

# Retroactive State Taxation: It's Back(ward)!

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# Introduction

- \* Retroactive Tax Legislation Is Evolving
  - \* Questionable purposes
    - \* Corrective, curative legislation →
    - \* Legislation as a litigation tactic or to overturn judicial decisions
  - \* Lengthier periods of retroactivity →
    - \* One-two years/next legislative session
    - \* Whatever period is required to fully reverse the effects of the statute

# *United States v. Carlton,* 512 U.S. 26 (1994)

- \* Congress passed legislation creating an estate tax deduction for the proceeds of stock sales to ESOPs. The original deduction was not limited to shares the decedent owned before death.
  - \* At the time Congress passed the original legislation, the estimated revenue loss was \$300 million.
  - \* After the error was apparent, the estimated revenue loss increased to \$7 billion.
- \* In reliance of the original legislation, the estate's executor purchased and sold stock to claim the deduction.
- \* The IRS and Congress acted within months (but after the estate's transactions) to propose corrective, retroactive legislation, resulting in a retroactive period of slightly over one year.
- \* The estate claimed the retroactive legislation violated due process.

# United States v. Carlton (cont.)

- \* The test applied to retroactive tax legislation is the same test applied to retroactive economic legislation: “[S]upported by a legitimate legislative purpose furthered by rational means.”
- \* The Court held the legislation was permissible:
  - \* Congress’ legislative purpose was not “illegitimate” or “arbitrary” because Congress acted to correct a “mistake” that would have created a significant and unanticipated revenue loss.
  - \* Congress acted “promptly” and “established only a modest period of retroactivity.”
    - \* The retroactive period was “slightly greater than one year”
    - \* The IRS and Congress took actions to amend the statute within months
- \* Justice O’Connor’s concurrence: “A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions.”

# “Tax Deference” Before *Carlton*

- \* Commentators generally viewed the “harsh and oppressive” standard arising from *Welch v Henry*, 305 US 134 (1938) to reflect a greater degree of deference to retroactive tax laws (the “tax deference” doctrine) than the “general deference” given other economic legislation of a “legitimate legislative purpose furthered by rational means.”
- \* This extreme presumption of constitutionality afforded retroactive tax legislation beginning with *Welch v Henry* conflicts with the long history preceding that decision of a bias against retroactivity imported from the English common law into American jurisprudence.
- \* From this perspective, *Carlton* can be viewed as having abandoned the higher deference given to retroactive tax legislation and given teeth to due process through its mandate of a “modest” period of retroactivity, rather than having undermined the protections of due process as asserted in Scalia’s dissent.

# A Scorecard and Typology of Cases

Cases Finally Decided Since *Carlton*  
(and some others)

- 1 – Legitimate and Illegitimate Governmental Purposes
- 2 – Rational Means Test – Modest Period of Retroactivity?

# Legitimate and Illegitimate Governmental Purposes

Clarifying ambiguities in statutes (*Is this retroactivity at all?*)

- \* *Caprio v. N.Y. Dep't of Tax & Fin.*, 25 N.Y. 744 (2015)

A purported “long-standing” agency interpretation was overturned by 2 administrative-tribunal decisions; Legislature asserted that the agency interpretation was correct

NY Court of Appeals accepted that the amendment was “curative;” this and the related goal of preventing unintended consequences from the erroneous administrative decisions were held to be rational public purposes

Despite the mere “curative” effect of the amendment, the court applied Due Process tests and upheld a 3-1/2 year period (equal to open periods)

- \* *Tesoro Ref. & Mktg. Co. v. Wash. Dep't of Revenue*, 269 P.3d 1013 (Wash. 2012), *rev'g* 246 P.3d 211 (Wash. Ct. App. 2010)

The court held that the plain language of the original statute did not provide an exemption to the taxpayer and reversed the lower court on this ground

The court did not reach Due Process analysis of the 23-year retroactive amendment, which explicitly stated that the Legislature intended to restore the exemption’s original intent (leaving intact the lower court’s analysis that the retroactive amendment violated Due Process by targeting a single taxpayer and extending the period too long)

# Legitimate and Illegitimate Governmental Purposes -2

## Clarifying ambiguities in statutes (*Is this retroactivity at all?*) -2

- \* *Mont. Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996)

Between 1983 and '89, there was a divergence in text between the Railroad Retirement Tax Act, which did not explicitly provide that tax applied to employer 401(k) contributions, and the Social Security Act, which did; Congress resolved this “ambiguity” in the RRTA retroactively to align the RRTA with the SSA

9<sup>th</sup> Circuit did not treat curing this ambiguity explicitly as the “purpose” but instead treated it as validating a 6-year period as rational, because otherwise the uncertainty could harm retirees who expected benefits based on credits for tax paid on 401(k) contributions

- \* *Enterprise Leasing Co. v. Ariz. Dep't of Revenue*, 211 P.3d 1 (Ariz. App. 2008)

“A retroactive clarification does not violate due process.”

