent and a state later provides a cession of

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Kansas's jurisdiction at the time of the state's admission; (2) the federal government did not purchase the land with the consent of the legislature for a purpose stated in the Enclave Clause; (3) the railroad business property was on a part of a tract that was not being used for a military purpose; and (4) when Kansas ceded the land to the federal government, Kansas reserved the right to tax railroad businesses on the military reservation); *see also* U.S. CONST. art. IV, § 3, cl. 2 (the Property Clause) ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); 16 U.S.C. § 480 ("The jurisdiction, both civil and criminal, over persons within such forest reservations national forests shall not be affected or changed by reason of the existence of such reservations national forests, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning, of this provision being that the State wherein any such reservation national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.").

[14] *Silas Mason Co.*, 302 U.S. at 197.

[15] *Wilson*, 327 U.S. at 487–88.

[16] *Dravo Contracting Co.*, 302 U.S. at 141 (citing *Surplus Trading Co.*, 281 U.S. at 652).

[17] Humble Pipe Line Co. v. Waggonner, 376 U.S. 369, 372 (1964). The Court has also recognized that land the federal government acquires by condemnation is "purchased" within the meaning of the Enclave Clause. United States v. State Tax Comm'n of Miss., 412 U.S. 363, 371 (1973).

[18] *Humble Pipe Line Co.*, 376 U.S. at 372–74.

[19] Paul v. United States, 371 U.S. 245, 264 (1963) (citing *Dravo Contracting Co.*, 302 U.S. at 146–49); *cf.* Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 539 (1885) ("Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings . . . will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed.").

[20] *Paul*, 371 U.S. at 264 (quoting *Fort Leavenworth R.R. Co.*, 114 U.S. at 541, 542).

jurisdiction.[21] Prior to 1940, in the absence of evidence to the contrary, courts presumed that the federal government accepted state transfers of exclusive jurisdiction.[22] Since 1940, Congress has required the federal government to assent to any transfer of jurisdiction to the federal government.[23]

Whether the federal government has acquired exclusive legislative jurisdiction over a federal area is a federal question.[24] The question of whether lands the United States acquired by purchase, condemnation, or donation are within the territorial taxing jurisdiction of a state is determined by interpreting the federal statute authorizing the acquisition and the state statute providing consent or cession.[25] The federal government and states may make mutually satisfactory arrangements as to jurisdiction over a federal area within a state's borders.[26] A state may grant the federal government jurisdiction that is less than exclusive and it may qualify its consent or cession by agreement, by offer and acceptance, or by ratification.[27] A state statute will not be viewed as yielding or intending to surrender state legislative jurisdiction to the federal government where the statute makes no express grant or reservation of legislative power over the area acquired by the federal government.[28]

In *Collins v. Yosemite Park & Curry Co*., the Supreme Court held that a California law imposing excise taxes on sales of alcoholic beverages was enforceable in Yosemite National Park because California had reserved the right to tax in an act of cession.[29] California had ceded exclusive jurisdiction over Yosemite National Park (subject to a few specific state reservations) in an act of cession, and the federal government had assumed jurisdiction of Yosemite National Park in a federal statute that referred to California's reservation to tax in the act of cession.[30] In the same case, the Court found that other provisions of the same California law that required licenses and license fees for the importation or sale of alcoholic beverages were unenforceable in Yosemite

[21] *Paul*, 371 U.S. at 264.

[22] Silas Mason Co. v. Tax Comm'n of Wash., 302 U.S. 186, 207 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930) ("It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction."); *see Fort Leavenworth R.R. Co.*, 114 U.S. at 528.

[23] 40 U.S.C. § 3112; *see Paul*, 371 U.S. at 264.

[24] *Paul*, 371 U.S. at 267.

[25] Wilson v. Cook, 327 U.S. 474, 486 (1946).

[26] Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 528 (1938) ("The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. . . . These arrangements the courts will recognize and respect."); *Fort Leavenworth R.R. Co.*, 114 U.S. at 533 ("The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice.").

