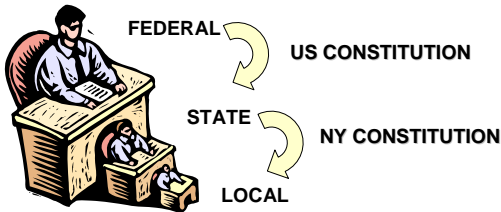


## Levels of Government

- Allocation of power to make and enforce laws



Source: Samantha K. Graff, Staff Attorney, Ventura County Health Department.

1

## U.S. Bill of Rights

- Freedoms of speech, press, religion, peaceable assembly, and to petition the government.
- Right to keep and bear arms.
- Protection from quartering of troops.
- Protection from unreasonable search and seizure.
- Due process, double jeopardy, self-incrimination, private property.
- Trial by jury and other rights of the accused.
- Civil trial by jury.
- Prohibition of excessive bail, as well as cruel or unusual punishment.
- Protection of rights not specifically enumerated in the Bill of Rights.
- Powers of states and people retained.

2

## The United States consists of:

- 50 States and the District of Columbia
- 38,000 local governments
- 36,000 special districts which are creations of the States and/or local governments

3

## Total U.S. Tax Revenue

Federal, State, and Local Government Revenues by Source, 2002  
(in thousands of dollars)

	Federal government amount	State government amount <sup>1</sup>	Local government amount <sup>1</sup>
<b>Taxes</b>	<b>1,853,173,000</b>	<b>535,211,161</b>	<b>369,739,209</b>
Property	9,702,395	262,360,613	61,679,232
Sales and gross receipts	179,666,267	179,666,267	43,321,430
General sales	66,369,000	66,369,000	18,357,802
Selective sales / excise	66,369,000	66,369,000	17,381,361
Individual income	140,044,000	25,123,137	3,026,725
Corporate income	15,641,246	15,641,246	1,302,673
Motor vehicle license	700,760,000	16,967,361	17,107,674
Social Insurance / Retirement	79,036,000		
Other taxes			
<b>Other revenue</b>		191,641,036	227,626,917
Miscellaneous general revenue		91,830,268	74,247,072
Utility revenue		11,935,400	30,386,361
Liquor store revenue		4,267,846	777,261
Insurance trust revenue		19,300,945	3,090,918

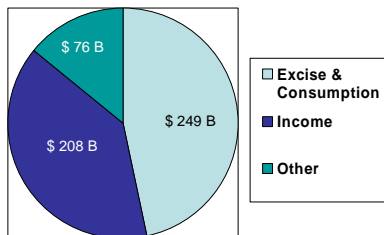
<sup>1</sup> Duplicative intergovernmental transactions are included.

State and Local Source:  
U.S. Census Bureau, Census of Governments 2002

Federal Government Source:  
Office of Management and Budget, Budget of the US Government, Fiscal Year 2004

4

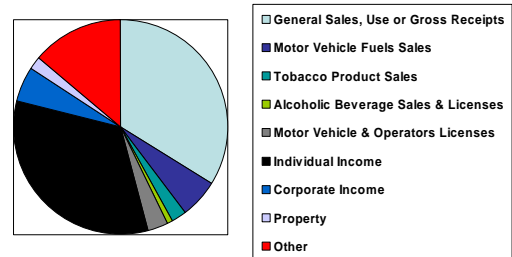
## State Tax Collections by Source 2003 (Total \$542.9 Billion)



