The Federal Facial Constitutionality of California's Proposed Billionaire Tax Act

The 2026 Billionaire Tax Act (BTA) authorizes a facial constitutional challenge to its provisions by any interested person within sixty days of voter approval through a validation action that does not impose a tax-prepayment requirement.[1] To prevail in this facial constitutional challenge, the interested person must establish that the BTA *always* operates unconstitutionally and that judicial enforcement is constitutionally barred under any potential set of circumstances.[2]

Some opponents of the Act urge that the Act should be rejected by California voters due to federal constitutional infirmities with the Act that would render it facially invalid in such an action. We believe, similar to the attached litigation risk assessment by Gupta Wessler LLP, that the Act would be upheld against federal constitutional facial challenges. None of the opponents' federal constitutional claims support that the BTA is facially unconstitutional.

Retroactivity under the Due Process Clause

The BTA imposes a one-time 5 percent tax on the net worth of billionaires residing in California as of January 1, 2026, based on their wealth valued as of December 31, 2026. The BTA thus locks in tax liability before voter approval of the tax.

The Supreme Court has explained that such retroactive application of a tax statute is constitutional when "supported by a legitimate legislative purpose furthered by rational means."[3] This standard is exceptionally deferential; the judiciary does not adjudge the wisdom and fairness of taxation because such economic policy determinations "remain with the exclusive province of the legislative and executive branches."[4] All retroactive economic laws, including tax legislation, trigger this same deferential judicial scrutiny.[5] Retroactive tax laws are thus upheld under the Due Process Clause unless the retroactive application bears no rational relationship to a permissible legislative purpose.

The BTA's look-back mechanism for triggering its tax obligation readily survives this minimal due-process threshold. The state's legitimate purpose is to ensure that individuals

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[1] BTA § 4 (h) (to be codified at Cal. Const. art. XIII and 2 Rev. & Tax. Code § 50314).
[2] *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008); *United States v. Salerno*, 481 U.S. 739, 745 (1987).
[3] *United States v. Carlton*, 512 U.S. 26, 30-31 (1994) (quoting *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729-30 (1984) & *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)).
[4] *Id.* at 31 (quoting *Pension Benefit Guaranty Corp.*, 467 U.S. at 729-30 & *Usery*, 428 U.S. at 16-17 (1976)).
[5] *Id.* at 30-31; *see* CHARLES W. RHODES & RENEE KNAKE JEFFERSON, CONSTITUTIONAL LAW: FOUNDATIONS, INTERPRETATIONS, AND COMMENTARIES 528 (2025).

who accumulated and sustained immense wealth under the protection, infrastructure, and economic benefits of California contribute their equitable share to critical public needs, specifically healthcare, education, and nutrition. Raising revenue to fund state programs and adjusting the tax burden are quintessential legitimate government purposes.[6] California has a strong interest in preventing the artificial erosion of its tax base for these purposes through locking in the tax obligation as of January 1.

The retroactive period in the BTA is a rational means to accomplish this legitimate purpose. It spans less than a single year to ensure that those benefiting from California's laws in accumulating and sustaining their wealth do not maneuver to avoid paying their fair share. Because billionaires possess highly mobile assets, a wealth tax effective only after BTA's passage would invite capital flight and portfolio restructuring. The look-back mechanism is therefore an appropriate means to ensure that the tax base is not subverted by short-term gamesmanship. The Supreme Court routinely upholds retroactive tax applications of similar durations to avoid such gamesmanship.[7]

Opponents' reliance on *Nichols v. Coolidge* (1927), *Blodgett v. Holden* (1927), and *Untermyer v. Anderson* (1928) is misplaced. As the Supreme Court explained in *United States v. Carlton* (1994), those cases were products of the *Lochner* era's rigid and long-discarded judicial second-guessing of economic tax legislation through heighted judicial scrutiny.[8] Modern decisions merely require a rational basis for the retroactive application.[9]

