Questionnaire 'Retroactivity and Tax Legislation', EATLP 2010

US Respondent's General Preliminary Remarks

In the United States, there is no source of authoritative law other than judicial decisions and legislative acts. There is, furthermore, a general sense that the common law approach to judicial decisions may result in decisions—even by the same court—that can be reconciled only in terms of their results and not necessarily in terms of the rationale stated in the opinion. As a result, it is almost impossible to answer the questions posed in part A "On terminology" separately from the questions posed in part D "Ex post evaluation of retroactivity in case law." This difficulty is compounded by the fact that since the introduction of the Graetz/Kaplow/law-and-economics approach, virtually no traditional law review articles have been written that attempt to deal with the actual practices either of courts or of legislatures. The debate in the law reviews is entirely theoretical; there has been no sustained attempt to review the outcomes of actual cases or the actual practice of legislatures under a post-Graetz approach.

In the United States, constraints on retroactive legislation can be found both in the federal constitution and in the state constitutions. The constraints based in the federal constitution apply both to Congress and to the state legislatures. In theory, these constraints should be applied the same at both levels. As noted below in the case of validation/curative statutes, however, the institutional position of the states and their subunits are sufficiently different that situations for which there no federal counterparts have emerged.

The constraints based in a state constitution apply only to the legislature of that state. Even though these state constitutional provisions contain exactly the same language and can be traced to common sources, each highest court in a state is free to interpret these constraints independent of the interpretations of other courts, including the Supreme Court of the United States. This practice compounds the difficulty of stating conclusions regarding the meaning given in the United States to any particular language. The attitude toward retroactive tax legislation in the state courts is considerably more hostile in least some instances than the attitude in the federal courts. Some of this difference may, however, reflect the fact that state legislatures tend to engage in more controversial legislative practices. The responses in this questionnaire include these state practices (labelled "subnational" and set at the margin) but no assurance can be given that all state practices are reflected in these responses.

This questionnaire deals only with constraints on legislative behaviour. In the United States, at the federal level, new constraints were imposed by Congress in 1998 on the ability of Treasury and the Internal Revenue Service to announce positions with retroactive effect. These constraints map relatively easily into the distinctions made in this questionnaire, and are dealt with in a separate set of responses.

General preliminary remarks
There are different concepts with various meanings when dealing with the phenomenon of retroactivity in legislation. Not only are various concepts used for 'retroactivity' (e.g., retroactivity, retrospectivity, formal retroactivity, material

retroactivity, and true retroactivity) but the same concept is often used with different meanings (viz., the concepts of retroactivity and retrospectivity[1]).
In this questionnaire, the term 'retroactivity' means that the effective entrance date of (one of more provisions of) a statute is set at a date prior to the moment on which the statute enters into force (in Dutch fiscal literature, this is called 'formal retroactivity'), i.e. (one of more provisions of) the statute covers the period before the date of entry into force. For example, a statute enters into force on February 1, 2010, and stipulates that a certain tax exemption is repealed as from January 1, 2009.
The term 'retrospectivity' means that the statute has 'immediate effect' (i.e., the effective entrance date of a statute is the same date as the date on which the statute enters into force) without grandfathering, as a result of which the statute alters or affects the results of a past event for the future (in Dutch fiscal literature, this is called 'material retroactivity'). For example, a statute enters into force on January 1, 2010, and stipulates that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealised gains, as a result of which gains that accrued prior to January 1, 2010 are not tax exempt although they accrued in a period when the exemption applied.
Furthermore, if in this questionnaire a reference is made to the introduction of a tax statute, this includes the change (amendment) of an existing tax statute, for there is no conceptual difference between the two. After all, a change in an existing statute is realized by means of the introduction of a statute that provides for the change.

A. On terminology

(1) In Dutch legal discourse, a distinction is usually made between formal retroactivity (here: retroactivity) and material retroactivity (here: retrospectivity).

a. Does legal discourse in your country usually employ concepts like 'retroactivity' and 'retrospectivity'?

In the United States, both concepts are occasionally invoked, but more often than not only the term "retroactive" is used to describe both. The term "retrospective" has no particular significance in the jurisprudence involving the power of the federal Congress to enact tax legislation that either is "effective" as of a date prior to its enactment or alters the results of previously established economic positions. As discussed below in answer to questions 15, such "retrospective" taxation of most types of income streams and many types of transactions would be uncontroversial.[2]

Subnational. *In several states (Colorado, Missouri, New Hampshire, North Carolina, Tennessee) the state constitution expressly prohibits "retrospective" legislation; in several others (Georgia, Ohio, Texas) the prohibition is on "retroactive" legislation.*

b. Is a clear distinction usually made between 'retroactivity' and 'retrospectivity'?

Clearly not in the authorities relating to limitations derived from the federal constitution.

Subnational *Even in the states with specific constitutional provisions, no distinctions between the terms are discernible in the case law discussing these prohibitions. See, e.g., Shangri-la, Inc. v. State, 113 N.H. 440 (1973)(tax on capital gain realized in March 1970, included in business profits tax first imposed Jan 1970, although gain admitted to be economically accrued prior to Jan 1970 not "retroactive" and thus not unconstitutional under NH provision); Coley v. State, 360 N.C. 493 (2006)(permitting, despite constitutional*

[1] See, e.g., the editors of British Tax Review, Retroactive or retrospective? A note on terminology, *British Tax Review* 2006, pp. 15-18.
[2] *The federal government upon first enacting an income tax, and many states when enacting their separate income taxes, defined the base to as to avoid an extraordinary amount of "retrospective" taxation of capital gains by setting the basis for measuring such gains at the fair market value when the sixteenth amendment first came into effect. This limitation was not so much the result of a Congressional view that, even had the power to tax such income been present, there retrospective nature of the tax made it unconstitutional, but an acknowledgment that prior to that date there may have been no power to impose an income tax.*

prohibition on "law[s] taxing retrospectively sales, …or other acts previously done", an increase in income tax rates, in statute enacted in Sept. 2001, increasing rate on entire 2001 year).

It appears to be the case that, although the above-mentioned distinction between the two kinds of retroactivity (i.e., retroactive effect and retrospective effect) is recognised in most countries, there are some additional varieties. A first conceptual variation concerns the situation that, during a fiscal year, the income tax rules are changed as from the beginning of the fiscal year. For example, an income tax statute enters into force on July 1, 2009, and stipulates that a certain tax exemption is repealed as from January 1, 2009. In the Netherlands this would be regarded as retroactive. It appears that in some other countries it would not be regarded as (actual) retroactive, because – it is argued – the income tax obligation only arises at the end of the year. In these countries, a conceptual distinction is made between a statute that applies to a previous year (*actual retroactivity*) and a statute that applies as from the beginning of the current year (*de facto retroactivity*).[3]

(2)

a. Does legal discourse in your country usually employ this conceptual distinction [between actual retroactivity and de facto retroactivity?

In the United States, both provisions could be called "retroactive," but, as above, there is generally no significance to using this label in determining the limitations on the power of Congress to tax. The labelling of a particular provision as "retroactive" will not be determinative of its validity.

Indeed, the phenomenon of a federal tax provision enacted in a later month having an effective date in an earlier month, that is, changing the results of transactions occurring earlier in the same year is common. The Supreme Court has taken note of the phenomenon, see, United States v. Darusmont, 449 U.S. 292, 297 (1981)(calling this a "customary Congressional practice,"and permitting changes enacted in October 1976 to have effect on transactions after January 1, 1976). The practice dates at least to the first enactment of the income tax after the ratification of the sixteenth amendment, on October 2, 1913, retroactive to March 1, 1913, and was present in a multitude of congressional acts both before and after, see the instances listed in the dissent of Justice Brandeis in Untermeyer v. Anderson, 276 U.S. 440 (1928).

This practice is occasionally justified on the ground that the tax is on the overall income of the year, and "income" is not final until the end of the taxable year. This justification has not been relied upon in modern cases scrutinized under federal standards; indeed, taxes enacted in a period after the close of the taxable year first affected have not been treated differently from taxes enacted within that year, e.g., Welch v. Henry, 305 U.S. 134 (1938)(Wisconsin statute enacted in 1935 affecting dividends paid in 1933).

Subnational. *This distinction was been relied upon in earlier state cases, in which the rational was that a tax could be a prospective tax on the privilege of doing business, even if its measures could include past events, e.g., Oleson v. Borthwick, 33 Haw. 766 (1939) (upholding inclusion in income tax base of dividends paid in 1934, upon change in law not occurring until 1935); Neild v. District of Columbia 110 F. 2d 246 (C. A. D. C. 1940). This logic seems to play an especially important role in those states with a stronger prohibition on retroactivity generally, e.g., Coley v. State, 360 N.C. 493 (2006)(permitting, despite constitutional prohibition on "law[s] taxing retrospectively sales, …or other acts previously done", an increase in income tax rates, in statute enacted in Sept. 2001, increasing rate on entire 2001 year) and in General Dynamics Corp. v. Sharp, 919 S.W.2d 861 (Texas 1996) (giving effect to, "as not retroactive" an alteration in the formula for determining the corporate franchise tax*

[3] Victor Thuronyi, *Comparative Tax Law*, The Hague: Kluwer Law International 2003, pp. 79-80.

to include a component based on earned surplus, which for this taxpayer included amounts under contracts begun 8 years earlier, since a franchise tax is not "retroactive" in violation of the state constitution simply because it "draws upon antecedent facts" relating to prior years, so long as it "pays for the privilege of doing business" prospectively"; also noting that even if tax was "retroactive," it is not impermissibly so since it does not impair vested rights). However, in at least one state with a stricter prohibition on retroactivity, this logic was not sufficient, Lakengren v. Kosydar, 44 Ohio St. 2d 199, 339 N.E.2d 814 (Ohio 1975)(holding impermissibly Olsen retroactive the application of a statute enacted Dec. 20, 1971, which added income as alternative measure in addition to net worth as a measure of the 1972 corporate franchise tax, as applied to income earned in taxable year ending Feb 1971)

b. If in your country the conceptual distinction is employed, please discuss, when answering the questions of section B, C, and D and question 20 of section F, whether this distinction is materially significant, e.g., whether different standards apply.

