FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION

SYLLABUS

GEORGETOWN UNIVERSITY LAW CENTER
2017 SPRING SEMESTER

ADMINISTRATIVE MATTERS

Contact Information

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Executive Director, Ernst & Young LLP

Class Location, Meeting Times, Grades

Meeting Time: Wednesdays, 5:45 – 7:45 PM
Grades: written paper or take-home exam

Securing Class Materials; Grades and Final Exam

The TWEN system should be visited before preparing for each class to ascertain there have been no changes to assigned reading assignments or content. Further, the TWEN system should be consulted before each class to verify no announcements or other administrative items have been posted concerning class changes.

Note: Class readings are parceled between “assigned” and “optional.” Students are not required, nor will they be called upon, to discuss optional readings, which may be discussed by the professor during class. However, in advance of the relevant class, students should read and be prepared to discuss assigned readings.
Securing Class Materials: Grades and Final Exam (cont.)

PowerPoint slides are used extensively throughout each lecture. While the content of these slides are proprietary and may not be removed, photocopied or reproduced, to assure parity between in-class and distance learners, a hardcopy of the slides are available for review for classroom-based students who wish to supplement their notes.

Final Grades

Students taking the 2-credit hour course may elect to take an exam or write a paper. Also, this course is also being made available for 3-credit hours for those who have elected to write a more substantive paper.

Examination: For those electing to take the exam, grades will be awarded based on a single take-home exam that can be taken on a date of the student’s choosing during May 2, 2017 to May 12, 2017. Students will be allowed three hours to complete the exam. The primary objective of the exam will be to test students on their ability to identify and analyze issues and their ability to apply the legal principles and rules that will be taught in this course to hypothetical fact patterns.

Written Paper: For those electing to write a paper, Class grade will be based on the following: written paper (50%); rough draft (20%); class attendance (20%); and, class participation (10%). Written papers must be at least 25 pages in length (approximately 6,000 words) for students taking the 3-credit hour course and 20 pages in length (approximately 4,800 words) for students taking the 2-credit hour course. Students must submit an outline and a draft for comment. Both the draft and final papers must be approximately 20 or 25 pages depending upon level of credit hours of course taken as noted above and must be supported by substantial independent research. See Appendix A for the schedule for preparation of papers.
CLASS SCHEDULE AND ASSIGNMENTS

CLASS ONE – January 18, 2017 (Phil Tatarowicz)

Introduction, Course Overview, Commerce Clause: (Introduction, Overview and Direct Aspect)

1. Administrative matters
2. Course Overview
3. Topic Selection (3 credit course)

The Commerce Clause: Introduction and Overview

4. The Commerce Clause - Introduction and Overview
   a. To minimize repetition of issues, tax and topical applications will be waved throughout review of the Commerce Clause.
   b. Last class will be devoted to a judicial and congressional case study dealing with tax incentives

5. The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3
   a. Raison d’être
   b. A Product of Compromise
   c. Three sub-clauses: Interstate, Foreign, and Indian Commerce
   d. Parsing Local Commerce From Interstate and Foreign Commerce
      U.S. Territories and Possessions
   e. Direct & Implied Aspects

The Direct Aspect of the Commerce Clause

6. Examples of Congressional restrictions on the states’ power to tax:
CLASS ONE (cont.)


e. Levy stock transfer taxes, 15 U.S.C. § 78bb(d) (part of federal securities act of 1975)


g. ERISA supersedes state taxes on employee benefit plans, 29 U.S.C. § 1144(a).


i. Localities from taxing providers of direct-to-home satellite services, 47 U.S.C. § 251.


k. Prohibits state or political subdivision other than the person’s home district from taxing a member of Congress, Pub. L. 95-67 (1977).

7. Examples of Congressional expansions of the states’ power to tax:


8. Pending Congressional Proposals

   a. Economic Development Act (S. 1066; H.R. 2471).


   c. Sales Tax Fairness and Simplification Act (S. 34; H.R. 3396).

   d. Internet Tax Nondiscrimination Act (H.R. 1684; S. 849).

   e. Telecommuter Tax Fairness Act (S. 1811; H.R. 5615).

   f. A Bill to Prevent Certain Discriminatory Taxation of Natural Gas Pipeline Property (H.R. 2877).
CLASS ONE (cont.)

