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Constitutionality of Retroactive Tax Legislation

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Summary

The question is frequently asked whether Congress can enact retroactive tax legislation. It can be an important one for Congress because (1) an ever-growing number of tax provisions have expiration dates and some may not always be extended in a timely manner; (2) an interest in finding new revenue can encourage making a provision retroactive in order to increase the amount raised; and (3) an intent to influence behavior by means of a tax provision can sometimes include a desire to "penalize" past conduct.

It is clear there is no absolute constitutional bar to retroactive tax legislation. Nonetheless, it is possible, albeit rare, for retroactive tax legislation that increases a taxpayer's tax liability to violate the Constitution. For example, some cases where retroactive taxes have been struck down suggest that extended periods of retroactivity and lack of notice of a wholly new tax can raise due process concerns under the Fifth Amendment.

While it is often asked whether such legislation would violate another of the Fifth Amendment's provisions—the Takings Clause—it seems unlikely this would be the case. The Supreme Court has long ruled that the sovereign's taxing power and its power to take private property upon payment of just compensation are distinct. Most of the retroactivity challenges to taxes have been litigated on a substantive due process rather than takings theory. On the other hand, if a court can be convinced that what looks like a tax is, in reality, an arbitrary confiscation of property, then a taking might be found.

Other provisions of the Constitution may be implicated if the legislation appears to target certain taxpayers or attempts to penalize past conduct. Any retroactive tax legislation found to be a criminal penalty will likely be struck down as a violation of the Ex Post Facto Clause, which the Supreme Court has done on at least one occasion. In extremely rare circumstances, tax legislation that seems to target certain taxpayers might raise concerns under the equal protection guarantees of the Fifth Amendment. Finally, it might also be asked whether such legislation is an unconstitutional bill of attainder. While there do not appear to be any instances of this occurring, it seems possible that retroactive tax legislation could, depending on its specifics, meet the criteria to be a bill of attainder. The two main criteria that courts have used to determine whether legislation is an unconstitutional bill of attainder are (1) whether specific individuals are affected by the statute ("specificity" prong), and (2) whether the legislation inflicts a punishment on those individuals ("punishment" prong). The Supreme Court has identified three types of legislation that would fulfill the "punishment" prong of the test: (1) where the burden is such as has "traditionally" been found to be punitive; (2) where the type and severity of burdens imposed cannot reasonably be said to further "non-punitive legislative purposes"; and (3) where the legislative record evinces a "congressional intent to punish."

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It is quite common for Congress to enact tax legislation that applies retroactively. Typically, such legislation is retroactive back to the beginning of the year of enactment, but other periods are sometimes used as well. One question often asked is whether legislation that amends the federal tax laws in a way that retroactively increases a taxpayer's tax liability is constitutional.[1]

The short answer is that retroactive tax legislation is not absolutely barred by the U.S. Constitution.[2] In fact, the Supreme Court, recognizing that retroactive application of tax laws is sometimes required by "the practicalities of producing national legislation," has deemed it a "customary congressional practice."[3] As such, there are few examples of retroactive tax legislation being struck down as unconstitutional.

Having said that, it is possible for retroactive tax legislation to violate the Constitution. For example, extended periods of retroactivity might raise concerns under the Fifth Amendment's Due Process Clause. Other provisions of the Constitution may be implicated depending on the particulars of a specific bill (e.g., if the bill appears to target certain taxpayers or penalize past conduct).

This report examines the constitutional provisions that might be implicated by retroactive tax legislation, including legislation that seems intended to punish past behavior. Specifically, it looks at how a court might analyze whether retroactive tax legislation violates the due process guarantees of the Fifth Amendment; is a taking for purposes of the Fifth Amendment; violates the prohibition against ex post facto legislation; is an unconstitutional bill of attainder; or violates the equal protection guarantees of the Fifth Amendment.

Due Process

Retroactive tax legislation potentially implicates the Due Process Clause of the Fifth Amendment, which states that no person shall "be deprived of life, liberty, or property, without due process of law."[4] Of the constitutional provisions discussed in this report, this clause presents the most common potential concern for Congress because it appears that extended periods of retroactivity might be unconstitutional.