(3) A second conceptual variation concerns the so-called interpretative statutes,[4] which are statutes that stipulate the interpretation of another statute and are often applicable as from the effective entrance date of that other statute. The Dutch legal system does not explicitly have the phenomenon of 'interpretative statute'.If the Dutch legislator introduces a statute with retroactive effect and explains that the statute provides an interpretation (i.e., only clarifies the meaning) of another statute, this statute is considered 'retroactive' in Dutch legal discourse.[5] It appears however that in some countries such a statute would not be called 'retroactive' and/or that in some countries even in the Constitution or the General Tax Act, it is explicitly provided that interpretative statutes apply as from the effective entrance date of that the statute to which the interpretation applies.

a. Does the legal system of your country explicitly have the phenomenon of 'interpretative statute'?

In the United States, two very common practices might fall within the meaning of "interpretative" statute as described here. Only the first is explicitly acknowledged as a distinct practice. Neither has any constitutional significance.

Technical Corrections. *The practice most common at the federal level is the enactment of "technical corrections." "Technical corrections" would include (1) changes to statutes that contained clear errors in drafting, both in grammar and in effect and (2) language that was intended to be "interpretative" in the common sense of clarifying the intent of the prior statute.*

Technical corrections packages are fairly routine, enacted essentially after every major piece of tax legislation. They are by definition "revenue neutral," in the sense that they are enacted only to restore the expectations of the enacting Congress with regard to the original measure. They are also generally assembled as bipartisan legislation, agreed to by the relevant staffs and are likely to move through Congress without amendment. See generally Mark Gerson, Technically Speaking: The Art of Tax Technical Corrections, 2007 TNT 44-35 (*March 6, 2007).*

Restatement of intended meaning. *A federal statute might purport to declare the meaning of a previously enacted statute, without fitting the generally understood meaning of "technical correction." Although such statutes are far less likely to be*

[4] Victor Thuronyi, *Comparative Tax Law*, The Hague: Kluwer Law International 2003, p. 76, mentions *lois interprétatives* (France), declatory legislation (United Kingdom) and *legge di interpretazione autentica* (Italy).
[5] Notwithstanding, when judging (e.g., by parliament or by the courts) whether the (proposed) retroactive effect is justified, it could be taken into account that the statute 'only' provides a clarification.

enacted than "technical corrections," they might be enacted in response to judicial interpretations, or, in rare cases, to positions taken by the government in litigation or in anticipation of litigation. Such a practice was approved by the Supreme Court in an early case, Stockdale v. Ins. Cos., 87 U.S. 323 (1873) (in convoluted set of opinions, allowing 1870 tax on 1869 income of entities; also approving of congressional acts interpreting prior legislation).

This was also the practice involved in United States v. Wells Fargo, 485 U.S. 351 (1989); in that case, however, the Supreme Court did not have to rule on the retroactivity issue because within the same case it reversed the substantive judicial decision that had led to the corrective statute. The far more common practice when Congress rejects a judicial interpretation is simply to amend the statute with the ordinary degree of retroactivity.

The Congressional reaction to a recent rather notorious administrative pronouncement thereto may help demonstrate the wide degree of latitude within which Congress may legally act, and the likelihood that its actions will be constrained more by politics than by law. On Sept. 30, 2008, Treasury announced, claiming apparently to be acting under regulatory authority granted by Congress, that the limits on the survival of carryover operating losses when a business changes ownership would be applied in a very generous way to the financial industry. Legislation that was signed in February 2009 "clarified" that this announcement was outside of the authority previously granted. This legislation stopped short of entirely revoking the position in the announcement and provided that for deals in place before January 16, the day on which legislation containing these provisions was introduced, the announcement "shall be deemed to have the force and effect of law with respect to any ownership change."

b. If so:
   i. does the retroactive effect of such a statute has a legal basis in the Constitution or the General Tax Act?

      No. Since the degree of permissible retroactivity under the federal constitution is so broad, there is no special doctrine needed. Congress is far more likely, as a political matter, however, to enact such statutes that other provisions with either "retroactive" or "retrospective" effect.

   ii. is there a special term for this kind of 'retroactivity'?

   iii. what standards are used to determine that the 'interpretative statute' is actually 'interpretative'? Is it regarded as a problem that possibly the statute confirms the view of the tax authorities, while (some) tax payers have a defensible/justifiable different interpretative view?

      A taxpayer is ordinarily not treated as having a vested position in any statute setting forth a tax law, much less in any particular interpretation of it.

Nevertheless, Congress may acknowledge in an interpretive statute a difference between taxpayers who have clearly have relied on the prior law and those who have not; thus, in the statute in involved Wells Fargo, 485 U.S. 351 (1989), honoured the exemption claimed by those who did not include the notes in question in their estate tax returns (many of whom had paid a premium on the expectation that the notes would be exempt from estate tax.

iv. when answering the questions of sections B, C, and D and question 22 of section F, please discuss whether different standards are used for examining retroactivity of interpretative statutes (in comparison with the normal standards used to examine retroactivity).

(4) A third conceptual variation concerns the so-called validation statutes. A judicial decision may deviate from the legal practice (shared view by tax payers and tax authorities) or the view of the tax authorities. It happens that the legislator then introduces a statute with retroactive effect to 'validate' the legal practice or the view of the tax authorities. Although it sometimes happens that the Dutch tax legislator introduces a statute with retroactive effect to 'overrule' a judicial decision, the phenomenon 'validation statute' is not recognised as such.

a. Does your legal system recognise the phenomenon of 'validation statute' as such?

Such statutes are possible, but in general are not recognised as a distrust category treated as creating any special challenges under the federal constitutional standards regarding retroactivity. It is assumed that the primary distinction between the "interpretative" structure that is the subject of question and the "validation" structure here is the intervention of a judicial decision. For a survey of the Congressional practice in reaction to the decisions of the Supreme Court (perhaps significantly making no note of Congressional intent with respect to retroactivity, see Nancy C Staudt, Rene Lindstadt, and Jason O'Connor, Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005, 82 N.Y.U. L. Rev. 1340, 1383-1394 (2007). Such statutes in general could not change the outcome of a case that had already been finally determined by a court and a final judgment entered. This prohibition stems not from a simple rule against retroactivity, but concerns for separation of powers. Plant farms.

In a series of older cases, such validation or ratification was permitted in situations involving far more retroactivity than involved in most modern cases. For instance, in Rafferty v. Smith, Bell & Co., 257 U.S. 226 (1921), the Court allowed a curative act enacted in 1920 to legitimate tariffs collected in 1916 and subsequently held invalid, when litigation challenging collection still pending; in United States v. Heinszen & Co., 206 U.S. 370 (1907, the Court allowed a similar a curative act enacted in 1906, ratifying a tariff collected between 1899 and 1902 for which courts had held there was no authority after the status of Philippines changed on the ending of hostilities there.

In a dissent from a procedural order, Justice White indicated that this category may still have legal significance, Van Emmerik v. Janklow, 454 U.S. 1131 (1982), when he stated that "The difficulty in discerning the difference between permissible curative legislation and unconstitutionally retroactive legislation is apparent from an examination of our case," in a case in which a state court had upheld curative *legislation enacted in 1981 that retroactively imposed sales tax initially erroneously collected in 1969 after that same state court had ruled that original tax invalidly collected.*

Congress recently had an opportunity to enact this type of curative tax legislation, but declined to do so; there is no public record of the nature of its reluctance to act in this way. Over most of the twentieth century, an excise tax was imposed on "long-distance" telephone service, with "long distance" defined as service for which the rate charged was determined by duration of the call and distance. Beginning in the late 1980's telephone service providers began to charge "flat rate" for long distance calls—some such providers apparently understanding that in doing so they might avoid the excise tax. The government urged the courts to interpret the statute so as to permit continued collection for "long distance" service even if the measure of the charge no longer fit the statutory description; the courts refused. Although Congress could have enacted a "interpretative" provision (as described in the above question) when this problem first surfaced, see Rev. Rul. 79-404, 1979-2 C.B. 382 and GCM 37273 (ruling that the excise applied to certain maritime telephone service, despite the lack of fit with the statute), or a "validation" provision, as that term is used here after the government began to lose in the district courts, it chose not to do so for reasons that do not appear in the public record. Instead, after the government lost numerous cases in the courts, the government granted" refunds based on formulaic determinations rather than actual computations of amounts owed , the adequacy of which is still snarled in litigation. See, e.g., Cohen v. United States, August 7, 2009 (D.C. Cir.). Even now, Congress has failed to act, apparently because the political stakes are difficult.

> ***Subnational.*** *In practice in the states, a distinction may be made between those "validating" or "curative" provisions which redefine liabilities in ways that would have been clearly within the power of the taxing body if enacted or properly assessed at the earlier time, and those which purport to grant power (for instance, to a more local unit of government) that has been determined not to have been present at the earlier time. IEC Arab Ala., Inc. v. City of Arab, 7 So. 3d 370 (Ala. 2008)(allowing 1997 alteration of measure use tax to close retroactively to 1994 judicially expanded gap in sales/use tax base after change in federal commerce clause limitations rendered earlier tax invalid); Gautier v. Crescent City, 138 Fla. 573 (1939)(permitting retroactive validation of faulty real estate tax assessment).*

b. If so:
    i. what standards are used to determine that the 'validation statute' really validates legal practice (and not only the unilateral view of the tax authorities)?
    ii.