This clarifying amendment, which provided that equipment attached to motor vehicles was not “personal property . . . used to control or prevent pollution” such as could entitle the purchaser to a tax credit, “did not change the status quo” and “did not retroactively abolish a right”

Court nevertheless applied Due Process analysis and found a legitimate purpose in preventing revenue losses from an unexpected taxpayer claim

# Legitimate and Illegitimate Governmental Purposes -3

## Preserving benefits for workers and others

- \* *Mont. Rail Link, Inc. v. United States*, 76 F.3d 991 (9th Cir. 1996)

Court affirms legitimacy of stated purpose in House Conf. Report – “protecting the reliance interests of employees who were expecting to receive higher benefits based upon the taxes paid and withheld by their employers”

- \* *Canisius College v. United States*, 799 F.2d 18 (2d Cir. 1986) – pre-*Carlton*

Invalid IRS Revenue Ruling that imposed FICA taxes on employer contributions to retirement plans retroactively ratified partly to avoid “reduction of social security benefits being paid to current beneficiaries and recoupment of a portion of benefits” paid in recent years – court says this “curative” purpose was rational

- \* *See also General Motors Corp. v. Romein*, 503 U.S. 181 (1992) – pre-*Carlton* economic regulation case (not cited in *Carlton*)

1981 Michigan workers comp law required “benefits coordination;” automakers applied law retroactively and reduced benefits to employees; 1982 Michigan legislature passed resolution declaring 1981 act was not to affect benefits for employees injured before 1981 act’s effective date; Michigan Supreme Court disagreed and permitted reduction of benefits; 1987 legislature retroactively amended 1981 act and required automakers to make employees whole – Supreme Court held the purpose of correcting the unexpected state court result was legitimate, and retroactive application rationally furthered this objective because it preserved full benefits for workers as anticipated by the 1981 act

# Legitimate and Illegitimate Governmental Purposes -4

Correcting legislative mistakes – the *Carlton* scenario

\* ***Have there been any like it?***

Correcting Commerce Clause violations

\* *W.R. Grace & Co. v. Dep't of Revenue*, 973 P.2d 1011 (Wash. 1999)

U.S. Supreme Court's *Tyler Pipe* decision held that Washington's B&O tax multiple activities exemption discriminated against interstate commerce and instructed that providing a credit for gross receipts taxes paid elsewhere would correct the problem

Legislature adopted such a credit and court held it had a proper motive because it aimed to comply with *McKesson's* requirement of meaningful backward looking relief and was "curative" legislation to fix the constitutional infirmity

\* *River Garden Retirement Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62 (Cal. App. 2010)

Cal. dividends received deduction, limiting deduction to dividends from Cal. corporations, held to discriminate against interstate commerce in 2003

FTB's solution to provide retroactive nondiscrimination consistent with *McKesson* by retroactively denying deductions for dividends received from Cal. corporations (*i.e.*, assessing additional tax on favored taxpayers) was authorized by state statute

*McKesson's* emphasis on states' flexibility in correcting Commerce Clause violations supported conclusion that the FTB's remedy had a "legitimate nature and purpose"

# Legitimate and Illegitimate Governmental Purposes -5

## Correcting Commerce Clause violations -2

- \* *Moran Towing Corp. v. Urbach*, 768 N.Y.S.2d 33 (N.Y. App. Div. 2003)  
1996 Court of Appeals decision found the NY petroleum business tax discriminated against interstate commerce by threatening multiple taxation; “curative” legislation providing retroactive credits, refunds, and reimbursements to taxpayers subjected to multiple taxation had a legitimate purpose in light of *McKesson*, even if this taxpayer was not eligible for those benefits
- \* *City of Modesto v. Nat’l Med, Inc.*, 27 Cal. Rptr. 3d 215 (Cal. App. 2005)  
City business license tax was invalid because it violated Cal.’s intrastate “commerce clause” principle; amending the ordinance to provide for apportionment was legitimate – **but** retroactive application failed the “rational means” prong because it required new documentation taxpayers were not required to maintain during prior periods