9. Limits on Congress’ Commerce Clause Power

   a. Intent and the scope of congressional enactments

      *Northwest Airlines, Inc. v. Wis. Dep’t of Revenue, 717 N.W.2d 280 (Wis. 2006).*

   b. Sufficiently remote from regulation of commerce, e.g.,

      *United States v. Lopez, 514 U.S. 549 (1995).*

      *United States v. Morrison, 529 U.S. 598 (2000).*

      Healthcare Cases:


      *Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D.Va. 2010), rev’d, 656 F.3d 253 (4th Cir. 2011).*

   c. In conflict with other express constitutional provisions, e.g.,

      i. Example of legislation allowing future state preemption of Federal law:


      ii. Examples of state actions frustrating federal legislation:

      *McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940).*

      *Xerox Corp. v. Harris Cnty., 459 U.S. 145 (1982).*

      *Maryland v. Louisiana, 451 U.S. 725 (1981).*

      *Exxon Corp. v. Eagerton, 462 U.S. 176 (1983).*

CLASS TWO – January 25, 2017 (Phil Tatarowicz)

*The Implied Aspect of the Commerce Clause*

**Assigned Readings:**

*Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).*

*Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434 (1979).*
1. The Evolution of the Dormant Commerce Clause
   a. An unrestricted view
      
   
   b. Conceptual recognition
      
   
   c. Application to state regulations
      
   
   d. Application to a state tax
      
   
   e. Current call for abandoning the dormant commerce clause
      
      Various Associate Justices, particularly Justice Scalia and Justice Thomas, have called for the Court to jettison its use of the dormant commerce clause. See also *Edward A. Zelinsky, Restoring Politics to the Commerce Clause: The Case For Abandoning The Dormant Commerce Clause Prohibition on Discriminatory Taxation, 29 Ohio N.U.L. Rev. 29 (2002)*; *Laurence H. Tribe, American Constitutional Law* 1032 (3rd ed. 2000).

2. Historical Standards
   a. The National-Local Interests Standard
      
   
   b. The Direct-Indirect Tax Standard
      
   
   c. The Multiple Taxation Standard
      
   
   d. The Return to the Direct-Indirect Standard
      
e. The Return of a Free Trade Standard


3. The Court’s Contemporary Standard


4. Scope of Commerce


5. Federalist Tensions Inform Application

For example, too expansive an application of the anti-tax discrimination principle will result in greater uniformity of state laws and tension with the retained powers of the states. Arguably, across-the-board uniformity is at odds with a federalist form of government; a government that has been designed to share powers and responsibilities between different branches of government at the national and state levels.

6. Animating Principles

a. The protection of out-of-state interests that are not represented in the state’s political process.

1. See, e.g., McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45-46 n.2 (1940) (holding that destination state could impose sales tax on interstate sales without violating the Commerce Clause; commerce clause analysis must recognize the danger that “to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.”).

2. Compare S.C. State Highway Dep’t v. Barnwell Bros., 303 U.S. 177 (1938) (upheld South Carolina regulation denying access to the state’s highways of trucks over a certain weight and length, because the law applied equally to a large number of intrastate and interstate shippers where former category had influence with the state’s lawmakers) with Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (plurality opinion) (struck down Iowa regulation banning 65-foot double tractor-trailers, because it provided reduced restrictions on domestic truckers).

b. States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens
c. A strong suspicion of “state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere;”


d. Out-of-state taxpayers should not be required “to become a resident in order to compete on equal terms;”


e. Insufficient congressional resources and time to address all state actions that have a protectionist purpose or effect;

See, _e.g._, Dan T. Coenen, _Untangling the Market-Participant Exemption to the Dormant Commerce Clause_, 88 Mich. L. Rev. 395, 418 (1989) (“the central justification for judicial use of the Commerce Clause is that Congress has too little time and too few resources to give attention to low visibility state programs that have protectionist purposes or effects”); _Laurence H. Tribe, American Constitutional Law_ 772-73 (2nd ed. 1988); § 6-1; Jonathan D. Varat, _State “Citizenship” and Interstate Equality_, 48 U. Chi. L. Rev. 487, 488 n. 4 (1981);

f. A coterminous need to prevent discriminatory state actions that are designed to either close their market to outsiders or close outside markets to their citizens;