       Since the degree of permissible retroactivity is so broad, none would be necessary.
    iii. what is the difference between a 'validation statute' and an 'interpretative statute' (if, in your country, this phenomenon is also separately recognised)?

Neither is recognized as a distinction category, even in the states with stricter limitations, and therefore no distinction is made between the two categories.

iv. when answering the questions of section B, C, and D and question 22 of section F, please discuss whether different standards are used for examining/assessing? retroactivity of validation statutes (in comparison with the normal standards used to judge retroactivity).

(5) In the Dutch legal system, the date of the entry into force of a statute should be on or after the date of publication of the statute in the Government Gazette. A conceptual distinction is made between the date of entry into force of a statute and the effective date of a statute. If retroactive effect is granted to a statute by the legislator, the date of entry into force still is a future date, but the statute's effective entrance date is a date in the past. This explains why, at least in Dutch legal discourse, the relevant moment to compare with in order to determine whether a statute has retroactive effect, is the date of the entry into force of the statute.

a. Does legal discourse in your country also employ a difference between the date of entry into force of a statute and the effective date of a statute? And is the 'comparison moment' also the moment of entry into force, or is it the moment of the publication in the government's official journal?

Federal statutes ordinarily become law or "are enacted" (and thus "enter into force") immediately upon the final act prescribed by the Constitution (generally signing by the President, a vote to override a Presidential veto of a bill passed by both the House and the Senate, or the passage of time without Presidential action). No additional act of publicity is required. The relationship of such dates to the effective date of the statute has no legal significance. As noted in the answer to Question A.1.c above, tax statutes are regularly "enacted" with "effective dates" that are several months earlier, and sometimes enacted with "effective dates" that are dates before the beginning of the current calendar year.

Although a bill will become "enacted" and "enter into force" as a "public law" under the above procedure, particular sections of such laws frequently will have separate effective dates. These effective date provisions can be very detailed, with very different rules applying to different situations. Although these rules will almost always be stated in seemingly general terms (e.g., [this provision will not apply] contracts that became binding before [specific date], they frequently have been written with the specific circumstances of specific taxpayers in mind. These special transition rules will frequently be found only in the "statutes at large" and will not be included in the codified versions of the statutes. (This legislative procedure is different from the "private bill" procedure, through which very rarely special exceptions to the general application of tax provisions can be made.)

Subnational. *Many states have special constitutional limitations on the date on which statutes may enter into force, with, for instance, different procedures and majority requirements for statutes that are to have an effective date before they enter into force. Even in these states, this distinction does not seem to affect the legislature's ability to impose a tax with an early effective date, so long as the special limitations on such legislature generally are met. E.g., Homestake Mining Co. v. Johnson, 374 N.W.2d 357, 363-64 (S.D. 1985) (holding that despite a provision requiring a supermajority in order to have a statute enter into force before 90 days after its passage, there need be no supra majority to have a statute that does not enter into force until that time require a report that takes into account taxable activity prior to that time; Mecham v. State Tax Comm'n, 17 Utah 2d 321(1966)(holding* *that a statute that could not "take effect" until May 11, 1965, could nevertheless set rates for taxable years beginning January 1, 1965).*

(6) Although, in Dutch legal discourse, material retroactivity ('retrospectivity') is distinguished from formal retroactivity, there is not one definition of material retroactivity that is generally accepted and used. Furthermore, it is not clear which situation is one of 'material retroactivity'. The above-mentioned example of a statute that enters into force on January 1, 2010, and that stipulates that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealised gains, would certainly be regarded as an example of 'material retroactivity'. However, if a statute that enters into force and that stipulates that interest on a certain type of loan is not tax-deductible anymore without grandfathering existing loans, many but not all authors in literature would call that 'material retroactive'.

a. How is the concept of retrospectivity defined in your country?

As noted above, since the conclusion that a tax statute is "retroactive" or "retrospective" has no legal significance in itself, there is no single definition or set of criteria used to distinguish such statutes.

The most commonly articulated descriptions of statutes that are invalid because of their retroactive effect are "harsh and arbitrary," As described further in response to question 15, the United States Supreme Court has not found any statute invalid because of its retroactive effects since 1930, and even before that, only in a very limited context.

b. Please provide some examples of situations that would be regarded as retrospective and – if possible – some examples of situations that would not be regarded as retrospective.

The literature in the United States recognizes that any change in taxes will affect the value of commitments and investments in place at the time. It is generally well-accepted that changes such as changes in the rate at which unrecognized gains would be taxed and changes in the rules affecting the ability to offset future items of loss against future items of gain of a slightly different sort are within the legislature's power. Therefore the question for courts examining legislation under the federal standards regarding retroactivity is not whether the statute is retroactive or retrospective, but whether the operation of that statute is so harsh or arbitrary that it violates due process. (See answer to Question 15 below for further discussion of this standard.)

Somewhat more controversial is the ability of the legislature to change the terms of tax legislation that has been enacted in order to induce particular behaviour. Congress rarely enacts such legislation, so it is difficult to conclude what the reaction of the courts would be. The only case in which the modern Supreme Court has held that Congress enacted a statute that was invalid because of its retroactive effect involved a statute that the Court viewed as having attempted to alter the terms of a binding contract. See the discussion of these cases in the answer to question 15 below.

Subnational. *Even in those states whose constitutions contain express limitations on "retroactive" or "retrospective" legislation it is difficult to ascertain a particular standard applied in assigning these labels. (One aspect of the problem seems clear: there is very little discussion of these questions outside of judicial opinions, and if the legislature in a particular state, adhering to its view of its constitution, does not enact arguably retrospective tax measures, the courts never opine upon them.) Thus in Martin v. Board of Assessment Appeals, 707 P.2d 348 (Colo. 1985) the court allowed effect to* *a statute passed in mid-1982 to alter the assessment of a newly converted condominium property as of January 2, 1982, and in doing so hinted that a deviation in way old tax was administered could be different from new tax; but the court then went on to indicate that its view would not be substantially different from results in jurisdictions with no express limit on retroactivity.*

Some noteworthy situations in which state courts have denied that legislation had retroactive effect have arisen when a state imposes a tax measured almost entirely by the amount of income shown on a federal tax return. In some such cases, the courts have simply ignored the fact that the amounts shown on the federal return may reflect past events. Thus, in Tiedemann v. Johnson, 316 A.2d 359 (Me. 1974) the state court held that the use of the federally reported adjusted gross income resulted in a tax that was "wholly prospective," even though the federal amount included gains on real property resulting from installment sales which had occurred before the enactment of the state income tax. Marco Associates, Inc. v. Comptroller of Treasury, 265 Md. 669 (1972)(essentially same as Tiedeman).

In Couchot v. State Lottery Comm'n, 74 Ohio St. 3d 417 (1996) the court allowed application of a statute enacted on July 1, 1989 extending the state income tax to cover payments received after that date by a nonresident who won the lottery in March 1988, despite a state constitutional prohibition on "retroactive laws."

(7) With respect to the impact of a statute having 'immediate effect', a distinction is usually made between substantive statutes and procedural statutes. A substantive statute with immediate effect applies to taxable events occurring after the date on which the statute enters into force, while a procedural statute immediate effect is directly applicable on pending proceedings (so also to proceedings regarding taxable events that occurred prior to the date on which the statute enters into force).[6]

a. Is this distinction (with respect to the impact of a statute having immediate effect) between substantive statutes and procedural statutes also made in your country?

This distinction is made in the criminal area, where a constitutional prohibition on ex post fact laws is strictly adhered to.

The distinction between substantive and procedural rules does not apply to substantive tax rules enacted by Congress. The distinction between substantive and procedural rules may apply to tax rules promulgated by the Internal Revenue Service and Treasury, see separate answers.

b. If so, what kind of tax rules are considered procedural rules (e.g., also rules regarding evidence and the burden of proof)?

NB
(i)If relevant, please state two differences in the use of the concepts in fiscal literature, case law, and parliamentary history;
(ii) If in your country the meaning of or the application of concepts differs depending on the nature of the tax concerned (e.g., (corporate) income tax, VAT, withholding tax, etc), please discuss.

B. *Ex ante* evaluation of retroactivity

[6] E.g., ECJ C-61/98 (*De Haan*), pt. 13: "It should be noted in this connection that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force."

(8) In some countries, the Constitution imposes limitations to retroactivity of tax statutes. There seem to be three variants: (i) the limitations are derived from a general principle (e.g., the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of the rule of law, and the ability to pay principle) that is laid down in the Constitution, (ii) the limitations are explicitly laid down in a general[7] provision, (iii) the limitations are explicitly laid down in a provision that specifically regards taxation.

a. Does your Constitution include a provision that imposes limitations to retroactivity of tax statutes? If so, what variant(s)?

The US Constitution contains only one provision that expressly forbids retroactive legislation, Art I, Sec 9, cl. 3 provides that "No...ex post facto law shall be passed." This provision has been held to apply only to criminal proceedings, and thus not to ordinary tax matters, or more generally, to "economic legislation" of broad application. Two other provisions are relied upon by those challenging retroactive tax legislation, the fifth amendment ("No person shall be ... deprived of life, liberty, or property without due process of law") and the contract clause (art. 1, sec. 10, cl.1)(These two provisions are literally applicable only as a limitation on the federal govenment, but incorporated through the 14th amendment to apply to the stress.

Subnational. *All states are subject to the due process clause in the fourteenth amendment of the federal constitution. The authorities developed under this provision have been considered throughout this questionnaire as "federal" authorities. Every state also has its own equivalent of a "due process" clause, and most have "ex post facto" and "contract" clauses. Rarely are these provisions found by modern courts to have content different from their federal counterparts.*

As noted above, several states have provisions specifically restricting retroactive civil legislation. In Colorado, Missouri, New Hampshire, Tennessee the state constitution expressly prohibits "retrospective" legislation; in North Carolina the proscription is on "restrospective tax" legislation particularly. In Georgia, Ohio, and Texas, the prohibition is on "retroactive" legislation.

