



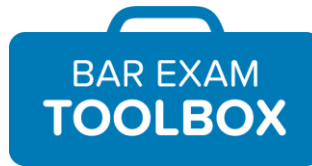
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Con Law. Specifically, we’ll be discussing money, and what powers Congress has with respect to money. That’s right, we’re discussing the Taxing and Spending Clause of the Constitution! Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast! Today, we will be discussing Article 1 Section 8 of the Constitution. Article 1 Section 8 probably doesn’t trigger anything in your mind, right? Not like the First Amendment, the Second Amendment, or other popular – or controversial – constitutional topics. But even though it isn’t a hot-button political issue, Article 1 Section 8 is a really important clause in our Constitution, and not just because you may see it on an exam. It is basically where Congress gets all of its money, and therefore, the power to do most of what it does.

Lee Burgess: Clause 1 of Section 8, specifically, gives Congress the power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States. Most commonly, it is known as the "Taxing and Spending Clause."

Lee Burgess: The Taxing and Spending Clause goes on to detail appropriate circumstances under which Congress can lay or collect taxes. Other restrictions and permission related to Congress’ power to tax and spend are also sprinkled throughout the Constitution. The Sixteenth Amendment, for example, gives Congress the power to collect income tax. In all, Congress is only permitted to lay or collect taxes for two general purposes: to pay the debts of the United States, and to provide for the common defense and general welfare of the United States. Taken together, these two purposes have generally been understood to establish the federal government's taxing and spending power.

Lee Burgess: Now, if you’ve studied the Constitution at all, you’ll know that a major topic in Con Law is the division of power between the states and the federal government. The unique power of the states is central to the way our



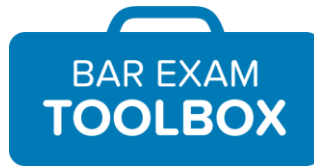
democracy was set up. A central question is always “Who takes precedence, and when?” In this case, they both do. The power to tax is a concurrent power – both the federal government and the individual states have independent power to tax. And it's a pretty sweeping power. Over time, the power to tax has been understood to be very broad, but it's not unlimited and, at times, the court has curtailed it.

Lee Burgess: Alright, so let's get into the weeds a little bit here. As I said earlier, Congress has the power to lay and collect taxes, duties, imposts, and excises. As an aside, all four of those – taxes, duties, imposts, and excises – are types of taxes. The word “duty” is often used to describe the tax on an import or export. That is why, in international airport terminals, you see “Duty Free” shops. An impost is a tax or a similar compulsory payment. And an excise is a tax on certain goods and commodities produced or sold domestically and on licenses for certain activities.

Lee Burgess: Let's keep it simple and just use the term “tax”. Under the law, taxes must be geographically uniform throughout the United States. While the federal government can tax different goods and services at different rates, it cannot tax goods, services, or people differently based on their location. And remember, the Sixteenth Amendment gives Congress the power to collect taxes on income from any source. So, while different states may have different (or no!) tax rates, no matter where you live your federal tax rate will be the same.

Lee Burgess: So, Congress can tax goods, imports, services, income – but what do they do with all that money? Can they spend it however they want? The short answer is “No”. Remember the two major purposes I mentioned earlier? Congress has the power to spend for the common defense and general welfare. So, as long as Congress can tie its spending to defense or general welfare, they can use the money however they want, without running afoul of the Constitution.

Lee Burgess: Another powerful tool Congress has, related to its spending power, is to attach restrictions to that spending. For example, Congress may allocate spending or money to a particular state but require that the state follow certain conditions in order to receive that money. That way, Congress can control the actions of that state simply through the power of its purse. If the state doesn't comply, they don't get paid. So, states are typically incentivized to comply. But there are restrictions on that power as well. The rule is this: Congress may attach restrictions or conditions on states receiving federal funds, but Congress must satisfy the following: 1) spending must be for the general welfare; 2) the condition must be imposed unambiguously; 3) the condition must be related to the federal interest in national projects or programs; 4) the condition cannot



induce unconstitutional activity; and 5) the condition cannot be so coercive as to turn pressure into compulsion.

Lee Burgess: Put another way, Congress can only attach restrictions to their spending when they are spending in the general welfare. But, if they are spending in the general welfare, they can attach conditions so long as they are obvious, related to the federal interest in that program, don't make the state act unconstitutionally, or be more a requirement than an option.