# Legitimate and Illegitimate Governmental Purposes -6

## Overruling (costly) judicial interpretations

- \* *In re Estate of Hambleton*, 335 P.3d 398 (Wash. 2014), cert. denied (2015)  
A 2012 Wash. Supreme Court decision held the estate tax did not apply to certain trust assets passing on the death of a lifetime beneficiary; 2013 legislation reversed the court's interpretation back to the original enactment of the tax (2005), citing the need to "prevent the adverse fiscal impacts of the *Bracken* decision"  
Court recited *Carlton's* position that "[p]reventing unanticipated and significant fiscal shortfall is a legitimate purpose for amending tax legislation," but did not identify factual basis for calling the shortfall "unanticipated"
- \* *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009), cert. denied (2010)  
A 1994 Ky. Supreme Court decision held that corporate groups were entitled to file combined income tax returns; 1998 legislation barred refunds based on the 1994 decision; 2000 legislation reaffirmed this bar but did not disturb consolidated returns filed before the 1994 decision  
Court held that "there can be no question that the legislature acted to correct what it viewed as a mistake in *GTE's* interpretation of the law [and] that it had a legitimate governmental purpose (raising and controlling revenue)"

# Legitimate and Illegitimate Governmental Purposes -7

## Overruling (costly) judicial interpretations -2

- \* *General Motors Corp. v. Dep't of Treasury*, 803 N.W.2d 698 (Mich. App. 2010) (per curiam), cert. denied (2012)

A 2006 decision held that vehicles used by auto-dealer employees qualified for a use tax exemption because the vehicles were purchased for resale or demonstration; 2007 legislation limited the decision to its context and expressly denied exemption to auto manufacturers retroactively to 2002 and for all open years (GM filed claims back to 1996)

Court held that legislature's purpose in amending a law that it believes the judiciary has wrongly interpreted is legitimate and that "action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation" is "rationally related to a legitimate legislative purpose" (quoting *Carlton*)

- \* *GMAC LLC v. Mich. Dep't of Treasury*, 781 N.W.2d 310 (Mich. App. 2009) (per curiam)

A 2006 decision held that assignees of installment sales qualified for a bad debt deduction for sales tax not paid by automobile purchasers; 2007 legislation, couched as "curative," sought to reinstate retroactively (for 7 years) the "original intent" of the 1933 sales tax deduction statute that only the actual seller of the goods who remits the sales tax could claim the bad debt deduction

No express application of *Carlton's* purpose test, but court affirms that the legislature generally has authority "to obviate a judicial interpretation"

# Legitimate and Illegitimate Governmental Purposes -8

## Overruling (costly) judicial interpretations -3

- \* See *King v. Campbell County*, 217 S.W.3d 862 (Ky. App. 2006)

A 2004 decision held that an increase in the rate of a county license fee in 1986 was subject to a mandatory credit for license fees paid to cities in the county, contrary to the practices observed by the county and taxpayers in most of the interval

2005 legislation barred refund claims filed after the date of the 2004 decision in order to prevent “catastrophic financial hardship for some Kentucky counties,” which had “acted in good faith to provide for the needs of its community”

Court held that “the prevention of a potentially severe disruption of county finances” was a legitimate legislative purpose

## Targeting specific taxpayers

- \* *Carlton* itself identified this as a potential improper motive that could taint an otherwise legitimate legislative purpose
- \* *Tesoro Ref. & Mktg. Co. v. Wash. Dep’t of Revenue*, 246 P.3d 211 (Wash. App. 2010), *rev’d on other grounds*, 269 P.3d 1013 (Wash. 2012)

Court found that the fiscal note’s identification of a specific pending refund suit and the dollars to be saved by preventing judgment for the taxpayer, as well as the enactment of the day before trial, “evidence[] the type of improper taxpayer targeting identified by the *Carlton* Court”

# Legitimate and Illegitimate Governmental Purposes -9

## Revoking incentives

- \* *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013)

Empire Zones were created by legislature to stimulate investment and offered qualified businesses tax credits per new jobs created

2009 act added eligibility criteria to prevent transfers among affiliated entities or reincorporating as ersatz “new jobs” (called “shirt-changing”) and agencies applied the new rules retroactively to 2008; the legislature ratified the retroactive interpretation and provided for retroactive decertifications

Court held that stemming abuses is not a legitimate purpose for a retroactive change of incentives, since it “did nothing to spur investment, to create jobs, or to prevent prior shirt-changing;” it merely punished taxpayers more harshly for behavior that already occurred and could not be altered

