The retroactivity provision in Proposition 40

Overview

If it passes, Proposition 40 may be a temporary solution to Medi-Cal's federal funding cuts.[1] But many potential constitutional challenges await it.[2] Retroactivity is a key feature of the critiques about this measure.[3] Proposition 40 arguably imposes a "whole new tax" because the tax obligation date occurs before the proposition's hypothetical adoption date.[4] This article provides an analytical framework for the retroactivity question, arguing that Proposition 40 does not impose a "whole new tax" and is not unconstitutionally retroactive. This article should be considered with the points raised in "Proposition 40: A measured look at the billionaire tax" to inform views about how Proposition 40 might fare against legal challenges.

Analysis

On November 3, 2026 California voters will decide on Proposition 40, which proposes a wealth tax on billionaires who were California residents as of January 1, 2026.[5] These billionaires would pay a one-time state tax of 5% of their net worth.[6] Ninety percent of the money collected from the wealth tax must be used to fund healthcare services for the public.[7] The remaining 10% must be spent on education, food assistance, and administering the tax.[8]

That January 1 obligation date creates a retroactive classification mechanism, which raises a constitutional issue about retroactivity. Critics argue that this retroactive mechanism is unconstitutional because it establishes a tax obligation date that would predate Proposition 40's hypothetical adoption date by eleven months.[9] The response is that Proposition 40 does not impose a "whole new tax," and it is analogous to other cases where retroactivity provisions have been upheld.

The key question is whether Proposition 40 establishes a "whole new tax." That standard evolved through four United States Supreme Court cases. In *Blodgett v. Holden* and *Untermyer v. Anderson*, the high court held that a retroactive application of the Revenue Act of 1924 was unconstitutional.[10] The Revenue Act of 1924 imposed a first-of-its-kind gift tax, and any transfers of property made as a gift in excess of $50,000 were retroactively taxed.[11] But in 1938 the Court in *Welch v. Henry* reversed course and held that a retroactive tax on corporate dividends was constitutional.[12] *Welch* recognized the importance the *character* of the tax plays in the retroactivity analysis.[13]

The "whole-new tax standard" crystalized in 1994 in *United States v. Carlton*, which upheld a retroactive application of a federal estate tax.[14] The Court endorsed *Welch* and restrained *Blodgett* and *Untermyer*: "To the extent that their authority survives, they do not control here. *Blodgett* and *Untermyer*, which involved the Nation's first gift tax, essentially have been limited to situations involving 'the creation of a wholly new tax,' and their 'authority is of limited value in assessing the constitutionality of subsequent amendments that bring about *certain changes in operation of the tax laws*.'"[15] *Carlton*'s standard for evaluating the constitutionality of retroactivity remains in force today: retroactivity provisions are upheld, provided they do not constitute "a whole new tax," as prescribed in *Blodgett* and *Untermyer*.[16]

Proposition 40 arguably is not a "whole new tax"

California has already enacted various forms of wealth taxes, including a tax based on 0.65% of the value of a vehicle and an annual property tax on 1% of the value of a house.[17] Until the 1930s wealth taxes on property were a common feature of state taxation systems.[18] Proposition 40 is no different.

Proposition 40 is also distinguishable from the taxes at issue in *Blodgett* and *Untermyer*. The gift tax in *Blodgett* and *Untermyer* could not simply rely on existing methods of property taxation. The Revenue Act of 1924 instead needed to establish new rules that considered property transferred as a gift, thus altering the broader

property taxation framework.[19]

Unlike in *Blodgett* and *Untermyer*, Proposition 40 relies on existing tax mechanisms. Proposition 40 looks at a billionaire's worldwide assets, including everything from property to intellectual property rights to cash.[20] It then subtracts the assets' combined value by allowable debts and liabilities to calculate the billionaire's net worth.[21] This net worth amount is then taxed at a 5% rate if it meets or exceeds the $1 billion threshold.[22] Proposition 40 arrives at a single valuation of all worldwide assets — assets that vary in character, holding period, treatment, and timing.

