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NOTES

GRAVEYARD ROBBERY IN THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993:
A MODERN LOOK AT THE CONSTITUTIONALITY OF RETROACTIVE TAXES

No man's property is safe while the legislature is in session.
- Mark Twain

I bet it comes as a heck of a shock to poor old departed Uncle Louie who never guessed Clinton, with the IRS, would hound him through the afterlife for yet another contribution or another investment... Now on his deathbed instead of asking for a priest or for his dearly beloved to gather around him, Uncle Louie must ask for his tax lawyer to see him through his last moments, and his last earthly comments will be, "Quick, shift all of my investments into shelters."
- Senator John McCain, on August 6, 1993, on the Senate Floor during the 1993 budget debate

INTRODUCTION

On August 10, 1993, President Bill Clinton signed into law his 1993 budget bill, the Omnibus Budget Reconciliation Act of 1993 (Budget Act).1 The Budget Act contains several highly controversial tax provisions which apply retroactively to the last weeks of the prior administration.2 The first of these provisions increases the income tax rates on both wealthier Americans and corporations and applies the new rates retroactively to January 1, 1993.3

1. Barbara Kircheimer, President Signs Tax Bill; Retroactivity Debate Lingers, 60 TAX NOTES 911, 911 (1993).
2. The income tax rate changes, both personal and corporate, as well as the estate and gift tax rate changes, apply to January 1, 1993, when George Bush was still in office. Omnibus Budget Reconciliation Act of 1993 §§ 13201, 13208, 13221, 26 U.S.C. §§ 1, 11, 2001 (1993).
3. David S. Cloud, New Levies on Gas and the Rich Would Yield $240 Billion, CONG. Q., Aug. 7, 1993, at 2132-33. The Budget Act creates a new fourth bracket for individuals and raises the top rate from 31% to 36%. Id. at 2132. The new rate applies to couples making more than $140,000 or single taxpayers earning more than $115,000. Id. Individuals making more than $250,000 would be assessed a 10% surtax, bringing their rate up to 39.6%. Id. A similar top bracket is added to the corporate income tax structure, increasing the top rate from 34% to 35% where corporate income exceeds $10 million. Id. at 2133.
The second provision, in effect, allows the Clinton administration and the 103rd Congress to reach beyond the grave and tax the dead, even those who died during the Bush administration. This second controversial provision increases the estate and gift tax rates and applies such rates retroactively to January 1, 1993, several days before Clinton and the new 103rd Congress were even sworn in. Despite the fact that the retroactive provisions only affect the wealthiest Americans, public outrage over the retroactivity has nonetheless been enormous. Congressional leaders have introduced legislation to repeal the retroactive tax provisions and have proposed constitutional amendments. Constitutional challenges to the retroactive tax provisions are already underway in the court system. The fate of the Budget Act appears even more uncertain in light of the United States Supreme Court's recent grant of certiorari to hear a case involving the constitutionality of retroactive taxation.

This Note examines the constitutionality of the retroactive tax

4. Cloud, supra note 3, at 2133. The Budget Act raises the estate and gift tax rate for transfers valued between $2.5 and $3 million from 50% to 53%. Id. For transfer over $3 million, the Budget Act raises the rate from 50% to 55%. Id. These rates had been lowered to 50% as of January 1, 1993, and the Budget Act retroactively reinstates these top two rates as if they had never been lowered. Id.


6. See, e.g., Efforts Are Under Way to Strip Out Retroactive Application of Tax Hike, DAILY TAX REP., Aug. 10, 1993, at 65. On August 6, 1993, Representative Richard Armey (R-Texas) introduced a bill (HR 2913) that would eliminate the retroactive tax provisions of the budget bill. Id. at 66. Republicans will introduce similar legislation to repeal the provisions in the fall of 1994. Id.

7. Id. at 66. On August 6, 1993, Senators Paul Coverdell (R-Ga) and John McCain (R-Ariz) proposed a constitutional amendment banning retroactive taxes (SJRes 120). Id. Senator Bob Bennett also proposed a constitutional amendment to prohibit retroactive taxation. Dina ElBoghdady, Bennett Introduces Bill to Ban Retroactive Taxes, States News Services, Aug. 5, 1993, available in LEXIS, Nexis Library, SNS File. The proposed amendment would state that: "No Federal tax shall be imposed for the period before the date of enactment of the tax." Id.


Former presidential candidate Pat Buchanan and his organization American Cause have also announced a suit challenging the budget plan's retrospective taxes. David A. Coia, Buchanan To Sue Over Retroactive Tax Boost, WASH. TIMES, Aug. 12, 1993, at A4.

9. Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992) (finding unconstitutional retroactive loophole-closing legislation where a taxpayer has reason-
provisions in the 1993 Clinton budget. Part I of this Note canvasses the history of retroactive tax legislation and its judicial faring in the United States. Part II of this Note examines modern due process analysis of retroactive tax legislation and proposes a test which could be consistently applied in determining when a retroactive tax offends due process. Lastly, Part III of this Note applies this test, showing that the retroactive estate, gift, and income tax provisions of the Omnibus Budget Reconciliation Act of 1993 are unconstitutional.

I. HISTORICAL RETROACTIVITY IN UNITED STATES TAX LEGISLATION

One of Congress' enumerated powers is the power to tax.\(^\text{10}\) This power is necessary for the raising of revenue and the effective functioning of government.\(^\text{11}\) As the need for revenue has increased, Congress has sought new and different ways to tax the populace.\(^\text{12}\) Congress has turned to the retroactive tax as one tactic for raising revenue.\(^\text{13}\) A statute is retroactive if it "gives preenactment conduct a different legal effect from that which it would have had without the passage of the statute."\(^\text{14}\) Yet retroactive taxes may be unjust\(^\text{15}\) and are often unconstitutional.\(^\text{16}\) Retroactive taxes may be unjust because they interfere with a person's ability to plan his financial affairs with some degree of certainty as to the legal consequences of his actions.\(^\text{17}\) Retroactive taxes may also vio-

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\(^{10}\) For the full text of this clause, see infra note 20.

\(^{11}\) See generally Note, Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, 84 Harv. L. Rev. 436, 441 (1970) [hereinafter Rule of Prospectivity] (noting that the government will often justify retroactivity out of "administrative and revenue concerns"). For cases emphasizing the government's need to raise revenue, see infra note 79.

\(^{12}\) Id. Prospective statutes may be passed which annul preexisting obligations.

\(^{13}\) For the Treasury Department's list of retroactive tax rate increases between 1917 and 1976, see infra note 273.

\(^{14}\) Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 692 (1960). Many prospective statutes will fall within this definition, even though their date of application is not retroactive. Id. Prospective statutes may be passed which annul preexisting obligations. Id.

\(^{15}\) For arguments that retroactive taxes are unjust, see infra note 17.

\(^{16}\) See, e.g., Coolidge v. Long, 282 U.S. 582 (1931); Blodgett v. Holden, 275 U.S. 142 (1927), modified, 276 U.S. 594 (1928); Untermeyer v. Anderson, 276 U.S. 440 (1928) (both cases holding that the retroactive application of the first gift tax was unconstitutional).

\(^{17}\) Hochman, supra note 14, at 692-93. Hochman gives several other reasons why retroactive legislation is viewed disfavorably. Id. The fluctuations of
late a variety of constitutional provisions which courts have interpreted as protecting the taxpayer from retroactive taxes. On the other hand, these constitutional protections of the taxpayer may sometimes unduly restrict the power of Congress to levy taxes and collect revenue. Thus, although retroactive taxes may impose some burden on the taxpayer, the taxing power which the Constitution grants to Congress may justify the imposition of that burden.

This section first examines the constitutional power of Congress to tax. This section then discusses how the Constitution may protect the taxpayer from retroactive taxation. Lastly, this section examines the legislative justifications for retroactive taxes which Congress has raised when the protections which the Constitution affords to the taxpayer collide with the constitutional power of Congress to tax.

A. Power to Tax

The Constitution of the United States bestows upon Congress the power to tax in Article I, Section 8. Article I gives Congress the “power to lay and collect taxes, duties, imposts, and excises . . . for the . . . general welfare of the United States.” Further, the Constitution distinguishes between two different categories of taxes and the corresponding constitutional limitations on each. The rule of apportionment governs direct taxes, which are taxes as
sessed on property based on its value.\textsuperscript{23} This rule requires that such taxes be apportioned among the States based on population.\textsuperscript{24}

On the other hand, the rule of uniformity applies to the levying of indirect taxes,\textsuperscript{25} which are taxes upon rights or privileges. This rule of uniformity requires that Congress assess duties, imposts, and excises uniformly throughout the country.\textsuperscript{26} While not an indirect tax, the income tax is not required to be apportioned like other direct taxes due to the Sixteenth Amendment.\textsuperscript{27} The Sixteenth Amendment, passed in response to a successful constitutional attack on income taxes,\textsuperscript{28} permits Congress to assess income taxes without apportionment among the States.\textsuperscript{29} In legal challenges similar to that which brought about the Sixteenth Amendment, taxpayers have questioned whether taxes applied retroactively are constitutional.\textsuperscript{30}

**B. Constitutional Attacks on Retroactive Taxes**

Although the Constitution empowers Congress with the authority to tax, it also protects the taxpayer from oppressive taxation.\textsuperscript{31} While the fear of retroactive taxation seems to have been in the hearts of the Framers of the Constitution,\textsuperscript{32} such a fear seems

\begin{quote}
that the income tax of 1894 was a direct tax which was unconstitutional since it was not apportioned).
\end{quote}

\textsuperscript{23} \textbf{BLACK'S LAW DICTIONARY} 461 (6th ed. 1990). Direct taxes are based on the value of the property. \textit{Id.} Such taxes may be referred to as property taxes or \textit{ad valorem} taxes. \textit{Id.}

\textsuperscript{24} U.S. \textbf{CONSTR.} art. I, § 2, cl. 3. The clause in part states:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

\textit{Id.}

\textsuperscript{25} \textit{Pollock}, 157 U.S. at 557. "[I]n the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises." \textit{Id.}

\textsuperscript{26} U.S. \textbf{CONST.} art. I, § 8, cl. 1. For a discussion of this clause, see \textit{supra} note 20.

\textsuperscript{27} U.S. \textbf{CONST.} amend. XVI.

\textsuperscript{28} \textit{See} Frederick A. Ballard, \textit{Retroactive Federal Taxation}, 48 Harv. L. Rev. 592, 594 (1935). The case which held that the income tax was an unconstitutional direct tax was \textit{Pollock} v. Farmers' Loan & Trust Co., 157 U.S. at 557.

\textsuperscript{29} U.S. \textbf{CONST.} amend. XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." \textit{Id.}

\textsuperscript{30} For more information on constitutional challenges to retroactive taxation, see \textit{infra} notes 31-78 and accompanying text.

\textsuperscript{31} \textit{See} Welch v. Henry, 305 U.S. 134, 147 (1938) (holding that a retroactive tax may, under some circumstances, be "so harsh and oppressive as to trespass the constitutional limitation").

\textsuperscript{32} The Federalists greatly feared the fluctuations of the legislature. The
not to have been translated into a *per se* Constitutional bar on retroactive taxes. Courts themselves have even admitted not knowing exactly what is unconstitutional about retroactive taxation.

Early courts avoided the constitutional issue altogether by construing all tax statutes to apply prospectively, if possible. However, after Congress passed tax statutes that were clearly retroactive, taxpayers (and their attorneys) then had to delve into the Constitution in search of restraints on retroactive taxation. Taxpayers have suggested a variety of Constitutional provisions which may protect the taxpayer to some degree from retroactive legislation. These include the Ex Post Facto Clause, the Due Process Clause, and the Tenth Amendment.

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

33. Dash v. Van Kleek, 7 Johns. 477, 505 (N.Y. 1811) (finding that a civil statute providing sheriffs with a defense to certain civil actions applied prospectively). "It is not pretended that we have any express constitutional provision on the subject [of retroactive civil laws]; nor have we any for numerous other rights dear alike to freedom and to justice." *Id.* The most relevant provision of the Constitution dealing with retroactive legislation is the provision in Article I decreeing that "no Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. For reasons why this clause has not been interpreted to forbid retroactive tax legislation, see *infra* notes 42-47 and accompanying text.

34. See Untermyer v. Anderson, 276 U.S. 440 (1928) (Holmes, J., dissenting). In his dissent, Justice Holmes commented that "I find it hard to state to myself artifically the ground for denying the power of Congress to lay the tax." *Id.* at 446.

35. Courts in early retroactive legislation cases, perhaps realizing that there was no express Constitutional ban on retroactive taxes, dodged the issue by formulating a rule of construction. See generally Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U. L. Rev. 540, 550-53 (1956). This rule of construction holds that statutes are assumed to apply prospectively, absent a clear statement of contrary intent. *Id.* at 550. Legislatures inevitably stepped up to the judicial challenge and passed civil legislation clearly intended to apply retroactively. See, e.g., Nichols v. Coolidge, 274 U.S. 531, 539 (1927) (finding an estate tax unconstitutional where the statute specified that the tax would apply to any transfer regardless of whether it was made before or after the passage of the act).

36. The terms "retroactive" and "retrospective" will be used interchangeably throughout this Note.

37. Calder v. Bull, 3 U.S. 386 (1798). For further discussion of this case, see *infra* notes 44-47 and accompanying text.
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cess Clause of the Fifth Amendment, the Contracts Clause, the Equal Protection Clause of the Fourteenth Amendment, and the requirement that direct taxes be apportioned.

