Digging Up New Revenue: Retrospective Estate Taxation and the Omnibus Budget Reconciliation Act

Michael George

The American Cause

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DIGGING UP NEW REVENUE:
RETROSPECTIVE ESTATE TAXATION
AND THE OMNIBUS BUDGET
RECONCILIATION ACT OF 1993

MICHAEL J. GEORGE*

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* Michael J. George, J.D. 1988, William & Mary; A.B. 1984, Harvard. Mr. George is
the General Counsel to The American Cause, an organization which has declared its
intention to challenge the constitutionality of the 1993 Omnibus Budget Reconciliation Act. Mr.
George drafted an amicus brief on behalf of The American Cause in United States v.
Carlton, No. 92-1941, a case recently decided by the United States Supreme Court involving
issues very similar to those discussed in this article.

Author's Note: Although written by the General Counsel to The American Cause, this
Article does not necessarily reflect the views of The American Cause and is solely the work
of the author. The author would also like to express his gratitude and appreciation to Carrie
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I. INTRODUCTION

On August 10, 1993, President Clinton signed the Omnibus Budget Reconciliation Act of 1993 (OBRA). The passage of OBRA was difficult and split Congress along party lines, with the Republicans united in opposition. In a dramatic finale, Vice President Al Gore cast the tie-breaking vote in the Senate to put the bill over the top with a 50-51 final tally. Four days later, President Bill Clinton signed the bill. As the President’s pen left the paper and the bill was transformed into law, segments of our nation became suddenly and unexpectedly poorer.

Contained within the Act were certain provisions that changed the estate tax laws retrospectively. These retroactive laws were requested by the President and enacted by Congress ostensibly to reduce the fed-

1. Barbara Kircheimer, President Signs Tax Bill; Retroactivity Debate Lingers, 60 TAX NOTES 911 (1993).
2. See infra notes 9-10.
4. Estate tax. § 13208 of the Omnibus Budget Reconciliation Act of 1993 reinstated, retroactive to January 1, 1993, the two top estate and gift tax rates which had expired at the end of 1992 (dropping the top rate to 50%). As a result, for taxable transfers over $2.5 million but not over $3 million, the rate rose 3% to 53%. For taxable transfers over $3 million, the rate rose to 55%. Income Tax. §§ 13201 & 13202 of the Act added a new 36% bracket and tacked on an additional 10% high income surtax which raised the effective top rate to 39.6%. These changes were also retroactive to January 1, 1993. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13201, 13202, 13208, 107 Stat. 312 (1993).
6. Throughout this article, the terms retroactive, retrospective, and their derivatives will be used interchangeably.
eral budget deficit. Yet, despite this laudable goal, a storm of criticism assailed the President and the Democrats in general. Prior to passage, a variety of editorial pieces were written which were highly critical of the retroactive aspect of OBRA. This editorial assault dovetailed with the Republican inclination to make retroactivity a focal point for their attacks on the President’s plan. This Republican strategy, although ultimately unsuccessful, resulted in putting proponents of the bill on notice that retroactivity was strongly disliked by many Americans and that its use could give rise to a serious and popular opposition movement.

In the aftermath of OBRA’s passage, several conservative organizations announced intentions to challenge the new law on constitutional grounds. The first to publicly declare their intention to challenge

7. See infra note 10.
10. Eric Pianin and David Hilzenrath of the Washington Post have reported that: Senate Minority Leader Robert J. Dole (R-Kan.), in concluding the Republican attack, dismissed the package as a ‘terrible bill’ that will come back to haunt the Democrats in the next election . . . . Through 10 hours of debate, Democrats fended off several last-gasp efforts by Republicans to scuttle the bill, including a challenge to the constitutionality of a provision making the tax increase on upper-income Americans retroactive to Jan. 1 . . . . Few Democrats expressed enthusiasm for the bill . . . . Some, like Sens. Donald W. Riegle Jr. (D-Mich.) and David Pryor (D-Ark.), conceded they were uncomfortable with the retroactive feature of the tax increases . . . . The constitutional challenge to the retroactive tax increase was the most concerted GOP attack on the bill yesterday . . . . ‘I bet it comes as a heck of a surprise to old departed Uncle Louie who never guessed that President Clinton would have the IRS hound him into the afterlife for yet another contribution or investment,’ Sen. John McCain (R-Ariz.) said. ‘Can’t the administration confine its broken promises to the living and let the dead rest in peace.’

OBRA was The American Cause. This announcement was followed closely by one from the National Taxpayer Union (NTU). Racing to be first to court, NTU filed suit on August 27, 1993. Meanwhile, The American Cause set out on the more difficult and longer course required to file on behalf of specific individual taxpayers affected by the retroactive provisions. Rumors of possible suits circulated, but to date there appears to be only one lawsuit actually filed and one which will definitely be filed shortly.

This article does not pretend to be a general survey of legislative retroactivity. Instead, it will concentrate on the constitutional theories which will likely be used to base legal challenges to the retroactive estate tax increase contained in OBRA. Although many of the arguments against retrospection discussed herein apply with equal force to the OBRA retroactive income tax changes, this narrowing of the discussion helps to focus the analysis in a confusing area of the law. Additionally, challenges to the estate tax provision are more likely to

12. National Taxpayers Union, Inc. v. United States, D.D.C., Civil No. 93-1796-RCL. The NTU suit claims standing in its own right and on behalf of its membership.
13. Author’s personal knowledge.
15. Although not considered at length in this Article, it should be noted that in addition to the matters discussed herein, retrospective legislation may also run afoul of the following sections of the United States Constitution: (1) Equal Protection Clause. Retroactive legislation may give rise to an equal protection issue under section one of the Fourteenth Amendment. At least one observer has noted that while the practice of differentially taxing certain activities or circumstances at different rates prospectively is commonly accepted by the courts, retrospective application of such taxes has the additional characteristic of allowing legislators to know exactly which individuals will reap the benefits or penalties of such an act and thus would allow for targeting of certain disfavored groups. Hochman, supra note 14. (2) Contract Clause. Article I, § 10, cl. 1, of the United States Constitution prohibits the states from passing any law impairing the obligations of contracts. Retroactive legislation may so impair such obligations by interfering with rights which have fully vested pursuant to a contract. However, it should be noted that the 1938 case, Welch v. Henry, 305 U.S. 134 (1938), concerning a retroactive Wisconsin tax affecting previously untaxed corporate dividends, severely eroded this Clause's vitality with respect to retrospective taxes.
receive sympathetic treatment by the courts due to the obvious unfairness of changing tax rates after taxpayers have died.

This Article contains four sections. Section I introduces the topic and provides a quick overview of the cultural and historical dislike of retrospective laws. Section II discusses the various theories likely to be used in the upcoming court challenges to OBRA, namely: apportionment, ex post facto, and due process. The sub-section devoted to due process represents the bulk of this section and reflects the fact that a due process court test is the most likely to be successful based upon recent cases. Section III is an appeal for consistency in the area of due process jurisprudence. Section IV concludes with a general summary and discussion of the likely direction of challenges to OBRA.

II. THE CASE AGAINST RETROACTIVITY

A. Indictment of Retroactive Laws

There are no admitted fans of retrospective legislation. For well over two hundred years of American history, few concepts have been so universally criticized and reviled. In Ogden v. Saunders, Justice Trimble declared:

In my judgment, the language of the authors of the Federalist proves that they, at least, understood, that the protection of personal security, and of private rights, from the despotic and iniquitous operation of retrospective legislation was, itself, and alone, the grand principle intended to be established. It was a principle of the utmost importance to a free people . . . .

All this hostility stems from a recognition that retrospective laws as a class are unrivaled in their susceptibility to abuse. By definition,

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18. Id. at 331.
19. Justice Trimble expressed his belief that at the time of the convention, the American people fairly understood the evils of retrospective laws as being "exercises of arbitrary power, perverting the justice and order of existing things by the reflex action of these laws."
retrospective or retroactive laws act upon events which have already transpired. In effect, such laws travel back in time. It is this time traveling aspect which gives such laws an arbitrary and capricious or "Queen of Hearts" character.

Because they are enacted after an event has occurred, retrospective laws are inherently unknowable at the time of the event. One cannot know today what laws will be passed tomorrow or a year from now. A citizen’s conduct today may thus have dire legal consequences which cannot be predicted and which cannot therefore be avoided.²⁰

That citizens are entitled to know the law remains a fundamental, underlying principle of our system of government.²¹ This has long been accepted in western culture in general, and in the United States in particular.²² Part of the horror of Kafka’s novel, The Trial, lies in the victim/protagonist’s inability to ascertain the law he is alleged to have violated and rebut the evidence against him.²³ Our wise and remarkably prescient forebears chose to spare us from the horrors of a despotic and arbitrary state by erecting numerous barriers to retroactivity and other abuses of state power in the Constitution.²⁴ As any student of history will attest, preventing the abusive exercise of state power was of central concern to the founding fathers in drafting the Constitution.²⁵ The contract clause, the prohibition on bills of attainder, the due process clause, and other limitations shield us from what the Framers rightly called "tyranny" and promote the rule of law.

Friedrich von Hayek discussed the principle of the rule of law in his classic work, The Road to Serfdom:

The Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand—rules which make it

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²⁰ Id. at 330.
²¹ This is, in essence, the argument utilized by Blackstone in positing that all laws should be made to commence in futuro. See infra note 57.
²² See, e.g., Weiler, supra note 14.
²³ Smead, supra note 14, at 780.
²⁵ See, e.g., THE FEDERALIST Nos. 1, 9, 10, 16, 44, 45, 46, 47, 48, 49, 50, 51, 84.
possible to foresee with fair certainty how the authority will use its coersive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.  