(9) The Dutch State Secretary of Finance has published (and discussed with Parliament) a memorandum that incorporates the main lines of his 'transition policy' with respect to the introduction of tax statutes. The memorandum is not legally binding, but it has some influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect.

a. Does the government of your country have a transition policy in general and/or in the field of tax statutes, and if so has the policy been published?

There is no such general rule prescribing the terms for transition policy with respect to tax changes. Policies of the type described here would ordinarily be dealt with as internal rules of Congress. The leadership of each Congress is free to set this type of rule, and frequently does so; for instance, specific rules are prescribed relating the effect of tax changes on the deficit (so-called "Pay-go" rules), but none have address retroactivity. For more on this type of rule, see Elizabeth Garrett Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. Chi. L. Rev. 501 (1998).

On occasion, when a major reform effort is undertaken, Congressional leaders will signal, albeit perhaps vaguely, their intentions about the degree of retroactivity anticipated. Thus, in a speech to the Economic Club of New York in February 1985,

[7] Not only regarding tax statutes.

House Ways and Means Chairman Dan Rostenkowski (D-III.) in anticipation of the process that would lead to the Tax Reform Act of 1986 stated:

> *The price of reform must be affordable. No one sector should be crippled by the elimination of present breaks. No person should be penalized tomorrow for doing something that's perfectly permissible today.*
> *The transition from the old code to the new code must be without abrupt and arbitrary changes. Transition rules will be a major concern in drafting.*

85 TNT 41-3. Shortly thereafter, this position was affirmed in a joint statement with Rostenkowski's counterpart in the Senate, see 26 Tax Notes 1192 (March 25, 1985).

[No similar policies at the state level were encountered in this research, but the research was not exhaustive.]

b. If so, in what form has this been done, e.g., in a kind of memorandum or an Act? To what extent is this policy legally binding, e.g., has it only influence in the parliamentary debate or do also judges take the policy into account if they test transition law for compatibility?
c. If a transition policy in the field of tax statutes has been published, what are the policy guidelines with respect to (i) granting retroactive effect to statutes and (ii) grandfathering?
d. Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to tax payers?

No such policies were identified, except in the increasingly common federal practice of extending lapsed provisions that benefit taxpayers on a retroactive basis. See question 13 below.

> ***Subnational.*** *In some states, however, such practices can raise problems if they are viewed as "gifts of public property" to the taxpayers benefitted. Cf. Preston v. State Bd. of Equalization, 25 Cal. 4th 197 (2001)(court gave retroactive effect to a statute "clarifying" prior law so as to undo the effect of judicial decision which retroactively benefiting the taxpayer and thus would make gift of public funds)*

(10) In the Netherlands, the Council of State provides advice to the government and Parliament with respect to legislative proposals. The Council of State has laid down criteria with respect to the question of when, in its opinion, granting retroactive effect to tax statutes is allowed.

a. Does an institution like a Council of State (*Conseil d'État*) exist in your country? NB It might be that in your country instead of, or in addition to, the Council of State, another institution (e.g., the Supreme Court) could be asked for advice. If so, please answer the following questions (also) for that other institution.

In the United States, at the federal level, there is no means by which Congress may obtain an advisory opinion from the Supreme Court, and there is no other authoritative institution.

> ***Subnational.*** *Such procedures are available in some states, and can be used both to determine whether the court would give interpret the legislation to have retroactive effect and whether such legislation was impermissibly retroactive. See, e.g., Opinion of Justices,*

370 A.2d 654 (Me. 1977)(ruling that a submitted initiative that if passed, would void a legislatively enacted local tax, would not be interpreted to have retroactive effect).

b. If so, does it follow certain rules to review proposed retroactivity in tax statutes?
c. And does it follow certain rules to review whether or not grandfathering is necessary?

Subnational. *No stated policies have been found, and the practice is too rare to make generalizations from the existing examples.*

d. Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to tax payers?

C. Use of retroactivity in legislative practice

(11) In the Netherlands, the legislator occasionally makes use of the so-called instrument of 'legislating by press release':[8] it is announced in a press release that a bill is (or will be) proposed in Parliament and that the bill provides for retroactivity till the date of the press release.

a. Is this instrument used in your country?

Congress will frequently use a date prior to the effective date of legislation as the limit of the extent to which the substantive provisions will be retroactively applied. Various dates may be used, including
a date connected to an administrative pronouncement, or
a date with significance in the legislative process including
a presidential budget message,
a committee announcement or press release,
the introduction of a specific bill,
the release of a committee report,
the date a bill is passed by both houses,
the date a conference agreement is reached,
or the date of enactment itself.
See generally Testimony of Mortimer Caplin, former IRS Commissioner, Hearings Before the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, April 15, 1996 available at 96 TNT 75-35.

The courts have not expressly relied upon these earlier announcements in determining the degree of retroactivity to be permitted, although in the leading case allowing retroactive application of tax legislation, United States v. Carlton (1994), the Court recited that such announcements had been made. The extent of retroactivity was relatively small given this announcement (retroactive to October 1986, from an administrative announcement in January 1987 warning of legislation introduced in February 1987 and finally enacted in December 1987, but the behaviour of the taxpayer affect by the retroactivity had already occurred (in December 1986).

[8] For an example, see the disputed retroactivity in the *Stichting Goed Wonen II* case (ECJ C-376/02).

b. If so, in what kind of cases? E.g., only in cases of anti-abuse legislation or also in cases of a policy change and if the government wants to prevent so-called announcement effects?

Such announcements are likely to be used in various types of tax and other legislation.

(12) Sometimes the Dutch tax legislator grants retroactive effect to tax statutes reaching further back in time from the moment of the first announcement (e.g., by press release) of the bill in question.

a. Does your legislator grant retroactive effect in cases in which the instrument of 'legislating by press release' is not used? If so, in what kind of cases?
b. And does it happen that the retroactive period reaches further back in the past than the date of the press release? If so, in what kind of cases?

The classic list of accepted US federal practice can be found in Laurens Williams, Retroactivity in the Federal Tax Field, 12 U.S.C. Law School Tax Inst. 79 (1960)

> *1. Legislation is commonly made retroactive to the beginning of the year of enactment. At times, too, there are provisions enacted shortly after the end of the first year to which they are retroactively made applicable.*
>
> *2. Provisions which are nominally prospective only will frequently have future application to transactions irrevocably entered into years previously. In contrast, Congress will at times exempt situations entirely when before the date of enactment, transactions had been completely culminated or even where only binding contracts or other commitments had been made.*
>
> *3. Retroactivity may be employed to eliminate a "loophole" or "unintended benefit," although even here -- depending upon the egregiousness or the revenue loss at stake -- Congress leans towards post-enactment application.*
>
> *4. Retroactivity is at times adopted to correct technical errors in prior legislation -- "technical," "clerical," "typographical," or "grammatical" errors. Related to this is the so-called "clarifying" amendment, made to "reflect" a supposed "Congressional intent," which is usually made retroactive but may be made prospective when doubt exists about the meaning of the prior law.*
>
> *5. Mention should also be made of legislation which confers a benefit on taxpayers or corrects hardships inadvertently created in previously enacted legislation. Here retroactivity is generally considered unobjectionable, although recognition must be given to the cost-shifting effect of the overall burden on other taxpayers.*

(13) If the retroactive period is long, it could happen that pending legal proceedings are influenced.

a. Does it happen in your country that retroactive effect is granted to substantive statutes as a result of which also pending legal proceedings are influenced?
b. Or is it common that pending legal proceedings are excluded from the application of the new statute?

There is no established modern practice for Congress.

Early cases allowed Congress to affect the outcome in pending cases through the enactment of retroactive legislation, e.g., United States v. Heinszen & Co., 206 U.S. 370 (1907) (holding valid a curative act enacted in1906, ratifying a tariff collected between 1899 and 1902 for which courts had held there was no authority after the status of Philippines changed on the ending of hostilities), but see Forbes Pioneer Boat Line v. Board of Comm'rs, 258 U.S. 338 (1922)(holding state legislature could not ratify illegally collected tax after final judgment holding such exaction illegal, although unclear whether judgment was result of presence of final judgment, after which the legislature could no longer act, or the pure retroactive nature of tax). See question A.3 above, regarding curative legislation.

(14) In the Netherlands the legislator sometimes grants retroactive effect to tax statutes that are favourable to tax payers.

a. If that also happens in your country, in what kind of situations does it happen?

Such effects are common when, as part of the income tax, Congress enacts "extender" legislation after a provision that was subject to sunset has expired. For instance, the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (dealing with a wide variety of incentive and special relief provisions) was not enacted until October 2008, but was effective for tax years beginning after December 31, 2007. This practice is not distinguishable from that in which the provisions with similar retroactive effect are unfavourable.

D. *Ex post* evaluation of retroactivity (in case law)

Introduction.

Courts may or may not test Acts of Parliament against the national Constitution. In Dutch law, the courts are not allowed to test Acts of Parliament for compatibility with the Constitution nor with general legal principles, because of a constitutional prohibition to do so. The courts are however permitted to test Acts of Parliament for compatibility with international treaties: as far as such an Act infringes a treaty provision that has direct effect, the courts must not apply the Act. Furthermore, the courts are allowed to examine subordinate legislation (i.e. not Acts of Parliament) for compatibility with legal principles.

With respect to the possibilities of a Dutch court to review retroactivity of tax regulations, the above implies that:

(i) the retroactivity of an Act of Parliament on a tax matter cannot be tested against the principle of legal certainty (nor against the principle of legality);

(ii) however, if an Act of Parliament on a tax matter falls within the scope of European Community law, the retroactivity of such an Act can be tested against the general principles of European Community law, viz., the protection of legitimate expectations and legal certainty;[9]

(iii) the retroactivity of an Act of Parliament on a tax matter can also be tested against Article 1 of the First Protocol ('protection of property') to the European Convention on Human Rights (ECHR),[10] although the Dutch Supreme Court has – up till now – never found retroactivity incompatible with that provision;

(iv) the retroactivity of subordinate legislation can be tested against the principle of legal certainty.

