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TEACHING TAX LAW: A COMPARATIVE LAW PERSPECTIVE¹

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TEACHING TAX LAW: A COMPARATIVE LAW PERSPECTIVE

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Tax plays a much larger role in the U.S. law school curriculum than in other countries, although in recent years the importance of tax seems to have increased elsewhere.² U.S. tax teaching focuses heavily on the income tax, while in other countries tax law has a broader focus.

A student can go through a U.S. law school having taken half a dozen tax courses, without considering any tax other than the income tax, and with little attention to tax procedure or tax law in general. In fact, there exists no comprehensive U.S. treatise on tax law. Areas such as state tax law and constitutional tax law are left to specialists in constitutional law or state and local finance and largely ignored by teachers of federal income tax law.³ This is, of course, consistent with the importance of the income tax in the U.S. tax system and with the complexity of U.S. income tax law. U.S. tax academics might learn from their counterparts in other countries by taking a more comprehensive view of tax law, getting away from an exclusive focus on the federal income tax.

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² For the U.K., see Judith Freedman, *Epilogue: Establishing the Foundations of Tax Law in UK Universities*, in *COMPARATIVE PERSPECTIVES ON REVENUE LAW* 10–11 (John Avery Jones et al. eds., 2008) (tax law is in the curriculum of around half the universities teaching law, but tax law teaching has increased).

³ THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS* (1876) covers general concepts of taxation and the power to tax, limitations on the taxing power, the construction of tax laws, tax procedure, and particular taxes (such as taxes on business and property—there was no federal income tax at the time). The vast preponderance of the authorities cited are state cases, many of them constitutional (i.e., dealing with state constitutions). In addition to dealing with constitutional law, including state constitutional law, an overall work on taxation would also usefully consider those aspects of tax law that are part of administrative law, and look systematically at interpretation of tax law and at the relation between tax law and other areas of law (e.g., criminal law, private law, public international law). BORIS BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* (3d ed. 1999) covers many but not all of these issues.

An introductory tax course could tackle fundamentals that are not limited to the income tax. Such a course could also provide an overview of taxes in the U.S. that would include highlights of the income tax, while also mentioning other tax types such as sales, property, estate and gift, and excise taxes.

In civil law countries, an introductory course on tax law, in addition to considering major taxes such as income tax and value added tax (VAT), would typically consider such general topics as the relation between tax law and other branches of law, including constitutional law, the nature of tax obligations, the sources of tax law, statutory interpretation, and tax procedure.⁴

Common law lawyers might find these topics hopelessly abstract; civil law lawyers might be amazed that common law lawyers feel they can study tax without first properly laying out its theoretical foundations.⁵

An introductory tax course might start by considering the nature of “tax” and “tax law.” While a tax can be defined as a legally required contribution to a public authority that is not in exchange for a specific benefit, it turns out that the boundaries around what is a tax are unclear in many respects. One might ask what difference it makes whether something is a tax—there are various contexts in which it does make a difference.

Some of these contexts are constitutional. Constitutions provide powers to tax and may limit those powers. Constitutional issues for tax mostly have to do with judicial control over legislative classifications in imposing the tax. Why did U.S. courts decide to apply a rational basis standard of review, while in other countries the principle of equality often brings a much more searching scrutiny over tax provisions? Under what circumstances are tax rules struck down as unconstitutional? Admittedly, some of these questions could be dealt with in the constitutional law course, but they tend to get short

⁴ See, e.g., PIERRE BELTRAME & LUCIEN MEHL, *LE SYSTEME FISCAL FRANÇAIS* 36–61 (6th ed. 1997); DE LA GARZA, SERGIO FRANCISCO, *DERECHO FINANCIERO MEXICANO* (28th ed. 2008). The latter (used in Mexico) is a good example of differences in basic tax texts. A work of 1,000 pages, it has almost no overlap in its coverage with the basic income tax texts that would be used at U.S. law schools. *Id.* MARTÍN QUERALT, JUAN ET AL., *CURSO DE DERECHO FINANCIERO Y TRIBUTARIO* (19th ed. 2008) (Spain) has a bit more overlap, but the vast bulk of the coverage differs from what is found in the U.S.

⁵ See generally KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 69–70 (Tony Weir trans., 3d ed. 1998).

shrift there. Considering constitutional law aspects of taxation in an introductory tax course instead would provide an appropriate space for this material.

An introductory tax course would emphasize the statutory nature of tax law. This raises questions of legislative drafting, interpretation, and administrative law. The tax code affects more people than any other statute. Given how broadly it applies, one would expect it to be drafted with that broad application in mind, but in fact it ends up being the most complex statute. The Internal Revenue Code is actually drafted pretty well,⁶ and accordingly can be used as a teaching tool, both for an example of how to draft and, in a few circumstances, how not to. The statute is interpreted by the courts, providing examples of different approaches to statutory construction. Moreover, it is administered by an agency, therefore involving a number of principles of administrative law. What is the role of the agency in issuing authoritative interpretations of the statute, and how are these regarded by the courts? How does the agency behave in practice in terms of auditing returns and communicating with taxpayers? What is the role of lawyers in terms of providing opinions to clients? What about tax as criminal law? How does the government decide which tax offenses get penalized civilly and which cases are prosecuted as crimes? No doubt these questions are dealt with in the basic tax course as currently constituted, but they might be subordinated to substantive income tax law. An introductory tax course that does not feel the pressure of getting through all of the income tax rules can better deal with these more generic issues.