Does not include local taxes. Source: U.S. Bureau of the Census

5

## State Tax Collections by Source 2003 (Total \$542.9 Billion)

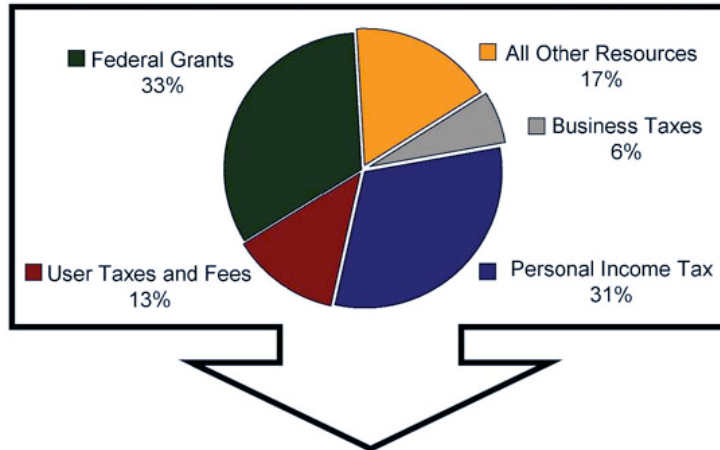


Does not include local taxes. Source: U.S. Bureau of the Census

6

## Example: New York State Revenue

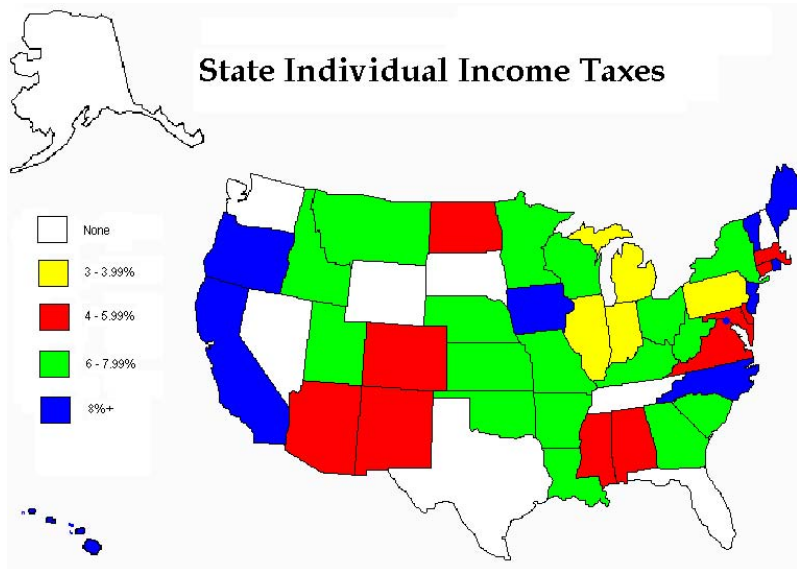
(Total Revenue \$100 billion)



Source: New York State 2006-07 Executive Budget

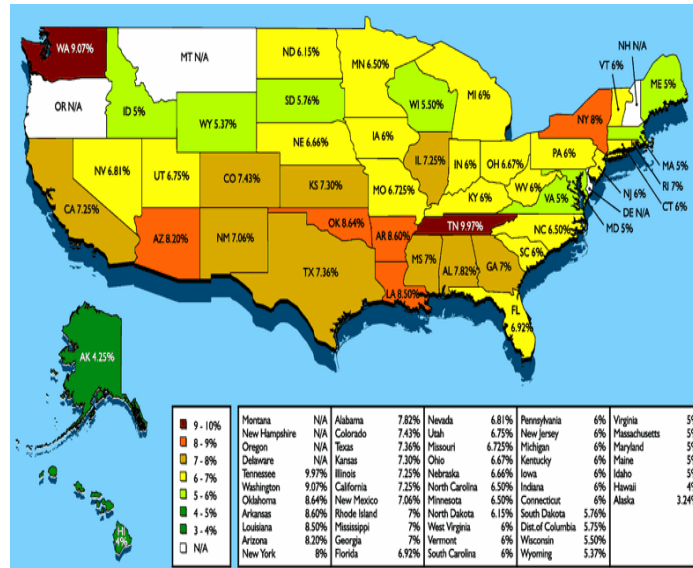
7

## State Individual Income Taxes



8

## States with Sales Taxes 2005

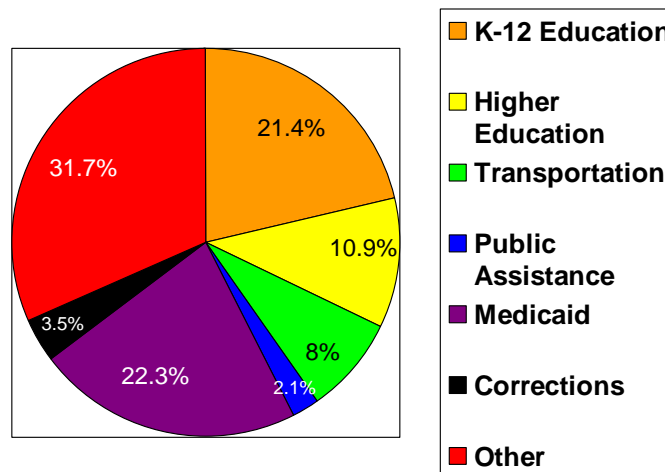


Source: International Tax Law Review

9

## State Expenditures by Function 2004

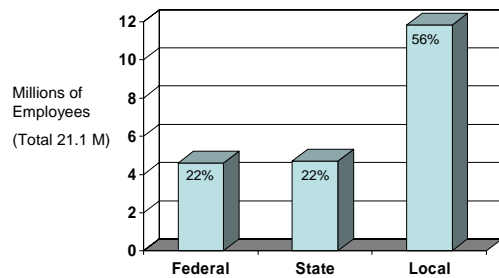
(Total Spending \$1.2 trillion)



Source: U.S. Census Bureau *State Government Finances*, and Holcombe and Sobel, 1997, 24-25.

10

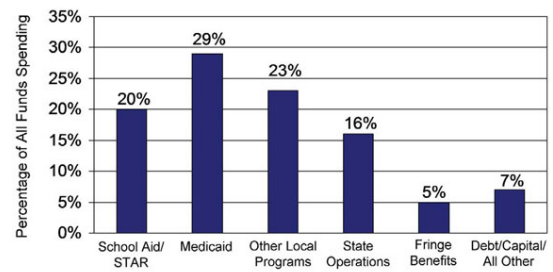
### U.S. Government Employment By Level of Government 1994



Source: American Council on Intergovernmental Relations

11

### Example: New York State Expenditures



Source: New York State 2006-07 Executive Budget

12

### Federal & State Immunities from Tax

- The federal government is immune from state taxation.
- The states are partially immune from federal taxation.