[27] *Yosemite Park & Curry Co.*, 304 U.S. at 528; *see Silas Mason Co.*, 302 U.S. at 203–04. "[A] State may condition its 'consent'" upon the federal government's retention of the land for purposes "consistent with the federal use." *Paul*, 371 U.S. at 265 (citing James v. Dravo Contracting Co., 302 U.S. 134, 146–49 (1937)).

[28] *Wilson*, 327 U.S. at 487.

[29] *Yosemite Park & Curry Co.*, 304 U.S. at 532–33.

[30] *Id*. at 525–26.

National Park.[31] The Court held that California's reservation of the right to tax was not sufficiently broad to cover those regulatory provisions.[32]

Even absent a state's consent or cession, the federal government retains taxing jurisdiction over federal areas pursuant to Article IV, Section 3, Clause 2 of the Constitution—the Property Clause—which authorizes Congress to make "needful" rules and regulations "respecting" federal areas.[33] The Supreme Court has "repeatedly observed that '[the] power over the public land thus entrusted to Congress is without limitations.'"[34] When the federal government enacts legislation with respect to federal areas it necessarily overrides conflicting state laws under Article VI, Clause 2 of the Constitution—the Supremacy Clause.[35] "A different rule would place [federal areas] completely at the mercy" of states.[36]

Federal Immunity from State Taxation

When the federal government does not have exclusive jurisdiction over a federal area and a state retains taxing jurisdiction over a federal area, federal immunity may otherwise prevent the imposition or collection of a state tax in a federal area.[37] There is no provision in the Constitution that expressly provides that the federal government is immune from state taxation,[38] just as there is no provision in the Constitution that expressly provides that states are immune from federal taxation.[39] However, the Supreme Court has applied the intergovernmental tax immunity doctrine to invalidate taxes that impair the sovereignty of the federal government or state governments.[40] The intergovernmental tax immunity doctrine is a limitation on federal and state taxing powers by implication.[41] The Court has explained that the origins of the intergovernmental tax immunity

[31] *Id*. at 532–33.

[32] *Id*. at 532–34, 539.

[33] Kleppe v. New Mexico, 426 U.S. 529, 542–43 (1976).

[34] *Id*. at 539 (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

[35] *Id*. at 543; *see* U.S. CONST. art VI, cl. 2 ("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.")

[36] *Kleppe*, 426 U.S. at 543 (quoting Camfield v. United States, 167 U.S. 518, 526 (1897)).

[37] *See* James v. Dravo Contracting Co., 302 U.S. 134, 149–160 (1937). Even where a state has concurrent taxing jurisdiction with the federal government over a parcel of land in a federal area, a state may not impose a property tax on it pursuant to a state authority. Van Brocklin v. Tennessee, 117 U.S. 151, 181 (1885) ("Whether the Supreme Court of Tennessee rightly construed the provisions of the Constitution and statutes of the State as not exempting from taxation land belonging to the United States, exclusive jurisdiction over which had not been ceded by the State, is quite immaterial, because, for the reasons and upon the authorities above stated, this court is of opinion that neither the people nor the legislature of Tennessee had power, by constitution or statute, to tax the land in question, so long as the title remained in the United States.").

[38] Collector v. Day, 78 U.S. (11 Wall.) 113, 127 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939).

[39] *Day*, 78 U.S. (11 Wall.) at 127.

[40] *See, e.g*., McCulloch, v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *see also* South Carolina v. Baker, 485 U.S. 505, 517–24 (1988).

[41] *Graves*, 306 U.S. at 477–78.

doctrine lie in the Supremacy Clause,[42] the Tenth Amendment,[43] and the preservation of the Constitution's system of dual federalism.[44]

The Court first articulated the principles underlying the intergovernmental tax immunity doctrine in 1819 in *McCulloch v. Maryland*.[45] In *McCulloch*, the Court ruled that the Supremacy Clause barred Maryland from imposing taxes on notes issued by the Second Bank of the United States and related penalties.[46] The Court reasoned that if a state had the power to tax the federal government's means, the Supremacy Clause would be devoid of meaning.[47] Thus, the Court held states had "no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[48]