See, _e.g._, _Kassel v. Consol. Freightways Corp._, 450 U.S. 662 (1981); _Laurence H. Tribe, American Constitutional Law_ 1073-74 (3rd ed. 2000) (“_Kassel . . . stands for the rule that under the commerce clause a state may not reduce the risks posed to its own citizens by the stream of commerce by diverting that stream out-of-state, thereby increasing the hazards to non-resident, any more than a state may isolate itself from the problems of poverty common to all states by restraining the transportation of indigent persons across its borders._”)

_g. To avoid a per se rule that otherwise might preempt matters of a local nature that would not command the interest or time of Congress;

_h. Safeguarding against local actions that, in combination with other states’ local actions, create multiple burdens not faced by purely intrastate business;


_i. Safeguarding the states’ police powers that are not aimed at regulating commerce;

See, _e.g._, _Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co._, 393 U.S. 129 (1968).
CLASS TWO (cont.)

j. Allowing for fact sensitive balancing of state actions to determine if they directly burden or only remotely and insubstantially burden protected commerce.

But see Laurence H. Tribe, American Constitutional Law 1062 (3rd ed. 2000) (“When the Court has found a regulation nondiscriminatory and thus applied its balancing test, weighing the burden on interstate commerce against the benefit to the state’s legitimate interests, it has most often upheld the statute as one whose benefits outweigh its burdens.”).

k. Assuring that all people have access to other states’ markets on appropriately equal terms.

7. Tax v. Non-Tax Cases

CLASS THREE – February 1, 2017 (Phil Tatarowicz)

The Implied Aspect of the Commerce Clause (cont.)

Assigned Readings:

8. The Dormant Commerce Clause – Requirements:

a. Substantial Nexus


b. Fair Apportionment

i. Internal Consistency


ii. External Consistency


Dormant Commerce Clause Requirements continued next class

CLASS FOUR – February 8, 2017 (Phil Tatarowicz)

_The Implied Aspect of the Commerce Clause (cont.)_

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<th>Optional Reading:</th>
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8. Dormant Commerce Clause – Requirements (cont. from last class):

c. Tax Does Not Discriminate Against Interstate Commerce

    i. Disparate tax treatment

        1) Evolution of commerce clause adjudication

2) The Court’s Formulations of Tax Discrimination

3) Burden of proving disparate tax treatment

4) Identifying discriminatory state tax statutes
   a) Facially discriminatory statutes
   b) Facially neutral statutes with discriminatory effects

5) Statutory mechanisms used to create disparate treatment

6) Same market requirement


7) The compensatory tax doctrine
   a) The concept of complementary taxes


   b) The Court’s method of recognizing complementary taxes


   c) Principles for determining whether taxes are complimentary

   ii. The cause of the inequality

      1) Discrimination v. multiple burdens
      2) Discrimination v. formulary apportionment
      3) Concentric role of internal consistency

   iii. Negative effects on protected commerce

      1) Identifying protected commerce
      2) Classifying effects as burdensome while balancing federalist tensions
iv. Positive effects on local commerce

1) Protected commerce v. local commerce

2) Interstate commerce v. foreign commerce


v. State actions not limited or afforded greater judicial deference

1) Market participant doctrine

2) Public safety exception, e.g., quarantine and pollution control laws

vi. Effects of other laws

Constitutional, Congressional and judicial exceptions

vii. Current State Level Litigation


2) Also, there are other areas of state taxation that, based on discrimination challenges, may find their way to the courts for resolution. For instance, consider the states’ “addback” rules. See, e.g., _Ohio Rev. Code Ann. § 5733.042_; _Conn. Gen. Stat. § 12-218c_; _Miss. Code Ann., § 27-7-17._

d. Dormant Commerce Clause Requirements: “Fairly Related to Services Provided”


Dormant Commerce Clause Requirements continued next class

**CLASS FIVE**—February 15, 2017 (Phil Tatarowicz)
1. Dormant Commerce Clause Requirements: “Fairly Related to Services Provided” (cont’d)

a. General Revenue Taxes on Natural Resources Primarily Sold Out-of-State

b. User Taxes and Fees

2. The Court’s Foreign Commerce Standard

*Complete Auto Transit*’s four prongs, plus two from *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434 (1979):