The standard used to determine whether retroactive tax legislation violates substantive due process is whether the retroactive application is "supported by a legitimate legislative purpose

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[1] Tax legislation sometimes retroactively provides a benefit to taxpayers. It does not appear that any such legislation has been challenged on constitutional grounds. It seems unlikely that a person receiving the benefit would bring such a suit, and it is not clear on what grounds they would do so. *See* Allen v. Wright, 468 U.S. 737, 751(1984) (to have constitutional standing, a party must establish personal injury by allegedly unlawful conduct fairly traceable to the defendant and that the injury is redressable in court). Furthermore, it is unlikely anyone else would have standing to do so under the theory that they, as taxpayers, were harmed by the government's indirect payment of funds from the public fisc in violation of the Constitution. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344-45 (2006) (generally, no taxpayer standing because any injury is too generalized and remote).

[2] *See, e.g.*, United States v. Carlton, 512 U.S. 26 (1994); United States v. Hemme, 476 U.S. 558 (1986); United States v. Darusmont, 449 U.S. 292 (1981); Welch v. Henry, 305 U.S. 134 (1938); United States v. Hudson, 299 U.S. 498 (1937); Milliken v. United States, 283 U.S. 15 (1931).

[3] *Carlton*, 512 U.S. at 33; *Darusmont*, 449 U.S. at 297.

[4] U.S. CONST. Amend. V.

furthered by rational means."[5] This is known as the rational basis test, and it is a low standard of review by the courts. Once it is met, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches...."[6]

There have only been a few instances in which the Supreme Court has held that retroactive application of tax laws violated the Due Process Clause.[7] While these cases have not been overruled, the Supreme Court has downplayed their significance, noting they "were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded."[8] Nonetheless, the cases are useful because the Court in subsequent cases has contrasted them with permissible legislation, thus indicating they may represent the boundaries of the Due Process Clause.

Period of Retroactivity

The most common potential concern with respect to substantive due process is the length of the retroactivity. The Supreme Court has made clear that a modest retroactive application of tax laws is permissible, describing it as a "customary congressional practice" required by "the practicalities of producing national legislation."[9] As a result, tax legislation that is retroactive to the beginning of the year of enactment has routinely been upheld against due process challenges.[10] There does not seem to be any serious question as to whether such a period of retroactivity is constitutional.

What then happens with periods of application that go beyond the year of enactment? The Court has upheld several tax laws where the period of retroactivity extended into the preceding calendar year.[11] For example, in *United States v. Carlton*, the Court upheld the retroactive application of a federal estate tax provision that limited the availability of a recently added deduction for the proceeds of sales of stock to employee stock ownership plans. The deduction was added by the Tax Reform Act of 1986, which had not included a requirement that the taxpayer own the stock immediately prior to death. The lack of such a requirement essentially created a loophole that Congress fixed with the 1987 amendment. The Tax Reform Act of 1986 was enacted in October 1986, and the amendment was enacted in December 1987, to apply as if incorporated in the 1986 law. In upholding the 1987 law, the Court explained that the period of retroactivity was permissible since it was only slightly more than one year, as well as noting that the IRS had

[5] United States v. Carlton, 512 U.S. 26, 30-31, 32 (1994) (upholding a retroactive tax provision when, among other things, Congress had no "improper motive" or "illegitimate []or arbitrary" purpose in giving the taxing scheme retroactive effect).

[6] *Id*. at 31.

[7] *See* Nichols v. Coolidge, 274 U.S. 531 (1927); Blodgett v. Holden, 275 U.S. 142 (1928); Untermyer v. Anderson, 276 U.S. 440 (1928).

[8] *Carlton*, 512 U.S. at 34.

[9] United States v. Darusmont, 449 U.S. 292, 296-97 (1981).

[10] *See id.* at 299-300 (upholding a provision that increased tax on the gain from a sale that occurred four months before the law's enactment),

[11] *See, e.g., Carlton*, 512 U.S. at 32-35 (upholding a provision enacted in December 1987 that was retroactive back to October 1986); *Milliken*, 283 U.S. at 23-24 (upholding a provision that increased estate tax rates on a transfer made two years before the law's effective date); *Welch*, 305 U.S. at 150-51 (upholding a 1935 state tax law, enacted by a legislature meeting biennially, that amended the tax treatment of corporate dividends and was retroactive back to 1933).

announced its concern with the original law as early as January 1987 and a bill to make the correction was introduced in Congress the very next month.[12]

However, it does appear that due process concerns may be raised by a more extended period of retroactivity. In *Nichols v. Coolidge* (one of the few cases where the Supreme Court struck down a retroactive tax on due process grounds),[13] the Court disallowed the retroactive application of an estate tax provision that changed the tax treatment of a transfer 12 years after the transfer had occurred.[14] The Court later unfavorably compared the 12-year period with periods where the "retroactive effect is limited."[15] This suggests that due process concerns are raised by an extended period of retroactivity. However, it is not clear how long a period might be constitutionally problematic. The Court has recognized retroactive liability for periods beyond one or two years in non-taxation contexts,[16] but it is not clear how a similar situation arising under the tax laws would be addressed.