1. The Ex Post Facto Clause

The most obvious Constitutional provision which might bar retroactive taxes is the Ex Post Facto Clause. The Ex Post Facto Clause forbids Congress from passing any "bill of attainder or ex post facto law." An ex post facto law is one which is "passed after the occurrence of a fact or the commission of an act, which retroactively changes the legal consequences or relations of such fact or deed."

However, the case of Calder v. Bull greatly diminished the applicability of the Ex Post Facto Clause to civil law early in judicial history. In Calder, the Calders had received a favorable judgment in probate court which a subsequent resolution passed by the Connecticut legislature set aside. As a result, the United States Supreme Court was faced with the issue of whether such a resolution was an ex post facto law under the Federal Constitution. Holding against the Calders, the Court interpreted the prohibition of ex post facto laws to apply only to criminal statutes. After Cal-

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38. See, e.g., Nichols, 274 U.S. at 542. For further discussion of the due process argument, see infra notes 48-53 and accompanying text.
39. See, e.g., Coolidge v. Long, 282 U.S. 582 (1931). For further discussion of the contract impairment argument, see infra notes 54-61 and accompanying text.
40. See, e.g., Welch v. Henry, 305 U.S. 134 (1938). For further discussion of the equal protection argument, see infra notes 62-68 and accompanying text.
41. See, e.g., Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). For further discussion of the direct tax argument, see infra notes 69-78 and accompanying text.
42. U.S. CONST. art. I, § 9, cl. 3. The States are similarly limited by Article 1, Section 10, Clause 1, which states that "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST. art. I, § 10, cl. 1.
45. Id. at 386-87.
46. Id. at 387.
47. Id. at 391. The Court pronounced four definitions of ex post facto laws: any law which makes criminal an act innocent when committed; any law that aggravates a crime after the fact; any law which enhances the punishment of a previously committed act; and any law which alters evidentiary standards in favor of the prosecution after the commission of an act. Id. at 390. The Court also distinguished between ex post facto laws and retroactive laws, noting that while every ex post facto law must, by definition, be retroactive, the converse is not true. Id. at 391.
48. Id. at 390. The Federalist No. 84 (Alexander Hamilton). "To bereave a man of life [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must
der, constitutional challenges to retroactive taxes began to focus on the due process concerns of the taxpayer.

2. The Due Process Attack

Although Calder severely constrained constitutional attacks on retroactive taxation on ex post facto grounds, such attacks have been much more successful on Fifth Amendment due process grounds. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of the law." The Fourteenth Amendment makes this protection applicable to the States.49

Thus, a tax may be so "arbitrary and capricious" that it amounts to a taking without due process, in violation of the Fifth Amendment.50 In Nichols v. Coolidge, the Federal government attempted to include as part of the decedent's taxable estate, property which the decedent had transferred to others in 1917.51 The estate tax in question was approved in 1919 and attempted to include in the value of the decedent's estate any transfers made prior to or after passage of the act.52 Since the amount of tax was based on prior legal transactions, the Court found the tax to be "arbitrary, whimsical, and burdensome" and, therefore, unconstitutional under

at once convey the alarm of tyranny throughout the whole nation." Id. (emphasis added).

However, the applicability of the Ex Post Facto Clause to retroactive taxes should not be completely foreclosed. In explaining when retroactivity should be allowed, the Court mentions only acts of pardon and acts conferring benefits retroactively. Calder, 3 U.S. at 391. In fact, the Court declares that, as a general rule, no law should be retroactive and that retroactive legislation is "generally unjust, and may be oppressive." Id.

Further, the Calder Court's narrow interpretation of the Ex Post Facto Clause is not absolute. A civil statute may be unconstitutional as an ex post facto law where it, in effect, attempts to impose a penalty. Burgess v. Salmon, 97 U.S. 381 (1878). But see Licari v. Commissioner, 946 F.2d 690 (9th Cir. 1991) (holding that the retroactive increase in a monetary penalty for questionable deductions did not deny equal protection). In Burgess, the United States Supreme Court refused to apply an increased tax to a quantity of tobacco that had been sold the morning the tax increase was signed into law. Burgess, 97 U.S. at 384. The Court held that the imposition of the additional tax would constitute a criminal punishment or penalty, noting that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal." Id. at 384-85. The force of this penalty analogy has since been deflated by statements of the Court in Welch v. Henry. There the Court noted that taxation could not be considered a penalty assessed against the taxpayer. Welch v. Henry, 305 U.S. 134, 146-47 (1938). See infra note 68 for further discussion of Welch.

48. U.S. Const. amend. V.
49. U.S. Const. amend. XIV. "No State shall . . . deprive any person of life, liberty, or property, without due process of the law . . . ." Id.
51. Id. at 532.
52. Id. at 539.
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3. **Interference with Contracts**

A third ground for finding retroactive taxes unconstitutional is the Constitution's prohibition of laws which interfere with private contracts. Article I, Section 10, Clause 1 of the Constitution forbids the States from passing any law "impairing the obligation of contracts." Since retroactive taxation may change the benefits parties have received from a fully consummated contract, the Constitution may prohibit retroactive tax statutes.

Despite some early judicial success of the contract impairment argument, the case of Welch v. Henry significantly weakened the theory that retroactive taxation may impair preexisting contracts. In Welch, the Supreme Court upheld against constitutional attack a Wisconsin revenue statute which reached back two years to tax previously untaxed corporate dividends. In holding that the statute did not violate the Contract Clause of the Constitution, the Court held that taxation is neither a penalty nor a contract liability. Although their Contract Clause argument was rejected,

53. Id. at 542.
55. Id. By definition, this constitutional prohibition applies only to the states. The due process clause of the Fifth Amendment may protect the taxpayer from contract impairment by federal legislation, but the standard of review in such cases is "less searching." Pension Benefit Guar. Corp. v. R.A. Grain & Co., 467 U.S. 717, 733 (1984). Moreover, the United States Supreme Court has held that the two principles are not coextensive. Id.
57. See, e.g., id. In Long, the State of Massachusetts attempted to tax the same family that the federal government had tried to tax in Nichols v. Coolidge. Id. Yet Mrs. Coolidge again managed to beat back the Taxman from her grave, this time on both contract impairment and due process grounds. Id. at 595-96. After the death of Mr. Coolidge several years following the death of his wife, the state of Massachusetts attempted to tax the sons who had succeeded to the family trust. Id. at 593-94. While the questionable tax statute had been passed prior to the death of Mr. and Mrs. Coolidge, the trust had been created before the tax statute was passed. Id. at 594-95. The United States Supreme Court held that the trust deeds were contracts which were impaired by the subsequent tax legislation. Id. at 595. Since it was retroactively applied to a fully consummated gift (the trust), the tax was held equally unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment. Id. at 595-96.
59. Id. at 146.
60. Id. The Court's statement is an often cited passage in many cases justifying retroactive taxation:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process.

Id. at 146-47. It should be noted, however, that the Court spoke only of taxation
the taxpayers in *Welch* alternatively maintained that the tax denied them equal protection of the laws.\(^6\)

4. **The Equal Protection Clause**

However, the United States Supreme Court in *Welch* held that the retroactive operation of the Wisconsin revenue statute did not violate the Equal Protection Clause of the Fourteenth Amendment,\(^6\) another constitutional provision which may protect taxpayers from retroactive taxation. The Fourteenth Amendment precludes a State from denying "to any person within its jurisdiction the equal protection of the laws."\(^6\)

Equal protection concerns arise when taxes are applied retroactively because such legislation, in effect, gives lawmakers hindsight.\(^6\) Lawmakers, armed with knowledge of who made what and how it was made in previous years, can target specific groups and individuals when designing retroactive tax statutes.\(^6\) These targeted groups may then very rightly question whether they have been given equal protection of the laws.

The Court in *Welch* apparently found this argument unconvincing, as it set forth a broad test which virtually any retroactive tax statute would pass.\(^6\) The test in determining whether a retroactive tax fails to provide equal protection involves asking whether the object of the tax "falls within a distinct class which may rationally be treated differently from other classes."\(^6\) Since the statute in question in *Welch* taxed only recipients of corporate dividends who had never previously been taxed on such receipts, the tax was generally. The possibility that retroactive taxation may, indeed, be either a penalty or a contract liability is not completely foreclosed by the Court's statements.

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\(^6\) The possibility that retroactive taxation may, indeed, be either a penalty or a contract liability is not completely foreclosed by the Court's statements.

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\(^6\) Id. at 145.

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\(^6\) Id.

\(^6\) U.S. CONST. amend. XIV. Although this provision is not directly applicable to the federal government, the United States Supreme Court has found that actions of the federal government which would violate the Equal Protection Clause if taken by a state violate the Due Process Clause of the Fifth Amendment. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (finding that District of Columbia segregation laws violate due process and noting that, although the Fifth Amendment does not contain an equal protection clause, due process and equal protection are not mutually exclusive).

\(^6\) Hochman, *supra* note 14, at 693.

\(^6\) Id.

\(^6\) *Welch*, 305 U.S. at 145.

\(^6\) Id. Thus, the standard is the same "arbitrary and capricious" standard used in due process analysis. *Id.*

It is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be *arbitrary or capricious*, do not fall within the constitutional prohibition.

*Id.* (emphasis added).
not "hostile or oppressive discrimination" so as to deny equal protection. While the argument has not succeeded in convincing the Court that retroactive taxes deny equal protection, this inability of the taxpayer to avoid the retroactive tax has also led to charges that retroactive taxes are unconstitutional as unapportioned direct taxes.

5. Unapportioned Direct Tax

Retroactive taxes may also be unapportioned direct taxes in violation of rule of apportionment. Taxes become unavoidable when Congress assesses them retroactively, and these taxes may then be direct taxes, not taxes on previous events or privileges. Further, after a certain length of time, taxpayers should be able to feel secure that they have paid all taxes due on their income. When all taxes have been paid, income becomes capital, which, if taxed, is taxed directly and must be apportioned.

However, the Supreme Court of the United States has never adopted the view that a retroactive tax is an unapportioned direct tax. In Milliken v. United States, a taxpayer challenged a retroactive estate tax as an unapportioned direct tax. The decedent in Milliken had made a gift to his children three years before he died. When the decedent died, the tax collector held the gift to be a gift in contemplation of death. The collector then included the value of the gift in the taxable estate and taxed the gift at the current rates, which were higher than the rates in effect at the time of the gift. The United States Supreme Court held that the increased tax was still a tax on an event (the giving of a gift) and not an unapportioned direct tax. In addition, the Court found that Congress’ need to prevent evasion of estate taxes by deathbed gift-

68. Id. at 146. The decision in Welch was by no means unanimous. Three United States Supreme Court justices and three justices of the Wisconsin Supreme Court agreed with the trial judge that the controversial act was unconstitutional. Id. at 154 n.8. The dissenting United States Supreme Court justices in Welch thought the act violated the Equal Protection Clause because it reached back two years into the past to place the complete burden of an emergency tax on a small group of select taxpayers. Id. As such, the selection of these unfortunate taxpayers amounted to "arbitrary and discriminatory classification" which denied these citizens equal protection of the laws. Id. at 157.
70. See generally Ballard, supra note 28, at 595.
72. Id.
74. Id. at 18.
75. Id. at 19.
76. Id. The gift was made when the Revenue Act of 1916 was in force but was later taxed at the higher rate provided in the Revenue Act of 1918. Id.
77. Id. at 24. The Court held that "a mere increase in the tax, pursuant to a
giving justified the retroactivity.\textsuperscript{78} Thus, \textit{Milliken} illustrates that Congress may justify retroactivity in response to constitutional attacks on such taxes.

\section*{C. Permissible Retroactivity}

When a taxpayer challenges a retroactive tax statute on constitutional grounds, the Federal government may, in response, justify any alleged unconstitutional retroactivity on numerous grounds. Such retroactivity is often justified as being necessary for the efficient collection of revenue and the smooth operation of government.\textsuperscript{79} Thus, retroactive statutes which are "curative" in effect will generally withstand constitutional attack.\textsuperscript{80} Such "curative statutes" may range in effect from those which merely correct technical errors in the tax code to those which close unintended "loop-holes."\textsuperscript{81} A second justification for the limited retroactivity of a tax statute is that such retroactivity is necessary to eliminate taxpayer evasion of the statute while it is in the process on enactment.\textsuperscript{82} Finally, Congress is obviously free to retroactively apply tax provisions which benefit the taxpayer.\textsuperscript{83}

\begin{itemize}
\item\textsuperscript{78} Milliken v. United States, 283 U.S. 15, 24 (1931).
\item\textsuperscript{79} See, e.g., Nicol v. Ames, 173 U.S. 509, 515 (1899). In Nicol the Supreme Court stated:
\begin{quote}
The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.
\end{quote}
\textit{Id.}; see United States v. Darusmont, 449 U.S. 292, 297 (1981) (holding that retroactive tax legislation is allowable for "short and limited periods required by the practicalities of producing national legislation" and that such retroactivity is "customary congressional practice"); Ekins v. Commissioner, 797 F.2d 481, 485 (7th Cir. 1986) (stating that "Congress cannot be left powerless to carry out the yearly tinkering with the [Internal Revenue] Code that is necessary to prevent losses of revenue and secure the national fiscal goal."); see also Ballard, \textit{supra} note 28, at 596 (noting that legislation involving the "machinery of administration of the taxing system" is generally unobjectionable).
\item\textsuperscript{80} See generally Ballard, \textit{supra} note 28, at 596.
\item\textsuperscript{81} For further discussion of permissible retroactivity in this area, see infra notes 84-101 and accompanying text.
\item\textsuperscript{82} See, e.g., Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) (upholding legislation which was retroactively applied to employers who had withdrawn from pensions while the new legislation was pending).
\item\textsuperscript{83} Cf. United States v. Hemme, 476 U.S. 558 (1986) (upholding against due process attack a retroactive tax statute which resulted in a net gain to the taxpayer).
\end{itemize}

Congress has been permitted to retroactively apply tax statutes in a limited number of other situations. An emergency or overriding public policy may also justify retroactivity in certain situations. See, e.g., Veix v. Sixth Ward Bldg. & Loan Ass’n, 310 U.S. 52 (1940) (upholding the retroactive application of depression measures designed to prevent the collapse of the building-and-loan industry).
Retroactive Taxes

1. Curative Statutes

One type of tax legislation which does not often raise constitutional concerns is curative legislation which corrects defects in prior tax enactments.\(^84\) Such legislation may range from statutes which merely correct technical errors (such as clerical or typographical errors)\(^85\) to statutes that close unintended loopholes in the tax code.\(^86\) Courts often justify such retroactivity on the basis that "constitutional principles must leave some play to the joints of the

\(^{84}\) Forbes Pioneer Boat Line v. Board of Comm’rs, 258 U.S. 338 (1922) (acknowledging that retroactive curative legislation is allowable to correct minor technical errors).