Lee Burgess: Just a side note on that last requirement. The government can make incentives to follow their restrictions quite strong! Just because a state feels deeply incentivized to comply does not make it coercive. Look for real coercion – that is a choice that is not really a choice – when analyzing this last factor.

Lee Burgess: Since everything is more confusing in the abstract, let's dive into a hypothetical taken from the [July 2009 California bar exam](#):

Lee Burgess: “In a recent statute, Congress authorized the United States Secretary of Transportation to do everything necessary and appropriate to ensure safe streets and highways. Subsequently, the Secretary issued the following regulations:

- Regulation A, which requires that every bus in commercial service be equipped with seatbelts for every seat; and
- Regulation B, which provides that states failing to implement adequate measures to ensure that bus seatbelts are actually used will forfeit 10% of previously appropriated federal funds that assist states with highway construction.

The State Highway Department, a state agency, is considering challenging the validity of Regulation B under the United States Constitution. What constitutional challenge may the State Highway Department bring against Regulation B, and is it likely to succeed?”

Lee Burgess: Well, what do you think? Does Congress have the right to restrict states, withholding 10% of appropriated highway construction funds if they do not implement adequate seatbelt measures? Let's start broad and go narrow from there. First, what rule are we applying here? Is this contemplated under Congress' power to tax or to spend? Think about it this way: Are they getting money or withholding spent money? If you said “withholding spent money”, you're right! Congress isn't trying to get any money from the states or state agencies; they are giving money to them. They're spending. Remember, Congress has the power to spend for the common defense and provide for the

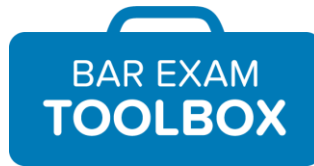


general welfare. Again, this essentially allows Congress to spend money for any purpose which is related to the general welfare of the United States.

Lee Burgess: Of particular importance, under the Spending Clause, Congress may attach restriction to congressional grants of money to require states to act in a certain way. Thus, although Congress may not have power to regulate a certain activity, it can require states to regulate as a condition of receipt of federal funds. In this case, Congress cannot constitutionally require states to legislate on the subject of seatbelts on buses. However, under the Spending Clause, it can incentivize states to so regulate by conditioning the receipt of federal funds on enacting what Congress considers to be proper seatbelt measures. In this case, the regulation requires states to implement adequate measures to ensure that bus seatbelts are actually used, by conditioning 10% of the previously appropriated federal funds that assist states with highway construction on the implementation of such measures.

Lee Burgess: Under Congress' conditional spending power this condition placed on the funds is appropriate so long as, 1) the spending is for the general welfare; 2) the condition is imposed unambiguously; 3) the condition is related to the federal interest in national projects or programs; 4) the condition does not induce unconstitutional activity; and 5) the condition is not so coercive as to turn pressure into compulsion.

Lee Burgess: First, the funds are certainly for the general welfare. The funds are being used to assist with highway construction. They are likely to be used to build more, better, safer highways. Second, the condition is clear and unambiguous – implement adequate seatbelt measures or lose 10%. The State Highway Department might argue that the condition is not unambiguous, but what are adequate measures? How can they know if they are complying? If the regulations provide no additional detail here, the State Highway Department may have a point, although I think it's likely the courts would find this condition to be unambiguous, in that Congress clearly indicates from the get-go that the condition will be applied. The condition contemplating traffic safety is inarguably in the federal interest and related to federal projects and programs. The condition on the funds is that the states must implement measures ensuring that buses have seatbelts. The purpose of the condition is to improve the safety of an important instrumentality of interstate commerce. In this case, the condition is clearly related to at least one of the likely goals of the federal funds. Fourth, nothing in the regulation induces unconstitutional activity. And finally, the condition of a 10% drop in funding is not so coercive as to turn pressure into compulsion. Weighing all five factors, Congress did not act unconstitutionally.

