

1991

# Wendell E. Brumley, et al. v. Utah State Tax Commission, et al. : Brief of Appellee

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

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IN THE UTAH SUPREME COURT

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WENDELL E. BRUMLEY, et al.,	:	
	:	
Plaintiffs/Cross-Appellants,	:	Appeal No. 91-0242
	:	
vs.	:	
	:	
UTAH STATE TAX COMMISSION,	:	Priority No. 11
et al.,	:	
	:	
Defendants/Appellants.	:	

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BRIEF OF PLAINTIFFS/CROSS-APPELLANTS

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Interlocutory Appeal from the Tax Division of the  
Third Judicial District Court.

Judge David S. Young, Presiding.

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CLERK SUPREME COURT,  
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## LIST OF PARTIES

### Plaintiffs

1. Wendell E. Brumley
2. Utah National Association of Retired Federal Workers
3. American Federation of Government Employees, Local 1592
4. American Federation of Government Employees, Utah Counsel
5. 335 Named Class Members and Approximately 34,000 Unnamed Class Members

### Defendants

1. Utah State Tax Commission
2. Clyde Nichols
3. Hal Hansen
4. Joe Pacheco
5. Roger Tew
6. Blaine Davis
7. State of Utah



## TABLE OF CONTENTS

	<u>PAGE NO.</u>
I. THE TRIAL COURT CORRECTLY APPLIED § 111 TO INVALIDATE UTAH'S TAXING SCHEME . . . . .	10
A. SECTION 111 IS A LIMITED WAIVER OF INTERGOVERNMENTAL TAX IMMUNITY. . . . .	10
B. DAVIS HELD THAT DISCRIMINATORY TAXATION OF FEDERAL RETIREES VIOLATED § 111 . . . . .	12
C. UTAH TAXED FEDERAL RETIREES IN VIOLATION OF § 111. . . . .	13
II. RETROACTIVITY OF U.S. SUPREME COURT CASES IS DETERMINED BY FEDERAL RETROACTIVITY DOCTRINE. . . . .	13
III. THE U.S. SUPREME COURT'S RECENT DECISION IN <i>JAMES B. BEAM DISTILLING CO. V. GEORGIA</i> , U.S. 111 S.CT. 2439 115 L.ED. 2D 481 (1991) (HEREAFTER "BEAM") IS DISPOSITIVE OF THE RETROACTIVITY ISSUE. . . . .	14
A. BEAM REJECTS "SELECTIVE OR MODIFIED" RETROACTIVITY. . . . .	14
B. BEAM REJECTS USE OF THE <i>CHEVRON</i> ANALYSIS BY ANOTHER COURT ATTEMPTING TO DETERMINE THE RETROACTIVITY OF A UNITED STATES SUPREME COURT CASE . . . . .	16
C. BEAM MANDATES THAT OTHER COURTS ATTEMPTING TO DETERMINE THE RETROACTIVITY OF A U.S. SUPREME COURT OPINION FOCUS THEIR INQUIRY ON THE OPINION ITSELF . . . . .	18
D. UNDER THE BEAM ANALYSIS, A U.S. SUPREME COURT OPINION IS RETROACTIVE TO ITS LITIGANTS AND THUS TO ALL OTHERS, IF 1) THE COURT APPLIED ITS DECISION RETROACTIVELY, OR 2) THE COURT ALLOWED CONSIDERATION OF REMEDIES, OR 3) THE COURT DID NOT RESERVE THE ISSUE OF RETROACTIVITY (SILENCE) . . . . .	18
1. A case is retroactive if it applies its rule retroactively to its litigants. . . . .	19
2. A case is retroactive if the court allowed consideration of remedies. . . . .	19
3. A case is retroactive if the Court does not reserve the issue of retroactivity (silence). . . . .	20
E. APPLYING THE BEAM ANALYSIS, DAVIS WAS RETROACTIVE TO ITS LITIGANTS AND THUS TO ALL BECAUSE, 1) DAVIS RETROACTIVELY INVALIDATED THE MICHIGAN TAX IN PRIOR YEARS; 2) DAVIS ALLOWED ITS LITIGANTS TO CONSIDER REMEDIAL ISSUES; AND 3) DAVIS DID NOT RESERVE THE ISSUE OF ITS RETROACTIVITY (SILENCE) . . . . .	20

1.	<i>Davis</i> is retroactive because it applied its rule retroactively to invalidate the Michigan tax in prior years.	21
2.	<i>Davis</i> is retroactive because it allowed its litigants to consider remedial issues.	21
3.	<i>Davis</i> is retroactive because it did not reserve the issue of retroactivity (silence).	22
4.	The U.S. Supreme Court views <i>Beam</i> to be applicable to <i>Davis</i> .	22
IV.	<b>THE PLAIN INTERPRETATION OF AN UNAMBIGUOUS STATUTE DOES NOT RAISE AN ISSUE OF RETROACTIVITY (<i>CHEVRON</i>) . . . . .</b>	23
A.	THE TRIAL COURT CORRECTLY CHARACTERIZED <i>DAVIS</i> AS THE PLAIN READING OF AN UNAMBIGUOUS STATUTE, § 111.	23
B.	THE PLAIN INTERPRETATION OF AN UNAMBIGUOUS STATUTE DOES NOT MEET THE "LAW CHANGING" THRESHOLD OF <i>CHEVRON</i>	25
C.	INTERPRETING A FEDERAL STATUTE IS A FAR DIFFERENT MATTER FROM INTERPRETING THE CONSTITUTION OR COMMON LAW	26
D.	BECAUSE <i>DAVIS</i> DID NOT MEET THE "LAW CHANGING" THRESHOLD OF THE <i>CHEVRON</i> ANALYSIS, THE TRIAL COURT PROPERLY DECLINED CONSIDERATION OF THE REMAINING TWO "PRONGS" OF <i>CHEVRON</i>	27
E.	CONSIDERATION OF THE SECOND AND THIRD PRONGS OF <i>CHEVRON</i> WOULD HAVE SHOWN COMPELLING REASONS FOR THE RETROACTIVITY OF <i>DAVIS</i> .	29
	1. Retroactive application of <i>Davis</i> will further the policy of intergovernmental tax immunity.	30
	2. The equities in this case favor retroactive application of <i>Davis</i> .	31
F.	THE ATA DECISION DOES NOT SUPPORT DEFENDANTS' CLAIM THAT <i>DAVIS</i> IS RETROACTIVE	33
V.	<b>DEFENDANTS' ARGUMENTS DO NOT MAKE <i>DAVIS</i> RETROACTIVE</b>	34
A.	THE REAL SURPRISE TO UTAH OFFICIALS IS THE EXISTENCE OF § 111, NOT ITS MEANING.	34
B.	DEFENDANTS' CRITICISM OF THE U.S. SUPREME COURT IS IRONIC	34
C.	DEFENDANTS MISINTERPRET § 111 AND CALL <i>DAVIS</i> A NEW LAW BECAUSE THEY DENY THAT FEDERAL RETIREMENT PAY IS "PAY OR COMPENSATION FOR PERSONAL SERVICE AS AN OFFICER OR EMPLOYEE OF THE UNITED STATES"	34
D.	DEFENDANTS MISINTERPRET § 111 AND CALL <i>DAVIS</i> "NEW LAW" BECAUSE THEY FAIL TO SEE § 111 AS A STATUTORY LIMITED WAIVER OF INTERGOVERNMENTAL TAX IMMUNITY	36

E.	DEFENDANTS' CLAIM OF RELIANCE ON THE PRACTICE OF OTHER STATES DOES NOT MAKE DAVIS RETROACTIVE.	39
VI.	HOLDING DAVIS TO BE RETROACTIVE WOULD NOT RELIEVE THE COURT OF ITS DUTY TO CONSTRUE § 111 UNDER PRIOR LAW. .	40
VII.	UTAH'S SPECIFIC STATUTORY REMEDY FOR INCOME TAX REFUNDS IS PLAINTIFFS' PROPER REMEDY. . . . .	41
A.	UTAH HAS ADOPTED A REMEDY FOR INCOME TAX REFUNDS PATTERNED AFTER THE FEDERAL TAX SYSTEM.	41
B.	DEFENDANTS DO NOT DENY THAT PLAINTIFFS HAVE COMPLIED WITH THE REFUND PROVISIONS OF § 59-10-529 OR THAT ITS REMEDY APPLIES TO PLAINTIFFS, YET THEY RAISE AN OLD PROTEST REMEDY AS PLAINTIFFS' SOLE REMEDY.	43
C.	PROTESTS ARE NOT REQUIRED FOR REFUNDS OF INCOME TAX "OVERPAYMENTS".	46
D.	REFUNDS OF INCOME TAX "OVERPAYMENTS" UNDER § 59-10- 529 INCLUDE TAXES UNLAWFULLY COLLECTED.	48
E.	UNDER UTAH LAW, THE PROTEST REMEDY HAS NO APPLICATION WHERE A MORE SPECIFIC STATUTORY REMEDY EXISTS AND AN ADMINISTRATIVE PROCEDURE IS ESTABLISHED.	50
F.	UTAH HAS NEVER REQUIRED PAYMENT UNDER PROTEST FOR INCOME TAX REFUNDS; TO DO SO NOW WOULD BE UNFAIR.	54
G.	THE EXISTENCE OF NO PROTEST REMEDY IN 1987 BELIES DEFENDANTS' CLAIM THAT IT WAS AND IS PLAINTIFFS' SOLE REMEDY.	55
H.	PAYMENT UNDER PROTEST IS AN ALTERNATE REMEDY FOR THE 1988 TAX YEAR. PLAINTIFFS PAID TAXES UNDER PROTEST IN 1988.	56
I.	NEITHER LACHES OR WAIVER BAR PLAINTIFFS' CLAIMS.	57
VIII.	DEFENDANTS IMPROPERLY ASK THE COURT TO CRAFT A NEW REMEDY IN PLACE OF TAX REFUND STATUTES (BUT EQUITY FOLLOWS THE LAW). . . . .	59
A.	THE TAX REFUND STATUTE IS THE VOICE OF THE PEOPLE OF UTAH.	59
B.	THE CONSTITUTION OF UTAH PROTECTS A CLEAR STATUTORY REMEDY FROM EROSION BY POLITICAL EXPEDIENCE.	60
C.	FEDERAL DUE PROCESS DEMANDS A REMEDY.	61
D.	EQUITY FOLLOWS THE LAW.	63
IX.	THE TRIAL COURT HAD JURISDICTION TO GRANT THE RELIEF SOUGHT AND PROPERLY WAIVED EXHAUSTION OF ADMINISTRATIVE REMEDIES . . . . .	66
A.	THE COURT'S JURISDICTION IS BEST DETERMINED BY THE RELIEF SOUGHT	67