# Legitimate and Illegitimate Governmental Purposes -10

## Filling budget holes

- \* *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374 (N.Y. 2013)  
“[R]aising money for the state budget is not a particularly compelling justification. Absent an unexpected loss of revenue, such a legislative purpose is insufficient to warrant retroactivity in a case where the other factors militate against it . . . . Raising funds is the underlying purpose of taxation, and such a rationale would justify every retroactive tax law, obviating the balancing test itself.”
- \* *Rivers v. State*, 490 S.E.2d 261 (S.C. 1997)  
In the late ‘80s, legislature granted retroactive capital gains rate reductions and related refunds, to be paid out half-and-half in 1991 and 1992; 1991 act revoked the second half of refunds  
The purpose of the 1991 act – “the government’s interest in meeting its revenue requirements”– was not labeled legitimate or illegitimate, but it was deemed less important than the value of “taxpayers’ interest in finality”

## The Rational Means Test: Must the Period Merely Rationally Further the Act's Purposes or Must It Be "Modest"?

- \* Courts purporting to apply *Carlton*'s requirement that retroactive tax legislation be "supported by a legitimate legislative purpose furthered by rational means" have taken two approaches:
  - \* Constitutional if (1) the legislative purpose is not "arbitrary" or "illegitimate" and (2) the legislature acted "promptly" and established a "modest" period of retroactivity, or
  - \* Constitutional if the legislature had a legitimate purpose for the retroactive amendment and the retroactive period was rationally related to that purpose.

# Cases Purporting to Apply *Carlton's* Tests

## Two Prong Test

1997 - SC	<i>Rivers v. South Carolina</i>	2-3 years <b>overturned</b>
2005 - CA	<i>City of Modesto v. National Med</i>	8 years <b>overturned</b>
<b>Period Must Be Rationally Related to Legislative Purpose</b>		
1996 - US	<i>Montana Rail Link v. United States</i>	6 years <b>upheld</b>
1998 - OR	<i>Atlantic Richfield v. Oregon DOR</i>	8 years <b>upheld</b>
2009 - KY	<i>Miller v. Johnson Controls</i>	6-10 years <b>upheld</b>
2009 - MI	<i>GMAC v. Department of Treasury</i>	7 years <b>upheld</b>
2010 - MI	<i>General Motors v. Department of Treasury</i>	5-11 years <b>upheld</b>
2014	<i>Estate of Hambleton</i>	8 years <b>upheld</b>

# Pending Cases: Michigan's Retroactive Repeal of the Multistate Tax Compact

- 1969: Multistate Tax Compact enacted, effective in 1970
- July 2007: Michigan Business Tax (MBT) enacted in July 2007, effective on January 1, 2008. MBT was silent regarding MTC election
- May 2011: MBT repealed, effective December 31, 2011
- May 2011: MTC election repealed, effective January 1, 2011
- July 14, 2014: Election held applicable to MBT for 2008-2010 in *IBM v Treasury*
- September 12, 2014: 2014 PA 282 enacted retroactively repealing MTC effective January 1, 2008
- November 14, 2014: Motion for Rehearing in *IBM* denied by Michigan Supreme Court
- November 19, 2014: Michigan Court of Claims on remand enters Order granting Summary Disposition to *IBM*

# Michigan's Retroactive Repeal of the Multistate Tax Compact (cont.)

- December 19, 2014: Michigan Court of Claims holds 2014 PA 282 constitutional and grants summary disposition to Treasury in all pending MTC cases
- April 28, 2015: Michigan Court of Claims grants reconsideration in *IBM* and grants summary disposition in favor of Treasury based on 2014 PA 282 (appeal pending)
- September 29, 2015: Michigan Court of Appeals rules in *Gillette, et al v Treasury* that 2014 PA 282 is constitutional
- November 10, 2015: Application for Leave to Appeal filed in Michigan Supreme Court in *Gillette, et al*

# Other Pending Cases

*Dot Foods, Inc. v. Wash. Dep't of Revenue*, Wash. S. Ct. No. 92398-1 (argued Jan. 28, 2015)

Following decision in *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 215 P.3d 185 (Wash. 2009), which held that the taxpayer qualified for a B&O tax exemption, 2010 legislature amended the exemption retroactively to reconfirm the “original intent” of the 1983 legislature and avoid “large and devastating revenue losses”