Reliance and Lack of Notice

One issue often raised is that it may seem unfair to change the tax laws once a taxpayer has done something based on the law as it existed at the time. The fact that taxpayers may have concluded a transaction in reliance on prior law is generally not important to the analysis as "reliance alone is insufficient to establish a constitutional violation."[17] As the Court has made clear, "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[18] In other words,

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process....[19]

[12] *See Carlton*, 512 U.S. at 32-33.

[13] Nichols v. Coolidge, 274 U.S. 531 (1927).

[14] In this case, the taxpayer transferred property to a trust in 1907, with the income going to the taxpayer during life and the corpus to the taxpayer's heirs at death. The 1919 estate tax provision included transfers taking effect upon death in a descendant's taxable estate. The taxpayer died two years later. In holding that the 1919 provision did not apply to the 1907 transfer, the Court wrote that the law violated due process because it was "arbitrary, capricious and amounts to confiscation" in that it included the pre-1919 transferred property in the taxable estate "merely because the conveyance was intended to take effect in possession or enjoyment at or after his death" and out of concern that "[d]iffferent estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died." *Nichols*, 274 U.S. at 542-43.

[15] *Carlton*, 512 U.S. at 34.

[16] *See, e.g.,* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18 (1976) (where the Court held that retroactive liability imposed under the Black Lung Benefits Act of 1972 on employers for disabilities suffered by employees who had terminated employment prior to the act's passage was a "rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor ... ").

[17] *Carlton*, 512 U.S. at 34.

[18] *Id*.

[19] *Welch*, 305 U.S. at 146-47.

Additionally, lack of notice of the retroactive effect of a tax law is not dispositive of whether due process has been violated.[20] Lack of notice may, nonetheless, be a concern when the retroactive legislation enacts a wholly new tax. This was the issue in two cases where the Court struck down retroactive tax legislation on due process grounds—*Blodgett v. Holden* and *Untermyer v. Anderson*.[21] Both dealt with the constitutionality of retroactive application of the Revenue Act of 1924, which enacted the gift tax. The legislation was introduced in February 1924, enacted that June, and applied to gifts made after January 1, 1924. The taxpayer in *Blodgett* made a gift in January 1924, and the taxpayer in *Untermyer* made a gift in May 1924, while the bill was in conference. The plurality in *Blodgett* and the majority in *Untermyer* held the retroactive application was unconstitutional because it was arbitrary as the taxpayers made gifts without knowing they would subsequently be subject to tax.[22] In such a situation, a taxpayer has "no reason to suppose that any transactions of the sort will be taxed at all."[23]

The Court in later cases has clearly distinguished the two cases on the basis that they dealt with the "creation of a wholly new tax" and therefore "their authority is of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws."[24] Thus, while lack of notice is not dispositive, the Court has suggested that lack of notice may violate due process if the retroactive law creates a "wholly new tax."

Since the two cases dealing with the creation of the gift tax, it does not appear the Court has found any other situations where lack of notice was an issue.[25] In some instances, the Court determined the retroactive tax provision was not a wholly new tax, as with the provision in *Carlton*, which amended a new estate tax deduction that was enacted 14 months prior as part of a major overhaul of the tax code.[26] Even in a case with what looked like a brand new tax—a tax on silver under the Silver Purchase Act—the Court upheld a 35-day period of retroactivity.[27] In that case, the law was enacted on June 19, 1934, retroactive back to May 15, 1934. In upholding the law's retroactive application, the Court suggested that taxpayers had sufficient notice since there had been pressure for legislation for months, the President had sent a message to Congress encouraging such a tax on May 15, and the bill that became the act was introduced on May 23. This suggests that it would be rare for a tax provision to be characterized as a "wholly new tax" so long as taxpayers were on some kind of notice that a tax might be imposed.

[20] *See Carlton*, 512 U.S at 34.

[21] Blodgett v. Holden, 275 U.S. 142 (1928); Untermyer v. Anderson, 276 U.S. 440 (1928).

[22] *See Blodgett*, 275 U.S. at 147 (where the court explained it was "wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing"); *Untermyer*, 276 U.S. at 445-6 (where the court reasoned that the bill was not relieved of its arbitrary character just because it was in the last stage of progress through Congress as the taxpayer "cannot foresee and ought not be required to guess the outcome of pending measures").

[23] *Darusmont*, 449 U.S. at 300.