13

### How Cases Arise in the U.S. Supreme Court

- Appeal of a Federal Court Decision
- Appeal of a State Court Decision Involving a "Federal Question"
- Disputes between the States
- Dispute in which the Federal Government is a Party
- Other ways (not relevant here)

14

## Appeal of a Federal Court Decision

**Geographic Boundaries**  
of United States Courts of Appeals and United States District Courts



15

## The U.S. Supreme Court is the highest federal court in the United States

- It is the final appellate court for cases arising in lower federal courts, including the Tax Court.
- The United States is divided into 13 circuits (11 circuits covering the states, plus the D.C. circuit and the federal circuit).

16

## Federal Appellate Process



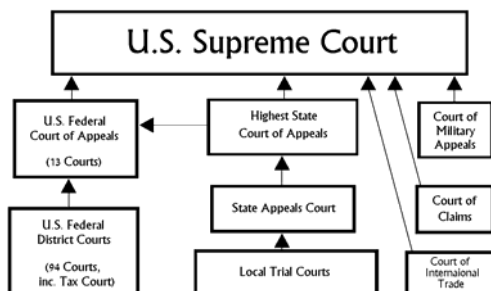
17

## Granting Cert

- U.S. Supreme Court chooses its cases
- Writs of *certiorari*
- Out of 5000-6000 requests, the Court will hear 150
- "Rule of four"
- Split among the Circuits

18

## Appeal of a State Court Decision Involving a "Federal Question"



19

## Other Methods

- Disputes between the States
- Dispute between a State and the Federal Government

20

## Overview of Constitutional Challenges to State Tax Laws

A state tax can be challenged on a number of Constitutional grounds, the most frequent of which are:

- Due Process
- Commerce Clause or Fundamental Rights
- Personal Rights (“Privileges & Immunities,” “Equal Protection”)

21

## Jurisdiction to Tax

22

## Constitutional Limitations on Jurisdiction to Tax

- Due Process Clause Nexus
- Commerce Clause Nexus

23

## Due Process

### **14th Amendment Privileges & Immunities Clause. U.S. Const. amend. 14, §1**

*“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

24

## Due Process

1. **“Substantive Due Process.”** Incorporates fundamental rights of the Constitution against the States, including most of the Bill of Rights
2. **“Procedural Due Process.”** Requires States to meet fundamental *procedural* standards of fairness before depriving persons of life liberty or property (property includes tax).

25

## Due Process

- Due Process nexus requires “minimum contacts”

26

## Due Process

### Individuals

- States may tax the worldwide income of residents, but states may only tax the income sourced within the state of non-residents.

### Corporations

- Commercial residence serves as a sufficient basis to exercise jurisdiction over worldwide income. States may tax non-residents on “persons, property, and business transactions *within their borders*”

27

## Due Process

### Some Determinants of Residence for Individuals

- Domicile
- Physical presence in the state for other than a temporary or transitory purpose
- Presence in the state for a specified minimum period (e.g., 183 days)
- Maintenance of a permanent place of abode in the state

It's a question of fact.

28

## Due Process

E.g., California defines a resident as

- Every individual who is in the state for other than a temporary or transitory purpose” and “every individual domiciled in the state who is outside the state for a temporary or transitory purpose”

29

## Due Process

### Domicile is a Factor for Determining Residence

One of the factors in determining residence is domicile. Domicile is usually defined as a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

Domicile is a question of fact.

30

## Due Process

A person can have multiple residences, but should theoretically have only one domicile.

31

## Due Process

Two different states may consider a single taxpayer to be their resident, and each will seek to tax him or her on worldwide income.

For example, New York's definition of a resident includes:

- Persons domiciled in New York, and
- Non-domiciliaries who spent more than 183 days in New York

32

## Due Process

### **Jurisdiction to Tax Non-residents under the Due Process Clause**

A non-resident person or entity must “purposefully avail” itself of the benefits of the economic market of the state, for example, by working there or soliciting sales in the state.

33

## Commerce Clause Nexus

Requires “substantial nexus,” interpreted to mean physical presence.

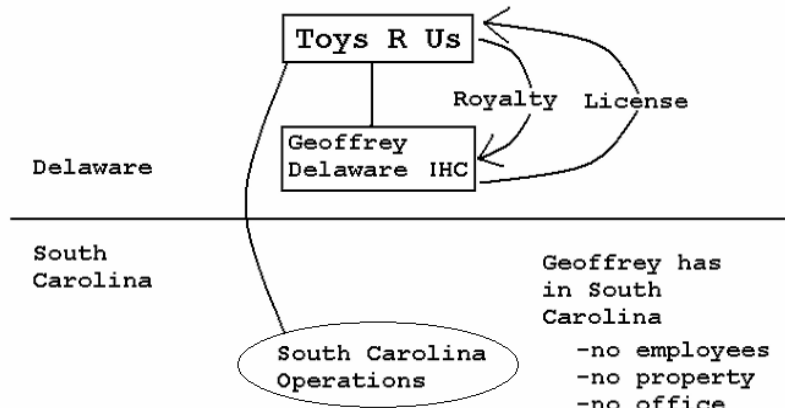
- Sales office
- Employees
- Agent
- Real or personal property
- What about intangibles?