Despite the long and nearly universal condemnation of retrospective laws, Congress passed and President Clinton signed OBRA into law. If one accepts the position of the Framers that unfettered federal legislative power represents a danger to liberty and leads to tyranny, this acceptance of retroactivity by two branches of our government gives rise to a sober concern. We know that as a class, such laws are unfair and unjust, yet our history reflects a long hostility to arbitrary government action. Somehow, OBRA was made to be politically palatable.

It has always been possible to isolate certain unpopular groups and treat them unfairly without political backlash. In the case of taxes, one commentator has stated facetiously: “The . . . public does not like new taxes . . . . The [government] has come to realize that the alternative is to pick affected taxpayers more carefully . . . if the government picks a politically unpopular group, the government can apply . . . any kind of tax it cares to.” Retroactive enactments, once they become commonplace and accepted, pose a clear and present danger due to their easy abuse and general unfairness. As noted above, among these dangers is the specter of targeting politically unpopular groups. However, our Constitution has given us the tools to resist the encroachment of tyranny.

27. As is discussed infra note 29, Federalist No. 16 makes the point that the people are the natural guardians of the Constitution. However, Madison also points out in the same passage that this is so only so long as the people are not swayed by their own self-interest or passions to support unconstitutional legislative initiatives. They are much less vigilant guardians of the Constitution when they can be so swayed. The Framers, cognizant of this danger, erected barriers to that unjust state of affairs termed by Madison in Federalist 10 as the tyranny of the majority.
29. The Federalist No. 16, at 75 (Alexander Hamilton), noted that the people are the natural guardians of the Constitution, but also observed in The Federalist No. 78 that the independent judiciary acts as the bulwark of a limited constitution against legislative en-
B. A Failure to Apportion

One possible, and somewhat novel, challenge to the OBRA retroactive estate tax stems from the so-called Apportionment Clause found in Article I of the Constitution. Article I, in addition to giving Congress plenary power to tax, also imposes restrictions upon this power. Direct taxes (taxes directly on property or ownership) must "be apportioned among the several States . . . according to their respective numbers." More specifically, such taxes are required to be "in Proportion to the Census or Enumeration herein . . . directed to be taken." Collectively, these are commonly known as the Apportionment "Clause."

The Framers made apportionment a requirement so as to prevent poorer states from taking advantage of richer states. As a mechanism to prevent this evil, the apportionment clause was well designed. As reflected in the Court's opinion in Pollock v. Farmers Loan & Trust Co., the Framers saw "to it that taxation and representation should go together . . . ." Apportionment requires that the burden of any direct tax fall upon the several states in proportion to each of their populations. The Framers were thus insureing that Congressmen would be very much aware that any tax they voted upon "would proportionately fall upon the immediate constituents of those [Congressmen] who imposed it." Because of the disuse of direct taxes as a fundraising device, Congress may no longer be so attuned to the resultant effects of direct taxes on their constituents, and indeed, may not be entirely familiar with the operation of the Apportionment Clause. Examination of section 13208 of OBRA reveals that it may be a direct tax subject to a challenge based upon the Apportionment Clause of the Constitution.

32. Taxes which are not "direct," such as duties or excises, must be uniformly laid. U.S. CONST. art. I, § 8, cl. 1.
33. 157 U.S. 429 (1895).
34. Id. at 556.
35. Id.
The retrospective effect of OBRA's estate tax rate change for the period January 1, 1993 to August 10, 1993 has the practical effect of directly taxing property. This effect is quite distinct and different from the "transactional" or indirect nature of a prospective estate tax. A new tax which is laid upon past events simply cannot be distinguished in a constitutionally meaningful way from a tax upon property directly.\textsuperscript{36}

While it is true that the Supreme Court has held that gift and estate taxes are not direct taxes and thus not subject to the requirement that they be apportioned,\textsuperscript{37} these holdings have all concerned prospective estate and gift taxes. As the Court noted in 	extit{Bromley}, gift taxes are indirect taxes because they tax "the exercise of one of the . . . rights of property," and do not fall "upon the owner merely because he is owner . . . ."\textsuperscript{38} However, in the case of a retrospective estate or gift tax, the tax does not directly relate to the exercise of a right of property. Instead, the tax attaches merely because of ownership—the prior transaction functions more as an "excuse" than as an actual taxable event. Possibly as a result of the direct tax nature of retroactive estate and gift taxes, "[n]o retrospective change has been imposed since the estate and gift tax was enacted in 1916 . . . ."\textsuperscript{39}—until OBRA.

Section 13208 of OBRA retroactively increased the estate tax rate for the period August 9, 1993 to January 1, 1993. As discussed above, there exists good reason to view this rate change as a new and unapportioned direct tax. Such a tax cannot exist under the Apportionment Clause of the Constitution.

\textsuperscript{36} Nicol v. Ames, 173 U.S. 509, 516 (1899). The contrary view is not supportable. Otherwise, Congress could always identify a past occurrence (e.g., the last transfer of the property) and lay a non-direct tax purporting to tax that past event. However, because the tax reaches back in time, the effect would be to tax present property owners merely for owning the property taxed.


\textsuperscript{38} 	extit{Bromley}, 280 U.S. at 137.

\textsuperscript{39} Shirley D. Peterson, \textit{Death and (Retroactive!) Taxes}, \textit{N.Y. Times}, July 24, 1993, § 1, at 19. A review of the statutes reveals that it would be more accurate to state that no rate changes have been enacted with retroactive effect since 1916.
C. Ex Post Facto

One of the most intuitively obvious places to start in any search for restrictions upon retrospective laws is the *ex post facto* clause. 40 Indeed, in the aftermath of the Senate passage of OBRA, noted economist Paul Craig Roberts wrote: "Clinton's tax increase, misleadingly termed a deficit-reduction plan, is a blatant assault on Article I, Section 9 of the Constitution, which explicitly forbids retrospective law." 41 Article I, Section 9, of the Constitution reads that Congress shall pass "[n]o bill of attainder or *ex post facto* law . . . ." 42 On its face, this constitutional prohibition would seem to prohibit all retrospective laws. This assumption derives from the plain meaning of the term, which translates: "of after the act" 43 and from the fact that the term is not further qualified within the text of the Constitution. However, the clause has had very little effect in barring retrospective legislation with regards to civil matters.

In the 1798 case, *Calder v. Bull*, 44 the Supreme Court is generally thought to have restricted the ambit of the *ex post facto* clause to criminal and penal legislation. 45 *Calder* involved a dispute over a

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43. According to Black's Law Dictionary 520 (5th ed., 1979), *ex post facto* is defined: "After the fact; by an act or fact occurring after some previous act or fact, and relating thereto; by subsequent matter . . . ." The same source defines *ex post facto* law as: "A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." *Id.*
44. 3 U.S. (3 Dall.) 386 (1798).
45. Though this is the common and accepted understanding of the *Calder* decision, Justice Johnson in Saterlee v. Mathewson, 27 U.S. (2 Pet.) 380, 416 (1829) mounted a blistering attack on the soundness of the decision itself and upon its precedential value. Regarding the value of the decision as precedence for restriction of the clause to criminal and penal laws, Justice Johnson wrote:

      I . . . deny that the construction intimated by three of the judges in the case *Calder v. Bull* is entitled to the weight of an adjudication. Nor is it immaterial to observe that an adjudication upon a fundamental law ought never to be irrevocably settled by a decision that is not necessary and explicit.
Connecticut will. The underlying dispute had been initially disposed of in probate with the will being declared invalid. Two years later, after expiration of the eighteen month statute of limitations, Bull sought a new trial from the legislature, the time lapse notwithstanding. The new trial was granted, and in the second proceeding, Bull won. Calder appealed the decision claiming the grant of a new trial was contrary to the ex post facto clause of the United States Constitution. The Supreme Court ruled that since the Connecticut legislature was acting as a judiciary, and not in its legislative capacity, ex post facto did not apply. In what would today be considered dicta, the Court went on to state that even had the Connecticut legislature acted in its legislative capacity, the Court would still rule that ex post facto had not been offended since ex post facto applied solely to criminal laws. This interpretation restricts application of the clause and thereby excludes application in cases not involving criminal laws or penalties. This definition has persisted to this day, being recently cited by the Ninth Circuit in Carlton v. United States, despite the fact that this interpreta-

_id. at 562. Justice Johnson goes on to state that it was a principle of Roman civil law, "that in cases which depend upon fundamental principles, from which demonstrations may be drawn, millions of precedents are of no value." Id. Johnson then points out that English law is in conformity with this "that an extrajudicial opinion, given in or out of court, is of no good precedent." [Citations omitted.] Id. Although Justice Johnson makes a very good case on this point, for the purposes of this Article, the commonly held view will be accepted.

46. Although the ex post facto clause found in Article I, Section 10 of the Constitution is not that restricting the Federal government, its construction and interpretation is identical. See U.S. CONST. Art. I, § 10 (stating that "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing contracts . . . ").

47. Evidently it was a common practice at the time for the legislature to wear two hats.

49. Id.

Under longstanding judicial construction, the Ex Post Facto Clause does not apply here because this is not a criminal prosecution. "Although the latin phrase ex post facto literally encompasses any law passed 'after the fact,' it has long been recognized by the Court that the constitutional prohibition on ex post facto laws applied only to penal statutes which disadvantage the offender affected by them." Collins v. Youngblood 497 U.S. 37, 110 S.Ct 2715, 2718, 111 L.Ed.2d 30 (1990) (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798)).