[24] *Carlton*, 512 U.S. at 34.

[25] *Cf. Milliken*, 283 U.S. at 23 (upholding a gift tax rate increase that applied to a gift made two years earlier when the law taxed such gifts at a lower rate, explaining that "[n]ot only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation under which substitutes for testamentary gifts were classed and taxed with them.").

[26] *Id*. (provision "certainly is not properly characterized as a 'wholly new tax' ... ").

[27] United States v. Hudson, 299 U.S. 498, 501 (1937).

Takings

While it is often asked whether retroactive tax legislation would violate the Takings Clause of the Fifth Amendment,[28] it seems unlikely this would be the case. Since the 19th century, the Supreme Court has ruled that the sovereign's taxing power and its power to take private property upon payment of just compensation are distinct. As the Court said in 1880, "neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution."[29] More recently, the Ninth Circuit noted that the rule that taxes do not effect takings is "well established."[30]

Most of the retroactivity challenges to taxes have been litigated on a substantive due process, rather than takings, theory. The Supreme Court has indicated that, at least for economic legislation, an enactment that does not offend due process is highly unlikely to offend the Takings Clause.[31] As discussed above, it is rare for a court to find retroactive tax legislation to violate due process, and the few takings decisions that deal with retroactive taxes find no constitutional infirmity.[32]

If a court can be convinced that what looks like a tax is, in reality, an arbitrary confiscation of property, then the principle that taxes are not takings is circumvented. As the Supreme Court said,

> although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exercise of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.[33]

While the courts have reiterated this principle multiple times,[34] research discloses no instance where the Supreme Court has ever found it to be triggered, thus the "arbitrary" threshold lacks definition. If a retroactive tax bill seemed to target certain taxpayers, it might be argued that "singling out" a group from others similarly situated is a circumstance said by the Supreme Court to indicate a taking.[35] But this is only one factor relevant to whether a taking has occurred, and depends on how one defines the group "similarly situated." All things considered, the strength of the "taxes are not takings" principle suggests that retroactive tax legislation will typically not fall on the wrong (takings) side of the line of demarcation.

Parenthetically, in the unlikely event that a taking were found, the remedy probably would be invalidation of the tax, not the constitutionally stated remedy of "just compensation." The Supreme Court has recognized that where, as with taxes, the government act held to be a taking

[28] U.S. CONST. Amend. V: [N]or shall private property be taken for public use, without just compensation."

[29] County of Mobile v. Kimball, 102 U.S. 691, 703 (1880).

[30] Quarty v. United States, 170 F.3d 961, 969 (9th Cir. 1999).

[31] Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 641 (1993).

[32] *See, e.g., Quarty*, 170 F.3d at 969.

[33] Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 24 (1916).

[34] *See, e.g., Quarty*, 170 F.3d at 969.

[35] *See, e.g.,* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542-544 (2005); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 341 (2002).

takes the form of a requirement that money be paid, requiring a dollar of just compensation for every dollar paid is "utterly pointless."[36]

Ex Post Facto

If legislation appeared to penalize past behavior that was lawful when conducted, it might be argued that a retroactive tax bill violates the Ex Post Facto Clause.[37] It prohibits Congress from enacting retroactive penal legislation.

From its earliest days, the Court has interpreted the clause to apply only to criminal punishment.[38] Thus, the analysis begins with determining, as a matter of statutory construction, whether the legislation at issue is civil or criminal.[39] Taxation is typically not a criminal punishment, and therefore the Ex Post Facto Clause is generally understood not to apply to tax legislation.[40]

Having said that, there may be cases where a tax provision appears to be a criminal punishment. In such cases, the Court requires the "clearest proof" to reclassify a civil remedy as a criminal penalty due to the deference owed the legislature's stated intent.[41] An example of this occurring is *Burgess v. Salmon*,[42] where the Supreme Court recharacterized a tax as a criminal penalty, and held its retroactive application violated the prohibition on ex post facto laws. The legislation at issue had increased the federal tobacco stamp tax, while also imposing criminal penalties on the transfer of tobacco without the proper stamp. At the time of the bill's passage, the taxpayer had already paid the stamp tax, and the Court held that imposing the higher tax was impermissible. Finding that the higher tax and criminal penalties were "equally authorized," the Court concluded that since any criminal proceeding would have violated the ex post facto prohibition, the imposition of the higher tax also violated it since "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[43]

Burgess is a rare example of a tax being struck down under the Ex Post Facto Clause. Taxes will typically not be seen as equal to a criminal penalty.[44] Thus, for example, in *Bankers Trust Co. v. Blodgett*,[45] the Court refused to apply the Ex Post Facto Clause to a state law imposing a 2% tax on the value of taxable property in an estate for the five years preceding death if no tax had been assessed or paid during the year preceding death because "[t]he penalty of the statute was not in punishment of a crime…."