Initially, following *McCulloch*, there were few limitations on federal immunity from state taxation and state immunity from federal taxation.[49] The Court applied the intergovernmental tax immunity doctrine to prohibit federal and state governments from imposing a nondiscriminatory tax on the income or the assets of an individual or business received from a contract with the other sovereign.[50] In 1842, in *Dobbins v. Commissioners of Erie County*,[51] the Supreme Court held that the compensation of a federal officer was immune from state taxes.[52] In 1871, in *Collector v. Day*,[53] the Court relied on the dual federalism principles laid out in *McCulloch* to hold that the salary of a state officer was immune from federal taxes.[54]

By the 1930s, the Supreme Court had begun to reverse course, explaining "the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted."[55] In 1938, in *Helvering v. Gerhardt*,[56] the Court determined that there were limitations to when the salaries of state employees were immune from federal taxes.[57] In *Gerhardt*, the Court held that the federal government could tax

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[42] U.S. CONST. art. VI, cl. 2.

[43] U.S. CONST. amend. X.

[44] *See, e.g.*, *South Carolina*, 485 U.S. at 523, 523 n.14; United States v. New Mexico, 455 U.S. 720, 735–36 (1982); New York v. United States, 326 U.S. 572, 586–87 (1946); *Day*, 78 U.S. (11 Wall.) at 123–27; *McCulloch*, 17 U.S. (4 Wheat.) at 427–37.

[45] *McCulloch*, 17 U.S. (4 Wheat.) at 427–37.

[46] *Id*. at 436.

[47] *Id*. at 433.

[48] *Id*. at 436.

[49] Jefferson Cnty, Ala. v. Acker, 527 U.S. 423, 436 (1999), *superseded on other grounds by statute*, Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (broadening grounds for removal of certain litigation to federal courts); *see also* Panhandle Oil Co. v. Mississippi *ex rel*. Knox, 277 U.S. 218 (1928) (holding a state tax on the privilege of distributing gasoline measured by gallons of gasoline sold was unconstitutional as applied to sales a distributor made to the United States), *abrogated by* Alabama v. King & Boozer, 314 U.S. 1 (1941).

[50] South Carolina v. Baker, 485 U.S. 505, 517–22 (1988).

[51] 41 U.S. (16 Pet.) 435, 450 (1842), *superseded by statute*, Public Salary Tax Act of 1939, Pub. L. No. 76-32, tit. 1, ch. 59, § 4, 53 Stat. 574, 575 (codified as amended at 4 U.S.C. § 111).

[52] *Id*.

[53] 78 U.S. (11 Wall.) 113 (1871), *overruled by* Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466 (1939).

[54] *Id.* at 120–21.

[55] *Graves*, 306 U.S. at 483 (citing Helvering v. Gerhardt, 304 U.S. 405 (1938)).

[56] *Gerhardt*, 304 U.S. 405.

[57] *Id.* at 424 ("The present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government. So much of the burden of the tax laid upon respondents' income as may

the salaries of employees of a bi-state corporation, the Port of New York Authority.[58] Then, in 1939, in *Graves v. New York ex rel. O'Keefe*, the Court held that New York could impose a nondiscriminatory income tax on the salary of a New York attorney for the Home Owners' Loan Corporation, a wholly owned instrumentality of the United States.[59] The Court reasoned that the purpose of the immunity is not to confer benefits on federal and state employees, but to prevent "undue interference" with one government through the "tax burdens" of the other.[60] The Court did not construe the intergovernmental tax immunity doctrine to bar state taxes on federal employees' salaries because it concluded it would impose an impermissible "restriction on the taxing power which the Constitution has reserved to the state governments."[61]

The current scope of federal immunity from state taxation extends only to state levies on (1) the "United States itself" or (2) "an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned."[62] Federal tax immunity is not conferred on an agent or instrumentality simply because a state tax has an effect on the United States or the federal government bears the economic burden of the tax.[63] Accordingly, states may generally impose

reach the state is but a necessary incident to the coexistence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes. The immunity, if allowed, would impose to an inadmissible extent a restriction upon the taxing power which the Constitution has granted to the federal government.").