The trial court granted summary judgment that the act violated Due Process “as applied”, based on (1) the irrationality of divining the legislative intent from 27 years previously and (2) the 27-year period of retroactivity did not comport with the *Carlton* modesty standard, in light of the opinion in *Tesoro Ref. & Mktg. Co. v. Wash. Dep't of Revenue*, 246 P.3d 211 (Wash. App. 2010), *rev'd on other grounds*, 269 P.3d 1013 (Wash. 2012)

The case is on direct appeal to the Wash. Supreme Court after being stayed pending the decision in *Hambleton*. The State's principal argument is that the period in question should be analyzed “as applied” – *i.e.*, only a 4-year period to reach back to Dot Foods' refund claims

## Another Typology of Cases – “New Taxes” Outside the *Carlton* Paradigm

*Carlton* distinguished older cases that involved “the creation of a wholly new tax,” such as *Blodgett v. Holden*, 275 U.S. 142 (1927), and *Untermeyer v. Anderson*, 276 U.S. 440 (1928), as having “limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws.” 512 U.S. at 34 (quoting *United States v. Hemme*, 476 U.S. 558 (1986)).

Few cases neatly fit this “wholly new tax” alternative paradigm

- \* *NetJets Aviation, Inc. v. Guillory*, 143 Cal. Rptr. 3d 111 (2012), held that a 2007 statute providing a method of property-tax assessment of fractionally owned aircraft was a “new tax,” largely in reliance on administrative and legislative materials tending to establish that the act was needed to impose tax on such property. Assessment was permitted only prospectively. No supporting precedent cited other than cases collected in *Carlton*.
- \* A pre-*Carlton* case, *Bates v. McLeod*, 120 P.2d 472 (1941), relied on *Blodgett v. Holden* and *Untermeyer v. Anderson* to invalidate even a 2-1/2 month retroactive imposition of a new unemployment compensation tax where the privilege of employing others had not previously been subject to tax.

# Underlying Due Process Factors – Economic Regulation under *R.A. Gray*

- \* *Carlton* adopted the rational basis test for tax cases -- retroactive tax amendments are permissible if a legitimate legislative purpose is furthered by rational means – from *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), as equivalent to the “harsh and oppressive” test from *Welch v. Henry*, 305 U.S. 134 (1938)
- \* *R.A. Gray* involved imposition of liability on employers that withdraw from underfunded multi-employer pension plans, retroactive to 5 months before enactment (an effective date well after congressional consideration began)
- \* The Court recognized that retroactive imposition of withdrawal liability had a legitimate purpose in preventing employers from taking advantage of a lengthy legislative process – a concern typical of congressional amendments of the Internal Revenue Code (*United States v. Darusmont*, 449 U.S. 292 (1981), cited in support)

# Underlying Due Process Factors – Economic Regulation under *R.A. Gray* -2

- \* *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (plurality of 4 conservative justices), invalidated retroactive imposition of liability on coal-mine employers as a regulatory taking, but with reliance on Due Process cases – *R.A. Gray* and others
- \* Court summarized the Due Process cases on economic regulation thus:

“Congress also may impose retroactive liability to some degree, particularly where it is ‘confined to short and limited periods required by the practicalities of producing national legislation.’ [Quoting *R.A. Gray*.] Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”
- \* Kennedy, J., concurred in the judgment but would have invalidated the act on Due Process grounds (some citations omitted):

“The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process. The plurality opinion demonstrates in convincing fashion that the remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute. In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute. [Citing *Carlton* and *Darusmont*.] As the plurality explains today, in creating liability for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope.”

# Underlying Due Process Factors – Economic Regulation under *R.A. Gray* -3

- \* Breyer, J. (and 3 liberals) would have upheld the act under Due Process:

“Unless it is fundamentally unfair and unjust, in terms of Eastern’s reasonable reliance and settled expectations, to impose that liability, the Coal Act’s ‘reachback’ provision meets that challenge.”

The long-ago employment relationship between Eastern and the employees in question was key to the fairness of the retroactive liability:

“[T]he liability that the statute imposes upon Eastern extends only to miners whom Eastern itself employed. . . . [T]he special tie between a firm and its former employee, a human resource, . . . helps explain the special retroactive liability. That connection, while not by itself justifying retroactive liability here, helps to distinguish a firm like Eastern, which employed a miner but not longer makes coal, from other funding sources, say, current coal producers or coal consumers, who now make or use coal but who have never employed that miner or benefited from his work.”