To determine this single valuation, Proposition 40 requires an analysis of assets under their respective governing codes. For example, a billionaire's partnership interest would still be analyzed under existing tax principles, such as I.R.C. § 704 and Treas. Reg. § 1.704-1, to determine what economic rights or profit allocations the billionaire is actually entitled to for tax purposes.[23] Only with this entitlement determination can an interest valuation be properly formed. Proposition 40 also expressly incorporates existing tax valuation principles, including Cal. Rev. & Tax. Code § 25129 to valuate non-excluded real property.[24]

Proposition 40 is so intertwined with other areas of tax law because it requires a systematic valuation of different types of assets using other known tax mechanisms. Unlike the gift tax in *Blodgett* and *Untermyer*, a tax on net worth cannot stand on its own. The wealth tax is a mere label for a combination of existing tax schemes. Proposition 40 extends California's pre-existing wealth taxes — or in the words of *Carlton*, embodies a "change in [the] operation of [existing] tax laws."[25] Because the application of *Blodgett* and *Untermyer* has been so limited, Proposition 40 does not fall into their narrow "whole new tax" landscape.[26]

Proposition 40 is analogous to *Welch*

In upholding the retroactivity provision, *Welch* distinguished the character of the corporate dividends tax from the gift tax in *Blodgett* and *Untermyer*. The gift tax cases involved the imposition of tax on a voluntary act: the gift-giver could choose

not to give the gift had they known of the gift tax to be imposed on them.[27] Yet the tax in *Welch* "cannot be said to be so offensive" because corporate dividend holders would not refuse this income due to the imposition of a new tax.[28]

Welch was decided during the Depression, and the Court emphasized deference to the state legislature's judgment in responding to emergencies.[29] The Court noted that the state legislature allowed corporate dividends to be relieved of tax when the need for revenue was less.[30] But this urgent need for revenue to combat the economic crisis understandably caused the state legislature to change its mind and make adjustments retroactively.[31] The Court added that if the amendment were to be held unconstitutional, the state legislature "would be left powerless" to rectify the unintended consequences of "tax burdens which experience had shown to be inequitable."[32]

Much like the corporate dividends tax in *Welch*, Proposition 40 does not tax individuals based on a voluntary act.[33] There is no action that must occur for the billionaire to be taxed; the tax trigger is their status as a billionaire. Like *Welch*, Proposition 40 does not pose a due process violation because it cannot be presumed that billionaires would "refuse their wealth."[34] Billionaires would not go back in time and give away their money to change their status as billionaires.

Welch was wary of limiting state legislative power to fix mistakes. The same reasoning applies to Proposition 40. The measure recognizes that California has around 200 billionaires who collectively possess $2 trillion in wealth.[35] These billionaires pay less than 1.5% of their total wealth, accounting for all annual taxes.[36] Billionaires pay about 24% of their annual income in taxes. But over 19 million taxpayers in California are not billionaires.[37] On average, these 19 million individuals pay 30% of their annual income in taxes — a 25% larger share of their economic income compared to billionaires.[38] Rectifying this disparity would be consistent with the reasoning in *Welch*.

The emergency situation prompting Proposition 40 parallels the emergency situation the legislature faced in *Welch*.[39] Medi-Cal has already absorbed billions of dollars in federal funding cuts and is predicted to lose $30 billion in federal funding each year going forward.[40] Hospitals and providers will receive lower payment rates, rural hospitals are at high risks of closure, and many formerly eligible Medi-Cal users are expected to lose healthcare coverage.[41]