_id. at 1055 n.3.
tion of the meaning of *ex post facto* was not without controversy.\(^51\) Although there is support both for and against the belief that the founding fathers at the time of ratification may have intended the *ex post facto* clause to apply solely to criminal and penal legislation,\(^52\) even assuming this restriction of the clause to criminal laws and penalties is valid does not in itself grant unlimited license to the Congress to enact retroactive legislation willy-nilly in civil matters. Furthermore, there exists good reason to question whether the *ex post facto* prohibition is indeed so limited.

The plain meaning of the term *ex post facto* and the general understanding of its intended effect by some of the Framers leaves a fair amount of room for debate.\(^53\) More specifically, Federalist 44 provides

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53. At the Virginia Convention Debates, George Mason (author of the Bill of Rights) responded to the assertion by Governor Edmund Randolph that *ex post facto* laws referred to criminal cases only:

But the Honorable Gentleman has called to his aid technical definitions. He says, that *ex post facto* laws relate solely to criminal matters, I beg leave to differ . . . . Whatever it may be at the bar . . . according to the common acceptance of the words *ex post facto* laws, and retrospective laws, are synonymous terms. Are we to trust business of this sort to technical definitions? The contrary is the plain meaning of the words . . . . Whatever may be the professional meaning, yet the general meaning of *ex post facto* law, is, an act having a retrospective operation. This construction is agreeable to its primary etymology.


Another Virginian, Thomas Jefferson wrote:

Every man should be protected in his lawful acts, and be certain that no ex post facto law shall punish or endanger him for them . . . . [T]hey are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing of what is wrong.

Thomas Jefferson, Letter to Isaac McPherson, Aug. 13, 1813, 8 The Writings of Thomas Jefferson 326-27 (1903); and north of the Mason-Dixon line, two New Englanders, Roger Sherman and Oliver Ellsworth (two of the Connecticut delegates to the Philadelphia Convention of 1787), wrote to Governor Samuel Huntington, transmitting a copy of the Constitution to the Governor and giving their report on the Convention: “The restraint on the legislatures of the several states respecting emitting bills of credit, making any thing but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce . . . .” 8 The Documentary History of the Ratification of the Constitution 470, 471 (John P. Kaminski et al. eds., 1988).
a great deal of ammunition for the argument that the *ex post facto* clause should be applied to retroactivity in the civil sphere.\(^4\) The contemporary understanding of the term at the time of ratification is also supportive of a more expansive definition of this limitation than is currently in vogue. One learned commentator noted, among a fairly extensive list of examples, that Roman law applied the term civilly,\(^5\) that both Coke and Bacon applied the term in a civil sense,\(^6\) and that Blackstone’s Commentary utilized a criminal statute as an example of the principle’s operative effect,\(^7\) possibly to better illustrate the inher-

\(^{54}\) The Federalist No. 44, at 206-08 (James Madison) (Hollowell Masters Smith & Co., 1857). In discussing the motivation behind certain clauses of the proposed federal Constitution, Madison wrote:

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights . . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of . . . speculators; and snares to the more industrious and less informed part of the community . . . . 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.

*Id.*

\(^{55}\) Smead, *supra* note 14, at 791, 792 n.51 (“Clasula vel dispositio inutilis per praesumptionem vel causam remotam, ex post facto non fulcitur.”).

\(^{56}\) Smead, *supra* note 14.

\(^{57}\) See 1 Sir William Blackstone, *Commentaries On The Laws Of England* 45-46 (1765), explaining that:

[A] bare resolution, confined in the brest [sic] of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made . . . it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action indifferent in itself is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, inno-
ent injustice of such laws and not as an declaration that the clause was limited to apply to criminal cases exclusively.

Justice Johnson, in a note to his dissent in Saterlee v. Mathewson, 58 made a very strong case that the Court in Calder v. Bull 59 erred in its understanding of the English and Roman law origins of the term ex post facto and its application to civil law. 60 Although convincing in his marshalling of evidence against the soundness of the decision in Calder v. Bull, Justice Johnson’s fight to revive the ex post facto clause failed. As Justice Story put it many years later,

[a]n original question, the argument would be entitled to grave consideration; but the current opinion and authority has been so generally one way, as to the meaning of this phrase in the State constitutions, as well as in that of the United States . . . that it is difficult to feel that it is now an open question. 61

Although it is important and useful to understand the history of the ex post facto clause, given the modern understanding of the term, it does not provide a reliable guide as to how a modern case will be decided if no criminal component is fairly evident. 62 Simply put, the probability of the Court reversing itself is remote, however right and just the cause may be. That the meaning of the ex post facto clause should be revisited seems clear, due to the history of the clause and the odd and possibly mistaken birth of the modern interpretation. The

58. 27 U.S. (2 Pet.) 380, 416 n.(a) (1829).
59. 3 U.S. (3 Dall.) 386 (1798).
60. See supra note 44.
61. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 219, 220 (1891). But see JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1339 (1833). In this earlier version, Story observed that at the time of ratification the understanding of the term ex post facto was not such a closed question and many people believed the term to “embrace all retrospective laws, or laws governing or controlling past transactions, whether . . . of a civil or a criminal nature.” Id.
62. See supra note 44.
upcoming battle over OBRA’s constitutionality will provide a convenient forum for this purpose.

Regarding the retrospective OBRA section 13208, if the *ex post facto* clause operates as Justice Johnson and others insist, then clearly the provision is unconstitutional as violative of the *ex post facto* clause. Should the various OBRA challenges advance to the Supreme Court, the nine justices will have the opportunity to re-examine this issue and perhaps set right what may have been a grave misinterpretation of the meaning of the phrase *ex post facto*. As a practical matter, however, the more profitable and more likely avenue to successfully challenge the OBRA’s constitutional soundness lies in other portions of the Constitution, namely the Due Process Clause of the Fifth Amendment.

**D. Due Process**

The Due Process Clause of the Fifth Amendment provides that “*no person ... be deprived of life, liberty, or property, without due process of law . . . .*” As noted by Raoul Berger in *Government by Judiciary*, the term was transformed after the 1880s “into one of ‘convenient vagueness’; and such vagueness has become the reigning orthodoxy.” Convenient or not, this vagueness has allowed for relatively radical shifts in the Court’s position vis-a-vis the application of the clause.

Presently, the clause has a somewhat fluid or evolving meaning, which the Supreme Court has continued to shape in the years following the abandonment of substantive economic due process and the

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63. U.S. CONST. amend. V.
64. “To this day, no one knows precisely what the words ‘due process of law’ meant to the draftsmen of the fifth amendment . . . .” Arther Sutherland, *Privacy in Connecticut*, 64 Mich. L. Rev. 283, 286 (1965).
65. RAOUl BERGER, GOVERNMENT BY JUDICIARY 193 (1977).
Lochner doctrine. This due process logical construct creates a framework on which an effective attack on OBRA can be based.

1. Judicial Deference to Retroactivity

The Court’s celebrated retreat from economic substantive due process in the aftermath of Lochner required the creation of an alternative interpretation of the extent of the due process clauses and the setting of new standards. Current so-called substantive due process analysis now requires a preliminary determination of whether an interest affected by questioned legislation rises to the level of a fundamental right. Fundamental rights trigger heightened scrutiny and afford greater protection than the alternative standard. Legislation affecting non-fundamental interests receives only a minimal scrutiny for rationality. This legislatively deferential standard does not pose much of an obstacle to enactments affecting economic rights, which are not considered “fundamental” by the court. Despite the seeming simplicity of modern due process theory, this simplicity degenerates when tax legislation is considered.

An effective and practical approach to understanding the case law divides due process into tax and non-tax camps and assigns to each appropriate standards. One recent commentary on the field denoted the two doctrinal standards with the descriptive and useful designations “general deference” and “tax deference.” The standard of general deference is simply the customary rationality standard, an examination of the legitimacy of economic legislation’s end and the rational basis

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67. The Lochner doctrine is named after the infamous case Lochner v. New York, 198 U.S. 45 (1905); see generally infra notes 141-159 and accompanying text.

68. Weiler, supra note 14, at 1070. The terminology utilized by Mr. Weiler provides a convenient way in which to refer to the two standards and as such will be utilized in this Article; c.f. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984). In Pension Guaranty, the Court announced that the two tests, termed the “harsh and oppressive” test (referred to in other cases and commentaries as the “in light of the circumstances” test) and the “arbitrary and irrational” (referred to in other cases and commentaries as the “rational means/legitimate ends” test) tests were identical. This comment by the Court was unnecessary to the decision and could be considered dicta. However, this language is cited with approval in two recent Ninth Circuit cases. See Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct. 55 (1993); Licari v. Comm'r, 946 F.2d 690 (9th Cir. 1991).
of its mechanism. The tax deference standard seems facially distinct and requires a determination of whether, in light of the nature of a tax and the circumstances in which it is laid, a tax is so harsh and oppressive that it offends the Constitution. These two standards in combined application represent a virtual abandonment of the field of Constitutional review of retroactive economic legislation, particularly of retroactive tax legislation. This abdication is all the more surprising and disappointing given the traditional and historical hostility to retroactivity which is deeply embedded in our jurisprudence and our political traditions.