34



## Commerce Clause Nexus Intangibles Holding Company

GEOFFREY



35

## Why Delaware?

"For a glimpse into this quiet and lucrative world, head up to the 13th floor of 1105 N. Market St.. Through smoked-glass windows, a visitor can view the high-rise headquarters surrounding Wilmington's prestigious Rodney Square: DuPont and Hercules, Wilmington Trust and MBNA. But turn back, and look inside this slender office tower. Tucked within the building's stark, upper floors, is another, hidden corporate center. Here, more than 700 corporate headquarters make up a vast and quiet business district of their own. The lobby computer lists their names: Shell and Seagram and Sumitomo, Colgate-Palmolive and Columbia Hospitals and Comcast, British Airways and Ikea, Pepsico and Nabisco, General Electric and the Hard Rock Cafe. How do 700 corporate headquarters squeeze into five narrow floors? How do 500 fit on the 13th floor alone? "Frankly, it's none of your business," said Sonja Allen, part of the staff that runs this corporate center for Wilmington Trust Corp. . . . "Some of my clients are saving over \$1 million a month, and all they've done is bought the Delaware address," said Nancy Descano, holding company chief of CSC Networks outside Wilmington"

Source: Joseph N. DiStefano, "In the War Between the States, Delaware is Stealing the Spoils," Gannett News Service, January 25, 1996.

36

## Foreign Entities

- Partnership
  - A foreign corporate partner in a partnership engaged in business in a state can be subject to tax in that state if it is engaged directly or indirectly in the control of all or any portion of the business activities or affairs of the partnership (under NY law).
- Corporation
  - Usually nexus cannot be established through related companies

37

## Federal Statutory Limitations on Jurisdiction to Tax

- Public Law 86-272
- 1998 Internet Freedom Act

38

## Competing Powers: State & Federal Government

- The state governments have a general police power, and the power to legislate for the general welfare of the citizenry. In contrast, the federal government's powers are limited to those enumerated in the federal Constitution.
- A state action is valid unless it violates a specific limitation placed on the states by the Constitution (e.g., the Bill of Rights)
- Whereas, a federal action is *invalid* unless it falls within one of the enumerated powers granted to the federal government in the Constitution.

39

## Important Enumerated Congressional Powers

- lay and collect taxes
- provide for the defense of the country and declare war
- borrow money on the credit of the U.S.
- regulate commerce with foreign countries and among the states
- regulate immigration and bankruptcy
- control and issue patents and copyrights
- make all laws necessary and proper to carry out the powers granted to the federal government by the Constitution.

40

## The Constitution acts both as:

- a source of federal power, and
- a limitation on state power

41

## Aggrandizement of Central Government by the High Court Court as Arbiter of Competences

### Marbury v. Madison

In the U.S., the question was not whether the final arbiter of constitutionality should be state supreme courts or the federal Supreme Court, but rather whether it should be the federal Supreme Court or another branch.

Nowhere in the U.S. Constitution does it say the Supreme Court is the final arbiter of constitutionality, but in *Marbury* the Supreme Court set itself up as that arbiter.

42

# Aggrandizement of Central Government by the High Court

## Commerce Clause, U.S. Const. art. 1 §8, cl.3

*[Congress shall have the power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes*

43

# Other Constitutional Limits on Tax

## **Express Limitations on State Taxing Authority**

The Commerce Clause does not expressly mention taxation—it is not an explicit limitation on state taxes. There are only two such express limitations to be found in the Constitution.

### •**The Import-Export Clause** U.S. Const. art. 1, §10

*"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's 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 of the Congress."*

### •**The Duty on Tonnage Clause** U.S. Const. art. 1, §10

*"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."*

44

## Dormant Commerce Clause

The mere existence of the federal commerce power, as described in the Commerce Clause, restricts the states from discriminating against, or unduly burdening, interstate commerce. That is, Congress has the exclusive power to regulate interstate commerce, and this exclusive power precludes the states from burdening interstate commerce.

45

## Three Part Test under the Dormant Commerce Clause

1. The regulation must pursue a legitimate state end
2. The regulation must be rationally related to that end
3. The state's policy objective must outweigh the burden on interstate commerce imposed

46

## Market Participation Exception

47

## Congress' Power, not Citizen's Right

Note that these principles of non-interference with commerce by the states derive from the Commerce Clause. They derive from the fact that Congress, not the states, has the power to regulate interstate commerce. This means that Congress could consent to an action that would otherwise violate the Commerce Clause; it can even consent to discrimination against out-of-staters.

48

## Congress' Power, not Citizen's Right

- Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946)
  - Congress passed the McCarran Act, which said that the states were permitted to regulate insurance, and no federal statute should be construed to invalidate any state insurance law, except by express Congressional statement. South Carolina assessed a tax of 3% on premiums paid to out-of-state insurers. The tax did not apply to premiums paid to South Carolina insurers.
- Held.
  - The tax was discriminatory, and would be invalid under the Commerce Clause, except that it was valid under the McCarran Act. Since Congress has the power to discriminate in favor of local trade, Congress and the states together must have that power

49

## Congress' Power, not Citizen's Right

However, individuals may sue.