While California did not previously tax the accumulation and maintenance of wealth, affected taxpayers possessed constructive notice of the potential for impending liability as of the tax obligation date of January 1, 2026. Although opponents claim that the BTA is a "wholly new tax" that cannot be retroactive under the holdings of two century-old *Lochner*-era precedents, those cases have never been relied on again by the United States Supreme Court to invalidate any tax as retroactive. The Court's modern cases, such as *United States v. Darusmont*, explain that, to the extent these century-old cases have any remaining vitality, they would only apply when the taxpayer has "no reason to suppose that any transactions of

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[6] *Carlton*, 512 U.S. at 32; *see also Welch v. Henry*, 305 U.S. 134, 147 (1938) (holding that distribution of the tax burden is a permissible legislative goal).

[7] *See United States v. Darusmont*, 449 U.S. 292, 296–97 (1981) (customary congressional practice to make tax statutes retroactive to the beginning of the calendar year or the date of introduction); *Carlton*, 512 U.S. at 32–33 (upholding a 14-month retroactive period).

[8] *Carlton*, 512 U.S. at 34 ("Those cases were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded'" (quoting *Ferguson* v. *Skrupa,* 372 U.S. 726*,* 730 (1963)); *see* RHODES & JEFFERSON, *supra* n.5, at 521-28 (detailing the demise of economic substantive due process).

[9] *E.g.*, *Carlton*, 512 U.S. at 30-34*; Pension Benefit Guaranty Corp.*, 467 U.S. at 729; *Quarty v. United States*, 170 F.3d 961, 965 (9th Cir. 1999).

the sort will be taxed at all."[10] A statewide initiative requires public filing, title and summary preparation, and months of highly publicized signature gathering before it ever reaches the ballot, and the California legislature for several years before that considered wealth tax proposals.[11] Ballot proponents initially filed the BTA with the California Attorney General on October 22, 2025, and amended the filing on November 26, 2025. A taxpayer is not unfairly surprised when such a tax measure was a matter of active public debate during the period of retroactivity.[12]

Finally, even assuming the United States Supreme Court overruled *Carlton* and reinvigorated its 1920s decisions on retroactive tax liability, that would not render the BTA facially invalid. A statute is facially invalid only if it is unconstitutional in all applications.[13] Because federal constitutional facial challenges are "disfavored" by the Supreme Court,[14] a challenged law that is constitutional in at least some applications must be upheld.[15] Any judicial holding that the BTA operated impermissibly retroactively under those century-old decisions when applying to some California billionaires who left the state before its passage would not establish that the BTA was invalid in *all* its applications. This is especially true because the BTA details that the Act's provisions are severable and that the tax obligation date is subject to judicial reformation to cure any constitutional infirmity.[16]

Fair Apportionment under the Due Process and dormant Commerce Clauses

Some opponents have also claimed that the BTA would violate the fair apportionment requirements of the Due Process and dormant Commerce Clauses of the U.S. Constitution. Like the claims addressed in the prior part, those claims are not supported by established Supreme Court precedent.

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[10] *Darusmont*, 449 U.S. at 298, 300.

[11] *E.g.*, Assemb. B. 2088, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (as amended Aug. 13, 2020); Assemb. B. 310, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (as amended Apr. 5, 2021); Assemb. B. 2289, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (as amended Apr. 28, 2022); Assemb. Const. Amend. 8, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (as amended Apr. 28, 2022); Assemb. B. 259, 2023–2024 Leg., Reg. Sess. (Cal. 2023) (as introduced Jan. 19, 2023); Assemb. Const. Amend. 3, 2023–2024 Leg., Reg. Sess. (Cal. 2023) (as introduced Jan. 19, 2023).

[12] *Darusmont*, 449 U.S. at 299-300 (explaining the taxpayer was "hardly in a position to claim surprise" regarding retroactive application when the proposed rate increase had been under public discussion for almost a year before its enactment); *Milliken v. United States,* 283 U.S. 15, 24 (1931) (noting tax was not unconstitutionally retroactive when decedent taxpayer "was as well warned that it might be taxed on that basis").