[9] E.g., the *Stichting Goed Wonen II* case (ECJ C-376/02)

[10] E.g., compare the examination of the retroactive effect of a Finnish tax statute for compatibility with Article 1 of the First Protocol ECHR in the case of *M.A. and 34 Others against Finland* (Application no. 27793/95 (decision); see the HUDOC database under 'case law' at <http://www.echr.coe.int/>).

(15) Is it possible in the legal system of your country that courts test the retroactivity of a tax statute for compatibility with the Constitution and/or with general legal principles such as the principle of legal certainty (including the principle of legitimate expectations)?

In the United States, both the federal courts and the state courts have the authority to, when at the behest of litigants, test the retroactivity of a statute for compatibility with the federal Constitution. It is generally accepted, as one might infer from the answers above, that the Supreme Court of the United States has the final word on the degree of retroactivity that would be permissible under the due process clauses of the federal Constitution, as they apply both to Congress and to the state legislatures. The highest courts in the several states will have final word on the degree of retroactivity permitted to the state legislatures under the distinct provisions in each state constitution.

(16) If, in your country, courts can test the retroactivity of a tax statute against the Constitution and/or with general legal principles, what examination method do courts apply? In other words: when would courts rule retroactivity incompatible?

Restraints on retroactivity based on the federal constitution. *There are technically two strains of* ***federal*** *constitutional doctrine that might be relied invoked to limit the enactment of retroactive taxes. The first involves potential limits on the power of the federal Congress to impose retroactive taxes, primarily under the fifth amendment's command that property not be taken by Congress without Due Process of Law, but also under the "contract clause."*

The second involves the potential limits under the fourteenth amendment on the state legislatures' ability to impose taxes. In modern practice the two lines of Supreme Court authority based on federal law are generally viewed as one. Both strands involve interpretation of essentially the same language and, in general, have involved the same type of review.

However, because the federal government and the states are subject to substantially different limitations on their taxing powers and because the procedures according to which taxpayers may invoke the power of courts to challenge taxes, the overall pattern of the cases historically has been somewhat different. As further described below, in several instances, the Supreme Court has disallowed that the actions of state legislatures attempting to remove taxpayers' rights to pursue refunds in the same way that a curative statute might have allowed.

Note that in the analysis that follows, the distinction between cases involving "simple retroactivity" and "validation/curative" provisions is made entirely for ease of comparison; the distinction is rarely if ever made in a way that affects the outcome of cases. The distinction between these two types of retroactivity and retroactivity that "impairs contracts" is a significant legal distinction, but the latter will depend upon the presence of a binding mutual contract and not on mere reliance.

1.a. Federal constitutional limitations on Congressional acts: simple retroactivity. *There is no modern opinion of the Supreme Court holding an act of Congress unconstitutional solely as a result of its retroactive effect. Those cases in which challenges have been raised have not, however, dismissed the possibility that a tax provision could be invalid because of its retroactive effect. This possibility has arguably led to restraint on the part of Congress to avoid objectionable retroactivity. For a summary of the modern cases, see*

Charlotte Crane, Constitutional Limits on the Power to Impose a Retroactive Tax, in Blessings of Liberty: The Constitution and the Practice of Law (1988).

The more significant of these cases, and the language used therein, include:

> *In United States v. Carlton (1994), the Court gave effect as of October 1986 to a statute enacted in December 1987, announced Jan 1987 for which legislation introduced in Feb 1987, which removed the tax benefit associated with a transaction undertaken by an estate in December 1986, for transfer tax relating to a death that occurred Dec 1985. The amendment was accepted by the Court as curative, given the legislation history of both the original 1986 provision and the later act, although that characterization arguably not determinative.*
>
> > *The majority opinion articulated the standard to be applied: The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation: "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 . . . .*
> >
> > *Justice O'Connor, concurring, stated: The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose. . . . In every case in which we have upheld a retroactive federal tax statute against a due process challenge . . . the law applied retroactively for only a relatively short period prior to enactment.").*
>
> *In United States v. Hemme, 476 U.S. 558 (1986), the Court allowed a statute signed 10/4/86 to limit ability to claim unified credit for estate and gift taxes, where limit applied to those making gifts in month before new provisions enacted and limit intended to block double benefit such as that hoped for in case. The case provides little in the way of interesting insight, since its reasoning was largely that the estate paid no more tax as a result of the change than it would have without it—the retroactive feature of the legislation had simply meant that the taxes were more than they would have been if there had been no retroactive feature.*

In United States v. Darusmont, 449 U.S. 292 (1981), the Supreme Court permitted legislation enacted in October 1976 to apply to tax years beginning anytime in 1976 in the threshold for determining when an alternative base and rate would apply. In language far more permissive than that used in Carlton, it indicated that the mere fact that an increase in tax rates was made retroactive would rarely constitute a violation of the due process clause. According to the Court:

> *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, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."*

The Court included three criteria which other courts have interpreted as indicative of the situations in which retroactivity might not be permitted:

> *Namely, whether the taxpayer could have altered his behavior to avoid the tax if it could have been anticipated by him at the time the transaction was effected; whether the taxpayer had notice of the tax when he engaged in the transaction; and whether the tax is a new tax and not merely an increase in the rate of an existing . . . tax.*

In only one set of cases has the Supreme Court held that simple retroactive taxes imposed by Congress are invalid; in these cases the result was held to be a denial of due process. These cases all involved the imposition of estate or gift taxes that applied to transfers occurring before the effective date of the statute. The modern federal estate tax was not enacted until 1916; the modern gift tax component--extending the transfer tax scheme to gifts not made in contemplation of death--was not permanently enacted until 1932, but it was temporarily introduced in 1924, and was repealed within two years. Because this line of cases is the sole authority for denying effect to retroactive tax legislation based on the limitations contained in the due process clauses article I and in of the fourteenth amendment, it is very frequently cited. Therefore it may be helpful to provide more detail about these cases:

> *In Nichols v. Coolidge, 274 U.S. 531 (1927) the Court held that an inter vivos transfer (not in contemplation of death) to a trust in 1907, the corpus of which was to be distributed at the settlor's death could not constitutionally be subject to a tax enacted by statute effective February 19, 1919 (called the Revenue Act of 1918), since such a tax would be so arbitrary and capricious as to amount to confiscation under the fifth amendment. In this case, the Court's opinion made much of the fact that the property actually included in the decedent's estate would bear the burden of a tax measured by property over which the executor's of the estate would have no control, since they would have no control under state law of the previously settled property.*
>
> *In Blodgett v. Holden, 275 U.S. 142 (1927), the Court evenly divided in a case considering the effect of the June 1924 enactment of a [by then known to be temporary] gift tax first introduced in Congress in February 1924 on gifts made in January 1924. An opinion in which four of the justices joined held that the tax was arbitrary ("It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."); in a second opinion the other four of the justices thought the taxing statute inapplicable to the gifts in question.*
>
> *In Untermeyer v. Anderson, 276 U.S. 440 (1928), the Court held that the retroactive provision of the gift tax of the Revenue Act of 1924 [again, by then known to be temporary] enacted June 2, 1924 was invalid as applied to a gift made on May 23, 1924 (at which date the ultimate enactment was all but certain, that is, the conference between the House and Senate to reconcile deviations between the legislation by those two houses had been held, and all that remained was ratification by the two houses of the conference agreement and a presidential signature). In a strident dissent, Justice Brandeis listed in detail the many prior federal tax statutes with far more retroactivity than was present in this case, as well as several instances of similar retroactivity in foreign jurisdictions.*

The anomalous nature of the Untermeyer result was made clear in Milliken v. United States, 283 U.S. 15 (1931), in which it was held that a February 1919 change in the rates *could apply to a December 1916 transfer made in contemplation of death: " a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character." There were no dissents.*

These cases were effectively dismissed by the majority (but not by the dissent) in Carlton:

> *These cases were decided during an era characterized by exacting review of economic legislation under an approach that "has long since been discarded... To the extent that their authority survives, they do not control here.*

1.b. Federal constitutional limitations on Congressional action: ivalidations and cures. *Congress has not enacted any provisions that have either attempted to cure defective tax collections, or attempted to block taxpayers' attempts at refunds for improperly collected taxes, so there are no modern cases looking at the possible limitations that might apply. It is clear, however, that the separation of powers doctrine prevents Congress from interfering with a judgment once it is final. Cf. Plaut v. Spendthrift Farm, 514 U.S. 211 (1995).*

1.c. Federal constitutional limitations on Congressional action: alteration of tax consequences in breach of contract. *In United States v. Winstar, 518 U.S. 839 (1996), the Supreme Court held that the government, because of the existence of an implied duty of fair dealing, cannot alter a regulatory treatment that was the object of a contract between the regulated party and the government. (The standard that it used to determine that the contract term in question was material is not clear, and the case is in many respects sui generis.) In a series of cases involving essentially the same contracts, the federal courts have treated the tax treatments involved as unsusceptible to even congressional change. See, e.g., Centex Corp. v. United States, 431 F.3d 1342 (Fed. Cir. 2005); Nat'l Australia Bank v. United States, 452 F.3d 1321 (Fed. Cir. 2006); Local Okla. Bank v. United States, 452 F.3d 1371 (Fed. Cir. 2006).*

A good entry into the relationship between the contract clause doctrines involved in Winstar, the general due process limitations on retroactive taxation, and the other limits on governmental takings of private property can be found in the pamphlet prepared by the Congressional Research Service, Retroactive Taxation of Executive Bonuses: Constitutionality of H.R. 1586 and S. 651, CRS (March 25,2009) (analyzing legislation that would impose taxes on those businesses receiving stimulus package bailouts and paying bonuses). See generally Daniel S. Goldberg, Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar on Retroactive Tax Legislation, 14 Am. J. Tax Policy 1(1997); Charlotte Crane, Honoring Expectations about Taxes: Are Roth IRAs Different? (manuscript available on SSRN).