The United States Supreme Court has also upheld curative statutes which ratify prior acts of Congress. See Ballard, supra note 28, at 596. Under this theory, Congress may retroactively ratify the prior unlawful collection of taxes without fear of offending the Constitution. United States v. Heinszen & Co., 206 U.S. 370, 382 (1907). This retroactive ratification of taxes is allowable only where Congress had the power to levy the taxes in the first place. \(\text{id.}\) In Heinszen, the United States Supreme Court found nothing wrong with a 1906 act of Congress which ratified previous unauthorized collections of duties in the Philippines. \(\text{id.}\) An order of the President, dated July 12, 1898, called for the collection of duties on imports to the Philippines. \(\text{id.}\) at 378. Since the President had no power to levy taxes, the prior collections were illegal. \(\text{id.}\) at 382. The corporation in Heinszen had filed for a refund before the 1906 act of Congress had been passed to ratify the unlawful collections. \(\text{id.}\) at 378. The corporation claimed that the elimination of the refund was a denial of due process under the Fifth Amendment. \(\text{id.}\) at 382. The United States Supreme Court held that as long as Congress had the power to lay the tax when it was originally collected there was no constitutional bar to the retroactive ratification of the tax. \(\text{id.}\) at 382. The Court declared that Congress had the power to "cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights." \(\text{id.}\) at 384 (citing Mattingly v. District of Columbia, 97 U.S. 687, 690 (1878)).

However, this doctrine of ratification may not be used, under the guise of curative legislation, to retroactively validate an act which remains unlawful at the time of ratification. Forbes, 258 U.S. at 339. In Forbes, the State of Florida had attempted to ratify the defendant Board’s collection of tolls for prior passages through a canal, which were free at the time the passages were made. \(\text{id.}\) at 338. The plaintiff had traveled through the canal free of charge until 1917, when a toll was imposed on such passages. \(\text{id.}\) The plaintiff had, upon demand by the defendant, paid the Board for use of the canal prior to 1917. \(\text{id.}\) The Florida legislature attempted to ratify the actions of the Board in 1919. \(\text{id.}\) The United States Supreme Court held that ratification presupposes the power to do the antecedent act. \(\text{id.}\) at 339. Since the Florida legislature never had the power to retroactively tax an event which was untaxed when undertaken, it could not subsequently ratify the illegal collection of the tolls. Such an attempt was held to violate the Fourteenth Amendment. \(\text{id.}\) Justice Holmes analogized the Florida legislature’s attempt to force the plaintiff to pay for passages free when made to an attempt to “m[a]ke a man pay a baker for a gratuitous deposit of rolls.” \(\text{id.}\)

\(^{85}\) See Williams, supra note 71, at 103 (noting the Technical Amendments Act of 1958).

machine."\textsuperscript{87}

Thus, when a legislative mistake gives a taxpayer a right to recover money from the Government, Congress may retroactively eliminate this right with a curative statute.\textsuperscript{88} In \textit{Graham & Foster v. Goodcell}, the Supreme Court found the Revenue Act of 1928 constitutional despite its retroactive operation.\textsuperscript{89} The Act in question eliminated a right of refund which had accrued to taxpayers as a result of an erroneous statutory interpretation by the Treasury Department.\textsuperscript{90} The Court held that a "curative statute aptly designed to remedy mistakes and defects in the administration of government" did not violate due process when retroactively applied.\textsuperscript{91}

The Supreme Court of the United States will decide in early 1994 whether the taxpayer should always be expected to bear the cost of Congressional miscues when the taxpayer has relied to his detriment on the legislative oversight.\textsuperscript{92} On October 4, 1993, the United States Supreme Court granted certiorari to hear the case of \textit{Carlton v. United States},\textsuperscript{93} a case which will likely influence how the Omnibus Budget Reconciliation Act of 1993 fares in court. In \textit{Carlton}, the plaintiff, as executor of an estate, had purchased a large share of stock which he later sold to an Employee Stock Ownership Plan (ESOP).\textsuperscript{94} He undertook such actions in reliance on an estate tax deduction promulgated in the Tax Reform Act of 1986.\textsuperscript{95} To promote ESOPs, Congress had allowed an estate tax deduction for the value of stock sold at a substantial discount to an ESOP.\textsuperscript{96} Carlton relied on the incentive, bought a large quantity of MCI

\textsuperscript{87} \textit{Forbes}, 258 U.S. at 340.
\textsuperscript{88} \textit{Graham}, 282 U.S. at 429-30. Notice, however, that no taxpayer reliance is involved in this scenario. The existence of taxpayer reliance on a legislative mistake changes the situation markedly. \textit{See Carlton}, 972 F.2d at 1059.
\textsuperscript{89} \textit{Graham & Foster}, 282 U.S. at 429-30.
\textsuperscript{90} \textit{Id.} at 417-18. An earlier Supreme Court decision held that the five-year statute of limitations in the Revenue Act of 1918 applied to collections by distraint. \textit{Id.} at 417. The Treasury Department had been erroneously interpreting the statute as not applicable to such collections. \textit{Id.} When the Court's decision had been announced, taxpayers began filing for refunds for taxes paid after the statute of limitations had run. \textit{Id.} at 415. The Act of 1928 retroactively denied all such refunds. \textit{Id.} at 416-17.
\textsuperscript{91} \textit{Id.} at 429. The Court conditioned its approval of such curative statutes on a showing that "the remedy can be applied without injustice." \textit{Id.}

A curative enactment may, subject to the conditions in \textit{Graham & Foster}, nullify rights vested due to the defect or even rights settled by prior litigation. \textit{See Ballard, supra note 28, at 596 (citing Graham & Foster and Rafferty v. Smith, Bell & Co., 257 U.S. 226 (1921)).}
\textsuperscript{92} \textit{Carlton}, 972 F.2d at 1051 (finding unconstitutional the Tax Reform Act of 1986 with respect to a provision which retroactively closed an estate tax deduction for proceeds from a sale of securities to an Employee Stock Ownership Plan).
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 1053-54.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 1053.
stock, and then sold it to an ESOP at a loss to the estate of $631,000.97

By way of a “Congressional Clarification,” Congress retroactively limited this deduction so that it was only available to estates where the decedent actually owned the stock before he died.98 Congress took this action because the tax deduction had resulted in more revenue loss than Congress originally anticipated.99 Since Carlton, and not the decedent, had purchased the stock, the estate incurred a loss of $631,000.100 The Ninth Circuit held that a curative statute, retroactively applied, violates due process when there has been reasonable detrimental reliance on the legislative blunder.101

2. Evasion

Tax statutes applied retroactively to prevent evasion by the taxpayer during the enactment process are also generally immune from constitutional attack.102 In Pension Benefit Guar. Corp. v. R. A. Gray & Co., the United States Supreme Court upheld the retroactive application of the Multiemployer Pension Plan Amendments Act (MPPAA) of 1980.103 Under the MPPAA, Congress required employers to pay a sum of money to the Government if the employer withdrew from a pension plan.104 Congress applied the act retroactively to the five-month period preceding final passage of the Act because many employers, such as the plaintiff, had withdrawn from pension funds during that period to avoid the mandatory contribution.105 The Supreme Court held that such a tax statute, retroactively applied to prevent evasion by the taxpayer during the interim period between proposal and enactment, did not violate due process.106

97. Carlton, 972 F.2d at 1053-54.
98. Id. at 1054-55.
99. Id. at 1055.
100. Id. at 1053-55.
101. Id. at 1059. In addition, the taxpayer must have had neither actual or constructive notice of the impending change at the time he acted in reliance. For a further discussion of the principles of notice, see infra notes 170-204.

The plaintiff in Carlton had argued in district court that the Act also violated the Contract Clause and the Takings Clause of the Constitution, but he did not contest these points on appeal. Id. at 1055.

102. See Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) (upholding legislation which was retroactively applied to employers who had withdrawn from pensions while the new legislation was pending).
103. Id.
104. Id. at 725.
105. Id. at 723.
106. Id. at 734. The Court also rejected the claim that the Act violated the Contract Clause of the Constitution by noting that the Contract Clause was never intended to apply to the National Government. Id. at 733.
3. Relief Measures

While in some instances it may be unconstitutional to increase taxpayer's burden retroactively, Congress is certainly free to retroactively grant tax relief.\textsuperscript{107} For example, in \textit{Commissioner v. Estate of Church}\textsuperscript{108} the Supreme Court of the United States held that the value of a trust could be included in the settlor's taxable estate where the settlor retains a life income from the trust.\textsuperscript{109} The Technical Changes Act of 1949 reversed the decision in \textit{Estate of Church} and provided relief to individuals who had created such trusts.\textsuperscript{110} Since the act benefited the taxpayers, no taxpayer challenged the constitutionality of these retroactive relief measures.\textsuperscript{111}

II. DUE PROCESS — THE MODERN DAY TEST

Since 1980, the United States Supreme Court has entertained only three cases where the constitutionality of retroactive tax legislation was the central issue.\textsuperscript{112} All three indicate that the Supreme Court considers due process the only remaining viable ground on which to attack retroactive taxes.\textsuperscript{113} However, these decisions only

\textsuperscript{107} See Williams, supra note 71, at 100. Williams includes within this category legislation which lessens a tax burden imposed by prior enactments or legislation which provides relief by overruling a court decision unfavorable to the taxpayer by statute. \textit{Id.}

\textsuperscript{108} Commissioner v. Estate of Church, 335 U.S. 632 (1949).

\textsuperscript{109} \textit{Id.} at 651.

\textsuperscript{110} See Williams, supra note 71, at 100 n.50.

\textsuperscript{111} In addition to retroactive tax relief, retroactivity in tax legislation has been permitted in certain other situations. The existence of an emergency or overriding public policy considerations may justify the retroactive legislation. \textit{Veix v. Sixth Ward Bldg. & Loan Ass'n}, 310 U.S. 32 (1940) (upholding the retroactive application of depression measures designed to prevent the collapse of the building-and-loan industry).

In \textit{Veix}, the United States Supreme Court upheld the retroactive application of certain Depression-era legislation. \textit{Id.} The legislation in question limited the right to withdraw funds from building-and-loan associations due to the imminent collapse of those institutions. \textit{Id.} at 37. The United States Supreme Court held that the interest in preserving the credit system outweighed the public's interest in prospective legislation. \textit{Id.} at 38. See also \textit{Home Bldg. & Loan Ass'n v. Blaisdell}, 290 U.S. 398 (1934) (rejecting the argument that retroactive depression measures constituted an impairment of contracts when an emergency existed).

Chief Justice Hughes in \textit{Blaisdell} stated that the "policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while . . . ." \textit{Id.} at 435. By its very nature, however, this "emergency exception" should rarely be necessary.


\textsuperscript{113} See Darusmont, 449 U.S. at 298. In \textit{Darusmont}, the Court reiterated its holding in \textit{Welch} that taxation cannot be considered a contract liability or a penalty. \textit{Id.; see supra note 60 for a further discussion of this view.} Such a statement would seem to restrict attacks on ex post facto or contract impairment grounds.

Retroactive tax legislation is still occasionally attacked (usually unsuccess-
offered vague guidance as to when the retroactive imposition of taxes offends due process. This section first examines the three most recent cases in which the Supreme Court of the United States has squarely confronted the issue of retroactive taxation. This section then summarizes how the Court determines whether a retroactive tax statute violates due process. Lastly, this section suggests a more consistent approach which should be followed when analyzing retroactive tax enactments for due process violations.

