Preface

Like my earlier book, The Supreme Court’s Federal Tax Jurisprudence (2010),¹ this is a hornbook on a subject never treated by a hornbook (although hornbooks usually are not limited to Supreme Court decisions). As a hornbook, it is intended to be useful in practice. However, due to the somewhat limited application of constitutional law in everyday tax practice, this hornbook also attempts to be generally entertaining and informative on the general subjects of constitutional and American history. Hornbooks fit in the array of legal writing like this:

• **Litigators** brief arguments designed to win the case at hand, without much regard to whether the argument fits into the larger logic of the law.
• **Courts** decide those cases with opinions usually (but not always) designed to state just enough law to decide the case at hand.
• **Hornbooks** attempt to take the courts’ opinions to the next level by weaving them into categories designed to make them more accessible for use by the litigators, other practitioners, and judges, thus helping those lawyers to advance the cycle of law making. Hornbooks make a modest

¹Jasper L. Cummings, Jr., The Supreme Court’s Federal Tax Jurisprudence (ABA Section of Taxation 2010) (available on Westlaw at ABA-SCTTAX).
attempt to provide integrating frameworks, if not theories, in the law, which is a task that courts usually (but not always\(^2\)) eschew.

- Academic articles tend either to spin what courts actually do into ever deepening insights that may outrun matters normally considered by courts, or to ignore what courts actually do and instead suggest alternate systems that are preferable to the actual systems of law applied in the courts.\(^3\)

This hornbook addresses the one area of the Supreme Court’s federal tax jurisprudence not addressed by my earlier book: the Court’s federal tax opinions that have involved the application of the Constitution of the United States. The two books together address all federal tax rulings of the Court, leaving uncovered in the tax area only the application of the Constitution to state taxation, a large and well-studied set of cases. However, this book does include some state tax decisions that address issues shared with federal taxation (for example, the intergovernmental tax immunity cases and due process limitations applicable to both state and federal taxes).

Although my earlier book delved into a matter of substantial current academic interest — statutory construction — this one trenches on the much more vast subject of constitutional law, which has an even larger academic following, but relatively little practitioner following. Perhaps a general constitutional law expert should have written a book on the intersection of the Constitution and federal taxation, but none has.\(^4\) Therefore, I am attempting to bring the Mohammed of tax to the mountain of constitutional law. The result may be imperfect from the constitutional expert’s viewpoint, but should be an improvement for tax folk over cursing the darkness. This book identifies pertinent academic treatments of the subjects addressed, but does not simply build on other secondary writings.

\(^2\)The Supreme Court, more frequently than other courts, sometimes attempts to create frameworks for analysis. A notable failure was Frank Lyon Co. v. United States, 435 U.S. 561 (1978), which listed 26 or 27 factors that might be considered in determining if a lessor actually owned the property, which has been read by lower courts as an all-purpose framework of uncertain meaning for disentangling substance from form. A classic example of a more successful opinion that describes a framework of analysis picking a path through disparayoungate authorities is Justice Jackson’s concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952), which created a way to analyze the constitutionality of exercises of executive power. However, the last time a majority opinion of the Court directly employed that framework was Justice Rehnquist’s opinion in Dames & Moore v. Regan, 453 U.S. 654 (1981).

\(^3\)A prime example in the income tax area is the penchant of academic articles to begin discussions of income with citations to the Haig-Simons definition of income, with no regard to the fact that the Supreme Court has never relied on it to define income as that term is used in the Sixteenth Amendment and the Code.

\(^4\)Cf. Staff of the Joint Committee on Taxation, The Taxing Power of the Federal and State Governments (1936) (available on Joint Committee website) (effectively discusses federal tax constitutional issues as of 1936, with a slant toward conservative views like those in Butler v. United States, 297 U.S. 1 (1936), which it cites).
In researching and writing this book I have begun with and worked from
the Supreme Court opinions, and have applied a number of methodologies to
capture all of them addressing federal tax constitutional issues. The opinions
themselves have primarily informed my analysis. Although the Court has the
luxury and power of rejecting its own prior rulings, we do not; and it can be
said with confidence that the Court does not usually exercise that power, absent either (1) a fairly lengthy process of disenchantment with a wrong turn it has taken (for example, the intergovernmental tax immunity cases), or (2) a fairly abrupt political jog to the left or right, which is the Court’s preroga-
tive (for example, the anti-tax rulings from 1922 to 1936 and their rejection in 1937).

Obviously there is much more constitutional case law in relation to federal
taxes than can be found in the Supreme Court’s opinions. The lower federal
courts have been busy in the area for nearly 100 years in the case of the income
tax, and longer as to other federal taxes, and they provide the last word on
many issues the Supreme Court has not chosen to review. Nevertheless, this
book focuses entirely on the Supreme Court’s opinions for four reasons:

• The lower federal court rulings tend to be all over the lot, and tend to sow
more confusion than understanding of many subjects (as illustrated by
the fact that the most effective way to obtain review of appellate rulings
on federal tax is to develop a conflict among the circuits).

• While the litigator will assiduously seek out the lower court ruling that
is on “all fours” with his case, or that can be analogized, or whose dic-
tum can be pirated in any way, shape, or form, an on point (or even
not so on point) Supreme Court opinion usually will trump all lower
court authority.

• Many of the numerous “old” tax decisions of the Supreme Court tend to
be overlooked by practitioners and the lower courts, but the Court does
not generally overlook them; rather it feels compelled to deal with them,
if not to follow them, when they are implicated by a current case.

• Perhaps most important, the Court’s opinions “are not final because
[they] are infallible, but [they] are infallible only because [they] are
final.” Consequently, the lower courts must follow the Supreme Court’s
federal tax constitutional law precedents, but the Supreme Court usually
gives no credence to the views of the lower courts.

At various points this book addresses several major aspects of constitutional
law that are not specifically related to tax but that bear on the tax subject (for
example, “substantive due process”). Not only should these discussions aid
in fully explaining the constitutional tax decisions, but also they aim to help

5 See, e.g., United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012), following
under the principle of stare decisis its earlier decision in Colony, Inc. v. Commissioner, 357
U.S. 28 (1958), somewhat to the surprise and dismay of many commentators.


7 See Ch. V.D.3(b)(7).
the tax specialists to recall subjects they once learned in law school but may not have used since, and to see the connection between those subjects and federal taxation.

Finally, the reader may notice that this book contains an abundance of quotations from and about the Court. They appear not entirely due to the author’s laziness, but (1) to prove the sometimes surprising force with which the Court has protected the federal taxing power, and (2) to show the great trove of pithy (and sometimes not so pithy) statements from the past making points that we sometimes think we have just discovered.

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