[36] Eastern Enterprises v. Apfel, 524 U.S. 498, 521 (1998) (plurality opinion by O'Connor, J.).

[37] U.S. CONST. Art. I, § 9, cl. 3.

[38] *See* Calder v. Bull, 3 U.S. 386, 390-91 (1798).

[39] *See* Smith v. Doe, 538 U.S. 84 (2003).

[40] *See* NationsBank of Texas, N.A. v. United States, 269 F.3d 1332, 1336 (Fed. Cir. 2001); *see also* Karpa v. Comm'r, 909 F.2d 784 (4th Cir. 1990).

[41] *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

[42] Burgess v. Salmon, 97 U.S. 381 (1878).

[43] *Id*. at 385.

[44] *See* NationsBank of Texas, 269 F.3d at 1336.

[45] *Bankers Trust Co. v. Blodgett*, 260 U.S. 647, 652 (1923).

When determining whether a tax provision is a criminal penalty for purposes of the Ex Post Facto Clause, a court's analysis could be informed by how taxes are treated in other contexts, such as the Fifth Amendment's prohibition on double jeopardy. In these contexts, the Court has recognized that a tax provision may at some point lose its character as a tax and become instead "a mere penalty with the characteristics of regulation and punishment."[46] A high rate of tax and deterrent purpose are evidence that a tax may in fact actually be a penalty, but are not dispositive.[47] Rather, the Court has often looked for other features of the provision that distinguish it from a typical tax, including that its imposition is dependent on the commission of a crime.[48] Tax legislation rarely includes these other factors,[49] strengthening the general conclusion that tax provisions would typically not be considered penalties for purposes of the Ex Post Facto Clause.

Bills of Attainder

The Constitution expressly prohibits the federal government from enacting bills of attainder.[50] The Supreme Court has defined a bill of attainder as a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[51] The basis for the prohibition lies in the separation of powers concern that the enforcement of a bill of attainder would allow the Congress to usurp the power of the judicial branch.[52]

By passing a bill of attainder,

> the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what

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[46] Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994) (holding that a state excise tax was a criminal penalty for purposes of the Fifth Amendment's double jeopardy clause because it was a "remarkably high" tax; had an obvious deterrent purpose; was conditioned on the commission of a crime and imposed only after the taxpayer had been arrested for the conduct that gave rise to the tax; and was levied on goods that the taxpayer did not own or possess when the tax was imposed).

[47] *See id.*

[48] *See id.; see also* United States v. Sanchez, 340 U.S. 42 (1950) (classifying a federal marijuana tax as a civil sanction, rather than a criminal one, because liability was not dependent on criminal conduct).

[49] *Cf.* NFIB v. Sebelius, 132 S. Ct. 2566, 2596-97 (2012) (finding that a requirement to have health insurance or else pay a tax was not a penalty for purposes of Congress' taxing power because "'if the concept of the penalty means anything, it means punishment for an unlawful act or omission'" and the requirement did not to be read as making the failure to have coverage was unlawful when, among other things, the only consequence was owing payment to the tax agency) (quoting United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).

[50] U.S. CONST. Art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[51] United States v. Brown, 381 U.S. 437, 468 (1965).

[52] "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply, trial by legislature. *Brown*, 381 U.S. at 443.

> it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions.[53]

At common law, a bill of attainder was a parliamentary act that sentenced a named individual or identifiable members of a group to death.[54] It was most often used to punish political activities that the Parliament or the sovereign found threatening or treasonous.[55] A bill of pains and penalties was identical to a bill of attainder, except that it prescribed a punishment short of death such as banishment, deprivation of the right to vote, exclusion of the designated individual's sons from Parliament, or the punitive confiscation of property.[56] The prohibition on bills of pains and penalties has been subsumed into the prohibitions of the Bill of Attainder Clause, so that a variety of penalties less severe than death may trigger its provisions.[57]

The Court has noted that cases regarding bills of attainder cannot be analyzed in the abstract, as each "turns on its own highly particularized context."[58] The two main criteria which the courts look to in order to determine whether legislation is a bill of attainder are (1) whether specific individuals are affected by the statute (specificity prong), and (2) whether the legislation inflicts a punishment on those individuals (punishment prong).