[13] *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 449 (2008); *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[14] *Wash. State Grange*, 552 U.S. at 450.

[15] *See* RHODES & JEFFERSON, *supra* n.5, at 594-95 (explaining facial challenges outside the First Amendment context typically depend on the challenger establishing "that the challenged statute *always* operates unconstitutionally when its provisions apply to require or prohibit conduct.") (emphasis in original).

[16] BTA § 6 (to be codified at 2 Rev. & Tax. Code § 50311).

Taxpayers who bring constitutional challenges to state apportionment methods face a heavy burden.[17] This is particularly true for facial challenges, as evidenced by the fact that the Supreme Court has never held an apportionment formula unconstitutional on its face.[18]

The standards under the Due Process and dormant Commerce Clauses overlap. The Due Process Clause requires only that the values being taxed are "rationally related to values connected with the taxing state."[19] A taxpayer bringing a facial challenge to a statute under that standard must show that the apportionment of the tax was "inherently arbitrary."[20] In this context, the Court has said that state apportionment methods are "presumptively valid."[21] The taxes that the Court has upheld under this standard are instructive. For example, for corporate income tax purposes, the Court has repeatedly upheld the use of single-factor methods while acknowledging that those methods do not produce results that represent actual in-state profits.[22] The use of a single factor, like sales, is not an inherently arbitrary method, despite being an imprecise way to apportion income.

For personal income taxes, the Supreme Court has held that residence, standing alone, is a constitutionally sufficient basis for taxing individuals on their income wherever earned.[23] The same principle applies to the taxation of intangible property. A state may tax a resident's intangible property wherever that property is located.[24] As stated by the Court, "[f]rom the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value."[25] The Court has recognized that this rule permits more than one state to tax the same intangibles and has held that the resulting exposure to multiple taxation does not violate the Due Process Clause.[26]

The risk of multiple taxation, or more precisely of higher burdens on interstate commerce than on intrastate commerce, is more appropriately a dormant Commerce

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[17] HELLERSTEIN & HELLERSTEIN, STATE TAXATION ¶ 8.13 ("In challenging state tax apportionments, taxpayers bear the burden of proof, and it is a very heavy burden indeed.").
[18] *Id.* at ¶ 8.13[2].
[19] *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978).
[20] *Id.* at 274; *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920).
[21] *Id.*
[22] *Moorman*, 437 U.S. at 273.
[23] *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937).
[24] *See*, *e.g.*, *Curry v. McCanless*, 307 U.S. 357 (1939). Residence does not, however, support taxation of land or tangible personal property located in another state. *Id.* at 363–64; *Frick v. Pennsylvania*, 268 U.S. 473, 488–89 (1925).
[25] *Curry*, 307 U.S. at 366.
[26] *Id.* at 368–72.

Clause concern. Formally, the dormant Commerce Clause requires that state taxes be fairly apportioned, which requires that a statute be both externally and internally consistent.[27] The external consistency test is functionally the same as the Due Process "rationally related" test.[28] The internal consistency test is different. That test looks to whether the tax, if applied by every jurisdiction, would result in higher tax burdens on interstate commerce as compared to purely intrastate commerce.[29] Internal consistency can be met in several ways, including by apportioning taxes or by using unapportioned taxes along with tax credits for taxes imposed by other states on the same base.[30]

The BTA meets these Due Process and dormant Commerce Clause standards. To start, the BTA would apply only to California residents as of the tax obligation date and would be imposed on "net worth," which is defined to exclude tangible property located outside of the state.[31] Residence therefore supplies the constitutional basis the Due Process Clause requires, and the exclusion of out-of-state tangible property keeps the tax within the rule described above.[32]

The BTA would also be apportioned in a constitutional manner. The tax apportions 100% of the tax base to California, but it also provides taxpayers with credits against the resulting tax for taxes paid to other states on the same base. [33] That structure is no different from the structure that states use for purposes of their personal income taxes. *Comptroller v. Wynne* (2015) confirmed that this structure satisfies the dormant Commerce Clause, as long as the tax credit mechanisms make the statute internally consistent.[34]

The tax credit provisions of the BTA are broad and ensure that the tax would be internally consistent. Section 50307(a) provides a general credit for taxes paid to other states, with credits specifically apportioned based on part-year residencies, and Section 50307(b) directs an additional credit wherever the Constitution requires one. These credit provisions eliminate the multiple-taxation exposure that the internal consistency test targets.