50

## Personal Protections Against Discrimination

- Article 4 Interstate Privileges & Immunities (art. 4, §2)
- 14th Amendment Rights (amend. 14, §1)
  - 14th Amendment Privileges & Immunities
  - Due Process Clause
  - Equal Protection Clause
  - Incorporation of Bill of Rights (amend. 1-10)

51

## Interstate Privileges & Immunities Clause, U.S. Const. art. 4, §2

*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."*

- Only applies to U.S. citizens, not corporations or foreigners.
- Only protects rights "fundamental to national unity."

52

## Article 4 Privileges and Immunities

The Supreme Court has said that the clause:

"...unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

53

## Comparing U.S. Privileges & Immunities with EC Freedoms

The U.S. right of interstate travel is like the EC freedom of movement:

- Article 18(1) EC
- "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

54

## Comparing U.S. Privileges & Immunities with EC Freedoms

The U.S. right to engage in commerce, or a trade or business in another state is like the EC freedoms of establishment, services, movement of workers

### **Workers** Article 39(1) EC

"Freedom of movement for workers shall be secured within the Community."

### **Servcies** Article 39 EC

"...restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. ..."

### **Establishment** Article 43 EC

"...restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. ..."

55

## Comparing U.S. Privileges & Immunities with EC Freedoms

The U.S. right to take and hold real estate is like the EC freedom of capital movement

### **Capital** Article 56 (1) EC

"...all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

56

## Comparing U.S. Privileges & Immunities with EC Freedoms

For tax purposes, the Privileges and Immunities Clause of the U.S. Constitution functions similarly to EC Treaty Article 12:

**Non-discrimination** Article 12 EC:

*"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

**Interstate Privileges & Immunities**, U.S. Const. art. 4, §2

*"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."*

57

## Limitation: Must Implicate a Fundamental Freedom

The Interstate Privileges and Immunities Clause prevents a State from discriminating against *non-residents* with respect to rights fundamental to national unity. States may also not discriminate on the basis of what city a person resides in.

Rights fundamental to national unity include

- the right to be employed
- the right to practice one's profession or conduct business

No Market Participation Exception

58

## Justifications for Discrimination

The right of a non-resident to be treated as well as a state resident is not absolute. To put it in the Supreme Court's words,

"It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of the other States. But it does not preclude disparity of treatment in many situations where there are perfectly valid independent reasons for it."

59

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## Comparing U.S. and EC Cases Involving Non-Resident Taxpayers

60

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## Indirect or Covert Discrimination

Compare

*Chalker v. Birmingham N. W. Ry. Co.*

with

*Commerzbank*

In both cases, the high courts struck down harsher tax rules that applied when the taxpayer had a characteristic that, although not facially discriminatory on the basis of state nationality or citizenship, tended to coincide with nationality or citizenship.

61

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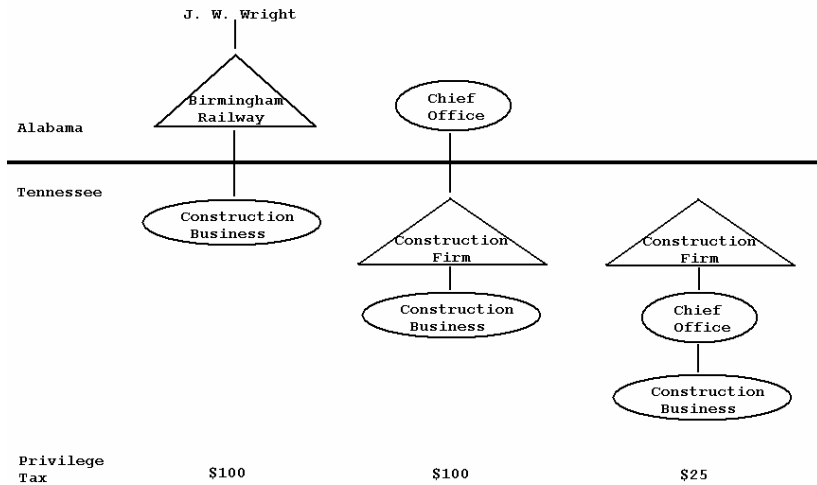
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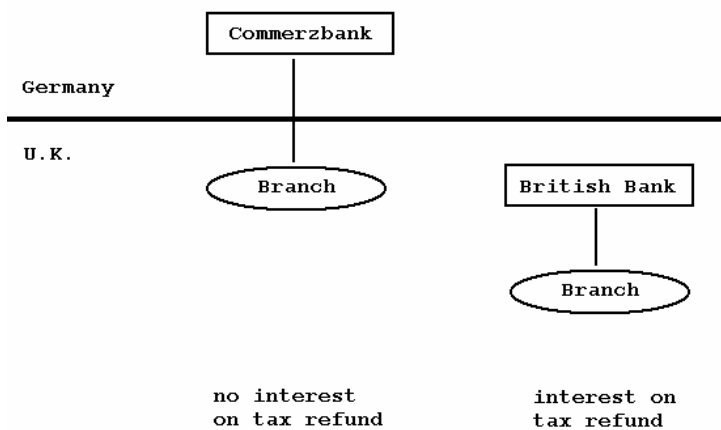