A. Recent Cases Involving Retroactive Taxation

The three most recent cases which have dealt with the constitutionality of retroactive taxes are United States v. Darusmont,\textsuperscript{114} Pension Benefit Guar. Corp. v. R. A. Gray & Co.,\textsuperscript{115} and United States v. Hemme.\textsuperscript{116} In Darusmont, the Supreme Court upheld a retroactive tax statute by focusing on the statute's effects on the taxpayer.\textsuperscript{117} In Gray, the Court shifted its focus to the Congressional justifications for the retroactivity in upholding the challenged tax legislation.\textsuperscript{118} In Hemme, the Court shifted its focus back to the legislation's effect on the taxpayer to again uphold a retroactive tax statute.\textsuperscript{119}

In United States v. Darusmont, the Court held that a tax statute retroactively applied to the first of the calendar year in which the statute was enacted would not \textit{per se} violate the Due Process Clause of the Fifth Amendment.\textsuperscript{120} In Darusmont, the plaintiffs challenged the constitutionality of a provision of the Tax Reform Act of 1976 which increased the amount of tax on the sale of the plaintiffs' home.\textsuperscript{121} The Act was signed into law on October 4, 1976, and made retroactive to January 1, 1976, thereby covering the plaintiffs' July home sale.\textsuperscript{122} The taxpayers set forth three factors which they asserted as relevant when deciding if a retroactive tax violates due process: whether the taxpayer has notice of the change at the time of the transaction; whether, if the taxpayer had been

\textsuperscript{114} Darusmont, 449 U.S. at 292.
\textsuperscript{115} Gray, 467 U.S. at 717.
\textsuperscript{116} Hemme, 476 U.S. at 558.
\textsuperscript{117} Darusmont, 449 U.S. at 299-301.
\textsuperscript{118} Gray, 467 U.S. at 728-31.
\textsuperscript{119} Hemme, 476 U.S. at 568-72.
\textsuperscript{120} Darusmont, 449 U.S. at 297.
\textsuperscript{121} Id. at 295. The tax in question was the minimum tax, a type of income tax applied to items of preference in the tax code. \textit{Id.} at 294.
\textsuperscript{122} Id. at 294-95. Mr. Darusmont had been transferred by his employer. \textit{Id.} at 293. Under the tax laws which existed at the time of the sale of his house, he owed no minimum tax on the sale of the house. \textit{Id.} at 294. The retroactive application of the Tax Reform Act of 1976 resulted in a minimum tax liability of $2280. \textit{Id.} at 295.
given notice, he could have altered his behavior accordingly; and whether the tax was a new tax or just a rate change of an existing tax.\textsuperscript{123}

However, the Court entertained the three factors suggested by the plaintiffs simply for the sake of argument, leaving their importance largely unsettled.\textsuperscript{124} The Court held that retroactivity was permissible, at least with respect to income tax statutes, to cover transactions made during the enactment process or even those made within the calendar year in which the statute was enacted.\textsuperscript{125} The Court found that notice, even if relevant, existed since the changes in question had been under discussion for over a year prior to the Act's passage.\textsuperscript{126} Further, the Court distinguished the case before it from earlier gift tax cases that had suggested that the taxpayer's ability to alter his behavior, given notice of a change, was relevant to due process analysis.\textsuperscript{127} Finally, the Court held, again assuming relevance, that the plaintiffs failed their own "new tax" test since the tax in question was merely a change in an existing tax.\textsuperscript{128}

\textsuperscript{123} Id. at 299. The Supreme Court seems to have assumed the test to be whether a tax is "so harsh and oppressive as to be a denial of due process." \textit{Id.} Such language echoes statements made in \textit{Welch v. Henry} that a retroactive tax must be "so harsh and oppressive as to transgress the constitutional limitation." \textit{Welch v. Henry}, 305 U.S. 134, 147 (1938).

\textsuperscript{124} \textit{Darusmont}, 449 U.S. at 299-300. The Court simply did not consider the taxpayer's ability to alter his behavior because the plaintiffs had cited old gift tax cases for this proposition. \textit{Id.} at 299. This ability of a taxpayer may not be a relevant factor anyway, at least in respect to income taxes, because, even if a taxpayer knows of a change in income tax rates, it can be assumed he would not refuse to receive the income. \textit{Hochman, supra} note 14, at 706-07. Thus, there can be no reliance by the taxpayer on the prior income tax rates. \textit{Id.} at 707.

As for notice, the Court in \textit{Darusmont} simply assumed it was relevant "for purposes of argument." \textit{Darusmont}, 449 U.S. at 299. The only discussion of the third factor, the "new tax" argument, simply rebutted the plaintiffs' assertion that the tax in question was a new tax. \textit{Id.} at 300.

While most of the Court's discussion in \textit{Darusmont} focused on the statute's effect on the taxpayer, the determinative factor in the case was actually the time span of the retroactivity of the statute in question. \textit{Id.} at 296-97.

As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process clause of the Constitution. \textit{Id.} at 297-98 (quoting \textit{United States v. Hudson}, 299 U.S. 498, 500 (1937)).

\textsuperscript{125} \textit{Darusmont}, 449 U.S. at 297-98.

\textsuperscript{126} \textit{Id.} at 299. The Court stated that the proposed changes had been "under public discussion" for over a year before enactment. \textit{Id.} For a discussion of notice, and this broad phraseology in particular, see \textit{infra} notes 170-204 and accompanying text.


\textsuperscript{128} \textit{Darusmont}, 449 U.S. at 300. The minimum tax had been in force since 1969, and the 1976 changes merely decreased the amount of exemption and
In the next case that the Court confronted the issue of retroactive taxation, the Court shifted its focus from the effects on the taxpayer to the purpose of the legislation. In *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, the Court held that the Multiemployer Pension Plan Amendments Act of 1980 did not violate due process where it was applied retroactively to eliminate taxpayer evasion during the enactment process. The Court went on to broadly hold that tax legislation does not violate due process where its retroactive application is based on a "legitimate legislative purpose furthered by rational means." 

Gray, however, virtually eliminated the taxpayer from the due process equation. Whereas in *Darusmont* the Court at least addressed the concerns of the taxpayer, Gray looked solely to the Congressional justification for the retroactive application of the legislation. After Gray, retroactive tax statutes must only pass the amorphous "legitimate legislative purpose/rational means" test to pass constitutional muster.

Nevertheless, the United States Supreme Court's emphasis on increased the tax rate. *Id.* The Court distinguished the plaintiffs from one who "has no reason to suppose that any transactions of the sort will be taxed at all." *Id.* (quoting Judge Learned Hand in *Cohan v. Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930)).

129. See *surpa* notes 102-106 and accompanying text for a discussion of this case.


131. *Id.* at 729. The Court stated: It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *Id.* (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

132. The Court again rejected a test which emphasized the concerns of the taxpayer. The Court rejected the test set forth in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, which examined four factors when analyzing retroactive legislation: reliance by the parties; the amount of prior legislative activity in the area; the "equities of imposing the legislative burdens"; and the degree to which transitional provisions moderate the effects of the legislation. *Gray*, 467 U.S. at 727 (citing *Nachman Corp. v. Pension Benefit Guar. Corp.*, 592 F.2d 947 (1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980)).

133. *Gray*, 467 U.S. at 729. The Court's swing to an emphasis on statutory justifications is further evidenced by the Court's equating of the old, taxpayer-oriented due process test (whether the statute is "harsh and oppressive") to the more recent, legislation-oriented due process test (whether the statute is "arbitrary and irrational"). *Id.* at 733 (citing *Welch v. Henry*, 305 U.S. 134, 147 (1938), and *Turner Elkhorn*, 428 U.S. at 15).

The Court did, however, again suggest in dicta that notice might be important, the point again being mooted by the existence of ample notice in the case before the Court. *Gray*, 467 U.S. at 732. The Court found abundant notice "even assuming that advance notice of legislative action with retrospective effects is constitutionally compelled." *Id.* (relying on *United States v. Darusmont*, 449 U.S. 292, 299 (1981), where a similar assumption was made). *Gray*, 467 U.S. at 732. The Court held that employers were on notice of the impending change since several proposals which were debated before enactment of the MP-PAA had retroactive effective dates. *Id.*
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the Congressional justifications for retroactive legislation was short-lived. The Court soon shifted its focus back to the taxpayer in United States v. Hemme. In Hemme, the Court held that the retroactive application of a tax statute did not offend due process where the taxpayer suffered no net detriment from the retroactive enactment. The taxpayer in Hemme had claimed that the Tax Reform Act of 1976 violated due process because the Act had reduced his tax deduction based on gifts made prior to the statute. However, the taxpayer actually paid less tax under the new “unified credit” system created by the Act. Once again, the Court’s focus was on the statute’s effect on the taxpayer, specifically whether “without notice, a statute gives a different and more oppressive legal effect” to prior actions of the taxpayer.

135. Id. at 571.
136. Id. at 561. Prior to the Tax Reform Act of 1976, the estate and gift taxes were separate and distinct taxes. Id. at 560. A taxpayer had been allowed a $30,000 lifetime deduction on gifts made during his lifetime, which the taxpayer could claim at any point in his life. Id. Taxpayers were also able to deduct $60,000 from the value of their estates before paying an estate tax. Id. The Act eliminated these two deductions but allowed instead a “unified credit” intended to make up for the lost deductions. Id. at 560-61. The transitional rule in question reduced the unified credit which a taxpayer could claim by 20% of the gifts claimed under the old gift tax deduction. Id. at 562. The Court assumed for the sake of argument that the statute in controversy was a form of retroactive taxation. Id. at 571.

The taxpayer, and the District Court, had relied on Untermyer v. Anderson. Id. at 567. The District Court held that the statute was arbitrary and capricious because it affected “the final disposition of a gift made before the enactment of the statute.” Id. The Supreme Court, however, distinguished Untermyer on the basis that Untermyer involved the retroactive imposition of the very first gift tax without notice to the taxpayer. Id. at 568.

137. Id. at 570. The taxpayer had claimed his $30,000 lifetime gift tax exemption but had died within three years of the gift. Id. at 563. The value of the gift, presumptively a gift made in contemplation of death, was then required to be included in the value of the estate for estate tax purposes. Id. The estate then claimed the new unified credit, from which the Internal Revenue Service deducted 20% of the value of the gifts previously made. Id. The 20% reduction in exemption did not, however, outweigh the benefit to the taxpayer and the estate of being able to claim both the lifetime gift tax exemption and the unified credit. Id. at 571.

138. Id. at 569. Almost hidden in the Court’s statement was the apparent recognition of notice (of the taxpayer of the impending changes) as a factor to be considered when assessing the constitutionality of retroactive taxes. Id. Yet notice was not even vital to the Court’s decision in Hemme. Id. The Court never reached the question of notice, assumedly because the taxpayer was not found to have suffered a detriment as a result of the enactment. Id. Clearly, the Court’s due process analysis focused primarily on the statute’s effects on the taxpayer rather than the Congressional justification of the legislation. Id. at 571. Possibly, had the Court found that the taxpayer in Hemme had suffered a detriment from the enactment and that the taxpayer had not been given any notice of the questionable legislation, it might have then considered the legislative reasons for passing the statute.

The Court also considered the character of the tax and the circumstances surrounding its enactment to be important in its decision. Id. at 569-70. “We
B. Summary of the Current Constitutional Test Applied to Retroactive Taxes

These modern cases, as well as some of the older Supreme Court cases dealing with retroactive tax legislation, have provided only vague guidance as to when such retroactive tax enactments are unconstitutional. The Court has consistently examined the "nature of the tax and the circumstances in which it is laid" when testing the constitutionality of such enactments. On the one hand, the Court examines the statute's effect on the taxpayer: a "harsh and oppressive" effect on the taxpayer will result in a finding of unconstitutionality. On the other hand, the Court evaluates the legislative justifications for the retroactive legislation: the Government will prevail where it can show a "legitimate legislative purpose furthered by a rational means."

Yet these standards vary with the "nature of the tax" which Congress seeks to retroactively increase. The courts will allow greater retroactive effect for income taxes than for gift and estate taxes. In the gift and estate tax areas, the prior gift or the death of the taxpayer has usually ended the control of the taxpayer over the taxable event. In these types of cases, the taxpayer may have taken different actions if he had known of the increased tax rate. In contrast, a taxpayer would not likely refuse to receive income even if he knew that Congress would retroactively apply rate increases. Thus, the Supreme Court of the United States must 'consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.' Id. (quoting Welch v. Henry, 305 U.S. 134, 147 (1938)). While not dispositive, the amount of the tax is a relevant factor in assessing the tax and its effect on the taxpayer. Hemme, 476 U.S. at 571.


140. Welch, 305 U.S. at 147. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." Id. This taxpayer-oriented test was applied in both Darusmont and Hemme. Darusmont, 449 U.S. at 299; Hemme, 476 U.S. at 568-69.


143. Hochman, supra note 14, at 706-08; see also Welch, 305 U.S. at 147-48.

144. Cf. Blodgett v. Holden, 275 U.S. 142, 147 (1927). "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." Id.

145. Hochman, supra note 14, at 706-07.

146. See Welch, 305 U.S. at 147-48 (distinguishing an income tax on corporate dividends from a gift tax and finding the income tax constitutional despite
has allowed a greater degree of retroactivity in the income tax area than in the gift and estate tax areas.\textsuperscript{147}

\section*{C. A Suggested Approach}

The courts must view retroactive tax statutes from two vantage points when analyzing such enactments for due process violations. Courts must first analyze the statute from the viewpoint of the taxpayer.\textsuperscript{148} Under this taxpayer-oriented approach, courts must consider the following two factors: (1) whether the taxpayer reasonably relied to his detriment on the existing law;\textsuperscript{149} and (2) whether the taxpayer had notice (either actual or constructive) of the retroactively-imposed change.\textsuperscript{150} A third factor, the taxpayer's ability to alter his conduct if he had notice of the retroactive change, if analyzed at all, should be weighed in a manner opposite of the way courts currently treat this factor.\textsuperscript{151} Secondly, courts must weigh the statute's effect on the taxpayer against the legislative justifications for the retroactive enactment.\textsuperscript{152} This legislature-oriented approach takes into account the government's need to raise revenue by examining the purpose of the statute and the rationality of its retroactive application.