Specificity

The Supreme Court has held that legislation meets the criteria of specificity if it identifies a person, a group of people, or readily ascertainable members of a group[59] who are identified in the legislation by past conduct.[60]

It has been suggested that a court's determination that a statute referencing a specific group of persons for past behavior may in some cases be treated as a *per se* violation of the specificity prong.[61] For instance, in the case of *United States v. Lovett*,[62] Congress passed Section 304 of the Urgent Deficiency Appropriation Act of 1943, which named three government employees, labeled them as subversive, and then provided that no salary should be paid to them.[63] The

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53 3 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1338 (1833).

54 Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 473 (1977).

55 Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Due Process*, 50 BROOK L. REV. 77, 81 (1983).

56 *Brown*, 381 U.S. at 441-42.

57 *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) ("[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both").

58 Flemming v. Nestor, 363 U.S. 603, 616 (1959).

59 *See* United States v. Lovett, 328 U.S. 303, 315 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

60 *See* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984).

61 *See* Case Note, *Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder. - SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), cert. denied, 119 S. Ct. 889 (1999)*, 112 Harv. L. Rev. 1385, 1388 (1999). *See, e.g.,* United States v. Brown, 381 U.S. 437, 438-39 n.1 (1965) (striking down statute that made it a crime for anyone "who is or has been a member of the Communist Party" to serve as an officer or employee of a labor union); United States v. Lovett, 328 U.S. 303, 305 n.5 (1946) (striking down a statute prohibiting payment of government salaries to alleged Communists "Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett").

62 328 U.S. 303 (1946).

63 *Id.* at 304-05, 311-12.

employees brought suit, and the Supreme Court ruled in their favor, holding that Section 304 was a punishment of named individuals without a judicial trial.[64]

As will be discussed later, it is a defense to a bill of attainder challenge to establish that a statute is not intended to punish, but rather to implement a legitimate regulatory scheme. Although this analysis is generally considered under the punitive prong of the test, it may have implications for the specificity prong. For instance, in *Nixon v. Administrator of General Service*,[65] the Court evaluated the Presidential Recordings and Materials Preservation Act,[66] which required that former President Richard Nixon, whose papers and tape recordings were specifically named in the act, turn those items over to an executive branch official. He argued the act was a bill of attainder because it was based on a congressional determination of his blameworthiness and represented a desire to punish him. While it would appear the identification of papers and recordings under the control of a named person would meet the *per se* requirement, the Court found the statute was constitutional despite this specificity because it failed the punishment prong since it fulfilled the valid regulatory purpose of preserving information needed to prosecute Watergate-related crimes and was of historical interest.[67] As part of this analysis, however, the Court even questioned whether the act met the specificity prong, finding that naming an individual could be "fairly and rationally understood" as designating a "legitimate class of one."[68] Thus, it has been suggested that *Nixon* stands for the proposition that any level of specificity is acceptable, even the naming of individuals, as long as a rational, non-punitive basis for the legislation can be established.[69]

It is not uncommon for a bill to apply both retrospectively and prospectively, and it does not appear to be fatal to a bill of attainder challenge that the statute in question applies to both past and future behavior. In one of the relatively few cases in which a successful bill of attainder challenge was made, the Court in *United States v. Brown* invalidated Section 504 of the Labor-Management Reporting and Disclosure Act, which made it a crime for anyone "who is or has been a member of the Communist Party" to serve as an officer or employee of a labor union ... during or for five years after the termination of his membership in the Communist Party.... "[70] The Court did not find it significant that future members of the Communist Party would be included in the group affected. Rather, the Court focused on the fact that once a person had entered the Communist party, his or her withdrawal did not relieve the disability for five years.[71] So, the requirement of specificity is not defeated by the potential of future persons being added to the identified group, as long as the persons or entities identified cannot withdraw from such specified group.[72]

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[64] *Id.* at 315.

[65] 433 U.S. 425 (1977).

[66] P.L. 93-526.

[67] *Nixon*, 433 U.S. at 476-77.

[68] *Id.* at 472.

[69] *See* Case Note, *Fifth Circuit Holds That the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder. - SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), cert. denied, 119 S. Ct. 889 (1999),* 112 HARV. L. REV. 1385, 1388 (1999).

[70] *See Brown*, 381 U.S. at 438-39 n.1.

[71] *See id*. at 458.

[72] *See also* Selective Service System v. Minn. Pub. Interest Research Group, 468 U.S. 841, 851 (1984) (affected class must be defined by past conduct that makes their ineligibility for a particular benefit "irreversible.").