Such an abdication or abandonment of the due process clause is disturbing. As Justice Story stated, "[r]etrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." If the Constitution cannot reach legislative enactments which are, as Justice Story noted, "generally unjust" what does the phrase "due process" mean? The question thus becomes: can the Constitution's guarantee of due process

69. Weiler, supra note 14.
70. Id.
71. See, e.g., United States v. Sperry Corp., 493 U.S. 52 (1989); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). These cases, despite the cautionary language, have come to be interpreted as judicial deference for retroactive economic laws. This judicial doctrine represents a departure from the historic hostility to retroactive enactments by the legislature.
72. Smead, supra note 14; see also supra notes 52, 53, 57, 58, 61 and accompanying text.
73. 2 Joseph Story, Commentaries on the Constitution of the United States § 1398 (5th ed. 1891).
74. But see Berger, supra note 65, at 193-220 (1977). Berger makes a very strong case for the proposition that due process is very limited in scope. He traces the term's derivation from a phrase used by Lord Coke, "by the due course and process of law." This phrase, and by extension the phrase "due process of law," referred to judicial proceedings and did not extend to legislative acts. As such, the concept is entirely limited to right of access and use of the judiciary. Such a curtailment of due process today, given the continuing activity of federal courts in legislating new social principles, would be orders of magnitude less likely than the reversal on ex post facto discussed in supra part I. Nevertheless, Berger's position has one outstanding virtue over the present bifurcated due process system in that it would eliminate substantive due process in its entirety if accepted. See generally id.; supra note 64 and accompanying text; infra note 86.
embrace "generally unjust" laws? If the spirit of that document is any guide, the answer must be no.

Fortunately for the prospective challenges to OBRA, there is cause to believe that the Court may be ready to consider a turnaround from its retreat from the field of economic or civil retroactivity. Recent cases seem to indicate a change of moderate proportions in the Court's thinking. Furthermore, the granting of certiorari in the Carlton case may well be another signal that the Court is ready to reconsider its wild retreat from economic due process. Regardless of how the Court eventually moves, the present standards are sufficient to make a determination that OBRA is unconstitutional.

2. Analytical Framework

As previously observed, due to the long, and arguably mistaken, interpretation of the ex post facto clause, the area most likely to yield an effective means for challenging retroactive federal economic legislation, particularly taxes, is that governed by the due process clause of the Fifth Amendment. Founding an attack upon retroactivity on the due process clause, though, poses more of a problem than might be expected.

The preceding section noted that the division of the standards used to make a due process determination provided a useful means for understanding the case law. However, although this division appears macroscopically sound, confusion persists in understanding the cases, a condition to which even judges are not immune. The primary reason

76. 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct 55 (1993).
77. Indeed, this area of the law is so filled with varying theories of just what the Constitution requires that it is virtually impossible to predict what theory or standard will be utilized. An example in point is the Ninth Circuit which recently decided two cases, Licari v. Comm'r, 946 F.2d 690 (9th Cir. 1991) and Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct. 55 (1993). Although sharing many of the same attributes, the Ninth Circuit decided that the utter absence of notice in Licari did not prevent a retroactive change in a penalty, while some notice of impending change in Carlton was insufficient to satisfy due process requirements.
for such confusion seems to stem from inconsistent application of the
tests or standards. In particular, the requirement of foreseeability seems
to often be given short-shrift despite its inherent importance in ensuring
due process. Any analysis of a particular case for compliance
with due process should consider both the foreseeability of the statute
involved and whether or not the appropriate deference standard is met.
Thus, the proper approach requires first an examination of the manner
in which a particular tax is conceived and asks whether exigent cir-
cumstances existed from which it can reasonably be inferred that the
taxpayer could or should have foreseen the likelihood the tax would be
enacted. This approach was inherent in the approach taken by the
Ninth Circuit in Carlton v. United States. "We flatly reject the . . .
promise that a taxpayer cannot rely on the clear and unequivocal text
of the tax code, but instead must speculate on the unspoken and incho-
ate intentions of Congress."

Once the foreseeability of the tax has been addressed, the analysis
turns to the mechanism and effect of the tax. Here, a determination
must be made as to whether the tax is harsh and oppressive. Although
some cases seem to focus upon either foreseeability or reason-
ableness to the exclusion of the other, it appears safe to assume that

78. See, e.g., Welch v. Henry, 305 U.S. 134, 145 (1945); General Motors Corp. v.
80. Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct.
81. Id. at 1060.
82. United States v. Hemme, 476 U.S. 558 (1986); Welch v. Henry, 305 U.S. 134
(1938); Reinecke v. Smith, 289 U.S. 172 (1933); Blodgett v. Holden, 275 U.S. 142 (1927);
Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916); Carlton v. United States, 972
F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct. 55 (1993); Licari v. Comm'r, 946 F.2d
690 (9th Cir. 1991); Wiggins v. Comm'r, 904 F.2d 311 (5th Cir. 1990); Estate of Ekins v.
Comm'r, 797 F.2d 481 (7th Cir. 1986); Buttke v. Comm'r, 625 F.2d 202 (8th Cir. 1980);
Purvis v. United States, 501 F.2d 311 (9th Cir. 1974).
83. Cases which focus only on notice include United States v. Darusmont, 449 U.S.
292 (1981); United States v. Hudson, 299 U.S. 498 (1937); Estate of Ceppi v. Comm'r, 698
F.2d 17 (1st Cir. 1983). Cases which focus only on reasonableness include Reinecke v.
Smith, 289 U.S. 172 (1933); Blodgett v. Holden, 275 U.S. 142 (1927); Licari v. Comm'r,
946 F.2d 690 (9th Cir. 1991); Wiggins v. Comm'r, 904 F.2d 311 (5th Cir. 1990).
if a particular tax fails to satisfy both requirements at once, such a tax
must, by necessity, be unconstitutional pursuant to due process.

3. The Requirement of Foreseeability

Benjamin Cardozo commented in The Growth of the Law that,
"[l]aw as a guide to conduct is reduced to the level of futility if it is
unknown and unknowable."84 Retrospective legislation, whether it be
criminal or civil in nature, stands indicted for being unknowable and
hence of little use as a guide to conduct. Simply put, laws should be
knowable85 or they deny affected citizens the due process of law. In
the field of tax legislation, decisions made by the Supreme Court and
lower courts have acknowledged this due process principle either
implicitly or explicitly in holding that some degree of foreseeability,
such as constructive or actual notice, of the probable future enactment
of a particular tax law is necessary to excuse or justify the retrospec-
tive action of such laws.87 These cases therefore suggest that despite

84. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 3 (1924). Although speaking
of the need for a scientific approach to law and arguing for the need of a restatement to bet-
ter unify and clarify law in general, his words are equally apposite to the matters considered
in this article, and a more lengthy quote is perhaps of some use in clarifying this author's
purpose:

One does not need to expiate upon the value of certainty in a developed legal
system. Law as a guide to conduct is reduced to the level of mere futility if it is
unknown and unknowable. Our law stands indicted for uncertainty, and the names
of weighty witnesses are endorsed upon the bill. If we seek for causes, there are
many; . . . There was the lack of agreement on the fundamental principles of the
common law . . . conflicting and badly drawn statutory provisions; . . . ignorance
of judges and lawyers; the number and nature of novel legal questions. (footnote
omitted)"

Id. at 3, 4.

85. See supra note 57 (referring to the Roman emperor Caligula's practice of posting
new laws high upon pillars in small type so as to better entrap the uninformed—an injustice
similar, in Blackstone's opinion, to the practice of making laws retroactive).

86. According to Professor Corwin, the term "due process of law" comes from chapter
3 of 28 Edw. III (1335), which states: "No man of what state or condition he be, shall be
put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be
brought to answer by due process of law." This statute, in turn, has as its distinguished ances-
tor the Magna Carta's requirement that a free man be treated by the King and his agents
in accordance with the law of the land (per legem terrae). EDWARD S. CORWIN, THE CON-

87. See generally United States v. Darusmont, 449 U.S. 292 (1981); Welch v. Henry,
retrospective effect, such backward looking taxes may be made constitutionally inoffensive if the prospective or possible future tax law in question is made somehow "knowable" or foreseeable at the time of the taxable event.

Despite the general acclamation of the concept of foreseeability, referred to hereinafter as the "foreseeability doctrine," the application of the concept has been distinctly inconsistent even in similar cases. In Blodgett v. Holden,88 and Estate of Ceppi v. Commissioner,89 introduction of a bill in the legislature was deemed to be "notice" of the impending tax change, making the new law foreseeable and in accordance with due process. Some decisions reflect a more liberal understanding of the requirements of foreseeability. Welch v. Henry,90 United States v. Hudson,91 and Miller v. Commissioner92 posit that, essentially, all citizens are on notice that tax laws could change, and therefore, any reasonable period of retroactivity is not constitutionally offensive. Finally, some decisions, such as Purvis v. United States,93 seem to stand for the proposition that any conceivable activity pertaining to possible or prospective legislation is sufficient to provide notice, even if the activity is outside of the legislature.

These due process foreseeability cases, although all based upon the well settled proposition that citizens should have some hope of knowing what the law is, stake out widely divergent views on just what

305 U.S. 134 (1938); Milliken v. United States, 283 U.S. 15 (1931); Untermyer v. Anderson, 276 U.S. 440 (1928); Fein v. United States, 730 F.2d 1211 (8th Cir. 1984); Estate of Ceppi v. Comm'r, 698 F.2d 17 (1st Cir. 1983); Buttke v. Comm'r, 625 F.2d 202 (8th Cir. 1980); Purvis v. United States, 501 F.2d 311 (9th Cir. 1974). Although the Supreme Court has never decided a case in which notice is the dispositive issue, all of these decisions devote a great deal of ink to the discussion of notice. Thus, although an argument can be advanced that notice has not yet been elevated to a constitutional requirement, this argument is unpersuasive given the energy expended by the Court in discussing the issue in case after case.