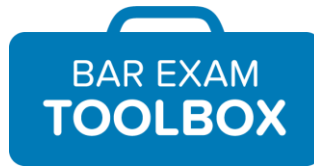


Lee Burgess: Let's pull some nuggets out of that question that we can use when we come across a taxing and spending question on an exam. First, it's pretty easy to argue Congress is spending in support of the general welfare. Second, if that is true, Congress is going to have quite a lot of leeway to incentivize states to go along with their plan. Even if Congress cannot legislate or regulate around state seatbelt laws, they can use their spending powers to convince the states to do what they want. See why this clause is so important?

Lee Burgess: Before we wrap up, let's look at one more hypo:

Lee Burgess: "To protect the nation against terrorism, Congress passed a law authorizing the Secretary of Homeland Security to issue National Security Requests, which would require businesses to produce detailed personal and financial records of their customers to the Federal Bureau of Investigation without a warrant. In order to comply with National Security Requests, businesses must purchase an expensive HR software that mines, tracks, and sends information. In its bill, Congress has agreed to allocate money to each state to purchase that software and distribute it to companies headquartered in its state. If states choose not to participate, they will face a 70% reduction of their previously allocated federal funds for the safe operation of their airports, train stations, and other sensitive travel hubs. This will cost Congress around 2 billion dollars. To pay for the software, Congress has issued a tax on personal financial software at a rate of 25%. Individuals in border states who already bear a greater financial burden through their compliance with DHS activities only have to pay 10%. What constitutional challenges under the Taxing and Spending Clause might be brought against the National Security Requests program?"

Lee Burgess: Well, what do you think? Are these taxes and expenditures legal for Congress to undertake? Let's start with taxes. Remember, Congress has the power to tax and pay debts, and provide for the common defense and general welfare of the United States. Do any of those apply here? I think Congress will say "Yes". Their tax is for the common defense, specifically anti-terrorism. Now, Congress may face some real legal challenges to the warrantless search of private information, but that question is left for another day. Whether we agree with their methods or not, Congress' tax is indisputably within the realm of "common defense". Okay, but remember, taxes must be geographically uniform throughout the United States. It doesn't matter if Congress thinks it has a good reason to tax people in some states more (or less) than others. They cannot make that call. So, citizens of non-border states have a good case against the unequal share of taxes they must pay.

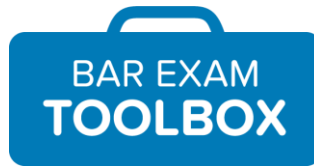


Lee Burgess: Now, what about the spending portion of this scheme? Can Congress use the power of the purse to buy software for companies participating in this program? Again, Congress has the right to spend for common defense, so they're likely good there if they can convince a judge the software supports the common defense. But can they impose such steep restrictions on states who choose not to comply? I think Congress is going to have an uphill battle on this one. First, they cannot rely on the "common defense" link here. They are going to have to convince a judge that their spending is for the general welfare. While counterterrorism may be in the general welfare, snooping on everyone's private data without a warrant is likely not. I think a good challenge could be raised here. I don't think there is any argument the condition is unambiguous, so Congress is okay there. The condition, too, depends on whether a judge finds the software to be related to a legitimate federal interest or national program. I think that can go either way, so both sides should make their best arguments.

Lee Burgess: But here is where I think Congress will really face a challenge: A condition cannot induce unconstitutional activity, and a condition cannot be so coercive as to turn pressure into compulsion. First, there are good arguments that businesses would be violating the Constitution by sharing sensitive personal data on such a broad scale with no warrant. And second, this restriction is arguably more coercive than merely convincing. I think you would be hard pressed to find any state that would be willing to give up 70% of its federal funding for its major transit hubs like airports and train stations. These hubs are incredibly busy, important for the economic wellbeing of the state, and highly sensitive areas. If states cannot ensure the security of flights, trains, and their passengers, it will be a catastrophe. Since that isn't a real option, states are likely forced to accept the money and purchase the software for its companies.

Lee Burgess: Well, I hope this was helpful! I know that Con Law can get in the weeds a bit, but it's such an interesting and important legal exercise to analyze the layers of constitutionality and understand what limits our democracy has placed on its governing bodies. And since Con Law is such a game of principles, the more you practice the more you'll start to gain an instinct that something isn't right. So keep it up!

Lee Burgess: And that's a wrap for today! Glad you could join me as we continue to discuss Con Law! If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you



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Thanks for listening, and we'll talk soon!

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