

# Preface

Like my earlier book, *The Supreme Court's Federal Tax Jurisprudence* (2010, 2016),<sup>1</sup> 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. The principal exception to the limited use in practice is state and local taxation, which commonly involves federal constitutional claims. The new Chapter IX added in this second edition treats the Supreme Court's SALT rulings.

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 attempt to

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<sup>1</sup> JASPER L. CUMMINGS, JR., *THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE* (2d ed. 2016) (available on Westlaw at ABA-SCTTAX). Also the first edition is available on HeinOnline.

provide integrating frameworks, if not theories, in the law, which is a task that courts usually (but not always<sup>2</sup>) 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.<sup>3</sup>

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. And this second edition adds the only major group of constitutional tax cases left out of the first edition: state tax decisions. The two books together address all federal tax rulings of the Court, plus the Court's state tax rulings involving the Constitution, which comprise essentially all of its tax rulings.

Although *The Supreme Court's Federal Tax Jurisprudence* 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.<sup>4</sup> 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 some academic treatments of the subjects addressed, usually older ones, but does not simply build on other secondary writings; instead it works principally from the original sources, the Supreme Court's own opinions. Some would find it shortsighted to ignore the academic literature; I consider it extremely practical, because the Supreme Court also will ignore the academic literature and will rely

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<sup>2</sup> 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 disparate 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. Justice Jackson had a penchant for organization and his opinion in *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) contains the best and only compendium of Supreme Court SALT decisions to that date (and later).

<sup>3</sup> 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.

<sup>4</sup> *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 *United States v. Butler*, 297 U.S. 1 (1936), which it cites).

heavily on its own prior rulings, except when it suits them, which is a political, not academic, choice. The book's goal is to attempt to know what the law is, not what academics might wish it to be.

Researching and writing this book began with and worked from the Supreme Court opinions, and employed a number of methodologies (including trial and error) to capture all opinions addressing federal and state 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,<sup>5</sup> 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 prerogative (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 taxes than can be found in the Supreme Court's opinions. The lower federal courts have been busy in the area of federal (but not state) taxation 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. And state court opinions on state taxes commonly address constitutional issues. Nevertheless, this book focuses entirely on the Supreme Court's opinions for four reasons:

- The lower federal and state 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 dictum 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 generally the Court does not overlook them; rather it feels compelled to deal with them, if not to follow them, when they are implicated by a current case. And, of course, electronic research and searching has made it easier to locate all possibly related authorities.

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<sup>5</sup> See, e.g., *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (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. [Congress.gov](http://Congress.gov) contains a Table of Supreme Court Decisions Overruled by Subsequent Decisions as well as annotations of the Constitution.

- Perhaps most important, the Court's opinions "are not final because [they] are infallible, but [they] are infallible only because [they] are final."<sup>6</sup> 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").<sup>7</sup> Not only should these discussions aid in fully explaining the constitutional tax decisions, but also they aim to help 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.

This book devotes much space to topics that may not have current prominence, because nothing said in Supreme Court opinions ever dies. Chapter II overemphasizes the Court's statements supporting the vast scope of the federal taxing power because it is so commonly questioned today. Chapter III rehearses the seemingly outmoded *Child Labor Tax Case* and *Butler* decisions and too carefully reviews the fractured *Sebelius* opinions, because they will be resurrected and new commentators will purport to find new meanings. Chapter IV perhaps is too repetitive in differentiating taxes and user fees and regulatory charges and special assessments, but the subject will grow in importance and confusion abounds. Chapter V beats the dead horse of direct taxation because tax avoiders will try to breathe life into it. Chapter VIII is briefer than it needs to be because using personal rights (which corporations increasingly possess) to attack taxes will be a growth area. And Chapter IX completes the entire set of Supreme Court constitutional law tax rulings with the state tax cases. It does not contain exhaustive analyses of subtopics like the infinite applications of the *Complete Auto Transit* test for tax discrimination against interstate commerce, but rather states what the law is known to be based solely on holdings in Supreme Court opinions.

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, which make points that we sometimes think we have just discovered.

I thank the Section of Taxation for publishing this and my first book (twice each). Fortunately it publishes to serve practitioners, who might actually need to know what the law is.

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<sup>6</sup> Justice Robert H. Jackson, concurring in *Brown v. Allen*, 344 U.S. 443, 540 (1953).

<sup>7</sup> See Ch. V.D.3(b)(7).