88. 275 U.S. 142 (1927).
89. 698 F.2d 17 (1st Cir. 1983).
90. 305 U.S. 134 (1938).
91. 299 U.S. 498 (1937).
92. 115 F.2d 479 (9th Cir. 1940).
93. 501 F.2d 311 (9th Cir. 1974); accord First Nat'l Bank in Dallas v. United States 420 F.2d 725 (Ct. Cl. 1970), cert. denied, 398 U.S. 950 (1970); Purvis v. United States, 501 F.2d 311 (9th Cir. 1974), cert. denied, 420 U.S. 947 (1975); see Sidney v. Comm'r, 273 F.2d 928 (2d Cir. 1960); but see Licari v. Comm'r, 946 F.2d 690 (9th Cir. 1991).
degree of foreseeability is necessary to guarantee due process. The obvious result is that multiple and often conflicting standards can apply to any given case. Thus, any court faced with a due process challenge to a new retrospective tax such as OBRA must first sort out the various standards and determine which should be employed in the case at hand. The ensuing confusion renders the standard itself as unknowable as the legislation in question.

(a) Strict View

What then is to be extracted from an examination of these cases? It would seem clear that some reasonable degree of foreseeability is required to satisfy the minimal constitutional requirements of due process. The more recent cases seem to adopt the stricter view and require a retrospective bill to at least have been introduced in the legislature before taxpayers can be said to have received notice sufficient to lend to the bill an air of foreseeability. This strict view, however, contains within it a rather obvious and fundamental flaw which serves to destroy the usefulness of the rule in practical application.

To see this flaw, one need only consider the hypothetical case wherein two bills are advanced by two legislators. Both bills, to make the analysis simple, can be assumed to be introduced within the same legislative session, perhaps on the same day, one imposing an additional tax on a particular economic activity and one reducing the tax on the same activity. Let us further suppose that both bills are explicitly retroactive to the date of introduction. It is apparent with only the most cursory use of elementary logic that the economically active and legislatively aware citizen is placed squarely on the very sharp horns of a dilemma. Which of the two bills should such a citizen assume to be the future law? He cannot assume both will pass since they accomplish differing goals and are to at least some extent mutually exclusive. Since the taxpayer is economically active, a choice of some kind must be made. The only reasonable choice is for the taxpayer to examine

the issue, assess the probabilities, and pick one of the bills. The taxpayer then orders his affairs accordingly and prays the one picked will pass. Although provided with the opportunity to guess correctly the outcome of the legislative session, there is no way such a citizen can be justly said to be apprised of anything. As was stated in *Untermyer v. Anderson*, such a view

would produce insuperable difficulties touching interpretation and practical application of the statute and render impossible proper understanding of the burden intended to be imposed. 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.95

Indeed, the more likely scenario is that scores of conflicting laws will be proposed by any number of participants in that confused maelstrom known as the legislative process. Even if we assume, *arguendo*, that a taxpayer has the means and intestinal fortitude to decipher the meaning and effect of these numerous proposals, the taxpayer is reduced to the role of a handicapper: forced to place bets, with his economic well-being at stake, on which of a multitude of proposed laws will cross the finish line first. Absent a gift of prescience, the taxpayer is no better off with such "notice" than without it. Indeed, if the taxpayer bets on the wrong bill, he or she may well be worse off. Due process requires more than this of our legislative enactments.

(b) Perpetual Notice

The older cases are less stringent in requiring anything approaching what any reasonable person would term as "notice."96 The first of

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these less stringent rules considered is what can be termed the "perpetual notice" view. This view relies upon the assumption that taxpayers are perpetually on notice of possible tax changes. This is a deceptively true statement. Obviously, Congress can change the tax laws at any time. But does this satisfy due process? In all of the perpetual notice cases discussed earlier, a due process claim was considered by the Court, and this perpetual notice theory was dusted off and advanced as dispositive of whether due process notice was satisfied. Closer examination of this seemingly robust theory reveals it to be somewhat anemic. To say that taxpayers are perpetually notified of possible changes is to say nothing. The taxpayer who is the recipient of such notice cannot deduce with any certainty what laws will and what laws will not affect his or her tax liability. Only the possibility of change is given. In other words, because the taxpayer is on notice that the tax laws may change, Congress may enact any change it wishes. Compare such a system with one which requires no due process, and hence no notice. The two systems are identical—in both, Congress may do anything it wishes.

A reasonable person will conclude that either foreseeability is required or it is not. Since the Court expended considerable effort in discussing the need for foreseeability of some kind in these perpetual notice cases, the only conclusion left is that foreseeability is indeed a requirement. However, as has been shown above, the system created is indistinguishable from one requiring no notice. Such an illusory perpetual notice machine does not constitutionally exist, and this view should be abandoned. Inasmuch as this doctrine has not graced a decision by the Court in some time, perhaps the Court has recognized the doctrine's inherent anemia and abandoned it.

98. See cases cited supra note 97.
99. The most recent perpetual notice case decided by the Supreme Court was Pension Benefit Guar. Corp. v. R.A. Gray, 467 U.S. 717 (1984).
(c) Some-Kind-of-Notice

Finally, we come to the some-kind-of-notice theory, which states that some event, not necessarily a legislative event such as introduction of a bill, sufficiently provides notice of an impending retrospective enactment and thus satisfies due process.\(^{100}\) In the case cited above, this event was a speech given by the President.\(^{101}\) To the extent that this theory includes factors which are external to Congress, the standard does not hold up to scrutiny. Let us examine the case taken up by the Court. The facts of *Purvis v. United States*\(^{102}\) reveal that the President made a speech indicating that a tax increase would be forthcoming and that either he or a member of Congress would be introducing it shortly.\(^{103}\) Such an announcement presumably would allow retrospective effect to the date of the President's speech. Logically, however, this scenario is no different than the case of strict notice, when stripped to its base elements. At any time up to passage or non-passage, another bill could be introduced which directly contradicts the President's expressed desire. The taxpayer is again forced to bet on the winning horse.

If anything, the utilization of events external to Congress results in an even more confused state of affairs and one which provides even less genuinely useful notice than obtains under the strict notice view of due process. Such an analytical model requires limits to be drawn as to the relevance of externalities, *i.e.*, should events entirely outside of government be considered notice? (Suppose a dozen or so Nobel laureates announce that they intend to lobby the President or members of Congress for a particular tax bill. Or suppose the National Governors Conference issues a demand for a particular piece of economic legislation which includes a tax). Do external events constitute notice sufficient to satisfy the due process clause? If the answer is in the affirmative, such a broadening of the sources of notice/foreseeability could

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100. United States v. Hudson, 299 U.S. 498 (1937) (public pressure or similar bills); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974) (presidential exhortation).
102. *Id.*
103. *Id.*
easily expand to such an extent to make the concept absurd. Virtually any prominent person or group, regardless of their connection with the federal legislature, may notify the taxpayer of a potential tax under this scheme. Some restriction would need to be applied by the courts in determining who may and who may not give notice of future taxes. Such a restriction would be entirely definitional and would fail because an artificially created definition would not be inherently obvious and would further complicate the issue from the taxpayer’s point of view.

(d) Wholly New Tax Rule

The muddled state of constitutional thought in the area of foreseeability becomes nearly incomprehensible when the wholly new tax rule is considered. Presumably, any tax which is not wholly new is foreseeable to some extent. Consequently, wholly new taxes would receive greater scrutiny and be more likely to offend due process. Although a new law imposing additional burdens upon a citizen would commonly be thought to be a new tax, the wholly new tax rule strictly construes the meaning of the phrase “wholly new tax” so as to include only legislation which taxes an entirely new class of economic activity. All other taxes, being mere changes of effect rather than of class, are excluded from the greater scrutiny suggested by the rule.

Although the rule seems relatively well ensconced in constitutional thought regarding tax legislation, construction of the rule in application ignores the practical effect of a change in tax structure. It is cold comfort to the citizen, whose taxes ratchet up due to a legislative decision to retroactively tax some activity at a much higher rate, that the tax is not “wholly new.” Insofar as the tax creates additional burdens and affects the citizen’s economic well-being, the tax is wholly


105. Milliken v. United States, 283 U.S. 15 (1931); Fein v. United States, 730 F.2d 1211 (8th Cir. 1984); Estate of Ceppi v. Comm'r, 698 F.2d 17 (1st Cir. 1983); Buttke v. Comm'r, 625 F.2d 202 (8th Cir. 1980); Purvis v. United States, 501 F.2d 311 (9th Cir. 1974).


107. See supra notes 105-106 and accompanying text.
new in its practical effect upon individual taxpayers. This exceedingly strict construction of the term "wholly new"\textsuperscript{108} robs it of practical meaning and eviscerates what might otherwise be a bulwark against legislative abuse. If accepted as controlling law, the common practice of strictly construing "wholly new" merely stands for the proposition that the confusingly inconsistent analytical previously discussed be applied to all tax legislation. Until or unless Congress enacts a tax on a heretofore untaxed sphere of activity (e.g., a sales or value added tax), the rule has no application, and the entirety of tax legislation is to be governed by the foreseeability doctrine without moderation by the wholly new tax rule.

Furthermore, it should be observed that the wholly new tax rule does not modify the foreseeability doctrine appreciably, and in fact, transforms itself into the perpetual notice rule in application. Indeed, this rule essentially revives the older perpetual notice view and subsumes the supposedly stricter modern view. Practically speaking, all likely new tax enactments merely modify existing taxes and because the wholly new tax rule must therefore apply, all such taxes fall within the ambit of the perpetual foreseeability view. In a manner of speaking, this rule is but a different way of restating the proposition advanced in the perpetual notice view.