B.	THE DISTRICT COURT HAS JURISDICTION TO ISSUE A DECLARATORY ORDER	68
C.	THE DISTRICT COURT HAD JURISDICTION TO COMPEL ACTION BY THE COMMISSION (MANDAMUS) . . . . .	70
D.	THE TRIAL COURT PROPERLY RELIEVED PLAINTIFFS OF THE REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES	71
	1. The trial court had authority in Utah Code Ann. § 63-46b-14 to relieve Plaintiffs of further administrative remedies.	72
	2. Further proceedings before the Commission would have caused the taxpayers irreparable harm.	72
	3. Further proceedings before the Commission were not justified by the incidental public benefit to be gained.	75
E.	COMMISSION HEARINGS COULD NOT HAVE AFFORDED PLAINTIFFS "DUE PROCESS" OR "REMEDY BY DUE COURSE OF LAW"	75
	1. Tax Commission hearings could not provide due process.	76
	2. Tax Commission hearings could not provide a remedy by due course of law.	78
F.	CONSIDERATION OF THE RETROACTIVITY OF A U.S. SUPREME COURT DECISION IS OUTSIDE THE SCOPE OF THE TAX COMMISSION'S AUTHORITY AND EXPERTISE	80
G.	THE COMMISSION COULD NOT HAVE PROTECTED THROUGH ITS PROCEDURES ALL MEMBERS OF THE CLASS	81
H.	IN DECIDING LEGAL ISSUES, THE COURT DID NOT STOP THE COMMISSION FROM DOING WHAT IT DOES BEST	83
I.	THE TRIAL COURT PROPERLY ENFORCED ITS ORDER RELIEVING EXHAUSTION OF ADMINISTRATIVE REMEDIES WITH A TEMPORARY INJUNCTION	83
X.	THE TRIAL COURT PROPERLY DEFINED THE CLASS . . . . .	85
XI.	MILITARY RETIREES WERE PROPERLY INCLUDED IN THE CLASS SINCE MILITARY RETIREMENT PAY IS DEFERRED COMPENSATION	89
XII.	DEFENDANTS HAD MADE ALL OBJECTIONS TO THE PROPOSED FINAL ORDER AT THE TIME IT WAS SIGNED BY THE TRIAL COURT . .	92
XIII.	THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' 42 U.S.C. § 1983 CIVIL RIGHTS ACTION . . . . .	93
XIV.	THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES AND COSTS OF RETURN PREPARATION SHOULD BE SUSTAINED.	

<b>THE SECURITY OF INDIVIDUAL RIGHTS AND THE PERPETUITY OF FREE GOVERNMENT.</b>	<b>98</b>
<b>CONCLUSION.</b>	<b>98</b>
<b>APPENDICES.</b>	
1. Tax Commission Press Release, April 5, 1989	
2. Protective Claim	
3. Tax Bulletin	
4. Determinative Law	

# TABLE OF AUTHORITIES

<u>STATUTES</u>	<u>PAGE NO.</u>
10 U.S.C. § 1408(c)(1) (1983) . . . . .	90
42 U.S.C. § 1983 . . . . .	4, 26, 94-96, 98
Code of Va. § 51-111 enacted in 1952 . . . . .	39
I.R.C. § 6401(c) (1954 Code) . . . . .	49
I.R.C. § 6511 (1954 Code as amended) . . . . .	42
1941 Utah Laws, Ch. 85, § 2 (effective January 1, 1940) . . .	11
1947 Utah Laws C. 131, § 13 . . . . .	39
1988 Utah Laws Ch. 3 § 88 . . . . .	52
1990 Utah Laws, Ch. 21 §§ 1 to 3, effective February 21, 1990 . . . . .	45
Mo. Statutes § 104.540 enacted in 1957 . . . . .	39
New Mexico NMSA § 10-11-145 enacted in 1953 . . . . .	39
U.C.A. § 39-22-104(4)(g) . . . . .	50
U.C.A. § § 59-1-210(5), and 59-10-544(1) . . . . .	79
U.C.A. § 59-1-202 . . . . .	81
U.C.A. § 59-1-210 . . . . .	81
U.C.A. § 59-1-210(22) . . . . .	81
U.C.A. § 59-1-301 . . . . .	6, 45, 50, 51, 67
U.C.A. § 59-1-304 . . . . .	75
U.C.A. §§ 59-1-501 through 505 . . . . .	62
U.C.A. §§ 59-1-608 (1987) . . . . .	4
U.C.A. § 59-1-704 . . . . .	84

U.C.A. § 59-10-101 . . . . .	42, 53
U.C.A. § 59-10-103(2) . . . . .	48
U.C.A. § 59-10-529 (as amended 1973) . . . . .	42-45, 48-51, 54-56, 60, 67, 87, 88
U.C.A. § 59-10-531 through 535 . . . . .	45
U.C.A. § 59-11-11 (1977) . . . . .	51, 55
U.C.A. § 59-11-11 . . . . .	*, *
U.C.A. § 59-14A-92 . . . . .	79
U.C.A. § 59-15-12 . . . . .	51
U.C.A. § 63-46b-21(3)(b) . . . . .	83
U.C.A. § 63-466-21 (1989) . . . . .	82
U.C.A. § 78-3-4 . . . . .	71
U.C.A. § 78-3-4 (as amended 1988) . . . . .	68, 85
U.C.A. § 78-2-2(3)(j) (1991) . . . . .	4
U.C.A. § 78-12-31 . . . . .	46
U.C.A. § 78-33-2 . . . . .	69
U.C.A. § 78-33-8 . . . . .	71
U.C.A. § 78-33-11 . . . . .	87
U.C.A. § 78-33-12 . . . . .	70, 71
Utah Admin. R. 861-1-5A(Q) . . . . .	82

#### **CONSTITUTIONAL PROVISIONS**

Constitution of the United States, 14th Amendment. . . . .	77
Utah Constitution, Art. I, § 2. . . . .	60, 61
Utah Constitution, Art. I, § 3 . . . . .	59
Utah Constitution, Art. I, § 7. . . . .	77

Utah Constitution, Art. I, § 11 . . . . .	80
Utah Constitution, Art. I, § 24. . . . .	61
Utah Constitution, Art. I, § 26. . . . .	98
Utah Constitution, Art. I, § 27. . . . .	98
Utah Constitution, Art. V, § 1 . . . . .	61
Utah Constitution, Art. XIII § 12 . . . . .	42

#### **OTHER RULES**

Utah Rule of Civil Procedure 12(b)(6) . . . . .	4
Rule 4-504(2) of the Utah Code of Judicial Administration . . . . .	93
Rule 5 of the Utah Rules of Appellate Procedure . . . . .	4

#### **CASES**

<i>Aloha Airlines, Inc. v. Director of Taxation</i> , 464 U.S. 7 (1983) . . . . .	25
<i>American Trucking Assns., Inc. v. Scheiner</i> , 483 U.S. 266, (1987) . . . . .	20, 28
<i>American Trucking Association v. Smith</i> , 110 S.Ct. 2323 (1990) . . . . .	14, 26, 28, 29, 33, 34, 40, 62, 90
<i>Andrews v. Morris</i> , 677 P.2d 81 (Utah 1983) . . . . .	28
<i>Armco v. Hardesty</i> , 467 U.S. 638 (1984) . . . . .	27
<i>Ashland Oil, Inc. v. Caryl</i> , 110 S.Ct. 3202 (1990) . . . . .	27, 28, 33
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984) . . . . .	15, 19, 20, 22
<i>Barker v. State of Kansas</i> , 815 P.2d 46 (Kan. 1991) Cert. granted, 60 U.S.L.W. 3395 . . . . .	92
<i>Bass v. South Carolina</i> , 395 S.E.2d 171 (S.C. 1990) cert. granted, vacated and remanded 111 S.Ct. 2881 (1991) . . . . .	23



<i>Berry v. Beech</i> , 717 P.2d 670 (1985) . . . . .	78, 98
<i>Board of Education v. Salt Lake County</i> , 659 P.2d 1030 (Utah 1983) . . . . .	14
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) . . . . .	40
<i>Carmichael v. Southern Coal Co.</i> , 301 U.S. 495 (1937) . . . .	37
<i>Carter v. State Tax Commission</i> , 98 Utah 96 P.2d 727 (1939) . . . . .	52
<i>Celebrity Club, Inc. v. Utah Liquor Control Commission Utah</i> , 657 P.2d 1293 (1982) . . . . .	78
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97 (1971) . . . . .	15-18, 23, 25, 27-33, 38, 50
<i>Christensen v. State Tax Commission</i> , 591 P.2d 445, (Utah 1979) . . . . .	46
<i>Christensen v. Tax Commission</i> , 591 P.2d 445 (Utah 1979) . . . . .	41
<i>Claflin v. Houseman</i> , 93 U.S. 130 (1876) . . . . .	59
<i>Cort v. Ash</i> , 422 U.S. 66 (1975) . . . . .	94
<i>Cowan v. University of Louisville School of Medicine</i> , 900 F.2d 936 (CA6 1990) . . . . .	95
<i>Davis v. Michigan Dep't. of Treasury</i> , 489 U.S. 803 (1989) . . . . .	5, 8, 10-14, 18-25, 27-31, 33-36, 38-41, 45, 57, 59, 64, 67, 73, 75-77, 80, 82, 86, 90-92, 96, 97
<i>Dennis v. Higgins, Director, v. Nebraska Department of Motor Vehicles</i> , 111 S.Ct. 865 . . . . .	94
<i>Ellis v. Utah State Retirement Bd.</i> , 757 P.2d 882, 884, 885 (Utah App. 1988) . . . . .	52
<i>Exxon Corp. v. Eagerton</i> , 462 U.S. 176, (1983) . . . . .	19, 22
<i>Fitzpatrick v. State Tax Commission</i> , 386 P.2d 896 (Utah 1963) . . . . .	35
<i>Golden State Transit Corp. v. Los Angeles</i> , 493 U.S. _____ (1989) . . . . .	94

<i>Graves v. New York ex rel. O'Keefe</i> , 306 U.S. 466 (1939) . . . . .	11, 12
<i>Great Northern Railway Co. v. Sunburst Oil and Refining Co.</i> , 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.2d 360 (1932) . . . . .	14
<i>Greene v. Greene</i> , 751 P.2d 827 (Utah App. 1988) . . . . .	90
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987) . . . . .	28
<i>Hafer v. Melo</i> , _____ U.S. _____, 60 USLW 4001 case No. 90-681 (decided Nov. 5, 1991) . . . . .	95, 96
<i>Harper v. Virginia Department of Taxation</i> , 401 S.E. 2d 868 (Vir. 1991) cert. granted, vacated and remanded, 111 S.Ct. 2881 (1991) . . . . .	23
<i>Helvering v. Gerhardt</i> , 304 U.S. 405 (1938) . . . . .	11
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 (1964) . . . . .	40
<i>Huckuba v. Johnson</i> , 573 P.2d 305 (Or. 1977) . . . . .	37
<i>In Re: Tanner</i> , 549 P.2d 703 (Utah 1976) . . . . .	80
<i>Independent School Dist. No. 89 v. Oklahoma City Federation of Teachers</i> , 612 P.2d 719 (Okla. 1980) . . . . .	66
<i>Industrial Commission v. Evans</i> , 52 Utah 394 174 P.2d 825 (1918) . . . . .	78
<i>James B. Beam Distilling Co. v. Georgia</i> , 111 S.Ct. 2439 (1991) . . . . .	14-23, 28, 33, 40
<i>Jarvis v. State Land Dept.</i> , 479 P.2d 169, 106 Ariz. 506 (1970) . . . . .	66
<i>Johnson v. Retirement Bd.</i> , 621 P.2d 1234 (Utah 1980) . . . . .	80
<i>Jones v. Liberty Glass Company</i> , 332 U.S. 524 (1948) . . . . .	48, 49
<i>Judge v. Spencer</i> , 15 Utah 242, 48 P. 1097 (1897) . . . . .	61
<i>Kimball v. Grantsville City</i> , 19 Utah 368, 57 P.1 (1899) . . . . .	61