\section*{I. The Taxpayer's Concerns}

\paragraph*{a. Was There Reasonable Detrimental Reliance by the Taxpayer on the Prior Law?\textsuperscript{153}}

The taxpayer must initially meet a threshold requirement the fact that it reached back two years to tax income). "We cannot assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one." Id.; see also Hochman, supra note 14, at 706-07 (noting that the courts assume that a taxpayer would not refuse income even if he knew it would be subjected to a higher tax rate).

147. Welch, 305 U.S. at 147-48.

148. See generally Rule of Prospectivity, supra note 11, at 439. The Note suggests balancing the taxpayer's reliance against the government's purpose in making a tax statute retroactive. Id.


150. Id. But see Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 731-32 (1984) (doubting that the retroactive pension act in question would have violated due process "even if it was suddenly enacted by Congress without any period of deliberate consideration . . .").

151. See Welch, 305 U.S. at 147-48 (finding it unlikely that a citizen would refuse to receive corporate dividends even if he knew the tax rate would soon be raised).

152. Cf. Gray, 467 U.S. at 729 ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by a rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . ."). See generally Rule of Prospectivity, supra note 11, at 439.

153. The action of the government in many retroactive tax cases, if taken by
before the court need even continue due process analysis. The complaining taxpayer must first show that he has suffered a detriment as a result of the retroactive tax legislation. By definition, there can be no Fifth Amendment due process violation without the deprivation of "life, liberty, or property." This "detriment threshold," therefore, allows the government to retroactively provide relief or confer benefits upon taxpayers but does not allow such retroactivity where it detrimentally affects the taxpayer. Formerly, the Supreme Court has found due process violations where a retroactive tax statute has a "harsh and oppressive" effect on the taxpayer. Perhaps realizing that the Fifth Amendment does not require a "harsh and oppressive" deprivation, the Court has since equated that standard with the prohibition of arbitrary and irrational laws. While the amount of the detriment need not be

one citizen against another, would give rise to a cause of action for negligent misrepresentation. Negligent misrepresentation generally requires a false representation, negligently made with the intent to induce reliance, resulting in justifiable, detrimental reliance by the plaintiff. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 105, at 728, 107, at 745 (5th ed. 1984). These elements often appear in retroactive tax cases. The false representation is usually in the form of a loophole that was negligently designed or drafted to allow more revenue loss than Congress originally anticipated. Such tax laws are obviously intended to induce reliance by the taxpayer, especially where tax incentives are used to induce the taxpayer to make socially desirable transactions. The taxpayer justifiably relies to his detriment when he makes such transactions at a cost, only later to find out that the loophole has been closed retroactively.

Carlton is a perfect example of the negligent misrepresentation analogy. Carlton, 972 F.2d at 1060. "[The statute in question] was enacted to induce taxpayers to sell shares at a discounted price to an ESOP, thus furthering the public policy of employee ownership. As intended, the (plaintiff) succumbed to the lure . . . . Then, when the private actor had completed the socially desirable action . . . the government reneged on its end of the deal." Id. It might also be argued that the government should be estopped from retroactively changing the tax code when there has been reasonable detrimental reliance by the taxpayer. Estoppel occurs when a party "is prevented by his own acts from claiming a right to detriment of the other party who was entitled to rely on such conduct and has acted accordingly." BLACK'S LAW DICTIONARY 551 (6th ed. 1990).

154. Cf. United States v. Hemme, 476 U.S. 558 (1986) (upholding against due process attack a tax statute which lessened the tax burden on the taxpayer); Carlton, 972 F.2d at 1059 (holding that a taxpayer must reasonably rely to his detriment on a tax statute before retroactivity will be found harsh and oppressive). This reliance interest is weaker when the actor is someone other than the taxpayer, such as the executor of an estate. Ferman v. United States, 993 F.2d 485, 492 (5th Cir. 1993) (upholding a retroactive curative statute after an executor of an estate had acted in reliance on the mistake). Thus, more weight should be given to this reliance interest when it is the taxpayer himself who has acted in reliance on the prior law. Id.

155. U.S. CONST. amend. V. This prohibition applies to the States as well.

156. For a discussion of the justifications for retroactive relief measures, see notes 107-11 and the accompanying text.

157. Welch v. Henry, 305 U.S. 134, 147 (1938) (holding that a retroactive tax must have a "harsh and oppressive" effect on the taxpayer before it can be found to violate due process).

“harsh and oppressive,” the Supreme Court has indicated that the detriment must be a *net* detriment.\(^{159}\)

In addition to considering the detriment suffered by the taxpayer, courts must also consider the extent of the taxpayer reliance on the prior tax code when analyzing for due process violations.\(^{160}\) In a system such as ours where Congress uses tax incentives to entice taxpayers into taking socially desirable actions, the taxpayer must feel he can trust the government not to renege on its end of the bargain when he takes action in reliance on an incentive.\(^{161}\) If not, the whole tax incentive system breaks down. Congress sets forth tax laws in particular detail and passes them with knowledge that taxpayers will rely on these laws to plan their financial affairs.\(^{162}\) The courts must protect this reliance if Congress does not.

Moreover, courts may find taxpayer reliance on the tax code even where the taxpayer has taken no affirmative action in reliance on a tax provision.\(^{163}\) The argument that a taxpayer would blindly accept income regardless of the rate at which it was being taxed is over simplistic.\(^{164}\) A taxpayer may continue to receive income because the current tax rate on such income is tolerable. At some point this rate may become intolerable and inspire the taxpayer to defer or expedite his income.\(^{165}\) However, the courts should not decide at what point a taxpayer would take such action.\(^{166}\) That decision should rest solely with the taxpayer. By holding that the income recipient would have continued to receive his income de-
spite the retroactively increased rate, the courts make financial decisions for the taxpayer which they have no right to make. Under certain circumstances, lack of reliance may be plainly obvious. Taxpayer reliance may be absent where the taxpayer acts without knowledge of the tax law, or where the taxpayer attempts to claim an "undiscovered benefit" which he claims after having paid a tax without protest. Thus, courts should begin due process analysis with a presumption of reliance by the taxpayer on prior law, and the taxpayer's due process argument will be easily overcome only where reliance is plainly lacking.

b. Was the Taxpayer Given Notice of the Retroactive Tax?

In addition to being detrimental, the taxpayer's reliance on the tax law must be reasonable under the circumstances. The reasonableness of the reliance is inversely proportional to the amount of notice given to the taxpayer: the more notice of the impending retroactive change, the less reasonable the reliance by the taxpayer on existing law. Further, courts should consider both actual and constructive notice when determining if the taxpayer's reliance was, in fact, reasonable.

Actual notice of an impending change in the tax laws makes taxpayer reliance on the existing code unreasonable. Yet it is equally unreasonable to assume that the Due Process Clause of the Fifth Amendment requires the government to provide citizens with

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167. See generally Rule of Prospectivity, supra note 11, at 439.
168. See United States v. Wells Fargo, 485 U.S. 351 (1988). In Wells Fargo, an earlier, unrelated District Court decision had interpreted public housing notes issued under the Housing Act of 1937 as being exempt from estate tax. Id. at 353. It had been assumed from the passage of the act that the notes were only exempt from federal income tax. Id. The plaintiffs had paid the estate tax on their notes before the District Court decision, and, subsequent to the decision, filed an unsuccessful refund claim. Id. Congress quickly and retroactively eliminated the newly discovered exemption and any rights to refunds. Id. Although the United States Supreme Court did not reach the issue of the constitutionality of the retroactive legislation because the Court interpreted the Housing Act of 1937 as containing no estate tax exemption, it is unlikely that the Court would have found Congress' action unconstitutional due to the virtual impossibility of taxpayer reliance on the exemption.
169. See Rule of Prospectivity, supra note 11, at 439.
170. Cf. United States v. Darusmont, 449 U.S. 292, 299 (1981) (holding that the taxpayer could not claim surprise when the retroactive tax had been under public discussion one year before it was passed).
171. See generally Rule of Prospectivity, supra note 11, at 443.
173. Cf. Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 732 (1984). In Gray, the legislation in question retroactively imposed a pension fund withdrawal liability. Id. Plaintiffs, even though there was ample notice of the retroactive liability, withdrew from their pension fund anyway to avoid other contributions required by the act. Id. The United States Supreme Court found that the retroactive legislation did not violate due process. Id. at 734.
actual notice of any proposed retroactive change to the tax code. Such a result would unduly hamper Congress in its collection of revenue.

In contrast to a requirement for actual notice, a requirement of constructive notice of a forthcoming change in the tax code allows the legislature sufficient administrative flexibility, while not denying the taxpayer his due process.\(^{174}\) Constructive notice is a legal fiction whereby the law presumes a person to have knowledge of a fact if "he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it."\(^{175}\) While defining constructive notice is not difficult, determining at what point it is fair to assert that the taxpayer had such notice is difficult.\(^{176}\)

Nonetheless, courts can consider a number of factors when assessing whether a taxpayer has been given constructive notice of a retroactively-imposed change in the tax law. Preliminarily, constructive notice might come from two sources. First, the obviousness of an error in the tax code (the "too good to be true" loophole\(^{177}\)) might alone be deemed to put the taxpayer on notice that a retroactive change may forthcoming. However, the courts should not require the taxpayer to second-guess Congress, and the taxpayer should not be punished for relying on clear and unambiguous law.\(^{178}\) Consequently, the obviousness of a Congressional blun-

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\(^{174}\) Cf. Darusmont, 449 U.S. at 296-97 (holding retroactivity permissible where "confined to short and limited periods required by the practicalities of producing national legislation").

\(^{175}\) BLACK'S LAW DICTIONARY 1062 (6th ed. 1990).

\(^{176}\) See, e.g., Gray, 467 U.S. at 717 (finding notice based on a similar retroactive liability of related legislation and based on the original Congressional proposals, which all contained retroactive dates); Darusmont, 449 U.S. at 299 (finding notice where the change had been under "public discussion" for one year before final passage, citing House and Senate reports as evidence of public discussion); Carlton, 972 F.2d at 1059 (finding no notice of a retroactive change in the tax law where there were only two vague, fleeting references in the legislative history of the change); Ferman v. United States, 993 F.2d 485, 491 (5th Cir. 1993) (finding notice of the same legislation in controversy in Carlton where there was an Internal Revenue Service news release before the plaintiff had acted in reliance). Carlton exemplifies the problem with defining constructive notice and asserting its fairness in application. In Carlton, the government did not become aware of one of the references which it asserted gave the taxpayer constructive notice of the change until the night before oral argument. Carlton, 972 F.2d at 1059.

\(^{177}\) Carlton, 972 F.2d at 1060. The government in Carlton had contended that the executor's reliance on the ESOP deduction was unreasonable for this reason. Id. The government implied that the tax statute "was such a windfall, any reasonable taxpayer would have known it was 'too good to be true.'" Id.

\(^{178}\) Id. at 1060. The Ninth Circuit rejected the government's contention that the size of the tax deduction should have put Carlton on notice that the deduction would be retroactively restricted. Id. "We flatly reject the government's premise that a taxpayer cannot rely on the clear and unequivocal text of the tax code, but instead must speculate on the unspoken and inchoate intentions of Congress." Id.
Retroactive Taxes

A taxpayer should not be put on notice of an upcoming retroactive change in the tax law.

Yet constructive notice of an upcoming change might come from a second source. A preenactment announcement of a possible future change in the tax code should, under certain circumstances, constitute constructive notice to the taxpayer of the change.179 A primary consideration when determining whether such an announcement constitutes constructive notice is the source of the announcement. Announcements of possible changes in the tax code may come from either non-government sources,180 such as the media, or government sources, such as Congress.181 Yet media reports cannot give the taxpayer constructive notice of changes in the tax law, as the media lacks authority to enact taxes and is often suspect of rumor, sensationalism, and inaccuracy.

Therefore, announcements of changes in the tax code will constitute constructive notice to the taxpayer only when they come from government sources, since only these sources have any authority to act on such announcements. However, not every announcement by a government official or agency of a potential change in the tax law constitutes constructive notice to the taxpayer of a later change.182 Again, the courts should consider the source of the an-

179. Cf. Darusmont, 449 U.S. at 299 (finding notice where the change had been under "public discussion" for one year before final passage, citing House and Senate reports as evidence of public discussion).

180. Gene Sperling, a National Economic Council aide, claimed that taxpayers were on notice of the retroactive tax hikes contained in the Omnibus Budget Reconciliation Act of 1993 because accounting firms had been warning their clients since late 1992 that taxes would soon be going up. Richard M. Weintraub, Attack on Retroactive Tax Central to GOP Opposition, WASH. POST, Aug. 6, 1993, at G1.

181. See, e.g., Darusmont, 449 U.S. at 299 (finding notice where the change had been under "public discussion" for one year before final passage, citing House and Senate reports as evidence of public discussion); Ferman v. United States, 993 F.2d 485, 491 (5th Cir. 1993) (finding notice of a change in the estate tax where there was an Internal Revenue Service news release before the plaintiff had acted in reliance).