Some of these drafting issues may not be considered very high-brow, but they are something that law students can latch on to and are a part of teaching legal skills. Putting them into an introductory tax course may be arbitrary, in that they might otherwise be dealt with in a general course on legislative drafting, but students seldom would take such a course. The introductory tax course could become a locus for teaching about legislation, which otherwise might not take its rightful place in the law school curriculum.

⁶ See generally Victor Thuronyi, *Should the IRC be Redrafted?*, 171 TAX NOTES FED. 1429 (2021).

The course might take some time considering cases on statutory interpretation in tax law. These might include classic cases that developed U.S. anti-avoidance jurisprudence, such as *Gregory v. Helvering*,⁷ *Knetsch v. United States*,⁸ and *Commissioner v. Ct. Holding Co.*,⁹ as well as the more problematic case of *Frank Lyon Co. v. United States*.¹⁰ Tax law is a particularly good area for this because it involves not just the statute itself, but also agency interpretation through revenue rulings and regulations.

The basic income tax of course considers some of this material, but some of it perhaps not (some of the cases would normally be considered as part of corporate tax). Discussing this material in the context of the basic income tax course may raise a pedagogical conflict. The income tax is an interesting subject area. The temptation when considering cases is to talk about how they contribute to the definition of income. However, this may not be the best thing for law students to focus on. They might be better off confronting the cases as part of higher-level questions on how one might draw lines. Tax law provides good examples of line drawing. One way to do it is by including bright lines in the statute. Or you can have a generally drafted statutory provision and details in regulations. Or perhaps court decisions can provide criteria where neither the statute nor regulations do so. There are general issues here for how the legal system functions which can be illustrated by tax law. And there is always the lingering question as to whether and how tax law is different from other branches of law. All of this could be considered more systematically and transparently in an introductory tax course, as opposed to an income tax course where the temptation is always to think that the subject matter is the definition of income.

An introductory course could also situate tax law within a policy framework by considering such concepts as tax expenditures, tax incidence, and progressivity of the tax system, including the question of what that even means and whether it makes sense to distinguish tax from spending programs. What is it that makes something a tax or a tax provision? What is the difference between a tax credit and some other government payment?

⁷ *Gregory v. Helvering*, 293 U.S. 465 (1935).

⁸ *Knetsch v. United States*, 364 U.S. 361 (1960).

⁹ *Comm'r v. Ct. Holding Co.*, 324 U.S. 331 (1945).

¹⁰ *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978).

Tax law is also a perfect area to consider the differences between law on the books and law in action. According to the law on the books there is a certain amount of tax that a given person owes. In other words, if someone knowledgeable in the law were to determine the tax, you would get a given amount. Law in action refers to the amount of tax that this person actually pays, which may be quite different from the legal liability. What accounts for the difference? We have a self-assessment approach, which means that somehow people have to figure out how much tax to pay (or may also deliberately understate their tax). There is an audit process and an administrative process. Of course, this process works differently for different types of taxpayers. Ultimately, there can be criminal liability for those who commit fraud.¹¹ How does that work in the tax area?

In the basic tax course as currently taught in U.S. law schools, these issues are dealt with to varying degrees, depending on the preferences of the teacher, but they tend to be crowded out because of the felt need to get through the fundamentals of income tax law. An introductory course that was liberated from the need to get through the details of income tax law would provide a more solid general foundation for understanding tax law. It would allow the basic income tax course to begin at a higher level. For those who do not want to continue in tax law, the introductory course would provide an understanding of how to deal with tax law that might otherwise not be as clear to students that need to learn these concepts as almost a byproduct of learning about the income tax.

As the above review shows, there is plenty of material to be considered in a basic tax course that has nothing to do with the concept of income or deductions, or other matters that are peculiar to the income tax. Teaching these at a more general level is pedagogically sounder and would give students a better idea of what tax law is about.

A course of this kind could be taught in the first year, or in the first semester of the second year. In the latter case, the basic income tax course should be taught in the second semester of the second year, rather than the first. My preference would be the first year. The basic tax course could be the introduction to statutory and administrative law.

¹¹ See, e.g., I.R.C. § 7206.

An alternative approach would be to teach such a course at the graduate level. This would assure that those pursuing an LLM would have the basics of tax law under their belt.

Yet another alternative would be to teach a course on legislation in the first year. In my imagination, such a course might be almost identical to a course on tax law. In this sense, tax law could be an example of legislation, since it is difficult to teach legislation in the abstract. For example courses on administrative law may include a lot of environmental law, just because a lot of the cases happen to be in this area. An argument for including a course on tax law in the first year is that it can introduce elements of legislation, constitutional, and administrative law, which students might (or might not) pursue at greater depth in the second year. As far as legislation is concerned, this is a pretty rarified course if taught on its own, so tax law might be a good stand in to familiarize students with legislation. I could not imagine a richer area to study legislation than tax.