<i>Kizas v. Webster</i> , 707 F.2d 524, 536 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984) . . . . .	35
<i>Kuhn v. State Dept. of Revenue</i> , 817 P.2d 101 (Colo. 1991) . . . . .	50, 91
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> , 410 U.S. 356 (1973) . . . . .	37
<i>Lowe v. Sorenson Research Co.</i> , 779 P.2d 761 (Utah 1989) . . . . .	4
<i>Loyal Order of Moose No. 259 v. County Board of Equalization</i> . . . . .	14
<i>Malan v. Lewis</i> , 693 P.2d 661 (Utah 1984) . . . . .	38
<i>Marbury v. Madison</i> , 1 Cranch 137 2 L.Ed. 60 (1803) . . . . .	25
<i>McCarty v. McCarty</i> , 453 U.S. 210 (1981) . . . . .	90, 91
<i>McCulloch v. Maryland</i> , 4 Wheat 3316 (1819) . . . . .	10, 11
<i>McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco</i> , 110 S.Ct. 2238 (1990) . . . . .	29, 60, 62, 63
<i>Milton v. Nainwright</i> , 407 U.S. 371 . . . . .	38
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961) . . . . .	96
<i>Moore Ice Cream Co. v. Rose</i> , 289 U.S. 373 (1933) . . . . .	46, 47
<i>Murdock v. Murdock</i> , 113 P. 330 (Utah 1911) . . . . .	56
<i>Nebraska Press Assoc. v. Stuart</i> , 427 U.S. 539 (1976) . . . . .	76
<i>Northern R. Co. v. Sunburst Oil &amp; Riners Co.</i> , 287 U.S. 352 (1932) . . . . .	28
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) . . . . .	26
<i>Pacific Intermountain Express v. State Tax Commission</i> , 7 Utah 2d 15, 315 P.2d 549, 552 (1957) . . . . .	43, 50, 51, 53, 55
<i>Papanikolas Brothers Enter. v. Sugarhouse Shopping Center Assoc.</i> , 535 P.2d 1256 (Utah 1975) . . . . .	58

<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1, 19 (1981) . . . . .	94
<i>Peterson v. Bountiful City</i> , 477 P.2d 153, 156 (Utah 1970) . . . . .	57
<i>Pittsburgh &amp; Midway Coal v. Dept. of Rev.</i> , 776 P.2d 1061 (Ariz. 1989) . . . . .	41, 47, 66
<i>Pledger v. Bosnick</i> , 811 S.W.2d 286 (Ark. 1991) . . . . .	30-32, 36, 91, 92
<i>Protrka v. Palmer</i> , 423 P.2d 514, 246 Or. 467 (1967) . . . . .	66
<i>Public Utilities Commission v. United States</i> , 355 U.S. 534, 539-40, 78 S.Ct. at 450 . . . . .	80
<i>Rio Algom Corp. v. San Juan County</i> , 681 P.2d 184 (Utah 1984) . . . . .	14, 16, 38
<i>Rohr v. Rohr</i> , 709 P.2d 382 (Utah 1985) . . . . .	58
<i>Rosenman v. United States</i> , 323 U.S. 658 89 L.Ed. 535, 65 S.Ct. 536 . . . . .	48
<u><i>Santa Barbara Optical Co., Inc. v. State Bd.</i></u> <u><i>of Equalization</i></u> , 120 Cal. Rptr. 609, 47 Cal.App.3d 244 (1975) . . . . .	88
<i>Shea v. Tax Commission</i> , 101 Utah 209, 120 P.2d 274 (1941) . . . . .	52, 53, 75, 78, 79
<i>Sheehy v. Montana</i> , No. 90-450 (Mont. Nov. 14, 1991) . . . . .	31-33
<i>Silver v. State Tax Commission</i> , 168 Utah Adv. Rep. 10, case no. 89-0138 (Utah, decided Aug. 30, 1991). . . . .	79
<i>Smith v. Schwartz</i> , 21 Utah 126, 60 P. 305 (1899) . . . . .	61
<i>State ex rel. Breeden v. Lewis</i> , 26 Utah 120, 72 P. 388 (1903) . . . . .	61
<i>State v. Bishop</i> , 717 P.2d 261 (Utah 1986) . . . . .	61
<i>State v. District Court</i> , 102 Utah 290, 115 P.2d 913 (1941) . . . . .	52, 53
<i>State v. Johnson</i> , 44 Utah 18, 137 P. 632 (1913) . . . . .	61

<i>Swanson v. State</i> , 407 S.E. 2d 791 (N.C. 1991) . . . . .	64
<i>Teague v. Lane</i> , 109 S.Ct. 1060 (1989) . . . . .	38
<i>United States v. Johnson</i> , 457 U.S. 537 (1982) . . . . .	38
<i>Untermeyer v. State Tax Commission</i> , 102 Utah 214, 129 P.2d 881 (1942) . . . . .	76
<i>Utah Manufacturers Ass'n. v. Stewart</i> , 82 Utah 198, 23 P.2d 229 (1933) . . . . .	61
<i>VanCott v. State Tax Commission</i> , 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939), decision on remand 96 P.2d 740 (Utah 1939) . . . . .	11
<i>Walker Bank &amp; Trust Company v. Taylor</i> , 15 Utah 2d 234, 390 P.2d 592 (1964) . . . . .	79
<i>Washington County v. State Tax Commission</i> , 103 Ut. 73, 133 P.2d 564 (1943) . . . . .	69, 74
<i>Welch v. Cadre Capital</i> , 946 F.2d 185 (2nd Cir. 1991) . . . . .	15
<i>West Virginia Univ. Hosp., Inc. v. Casey</i> , 111 S.Ct. 1138 (1991) . . . . .	25
<i>Wilder v. Virginia Hospital Association</i> , 496 U.S. ____, ____ (1990) . . . . .	94
<i>William "Sky" King v. St. Vincent's Hospital</i> , 60 USLW 4061, Case No. 90-889 (decided December 16, 1991) . . . . .	25
<i>Williams v. Vermont</i> , 472 U.S. 14, 28 (1985) . . . . .	19, 22
<i>Woodward v. Woodward</i> , 656 P.2d 431 (1982) . . . . .	36
<i>Wright v. Roanoke Redevelopment and Housing Authority</i> , 479 U.S. 418 (1987) . . . . .	94
<i>Utah Rest. Ass'n v. Davis Cty. Bd. of Health</i> , 709 P.2d 1159 (Utah 1985) . . . . .	88

**MISCELLANEOUS**

BLACKS LAW DICTIONARY, p. 553 (4th Ed. 1968) . . . . .	38
Conclusions of Law, p. 7, R. 1125 . . . . .	70
Conclusions of Law, p. 7, R. 1125 . . . . .	67
Conclusions of Law, p. 7, R. 1125. . . . .	68
Conclusions of Law, p. 8, R. 1126 . . . . .	71
Conclusions of Law, p. 19, R. 1137 . . . . .	63
Conclusions of Law, pp. 9-11, R. 1127-1129 . . . . .	41
Conclusions of Law, pp. 18-19, R. 1136, 1137 . . . . .	40
Conclusions of Law, R. 1128 . . . . .	35
Conclusions of Law, R. 1131 . . . . .	44
Conclusions of Law, R. 1131, 1132, pp. 13-14 . . . . .	49
Depo. of Commission Chairman Richard Hansen, R. 1159, pp. 21-22 . . . . .	34, 49
Depo. of Commissioner Roger Tew, R. 1163, p. 40 . . . . .	34, 86
Depo. of Richard Hanson, Tax Commission Chairman, R. 1159, pp. 22-23 . . . . .	54
Depo. of Roger Tew, Tax Commissioner, R. 1163, p. 28 . . . . .	50
Deposition of Jerry Larrabee, Appeals Supervisor, Utah State Tax Commission, R. 1161, p. 8 . . . . .	42
Deseret News, January 6, 1992, p. D-5 . . . . .	7
Df bf at pp. 25-27 . . . . .	80
Df bf p. 11 . . . . .	8
Df bf p. 13 . . . . .	7
Df bf p. 22 . . . . .	51
Df bf p. 28 . . . . .	73

Df bf p. 29 . . . . .	90
Df bf p. 29, ftnt 4 . . . . .	90
Df bf p. 31 . . . . .	45
Df bf p. 32 . . . . .	82
Df bf p. 35 . . . . .	80
Df bf p. 36 . . . . .	68, 71
Df bf p. 38 . . . . .	84
Df bf p. 41 . . . . .	41
Df bf p. 51 . . . . .	39
Df bf p. 53 . . . . .	35
Df bf p. 54, ftnt 14 . . . . .	35
Df bf p. 55 . . . . .	37
Df bf p. 56 . . . . .	36
Df bf p. 62 . . . . .	63
Df bf p. 63 . . . . .	63
Df bf p. 69, ftnt 25 . . . . .	23
Df bf p. 84 . . . . .	13
Df bf p. 85 . . . . .	60
Df bf p. 89 . . . . .	92, 93
Df bf p. 91 . . . . .	73
Df bf p.22, ftnt 1 . . . . .	55
Df bf p.85 . . . . .	62
Df bf pp. 20-27 . . . . .	75
Df bf pp. 25-26 . . . . .	46
Df bf pp. 30-37 . . . . .	76

Df bf pp. 32 and 33 . . . . .	77
Df bf pp. 39-62 . . . . .	80
Df bf pp. 44-47 . . . . .	57
Df bf pp. 50 and 62 . . . . .	39
Df bf pp. 52-60 . . . . .	34
Df bf pp. 63-64 . . . . .	30
Df bf pp. 65-68 . . . . .	33
Df bf pp. 68-78, especially p. 74 . . . . .	17, 18
Df bf pp. 84-86 . . . . .	60
Df bf pp. 84-89 . . . . .	59
Df bf, pp. 19-21 . . . . .	85



## **JURISDICTION OF THE UTAH SUPREME COURT**

Jurisdiction is in the Utah Supreme Court pursuant to: Art. VIII § 5 of the Utah Constitution; U.C.A. §§ 59-1-608 (1987) and 78-2-2(3)(j) (1991); and Rule 5 of the Utah Rules of Appellate Procedure.

### **STATEMENT OF ISSUES**

Plaintiffs raise this additional issue:

**Issue:** Did the trial court err in ruling that a direct violation of 4 U.S.C. § 111 (hereafter "§ 111") is not actionable under 42 U.S.C. § 1983 (hereafter "§ 1983") when it granted Defendants' Motion to Dismiss Count V of Plaintiffs' Amended Complaint?