Whether a retroactive tax provision meets the specificity criteria will depend on the legislation at issue. As discussed above, even when individuals or entities appear to be identified, the *per se* finding of specificity may still fail to meet the first prong if the group specified by the legislation can be justified by the nature of the regulatory purpose. This would require an analysis of the nexus between this specificity and the regulatory purposes generally served by tax laws, and a court might also consider any additional legislative purposes articulated in the legislative history of the bill in question. It is possible that a court might not consider some tax legislation to fall under the traditional tax rubric if, for example, it appears the bill was not intended to serve any traditional tax purposes, but was instead merely a vehicle to punish the taxpayers involved. If this were true, then the level of specificity provided by the legislation would appear to be of less importance.

Punishment

The mere fact that focused legislation imposes burdensome consequences does not require that a court find such legislation to be an unconstitutional bill of attainder. Rather, the Court has identified three types of "punitive" legislation that are barred by the ban on bills of attainder: (1) where the burden is such as has traditionally been found to be punitive; (2) where the type and severity of burdens imposed cannot reasonably be said to further non-punitive legislative purposes; and (3) where the legislative record evinces a congressional intent to punish. Thus, the question would be whether a specific piece of retroactive tax legislation fit into one of these categories.

Traditional Punishments

The Supreme Court has identified various types of punishments that have historically been associated with bills of attainder. These traditionally have included capital punishment, imprisonment, fines, banishment, confiscation of property, and more recently, the barring of individuals or groups from participation in specified employment or vocations.[73]

There do not appear to be any cases where the Court has found taxation to be the type of "punishment" traditionally engaged in by legislatures as a means of punishing individuals for wrongdoing. A concern might arise, however, whether a high enough tax rate would rise to the level of "confiscation of property." For instance, imposition of a 100% tax on past income might be seen by a court as rising to the level of confiscation, since the entire value of the taxable income has been taken from the person.

"Functional" Punishment

Despite the lack of case law holding that a particular form of taxation is a bill of attainder, it is clear that a tax law that was imposed for punitive purposes could fulfill the punishment prong of the test. The Court has specified that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."[74]

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[73] *Nixon*, 433 U.S. at 474-75.

[74] United States v. Lovett, 328 U.S. 303, 315 (1946). *See also* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U.L. REV. 899, 930-31 (2007).

In one example offered by a commentator, a special tax levied only on the descendants of slave-holders in order to pay reparation to the descendants of slaves would most likely be susceptible to attack as a bill of attainder.[75]

The Supreme Court has also indicated that some legislative burdens not traditionally associated with bills of attainder might nevertheless "functionally" serve as punishment.[76] The Court has indicated however, that in those cases the type and severity of the legislatively imposed burden would need to be examined to see whether it could reasonably be said to further a non-punitive legislative purpose.[77] For instance, various Supreme Court decisions have invalidated as bills of attainder legislation barring specified persons or groups from pursuing various professions, where the employment bans were imposed as a brand of disloyalty.[78] In *Cummings v. Missouri*,[79] the Supreme Court noted that "disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment."[80]

On the other hand, where a burden imposed by legislation is susceptible to explanation by a valid regulatory (non-punitive) purpose, then a court would be likely to find that such legislation is not intended to be punitive. For instance, in *Flemming v. Nestor*,[81] the Court upheld termination of Social Security benefits to persons deported for events occurring before the passage of the legislation terminating benefits, reasoning that Congress was within its authority to find that the purposes of Social Security were not served by providing benefits to persons living overseas. In reaching this conclusion, the Court noted that

> [O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [bill of attainder grounds]. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." Fletcher v. Peck, 6 Cranch 87, 128.[82]

However, it should be noted that the legislation in *Flemming* was but a small part of a larger regulatory scheme—the Social Security program—making any punitive intent less apparent.[83]

Thus, when analyzing retroactive tax legislation, the question arises as to whether there is an adequate nexus between the restriction imposed by the tax bill and some legitimate, nonpunitive

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[75] Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 174 (2004).

[76] *Nixon*, 433 U.S. at 475.

[77] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); *Nixon*, 433 U.S. at 476. *But see* Flemming v. Nestor, 363 U.S. 603, 614 (1959) (upholding termination of Social Security benefits to persons deported for events occurring before the passage of the legislation terminating benefits).

[78] *Nixon*, 433 U.S. at 474-75 (citing cases).

[79] Cummings v. State of Missouri, 71 U.S. 277, 320 (1867).

[80] *See also* Foretich v. United States, 351 F.3d 1198 (2003) (legislation limiting custodial rights was a bill of attainder).

[81] *Flemming*, 363 U.S. 603, 614 (1959).