Opponents of the BTA have come to a different conclusion, in one case based on a hypothetical where a person is a resident of two states for a single day. But that analysis ignores that application of the internal-consistency test requires an assumption that all

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[27] Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMPLE L. REV.331, 360–66 (2020).
[28] *Id.* at 361–62.
[29] *Id.* at 362.
[30] *Comptroller v. Wynne*, 575 U.S. 542, 568 (2015).
[31] BTA §§ 50308(a), 50301(a), 50303(c)(5).
[32] *See supra* note 24.
[33] BTA §§ 50306, 50307.
[34] *Wynne*, 575 U.S. 542 (2015).

states have the exact same laws. That exercise would mean incorporating the BTA's tax base, apportionment percentages, and the California residency requirements that it uses. The latter is particularly important because the California residency requirement is satisfied only if an individual is in the state for other than a temporary or transitory purpose or if they are domiciled in the state but outside the state for a temporary or transitory purpose.[35] The state's regulations clarify that only one state, "the state in which a person has the closest connection," is the state of residence under that law.[36] Therefore, if every state used the exact same residency standard, there would be no situation where a person had two states of residency for purposes of the tax. And there would concomitantly be no violation of the internal consistency requirement. Here too, then, any plausible facial constitutional infirmity is addressed by the tax credit provisions and the residency standard used.

The BTA also contains provisions that would remedy any potentially unconstitutional apportionments of the tax. Specifically, section 50306(b) of the BTA contains an alternative apportionment method that applies if the prescribed method does not "fairly represent" the portion of the wealth that is taxable by California.[37] The BTA also contains both a standard for establishing that an alternative formula may be used and a provision that permits the use of an alternative when a taxpayer shows that the standard method would violate federal law, the U.S. Constitution, or the California Constitution.[38] These provisions give taxpayers an as-applied remedy for any unfair apportionment, which defeats a facial challenge to the prescribed method.

Opponents also take exception to the provision of a "minimum" apportionment percentage of twenty-five percent under the BTA's alternative apportionment section. But that minimum is not required in all cases. The BTA explicitly provides that the twenty-five percent minimum can be waived if a lower percentage is required to avoid violating federal law or the U.S. or California constitutions.[39] On its face, then, the BTA provides a remedy for any application that would violate federal law, and a facial challenge on this ground therefore fails. As-applied challenges will turn on individual facts, but the statute supplies the mechanism to resolve them.

Right to Interstate Travel

Opponents' inventive right to travel argument is not supported by any relevant judicial authority. The Supreme Court identifies three components to the constitutionally protected

[35] Cal. Rev. & Tax'n Code §17014.
[36] Cal. Code Regs. Tit. 18, § 17014.
[37] BTA § 50306(b).
[38] BTA § 50206(b)(3), (4).
[39] BTA § 50306(b)(6).

right to travel: (1) the right to enter and leave another state, (2) the right when visiting another state to enjoy the "privileges or immunities" that state grants its own citizens, and (3) the right to become a citizen of a new state and have all the same rights as the existing citizens of that state.[40] The BTA does not interfere with any of these components of the right to travel.

The BTA does not prohibit, penalize, punish, or tax the right to enter and leave California. It is not an "exit tax" on every person departing or passing through the state, as it is not triggered by a taxpayer's exit or departure like the tax invalidated in *Crandall v. Nevada*.[41] Instead, the tax obligation is triggered based on enjoying the benefits and protections of California law as of the January 1, 2026 tax obligation date in accumulating and sustaining wealth. It is irrelevant to the tax obligation whether the taxpayer billionaire thereafter leaves the state. No precedent, constitutional text, or constitutional history supports the opponents' position that billionaires' inability to wholly avoid the tax by departing from California somehow restricts their ability to travel or move to another state.