**Standard of Review:** In reviewing

an appeal from the grant of a motion to dismiss under Utah Rule of Civil Procedure 12(b)(6), we review only the facts alleged in the complaint. In determining whether the trial court properly granted the motion, we accept the factual allegations in the [amended] complaint as true and consider them and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. [cites omitted]. We will affirm the dismissal only if it is apparent that as a matter of law, the plaintiff could not recover under the facts alleged. [cites omitted]. Because we are considering only the legal sufficiency of the complaint, we give the trial court's ruling no deference and review it under a correctness standard.

*Lowe v. Sorenson Research Co.*, 779 P.2d 668, 669 (Utah 1989).

### **CONSTITUTIONAL PROVISIONS AND STATUTES**

4 U.S.C. § 111

U.C.A. § 59-10-529

U.C.A. § 63-46b-14

U.C.A. § 78-33-1 and 2

Utah Constitution Art. I, § 7  
Utah Constitution, Art. I, § 2  
Utah Constitution, Art. I, § 11  
Utah Constitution, Art. I and 24  
Utah Constitution, Art. VIII, § 5

#### **STATEMENT OF THE CASE**

**Nature of the case** - For many years Defendants unlawfully taxed Plaintiffs by granting state income tax exemptions to retired state employees covered under the state retirement system while illegally taxing federal retirees. Three hundred thirty-five Plaintiffs, plus a number of federal retiree organizations filed a Class Action Complaint in the Tax Division of Third District Court seeking among other things, 1) a declaratory order that Utah's taxation of federal retirees was unlawful for all tax years in dispute, 2) an order compelling Defendants to recognize Plaintiffs' class claims for refund, and to compute and pay refunds, and 3) an award of costs and attorneys' fees (in the § 1983 action).

**Course of Proceedings** - Plaintiffs submit the following addition to the statement of the course of proceedings submitted by Defendants:

On April 5, 1989 the State Tax Commission (hereafter "Commission") issued a widely published press release stating Davis was not retroactive and refunds would not be granted to federal retirees. R. 130. This denial of refunds by the Commission was prior to the filing of Plaintiffs' Complaint. After the Complaint

was filed, the trial court relieved Plaintiffs of the requirement to exhaust administrative remedies. R. 250. The Plaintiff class was then certified. R. 289. However, the Commission proceeded to schedule administrative hearings on May 30, 1990 involving members of the Plaintiff class. R. 292. The trial court temporarily enjoined the Commission from conducting administrative hearings, granting members of the class the opportunity to opt out of the class and proceed before the Commission should they choose. R. 367.

**Disposition in the lower court** - By summary judgment the trial court declared the Utah taxing scheme to be in violation of 4 U.S.C. § 111, found refunds to be appropriate under U.C.A. § 59-10-529 for the 1985-88 tax years and to be appropriate under U.C.A. § 59-1-301 for the 1988 tax year, ordered the Commission to issue refunds to members of the class who paid state income tax on federal retirement income during 1985-88, and awarded interest, costs and attorneys' fees to Plaintiffs. R. 1140, 1141.

**Statement of facts** - Plaintiffs are dissatisfied with the statement of facts made by Defendants in the following respects:

Defendants repeatedly cite as facts, claims that were stricken by the trial court as being irrelevant. Plaintiffs did not nor were they required to file responsive affidavits to contest the assertions in Defendants' stricken affidavits. Defendants' cite to facts not found by the trial court on pages 10, 12 and 13 of Defendants' brief dealing with the belief of the Commission, the

good faith of the State, the "estimated" refunds to be paid to Plaintiffs, and the financial impact to the State of Utah. Defendants also argue these claims in their brief as if they were facts. (See pages 63 and 64 of Defendants' brief). Plaintiffs submit Defendants have improperly represented these allegations as facts in their statement of facts.

Plaintiffs hereby submit the following additional facts:

1. Plaintiffs and members of the Plaintiff class received pay or compensation as a result of personal services rendered as officers of employees of the United States. R. 289, 1120.

2. The State of Utah taxed the income of Plaintiffs and members of the Plaintiff class and did not tax the income of retired state employees. R. 401, 1120.

3. The U.S. Supreme Court decided *Davis v. Michigan* on March 28, 1989.

4. On April 5, 1989, the Commission issued a press release stating that refunds would not be granted to federal retirees and that *Davis* was not retroactive. R. 130. Addendum, Exh. 1.

5. The plaintiff class consists of approximately 34,000 individuals and/or estates, the majority of whom are of advanced age. R. 130, 213, 251-252, 1121.

6. The size of each class member's refund claim is small in amount in relation to the high cost of pursuing a resolution of the claim. R. 252, 1121.

7. Prior to April 17, 1989 Defendants received hundreds of phone calls from members of the plaintiff class protesting the collection of 1988 Utah state income taxes on Plaintiffs' federal retirement compensation. R. 402, 403, 1121.

8. Representative Plaintiffs and more than 3,000 Utah members of the National Association of Retired Federal Employees (NARFE), protested for themselves and "all others similarly situated", the collection of state income tax on their federal retirement benefits by filing with Defendants on or before April 17, 1989 a "Notice of Claim", and "Class Claim for Refund", seeking a refund of all state income taxes paid on federal retirement benefits for the 1985 through 1988 tax years, specifically alleging the illegality of the state income tax under federal and state law. R. 402, 455-463, 1122.

9. Many representative Plaintiffs and hundreds of members of the plaintiff class also protested payment of their 1988 state income taxes by calling the Commission, by filing written protests and by filing 1988 amended returns prior to the 1988 due date, or by filing claims for protection of rights in the form and manner prescribed by the Commission. R. 402, 464-591, 1122.

10. Representative Plaintiffs for themselves and all others similarly situated, plus over 3,000 Utah members of the National Association of Retired Federal Employees (NARFE) filed timely class claims for refund with the Commission for the years 1985 through 1988. R. 403, 455-593, 1122. Addendum, Exh. 2.

11. Individual class members filed claims with the Commission for the years indicated below seeking a refund of state income taxes paid on federal retirement benefits. The number of such individual claims filed with the Commission for each tax year were:

1985: 11,921; 1986: 16,892; 1987: 15,185; 1988: 11,827

R. 403.

12. On March 30, 1990, Plaintiff class, by and through legal representatives, filed a "Protective Claim" with the Commission on a form prepared by the Commission. R. 403, 593. Exh. 2.

13. The Commission instructed Plaintiffs in February 1990 to file protective claims by April 16, 1990, to protect their claims for refund for the 1985 and 1986 tax years within the three-year statute of limitations. R. 926-934, 1123.

14. The Commission has consistently and publicly taken the position since April 5, 1989, that refunds of state income taxes paid by federal retirees will not be paid. R. 595-604, 917-934.

#### **SUMMARY OF ARGUMENTS**

By taxing federal retirees while exempting its own state retirees, Utah violated 4 U.S.C. § 111 and the rule in *Davis v. Michigan*. The U.S. Supreme Court's recent decision in *Beam v. Georgia* is dispositive on the retroactivity issue of *Davis* under the Federal Doctrine. Under *Beam*, other courts are no longer free to apply the *Chevron* test to determine the retroactivity of a previously decided U.S. Supreme Court case; they must apply the same rule that was applied to the litigants in the case. The case

must be read as being retroactive to its litigants if it is silent on the issue of retroactivity or if the court does not reserve the issue in the opinion itself.

The Supreme Court in *Davis* characterized its opinion as the plain reading of an unambiguous statute. The U.S. Supreme Court has never refused to give retroactive effect to the plain meaning of an unambiguous statute. To do so would offend basic separation of power principles.

Utah has a specific income tax refund remedy which incorporates by definition Federal Tax Law and Procedure. Although Defendants claim Plaintiffs must first pay taxes under protest before they can obtain refunds, neither the refund statute nor the federal law so requires. The federal refund procedure, incorporated into the Utah statute by specific reference, abolished the requirement of a payment under protest more than sixty years ago. Utah's statute allows for refunds of tax "overpayments", a term specifically defined in the Utah Statute and in federal law to encompass taxes unlawfully assessed. Under Utah law, the more recent and specific refund of income tax remedy must be preferred over the ancient and general payment under protest remedy.

Defendants improperly ask this Court to craft a new remedy in place of the income tax refund statutes even if *Davis* is retroactive. To do so, however, would violate state and federal constitutional protection. Defendants assume the equities in the case favor them, but the equities follow the law.

When the Commission publicly announced that the *Davis* case was not retroactive and that refunds would not be paid, plaintiffs sought a declaratory order in district court. The court had jurisdiction to declare the rights of the parties. The trial court properly applied U.C.A. § 63-46b-14 to relieve plaintiffs of the exhaustion of administrative remedies before the Commission because the burden to the taxpayers would far outweigh the minimal benefit to be gained through hearings. The Commission had neither the authority to invalidate Utah's tax laws, nor the authority and expertise to decide the retroactivity of a U.S. Supreme Court decision. When the Commission ignored the court's order relieving exhaustion of remedies and attempted to compel five members of the class to appear at formal tax commission hearings, the trial court properly and joined enforcement of its prior order.

In deciding the legal issues in protecting the rights of the class, the trial court has not prevented the Commission from doing what it does best. If tax refunds are sustained on appeal, each member of the class will need to file an individual amended income tax return, which may be reviewed and challenged in a normal administrative process.

The trial court properly defined the class. Defendants' principal objection to the class definition is the granting of refunds to persons who did not pay their taxes under protest. This is a substantive issue and should be considered as such. Defendants do not dispute the propriety of a class action. U.C.A.



§ 78-33-11 in the Declaratory Judgment Act requires the court to join all parties in the action who have a claim or interest effected by the declaration; the class action is the obvious mechanism for accomplishing this.

Section 111 makes no distinction between civilian retirees and military retirees. Defendants objection on this issue is without merit.

Defendants had a full and fair opportunity to object to the proposed final order and did make all objections they had to make. Defendants' criticism of the trial court is unfair.

Two recent decisions by the U.S. Supreme Court have supported a § 1983 civil rights action in this case. The trial court's dismissal of Plaintiffs' § 1983 civil rights action should be reversed. The trial court's award of fees and the costs of return preparation should be sustained.

The Utah Constitution requires frequent recurrence to fundamental principles. Fairness in the exaction of taxes is one of the fundamental principles upon which this country was founded. This case presents an unusual opportunity to review and apply those fundamental principles necessary to a free government.

#### **ARGUMENT**

#### **I. THE TRIAL COURT CORRECTLY APPLIED § 111 TO INVALIDATE UTAH'S TAXING SCHEME.**

##### **A. SECTION 111 IS A LIMITED WAIVER OF INTERGOVERNMENTAL TAX IMMUNITY.**

The Federal Statute, § 111 is a limited waiver by the United States of its intergovernmental tax immunity, a doctrine derived from *McCulloch v. Maryland*, 4 Wheat, 3316 (1819), in which the U.S. Supreme Court held that the State of Maryland could not impose a discriminatory tax on the Bank of the United States. Cited in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989), (hereafter "*Davis*"). For over one hundred years, *McCulloch* was read broadly to prohibit one sovereign from taxing the employees of another. In 1938, however, the Court decided in *Helvering v. Gerhardt*, 304 U.S. 405 (1938), that the federal government could impose **nondiscriminatory** income taxes on most state employees. That decision was followed a year later by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939)<sup>1</sup>, in which the Court, for the first time, permitted **nondiscriminatory** state taxation of federal

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<sup>1</sup> The 1939 Graves decision and enactment of § 111 directly impacted Utah law. Until Graves and § 111, Utah exempted all federal income (including pensions) from state income taxation. Ut.Rev.St. 1933, § 80-14-3. In 1938 the Utah Tax Commission challenged the applicability of the exemption in the case of an attorney employed by a federal agency, lost at the Utah Supreme Court and appealed to the U.S. Supreme Court for a judicial delineation of the intergovernmental immunity doctrine.