[82] 363 U.S. at 618.

[83] 363 U.S. at 618.

governmental purpose.[84] For this, one would need to look at what legislative purposes are generally accorded to tax laws. It appears there are generally three: (1) taxes imposed for purposes of raising revenue; (2) taxes imposed to influence future behavior; and (3) taxes imposed for both reasons. In general, it would seem not uncommon for retroactive tax bills to fall within the third category, with the goal of discouraging a type of behavior found to be supported by the application to taxpayers in the future, and the goal of raising revenue for imposing the taxes on persons retrospectively.[85] In such case, it might be that to the extent that a court could determine that revenue raising was the intended goal of the bill, which may include looking at the provision's legislative history, then it could arguably determine that the legislation was not a bill of attainder.

Equal Protection

Finally, if retroactive tax legislation seemed to target certain taxpayers for unfavorable treatment, this could also raise potential equal protection concerns under the Fifth Amendment.[86] This would not be due to the bill's retroactivity, but rather because of its targeting of certain individuals. It seems unlikely this argument would be successful, except perhaps in rare, atypical circumstances.

In general, classifications made for federal tax purposes are constitutionally permissible so long as "they bear a rational relation to a legitimate governmental purpose."[87] The same standard applies in situations involving retroactive tax legislation.[88] As discussed above, the rational basis test is a low standard of review by the courts. Courts typically show great deference to the tax classifications made by legislatures in recognition of "the large area of discretion which is needed by a legislature in formulating sound tax policies."[89] As the Supreme Court has noted, "[i]t has … been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification."[90]

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[84] *See* BellSouth II, 162 F.3d 678, 688 (1998) (upholding a statute which required local operating companies to open their local telephone markets to competition to avoid the creation of monopolies); Dehainaut v. Pena, 32 F.3d 1066, 1072 (7th Cir. 1994) (upholding indefinite disbarment of former air traffic controllers from reemployment with the Federal Aviation Administration).

[85] *See, e.g.,* CRS Report R40466, *Retroactive Taxation of Executive Bonuses: Constitutionality of H.R. 1586 and S. 651* (pointing out that a bill to retroactively tax certain employment bonuses may appear intended, considering the specificity and high levels of taxation, to have the second purpose to deter future conduct by imposing punitive taxation, but that this purpose could not be used to justify retroactive application since those bonuses would have already been paid and there would be no future conduct to deter; on the other hand, it might also be argued that the tax would fit into the third category because the purpose of raising revenue is met by the retrospective application of the bills, while the purpose of discouraging behavior is met by the prospective application).

[86] U.S. CONST. amend. V. ("nor shall any person be ... deprived of life, liberty, or property, without due process of law ... "); Bolling v Sharpe, 347 U.S. 497, 499 (1954) (Fifth Amendment's Due Process Clause includes equal protection guarantees).

[87] Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547 (1983). Some tax classifications are subject to higher levels of scrutiny. For example, classifications based on a suspect classification (e.g., race or national origin) or that interfere with the exercise of a fundamental right (e.g., freedom of speech or religion) call for strict judicial scrutiny. *See id.*

[88] *See* Welch v. Henry, 305 U.S. 134, 145 (1938).

[89] Taxation with Representation, 461 U.S. at 547 (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

[90] *Id*. (quoting *Madden*, 309 U.S. at 88).

Because legislatures have "especially broad latitude" in creating tax classifications,[91] the bar is generally low for finding adequate justification for making classifications in a retroactive tax bill.[92] Tax classifications are usually given deference because they are "a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden" and it is inappropriate for a court, which is not in a position to be familiar with these things, to second guess the legislature.[93]

On the other hand, it seems possible that such deference by a court may not always be appropriate if a bill or its legislative history were to evidence a punitive intent towards a taxpayer or group of taxpayers.[94] In such cases, any expressed motivations targeting specific taxpayers may lead a court to question the legitimacy of the government's interest.[95] However, it would seem to be a rare occurrence where such evidence would exist.

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[91] *Id*.

[92] *See id*. at 547-48 ("'[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'") (quoting *Madden*, 309 U.S. at 87-88).

[93] *Id*. at 547 (quoting *Madden*, 309 U.S. at 88).

[94] *See* U.S. Dep't of Ag. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

[95] *See id.* (striking down a provision making households with unrelated members ineligible for food stamps after failing to find a legitimate reason for the limitation since it did not advance the stated purposes of the act (ensuring adequate nutrition and stimulating the agriculture economy) and the legislative history made clear the provision was targeted at "hippies" and "hippie communes").