These cuts have impacted more than half of California's children, 2.2 million seniors and people with disabilities, 20% of working Californians, and millions of other low-income individuals and families.[42] Proposition 40's drafters cited the Medi-Cal crisis as the core reason for the proposed wealth tax, calling it an "emergency funding situation."[43] Ninety percent of the revenue from the tax is designated for healthcare needs to address the crisis.[44] Proposition 40 should receive the deference *Welch* accords to state lawmakers in emergency situations.[45]

Assessing contrary arguments

There are colorable arguments that Proposition 40 fails *Carlton*'s "whole new tax" standard because it imposes a new tax liability and is not enacting an amendment to an existing statute.[46]

These arguments are flawed. The statute at issue in *Welch* originally provided that corporate dividends could be deducted in their entirety from gross income.[47] As a result, corporate dividends could go entirely untaxed. The subsequent amendment flipped the statutory scheme on its head. Rather than potentially being not taxed at all, as Welch himself experienced, the amendment called for corporate dividends to be taxed retroactively.[48] That was lawful because the tax was on an involuntary act and in the context of emergency circumstances.[49]

The retroactive result in *Welch* is functionally equivalent to Proposition 40 — while net worth as a class is currently untaxed, Proposition 40 would then retroactively impose a tax on net worth. A retroactive imposition of a new tax liability is not, by

itself, unconstitutional. Nor is a retroactivity provision "a whole new tax" simply because it lacks an existing statutory home. Rather, the "whole new tax" inquiry is anchored in the actual mechanics and character of the tax — just as *Welch* prescribed.

There is also a colorable argument that the "whole new tax" standard is inconsequential because a retroactive application of the modern federal income tax system was upheld. In *Brushaber v. Union Pacific Railroad Co.* the high court allowed the modern federal income tax to be retroactively applied via the Revenue Act of 1913.[50] This implementation of the modern federal income tax was a revolutionary switch from the tariff revenue system.

While the federal income tax was "new" in the colloquial sense, it was not "new" in the *Carlton* sense. *Brushaber* relied on the 16th Amendment, not on the mechanics or character of the tax — the essence of the "whole new tax" standard.[51] The 16th Amendment was passed in February 1913 and granted Congress the power to collect a federal income tax from any source.[52] The Revenue Act of 1913 was a verbatim implementation of this federal income tax from the 16th Amendment's authority.[53] Congress had purposely tailored the retroactivity period (March 1913 to October 1913) to not include the first two months of 1913 before the amendment had passed.[54] The decisions in *Blodgett* and *Untermyer* were thus unconstrained by *Brushaber* and could hold (without overturning *Brushaber*) that a retroactive application of a new gift tax was unconstitutional.[55]

Conclusion

Proposition 40 would not constitute a "whole new tax" under existing law.[56] Given its reliance on existing tax mechanisms, involuntary nature, and emergency context, a court is unlikely to strike down Proposition 40 on retroactivity grounds.

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1. Dawn Joyce, *How Massive Federal Cuts Will Create Unprecedent Challenges for Medi-Cal Patients and Providers* (2025) Cal. Health Found. ↑

2. *Thought Leadership: California 2026 Billionaire Tax Act* (2025) Baker Botts. ↑

3. *See, e.g., id.*; Jared Walzack, *Constitutional Flaws of California's Proposed Wealth Tax* (2026) Tax Found. ↑

4. *Id.* ↑

5. Legis. Analyst's Off., *Proposition 40* (2026) at 1. ↑

6. *Id.* ↑

7. *Id.* ↑

8. *Id.* ↑

9. *See, e.g.*, Jared Walzack, *Constitutional Flaws of California's Proposed Wealth Tax* (2026) Tax Found; Brian Galle, David Gamage, & Darien Shanske, *Correcting the Record: Addressing Some Legal Arguments About the 2026 Billionaire Tax Act* (2026) Univ. Mo. Sch. L. at 1, 2–3; *United States v. Carlton* (1994) 512 U.S. 26, 34 (maintaining that a retroactive application of a whole new tax is unconstitutional). ↑