The U.S. Supreme Court issued its opinion the same day it issued the Graves opinion, referring Utah to Graves and instructing Utah that intergovernmental immunity no longer presented the nondiscriminatory taxation of federal employee compensation. *VanCott v. State Tax Commission*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939), decision on remand 96 P.2d 740 (Utah 1939). Utah effectively repealed the exemption three (3) days after the Utah Supreme Court's December 28, 1939 opinion on remand. Laws 41, Ch. 85, § 2 (effective January 1, 1940). Utah lost no time in rushing to embrace the new intergovernmental immunity rules codified in § 111 (1939). Now the State attempts to distance itself from its own legal history and calls it all "unforeseeable", "a surprise."

employees. *Davis*, 489 U.S. at 811. Section 111 provides in relevant part:

**The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States...by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation. (emphasis added).**

The waiver of federal sovereign immunity allowed by *Graves* and codified in § 111 in only a **limited waiver**. Section 111 expressly prohibits state taxation which discriminates against federal officers or employees on the basis of the source of the pay or compensation which is being taxed. *Davis* at 808.

**B. DAVIS HELD THAT DISCRIMINATORY TAXATION OF FEDERAL RETIREES VIOLATED § 111.**

In *Davis*, the United States Supreme Court applied § 111 and the doctrine of intergovernmental tax immunity to state taxation of federal retirement benefits. In an 8-1 opinion, the Court held the Michigan tax scheme violated § 111 and the coextensive prohibition against discriminatory taxes embodied in the constitutional principle of intergovernmental tax immunity. *Id.* at 813.

The Court in *Davis* applied a three-part analysis. First, the Court found that federal retirement pay is "pay or compensation for personal services as an officer or employee of the United States." *Id.* at 808. In rejecting the State of Michigan's argument that § 111 applied only to current federal employees, not federal retirees, the Supreme Court explained:

While retirement pay is not actually disbursed during the time an individual is working for the Government, the amount of benefits to be received in retirement is based and computed upon the individual's salary and years of service....[B]ecause these benefits accrue to employees on account of their service to the Government, they fall squarely within the category of compensation for services rendered "as an officer or employee of the United States." (citations omitted).

*Id.* at 808.

Second, the Supreme Court held that Michigan's disparate tax treatment of retirement benefits violated § 111 and was unconstitutional because it "discriminate[ed] in favor of retired state employees and against federal employees." *Id.* at 817.

Third, the Court rejected Michigan's attempts to justify the discrimination, noting that the State's interest in discriminating "is simply irrelevant." *Id.* at 816. Having found retirement pay to be immune from discriminatory taxation and the Michigan tax statute to be discriminatory, the Supreme Court concluded the statute violated § 111 and the doctrine of intergovernmental tax immunity. *Id.* at 817.

**C. UTAH TAXED FEDERAL RETIREES IN VIOLATION OF § 111.**

Defendants have conceded that *Davis* applied to the Utah tax scheme that taxed federal retirees while exempting state retirees, and that *Davis* required revision of Utah's tax law. Df bf p. 84.

Defendants do not challenge the trial court's ruling that Utah's taxing scheme violated § 111 as defined in *Davis*. Their principle defense is that the *Davis* decision was "unforeshadowed"

and therefore should not apply retroactively to the tax years in dispute: 1985, 1986, 1987 and 1988.

**II. RETROACTIVITY OF U.S. SUPREME COURT CASES IS DETERMINED BY FEDERAL RETROACTIVITY DOCTRINE.**

In determining the retroactivity of a case, lower courts properly refer to the rules of the court announcing the decision. See *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358, (1932). Retroactivity of a U.S. Supreme Court decision is governed by the federal doctrine of retroactivity.<sup>2</sup> *American Trucking Association v. Smith*, 110 S.Ct. 2323 (1990) (hereafter "ATA").

Since *Davis*, the U.S. Supreme Court decided three landmark retroactivity cases which circumscribe the present boundaries of the federal retroactivity doctrine. (*McKesson*, *ATA*, and *Beam*). The trial court correctly followed the federal retroactivity doctrine set forth in these recent cases.

**III. THE U.S. SUPREME COURT'S RECENT DECISION IN JAMES B. BEAM DISTILLING CO. V. GEORGIA, U.S. 111 S.CT. 2439 115 L.ED. 2D 481 (1991) (HEREAFTER "BEAM") IS DISPOSITIVE OF THE RETROACTIVITY ISSUE.**

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<sup>2</sup> Although Defendants concede the application of federal retroactively doctrine, they seek refuge under *Rio Algom Corp. v. San Juan County*, 681 P.2d 184 (Utah 1984), *Loyal Order of Moose No. 259 v. County Board of Equalization*, and *Board of Education v. Salt Lake County*, 659 P.2d 1030 (Utah 1983). (Df bf p. 88). Though Utah's retroactivity rules may differ from the federal doctrine in some respects (ftnt 4), the "law changing" threshold is the same. In the cases cited, and in all other Utah decisions discovered by Plaintiffs, the Utah Supreme Court has given prospective-only application to law reversing rules arising from difficult issues of constitutional interpretation. None involved conduct which violated the plain meaning of an unambiguous statute.

**A. BEAM REJECTS "SELECTIVE OR MODIFIED" RETROACTIVITY.**

The U.S. Supreme Court applied the commerce clause to invalidate a Hawaii tax which discriminated against out of state liquor purchasers in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (hereafter "*Bacchus*"). Shortly after *Bacchus*, the James H. Beam liquor company filed suit in Georgia for refunds of taxes paid before *Bacchus*. The Georgia Supreme court acknowledged the unconstitutionality of Georgia's tax under the holding of *Bacchus*, but applied analysis contained in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), (hereafter "*Chevron*"), to label *Bacchus* a prospective-only opinion. In its analysis, the Georgia Supreme Court noted *Bacchus* had reversed prior U.S. Supreme Court commerce clause precedents. The Georgia Supreme Court also noted it had specifically ruled the challenged statute to be constitutional one year after its enactment in 1938. Because the cost of granting refunds to the State of Georgia was substantial, the Court found the *Chevron* analysis favored non-retroactivity and refunds were denied. James H. Beam appealed.

The U.S. Supreme Court granted certiorari and reversed in *Beam*. In a 6-3 opinion, the Court ruled the Georgia Supreme Court erred in: 1) applying the *Chevron* analysis to a case already decided by the U.S. Supreme Court, and 2) in failing to see that

*Bacchus* followed the normal course of full retroactivity in civil cases.<sup>3</sup>

*Beam* rejected "selective or modified" retroactivity by mandating that any opinion applied retroactively to its litigants must apply retroactively to all others similarly situated whose claims are not barred.

Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

\* \* \*

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*.

*Beam* at 2446.

The Court noted that "we have never employed *Chevron Oil* to the end of modified civil prospectivity". *Id.* at 2445. Justice White concurred, "there being no precedent in civil cases applying a new rule to the parties in the case but not to other similarly situated. . .".<sup>4</sup> *Id.* at 2448 J. White, concurring opinion). (Even

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<sup>3</sup> In *Welch v. Cadre Capital*, 946 F.2d 185 (2nd Cir. 1991), the Second Circuit addressed a remand in light of *Beam* and provided an insightful analysis of *Beam*.

<sup>4</sup> In this respect, Federal retroactivity doctrine differs from the Utah rule. See: *Rio Algom v. Corp. v. San Juan County*, 681 P.2d 184 (Utah 1984).

the dissent did not dispute this total lack of precedent for a contrary rule).

**B. BEAM REJECTS USE OF THE CHEVRON ANALYSIS BY ANOTHER COURT ATTEMPTING TO DETERMINE THE RETROACTIVITY OF A UNITED STATES SUPREME COURT CASE.**

What of the *Chevron* analysis after *Beam*? As the Court noted in *Beam*:

Both parties have assumed the applicability of the *Chevron Oil* test. . . But we have never employed *Chevron Oil* to the end of modified civil prospectivity.

\* \* \*

Our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case [citation omitted]. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated.

*Id.* at 2445 and 2447.

The impact of *Beam* on the federal doctrine of retroactivity is this: The U.S. Supreme Court may or may not apply the *Chevron* analysis in deciding the issue of retroactivity as to the litigants



themselves. But, it is error for other courts to apply the *Chevron* analysis to a case already decided by the U.S. Supreme Court.<sup>5</sup>

**C. BEAM MANDATES THAT OTHER COURTS ATTEMPTING TO DETERMINE THE RETROACTIVITY OF A U.S. SUPREME COURT OPINION FOCUS THEIR INQUIRY ON THE OPINION ITSELF.**

Because the pivotal issue is how the Court applied the rule of a case to its litigants, other courts now must look to the opinion itself with their sole line of inquiry being, "Did the U.S. Supreme Court apply its rule retroactively to the litigants?" The rule applied to the litigants must be applied to all, and re-litigation of the retroactivity issue in other courts is error.

**D. UNDER THE BEAM ANALYSIS, A U.S. SUPREME COURT OPINION IS RETROACTIVE TO ITS LITIGANTS AND THUS TO ALL OTHERS, IF 1) THE COURT APPLIED ITS DECISION RETROACTIVELY, OR 2) THE COURT ALLOWED CONSIDERATION OF REMEDIES, OR 3) THE COURT DID NOT RESERVE THE ISSUE OF RETROACTIVITY (SILENCE).**

In deciding *Beam*, the U.S. Supreme Court made no promise to specifically address the issue of retroactivity in all decisions.

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<sup>5</sup> Defendants analyze the opinion in *Beam* to conclude that at least four and possibly six U.S. Supreme Court Justices would still apply the *Chevron* analysis "in the proper case." Df bf pp. 68-78, especially p. 74. But the issue is not whether the U.S. Supreme Court will apply *Chevron*. The issue is whether other courts may apply *Chevron* to a case already decided by the U.S. Supreme Court. The answer is no. To apply a different rule than that applied to the litigants is error.

Defendants also conclude from the same analysis that "pure-prospectivity" is not dead. Df bf pp. 68-78, especially p. 74. That is not the issue. The *Beam* decision casts no doubt on whether the Court, in the proper case, will continue to refuse retroactivity both to the litigants and to all others similarly situated (pure-prospectivity). The issue is whether "pure-prospectivity" can apply to *Davis*. It cannot because the Court in *Davis* neither refused retroactive application to the litigants nor reserved the issue. Defendants are attempting to float on a "pure-prospectivity" ship which has already sunk.