[58] *Id*.

[59] *Graves*, 306 U.S. at 486 ("In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed.").

[60] *Id*. at 483–84; *see* Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 814 (1989).

[61] *Graves*, 306 U.S. at 487.

[62] United States v. New Mexico, 455 U.S. 720, 735 (1982) (holding that New Mexico could impose a gross receipts tax and use tax on funds advanced by the federal government to federal contractors under an "advanced funding procedure" to meet federal contractor costs); *see, e.g.*, Dep't of Employment v. United States, 385 U.S. 355, 358–59 (1966) (holding the Red Cross is immune from a state unemployment compensation tax on charitable organizations because it is an instrumentality of the federal government) ("On the merits, we hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment. Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality."); *see also* Mayo v. United States, 319 U.S. 441, 447–48 (1943) (construing the Supremacy Clause to prohibit Florida from regulating the purchase of fertilizer by the United States, under the direction of the U.S. Secretary of Agriculture) ("The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 578 [(1928)]. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.").

[63] *United States v. New Mexico*, 455 U.S. at 734; *see* Jefferson Cnty, Ala. v. Acker, 527 U.S. 423, 436 (1999) ("Although taxes 'upon the incomes of employees of a government, state or national, . . . may be passed on economically to that government,' the Court reasoned, the federal design tolerates such 'indirect [and] incidental' burdens." (quoting Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466, 487 (1939))), *superseded on other grounds by statute*, Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (broadening grounds for federal removal); James v. Dravo Contracting Co., 302 U.S. 134, 160 (1937) (explaining that a state gross receipts tax of general applicability is not invalidly laid because its application to a federal contractor "may increase the cost" to the federal government).

nondiscriminatory taxes[64] on federal contractors and lessees of federally owned property.[65] For federal tax immunity to extend to a private taxpayer, "a private taxpayer must actually 'stand in the Government's shoes.'"[66] Otherwise, Congress must expressly provide for the immunity of private taxpayers "to be expanded beyond its narrow constitutional limits."[67]

Waivers of Federal Immunity

When the federal government has exclusive federal jurisdiction over a federal enclave that meets the Enclave Clause's requirements, states cannot legislate with respect to a federal enclave without congressional action, even when there is no conflicting federal legislation.[68] Over the years, Congress has passed laws that expressly permit states to impose certain types of taxes on federal employees and in federal areas and reduce state tax disparities.[69] For example, the Hayden-Cartwright Act of 1936[70] "effectively waived the *federal* government's sovereign immunity from state tax collection."[71] The Hayden-Cartwright Act of 1936 allows states to impose taxes on gas and motor fuels on federal areas, including military bases, when the fuel is not for the exclusive use of the United States.[72] Congress enacted the law, in part, to address complaints about vehicles driven on public highways for nongovernmental purposes whose

[64] In this context, in general, a tax is discriminatory if it discriminates against the federal government—i.e., the tax treats the federal government or "those with whom it deals" unfavorably. United States v. City of Detroit, 355 U.S. 466, 473–74 (1958); *see, e.g.*, Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989) (applying the intergovernmental tax immunity doctrine to invalidate a state tax that exempted retirement benefits paid by the state and its political subdivisions from state personal income taxes, but not other retirement benefits, including those paid by the federal government); McCulloch, v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[65] United States v. Cnty. of Fresno, 429 U.S. 452, 464 (1977) (holding United States Forest Service employees were not immune from local taxes on their possessory interest in federal housing on national forest lands, which they were required to rent and live in); United States v. Boyd, 378 U.S. 39, 49–51 (1964) (upholding a Tennessee sales and use tax that reached property used by federal contractors in the performance of their cost-plus federal contracts); *see, e.g.*, Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 34 (1999) (holding Arizona could impose a transaction privilege tax on federal contractor building, repairing, and improving roads on an Indian reservation); Washington v. United States, 460 U.S. 536, 546 (1983) (upholding a Washington taxing scheme that taxed the sales of nonfederal projects to landowners and taxed the sale of construction materials to federal contractors); *United States v. New Mexico*, 455 U.S. at 734*; United States v. City of Detroit*, 355 U.S. at 473 (holding lessees and users of federal property were not immune from a state tax that was measured based on the value of tax-exempt property used in for-profit businesses); United States v. Muskegon, 355 U.S. 484, 486 (1958) (holding a private business using federal property under a permit in the performance of supply contracts for the federal government was not immune from a local tax that was measured by the value of tax-exempt property used in private businesses); *Dravo Contracting Co.*, 302 U.S. at 160 (holding West Virginia had jurisdiction to impose a tax on the gross income of a federal contactor with contracts to construct locks and dams on federal government sites in navigable rivers within the territorial limits of West Virginia).