182. Compare Carlton, 972 F.2d at 1059 with Ferman, 993 F.2d at 491. In Carlton the government cited two references which it contended should have put the taxpayer on notice of the retroactive change in the tax code. Carlton, 972 F.2d at 1059. One was a statement in a pamphlet published by the Joint Committee on Taxation written more than a year prior to the passage of the tax code amendment. Id. The Carlton court found this a weak attempt to establish constructive notice since the reference did not "purport to speak for Congress or even a congressional committee . . . ." Id. The second reference was a passing remark by a senator on the floor of the Senate. Id. The Carlton court also easily rejected this reference as constituting constructive notice. Id. In Ferman, the Fifth Circuit heard a case virtually analogous to Carlton, where the plaintiff had relied on the same estate tax deduction upon which Carlton had relied. Ferman, 993 F.2d at 491. However, in Ferman, the plaintiff had taken action in reliance on the Congressional mistake after the IRS had published a news release announcing the changes, whereas Carlton had acted before the release. Id.
nouncement. The power of the proclaimant to effectuate the potential change lends credibility to an assertion of constructive notice.\(^\text{183}\) Other factors that should indicate constructive notice, or lack thereof, are the specificity and definitiveness of the announcement, as well as the public exposure to the announcement.\(^\text{184}\) The greater the similarity between the prediction of changes and the final enactment, the more likely it is that the prior announcement put the taxpayer on notice of a potential change in the tax law.\(^\text{185}\) Further, constructive notice would be more evident if similarly situated taxpayers took action in response to the announcement.\(^\text{186}\)

In addition to the source, courts must consider the timing of an announcement when determining whether a taxpayer has been given constructive notice of a future change.\(^\text{187}\) When the retroactive tax is part of a budget act, the President will usually give a speech to Congress outlining the budget he intends to submit.\(^\text{188}\) The House Ways and Means Committee, after tinkering with the budget bill, will announce a “tentative decision” and may then issue its Committee Report.\(^\text{189}\) The bill then moves to the Senate Finance Committee, which usually will also issue a Committee Report.\(^\text{190}\) The Conference Committee will then work out a

183. Cf. Carlton, 972 F.2d at 1059.
184. See generally Rule of Prospectivity, supra note 11, at 443-44. All three would be positively correlated with a finding that constructive notice was given. The more specific the announcement, the more definitive the source, and the more exposure to the public, the more likely it is that it is fair to impute to the taxpayer as a matter of law knowledge of the impending change. Cf. Ferman, 993 F.2d at 491. The Ferman court held that “although [the IRS release] did not carry the authority of binding law, it did notify taxpayers of the possibility that section 2057 [the erroneous section] would be amended, how section 2057 might be amended, and the fact that there was risk associated with entering into transactions solely out of reliance upon section 2057.” Id. The court further held that to deny that the IRS release did not constitute constructive notice would allow the taxpayer “to locate Congress’ mistakes and exploit them before they are corrected.” Id.
185. Cf. Carlton, 972 F.2d at 1059 (holding that two ambiguous references in the legislative history did not constitute constructive notice of a later retroactive change in the legislation).
187. Cf. United States v. Darusmont, 449 U.S. 292, 299 (1981) (finding notice where the change “had been under public discussion for almost a year before its enactment”); Carlton, 972 F.2d at 1059 (finding no notice where the relevant reference was made more than a year before passage of the retroactive enactment); Ferman v. United States, 993 F.2d 485, 492 (5th Cir. 1993). The Ferman court suggested that the time between a Congressional error and an attempt to notify taxpayers of the error might relate to a finding of constructive notice: the less time between the error and the acknowledgment, the more likely it is that the acknowledgment constituted constructive notice. Id.
188. The Committee on Tax Policy, New York State Bar Association, Retroactivity of Tax Legislation, 29 Tax Law. 21, 25 (1975).
189. Id.
190. Id.
compromise between the two bills and issue a final recommendation which the President may then sign into law.\textsuperscript{191} Press releases and media reports will be interspersed in between all these occurrences. The point at which courts may infer constructive notice will vary with the circumstances surrounding enactment.

What is clear, however, is that if fairness and certainty are the goals in setting tax effective dates, the date of enactment should be the earliest date upon which the courts can fairly assert that a taxpayer has notice of a change in the tax law.\textsuperscript{192} The taxpayer has a right to demand certainty as to his tax burden, and the courts should not ask him to plan his affairs by guessing what actions Congress will take.\textsuperscript{193} If constructive notice is possible during the enactment process, the taxpayer is essentially in a state of paralysis;\textsuperscript{194} he cannot rely on the existing tax law because it may be changing, yet he cannot rely on any proposed changes because their passage is uncertain.\textsuperscript{195} Moreover, allowing notice to occur before enactment actually punishes those who rely in good faith on existing law, since constructive notice brings their actions within the scope of new legislation.\textsuperscript{196} Thus, making tax statutes effective from their dates of enactment would provide the maximum protection of taxpayer reliance.\textsuperscript{197}

At the other extreme, the test for "notice" that the Supreme Court has historically applied affords the taxpayer virtually no protection when he relies on an existing tax law. In addition to allowing the "customary Congressional practice" of calendar-year retroactivity regardless of notice,\textsuperscript{198} the United States Supreme Court has justified retroactive rate increases on the basis that such

\textsuperscript{191} Id.
\textsuperscript{192} For strong arguments in favor of making all tax legislation prospective in effect, see generally Rule of Prospectivity, supra note 11, at 436.
\textsuperscript{193} Untermyer v. Anderson, 276 U.S. 440, 445-46 (1928). The taxpayer may justly demand to know when and how he becomes liable for taxes — he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken.
\textsuperscript{194} See The Committee on Tax Policy, New York State Bar Association, Retroactivity of Tax Legislation, supra note 188, at 22.
\textsuperscript{195} Rule of Prospectivity, supra note 11, at 443. The Note questions the logic of requiring a taxpayer to rely on something which is not constitutionally "law." \textit{Id.} Constructive notice also gives members of Congress great power to alter conduct, if by introducing legislation or even making foreshadowing comments, they have the power to alter taxpayer behavior. \textit{Id.}
\textsuperscript{196} \textit{Id.} Taxpayers who rely in good faith on existing law, either because they are ignorant of the proposed change or must act out of necessity, are punished to avoid evasion of the impending statute by more knowledgeable taxpayers. \textit{Id.}
\textsuperscript{197} \textit{Id.} at 454-55.
\textsuperscript{198} As further evidence of the hollowness of the due process standard in retroactive tax cases, the Court has held that calendar-year retroactivity (retro-
taxes are not "wholly new taxes."\textsuperscript{199} The simple fact that a transaction has been taxed in the past is purported to give the taxpayer constructive notice of any future retroactive tax rate increase.\textsuperscript{200} This test for notice is a floodgate. The original taxable event opens the door for any infinite number of future retroactive tax rate increases.\textsuperscript{201} As the size of the government over the last 100 years has grown immensely and the number of non-taxable events in a taxpayer's life has decreased drastically,\textsuperscript{202} such a test renders due process meaningless. Thus, the courts should abandon the "wholly new tax" test as a test for notice, and the courts should not allow the time-honored customs of Congress\textsuperscript{203} to dispense with the notice requirement entirely.\textsuperscript{204} Although constructive notice may not provide the maximum protection of the taxpayer's due process rights and may, in some situations be difficult to determine, constructive notice, as determined by the source and timing of pre-enactment announcements, strikes a good balance between the taxpayer's interests and the interests of Congress.

c. Could the Taxpayer Have Altered His Behavior if He Had Been Given Notice of the Tax?

Even when the government fails to provide notice to the tax-

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\textsuperscript{199} United States v. Hemme, 476 U.S. 558, 568 (1986); Darusmont, 449 U.S. at 298.

\textsuperscript{200} See Darusmont, 449 U.S. at 298.

\textsuperscript{201} Certainly no taxpayer realized at the time he was studying about the Boston Tea Party that he was simultaneously being given constructive notice that the tax on his tea may one day be retroactively increased.

\textsuperscript{202} For example, gifts were at one time untaxed. For a discussion of cases involving the first gift tax, see supra note 12 and accompanying text.

\textsuperscript{203} Darusmont, 449 U.S. at 296-97.

\textsuperscript{204} Notice, however, should define the extent of permissible retroactivity. Constructive notice will not allow unbounded retroactivity; statutes may only be retroactive to the day on which notice was given. \textit{Cf.} Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992) (holding retroactive loophole-closing legislation unconstitutional where no notice of the change was possible prior to the taxpayer's completed transaction), \textit{cert. granted}, 114 S. Ct. 55 (1993).
payer of a retroactive tax, the tax may still survive a due process challenge.\textsuperscript{205} Where the taxpayer could not have altered his conduct even had he known of the retroactive tax, the Supreme Court has held that due process is not offended.\textsuperscript{206} Therefore, a retroactive gift tax is more likely to violate due process than a retroactive property tax.\textsuperscript{207} A taxpayer may not have made a gift had he known of the tax, while it is much more unlikely that he would not dispose of property for the same reason.\textsuperscript{208} Thus, the courts allow more retroactive effect for income taxes than they do for estate or gift taxes, since courts assume that a taxpayer would continue to receive income regardless of the tax rate.\textsuperscript{209}

Yet this argument is fundamentally flawed. Due process analysis should rarely depend on the type of tax involved. The argument that a taxpayer would continue to receive income even if he knew it were to be taxed at a higher rate may be true.\textsuperscript{210} However, the implied assumption that a taxpayer is limited to either accepting or rejecting income is untenable and unrealistic in today's society where ingenious tax attorneys abound. An individual may choose to defer or expedite his income\textsuperscript{211} just as easily as he might choose not to make a gift or not to plan his estate in a certain way. By assuming that the taxpayer would not have altered his behavior even had he been given knowledge of the tax,\textsuperscript{212} the Court is making a financial decision for the taxpayer which it has no right to make.

Moreover, even if the taxpayer's ability to alter his behavior is important, courts should not factor it in to the due process equation as courts have in the past. Historically, a retroactive tax is more likely to be upheld against due process attack where the taxpayer could not have altered his conduct to avoid the tax.\textsuperscript{213} The result should be just the opposite. In the rare situation where the tax-

\begin{itemize}
\item \textsuperscript{205} See Welch v. Henry, 305 U.S. 134 (1938) (upholding against constitutional attack a retroactive tax on corporate dividends despite a lack of notice).
\item \textsuperscript{206} Id. at 147-48. The Supreme Court in Welch used this argument to distinguish the income tax in question from prior gift tax cases. Id.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Cf. id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Welch, 305 U.S. at 147-48. This argument was made in Welch and seems to be one of the reasons why the United States Supreme Court allows more retroactivity in the area of income taxes as opposed to estate and gift taxes. In Welch the Court stated, "We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one." Id. at 148. For a discussion of other reasons why the Court distinguishes income taxes from estate and gift taxes when dealing with retroactivity, see supra note 14.
\item \textsuperscript{211} Hochman, supra note 14, at 707 (noting that the taxpayer may choose to defer income to another year or may change the character of his income so that he might avoid a higher income tax rate).
\item \textsuperscript{212} See Welch, 305 U.S. at 148.
\item \textsuperscript{213} Compare Welch, 305 U.S. at 134 (finding constitutional a retroactive tax
payer would be unable to take any action to avoid a tax, a retroactive tax would seem to be most repugnant to due process. Thus, a tax statute should be more suspect of due process violations where it affects taxpayers who are unable to avoid its retroactive operation.

2. The Legislature's Concerns — Is There a Legitimate Legislative Purpose Furthered by a Rational Means?

While the preceding factors help insure that the taxpayer is not denied due process, courts must balance these due process considerations against Congress' needs in carrying out the policies of government. The fact that a taxable event occurs before the date of a statute's enactment is not per se a violation of the Due Process Clause of the Fifth Amendment. While the simple need for revenue should rarely alone justify retroactivity in revenue enactments, other Congressional justifications may sometimes outweigh what would otherwise be violations of the taxpayer's due process.

The most compelling reason for allowing tax statutes some retroactive effect is to prevent evasion by the taxpayer during the enactment process. Congressional revenue statutes may be self-defeating if, during the process of enactment, the system allows enough taxpayers to take action to avoid the tax. However, this

on corporate dividends) with Untermeyer v. Anderson, 276 U.S. 440 (1928) (finding unconstitutional the retroactive application of the first gift tax).

214. The taxpayer's ability to alter his behavior is often equated with the degree to which the right being impaired has "vested." See generally Greenblatt, supra note 35, at 561-66. Thus, retroactive gift taxes are more suspect of due process violations than income taxes because a gift may be completely vested before the retroactive tax is passed. Welch, 305 U.S. at 147-48.

215. Cf. Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984) (justifying retroactivity where there is a "legitimate legislative purpose furthered by a rational means"); see generally Rule of Prospectivity, supra note 11, at 438-42; Hochman, supra note 14, at 697 (suggesting three factors which must be weighed in assessing the constitutionality of retroactive taxes: "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters").


217. Retroactivity of tax statutes should never be justified solely on these grounds since there are a virtually infinite number of other revenue-generating means available to Congress which do not implicate due process concerns. For example, to generate a certain amount of revenue, Congress may, instead of taxing at a lower rate and applying such a tax retroactively to the first of a year, raise the rate slightly and apply the tax prospectively. By applying the tax prospectively, Congress could not be charged with violating the taxpayer's due process, since the taxpayer retains the freedom to plan his financial affairs based on the new tax rates.