The BTA also has no connection to the second and third components of the right to travel. California is not denying anyone who visits the state the "privileges or immunities" it grants its own citizens—instead, it is taxing certain of its citizens to pay their fair share of the state's financial needs. California also is not denying rights to newly arrived citizens through the BTA. The BTA does not implicate the constitutional right to travel.

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The primary federal constitutional arguments raised by opponents thus do not facially invalidate the BTA. We also concur with the attached litigation risk assessment from Gupta Wessler LLP that other potential federal constitutional challenges to the BTA are not well taken. We believe that the Act would be upheld against federal constitutional facial challenges in a validation action or other similar proceeding.

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[40] *Saenz v. Roe*, 526 U.S. 489, 500-04 (1999); *see* RHODES & JEFFERSON, *supra* n.5, at 799-808 (discussing the right to interstate travel).

[41] *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 40 (1868) (invalidating law that imposed a tax on each railroad or stagecoach passenger either departing or passing through Nevada).

MEMORANDUM

To: Dave Regan, President, SEIU – United Healthcare Workers West
Date: July 14, 2026
Re: Litigation Risk Assessment for Proposition 40

Introduction and Summary

We have evaluated the relative strengths and weaknesses of arguments that might be made in litigation for invalidating Proposition 40 on federal constitutional grounds. Overall, we conclude that the risk from facial constitutional challenges is low. This memorandum summarizes our conclusions.

The distinction between facial and as-applied challenges is important to our reasoning in several respects, as detailed below. In a facial challenge, the plaintiff asks the reviewing court to hold a challenged law "unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). Facial challenges are "disfavored" under federal law, *id.* at 450, and the Supreme Court has purposefully made them difficult to win. To succeed on a facial constitutional challenge, a plaintiff must show either that "no set of circumstances exists under which the law would be valid" or that the challenged law lacks any "plainly legitimate sweep." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (citation omitted). If the challenged law is constitutional in at least some applications, it must be upheld.

We have focused on facial challenges for two reasons. First, a successful facial challenge would be an existential threat to Proposition 40. As-applied challenges, by contrast, would be seeking to set aside a specific application of the law to a particular taxpayer. Second, it is difficult to assess the potential risks of as-applied constitutional challenges in advance of actual cases with real facts.

This high-level summary is not intended to be legal advice and is limited in scope. It is not intended for public distribution. Please consult us for further details about any of these issues.

Takings Clause

- *Potential argument*
    - Opponents may argue that Proposition 40 constitutes an impermissible taking of private property, not a legitimate tax.
- *Litigation risk assessment*
    - **Taxes aren't takings.** The Supreme Court has held that state taxes are not "takings." *See, e.g., Koontz v. St. John's River Water Mgmt.*, 570 U.S. 595, 615 (2013). That rule is categorical. The Court has never treated a state tax as a taking.
    - **Deep historical roots.** The Supreme Court is unlikely to reconsider that approach. The rule that taxes are not takings has deep roots, stretching back at least to 1880. *See Koontz*, 570 U.S. at 615 (citing *County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880)).
    - **No limiting principle.** Any argument for treating Proposition 40 as a taking would logically also apply to other state excise and property taxes. The Supreme Court is unlikely to want to open the floodgates to those kinds of challenges. *Cf. Moore v. United States*, 602 U.S. 572, 592–93 (2024) (rejecting a different constitutional challenge to a federal tax where the taxpayers could not "contain the blast radius of their legal theory").

- *Potential fiscal impact*

    - If a taxpayer were to succeed on a Takings Clause theory, the taxpayer would be entitled to "just compensation," U.S. Const. Amend. V, presumably in the amount of the tax paid.

    - We assess the potential fiscal impact of takings litigation as low for two reasons: (1) challenges like this are very unlikely to succeed; and (2) any challenge would need to be brought by an individual taxpayer after paying the tax. The Takings Clause could not be a basis for enjoining Proposition 40 *before* the tax is paid.

