

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Other Publications

Faculty Scholarship

---

2007

### Preface to Comparative Fiscal Federalism: Comparing the European Court of Justice and the US Supreme Court's Tax Jurisprudence

Reuven S. Avi-Yonah  
*University of Michigan Law School*

Available at: <https://repository.law.umich.edu/other/198>

Follow this and additional works at: <https://repository.law.umich.edu/other>



Part of the [Comparative and Foreign Law Commons](#), [Taxation-State and Local Commons](#), and the [Tax Law Commons](#)

---

#### Recommended Citation

Avi-Yonah, Reuven S. Preface to *Comparative Fiscal Federalism: Comparing the European Court of Justice and the US Supreme Court's Tax Jurisprudence*, by R. S. Avi-Yonah, J. R. Hines Jr., and M. Lang, co-editors, xvii-xviii. EUCOTAX Series on European Taxation, 14. Alphen aan den Rijn, The Netherlands: Kluwer Law International, (2007).

This Preface is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Other Publications by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

EUCOTAX Series on European Taxation

# Comparative Fiscal Federalism

## Comparing the European Court of Justice and the US Supreme Court's Tax Jurisprudence

*Reuven S. Avi-Yonah, James R. Hines Jr.  
and Michael Lang*

**E**ucotax

**KLUWER LAW**

INTERNATIONAL

# Preface

*Reuven S. Avi-Yonah*<sup>1</sup>

In October 2005, a group of distinguished tax experts from both the European Union and the United States convened at the University of Michigan Law School for a conference on 'Comparative Fiscal Federalism: Comparing the US Supreme Court and European Court of Justice Tax Jurisprudence.' The conference was sponsored by the Law School, the European Union Center, and Harvard Law School's Fund for Tax and Fiscal Research. Attendees from Europe included Michel Aujean, the principal tax official at the EU Commission, Servaas van Thiel, chief tax advisor to the EU Council, Michael Lang (Vienna) and Kees van Raad (Leiden), who run the two largest tax LLM programs on the European continent, and many other distinguished guests. The US contingent included Michael Graetz of Yale Law School, Alvin Warren of Harvard Law School, Walter Hellerstein of the University of Georgia (widely recognized as the preeminent US state tax scholar), and other important academics. Michigan was represented by Kyle Logue and Daniel Halberstam of the Law School, James Hines of the Economics Department, and myself as conference organizer.

The impetus for the conference, the first of its kind, was a series of decisions by the European Court of Justice (ECJ) in the last twenty years, but with increasing frequency in the last five. In those decisions the ECJ interpreted the Treaty of Rome (the 'constitution' of the EU) aggressively to strike down numerous Member State income tax rules on the ground that they were discriminatory. For example, the ECJ ruled that Finland cannot grant tax credits for corporate tax paid to Finnish shareholders, but refuse them to foreign shareholders. In another case, the ECJ struck down Germany's rules that restricted the deductibility of interest to foreign lenders, even though the rules also applied to tax-exempt domestic lenders.

When we compare this line of cases to the US Supreme Court's treatment of state taxes under the US Constitution (most often under the Commerce Clause, but

---

1. Reuven Avi-Yonah is the Irwin I. Cohn Professor of Law and Director of the International Tax LLM Program at the University of Michigan.

sometimes under the Equal Protection and Due Process Clauses), the difference is striking. In general, the Supreme Court has granted wide leeway to the states to adopt any tax system they wish, only striking down the most egregious cases of discrimination against out of state residents. Thus, for example, the Court has refused to intervene against rampant state tax competition to attract business into the state. It has twice upheld a method of calculating how much of a multinational enterprise's income can be taxed by a state that is widely seen as both incompatible with the methods used by the Federal government and other countries, and as potentially producing double taxation. And it has allowed states to impose higher income taxes on importers than on exporters through the use of so-called 'single factor sales formulas', under which a business pays tax to the state only if it makes sales to residents of the state, but not if it makes sales outside the state.

The conference was an attempt to gather together the best experts on both EU and US state taxation to explore these differences and what may be the underlying motivation. This book is the result. I hope this conference and book is just the beginning of a series of discussions between EU and US tax experts on these important issues.

I would like to thank my co-editors, James Hines and Michael Lang, and the contributors and participants in the conference for making the book possible.

I would also like to thank Dean Evan Caminker, the University of Michigan Law School and the Harvard Law School Fund for Tax and Fiscal Research for their generous support. Finally, I would like to thank Friederike Oberascher, Angelika Schlögl - Jettmar, Christoph Schlager and Marie-Ann Mamut of Vienna Economic University for their editorial help and Margaret Klocinski of the University of Michigan and Lijntje Zandee of Kluwer Law International for superb editing support.