## Chalker v. Birmingham 249 U.S. 522 (1919)



62

## Case C-330/91 Commerzbank (1993)



63

## Non-Residents' Business Losses

Compare

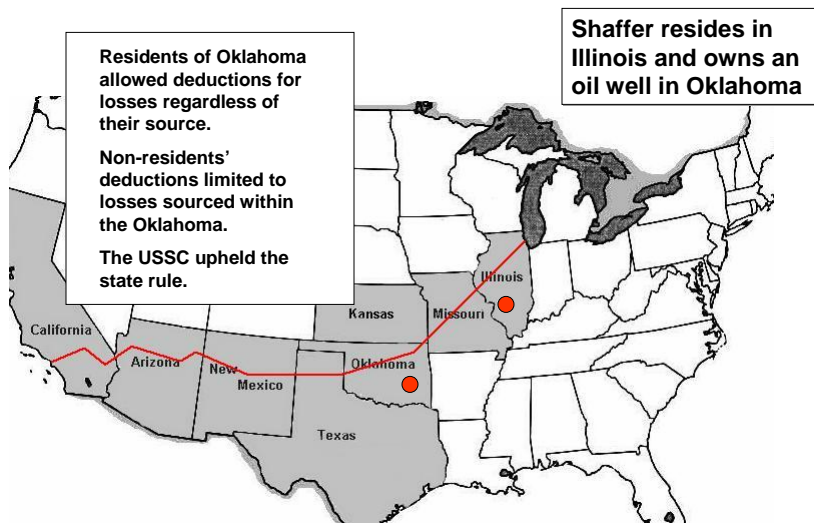
*Shaffer v. Carter*

with

*Gerritse*

64

## Shaffer v. Carter 252 U.S. 37 (1920)



65

### Case C-234/01 Gerritse (2003)

- *Gerritse* was a Dutch drummer who earned income from performing in Germany. However, because he did not earn enough German income, he could not elect to be treated as a German resident taxpayer. This meant that he was denied three benefits: (1) denial of his business expenses related to his musical performances (2) denial of the personal exemption (3) denial of progressive taxation.
- The ECJ held that the host state had to allow *Gerritse* to offset his expenses related to earning income in Germany.

66

### Personal Exemptions & Deductions

Compare

*Travis v. Yale & Towne Mfg. Co.*

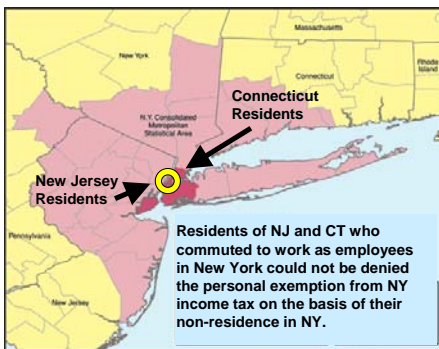
with

*Schumacker & Gerritse*

Both the ECJ and the USSC acknowledged that the residence state is the more appropriate state to take personal expenses into account, but both courts have held in some cases the source state must do so.

67

### Travis v. Yale & Towne Mfg. Co 252 U.S. 60 (1920)



68

### Case C-279/93 Schumacker (1995)

- Mr. Schumacker was a Belgian national residing in Belgium who worked exclusively in Germany. Germany taxed him as a non-resident and denied him deductions for personal and family expenses.
- If a non-resident earns *all or almost all* his income in the host state, he then becomes entitled to deduct his personal and family expenses, because in that case he is similarly situated to a resident taxpayer, and only the host state is in a position to take account of his personal expenses.

69

## Alimony Deductions

Compare

*Lunding v. New York Tax Appeals Tribunal*

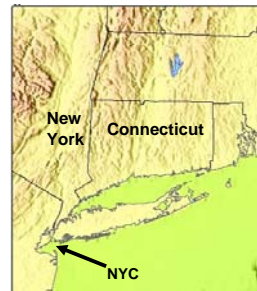
with

*Schempp*

70

### Lunding v. New York Tax Appeals Tribunal

522 U.S. 287 (1998)



Lunding and his wife lived in Connecticut. He earned half his income in New York, but New York denied him a pro rata deduction for alimony paid to his ex-wife, who also lived in Connecticut.

Supreme Court held New York discriminated against residents of other states by denying them alimony deductions while granting its own residents alimony deductions.

71

### Case C-403/03, Schempp (2005)

Germany denied Mr. Schempp, who was a German national and resident, a deduction for alimony paid to his former wife in Austria because the alimony was not includable in income there. Had the former Mrs. Schempp lived in Germany, Mr. Schempp would have received a deduction, notwithstanding that she would not have paid tax on the alimony because her income would not exceed the tax-free amount.

ECJ held that this did not infringe Articles 12 or 18. Germany took the actual tax situation of the recipient in the other state into account, whereas New York made assumptions.



72

## Practical Solutions

- Some EU Member States have provisions allowing taxpayers the personal exemption and deduction of personal expenses when they meet an earnings threshold in the host state (e.g., 90%).
- Many U.S. states just allow a non-resident to deduct a pro rata portion of expenses or a pro rata portion of the standardized deduction.

73

### Conclusion: Comparing State and Member State Obligations

- The obligations of U.S. States and EU Member States are not coextensive when it comes to non-resident taxpayers.