218. See generally Gray, 467 U.S. at 717 (upholding retroactive legislation
justification is not as compelling as it might sound. First, allowing under-the-wire activity encourages taxpayers to stay well-informed of the law.\(^{219}\) Secondly, Congress can limit the loss of revenue during the enactment process by giving the taxpayer constructive notice of the impending change.\(^{220}\) Thirdly, the number of taxpayers that daily browse the Congressional Record to keep abreast of Congressional activity is surely outweighed by the number who do not. It is certainly within Congress' power to anticipate the extent of taxpayer evasion and adjust other revenue-raising provisions accordingly.\(^{221}\) Consequently, this exception allowing retroactivity of revenue statutes should be a very limited one, justified only when taxpayer evasion during the enactment process severely threatens the purpose of the legislation.\(^{222}\)

Retroactive "curative" tax statutes are less justifiable than statutes retroactively applied to prevent taxpayer evasion. First, those individuals who rely to their detriment on existing law should not bear the cost of a Congressional mistake that Congress could spread among all taxpayers.\(^{223}\) Secondly, by not forcing the taxpayer to bear the financial burden of Congressional mistakes, the courts would discourage sloppy Congressional drafting of legislation.\(^{224}\) However, courts should find retroactive curative statutes permissible under certain circumstances. As discussed previously, retroactive curative statutes may range from those which merely correct inadvertent technical errors to those which close unintended loopholes.\(^{225}\) The more minor the error, the more leeway Congress

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\(^{219}\) Cf. Rule of Prospectivity, supra note 11, at 443.

\(^{220}\) For further discussion of constructive notice, see supra notes 174-204 and accompanying text.

\(^{221}\) Senator Dianne Feinstein (D-Calif.) has suggested that the revenue lost by eliminating the retroactive provisions of the Omnibus Budget Reconciliation Act of 1993 could be regained from a three-percent across-the-board cut in spending. Kircheimer, supra note 1, at 911-12.

\(^{222}\) See Rule of Prospectivity, supra note 11, at 445-46. There are some situations where a statute may be totally futile unless applied retroactively. The Interest Equalization Tax of 1954 was made retroactive to the date on which the President proposed it to Congress. Id. at 445. The tax was imposed to keep capital in the country by taxing the interest paid on foreign investments. Id. During the enactment process, however, a huge outflow of capital occurred which threatened the very purpose of the legislation. Id. Retroactivity should be permitted in such rare situations. Id.

\(^{223}\) The Committee on Tax Policy, New York State Bar Association, Retroactivity of Tax Legislation, supra note 188, at 23 (1975). But see Ferman v. United States, 993 F.2d 485, 492 (5th Cir. 1993) (upholding a retroactive curative statute despite detrimental reliance by the taxpayer where there was constructive notice of the change).

\(^{224}\) Id.

\(^{225}\) For a discussion of the different types of curative statutes and examples of each, see supra notes 84-101 and accompanying text.
should have in retroactively fixing the mistake. Yet even where the error is minor, the Due Process Clause may prohibit Congress from retroactively correcting the error if taxpayers, without notice of the mistake, reasonably relied on the error to their detriment. For the same reason, courts should allow retroactive loophole-closing provisions in even a more limited number of situations, as the risk of taxpayer reliance is much greater. Hence, courts should permit retroactive curative statutes only where the retroactivity is necessary to correct minor technical errors and where the probability of taxpayer reliance is minimal.


President Bill Clinton signed the Omnibus Reconciliation Act (the “Budget Act”) of 1993 into law on August 10, 1993. The Budget Act contains several controversial retroactive provisions. Under the Budget Act, some taxpayers (married individuals with over $140,000 in combined income and single individuals making over $115,000) will find that they have unknowingly been in a new thirty-six percent tax bracket since January 1, 1993. Even wealthier individuals will be further surprised to discover that Congress has been assessing a ten percent surtax on this top rate since January 1, 1993. The Budget Act allows taxpayers to pay the extra tax in three annual installments. The Budget Act gratuitously does not charge penalties and interest on the extra tax now due. The retroactivity is not limited to individual income tax rates. The Budget Act has also increased the top corporate tax rate.

226. Compare Hochman, supra note 14, at 705-06 (noting the United States Supreme Court’s reluctance to strike down statutes which “cure inadvertent defects”) with Rule of Prospectivity, supra note 11, at 440 (suggesting that taxpayer reliance may prevent the government from freely retroactively closing loopholes).

227. Cf. Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct. 55 (1993). Although Carlton involved the retroactive closing of a larger-than-expected loophole, the Carlton court did not distinguish between different degrees of governmental error.

228. See id.

229. Kircheimer, supra note 1, at 911.

230. For further discussion of the controversy surrounding the Budget Act, see supra notes 1-9 and accompanying text.


232. Omnibus Budget Reconciliation Act of 1993 § 13201. This provision will result in some taxpayers (those making more than $250,000 per year) seeing their income tax rate go up from 31% under the old law to 39.6% under the new law. Id.

233. Id.

234. Id.
from thirty-four to thirty-five percent, retroactive to January 1, 1993.235

In addition, the retroactive effect is not limited to income taxes. The Budget Act also retroactively increases estate and gift taxes.236 The Budget Act raises the tax rate to fifty-three percent on transfers valued between $2.5 million and $3 million and raises the rate to fifty-five percent on transfers above $3 million.237 These rate increases, like the increases in income tax rates, are effective as of January 1, 1993,238 over seven months before the Budget Act was passed.

These retroactive provisions in the Budget Act are unconstitutional, since no legitimate legislative need for the retroactivity exists which would outweigh the violation of the taxpayer's due process. Detrimental reliance by the taxpayer on the existing rates is likely, especially on the prior gift and estate tax rates. In addition, such reliance was reasonable given the impossibility of notice of a tax which reaches back to a prior administration for revenue. Further, it is probable that taxpayers would have planned their financial affairs differently, given notice of the rate increases. Lastly, President Clinton and Congress applied the provisions of the Budget Act retroactively for the sole purpose of raising revenue,239 which is not a legitimate legislative purpose justifying the due process violations.

A. Is the Taxpayer's Due Process Violated?

I. Is It Likely That the Taxpayer Relied to His Detriment on the Prior Law?

These retroactive provisions of the Omnibus Budget Reconciliation Act of 1993 obviously pass the detriment threshold required to

236. Omnibus Budget Reconciliation Act of 1993 § 13208, 26 U.S.C. § 2001 (1993). The Clinton administration has attempted to downplay the retroactive gift and estate tax rate increases by claiming that there is no new increase in the gift and estate tax rates. White House, White House Release Justifies Retroactive Increases in OBRA 1993, TAX NOTES TODAY, Aug. 20, 1993, at 15. However, the administration is simply playing word games. Although the new rates are technically not "new," they are retroactively-increased tax rates. The Act resurrects the top two estate and gift tax rates, which had been eliminated as of December 31, 1992. Omnibus Budget Reconciliation Act of 1993 § 13208. The top estate and gift tax rate had been 50% since January 1, 1993. Cloud, supra note 3, at 2133.
238. Id.
239. The goal of the Budget Act was to reduce the deficit, through increased taxes and spending cuts, by $500 billion. Weintraub, supra note 180, at G1. Political pressures over the corporate income tax hike and the gasoline tax "left the personal income tax rate as the main source for last-minute additional tax revenue." Id.
find a due process violation. In the seven month period preceding passage of the Budget Act, individuals who had thought that their income was being taxed at the then-current rate of 31% will instead find their income was being taxed at a rate of 36%, and in some cases, 39.6%. The estimated 1,000 individuals in the upper estate brackets who died between January 1 and August 9, 1993, will not have left their children as much support as they had thought when they originally planned their estates. Further, these retroactive provisions of the Budget Act do not confer any offsetting benefits upon the affected taxpayers, so as to preliminarily avoid a due process attack for lack of a deprivation. Thus, these provisions have the necessary "harsh and oppressive" effect on the targeted taxpayers.

Reliance by the affected taxpayers on the prior tax law is also likely, especially on the old estate and gift tax provisions of the Internal Revenue Code. Admittedly, in relying on prior estate and gift tax rates, the now-deceased taxpayers were not responding to a tax incentive in furtherance of a social policy. Nor, however, were they taking advantage of a large loophole to avoid a tax burden which would have otherwise been due. Knowledge of current estate and gift tax rates is an essential part of estate tax planning. Thus, a presumption of reliance on the prior estate and gift tax provisions is fair.

Similarly, a presumption of reliance on the prior income tax rates is also reasonable. Taxpayers in the highest income tax bracket may have been content with the thirty-one percent income tax rate which they thought was being assessed. Yet a court may not assume that these taxpayers would have taken no action to minimize their income tax had they known that the rate was instead 39.6%. Since it is not plainly obvious that upper-income

240. For further discussion of the detriment threshold required to find a due process violation, see supra notes 154-59 and accompanying text.
243. The Budget Act does retroactively confer some benefits, such as a research and development tax credit, a low-income housing tax credit, employer-provided education assistance, a Targeted Jobs tax credit, and a 25-percent self-employed health deduction. White House, supra note 236, at 15. Yet these benefits do not directly affect the taxpayers hit with the retroactive tax rate increases.
244. See Welch v. Henry, 305 U.S. 134, 147 (1938).
246. See generally Rule of Prospectivity, supra note 11, at 440 (discussing why taxpayer reliance has sometimes been looked upon disfavorably where a loophole is utilized to avoid paying certain taxes).
247. See Carlton, 972 F.2d at 1051.
248. For further discussion of the artificial distinction between income taxes and estate/gift taxes, see supra notes 163-69 and accompanying text.
taxpayers did not rely on the older income tax rates, a court should also presume taxpayer reliance on these rates.

2. Was There Notice of the Tax Rate Increases So That the Detrimental Reliance Was Unreasonable?

Not only was reliance on the prior tax rates probable, such reliance was also reasonable given the lack of notice of the retroactive rate increases. Even assuming that constructive notice of a retroactive change will defeat a taxpayer's claim of a due process violation,\textsuperscript{249} constructive notice of the provisions in the 1993 Budget Act retroactive to January 1, 1993, could not possibly have occurred if constructive notice is to be a meaningful concept. The questionable provisions of the Act reach back before Clinton was even inaugurated and apply to the last three weeks of the George Bush presidency.\textsuperscript{250} The earliest conceivable date upon which the government might have put the taxpayer on notice would be February 17, 1993, the date on which Clinton first announced his deficit-reduction plan.\textsuperscript{251} Yet even this date is questionable as a fair date upon which a court may assert that the taxpayer had constructive notice, since the Clinton administration did not announce the specific retroactive provisions until April 8, 1993.\textsuperscript{252}

However, even April 8, 1993, is not realistically a fair date for the law to impute to the taxpayer knowledge of the retroactive provisions of the Budget Act. The fate of the Budget Act was highly uncertain throughout the enactment process, as the budget bill passed by the narrowest of margins in both houses of Congress.\textsuperscript{253} The House of Representatives passed the budget bill by a vote of 218-216 on August 5, 1993,\textsuperscript{254} and the bill squeaked through the Senate by a vote of 51-50 on August 6, 1993.\textsuperscript{255} The government may fairly assert that it gave taxpayers constructive notice of the retroactive tax changes on August 6, 1993, although this date of constructive notice would only justify retroactivity to August 6, not to January 1. Thus, where a bill containing retroactive tax provisions is so controversial that its passage in Congress is highly un-

\textsuperscript{249} Cf. United States v. Darusmont, 449 U.S. 292, 299 (1981). The Court in Darusmont assumed that notice was relevant for the sake of argument and then went on to find constructive notice. Id.


\textsuperscript{251} White House, supra note 236, at 15.


\textsuperscript{253} George Hager & David S. Cloud, Democrats Tie Their Fate to Clinton's Budget Bill, Cong. Q., Aug. 7, 1993, at 2122.

\textsuperscript{254} Id.

\textsuperscript{255} It took the vote of Vice-President Al Gore to break the deadlock in the Senate. Id.
certain, the government cannot reasonably assert that it has given the taxpayer constructive notice until the act has cleared Congress.

Suprisingly, proponents of the Budget Act have claimed that notice of the January 1 retroactivity did occur, even before Clinton put his hand to the Bible in the oath-taking ceremony. The Congressional Research Service (CRS), after Congress asked the CRS whether the retroactive provisions of the Budget Act violate the Due Process Clause of the Fifth Amendment, reasoned that taxpayers were on notice of the change in estate tax rates because Congress had raised the rates in 1984 and 1987. Further notice, according to the CRS, comes from the fact that Congress proposed the same rate increases in 1992, although President Bush vetoed them. Regarding notice of the income tax hike, the CRS, citing United States v. Darusmont, seemingly adopted the Supreme Court's view that notice is not required for calendar-year retroactive income tax rate increases, since these increases are "customary Congressional practice."

Other sources, besides the CRS, have claimed that the taxpayer was given notice of the tax increases. The White House itself claims that taxpayers were on notice of the retroactive rate increases because Clinton promised to increase taxes on the rich during his campaign. Others assert that taxpayers had constructive notice of the retroactive taxes because tax practitioners and accounting firms had been warning their clients of higher taxes since late 1992.