2. a. Federal constitutional limitations on state legislative actions: simple retroactivity.

The Supreme Court of the United States has been just as unwilling to interfere with the imposition of retroactive state taxes it has been to interfere within the enactment of retroactive federal taxes. In only one case, decided in the same era as the case involving retroactive federal taxes cited above, Coolidge v. Long, 282 U.S. 582 (1931)(four justices dissenting) was a state tax on successions was held invalid because of its retroactive nature, here, with the Court citing under both and the due process clause of the fourteenth amendment and the contracts clause (apparently treating the establishment of a trust as a *"contract" with the state). This case involved the same gift as that involved in Nichols v. Coolidge; the state tax was held invalid because it was deemed to be a tax on a succession to a gift completely vested (both through the establishment of the trust in 1907 and in the relinquishing of the settlors' rights in the trust in 1917) before the 1921 enactment of the taxing act or of any other law taxing successions received by lineal descendants of the donor. The anomalous nature of this case seems apparent in light of the decision in Welch v. Henry, 305 U.S. 134 (1938) (Roberts, McReynolds and Butler dissenting) in which a change in the Wisconsin income tax enacted in March 1935 was allowed to operate on a dividend received in 1933.*

b. Federal constitutional limitations on state legislative actions: ineffective cures. *In Forbes Pioneer Boat Line v. Board of Comm'rs, 258 U.S. 338 (1922) the Court held that a state legislature could not ratify illegally collected tax after final judgment holding such exaction illegal, although unclear whether judgment was result of presence of final judgment or pure retroactive nature of tax. A review of the cases that have been decided by state courts reveals a conflict within the state courts regarding when curative actions will be barred by either the federal or the state constitutions.*

In a closely related context, however, the Supreme Court has been very hostile to attempts by state legislatures to limit the effect of judicial opinions holding state taxes invalid. (This is a far greater concern for states than for the federal government, because there are many more restrictions on the powers of states to impose taxes. Some of these restrictions are based in constitutional law that may evolve over time, leaving a large amount of previously collected revenue subject to claims for refund. In a series of cases, the Supreme Court intimated that it will not accept prospective applications of decisions invalidating state taxes, at least if the state does not provide a method of challenging the tax before payment. Newsweek, Inc. v. Fla. Dep't of Revenue, 522 U.S. 442 (1998), Reich v Collins 513 US 106 (1994); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990). Although in all three of these cases the Court's language suggests that it believed the states in question had acted in bad faith by changed the remedies available to the taxpayers, the full import of this line of decision has yet to be fully understood. See, e.g., Ex parte Surtees, 6 So. 3d 1157 (Ala. 2008)(refusing to block taxpayer suits); E.C. Garcia & Co. v. Ariz. State Dep't of Revenue, 178 Ariz. 510 (1993) (legislature cannot change terms of refund suits for pending claims) See generally John Coverdale, Remedies for Unconstitutional State Taxes, 32 Conn. L. Rev. 73 (2000)

c. ***Federal constitutional limitations on State legislative actions: alteration of tax consequences in breach of contract.***

No relevant authorities were found

3a. ***Subnational. Restraints based on the state constitutions on simple retroactivity.*** *It should be noted, furthermore, that many state constitutions either have provisions that clearly impose stricter limits on tax retroactivity than the limits imposed by federal constitution, or have similar "due process" provisions that have been interpreted by the state courts to impose more stringent limitations. So long as the appropriate state court does not purport to be relying on federal precedent in interpreting similar language, it is free to interpret language similar to the federal language as imposing a greater constraint on its legislature; there is no imperative for uniform interpretation of similar language across state constitutions. A thorough examination of all of the relevant precedent would, therefore, require a separate set of answers for each of the 50 states, and* *perhaps for the several other distinct territorial jurisdictions. The cases included here are only examples and do not represent an exhaustive survey of possible cases.*

Examples of cases finding retroactivity invalid, and which are most in tension with the federal (lack of) restraint are presented here.

Oberhand v. Director, 193 N.J. 558 (2008)(as matter of "manifest injustice" a plurality refused to apply a retroactive reduction in the deduction for transfers to a spouse under the estate tax, where decedents had died between effective date of federal statute and the date of a state enactment "decoupling" the state provisions from the new federal.

Clarendon Trust v. State Tax Com., 43 N.Y.2d 933 (1978)(holding invalid a 1973 statutory change, conforming the treatment of trust capital gains with changes made in 1972 increasing the taxation of individual capital gains, despite evidence, including publications for taxpayer use, indicating 1973 statute was correcting an error)

People ex rel. Beck v. Graves, 280 N.Y. 405 (NY Ct. App. 1939)(holding that statute including in income rentals relating to mineral property outside the state made such rentals taxable for the first time, and thus was not "clarifying", and given its purported 19 year retrospective reach, was "unreasonable, arbitrary, capricious and palpably unjust."

Rivers v. State, 327 S.C. 271 (1997) (purporting to apply the federal standards articulated in Carlton, but holding that 1991 denial of refund enacted in 1989 to remove retroactive capital gains tax enacted in 1988 and relating to 1987 violated state due process clause.

Examples of holdings finding retroactivity valid, but suggesting justifications for allowing retroactivity that would be unnecessary under the approach used in applying the federal standards.

Brink Elec. Constr. Co. v. Dep't of Revenue, 472 N.W.2d 493 (S.D. 1991)(holding that since 1988 legislation only clarified ambiguities about whether 1984 and 1979 statutes imposing a gross receipts tax applied to contracts with federal and state government, the 1988 act could be applied retroactively to contracts granted in 1987)

3b. Subnational Restraints based on the state constitutions on validations and uses.

Allowing curative statute effect: Ex parte City of Arab & Ala. Dep't of Revenue, 7 So. 3d 379 (Ala. 2008)(allowing 1997 alteration of use tax to cure judicially expanded 3-year gap in sales/use tax base)

Miller v. Johnson Controls, Inc., 2009 Ky. LEXIS 196 (2009)(finding no constitutional problem with 2000 statute that denied right to file combined return to corporate groups for years prior to 1995 (reinstating administrative position that had been reversed by court in 1994) even though clearly effort to stem loss of revenue resulting from judicial position)(with dissent).

U.S. Bancorp v. Dep't of Revenue, 337 Ore. 625 (2004)(allowing application of rule promulgated in 1995, in response to judicial decision, to apply to 1988-1992)

Not allowing curative statute effect: City of Modesto v. National Med, Inc., 128 Cal. App. 4th 518 (2005)(not allowing retroactive application of ordinance that would replace unconstitutional (for failure to apportion) tax with constitutional tax)

Some states may have a bar to this type of curative legislation even when the litigation giving rise to the issue is still pending, e.g., Phelps Dodge Corp. v. Revenue Div, 103 N.M. 20 (1981) refusing to find a legislative act that undid a judicial decision rejecting an administrative position merely "curative" when the judicial decision had found the statute *unambiguous, and therefore refusing to apply it retroactively in light of the state constitutional prohibition on legislation that "shall affect the right or remedy of either party * * * in any pending case."*

Moran Towing Corp. v. Urbach, 1 A.D.3d 722 (2003)(allowing retroactive effect to statute intended to cure commerce clause/apportionment problems with tax previously in effect)

3c. Subnational Restraints based on the state constitutions on retroactivity frustrating contract-like reliance.

Enterprise Leasing Co. v. Ariz. Dep't of Revenue, 211 P.3d 1, (Ariz. Ct. App. 2008)(allowing retroactive removal of the possibility of obtaining a credit for pollution control devices for motor vehicles. The credit was initially enacted in 1994, to begin in 1995; claims began to be filed in 1999 for credits motor vehicle devices; legislature reacted in March 2000 to clarify. The court held that whether the legislature intended to restore put its original intent, or merely had decided that the costs involved were too great, there was no denial of due process in the legislation removing the credit.)

Baker v. Ariz. Dep't of Revenue, 209 Ariz. 561 (Ct. App. 2005, rev. denied)(allowing retroactive removal of incentives first defined in Jan, enhanced in April, enhancement removed in Dec, after moratorium in Oct. The unenhanced version can constitutionally be applied to sept purchase without contract clause problem; stating that Carlton "clarifies that a retroactive modification of a tax benefit is constitutionally permissible as long as its purpose is neither illegitimate nor arbitrary and the period of retroactivity is modest. Nothing in the opinion limits constitutional retroactivity to drafting errors"

Proof of actual reliance seems not to have made a difference in International Home Foods, Inc., Rayovac Corp v Dep't of Treasury, 264 Mich. App. 44 (2004)(holding that SBT, not constrained by 86-272, may be applied retroactively to tp, despite fact that DOT had advised tp it would have no tax liability)

Replan Dev., Inc. v. Department of Housing Preservation & Dev., 70 N.Y.2d 451(1987)(upholding removal of temporary special tax treatment for conversion of single room occupancy dwellings after tp had purchased and begun construction on such a project)

First American Nat'l Bank v. Olsen, 751 S.W.2d 417 (1987)(permitting the inclusion of state bonds, exempt until disparate treatment of federal bonds under federal law raised issues, in corporate franchise tax base, since that was not "on" the bonds but on the privilege of doing business, and thus not impairing obligation of contracts, despite express constitutional prohibition on retroactivity)

(17) Do the courts in your country test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR? If so, have the courts ever found a tax statute containing retroactivity incompatible with Article 1 of the First Protocol ECHR?