4. Foreseeability and OBRA

The foreseeability doctrine and its modification by the wholly new tax rule are attempts to provide some means of ensuring that citizens are able to know the law and are judicial acknowledgements that the foreseeability of a new retroactive law is constitutionally desirable. Clearly, the ability of a citizen to know the law is fundamental to the concept of due process.\textsuperscript{109} However, as noted in the preceding discussion, the multifaceted and internally conflicted foreseeability doctrine fails in providing an adequate structural safeguard and flounders in its attempt to protect the individual citizen from the danger of unforeseeability. Similarly, the wholly new tax rule is virtually useless

\textsuperscript{108} See cases cited supra note 105.
\textsuperscript{109} CARDOZO, supra note 84.
as a safeguard because it has almost no practical application as commonly construed. The inadequacy of the current and lamentable state of foreseeability as a constitutional restriction on legislative action is clear. Despite its constitutional necessity, foreseeability as it pertains to legislative enactments of retroactive economic laws is a toothless tiger.

Although toothless, the foreseeability doctrine manages to significantly “gum” OBRA. With respect to external events such as President Clinton’s public speeches, nothing the President had publicly said could have enabled people to foresee a retroactive tax increase. Indeed, the first mention of a retroactive increase did not occur until late February.\textsuperscript{110} Even accepting the some-kind-of-notice view of foreseeability, this “notice” failed to provide the taxpayer anything on which to base future plans or present conduct between January 1, 1993, and at least late February. In searching for the first instance of truly useful notice, it should be noted that introduction of the bill occurred in mid-April 1993.\textsuperscript{111} Introduction would obviously satisfy both the strict and some-kind-of-notice views of foreseeability. Given the judicial shift towards the strict view, the introduction of the bill would seem to be the limit of retroactivity under the current foreseeability doctrine.

5. Reasonableness and the Standard of Review

After making a determination of whether a new tax passes the very low hurdles imposed by the forgoing foreseeability requirements, the tax should then be examined for compliance with more traditional constitutional tests regarding an enactment’s reasonableness.\textsuperscript{112} It is well established that the legislature in enacting economic laws cannot act arbitrarily, capriciously, irrationally, or in furtherance of non-legiti-

\textsuperscript{110} Carolyn Lochhead, \textit{Clinton Tax Plan Would Be Retroactive}, SAN FRAN. CHRON., May 20, 1993, at A1. However, it should also be noted that the specifics of the plan were not released until April 8, 1993. Stephen C. Glazier, \textit{Tax Bill: Retroactive, Unconstitutional . . .}, WALL ST. J., Aug. 5, 1993, at A12.

\textsuperscript{111} Id.

mate legislative ends (i.e., the "general deference" standard).\textsuperscript{113} Nor can the legislature, in light of the circumstances, act in a harsh or oppressive manner when promulgating a tax (i.e., the "tax deference" standard).\textsuperscript{114} It is less well established what many of the above terms mean in application to retroactive tax laws. Indeed, although the two standards used in performing a due process analysis are seemingly very different,\textsuperscript{115} it should be observed that both require a legitimate legislative purpose. The tax deference standard merely makes the assumption that any tax is presumptively a legitimate end.

The classic formulation of the general deference standard can be found in \textit{Nebbia v. New York}.\textsuperscript{116} In \textit{Nebbia}, the Court held that when applied to legislation concerning commercial matters, the Fifth Amendment's guarantee of due process requires only that "the law shall not be unreasonable, arbitrary and capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."\textsuperscript{117} This principle is more forcefully expressed in \textit{Pension Benefit Guarantee Corp. v. R.A. Gray & Co.}:\textsuperscript{118}

\[\text{The strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.}\]

The rationale of the general deference standard is that the judicial branch, in examining economic legislation for compliance with the Fifth Amendment's due process clause, need only examine whether legislation is rationally designed to accomplish a legitimate legislative

\begin{footnotes}
\textsuperscript{113} See cases cited \textit{supra} note 112.
\textsuperscript{114} United States v. Hemme, 476 U.S. 558 (1986); United States v. Darusmont, 446 U.S. 292 (1981); Welch v. Henry, 305 U.S. 134 (1938); Wiggins v. Comm’r, 904 F.2d 311 (5th Cir. 1990); Buttke v. Comm’r, 625 F.2d 202 (8th Cir. 1980); Purvis v. United States, 501 F.2d 311 (9th Cir. 1974).
\textsuperscript{116} 291 U.S. 502, 525 (1934).
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} 467 U.S. at 729.
\end{footnotes}
purpose.119 Under the current standard, economic legislation which has a retroactive effect is subject to a level of scrutiny identical to that used to examine any economic enactment, retroactive or not. Thus, so long as the government can show that the retroactivity of the legislation is (1) supported by a legitimate legislative purpose, and (2) this purpose is achieved by rational means, the retrospective law will not offend the Fifth Amendment’s due process clause.

As noted earlier, in matters concerning solely tax legislation, the standard of review is, on its face, an even milder level of scrutiny.120 In applying the tax deference standard, the nature of a tax and the circumstances surrounding its enactment are first examined.121 Only after taking these factors into consideration may a determination be made of whether the legislation’s effect is so harsh, in light of the statute’s nature and circumstances, as to transgress the Constitution.122 It follows that this “harsh and oppressive”/“tax deference” standard would allow a law which might otherwise be deemed unduly arbitrary and capricious to survive, if Congress has a good enough reason for the law—such a standard may also be termed the “good excuse” standard. This purely utilitarian interpretation of the Constitution is contrary to the strong American traditions of adherence to principles and refusal to accept the notion of the ends justifying the means.

In the case of estate and gift taxes, a taxpayer makes irrevocable decisions based upon his or her understanding of present law, in reliance on the law. A retrospective enactment made subsequent to those decisions, and bearing upon the actions taken by the taxpayer, changes the legal environment to make the decisions of a testator/gift-giver faulty by government fiat. The unfairness of an exercise of legislative power which so clearly disturbs citizens’ reliance on the law seems

119. Id.
120. United States v. Hemme, 476 U.S. 558 (1986); United States v. Darumont, 446 U.S. 292 (1981); Welch v. Henry, 305 U.S. 134 (1938). In Hemme, the most recent case, the Court restated the rule expressed earlier in Welch: “[W]e 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.’” United States v. Hemme, 476 U.S. at 568-69.
121. See cases cited supra note 114.
122. Id.
particular egregious in the case of estate taxes as opposed to gift
taxes. A testator has no ability to cope with government tinkering
after the fact to limit the damage done to his or her estate plan. For
this reason, consideration of reliance should be a necessary step in a
due process determination. A very recent example of retroactive gov-
ernmental estate tax tinkering is found in the facts of a Ninth Circuit
case, Carlton v. United States. This case is presently before
the Supreme Court and will, when decided, have a strong influence
upon the chances for success in any challenge to OBRA.

In Carlton, the taxpayer relied upon a tax deduction created in the
1986 tax reform act encouraging estates to sell stock to Employee
Stock Ownership Plans (ESOPs). The inducement to sell stocks to
ESOPs was more successful than the government had expected, and
and the next year Congress enacted retrospective legislation which modified
the deduction. This retroactive modification deprived the Carlton taxpayer
of a deduction that he relied upon to his own detriment. In reliance on
the wording of the statute, the taxpayer had engaged in a transaction
through which he lost over six-hundred thousand dollars. But for
the tax deduction, this transaction made no financial sense at the time
it was made.

In terms of just how retrospective taxes disturb settled expecta-
tions, the facts in Carlton are particularly egregious, due to the induce-
ment and reliance involved. However, whenever a tax is retroactively
changed, reliance must be addressed. All taxpayers engage in economic
actions in reliance upon the legal framework as it exists at the time a
particular economic decision is made and acted upon. If the tax conse-
quences of any decision are changed after the fact, the legitimate re-
liance to which the taxpayer is entitled is disturbed. Such reliance
clearly exists with respect to testators relying upon the law prior to the
passage of OBRA.

123. Their interrelated nature is noted.
124. 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct. 55 (1993).
125. Id.
126. Id.
127. Professor Tribe refers to "a simple constitutional principle," that when it induces
reliance, "government must keep its word." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL
LAW 619 (2d ed. 1988) (citation omitted).
Furthermore, if reliance is an important due process consideration, its recognition by the Court as such would have a profound effect on judicial review of retroactive taxes. Since the tax structure has an inherent policy component transcending the mere raising of revenue, it can also be assumed that taxpayers, to greater or lesser degrees, have made their economic decisions in reliance upon various inducements incorporated in the tax code pursuant to these policy considerations. Thus, although the taxpayer in Carlton would appear to have a particularly compelling case, any difference between the facts in Carlton and some other case would be a matter of degree and not kind. For this reason, all tax legislation could be held to contain an inducement to action, thus bolstering the reliance component.

In the case of OBRA, persons who died on or after January 1, 1993, but prior to August 10, 1993, may well have died thinking the estate tax rate was three to five percent lower than what actually was made to apply. To the extent that certain bequests may not have been made, or may have been made differently, had the testator known of the change in rate, then the testator relied upon the state of the law as it existed at the time of death. Clearly, the reliance of such a taxpayer was disturbed by OBRA. If the Supreme Court adopts a standard in its upcoming decision in Carlton which agrees with the Ninth Circuit's holding by acknowledging reliance as a crucial due process consideration, then OBRA's days may well be numbered.

6. Retrospective Taxes Should Meet a Higher Standard

It seems a rather obvious truth that the raising of revenue by tax is clearly and unambiguously a legitimate legislative end. Obviously, no government could function for long without some mechanism for raising revenue. However, the means by which revenue is raised is subject to abuse, and for that reason, the Fifth Amendment guarantees that no one be deprived of life, liberty, or property without due process of law. The means by which the government obtains property provides one of the central concerns of constitutional due process scru-

128. See supra note 4.
129. U.S. Const. amend. IV.
tiny, and an examination of these means furnishes us with one of the central issues in the instant analysis.