Indeed, the Court recognized that "[I]n most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying." *Beam* at 2445.

The Court in *Bacchus* did not address retroactivity. But in *Beam*, the Supreme Court of Georgia erred in failing to see that *Bacchus* followed the normal course of full retroactivity in civil cases. *Beam* at 2446. In so ruling, the *Beam* court analyzed important indicia of retroactivity.

**1. A case is retroactive if it applies its rule retroactively to its litigants.**

*Bacchus* was retroactively applied to its litigants so it was applied retroactively to *Beam*.

**2. A case is retroactive if the court allowed consideration of remedies.**

In the *Beam* court's view (while favorably citing *Davis*):

Indeed, any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court. See *McKesson*, 496 U.S. at \_\_\_\_\_ (slip op. 25-28) pass-through defense considered as remedial question). Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided. See also *Williams v. Vermont*, 472 U.S. 14, 28 (1985); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197 (1983); cf. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817 (1989). (emphasis added).

*Id.* at 2445, also 2448 [concurrence of J. White]; 2450 [concurrence of J. Scalia, J. Marshall and J. Blackman]; [all cases are retroactive]; 2451 [Dissent by J. O'Connor, C.J. Rehnquist, J. Kennedy] (agreeing that *Bacchus* applied its rule retroactively).

**3. A case is retroactive if the Court does not reserve the issue of retroactivity (silence).**

In the Court's view:

. . . *Bacchus* is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants then before the Court. **Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, compare *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 297-298 (1987) (remanding case to consider whether ruling "should be applied retroactively and to decide other remedial issues"), it is properly understood to have followed the normal rule of retroactive application in civil cases.** If the Court were to have found prospectivity as a choice-of-law matter, there would have been no need to consider the pass-through defense; **if the Court had reserved the issue, the terms of the remand to consider "remedial" issues would have been incomplete.** (emphasis added).

*Id.* at 2445; also 2450, [concurrence of J. Scalia, J. Marshall, J. Blackman] (all civil cases are retroactive).

On this test for retroactivity of a decision, even the dissent agreed:

I agree that the Court in *Bacchus* applied its rule retroactively to the parties before it. The *Bacchus* opinion is silent on the retroactivity question. **Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.** (emphasis added).

*Id.* at 2451; [Dissent by J. O'Connor, C.J. Rehnquist, J. Kennedy (dissenting on selective retroactivity issue only)].

**E. APPLYING THE BEAM ANALYSIS, DAVIS WAS RETROACTIVE TO ITS LITIGANTS AND THUS TO ALL BECAUSE, 1) DAVIS RETROACTIVELY INVALIDATED THE MICHIGAN TAX IN PRIOR YEARS; 2) DAVIS ALLOWED ITS LITIGANTS TO CONSIDER REMEDIAL ISSUES; AND 3) DAVIS DID NOT RESERVE THE ISSUE OF ITS RETROACTIVITY (SILENCE).**

**1. Davis is retroactive because it applied its rule retroactively to invalidate the Michigan tax in prior years.**

The Supreme Court's 1989 invalidation of Michigan's scheme in *Davis* applied to the years 1979-1984, the only years for which a refund was sought. *Davis v. Michigan Dep't of Treasury*, 160 Mich. App. 98, 408 N.W. 2d 433 (Mich. 1987). **Retroactive invalidation of the tax law in these earlier years** was the circumstance under which the state conceded a refund. (See *Davis* at 817).

**2. *Davis* is retroactive because it allowed its litigants to consider remedial issues.**

As the Court in *Beam* observed:

[A]ny consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the court.

*Beam* at 2445.

The parties in *Davis* did not stipulate to a refund. The State of Michigan "conceded that a refund is appropriate in these circumstances" if it was determined the state taxed Mr. Davis in violation of § 111. *Davis* at 817. (Emphasis added). Because the Court so determined, it invalidated the Michigan tax in prior years and accepted Michigan's concession regarding the appropriate remedy under state law. That the Court looked at all to the appropriate remedy, and allowed a refund to Mr. Davis, made *Davis* retroactive to its litigants.

If there is any doubt on this issue, **the *Beam* Court's citation to *Davis* as an analogous supporting authority** should resolve the issue.

Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided.  
n2 See also *Williams v. Vermont*, 472 U.S. 14, 28 (1985); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197 (1983); cf. *Davis v. Michigan Treasury*, 489 U.S. 803, 817 (1989). (emphasis added).

*Id.* at 2445. This citation to *Davis* alone, joined in by J. Stevens (the sole dissenter in *Davis*) and unchallenged by any member of the Court, is irreconcilable with Defendants' assertion that *Davis* is not retroactive.

**3. *Davis* is retroactive because it did not reserve the issue of retroactivity (silence).**

*Davis* did not reserve the issue of retroactivity and, other than to allow a refund, was silent on the issue. A case which does not reserve the issue "is properly understood to have followed the normal rule of retroactive application in civil cases". *Beam* at 2445. "The most reasonable reading of silence is that the court followed its customary practice "of retroactive application". *Id.* at 2451 (dissent by O'Connor). *Davis* must be read to follow the normal course of retroactivity to its litigants and thus to all others.

**4. The U.S. Supreme Court views *Beam* to be applicable to *Davis*.**

If the Court's citation to *Davis* in *Beam* is not clear enough, any lingering doubt about *Beam*'s applicability to *Davis* should have vanished on June 28, 1991, eight days after the *Beam* decision, when the U.S. Supreme Court vacated and remanded the South Carolina and Virginia federal retiree "*Davis*" cases for further consideration in

light of *Beam*. *Bass v. South Carolina*, 395 S.E.2d 171 (S.C. 1990) cert. granted, vacated and remanded 111 S.Ct. 2881 (1991); *Harper v. Virginia Department of Taxation*, 401 S.E. 2d 868 (Vir. 1991) cert. granted, vacated and remanded, 111 S.Ct. 2881 (1991).<sup>6</sup>

**IV. THE PLAIN INTERPRETATION OF AN UNAMBIGUOUS STATUTE DOES NOT RAISE AN ISSUE OF RETROACTIVITY (*CHEVRON*).**

Even after *Beam*, Defendants argue the three prong test set forth in *Chevron* should be used to determine the retroactivity of *Davis*. Plaintiffs submit *Beam* is clear on the issue of federal retroactivity doctrine, but will respond to Defendants' *Chevron* analysis below.

**A. THE TRIAL COURT CORRECTLY CHARACTERIZED *DAVIS* AS THE PLAIN READING OF AN UNAMBIGUOUS STATUTE, § 111.**

Because the court announcing a decision is the ultimate authority on its retroactivity, the trial court appropriately analyzed the *Davis* opinion itself. Michigan argued in *Davis* that its taxation of federal retirees was justified by the reading of § 111. The Supreme Court rejected Michigan's argument. "In our view, however, the plain language of the statute dictates the opposite conclusion." *Davis* at 1808. The court continued:

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<sup>6</sup> Defendants quibble about the meaning of these remands. (Df bf p. 69, ftnt 25). However, generalized studies and statistics are meaningless because so many cases involve multiple issues and require additional factual determinations. The So. Carolina and Virginia cases presented a single issue: May a case applied retroactively to its litigants not be applied to others similarly situated? (answer: No). The meaning of these remands is clear: *Beam* applies to *Davis*.

**We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the government.**

*Id.* at 808.

The Court called Michigan's interpretation of § 111 a "hypertechnical reading" of the statute. *Id.* at 809. "Any other interpretation . . .," said the Court, "would be implausible at best." *Id.* at 110. The court rejected Michigan's attempts to argue the legislative history of § 111:

The language of the statute leaves no room for doubt . . . legislative history is irrelevant to the interpretation of an unambiguous statute...

*Id.* at 809, ftnt 3.

The Court found it "difficult to imagine" that Congress intended Michigan's interpretation of § 111 and emphasized:

Nothing in the statutory language or even in the legislative history suggests this result . . . the overall meaning of § 111 is unmistakable.

*Id.* at 810.

To Michigan's contention that federal retirees are not entitled to protection under the immunity doctrine, the court observed:

[A]ll precedent is to the contrary . . . the state offers no reason for departing from this settled rule, and we decline to do so.

*Id.* at 815.

**B. THE PLAIN INTERPRETATION OF AN UNAMBIGUOUS STATUTE DOES NOT MEET THE "LAW CHANGING" THRESHOLD OF CHEVRON.**

A decision must be retroactive if it does not

establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . .

*Chevron*, 404 U.S. at 106.

In light of the Supreme Court's own characterization of *Davis*, Defendants have an impossible burden in showing that the U.S. Supreme Court would view its interpretation of § 111 as "law changing" or "unforeshadowed". A statute must foreshadow its own plain interpretation. Any contrary rule would raze the structure of statutory law. The U.S. Supreme Court does not apply its doctrine of non-retroactivity to the interpretation of plain and unambiguous statutes.<sup>7</sup> *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991) "The sole function of the court is to enforce it [the statute] according to its terms"; *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983) (invalidating a Hawaii tax on airlines, the Court said, "We acknowledge that our interpretation of § 1513(a) may result in disruption of state

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<sup>7</sup> It has no power to do so. For a court to suspend application of the plain meaning of an unambiguous federal statute for reasons other than its unconstitutionality would violate the separation of powers embodied in the Constitution. c.f.: *Marbury v. Madison*, 1 Cranch 137, 164-166, 2 L.Ed. 60 (1803). See also: *William "Sky" King v. St. Vincent's Hospital*, 60 USLW 4061, Case No. 90-889 (decided December 16, 1991) in which the Court found itself not "free to tinker with the statutory scheme."

Separation of power concerns do not arise when a court reverses its own interpretations of the Constitution or common law and then limits the effect of those decisions (non-retroactivity of common law and constitutional decisions allowed where no question of impairment of federal rights is involved).



systems of taxation; we are, however bound by the plain language of the statute." *Id.* at 14 n.10.).

**C. INTERPRETING A FEDERAL STATUTE IS A FAR DIFFERENT MATTER FROM INTERPRETING THE CONSTITUTION OR COMMON LAW.**

In *ATA*, *supra* at p. 13, the Court noted that the retroactivity of its decision interpreting a federal statute in *Owen v. City of Independence*, 445 U.S. 622 (1980) was a far different matter from deciding whether to give retroactive effect to its own case law decisions. *ATA* at 2334.

In *Owen*, the Court construed the difficult § 1983 civil rights statute and rejected the municipalities reasonable but contrary interpretation. The Court emphasized that holding a municipality responsible for the **foreseeable interpretation of a federal statute**:

**. . . merely makes municipalities, like private individuals, responsible for anticipating developments in the law.** We noted that such liability would motivate each of the city's elected officials to consider whether his decision compares with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury. *Id.* at 556. This analysis does not apply when a decision breaks with precedent, a type of departure which, by definition, public officials could not anticipate nor have any responsibility to anticipate. [cite omitted, emphasis added].

*ATA* at 2334.

Courts have found prospective-only decision making a useful tool for softening the sometimes harsh effects of changing constitutional fence lines. Because true boundaries of a constitution are not painted on the soil, courts forever seek them with new surveying instruments. But, a statute is a wall and the

rules of statutory construction have not changed substantially since Congress built its first walls.