[66] *United States v. New Mexico*, 455 U.S. at 736 (quoting City of Detroit v. Murray Corp. of America, 355 U.S. 489, 503 (1958)); *see also Dravo Contracting Co.*, 302 U.S. at 157 ("We said further that the nature of the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption, as it was obvious that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government 'that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.'" (quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926))).

[67] *United States v. New Mexico*, 455 U.S. at 737.

[68] Paul v. United States, 371 U.S. 245, 263–64 (1963) (citing Pacific Coast Dairy v. Dep't of Agric., 318 U.S. 285, 294 (1945)); *see also* United States v. State Tax Comm'n of Miss., 412 U.S. 363, 370–71 (1973).

[69] *See, e.g.*, 4 U.S.C. §§ 104–111.

[70] Hayden-Cartwright Act of 1936, ch. 582, 49 Stat. 1519, 1521–22 (1936) (codified as amended at 4 U.S.C. § 104).

[71] Coeur D'Alene Tribe v. Hammond, 384 F.3d 674, 695 (9th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005).

[72] 4 U.S.C. § 104.

owners avoided state gasoline taxes by purchasing gas in federal areas.[73] The Hayden-Cartwright Act of 1936 requires state fuel taxes to be paid and federal officers to report amounts of fuel sold on federal areas for purposes other than the exclusive use of the United States.[74]

The Public Salary Tax Act of 1939,[75] which Congress was considering before the Supreme Court decided *Graves v. New York ex rel. O'Keefe*,[76] effectively codified the Court's decision in *Graves*.[77] The Act waives federal immunity to state taxes on federal employee compensation as long as a state tax does not discriminate against federal employees.[78] The Court has held that whether a state tax comes within the scope of the Public Salary Tax Act of 1939 is a question of federal law.[79]

In *Jefferson County, Alabama v. Acker*,[80] the Supreme Court held that an Alabama county's occupation tax[81] on persons engaged in occupations that were not otherwise subject to a state license fee was valid as applied to federal judges working within the county, and did not violate the intergovernmental tax immunity doctrine.[82] The Court concluded that the occupational tax

[73] 80 Cong. Rec. 6913 (1936) (statement of Sen. Hayden).

[74] 4 U.S.C. § 104(a)–(b) ("Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located. . . . The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month."); *see* Tax'n of Motor-Vehicle Fuels Sold on Fed. Rsrv. in Territory of Haw., 80 Op. Att'y Gen. 519 (1936).

[75] Public Salary Tax Act of 1939, Pub. L. No. 76-32, 53 Stat. 574, 575 (codified as amended at 4 U.S.C. § 111 (2022)).

[76] Graves v. New York *ex rel*. O'Keefe, 306 U.S. 466 (1939).

[77] Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 812 (1989); *see* Public Salary Tax Act of 1939, Pub. L. No. 76-32, § 4, 53 Stat. 574, 575 (codified as amended at 4 U.S.C. § 111(a)).

[78] Public Salary Tax Act of 1939, Pub. L. No. 76-32, § 4, 53 Stat. 574, 575 ("The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States . . . by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation"); 4 U.S.C. § 111(a) (2022) ("The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."); s*ee*, *e.g.*, Dawson v. Steager, 139 S. Ct. 698, 703 (2019) (holding a West Virginia law violated 4 U.S.C. § 111 because it treated state retired employees more favorably than federal retired federal employees by exempting pension benefits); Barker v. Kansas, 503 U.S. 594, 604–05 (1992) (invalidating a Kansas taxing scheme that subjected military retiree benefits to Kansas's income tax but not state and local government retiree benefits); *Davis*, 489 U.S. at 812 (striking down a Michigan state taxing scheme that exempted state paid retirement benefits to state retirees from personal income taxes, but did not exempt retirement benefits paid by the federal government to federal retirees).