Requirement of not Creating a Substantial Risk of Multiple International Taxation

Foreign Commerce Requirement Prohibiting Interference With Federal Government Speaking With One Voice

3. Indian Tax Cases

4. Intoxicating Liquors

5. Permissible Incentive or Impermissible Discrimination?

**NOTE: February 22, 2017 – NO CLASS (Faculty Retreat)**

**CLASS SIX** – March 1, 2017 (Phil Tatarowicz)

*A Commerce Clause Case Study and Summary*

**Assigned Readings:**


1. Case Study: *Cuno v. Daimler Chrysler* and the Economic Development Act of 2005

2. Summary Review of Commerce Clause Lessons
Select Justiciability Issues

### Assigned Readings:


1. Judicial Federalism: The Judiciary Act of 1789, 1 Stat. 73

2. Tax Injunction Act, 28 U.S.C. § 1341:


   Beware old standards and new cases: Direct Mktg. Ass’n v. Brohl, 135 S.Ct. 1124 (2015), rev’d 735 F.3d 904 (10th Cir. 2013), distinguished Florida Bankers Ass’n v. U.S. Dept. of the Treasury, 799 F.3d 1065 and Huang v. City of Los Angeles, 9th Cir.(Cal.), 2016 WL 683269

3. Standing


### Supremacy Clause

1. Introduction and Overview

   The Supremacy Clause, U.S. CONST. art. VI, § 1 provides: “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.”

2. Cases

Class Eight – March 22, 2017 (Rick Capino)

Due Process Clause & Taxpayer’s Right to Refunds

 assigned Readings:

1. Introduction and Overview

2. Cases


3. The issue of Retroactive “Fixes”


b. How far back?

c. Tate & Lyle, Inc. v. Comm’r of Internal Revenue Serv., 87 F.3d 99 (3d Cir. 1996).

d. Mont. Rail Link, Inc. v. United States, 76 F.3d 991 (9th Cir. 1996).


h. Zaber v. City of Dubuque, 789 N.W.2d 634 (Iowa 2010).

i. Yaskawa Am., Inc. v Dep't of Treasury, No. 11-000077-MT (Mich. Ct. Cl. 2014).

**CLASS NINE** – March 29, 2017 (Rick Capino)

### Assigned Readings:


### Import-Export Clause

1. Introduction and Overview

   The Import-Export Clause, *U.S. Const.* art. I, § 10, cl. 2 provides: “No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul [sic] of the Congress.”

2. Imports


3. Exports


### Duty of Tonnage

1. Introduction and Overview

   “No State shall, without the consent of Congress, lay any Duty of Tonnage.” *U.S. Const.* art. I, § 10, cl. 3.


International Law Protections, e.g., GATT/GATS, WTO, Treaties


U.S. CONST. art. I, § 10, cl. 2.

United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203, 230-31 (1942) ("[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy . . . [b]ut state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement").

Michelle DiPuma, Why the Recent “Boeing Case” Will Not Ultimately Limit a State’s Ability to Provide Incentives to Attract Business, 66 TAX LAW. 873 (2013).


CLASS TEN – April 5, 2017 (Rick Capino)

Assigned Readings:

Equal Protection Clause

1. Introduction and Overview

The Equal Protection Clause, U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”).


2. Out of State Interests


3. Real Property Taxation


**Privileges and Immunities Clause**

1. Introduction and Overview

Privileges and Immunities Clause, *U.S. Const. art. IV, § 2* (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

Privileges or Immunities Clause, *U.S. Const. amend. XIV, § 1* (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”).

Not applicable to corporations

2. Cases


*Travis v. Yale & Towne Mfg.*, 252 U.S. 60 (1920).


3. **CAL. REV. & TAX. CODE § 17302.**

**CLASS ELEVEN** – April 12, 2017 (Rick Capino)

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First Amendment

1. Introduction and Overview

U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.”).

2. Free Speech and Press


First Amendment discussion continued next week

CLASS TWELVE – April 19, 2017 (Rick Capino)

First Amendment (cont.)