The U.S. Supreme Court has never refused to give retroactive affect to the plain meaning of an unambiguous statute. Never.

**D. BECAUSE DAVIS DID NOT MEET THE "LAW CHANGING" THRESHOLD OF THE CHEVRON ANALYSIS, THE TRIAL COURT PROPERLY DECLINED CONSIDERATION OF THE REMAINING TWO "PRONGS" OF CHEVRON.**

The trial court, citing *Ashland Oil, Inc. v. Caryl*, 110 S.Ct. 3202 (1990), (hereafter "*Ashland*"), correctly viewed the "law changing", first "prong" of *Chevron* as "a threshold test which, if not met, will be dispositive of the issue" of retroactivity. *Conclusions of Law*, p. 19, R. 1137. In *Ashland*, West Virginia had imposed a gross receipts tax on out-of-state wholesalers while exempting local manufacturers.

The U.S. Supreme Court addressed the retroactivity of *Armco v. Hardesty*, 467 U.S. 638 (1984), which invalidated a similar tax. Because *Armco* was not "revolutionary," the first "prong" of *Chevron* was not satisfied. The first prong being a "threshold test," the

Court did not consider the last two elements of the *Chevron* test.<sup>8</sup>  
*Ashland* at 3205.

Applying the policy and equity elements of the second and third "prongs" of the *Chevron* test to a decision which is not "law changing" is contrary to the whole purpose of federal non-retroactivity doctrine.

In those relatively rare circumstances where established precedent is overruled, the doctrine of non-retroactivity allows a court to adhere to past precedent in a limited number of cases, in order to avoid "jolting the expectations of parties to a transaction." (emphasis added).

ATA at 2341. Quoting *Northern R. Co. v. Sunburst Oil & Riners Co.*, 287 U.S. 352 (1932).

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<sup>8</sup> This limitation of non-retroactivity doctrine to precedent overruling cases in *ATA* and the Court's refusal to apply non-retroactivity in *Ashland*, supra, to a case which is not "revolutionary" is evidence of a narrowing of the scope and use of the non-retroactivity doctrine by the U.S. Supreme Court. Once used widely and almost exclusively in criminal procedure issues (see Summary and Discussion in *Andrews v. Morris*, 677 P.2d 81 (Utah 1983)), the Court has practically abandoned the practice since *Griffith v. Kentucky*, 479 U.S. 314 (1987), mandated the application of new rules of criminal procedure to all other cases or direct review and not yet final. A like narrowing in the civil context is best illustrated by the *ATA* decision. When the U.S. Supreme Court in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987), reversed its own line of cases going back more than fifty years, it invalidated an Arkansas highway use tax valid under prior law. Arguments of the State's reliance in *ATA* were compelling. Even so, the court was badly split on the issue of retroactivity. Four justices (dissenting) would never issue a prospective-only decision; four (the plurality) thought the case should be prospective-only and one (concurring) was against retroactive application only because he believed the earlier line of cases was still good law. He, however, noted that "prospective-only" decision making had no justification outside commerce clause decisions. Thus, a majority of the *ATA* court would apply all non-commerce clause decisions (e.g. *Davis*) retroactively.

Justice White in *Beam*, explained that the *Chevron* test is "not . . . implicated" where the court thinks its decision is "reasonably foreseeable and hence not a new rule." *Beam* at 2448 (Concurring Opinion of J. White).

Analysis of the second and third prongs of *Chevron* also suggests that the "law changing" threshold of the first prong is determinative of the other two. When a new decision reverses prior cases on which reliance was expected, reliance and policy arguments are compelling and strongly favor application of the prior law. Conversely, when, as in *Davis*, the opinion merely declares the plain meaning of an unambiguous statutes, the policy factors weigh heavily in favor of giving effect to the statute from its enactment. In such a situation the party resisting retroactivity can find no compelling reliance arguments ("others did it too", "the court was wrong", "we didn't know the law", or "it's just too expensive," are the only available arguments).

What policy, equitable consideration, or rule of law, allows a state to ignore a federal statute with impunity until some court finally interprets its plain meaning? As the ATA court explained its own unanimous ruling in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990) (hereafter "*McKesson*"):

Where a state can easily foresee the invalidation of its tax statutes its reliance interests may merit little concern, see *McKesson*, 110 S.Ct., at 2254-2255, 2257.

ATA at 2333. The trial court correctly found the "law changing" test of *Chevron* to be a threshold test.

**E. CONSIDERATION OF THE SECOND AND THIRD PRONGS OF CHEVRON WOULD HAVE SHOWN COMPELLING REASONS FOR THE RETROACTIVITY OF DAVIS.**

The trial court granted Plaintiffs' motion to strike the affidavits submitted by Defendants dealing with the second and third prongs of *Chevron* because they were irrelevant. R. 1114. Nonetheless, Defendants argue the allegations contained in the stricken affidavits, Df bf pp. 63-64, as though they are uncontested and presumed to be true.<sup>9</sup> If the last two prongs of *Chevron* had been considered by the trial court, they would have heavily favored the taxpayers.

**1. Retroactive application of *Davis* will further the policy of intergovernmental tax immunity.**

In *Davis* related litigation, the Arkansas State Supreme Court upheld the awarding of refunds to federal retirees in a class action suit. *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991). After finding that *Davis* did not establish a new principle of law, the court stated with regard to the second prong of *Chevron*:

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<sup>9</sup>Plaintiffs have maintained from the outset that *Davis* was retroactive and therefore the *Chevron* analysis was improper. When the trial court agreed and granted the motion to strike the affidavits submitted by Defendants, Plaintiffs did not need to present any evidence contesting the affidavits. Should this court determine the trial court erred in striking Defendants' affidavits, the proper course on remand would be to allow Plaintiffs the opportunity to present evidence regarding hardship to members of the class and regarding the second and third prongs of *Chevron*.

Obviously retroactive application will advance the doctrine for the members of this class. Also, a refusal to apply the doctrine in this case may retard the recognition of it in other matters which come before the Arkansas legislature which might fall under the scope of the doctrine.

*Pledger* at 293.

In Montana, where the State Supreme Court found *Davis* to be nonretroactive under *Chevron*, the dissent observed:

...the doctrine of intergovernmental tax immunity can only be furthered by the retroactive application of *Davis*. Refusing to apply *Davis* retroactively means that this Court has condoned the State's total disregard for the plain language of 4 U.S.C. § 111 and is akin to a continuation of past discrimination. Such a result does not further and, indeed, retards the doctrine of intergovernmental tax immunity in that it does not tend to deter future State violations of the doctrine.

*Sheehy v. Montana*, No. 90-450 (Mont. Nov. 14, 1991), p. 21.

Applying *Davis* retroactively will send a message to the legislature that discrimination in areas of intergovernmental taxation is not permissible.

**2. The equities in this case favor retroactive application of *Davis*.**

In finding that the equities weighed in favor of the class of Plaintiffs, the Arkansas Supreme Court found:

No doubt the State of Arkansas will suffer financial loss by making a refund to the members of this class who follow the procedures for such refund. However, the third prong of *Chevron* requires that the decision be applied retroactively unless a substantial inequitable result will occur as a result of the decision. If inequitable results occur whether retroactivity is applied or not, we must make the ruling retroactive. Our decision in this case itself does not create the hardship. It will exist regardless of the outcome of this case. Clearly if the members of this class are not given the relief they have prayed for, they will be treated inequitably in that they will have paid an unconstitutional tax. Someone

here will suffer, either the state or the taxpayers. We are not simply picking the class for refund based on need, nor are we penalizing the state. We are determining that since one of two inequitable results must occur, we are required to apply the ruling retroactively.

*Pledger* at 293.

The two dissents in Montana pointed out the obvious inconsistencies in the majorities logic:

It is true, as the majority states, that refunds to federal retirees would result in a financial burden on the other taxpayers of the State; it also is true, however, that those taxpayers have benefitted greatly from the federal retirees' overpayment of taxes over many years. In any event, the state's and taxpayers' exposure to the disruptive impact of the tax scheme's invalidation is limited because of the five-year statute of limitations.

\* \* \*

Finally, it must be recognized that, notwithstanding the financial impact to the State, substantial inequities have been wrought upon the federal retirees over a period of many years. Retirees who paid the discriminatory tax and have since left Montana or died would receive no remedy even under a proper resolution of this case. Others would receive back only a small portion of the discriminatory taxes they paid, no matter what remedy might be fashioned, because of the applicable statute of limitations. How the majority can conclude that the *Chevron* "equities" prong favors the State, as opposed to the federal retirees who were wrongfully discriminated against by the State, is simply beyond my understanding.

*Sheehy v. Montana*, *supra*, p. 22.

As far as I am concerned, the issue involved in this case is a simple one. The State took the petitioners' money illegally. That fact is obvious from the plain language of § 111. If a private citizen took someone's money illegally, he or she would be forced to give it back. The State ought to do the same.

The majority talks about equity. What is equitable about allowing the State, with all its power, to illegally seize

someone's property, and then after being told what it did was illegal, allowing the State to keep it?

\* \* \*

The majority's decision is clearly a result-oriented decision arrived at for the purpose of protecting the State's coffers. However, the State's coffers are not the responsibility of this Court. The rights of this State's citizens are.

*Sheehy v. Montana*, supra, pp 30-31.

Under either *Beam* or the first prong of *Chevron*, *Davis* is retroactive. However, even an analysis of the equities favors retroactive application of *Davis*.

**F. THE ATA DECISION DOES NOT SUPPORT DEFENDANTS' CLAIM THAT DAVIS IS RETROACTIVE.**

Defendants argue that ATA supports their retroactivity analysis because it confirms the *Chevron* analysis. Df bf pp. 65-68. Even ignoring *Beam*, Defendants' reliance on ATA is misplaced. ATA involved the Court's ever-evolving struggle with the commerce clause.<sup>10</sup> Its application outside the commerce clause is limited. However, ATA does illustrate the narrow scope of the federal civil retroactivity doctrine.

That the court would hesitate to give prospective treatment to a decision reversing fifty years of prior case law further explains

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<sup>10</sup> It is not surprising that the civil retroactivity cases relied on by Defendants are, like virtually all civil cases with retroactivity issues, commerce clause cases. The ATA court itself was careful to distinguish its policy considerations in interpreting the Constitution from those of interpreting a federal statute.



its refusal three weeks after *ATA*, to apply non-retroactivity to *Ashland*, *supra*.

**V. DEFENDANTS' ARGUMENTS DO NOT MAKE DAVIS RETROACTIVE.**

**A. THE REAL SURPRISE TO UTAH OFFICIALS IS THE EXISTENCE OF § 111, NOT ITS MEANING.**

No recent Utah official seems to have ever seen or read § 111 until the *Davis* decision.<sup>11</sup> Because Utah is charged with knowledge of the law, Defendants are in the position of arguing that they would not have thought § 111 applicable to federal retirees even if they had seen it.