10. *Blodgett v. Holden* (1927) 275 U.S. 142, 147; *Untermyer v. Anderson* (1928) 276 U.S. 440, 445–46. ↑

11. *Id.* at 146. ↑

12. *Welch v. Henry* (1938) 305 U.S. 134, 159. ↑

13. *Id.* ↑

14. *Carlton*, 512 U.S. at 27, 34. ↑

15. *Id.* at 34 (emphasis added) (citing *United States v. Hemme* (1986) 476 U.S. 558, 568). ↑

16. *Id.* ↑

17. *Letter from Suzanne Jimenez, Initiative Proponent, to Rob Bonta, Attorney General* (2025) at 3. ↑

18. Carl Davis & Eli Byerly-Duke, *America Used to Have a Wealth Tax: The Forgotten History of the General Property Tax* (2023), ITEP. ↑

19. Revenue Act of 1924, ch. 234, § 319, 43 Stat. 253, 313. ↑

20. *Letter from Suzanne Jimenez, Initiative Proponent, to Rob Bonta, Attorney General* (2025) at 3–4. ↑

21. *Id.* at 11. ↑

22. *Id.* at 10. ↑

23. I.R.C. § 704 (2017); Treas. Reg. § 1.704-1 (1960). ↑

24. Rev. & Tax. Code § 25129. ↑

25. *Carlton*, 512 U.S. at 34 (citing *United States v. Hemme* (1986) 476 U.S. 558, 568). ↑

26. *Id.* ↑

27. *Id.* at 147. ↑

28. *Id.* ("Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer."); *Id.* at 148 ("Similarly, a tax on the receipt of income is not comparable to a gift tax. We can[ ]not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one."). ↑

29. *Id.* at 145. ↑

30. *Id.* ↑

31. *Id.* at 144–45. ↑

32. *Id.* at 145. ↑

33. *Welch v. Henry* (1938) 305 U.S. 134, 159. ↑

34. *Id.* at 148 ("Similarly, a tax on the receipt of income is not comparable to a gift tax. We cannot assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one."). ↑

35. *Letter from Suzanne Jimenez, Initiative Proponent, to Rob Bonta, Attorney General* (2025) at 3. ↑

36. *Id.* ↑

37. *Id.* ↑

38. *Id.* ↑

39. *Welch v. Henry* (1938) 305 U.S. 134, 145. ↑

40. *Impact of Federal Funding Cuts to Medicaid (Medi-Cal) on California* (2026), Cal. Budget & Pol'y Ctr. ↑

41. Dawn Joyce, *How Massive Federal Cuts Will Create Unprecedent Challenges for Medi-Cal Patients and Providers* (2025) Cal. Health Found. ↑

42. *Id.* ↑

43. *Letter from Suzanne Jimenez, Initiative Proponent, to Rob Bonta, Attorney General* (2025) at 3. ↑

44. Legis. Analyst's Off., *Proposition 40* (2026) at 1. ↑

45. *Welch v. Henry* (1938) 305 U.S. 134, 145. ↑

46. *Carlton*, 512 U.S. at 34. ↑

47. *Id.* at 141. ↑

48. *Id.* at 141–42. ↑

49. *Id.* at 144, 147. ↑

50. *Brushaber v. Union Pac. R.R. Co*. (1916) 240 U.S. 1, 11. ↑

51. *See generally Brushaber*, 240 U.S. at 1 (detailing, for example, "but the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment"). ↑

52. U.S. Const. amend. XVI; *Brushaber*, 240 U.S. at 20. ↑

53. Revenue Act of 1913, ch. 16, § II, 38 Stat. 114, 166. ↑

54. *Brushaber*, 240 U.S. at 20. ↑

55. *Blodgett v. Holden* (1927) 275 U.S. 142, 147; *Untermyer v. Anderson* (1928) 276 U.S. 440, 445–46. ↑

56. *Carlton*, 512 U.S. at 34. ↑