Commerce Clause

- *Potential arguments*

    - States may not impose taxes that discriminate against interstate commerce. The Supreme Court applies a four-part test in this context. *See South Dakota v. Wayfair*, 585 U.S. 162, 174 (2018) (reciting the test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). A tax that fails to meet any of the four conditions is vulnerable, although not necessarily unlawful.

    - Opponents may argue that Proposition 40 violates three parts of the governing test. They may argue that the tax (1) extends to intangible property that lacks a "substantial nexus" to California; (2) is not "fairly apportioned" because it taxes property not fairly attributable to economic activity in California; or (3) is not "fairly related" to the services that California provides to taxpayers.

- *Litigation risk assessment*

    - **Facial vs. as-applied distinction.** As explained above, a facial challenge would require showing that there is no set of circumstances in which Proposition 40 would be constitutional.

    - **Built-in safety valves.** Proposition 40 has several built-in features that will make facial challenges very difficult, if not impossible.

        - **The tax applies only to the ownership of property that California has a strong constitutional case for taxing.**

            - Proposition 40 does ***not*** apply to real property or to personal property outside California.

            - Proposition 40 ***does*** apply to intangible property, regardless of location, but states generally may tax the intangible property of their own residents based on residency.

            - A state's authority to tax the intangible property of its residents is a bedrock principle of state taxation. *See Curry v. McCanless*, 307 U.S. 357, 364–67 (1939) (explaining that "[f]rom the beginning of our constitutional system," a state's "control over the person at the place of his domicile" has provided "an adequate constitutional basis" for taxing intangible property). Questioning that principle would call into question numerous settled state taxes.

- **The tax allows for apportionment if a taxpayer is subject to other wealth taxes on the same property.**
    - Under Proposition 40, if a taxpayer pays taxes to another jurisdiction for the same property based on partial residency in that jurisdiction, the taxpayer may take a credit to reduce the tax owed to California.
    - Proposition 40 thus ensures what the Supreme Court has called "internal consistency" for apportionment purposes. *Oklahoma Taxing Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).
    - Even if every state imposed the same tax, taxpayers still would not face the prospect of double taxation of the same property.
- **Taxpayers can petition for different treatment if applying Proposition 40's default rules would be unfair.**
    - Proposition 40 allows a taxpayer to petition the Franchise Tax Board if the default rules would result in a tax that does not "fairly represent the extent to which the taxpayer's excessive wealth was accumulated in … California."
    - In that process, the state or a reviewing court can direct an alternate apportionment if necessary to comply with the Constitution.

- *Potential fiscal impact*
    - **As-applied challenges.** Individual taxpayers may seek to challenge Proposition 40 as applied to their individual circumstances.
        - The fiscal impact of individual challenges is difficult to know at this point, because the strength of each challenge will depend on the particular facts.
        - But by their nature, as-applied challenges pose less systemic risk to Proposition 40 than facial challenges.
    - **Pay first**. Taxpayers generally cannot sue over state tax, even on federal constitutional grounds, without first paying the tax.

Due Process (Minimum Contacts)

- *Potential argument*
    - Opponents may argue that Proposition 40 violates due process because California is taxing the ownership of intangible property that lacks a sufficient "minimal connection" to the state.
    - The analysis here largely overlaps with the Commerce Clause. The two doctrines are conceptually distinct but impose "parallel limitations" on state taxes, focused on "whether the state has given anything for which it can ask return." *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 24–25 (2008).

- *Litigation risk assessment*

    - **No facial challenges.** For the same reasons discussed above, facial challenges will be difficult. Proposition 40 clearly does not violate due-process minimum-contacts principles in many applications and therefore is not facially unconstitutional.

    - **As-applied, after paying.** As with the Commerce Clause, taxpayers may still be able to bring as applied due-process challenges, but federal law would not provide a basis for challenging the law on due-process grounds without first paying.

