

5 Key Takeaways | Looking Beyond the Usual Suspects in SALT Challenges

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Kilpatrick's [David Hughes](#) recently joined other thought leaders to present the session "**Smells Like Constitutional Spirit: Looking Beyond the Usual Suspects in SALT Challenges**" at the **ABA 2026 Fall Tax Meeting** in Seattle. The panelists discussed state and local tax challenges by moving beyond the familiar Commerce Clause and Due Process frameworks. They examined other constitutional limits on state taxing authority - including how the First Amendment, Privileges and Immunities Clause, Equal Protection Clause, Takings Clause and state constitutional provisions shape tax litigation strategy.

David offers these key takeaways from the presentation:

1. Beyond Due Process and Commerce Clause Claims—What Other Constitutional Tools Matter?

SALT challenges need not be limited to the Commerce Clause and Due Process Clause. The First Amendment, Privileges and Immunities Clause, Equal Protection Clause, Tonnage Clause, Takings Clause, Import-Export Clause, and state uniformity provisions are as potentially important alternatives. The central strategic point is to match the constitutional provision to the tax's actual target—such as speech, nonresidents, vessels, confiscated equity, imported/exported goods, or an arbitrarily defined taxpayer class.

2. Equal Treatment—Can the State Justify Its Classification?

Privileges and Immunities protects nonresidents from discriminatory tax burdens without adequate justification, while Equal Protection generally asks whether similarly situated taxpayers have been treated differently without a rational basis. Equal Protection is highly deferential in tax cases, so a taxpayer must carefully define the relevant comparator class and negate plausible state rationales such as administrability, revenue stability, transition concerns, or industry regulation.

3. Imports, Exports, and Uniformity—Focus on Operation Rather Than Labels.

Modern Import-Export Clause analysis asks whether a state exaction functions as a prohibited impost or duty by interfering with federal foreign-commerce interests, diverting federal import revenue, or allowing a port state to exploit its geography—not merely whether goods are labeled imports or exports. State uniformity clauses likewise do not demand identical taxation for everyone, but can invalidate classifications that impose arbitrary or unjustified distinctions, as illustrated by Pittsburgh's unconstitutional higher tax rate on nonresident performers.

4. First Amendment—When Does a Tax Impermissibly Burden Expression?

A tax becomes vulnerable under the First Amendment when it discriminates based on speech, content, speaker, or press activity, rather than operating as a generally applicable tax. Cases illustrate both sides of the line: targeted taxes on newspapers, magazines, and adult-entertainment venues may fail, while viewpoint-neutral and reasonable arts subsidies or generally applicable taxes extended to new media may survive.

5. Property and Ports—When Are Tonnage and Takings Claims Strongest?

The Tonnage Clause prohibits state charges on vessels based solely on capacity or for entering, trading in, or lying in port, although charges tied to actual port services or facilities may be valid. Under the Takings Clause, a government may not retain equity beyond a delinquent property-tax debt after foreclosure; Tyler treated retention of the \$25,000 surplus from a \$40,000 sale to pay a \$15,000 debt as an unconstitutional taking, while Pung holds that proceeds from a fairly conducted tax sale may measure compensation.

Related People



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