Not applicable.

(18) If the courts in your country test retroactivity of Acts of Parliament and/or subordinate legislation against the principle of legal certainty, what examination method do the courts apply?

(19) Do courts in your country use interpretations that avoid what might be retroactive applications, because such applications might raise further questions about legitimacy and validity?

Yes. Countless opinions will include reference to the idea that statutes should be interpreted so as to avoid issues regarding their validity, and interpretations of statutes that might raise issues regarding retroactivity are generally not excepted, even when the likelihood of the validity of the statute being threatened is small.
In United States v. Wells Fargo Bank, 485 U.S. 351 (1988), the Supreme Court openly acknowledged this practice when it interpreted a statute to exempt certain government debt only from income taxes, and not from estate tax, and thereby avoided questions regarding the constitutionality of statute that had clarified that such debt was subject to estate tax after a judicial decision otherwise, with retroactive effect only for those who had included the debt in their transfer tax return. This has long been an uncontroversial practice; an see, e.g., Levy v. Wardell, 258 U.S. 542 (1922), in which the Supreme Court rejected out of hand the argument of the government that transfers made by a decedent dying in December 1916 completed in 1907 should be considered subject to the 1916 estate tax enacted in September 1916. Reinecke v. Northern Trust, 278 U.S. 339 (1929) in which the 1921 estate tax was interpreted to not include within the decedent's estate trusts which could only be revoked with the participation of some one in addition to the original grantor/decedent.

> ***Subnational.** A similar practice is common in the states, and ordinarily seems not be different in those states with express prohibitions and those states without.*
>
> *California Co. v. State, 141 Colo. 288(1959)(interpreting severance tax to apply only prospectively in state with specific prohibition on retroactivity; brief and unexceptional treatment)*
>
> *In a handful of cases, however, the express prohibition may have resulted in a different interpretation that would have been reached otherwise. So long as the court understands itself to have the power to "sever" the invalid portions of a statute and apply only the valid part, the court's decision may not reveal whether it is avoiding a constitutional problem by interpreting the intent of the statute to be only prospective, or whether it is simply refusing to enforce the invalid portion of the statute. See, e.g., Roberts v. Gunter, 251 Ga. 276, (1983) (bank share tax statute, passed in March 1975 stating that it did "apply to all taxable years beginning on or after January 1, 1975," could not retroactively impose a tax on property held by a bank before the statute was enacted, in violation of Ga. Const. 1983, Art. I, Sec. I, Para. X.)*

(20) If courts in your country do not recognise limits on the use of retroactivity, is there a reason, e.g., the legislator is regarded to be sufficiently self-disciplined?

NB regarding questions 15-20: (i) please discuss justifications that are accepted by the courts in your country for granting retroactive effect by the tax legislator, and (ii) if there are examples of cases in which the judge had found retroactivity incompatible, please discuss these cases briefly.

E. Retroactivity of case law

Introduction
The question of retroactivity of tax law not only arises with respect to the introduction of tax statutes, but also with respect to case law when a judgment has an *erga omnes* effect. The subject of retroactivity of case law is worth investigating separately, because it is related to the question of the nature of case law: when can case law be regarded as declaratory ('only declaring what the law has ever been') and when can it be regarded as constitutive ('new law'). We will not deal with this here.[11]

[11] Various items that relate to the subject of 'retroactivity of case law' (e.g. the item of limitation of the effects of case law of the European Court of Justice) are therefore not touched upon in this questionnaire either.

Nonetheless, at least in one situation transition law with respect to case law is very comparable with the transition law question with respect to changes in statutes. In that situation, the court explicitly abandons existing case law and formulates a new (general) rule.

(21) If the Supreme Court of your country abandons existing case law and formulates a new (general) rule, does the Supreme Court provide in a kind of transition rule to limit the retroactive effect of its judgment (e.g., prospective overruling)? If so, does the Supreme Court only provide such a rule if the new rule is unfavourable to tax payers, or also if the new rule is favourable to tax payers (and thus unfavourable to the government)? If the latter is the case, does the Supreme Court make an exception for the tax payer concerned in the legal proceedings before the court? *NB If there are peculiarities*[12] *in the tax system of your country that are relevant for understanding the way the Supreme Court rules in this respect, please state these peculiarities.*

The Supreme Court of the United States has been inconsistent in its decisions over the last few decades with respect to the appropriateness of prospective overruling in general and with respective to tax rulings in particular. In Am. Trucking Ass'ns v. Smith, 496 U.S. 167 (1990) eight members of the Court agreed that prospective application of ***new*** *limitations on state taxing powers was appropriate; the difficulty in implementing this possibility is evidenced by the fact that, in this case, four members of the Court believed that the rule involved in this case was clear under prior law. In James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), the judgment of a badly divided Court resulted in the application of a new rule in a similar case retroactively. In Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), the Court confirmed that state courts considering similar challenges to statutes within their states were not free to apply their decisions only prospectively when the federal courts announcing the rule had applied them in the traditional retroactive way (although this retroactivity did not necessarily mean all taxpayers would be entitled to refunds). The effect of the Supreme Court's recent decision in Danforth v. Minnesota, 552 U.S. 264 (2008), observing that "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law" and concluding that state courts are free to apply new rules expanding the rights of criminal defendants with more retroactivity than is allowed in collateral attacks in federal courts is not yet known.*

In tax cases arising in the states since American Trucking, furthermore, the Court has included language relating to the remedies that must be afforded taxpayers that many have read to preclude strictly prospective overruling. This language suggests that due process requires that in every case, taxpayers must be given a chance to challenge a tax before payment, or have a right to a refund upon payment; the limitations on pre-payment challenges of many taxes in many jurisdictions suggests that prospective application of pro-taxpayer decisions may not suffice.

The evolution of this approach is considerably complicated by the difficulty that state taxpayers have in bringingg their claims in federal courts. In general, if there is an adequate and efficient state remedy, state taxpayers may not have their challenges to state taxes heard in federal courts. Although state courts are far more likely to allow state taxpayers to proceed in their attacks on

[12] For example, if the Dutch Supreme Court changes its interpretation of a certain statute in favour of the tax payers, the retroactive effect of that judgment is *de facto* limited because previously paid tax on a tax assessment will not be refunded, unless an appeal against the tax assessment has been made in time (i.e., within 6 weeks after the date of the assessment). It might be, however, that the tax system of another country is different, for example, in the sense that, in the situation described, a refund should be made by the tax authorities if it is clear that tax has been paid unnecessarily (according to the new interpretation). Since the financial consequences for the government of a change of interpretation might be great, this might be a reason for the Supreme Court for 'prospective overruling'.

state taxes by way of class actions and without exhaustion of administrative remedies, they are far more accustomed to allowing state revenue departments and state legislatures formulate remedies other than refunds when challenges to state taxes are successful. Attempts by state legislatures to simply deny refunds, and by state courts to erect unexpected hurdles to such refunds may ultimately be successfully challenged when brought to the Supreme Court, see, e.g., 513 U.S. 106 (1994) and McKesson Corp. v. Division of Alcoholic Beverages 496 U.S. 18 (1990), cases involving such maneuvering may languish for many years in the state court system.

F. Views in literature

(22) Is there a general opinion in the fiscal literature of your country regarding retroactivity of tax statutes? Is there, for example, consensus with respect to the type of cases (e.g. anti-abuse legislation, legislation to abandon gaps in tax law, policy changes, etc.) in which it is considered justified (or the other way around: in which it is in any case considered not justified) to grant retroactive effect to tax statutes?

In general, academic writers continue to find few constitutional problems with retroactive tax legislation. The desirability of the various transition policies when tax changes are made is still a matter of considerable debate, see the response to question 22 below.

Legislatures, on the other hand, are generally careful not to enact legislation that is likely to be offensive to voters. Thus, although much tax legislation is retroactive to the beginning of the taxable year in which it is enacted (or, where there is good excuse and adequate notice, a few months into the prior year), there is relatively little legislation with more severe retroactive effect.

In fact, the larger problem in the United States is with legislative practices that make changes that are selectively prospective, that is, with elaborate and particular"grandfathering" provisions. These grandfathering practices would not exist were more general anti-retroactivity policies in place. See, e.g., Apache Bend Apartments v. United States, 964 F.2d 1556 (5th Cir. 1992)(finding selective transition benefits not violating equal protection); see generally Lawrence Zelenak, Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional? 44 Tax L. Rev. 563 (1989).

The law and economics view: Introduction.
The law and economics view is an important theoretical view in the academic literature in the US on tax transitions. This view was developed and supported by especially Graetz[13] and Kaplow.[14] Brief, the law and economics view on tax transitions argues that changes in tax law should have retroactive effect[15] because that is 'efficient'. A very short summary of the line of reasoning is provided by, among others Fisch

> "Although fairness arguments are typically used to support prospective lawmaking, efficiency is generally viewed as favoring retroactivity. Efficient lawmaking can be defined as lawmaking that maximizes the net benefits of legal change. The traditional economic conception of rational or efficient legal change is based on the utilitarian conception of a net gain in social welfare without regard for distributional issues. This conception explains the failure of economic analysis to address the moral concerns of fairness arguments. Retroactivity could produce net

[13] M.J. Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, *University of Pennsylvania Law Review* 1977, pp. 47-87, and M.J. Graetz, Retroactivity Revisited, *Harvard Law Review* 1985, pp. 1820-1841.
[14] L. Kaplow, An Economic Analysis of Legal Transitions, *Harvard Law Review* 1986, pp. 509-617, and L. Kaplow, Transition Policy: A Conceptual Framework, *Journal of Contemporary Legal Issues* 2003, pp. 161-209.
[15] The economic view holds that there is no fundamental (but only a gradual) difference between (formal) retroactivity and retrospectivity.