74

### Conclusion: Comparing State and Member State Obligations

- But what is perhaps more surprising than the differences between the ECJ and USSC decisions is their similarities. Notwithstanding that the two courts are interpreting significantly different constitutional language, they come to largely the same results

75

### Fourteenth Amendment Rights

- 14<sup>th</sup> Amendment Privileges & Immunities
- 14<sup>th</sup> Amendment Due Process
- 14<sup>th</sup> Amendment Equal Protection

76

### 14<sup>th</sup> Amendment Privileges & Immunities Clause, U.S. Const. amend. 14, §1

*"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

77

## Limits on Privileges & Immunities

- Only applies to U.S. citizens, not corporations or foreigners
- Only protects a rights “fundamental to national unity”

78

## Fundamental Rights

- Rights considered to derive exclusively from national citizenship, as distinguished from the rights of state (or state and national) citizenship.
- Right to vote in national elections
- Right to travel from state to state, including the right to resettle in another state
- Protection by the government
- Enjoyment of life and liberty
- Right to acquire and possess property
- Any right “bearing on the vitality of the nation as a single entity”
- One state court has explicitly said that the right not to be subject to discriminatory taxation is fundamental

79

## 14<sup>th</sup> Amendment Due Process Clause, U.S. Const. amend. 14, §1

*“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

- Jurisdiction
- Applies or “Incorporates” most of the Bill of Rights to the States

80

## U.S. Bill of Rights

1. Freedoms of speech, press, religion, peaceable assembly, and to petition the government.
2. Right to keep and bear arms.
3. Protection from quartering of troops.
4. Protection from unreasonable search and seizure.
5. Due process, double jeopardy, self-incrimination, private property.
6. Trial by jury and other rights of the accused.
7. Civil trial by jury.
8. Prohibition of excessive bail, as well as cruel or unusual punishment.
9. Protection of rights not specifically enumerated in the Bill of Rights.
10. Powers of states and people retained.

81

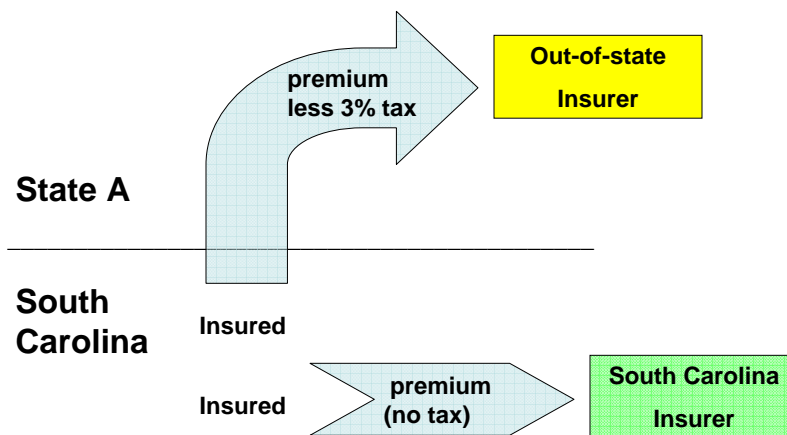
## 14<sup>th</sup> Amendment Equal Protection Clause, U.S. Const. amend. 14, §1

*"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

This clause helps ensure that people who are similarly situated will be treated similarly, and that people who are not situated similarly will not be treated similarly.

82

### Prudential Insurance Co. v. Benjamin 328 U.S. 408 (1946)



Congress consented to the Commerce Clause violation.

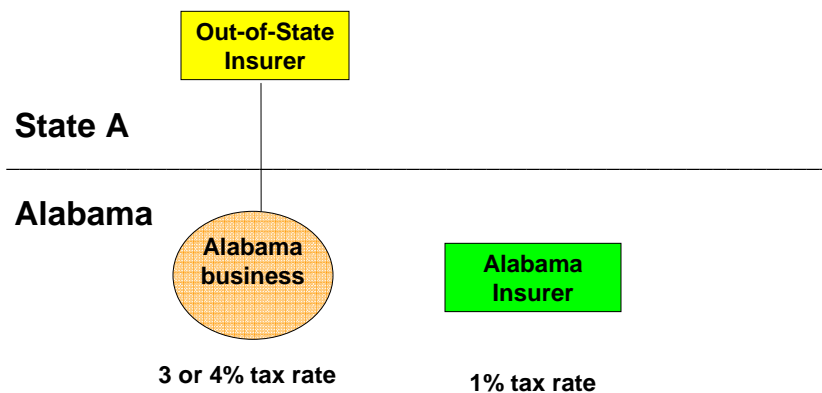
# Equal Protection

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946)  
South Carolina assessed a tax of 3% on premiums paid to out-of-state insurers. The tax did not apply to South Carolina insurers.

The Supreme Court held that the tax was discriminatory under the Commerce Clause, but that it was nevertheless *consistent with the Commerce Clause* because Congress had *consented to the discrimination* by passing the McCarran Act, which said that the states were permitted to regulate insurance, and no federal statute would be construed to invalidate any state insurance law, unless it expressly said so

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## Metropolitan Life. Ins. Co. v. Ward 470 U.S. 869 (1985)



Congress consented to the Commerce Clause violation, but could not consent to the Equal Protection Clause violation

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## Equal Protection

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)  
Alabama taxed out-of-state insurance companies at a higher rate than Alabama insurance companies. The U.S. Supreme Court held that this violated the Equal Protection Clause.