In examining the facts surrounding the passage of OBRA, it becomes apparent that the means employed to achieve the legitimate goal of revenue enhancement, a retroactive tax, should be examined with some skepticism. Prospective and retrospective tax laws are inherently different. In the case of retrospective tax changes, and contrary to prospective tax laws, the government always disturbs settled expectations. This disturbance cannot be avoided in a society not possessed of universal clairvoyance.

In the case of OBRA, the government cannot argue convincingly that prospective legislation would be inadequate to raise the required funds. Simply put, the government need not have made the statute in question retroactive since it could have accomplished the goal of raising revenue prospectively. Although there is some authority which stands for the proposition that no essential difference exists from a constitutional standpoint between retrospective and prospective laws, this proposition has clearly not withstood the test of time, and the more convincing authority is the more recent. In Usery v. Turner Elkhorn Mining Co., the Court stated: "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."

The decision in Usery implies that retroactive taxation is somewhat disfavored by the Court, or at least viewed with some mild suspicion. Such a position undoubtedly reflects the problems inherent to retroactive tax legislation generally as discussed earlier. Retroactive taxes upset settled expectations, in that they disturb reliance upon the laws as

130. Although this statement is abundantly and obviously true, even a cursory reading of the cases and literature serves to remind one that this fact cannot be recalled too often; see infra text accompanying note 134.
131. Stockdale v. Atlantic Ins. Co., 87 U.S. (20 Wall.) 323 (1873). Congress may pass a retroactive law if the purpose is clear and that purpose is within the power of Congress.
133. Id. at 16-17.
they exist when a particular act is done. They are generally of a confiscatory nature, are often contrary to an inducement inherent in the tax code, and are prone to be unfair. Undoubtedly for these and perhaps other reasons, the Court observed that the justifications for a prospective tax may not always suffice to justify a retroactive one.  

Based upon the language in Usery, it seems an obvious conclusion that retrospective legislation should be subject to harsher scrutiny than prospective legislation. Yet, this is not a position explicitly taken up by the Court in any of its recent cases. However, it follows that where one variety of legislation is favored constitutionally over another, the disfavored legislation should be accompanied by, at a minimum, special and additional circumstances making the disfavored legislation acceptable to due process scrutiny. Such circumstances need not necessarily rise to the level of a national emergency, but something urgent and out of the ordinary should be required.

The facts surrounding a typical tax enactment generally do not reveal a compelling special circumstance which would justify the choice of a retrospective over a prospective tax mechanism. Since the legitimate legislative end of raising revenue can almost always be achieved by prospective legislation, is revenue raising a sufficient special circumstance justifying a retroactive tax?

In the case of OBRA, it is well established that the government’s sole reason for enacting a retroactive modification of the estate and gift

134. See id.
135. Id.
136. The possibilities abound as to what might constitute special circumstances. One such circumstance is the “curative effect” of the legislation. Where legislation contains a non-substantive error, and correction of such an error does not necessarily change the effect of the law (e.g., a change to bring the clear meaning in accord with judicially interpreted meaning), special circumstances can be said to exist. Wiggins v. Comm’r, 904 F.2d 311 (5th Cir. 1990), concerns such curative purpose. “Where legislation is curative, retroactive application may be constitutional despite a long period [4 years] of retroactivity.” Id. (citing Canisius College v. United States, 799 F.2d 18, 27 (2d Cir. 1986), cert. denied, 481 U.S. 1014 (1987)); “Congress’s intention in enacting the new provision was to clarify existing law, not to change the law.” Id. (citing Fife v. Comm’r, 82 T.C. 1 (1984)). Of course, the strongest compelling interest of all is an emergency such as war, in Lichter v. United States, 334 U.S. 742 (1948), the government was allowed to renegotiate contracts retrospectively to prevent profiteering.
tax rate schedule was a desire to maximize revenue.\textsuperscript{137} In justifying their actions, the President and Congress have relied upon the tired old excuse that the additional revenue raised was made necessary by the existing national emergency represented by the federal deficit. Whether a creeping emergency (one which builds over several decades) provides an appropriate vehicle for justifying retroactive taxation is unclear. That the enactment was motivated merely by Congress' desire to secure for the general fund as much revenue as possible seems obvious. The mere desire to increase revenue to the general fund does not rise to the level of a meaningful "special circumstance" and is thus an insufficient excuse to justify the imposition of a retroactive tax. Indeed, such a position would stand for the proposition that Congress can do most anything, if it only wants to badly enough. While this may have worked for Dorothy in Oz, it should be denied Congress.

Absent special and compelling circumstances, the law as expressed in \textit{Usery}\textsuperscript{138} requires an elevated level of scrutiny of the retroactive tax enactment. Simply wanting to increase funds is insufficient as a special circumstance for the obvious reason that all tax laws have as their purpose the raising of revenue. The contrary view renders the language of this Court in \textit{Usery} mere surplusage without effect or meaning.\textsuperscript{139}

7. Summary of Due Process as Applied to OBRA

As seen in the above discussion of foreseeability, one cannot justly be said to be on notice or be able to foresee the imposition of a new tax until it becomes law. Additionally, in the case of OBRA, taxpayers

\textsuperscript{137} See \textit{e.g.}, \textit{supra} note 10.
\textsuperscript{138} See \textit{Usery}, 428 U.S. at 16-17.
\textsuperscript{139} Furthermore, under the standard expressed in United States v. Hemme, 476 U.S. 558 (1986), scrutiny of the effects of a new law occurs only after an evaluation of the nature and circumstances of the tax are taken into consideration. Because all tax laws have as their goal and motivation the raising of revenue, such a goal or motivation is not a "circumstance" worthy of significant consideration. Thus, any reliance upon existing law disturbed by a subsequent retrospective legislative act constitutes a harsh and oppressive effect where the injured party changed position in detrimental reliance on the existing law. Such a view is in accord with the standard most recently enunciated in \textit{Hemme} and Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984).
justly and reasonably relied upon the law, since they could not have foreseen the rate change. Finally, since the nature and circumstances did not rise to the level of an immediate national crisis, some form of elevated scrutiny should be applied. Consequently, the only logical conclusion to be drawn is that OBRA violates the due process clause of the Fifth Amendment and is thus unconstitutional.

III. AN APPEAL FOR DUE PROCESS CONSISTENCY

Finally, the Supreme Court should decide that OBRA offends the due process clause in order to remain consistent with its prior decisions in the realm of substantive due process. Otherwise, the Court should abandon substantive due process altogether in both social and economic areas.140

In the span of about two decades, the Supreme Court effectuated the most remarkable abandonment of a once vital and robust constitutional doctrine in the Court’s two hundred year history. This turn-around marked the death of the substantive due process doctrine as it pertains to economic matters. In the aftermath of the *Lochner*141 case, the Court has been exceedingly reluctant to sit as a “superlegislature” and substitute its judgments for those of the Congress or the various state legislatures142—at least with respect to economic legislation. As a practical matter, however, the doctrine of substantive due process clearly lives on.143 The unifying aspect of recent cases invoking substantive due process is a tacit judicial assumption that the Constitution principally protects civil or non-economic rights and provides a substantially lesser degree of protection to rights regarding property. However, if one accepts the correctness of the Court’s foray into social

140. It is accepted, *arguendo*, that non-economic substantive due process correctly applies the due process clause, the overwhelmingly persuasive and compelling arguments to the contrary notwithstanding.


substantive due process, this view is untenable in light of the historical context of the framing of the Constitution.\textsuperscript{144}

A cursory examination of the Constitution reveals a deeply rooted concern for property rights.\textsuperscript{145} This accurately reflects the importance of all rights to the Framers. The father of the Constitution, James Madison, stated at the Constitutional Convention that, "[t]he primary objects of civil society are in the security of property and the public safety."\textsuperscript{146} Later, a prominent Framer, Justice Patterson, wrote in \textit{Van Horne's Lessee v. Dorrance}, "[t]he preservation of property . . . is the primary object of the social compact."\textsuperscript{147} In \textit{Boyd v. United States},\textsuperscript{148} the Court wrote: "The great end for which men entered into society was to secure their property. This right is preserved sacred."\textsuperscript{149}

The Framers ascribed to the principle that liberty and a well-ordered society could only exist where one's rights were protected. Furthermore, that this belief included property rights was clearly understood by the federal judiciary well after the constitutional convention.\textsuperscript{150} Thus, it is fair to say that economic rights occupied a level of importance in the Framers' minds approaching that of, if not equal to, non-economic rights. The modern trend to emphasize the latter and ignore the former\textsuperscript{151} is not in accord with the prevailing view at the time of ratification, and as such, represents a break with the original intent of the Framers.\textsuperscript{152}

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\textsuperscript{144} See infra notes 146-148. \\
\textsuperscript{145} See, e.g., U.S. Const. art. I, § 2, cl. 3; art. I, § 9, cl. 3-7; art. I, § 10, cl. 2; art. IV, § 2, cl. 1; art. VI, cl. 1; amend. III, IV, V, and X. \\
\textsuperscript{146} 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 147 (1911). \\
\textsuperscript{147} 2 U.S. (2 Dall.) 304, 309 (1795). \\
\textsuperscript{148} 116 U.S. 616 (1886). \\
\textsuperscript{149} Id. at 627. \\
\textsuperscript{150} See supra notes 147-148 and accompanying text. \\
\textsuperscript{151} According to Professor Robert G. McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, Sup. Ct. Rev. 34 (1962), there were two main justifications for the demotion of economic rights versus non-economic civil rights. The first of these revolved around the "right to be left alone." (J. Brandeis, dissenting, in Olmstead v. United States, 277 U.S. 438, 478 (1928)). Id. at 45-46; the second rationale revolved around the encouragement of progress and democratic participation (see, e.g., Kovacs v. Cooper, 336 U.S. 77, 95 (1949)). Id. at 46. \\
\textsuperscript{152} As noted earlier, Professor Berger argues persuasively that the due process clause
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In the case of retroactive taxes, the *fundamental right* of property is impacted by the retroactive application of a statute. This should, in accordance with current so-called social substantive due process cases,\textsuperscript{153} trigger heightened scrutiny. Any contrary view, in light of our constitutional history, would by necessity be inconsistent with the intent of the Framers with respect to the relative importance placed upon property and other civil rights.