Assigned Readings:
None (same as Class Eleven)

3. Establishment Clause


Establishment Clause Challenges to State Tax Exemptions


Recent Establishment Clause challenges related to tax credits for contributions to school tuition organizations and similar programs.
Contracts Clause


Case Studies and Summary – Select Federal Limitations Issues and Summary

CLASS THIRTEEN – April 26, 2017 (Phil Tatarowicz and Rick Capino)

Last Class; Class Review
Schedule for Preparation of Papers:

Students preparing papers must meet the following schedule.

Topic Selection:

Students should select a topic in consultation with the Professor prior to Week 4 (Class 4 – February 8, 2017) of the course. The topics chosen should relate to one or more of the issues identified in the course outline. Because you will need to spend substantial time researching and writing on this topic, it is important to select a topic that will hold your attention for the semester.

Before settling on a topic, make sure that you have done sufficient preliminary research to determine that there is some debate, uncertainty, or conflict surrounding the issue that you have selected. Choose a problem that’s big enough to be important and interesting, but small enough to be manageable. You should have a tentative idea of the theme that you wish to develop in your paper, but you should anticipate that your theme will change as you work on the paper.

Outline:

An outline must be submitted by Week 6 (February 22). The outline should include a preliminary statement of your intended thesis or approach, the sources you plan to consult, and a preliminary plan for organizing the paper. For example, the outline might sketch out a description of a legal doctrine that you intend to criticize, followed by a list of the key criticisms and the policy recommendations or doctrinal changes implied by your analysis. The list of sources in this outline does not need to be complete, but it should provide sufficient details to allow us to provide feedback about the materials that you have reviewed and your plan for additional research.

Conference Draft:

A draft paper must be submitted by Week 7 (March 1, 2017) for May graduates and by Week 9 (March 15, 2014) for all others. The drafts should be at least 25 pages in length (approximately 6,000 words) for students taking the 3-credit hour course and 20 pages in length (approximately 4,800 words) for students taking the 2-credit hour course. Each section and subsection of the conference draft should be substantially complete and should include footnotes. Students will meet with the Professor to discuss revisions to the draft.

Final Paper:

Citations should be complete and in proper Bluebook form. All citations should be in footnote form, not endnote form. Margins should be 1 inch, line spacing should be double, and the typeface should be 12pt or greater. A table of contents should be included.

For students graduating in May, final papers are due by Monday, May 1, 2017. All other papers are due no later than Tuesday, May 12, 2017, absent an extension as permitted by the Law Center. Note, graduating students are not eligible for a deadline extension.

Feedback and Grading of Papers:
During the first few weeks of the course, we will meet with students who are preparing a paper to discuss selection of an appropriate topic. We will provide written comments on the outline and the conference draft. We will also be available to meet with students in person to provide additional feedback on the conference draft. It is anticipated that those seeking three hours of credit, as well as undergraduate law students taking this course, in part, to fulfill their writing requirement will meet more frequently with their assigned Professor to discuss their progress and related issues.

In evaluating papers, we will focus on three considerations. First, the paper should reflect careful research using a variety of sources. Your paper should show that you studied the relevant authorities and appreciate the differences between them. Your research should not be limited to legal authorities (e.g., case law and statutes), but must include law review articles and legal treatises.

Second, the paper should articulate a thesis about an issue in this area of the law and develop it. The thesis should articulate a useful, non-obvious viewpoint about the area of federal limitations on state taxation that you have chosen to address. The paper should not be simply a report of propositions found elsewhere, but should evaluate, synthesize, interpret or compare these propositions. On the other hand, your thesis need not be revolutionary or iconoclastic; it is alright to conclude that others who have written on your topic have reached correct conclusions. Whether or not you reach the same conclusions as others, your paper should contain an analysis that is critical and novel. Perhaps most importantly, the paper should demonstrate why you believe that the topic that you have chosen is important and interesting.

Finally, the final paper should reflect good writing and careful editing. The purpose of requiring the submission of an outline and a draft for comment is to provide an opportunity for you to hone your ability to analyze an issue and explain your views in writing. In particular, the paper should be organized in a logical manner that complements your theme. The paper should make good use of road maps, topic sentences and transitions to guide the reader. Your writing should show a command of the standard rules of grammar, a clear style, and the polish that comes from thoughtful rewriting.