However, pre-inauguration events cannot put the public on notice of later retroactive taxes. Past Congressional increases in tax rates, presidential campaign promises, and accounting firm newsletters do not put the taxpayer on notice of a retroactive estate tax rate increase. First, past estate tax rate increases give no notice of future rate increases, and the fact that retroactive income tax rate increases are "customary Congressional practice" cannot dispense with the due process requirement of notice altogether. Secondly, Bill Clinton as a presidential candidate or even as an incoming president had little power at the time to effectuate any taxes he was proposing. Although the media gave them wide exposure, Clin-

257. Id.
258. Id. (citing United States v. Darusmont, 449 U.S. 292, 297 (1981)).
259. White House, supra note 236, at 15. The President was always "clear and direct" on his intent to tax the rich. Id.
260. Weintraub, supra note 180, at G1.
261. For further discussion of why tax rate increases do not become foreseeable once a tax is first applied, see supra notes 198-204 and accompanying text.
262. For further discussion of how this power is related to the concept of constructive notice, see supra note 183 and accompanying text.
Retroactive Taxes

Koton's campaign promises were neither specific, definitive, nor similar to the subsequent retroactive taxes in the Budget Act. Clinton only promised to tax the rich, not to tax the rich retroactively. President Clinton did not even mention retroactivity until April 8, 1993, and the effective dates of the retroactive provisions changed many times during the enactment process. Thirdly, reports from tax consultants and accountants were speculative, unauthoritative, and predicative of higher taxes only.

More specifically, George Bush's veto of a similar estate tax provision before he left office does not put taxpayers on notice that the next President may try to retroactively apply the same tax. In fact, the prior veto makes the estate tax even more repugnant to the Constitution and points to the most alarming aspect of the Budget Act, if the courts uphold it against constitutional attack. The Budget Act exemplifies taxation without representation and, in effect, allows Clinton to legislate history. For the first twenty days of 1993, the 43-percent president Bill Clinton and the 124 new members of the 103rd Congress are imposing taxes that President George Bush and the prior 103rd Congress did not wish to impose. Never before has a President signed a revenue act which reached back to a prior administration to collect taxes.

263. For further discussion of these factors as tending to show that the government has given constructive notice, see supra notes 182-191 and accompanying text.
264. White House, supra note 236, at 15 (1993). The President said in the most clear manner possible throughout the entire campaign, the transition and in his original proposal on February 17, 1993 (which had a January 1, 1993 effective date) that he would push for a modest tax increase on the top 1% of Americans, those making over $180,000.
266. The House of Representative's proposal had the same effective date as that of the President's, January 1, 1993. Weintraub, supra note 180, at G1. The Senate's proposal had an effective date of July 1, 1993. Id. During the Conference Committee debate the date was pushed back to March 1, 1993 to raise additional revenue. Id. The Clinton administration later suggested the date be pushed back to February 17, 1993. Id.
267. Weintraub, supra note 180, at G1.
268. One of the reasons for the Declaration of Independence was Great Britain's "imposing taxes on us without our consent." THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776).
269. Glazier, supra note 252, at A12. "Retroactive laws also would allow a new party taking power after an election to, in effect, legislate history - to undo the past of its opponents." Id. "If notice requirements are no longer to be observed, the 1913 income tax can be made retroactive to the founding of the country and all personal wealth can be confiscated." Paul C. Roberts, Overtaxing the Rich and the Dead, L.A. TIMES, Aug. 8, 1993, at M5.
270. Bill Clinton won the presidential election in 1992 with only 43% of the popular vote. See, e.g., Repeal Retroactivity!, supra note 5, at A12.
273. The Treasury Department has published the following summary of retroactive tax rate increases and their effective dates:
The John Marshall Law Review

1917: The Revenue Act of 1917 imposed a surtax on individuals and an excess profits tax on corporations. The Act was passed on October 3, 1917 and the rate changes applied retroactively to the 1917 calendar year.

1918: The Revenue Act of 1918 increased individual rates and corporate rates. The Act was passed February 24, 1919, and the rate increases applied retroactively to the 1918 calendar year.

1935: The Revenue Act of 1935 increased the individual surtax rate and the corporate rate. The Act passed on August 30, 1935. The effective date for this tax was generally prospective, based on a pro ration formula, but for some corporations, it was possible that the rate could have been retroactive from July 30, 1935 to June 30, 1935.

1936: The Revenue Act of 1936 imposed an undistributed profits tax on corporations. The Act was passed on June 22, 1936 and the tax applied retroactively to December 31, 1935.

1938: The Revenue Act of 1938 altered the distribution of the corporate tax to make the tax more progressive. High income corporations faced a higher tax. The Act was passed May 28, 1938 and applied retroactively to years beginning after December 31, 1937.

1940: The Revenue Act of 1940 raised corporate rates and imposed a Defense Tax on individuals. The Act was passed June 25, 1940 and was effective retroactively to December 31, 1939. The Second Revenue Act of 1940 added an additional surtax on corporations and an excess profits tax on corporations. The Act was passed October 10, 1940. Both increases were effective retroactively back to December 31, 1939.

1941: The Revenue Act of 1941 increased the surtax on individuals and corporations, effective retroactively to December 31, 1940. The Act was passed on September 9, 1941.

1942: The Revenue Act of 1942 increased the normal tax and the surtax on individuals, both retroactive to December 31, 1941. The Act also increased the corporate surtax, again retrospective to December 31, 1941.

1943: The Revenue Act of 1943 increased the excess profits tax on corporations. The Act was not passed until February 25, 1944 and the rate changes applied retroactively to December 31, 1943.


1951: The Revenue Act of 1951 increased corporate rates both retroactively and prospectively. The rates were increased as of January 1, 1951, with further increases to take effect January 1, 1952. The Act was passed October 21, 1951.

1968: The Revenue and Expenditure Control Act of 1968 imposed a surtax on all taxpayers. For individuals, estates and trusts, the surtax was retroactive to April 1, 1968. For corporations, the surtax was retroactive to January 1, 1968. The Act was passed on October 22, 1968.

1976: Tax Reform Act of 1976 increased the alternative minimum tax on individuals from 10 percent to 15 percent. The corporate alternative minimum tax was similarly increased to 15 percent. Both increases were effective after December 31, 1975. The Act was passed on October 4, 1976.

those years when a change in presidency takes place, the date of inauguration should be an absolute limitation on the extent of retroactivity of any tax measures of the incoming President and Congress.

3. Could the Taxpayer Have Taken Action to Minimize His Tax Burden Had He Known of the Increased Rates?

While no notice would have been possible to justify the Budget Act’s retroactivity, the Clinton administration may contend that, at least with respect to the income tax hike, the taxpayer would not have acted differently even had he known of the tax.274 However, since the distinction between income and estate and gift taxes is an artificial one,275 this argument has no merit, given the sharp rate increases276 and the nature of estate tax planning.277 In summary, since reasonable detrimental reliance on the prior tax law is likely, Congress must show a legitimate legislative purpose for the retroactivity of the Budget Act to outweigh the apparent due process violations.278

B. Is There a Legitimate Legislative Need for the Retroactivity of the Budget Act Which Will Justify the Infringement of the Taxpayer’s Due Process?

No legitimate legislative purpose of the Budget Act exists which would excuse the due process violations of the Act. The Clinton administration and Congress made the income, estate, and gift tax rate increases retroactive to January 1, 1993, for the sole purpose of generating revenue.279 The need for revenue alone should rarely justify retroactive taxation. While the government may contend that there is a legitimate legislative need to reduce the deficit,280 the retroactive provisions of the Budget Act are not a “rational means” to achieve this result when spending cuts and prospective taxes are also available.281

None of the traditional justifications for retroactivity are appli-

275. For further discussion of why the courts should not distinguish between different types of taxes when analyzing tax statutes for due process violations, see supra notes 163-169 and accompanying text.
276. Where the income tax rate jumped from 31% to 39.6% for some taxpayers, it is highly probable that, given notice of the change, such taxpayers would have acted to minimize the financial effects of such a harsh change.
279. Weintraub, supra note 180, at G1.
280. Cf. id.
281. By eliminating the retroactivity from the Budget Act, the Clinton administration would have lost only $9 billion in revenue over the next five years,
cable to the retroactive provisions of the Budget Act. Congress did not apply the rate increases retroactively to prevent taxpayer evasion during the enactment process. Nor are the retroactive provisions "curative" in nature. The retroactive provisions of the Budget Act are tax rate increases, not mistake-correcting or loophole-closing provisions. Instead, the retroactive rate increases on the wealthy appear to be an attempt by the Clinton administration to legislate history by repealing the so-called "decade of greed," an impermissible, unconstitutional, and undemocratic purpose.

The Clinton administration has defended the Budget Act's retroactive taxes on the grounds that the Act also retroactively provides tax credits. While an exception exists allowing retroactivity where benefits are conferred or tax relief is granted, the Clinton administration is misapplying the exception. Retroactive tax relief is always permissible, and Congress may even justify a retroactive tax where simultaneous retroactive tax relief results in a net benefit to the taxpayer. However, the mere fact that a revenue act contains retroactive tax credits, in addition to retroactive taxes, will not automatically excuse the act of due process violations. The retroactive tax satisfies due process only where the tax is closely intertwined with a corresponding benefit that results in a net gain to the taxpayer. The Budget Act does not satisfy this requirement. It is unlikely that an individual with annual earnings of $250,000 who has seen his income tax rate rocket up from thirty-one to 39.6% retroactively will content himself with the Act knowing that the same act has retroactively granted a low-income housing tax credit. Thus, the Budget Act cannot be justified by the retroactive tax relief it affords.

The other White House justifications of the Budget Act's retroactivity are equally unconvincing. The Clinton administration has defended the retroactive tax provisions on the basis that the provi-

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282. For obvious reasons, taxpayer evasion should rarely be a concern where changes in the estate tax are being proposed. Evasion by death would seem to be a highly unlikely tactic and one which would not even succeed under the 1993 Budget Act. The only possible evasion of an estate tax would be that of executors of estates where the settlor has already died and the executor is in charge of the estate while a tax change is in the works.

283. Glazier, supra note 252, at A12.

284. White House, supra note 236, at 15.

285. Cf United States v. Hemme, 476 U.S. 558 (1986) (holding that the elimination of an exemption coupled with a new tax credit that results in a net benefit to the taxpayer does not violate due process when retroactively applied).

286. Id.


288. For further discussion of the retroactive benefits provided by the Budget Act, see supra note 243.
Retroactive Taxes affect only the top 1.2 percent of individual taxpayers. Yet the Due Process Clause of the Fifth Amendment does not prohibit only those takings from the bottom 98.8 percent of the population. Thus, the wealth and number of taxpayers burdened by a retroactive tax should not affect due process analysis.

Likewise, the time required to pay a retroactive tax is irrelevant to due process analysis. The Clinton administration has defended the retroactivity on the basis that taxpayers are allowed the to pay the additional taxes over three years without interest. Yet a taking without due process is not rendered constitutional simply because it is accomplished in annual installments. The payback schedule of a retroactive tax will not justify a due process violation. In summary, the government can point to no legitimate legislative purpose of the retroactive provisions which could justify the due process violations of the Budget Act.

CONCLUSION.

The retroactive tax provisions of the Budget Act are clearly unconstitutional. Certain aspects of the Budget Act and the circumstances surrounding its enactment distinguish it from prior retroactive tax cases and make it an ideal candidate for a successful constitutional attack. Not only was taxpayer reliance on the old law probable, but many of those who did detrimentally rely on the prior tax code are now deceased. Such graveyard robbery should be condemned. Congress has never retroactively increased an estate tax since the inception of the estate tax in 1916. Another historical first about this Act is that for the first time in history one administration is attempting to reach back into the pocketbooks of taxpayers of the previous administration, and the offensiveness of such action is exacerbated by the fact that the prior administration vetoed a similar tax. Allowing this legislating of history would set a grave precedent for future administrations and Congresses. The Act also presents the bare minimum Congressional justification of a retroactive tax: virtually all retroactive taxes have as one of their purposes the raising of revenue. Here, this is the only justification for the retroactivity. Moreover, retroactivity permits President Clinton and Congress to hide from the true effects of their taxes: an annual tax rate of 39.6% applied retroactively to January 1 is equivalent to a 51.6% rate applied prospectively from August 1. Finally, the Budget Act presents an excellent opportunity for the judi-

289. White House, supra note 236, at 15.
290. For a discussion of the Fifth Amendment, see supra notes 48-49.
291. White House, supra note 236, at 15.
ciary to overturn an act of Congress without fearing the practical consequences of its decision. The retroactive provisions of the Act account for only two percent of the $496 billion deficit reduction package. It should not take a constitutional amendment to protect taxpayers from retroactive taxes when the Constitution currently provides ample protection.

Carlton v. United States will give the Supreme Court a chance to restore some life into the concept of taxpayer due process. Since the early gift tax cases, the taxpayer has had very little success in convincing the courts that retroactive taxes are repugnant to the Constitution. The government has continued to encroach upon the right of the taxpayer to confidently plan his finances in reliance on the tax laws then in existence. If the Supreme Court finds against the taxpayer in Carlton, notice will be a moot concept, bringing down taxpayer due process with it. Due process will be yet another apparent constitutional bar to retroactive taxes that the Supreme Court has abandoned out of deference to the ever-increasing power of Congress to tax. While death and taxes may still be the only certainties in life, don't expect one to be the end of the other if the current administration has its way in court.

Andrew G. Schultz