Dissenters argued that industry and government actions in the distant past, when Eastern was an active employer, created reasonable expectations on miners’ part that they would have life-long medical benefits; those expectations overbalanced Eastern’s expectations that, by exiting the industry, it could avoid further benefits liabilities

“Eastern has therefore failed to show that the law unfairly upset its legitimately settled expectations.”

# Underlying Due Process Factors – Economic Regulation under *R.A. Gray* -4

Are retroactive tax increases then to be measured by the rubrics in *Eastern Enterprises* instead of *Carlton*?

- \* *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136 (Fed. Cir. 2015), upheld 2012 retroactive authorization for imposition of countervailing duties back to 2006 with respect to “non-market economy countries” – *i.e.*, China
- \* Court identified 5 considerations in U.S. Supreme Court opinions
  - \* Whether the retroactive provision is “wholly new” – citing *Hemme*
  - \* Whether the retroactive action resolves uncertainty in the law – citing *Romein*
  - \* The length of the period of retroactivity – citing *Carlton*
  - \* Whether the affected party had notice of the potential change before the conduct that was retroactively regulated – citing *R.A. Gray*
  - \* Whether the retroactive provisions are remedial in nature – citing *Romein*
- \* On the last point, the court specifically noted that the new law was directed to “remedial administration of trade duties, as opposed to raising government revenue.”
- \* Is there a difference in standards between remedial economic regulation and tax increases?



# Other Constitutional Issues

# Separation of Powers

- \* Can a retroactive statute impact pending cases?
- \* “having achieved finality, a judicial decision becomes the last word with regard to a particular case or controversy”
- \* The legislature can “compel changes in law” but cannot change “findings or results under old law”
- \* Cases or claims are commonly held in abeyance pending the outcome of a lead case
- \* Does the decision in the lead case constitute a “decision” in all other cases?
- \* Finality can be delayed for years by appeals even in the lead case (e.g., *IBM*)

# Ex post facto laws

- \* Are retroactive tax laws a violation of the prohibition against ex post facto laws?
- \* Forbidden by US Const. Art 1 Sec 9 (federal law), Sec 10 (state law), and many state constitutions
- \* The drafters were concerned about the evil effects of retroactive laws; a “hallmark of tyranny”
- \* Mostly applied to criminal laws, but “punitive” civil laws have also been invalidated
- \* Cases distinguish between regulatory and punitive motives behind laws
- \* Taxes neither regulate or punish, but “the power to tax involves the power to destroy”

# First Amendment

- \* The 1<sup>st</sup> Amendment guarantees the right to petition the government for redress of grievances
- \* This right is rooted in the Magna Carta, which made illegal the “dispensing with laws or the execution of laws”
- \* The right extends to all three branches of government
- \* A backward looking claim requires obstructive action by state actors, often demonstrated by concealing or destroying evidence, but doesn’t retroactively revoking a valid claim also constitute an “obstructive action” and the “dispensing with laws”?

# Equal Protection

- \* Does a tax increase targeting out-of-state companies satisfy the rational basis test by being rationally related to a legitimate state interest?
- \* Raising or protecting revenues is clearly a legitimate state interest, and *Welch v Henry* held that a tax does not violate equal protection merely because it is applied retroactively.
- \* However the collection of revenue from a targeted class may violate equal protection if it is found to be “hostile or oppressive discrimination” against the targeted class. A tax targeting out-of-state companies on a retroactive basis could be considered “hostile or oppressive” as a “bait and switch” since the out-of-state company could have chosen to conduct business elsewhere.

# Commerce Clause

- \* Does retroactively repealing an election which by definition benefits out-of-state companies constitute discrimination in violation of the Commerce Clause?
- \* Just as a law “motivated by an intent to confer a benefit on local industry not granted to out-of-state industry” is discriminatory (*Amerada Hess*), can the retroactive repeal of a law intended to protect out-of-state industry be deemed discriminatory?
- \* *Moorman* upheld the constitutionality of a single factor sales formula on the basis that a state has latitude in determining how to attribute income to the state, but did not sanction the retroactive repeal of statutes motivated solely by a desire to take away a benefit granted to out of state companies.



# Taxpayer Considerations

# Taxpayer Considerations

- \* Reliance not a determinative factor under *Carlton*
- \* Positions on originally-filed versus amended returns
- \* Multi-taxpayer litigation
  - \* Benefits to being “first in line”
  - \* Whether to hold cases in abeyance
  - \* Complications coordinating multiple litigants
- \* Evaluating likelihood of success



Questions  
welcome