The current state of the law in the area of economic legislation, particularly regarding tax legislation, is far from being in accord with the Framer’s intent when social legislation is considered. The doctrines of “general deference”\textsuperscript{154} and “tax deference”\textsuperscript{155} represent a remarkable indulgence by the judiciary of legislative behavior when it affects economic rights. The present state of constitutional jurisprudence shows much less tolerance of legislative incursions when they affect social or civil rights. Given that the rights of citizens respecting property were of great importance to the Framers, the current judicial bias towards zealously protecting social or civil rights and against affording at least vaguely comparable protection to equally or nearly equally important economic rights desiccates the purposes and meaning of a large part of the Constitution.

Finally, the obvious argument regarding the language of the clause must be made. The Fifth Amendment’s Due Process Clause reads: “No person shall be . . . deprived of life, liberty, or property without due

\textsuperscript{153} Supra note 143.

\textsuperscript{154} See supra notes 68-70 and accompanying text.

\textsuperscript{155} Id.
process of law . . . .” 156 The clause does not read “life or liberty,” it reads “life, liberty or property.” The present judicial blindness regarding property simply cannot be reconciled with the plain meaning of the due process clause as reflected by its language. Therefore, if substantive due process continues to thrive on social civil rights issues, so too should economic substantive due process. Rights in property are an enumerated and thus fundamental due process right. The judicial redrafting of the wording of the Fifth Amendment exceeds the scope of the Court’s Article III judicial powers and should be left a matter for the states to decide in the amending process governed by Article V.

The rationale for the Court’s abandonment of the Lochner doctrine, or economic substantive due process, applies with equal force to the Court’s adventurism in the field of social engineering. 157 However, since the Court has decided to continue along the due process road to utopia, its decisions with regards to the due process clause should at least be consistent. Economic rights are just as “fundamental” as the civil or personal rights mentioned in the due process clause. Simply, one cannot logically have a Griswold v. Connecticut 158 on the one hand and not have Lochner in the other. With respect to OBRA, should the Supreme Court eventually hear one of the challenges, it should be urged to avoid any decision which persists in perpetuating this artificial and pernicious division between enforced (social) and unenforced (economic) rights on the grounds that such a continuation of this division will further erode confidence in the rule of law. Optimistically, this argument has a vanishingly small but finite chance of success in our highest Court. 159 Regardless, this argument logically should be made given the strange and unevenhanded interpretation given by the Court to the due process clause. The problem for the Court would then be to either continue with its present inconsistent interpretations or be consistent either by correctly elevating the term “property” to co-equal status with “life” and “liberty,” or by scaling back its activism in the social arena.

156. U.S. CONST. amend. V.
158. Id.
159. It bears remembering that the Court has changed direction in this field before.
IV. CONCLUSION\(^{160}\)

Each of the various organizations which will be sponsoring the court challenges to OBRA will undoubtedly follow its own strategy. However, it is likely that all of the possible constitutional attacks discussed above and perhaps a few not thought of by the author will be advanced with varying degrees of emphasis in each of the lawsuits filed. Based upon the most recent excursions into the field of retroactivity by the Court,\(^{161}\) it would seem that the due process argument will be the most likely to curry favor. This assessment stems from the observation that the ex post facto issue has probably been "dead" since Justice Johnson departed our plane of existence nearly two centuries ago\(^{162}\) and that the Apportionment Clause challenge will almost certainly be viewed as too unusual. The latter is also unlikely to sway the Court since the modern Court seems oddly dyslexic when it comes to certain clauses.\(^{163}\) I fear that the Apportionment Clause may reside in this category of constitutional clauses, despite the merit of the arguments in its favor.

I believe it falls to the due process clause with its "conveniently vague" proscription/admonition to combat OBRA on equal terms. Certainly, the Ninth and Fifth Circuits consider due process to be the most credible avenue of challenge.\(^{164}\) Whether or not the challenge turns out to be difficult depends somewhat on the decision in Carlton. If Carlton is decided in favor of the taxpayer on due process grounds,

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\(^{160}\) It should be noted that should any of the preceding theories of unconstitutionality prevail, the government's attempts to impose and collect the retroactive taxes will qualify as an unconstitutional taking contrary to the Fifth Amendment. This fact, although interesting, was not discussed previously because this theory has no application absent a finding of unconstitutionality on other grounds.

\(^{161}\) Carlton v. United States, 972 F.2d 1051 (9th Cir. 1992), cert. granted, 114 S. Ct. 55 (1993); Licari v. Comm'r, 946 F.2d 690 (9th Cir. 1991); Ferman v. United States, 993 F.2d 485 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3299 (U.S. Oct. 12, 1993) (No. 93-569).

\(^{162}\) This is a truly lamentable state of affairs. Justice Johnson's position was never given the full airing and spirited debate his well founded objection to the Court's holding in Calder warranted.

\(^{163}\) See, e.g., U.S. CONST. amend. X and cases construing its meaning and application.

\(^{164}\) See note 161.
the challenges to OBRA will have all but won. If the decision retreats to a more legislatively deferential position, the battle against OBRA may be very difficult. Regardless of the outcome of any particular case, the battle lines have been drawn, and the next several years should prove very interesting.

ADDENDUM

Some months after the preceding article was written, the Supreme Court decided *Carlton v. United States.* The Court handed down a lopsided 9-0 vote against the taxpayer and in favor of Congress’ right to retroactively change the tax code. Writing with some force, Justice Blackmun declared for the Court: “Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.” Although heralded by a number of journalists as a loss apparently on a par with Waterloo, the inevitability of unlimited congressional power as a result of this decision is not as clear as many commentators seem to feel.

The majority opinion (Justice O’Connor wrote a concurrence and Justice Thomas joined Justice Scalia in another), relied upon the two analytical pillars of “legitimate legislative purpose” and “harsh and oppressive” due process standards. The latter pillar, an analysis of whether a particular retroactive application of a tax law is harsh and oppressive, while defiant of logic and reason, can be easily reconciled with other cases decided by the Supreme Court in recent years and therefore provides infertile ground for new doctrine to sprout.

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166. Id. at 2023.
168. 114 S.Ct at 2021-22.
169. Justice Scalia writes in his concurrence: “Retroactively disallowing the tax benefit that the earlier law offered, without compensating those who incurred expenses in accepting that offer, seems to me harsh and oppressive by any normal measure.” Id. at 2026.
Of the two pillars, the former is the most interesting from the perspective of a challenge to future and present acts of Congress.

In choosing the manner and scope of the "legitimate legislative purpose" analysis, the Court did not point at revenue raising as the purpose justifying the retroactive tax change. Instead, the Court pointed out that the post-legislative history indicated that Congress had made a mistake and that the retroactive change was merely a "curative measure."171

Given that the legislation was designed to "cure" what amounts to bad policy rather than an inadvertant mistake, the decision lends itself to a very broad interpretation. By logically extending the Court's reasoning, virtually all legislation could now be considered "corrective," because Congress would seldom pass legislation deemed to be inferior to that which it replaces. This result seems to have caused some journalists discomfort.

However, although such a broad interpretation follows inductively from the Courts' decision in Carlton, the Court certainly did not mean for its opinion to stand for such a theoretically rigid extreme. Instead, an examination of other "corrective measure" decisions indicates that the intent of the Court must certainly be more "mistake" oriented than the facts of Carlton and logic would dictate.172 Under the "curative measure" standard, Congress may retroactively legislate freely where it can demonstrate to the Court's satisfaction that it is correcting a recent policy mistake or blunder. Carlton evidently makes the primary factor in determining whether a measure is curative or not the reasonably quick recognition by Congress of its mistake.173 Acts which have an

171. Basing its decision upon comments made by various legislators after enactment of the statute, the Court concluded that "[t]here is little doubt that the 1987 amendment to § 2057 was adopted as a curative measure." 114 S.Ct. 2018, 2022 (1994). In a typically artful and perceptive manner, Justice Scalia pointed out the absurdity of relying upon post-legislative history, asserting that the very term was an oxymoron. Id. at 2026.


173. Such an interpretation follows from the Courts reference to Congress' quick realization of the problem created by the tax incentive: "It became evident shortly after passage of the 1986 Act, however, that the expected revenue loss under § 2057 could be as much as $7 billion . . . ." 114 S.Ct. 2018, 2022 (1994). Additionally, such a requirement is the only
alternative primary motivation, e.g., raising revenue for a spending increase, would not be considered “curative.” Thus, in the case of OBRA, a due process challenge remains viable, although not as robust as before Carlton.

Challenges to retroactive tax laws must now be very careful to choose their ground and not attack such corrective measures. Additionally, such challenges should prudently place a greater degree of attention upon the ex post facto and apportionment arguments. The final course of the supra-constitutional doctrine of substantive due process thus remains unsettled. The Carlton decision represents a setback of sorts to those who oppose retroactive taxation, but at the same time reveals some of the flaws inherent in the underlying legal construct utilized by the present Court. That these flaws may be susceptible to exploitation inspires the imagination. The possibility that alternative and constitutionally based principles may yet influence the Court keeps things exciting.