> social gain and yet impose clearly identifiable costs; there are winners and losers when a law is applied retroactively. Efficiency arguments typically add an additional normative factor to the analysis: the assumption that legal change has occurred because of a determination that the new rule is an improvement. The view that the new rule improves the operative legal principles supports the application of that rule to as broad a class of cases as possible."[16]

In the meantime, other law and economics scholars (than Graetz and Kaplow), have developed views with a different emphasis. Shaviro, for example, argues that policy changes should be retroactive (in the terminology used here: should be retrospective), but should not be nominally retroactive (in the terminology used here: should not be retroactive).[17]

(23) In the Netherlands, the law and economics view has so far provoked very little debate in fiscal literature and has not been invoked explicitly by the tax legislator or the Dutch State Secretary of Finance during parliamentary debate.
   a. Has the law and economics view on transition tax law, or other non-traditional legal views, provoked a debate in your country?
   b. If so, please provide a brief overview of the debate, and please state especially whether and, if so to what extent, the law and economics view (especially the dogmatic view of Graetz and Kaplow), or another non-traditional legal view, has gained support, e.g., from the legislator or in the fiscal literature.

In the scholarly literature. *The premise, but not necessarily the conclusions, of the Graetz/Kaplow position are generally accepted in the scholarly fiscal literature in the United States. This premise is essentially that any change in law, no matter how its effective date is stated, will affect the value of existing commitments. Under this view, it is impossible to distinguish the types of retroactivity that are invalid from those that must be allowed; note that this economist's perspective on the absence of benefit from arbitrary—or even modestly defensible—lines is not unique to this particular question.*

The positions of Graetz and Kaplow differ somewhat in the extent that the Graetz position supports choosing a transition policy as each new substantive policy is adopted and implemented; Kaplow and other writers have urged the establishment of a transition policy independent of any particular substantive policy. Daniel Shaviro, in When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity (2000) urges that Kaplow's approach is only appropriate in those situations in which it is possible to assume that the legislative change represents a desirable policy choice, which in general will be only when the legislation furthers the norms associated with the comprehensive tax base.

In general, however, the subsequent literature assumes the premise put forth by Graetz and concludes that the nominal effective date is morally (and therefore should be legally) irrelevant. It has frequently focused on whether distinctions among the political risks to which taxpayers can legitimately be exposed can be made on conceptual grounds. A symposium sponsored by the University of San Diego on these issues can be found at 13 J. Contemp. Leg. Issues (2003) and includes contributions by Louis Kaplow, Jill Fisch, Richard Epstein, Dan Shaviro and Kyle Logue).

Several views have emerged in the academic literature which, although not rejecting the premises of the Graetz/Kaplow view, approach a complete rejection of its conclusions. This view comes from the wing of law-and-economics that views the restraint of government action to be among the most important constitutional principles. Under this view, a government that chooses too frequently to

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[16] J.E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, *Harvard Law Review* 1997, p. 1088.
[17] D.N. Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief And Retroactivity*, Chicago: University of Chicago Press, 2000, pp. 98-111.

upset legitimate expectations pay a very high price to induce any reliance on the part of economically rational actors. The view finds considerable support in several older works against which the original Graetz argument was made, e.g., Martin Feldstein, Compensation in Tax Reform, 29 Nat'l Tax. J., 123 (1976); Martin Feldstein, On the Theory of Tax Reform, 6 J. Pub. Econ. 77 (1975); Note, Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, 84 Harv. L. Rev 436,438 (1970). This traditionally conservative view (premised largely on a distrust of all government action) remains implicit in much of the (decidedly limited) discussion of tax transitions in the economic literature, e.g., Alan Auerbach and James Hines, Investment Incentives and Frequent Tax Reforms, 78 Amer. Econ. Rev. 211 (1988); Alan Auerbach, Tax Reform and Adjustment Costs: The Impact on Investment and Market Value, 30 Inter. Ec. Rev. 939 (1989).

The newer literature recognizes that the absence of a strong presumption in favour of retroactivity, is likely to change legislative behaviours in undesirable ways. Taxpayers with substantial pre-commitments are more likely to fear changes, and legislators are more likely to act in ways that allow them to benefit from those fears. Mark Ramseyer & Minoru Nakazato, Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow, 75 Virginia L. Rev. 1155 (1989); Richard L. Doernberg & Fred S. McChesney, On the Accelerating Rate and Decreasing Durability of Tax Reform, 71 Minn. L. Rev. 913 (1987). As a result, with a presumption in favour of retroactivity and against general grandfathering, the cost of using the tax system to induce behaviour will inevitably increase. Kyle D. Logue, Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment, 94 Mich. L. Rev. 1129 (1996); The methods through which the tax system can induce behaviours will change, as taxpayers will insist on more immediate benefits, for instance, through reductions in the time period during which taxpayers may be exposed to a legislative change of mind. See generally Daniel S. Goldberg, Tax Subsidies: One-Time vs. Periodic: An Economic Analysis of the Tax Policy Alternatives, 49 Tax L. Rev. 305 (1994). Taxpayers with substantial pre-commitments will devote more resources to secure limited grandfathering, see generally Franklin A. Green, The Folly of Long-Term Tax Planning: Comments on the Instability of the Tax Law, Tax Notes, January 27, 1997.

Later contributions to this debate, offering further analysis but no clear policy recommendation include Eric Chason, The Economic Ambiguity (and Possible Irrelevance) of Tax Transition Rules, 22 Va. T. Rev. 615 (2002) and Michael Doran, Legislative Compromise and Tax Transition Policy, 74 U. Chi. L. Rev. 545 (2007) (relying on a perhaps distinctly US approach to separation of powers, observing that transition policy is inherently different depending upon the institutional context in which the transition question arises: legislative choices are inherently more political and thus transition policy must be more flexible than transition policies within which the judiciary and the administrative agencies operate).

It cannot be overemphasized that the scholarly debate referred to above, with very few exceptions, shows no awareness of either the jurisprudence developed under the possible sources of federal limitation of retroactivity (which, in general, are consistent with the Graetz position) or the jurisprudence under the state limitations (which, as reported in answers XX and XX above, are far less likely to be consistent with that position).

In Practical Politics. *The closest that the Graetz position has come to being a conscious part of the real political debate on tax transition policy is in the discussion in the United States about the move from an income tax to a consumption tax. See, for instance, United States Treasury, Blueprints for Tax Reform, p. 181-206, http://www.ustreas.gov/offices/tax-policy/library/blueprints/ch6.pdf. That discussion is premised on the lack of quasi-constitutional constraint on retroactive tax changes. Even in that discussion, the focus was on "minimizing unfair* *losses" and "undeserved windfalls." More recently, and despite a political climate increasingly hostile to embracing the notion that any tax change can appropriately be enacted retroactively, the Staff of the Joint Committee on Taxation has also embraced the Graetz approach. See Joint Comm. on Taxation, Description and Analysis of Proposals to Replace the Federal Income Tax, (JCS-18-95), at 87-92 (June 5, 1995), available at http://www.jct.gov.*

The Graetz/Kaplow position has never been whole-hearted embraced beyond the academic literature. Neither author, for instance, seems ever to have been cited by a state court (although not all state courts would consider it appropriate to cite such material, many would). Graetz has been cited only twice by federal courts, and then only for the proposition that regulation generally should not be viewed as creating vested rights.

The distrust of the Graetz/Kaplow view among real political actors seems most obvious in the calls during the 1990's for constitutional amendments that would limit Congress' power to tax, including one proposal to amend the Constitution to provide that " No Federal tax shall be imposed for the period before the date of enactment of the tax." (The lack of precision in this language strongly suggests that the motives of its sponsors were largely political posturing in the wake of the 1994 Carlton decision, discussed above.) See generally Retroactive Taxation : hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 103rd Cong, 2d Sess., on S.J. Res. 120 ... August 4, 1994 (1996), S. Hrg. 103-1080 (Serial No. J-103-66).

***Among Practicing Lawyers**. There is an active group of anti-Graetz/Kaplow authors among the practicing bar. Perhaps the best indication of this is the more than a dozen student notes published in law reviews criticizing the result in 1994 Supreme Court decision in Carlton. There is considerably more litigation over the retroactivity of state tax measures than federal tax measures for several reasons. First, historically, states have felt greater fiscal stress and therefore state legislatures have frequently responded with legislation that either involves entirely new tax instruments or is less carefully drafted. Second, the power of the states to impose taxes is far more constrained than is the power of the federal government. (Such constraints are found not only in the federal Constitution's commerce clause but also in the various state constitutions and especially in the organic laws establishing various units of local government within the states). Therefore states and their subunits are far more likely to be in a position to need curative tax legislation with retroactive effect (re-imposing the part of a tax instrument that would have been valid) and to limit a taxpayer's ability to obtain the benefit of newly articulated limits on the state taxing power, arguably with retroactive effect.*

The members of the tax bars in the various states therefore have a considerably greater stake in the continued vitality of anti-retroactivity doctrine. Their writings continue to raise objections to various types of retroactivity:

> *Paul Frankel and Amy Nogid, The Manifest Justice of The Manifest Injustice Doctrine: The Time has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases, 49 State Tax Notes 599 (Aug. 6, 2008);*
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> *Jennifer Carr and Cara Griffith, Retroactive Taxation: A Necessary Evil, State Tax Notes, Oct. 31, 2005, p. 473.*

F. Daniel E. Troy, http Retroactive Tax Increases and the Constitution, available at www.heritage.org/Research/Taxes/HL613.cfm

Surveys of the objections to particular Congressional practices prior to the dominance of the Graetz approach are include in:

Kaplow/law –and-economics

Tax Section of the New York State Bar Association, Retroactivity of Tax Legislation, 29 Tax Lawyer 21 (1975)

Michael J. McIntyre, Transition Rules: Learning to Live with Tax Reform, 4 Tax Notes 7 (1976)

Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. Pa. L. Rev. 47 (1977).