[79] Jefferson Cnty, Ala. v. Acker, 527 U.S. 423, 438–39 (1999) (citing Howard v. Comm'rs of Sinking Fund of Louisville, 344 U.S. 624, 628–29 (1953), *superseded on other grounds by statute*, Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (broadening grounds for federal removal); *see* City of Detroit v. Murray Corp. of America, 355 U.S. 489, 492 (1958) ("[I]n determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance. This is at least as true to uphold a state tax as to strike one down.").

[80] *Acker*, 527 U.S. 423.

[81] *Id*. at 429 ("The [occupation tax] is measured by one-half percent of the 'gross receipts' of the person subject to the tax. . . . 'Gross receipts' is defined as having 'the same meaning' as 'compensation,' and includes 'all salaries, wages, commissions, [and] bonuses.'" (second and third alterations in original)).

[82] *Id*. at 427.

was permissible under the Act as a nondiscriminatory tax on federal judges' compensation.[83] In reaching its decision, the Court clarified that the types of state taxes that can be imposed on federal employees under the Act are not limited to income taxes, and that the Act only requires that state taxes be nondiscriminatory.[84]

The Buck Act,[85] enacted in 1940, authorizes states to levy sales and use taxes[86] and income taxes[87] within federal areas without changing the federal government's exclusive jurisdiction or otherwise limiting it.[88] Congress passed the Buck Act to provide for uniformity in the administration of state sales and use taxes and income taxes inside and outside federal areas.[89] The Buck Act covers state sales and use taxes with respect to the sale, purchase, storage, or use of tangible personal property.[90] The Act does not define tangible personal property, but the term generally encompasses anything that can be touched and moved.[91] The Act defines an income tax "as any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."[92] The Buck Act preserves the immunity of the federal government and its instrumentalities from state taxes, and does not authorize the collection of sales and use taxes from the federal government with respect to tangible personal property sold to military personnel.[93]

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[83] *Id*.

[84] *Id*. at 442 ("The dispositive measure, however, is the Public Salary Tax Act, which does not require the local tax to be a typical 'income tax.' . . . [T]he Public Salary Tax Act consents to any tax on 'pay or compensation,' which Jefferson County's surely is. The sole caveat is that the tax 'not discriminate . . . because of the [federal] source of the pay or compensation.'" (second alteration in original).

[85] Buck Act, Pub. L. No. 76-819, 54 Stat. 1059 (1940) (codified as amended at 4 U.S.C. §§ 105–110).

[86] 4 U.S.C. § 105 ("(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.").

[87] 4 U.S.C. § 106 ("(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.").

[88] *Id.* §§ 105–108.

[89] S. Rep. No. 76-1625, at 2 (1940); S. Rep. No. 76-1028, at 1 (1939); H. Rep. No. 76-1267, at 1 (1939).

[90] 4 U.S.C. § 110(b).

[91] *See* S. Rep. No. 76-1028, at 2 ("Passage of this bill will clearly establish the authority of the State to impose its sales tax with respect to sales completed by delivery on Federal areas . . . ."); H. Rep. No. 76-1267, at 1 ("The taxes would in the vast majority of cases be paid to the State by sellers whose places of business are located off the Federal areas and who make sales of property to be delivered in such areas.").

[92] 4 U.S.C. § 110(c); *see, e.g.*, Howard v. Comm'rs of Sinking Fund, 344 U.S. 624, 629 (1953) (holding an occupation or license tax measured by amount earned was an income tax).

[93] 4 U.S.C. § 107; *see* S. Rep. No. 76-1625, at 3–4 ("Section 3 of the committee amendment provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. This section also provides that sections 1 and 2 shall not be deemed to authorize the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser. . . . For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser.").

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