In Met Life, the discriminatory tax was valid under the Commerce Clause, but invalid under the Equal Protection Clause

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## Equal Protection Government Makes a Classification

The Equal Protection Clause helps ensure that people who are similarly situated will be treated similarly, and that people who are not situated similarly will not be treated similarly.

This right applies when a state government makes a classification, for example, if the state distinguishes between resident and non-resident taxpayers.

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## Equal Protection

- Equal Protection applies to facial classifications, but also to facially neutral regulations that make a classification as applied.
- The “facial” vs. “as applied” classification in U.S. law is similar to the concept in the EC of “direct” vs. “indirect” discrimination.

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## Equal Protection: Standards of Review

Strict Scrutiny for “Suspect Classifications”

- Race, national origin, and (for most purposes) alienage
- Presumptively illegitimate
- To be upheld, a statute that makes a suspect classification must pursue a compelling government interest, and the statute must be *necessary* to achieve the goal. Here necessary means that there is no less discriminatory alternative.

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## Equal Protection: Standards of Review

Mid-Level Review for “Quasi-Suspect Classifications”

- Sex, illegitimacy, and (for some purposes) alienage are “quasi-suspect” classifications
- To be upheld, a statute that makes a quasi-suspect classification must pursue an *important* government objective.

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## Equal Protection: Standards of Review

Rational Basis Review for All Other Classifications

- Wealth, age, mental condition, sexual orientation (though this seems to be moving up to the quasi-suspect category) and state residence
- Classifications that are not suspect would be analyzed by the Court only to see whether there is a *rational relationship* between the law that makes the classification and a government goal that is *not prohibited* by the Constitution. It is a very low standard.
  - Does the challenged law have a legitimate purpose?
  - Was it reasonable for lawmakers to conclude that the challenged classification would promote that purpose?
- The classification cannot be wholly arbitrary.

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## Equal Protection: Standards of Review

- Classifications Based on State Residence:  
Rational Basis Plus?
  - The Supreme Court has clearly stated that state residence is not a suspect classification, and it has expressly stated, on more than one occasion, that such distinctions will be analyzed under the mere rational basis test.
  - Notwithstanding this permissive language, the Supreme Court and state courts interpreting the federal Constitution have invalidated taxes making such distinctions.

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## Equal Protection: Standards of Review

- Classifications Based on State Residence:  
Rational Basis Plus?

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## Legitimate State Interest: Fair Apportionment of Expenses

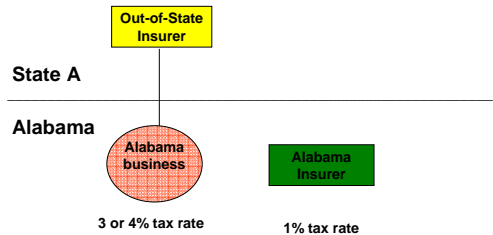
LCM Enterprises, Inc. v. Town of Dartmouth,  
14 F.3d 675 (1st Cir 1994).

Harbor usage fee system that charged non-residents more was rationaly related to legitimate legislative goal of reducing burden of excess waterways expenses borne by residents who already contributed to the harbor's maintenance through local general taxes

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## Illegitimate State Interest: Preferring or Protecting In-State Business

Metropolitan Life Ins. Co. v. Ward 470 U.S. 869 (1985)



Congress consented to the Commerce Clause violation, but could not consent to the Equal Protection Clause violation

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## Rational Relation

*Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

Struck down a New Mexico law that granted Vietnam veterans and exemption from property tax, but only if they lived in the state before 1976.

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## Equal Protection

Discrimination by the Home State

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## Equal Protection Strict Scrutiny for Fundamental Rights

The Court has found only a few such fundamental rights entitled to protection under the Equal Protection Clause.

- Vote
- Court access
- Public primary and secondary school
- Medical care
- Welfare benefits
- "Right to travel"

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## Why Bring a Case Under One Clause Rather than Another?

- Different parties may be covered by each clause
- Differing standards of review
- Precedential value

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## Different Parties May Be Protected by Each Right

14th Amendment

*"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

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## Different Interests are protected

- Commerce Clause protects the functioning of an integrated national market and Congress' superior legislative power to regulate commerce
- Privileges & Immunities protects rights fundamental to national unity like the rights to vote and travel
- Equal Protection protects people and entities from being treated differently from similarly situated people and entities based on classification

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## Standards of Review

### Commerce Clause: Three Pronged Test

Three part test for state regulation under the Commerce Clause

- The regulation must pursue a legitimate state end
- The Regulation must be rationaly related to that end
- The state's policy objective must outweigh the burden on interstate commerce imposed

### The Interstate Privileges & Immunities Clause

The Court applies strict scrutiny for regulation that discriminates on the basis of residence—it is presumptively invalid

### Equal Protection

In contrast, review of residence-based discrimination under the Equal Protection Clause is ostensibly rational basis review.

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## Value of Precedent

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