Due Process (Retroactivity)

- *Potential arguments*

    - **Retroactive residency.** Opponents may argue that Proposition 40 is impermissibly retroactive because it is keyed to residency in California as of January 1, 2026. In other words, it will impose new legal consequences for having resided in California on that date.

    - "**New tax.**" Additionally, opponents may argue that Proposition 40 violates due process because it is a retroactive "new tax," about which taxpayers lacked fair notice.

        - This is a distinct doctrine, derived from a pair of Supreme Court cases addressing the then-new federal gift tax. *See Untermyer v. Anderson*, 276 U.S. 440, 445 (1928); *Blodgett v. Holden*, 275 U.S. 142, 143 (1928) (per curiam).

- *Litigation risk assessment*

  - **Rational basis.** In general, retroactive taxes do not violate due process unless the legislature lacked any rational basis for the retroactive feature. *United States v. Carlton*, 512 U.S. 26, 30–31 (1994). That's not the case here. Proposition 40 uses January 1, 2026, as the residency date for rational reasons.

    - Reaching back and defining residency as of January 1 helps to mitigate concerns that billionaires will seek to evade the tax by manipulating their residency before it takes effect.

    - January 1 also provides an easy to administer date.

    - The retroactive provision is only for defining residency, not for calculating any tax owed. The tax will apply only to residents with a net worth of a billionaire dollars or more as of the post-enactment "valuation date," December 31, 2026.

  - **Limited retroactivity is common.** Many federal and state tax changes are retroactive. This is common and does violate due process. *See Carlton*, 512 U.S. at 32–33; *United States v. Darusmont*, 449 U.S. 292, 297 (1981) (per curiam). Legislatures often have good reason for making retroactive changes, including so that the timing of any changes corresponds to the ongoing tax year.

  - **"New tax" doctrine is defunct.** The two *Lochner*-era cases in which the Supreme Court invalidated retroactive application of the then-new federal gift tax are defunct. The Supreme Court has never

again relied on those cases to invalidate any federal or state tax as impermissibly retroactive. The Court has repeatedly found the gift-tax cases inapplicable, either because a given tax was not really "new" or because the taxpayers already had notice of the potential for tax liability. *Cf. Carlton*, 512 U.S. at 34. Reviving that line of cases would be a significant change in federal law and could throw other tax laws and practices into question.

- *Potential fiscal impact*
    - **Severability**. If Proposition 40's residency-date provision is deemed invalid, the law contains a provision specifying that residency should instead be determined as of the earliest constitutionally permissible date**.**
        - Courts would be required to give effect to that provision under background severability principles. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam); *California Redevelopment Ass'n v. Matosantos*, 267 P.3d 580, 607 (Cal. 2011).
        - Retroactivity therefore would not be a basis for striking down Proposition 40 as a whole.
    - **Limited fiscal impact.** The residency-date issue affects only those billionaires who successfully changed their residency from California to another jurisdiction *after* January 1, 2026.

Miscellaneous Other Arguments

Opponents have floated a number of other potential constitutional challenges to Proposition 40. These are not serious arguments.

- Proposition 40 is not an impermissible **bill of attainder** or **ex post facto** law because it does not impose a form of punishment on specific individuals. *See, e.g., Nixon v. Administrator of General Servs.*, 433 U.S. 425, 468–71 (1977).

- Proposition 40 does not violate **equal protection principles** because billionaires aren't a protected class. The Supreme Court has consistently held that legislative classifications based on wealth (or poverty) are subject only to rational-basis review, not heightened scrutiny. *See, e.g.*, *Kadras v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988). The Court is unlikely to revisit that precedent. And Proposition 40 easily passes rational-basis review because California had good reasons to tax only billionaires.

- Proposition 40 does not violate the **Privileges and Immunities Clause** in Article IV of the Constitution because it does not discriminate against non-residents of California or against recent transplants to the state. It treats all residents equally, regardless of the duration of their residency. *See, e.g., Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998).

- Proposition 40 does not violate the **right to travel** because it does not impose any penalty for leaving California. There is no "exit tax."