**B. DEFENDANTS' CRITICISM OF THE U.S. SUPREME COURT IS IRONIC.**

Of necessity, Defendants criticize the U.S. Supreme Court's view of § 111 as an unambiguous statute with a plain meaning and fault the Court's reasoning in an attempt to characterize *Davis* as law reversing. *Df bf pp. 52-60*. The irony of these arguments is that the U.S. Supreme Court itself is the ultimate authority on the foreseeability of its own decision. See *ATA* at 2330.

**C. DEFENDANTS MISINTERPRET § 111 AND CALL DAVIS A NEW LAW BECAUSE THEY DENY THAT FEDERAL RETIREMENT PAY IS "PAY OR COMPENSATION FOR PERSONAL SERVICE AS AN OFFICER OR EMPLOYEE OF THE UNITED STATES".**

Defendants' argument that retirement pay is not deferred compensation for prior service is without merit and illustrates the path Defendants must take to call *Davis* new law.

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<sup>11</sup> Deposition of Richard Hansen, Chairmen, Utah State Tax Commission, R. 1159 at p. 23; Deposition of Roger Tew, Tax Commissioner, R. 1163 at pp. 13-14.

Federal retirement benefits are, and always have been, "deferred wages." See e.g. 59 cong. Rec 6300 (April 29, 1920), (Statement of Rep. Hamill: "Pension are not gratuities, and they should not be considered as such. They should be looked upon as deferred wages -- as payment of wages which were not disbursed at the time when they were earned.") See also *Kizas v. Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), cert. denied, 464 U.S. 1042 (1984).

Defendants' claim of surprise<sup>12</sup> is puzzling in view of their contrary position in *Fitzpatrick v. State Tax Commission*, 386 P.2d 896 (Utah 1963), in which the Commission prevailed in characterizing private retirement benefits as deferred compensation.<sup>13</sup> (What else could they be, argued the Commission,

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<sup>12</sup> Defendants do not identify any prior precedent to the contrary. Instead, they criticize the Supreme Court's citation to its own precedent because "those cases did not discuss § 111." Df bf p. 53. This illustrates the narrowness of Defendants' reasoning. Because *Davis* is the first case interpreting § 111, they see no reason Utah should be held responsible to interpret and comply with the statute prior to 1989.

<sup>13</sup> Defendants attempt to distinguish their position in *Fitzpatrick* by arguing that private retirement benefits are deferred compensation, but public retirement benefits are not. Df bf p. 54, ftnt 14. As the trial court noted:

In the Court's view, this is a distinction without a difference. That federal employees pay or compensation may arise from a statutory enactment does not destroy the nexus between retirement pay and the employees previous service with the federal government. Most federal retirees would be justifiably offended at the States' view of their retirement pay, earned over many years of faithful service to the United States Government, as an unearned statutory entitlement. Conclusions of Law, R. 1128.

since the taxpayer invested no capital to purchase them?). *Id.* at 897.

Now, twenty-seven (27) years later, Defendants call the same characterization in *Davis* "unforeseeable", "a new rule of law". Defendants' claim of "surprise" that federal retirement benefits are deferred compensation from federal employment is unbelievable.

Defendants' argument also ignores this Court's holding which, consistent with virtually all others, recognizes that federal retirement benefits "derive from employment" and "are a form of deferred compensation by the employer." *Woodward v. Woodward*, 656 P.2d 431, 432 (1982).

**D. DEFENDANTS MISINTERPRET § 111 AND CALL DAVIS "NEW LAW" BECAUSE THEY FAIL TO SEE § 111 AS A STATUTORY LIMITED WAIVER OF INTERGOVERNMENTAL TAX IMMUNITY.**

The legal disagreements between the parties have their origin in Defendants' fundamental failure to see the connection between § 111 and the doctrine of intergovernmental tax immunity. In Defendants' words:

This connection between § 111 and the intergovernmental tax immunity clause was determined for the first time in *Davis* and was neither dictated nor foreshadowed by prior precedent.

Df bf p. 56.<sup>14</sup> Defendants' position is incredible. In applying intergovernmental immunity principles to resolve the issue of a

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<sup>14</sup> Contrast this with the Arkansas Supreme Court's statement in *Davis* related litigation: "A review of the extensive historical discussion in *Davis* will clearly show that the Doctrine of Intergovernmental Immunity has been applied for decades." *Pledger v. Bosnick*, 811 S.W. 2d 287, 297 (Ark. 1991).

state's taxation of federal employees, the U.S. Supreme Court expressly relied on a long line of cases.

Reference to intergovernmental immunity principles is not just helpful in understanding § 111, **these principles are the essence of the statute**; a limited waiver of immunity is its very purpose and its plain meaning.

Defendants argue for a "traditional equal protection analysis" of Utah's discriminatory taxation of federal employees. Df bf p. 55. Defendants use this to justify their unlawful taxation by alleging their "rational basis" for so doing.<sup>15</sup>

If the United States and its former employees are immune from taxation, no amount of good faith or rational reasons can rend the immunity wall. Only the United States can waive its own immunity as it did in § 111, and then only in its own terms, i.e., that the tax not discriminate. As the Court noted:

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<sup>15</sup> Defendants' citations to state taxation cases decided under equal protection are not helpful. See Df bf pp. 42, 43 and 55. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), appropriately applied equal protection analysis to uphold an ad valorem personal property tax which discriminated between individuals and business entities; *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937), appropriately applied equal protection analysis to uphold a state unemployment tax which certain classes of employers including all government entities. Neither of these cases involved levied on federal agencies or their instrumentalities.

*Huckuba v. Johnson*, 573 P.2d 305 (Or. 1977), (cited p. 42, ftnt 7), affirmed Oregon's practice of giving preferential tax treatment to retirees over a certain age. This is not discrimination on the basis of the "source of income" prohibited by § 111. The two New Jersey tax cases cited in the same footnote uphold the taxing of private annuities while exempting public annuities. This is also irrelevant.

The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment.

*Davis* at 816.

The *Davis* Court interpreted § 111 just as it reads: to prohibit "discrimination".<sup>16</sup> The only possible justification Michigan could have in discriminating between state and federal employees is if they were not similarly situated, i.e., if "significant differences" existed between the two classes.<sup>17</sup> *Davis* at 816. The only difference between federal retirees and state retirees in the matter of taxation was the source of the compensation. This was an express violation of the plain reading of § 111.

Now, Utah makes the same argument Michigan made and tries to characterize *Davis* as a reversal of prior law, as "unforeshadowed." *Df bf* p. 51. But, the Court's refusal to allow a breach in the

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<sup>16</sup> "Discrimination" is the disparate treatment of similarly situated classes. See: BLACKS LAW DICTIONARY, p. 553 (4th Ed. 1968).

<sup>17</sup> Defendants further confuse the retroactivity issue by their reliance on *Teague v. Lane*, 109 S.Ct. 1060 (1989), the dissent in *Milton v. Nainwright*, 407 U.S. 371 and *United States v. Johnson*, 457 U.S. 537 (1982), for the proposition that a case which disrupts a widely accepted practice is not retroactive. *Df bf* pp. 49-50. These are criminal cases dealing with revolutionary new criminal rules which contradicted prior decisions. Their considerations do not exist in the civil context and never became part of the *Chevron* analysis. In criminal cases, the prospective or retroactive effect of decisions involve a wide range of considerations. *Malan v. Lewis*, 693 P.2d 661, (Utah 1984).

wall of federal sovereign immunity because a state has a rational basis for discriminatory taxation is not new law.

**E. DEFENDANTS' CLAIM OF RELIANCE ON THE PRACTICE OF OTHER STATES DOES NOT MAKE DAVIS RETROACTIVE.**

Defendants lean heavily on Utah's reliance<sup>18</sup> on the practice of twenty-two other states who taxed federal retirees while exempting their own retirees. Defendants contend that *Davis* was a new rule of law because *Davis* interrupted this "practice". This prior practice, contends Utah, was the "prior law". Df bf pp. 50 and 62.

But, Defendants confuse the challenged practice with decisional law. *Davis* declared this practice to violate federal law. The prior law by which the practice was tested was § 111 which had not changed since its enactment in 1939. Defendants mistake the law changing issue when they claim that twenty-two other legislatures created prior law. The issue is: Did *Davis* change federal law in its interpretation of § 111? The answer is: It did not. It applied basic statutory interpretation rules older than § 111 itself, rules which are followed by the courts of all fifty states.

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<sup>18</sup> "Reliance" is used loosely. Utah enacted the exemption for its own retirees in 1947 (Utah Laws 1947 C. 131, § 13). Other states appear to have followed Utah. (See, e.g., New Mexico NMSA § 10-11-145 enacted in 1953; Virginia (Code of Va. § 51-111.15 enacted in 1952); Missouri (Mo. Statutes § 104.540 enacted in 1957). A review of the federal retiree litigation in the various states shows it to be a common theme for each state to argue "the others violated § 111 first".

State legislatures do not have the power to override congressional legislation. See: *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Reliance on state legislation without one interpreting decision<sup>19</sup> (did the other states, like Utah, simply not see § 111?) to contradict a plain unambiguous federal statute is manifestly unreasonable reliance. As the trial court observed,

Defendants do not claim to have relied on their own contrary reading of § 111. Indeed, the real surprise to the State seems to have been the existence of § 111, not its interpretation. Reliance on the practice of twenty-two other states, if indeed Utah did so rely, is not the type of reliance protected by the federal retroactivity doctrine. No person and no government can be excused by ignorance of the law, even widespread ignorance.

Conclusions of Law, pp. 18-19, R. 1136, 1137.

**VI. HOLDING DAVIS TO BE RETROACTIVE WOULD NOT RELIEVE THE COURT OF ITS DUTY TO CONSTRUE § 111 UNDER PRIOR LAW.**

Retroactivity is a rule of "stare decisis" only. The U.S. Supreme Court stated in *ATA*:

When the Court concludes that a law-changing decision should not be applied retroactively . . . [l]ower courts considering the applicability of the new decision to pending cases are then instructed as follows: If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct.

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<sup>19</sup> Defendants stand on sand compared to the litigants in *Beam*, who thought they could stand on the rock of a prior decision from their own Georgia Supreme Court declaring their tax to be legal. See: *Beam v. Georgia*, 382 S.E. 2d 95, 97 (Ga. 1989). Still, the U.S. Supreme Court's invalidation of their tax was retroactive.

*Id.* at 2338.

Defendants point to the practice of twenty-two other states in taxing federal retirees while exempting state retirees as the "prior law". However, the practice of the states is not relevant to the legal interpretation of § 111, a statute which *Davis* held to be plain and unambiguous.<sup>20</sup>

Even without the precedential effect of *Davis*, the trial court would not have been relieved of its duty to interpret § 111. Thus, the trial court did interpret *Davis*, and concluded that its plain meaning invalidated Utah's taxing scheme. See: *Conclusions of Law*, pp. 9-11, R. 1127-1129.

**VII. UTAH'S SPECIFIC STATUTORY REMEDY FOR INCOME TAX REFUNDS IS PLAINTIFFS' PROPER REMEDY.**

**A. UTAH HAS ADOPTED A REMEDY FOR INCOME TAX REFUNDS PATTERNED AFTER THE FEDERAL TAX SYSTEM.**

"An honorable government would not keep taxes to which it is not entitled, and the legislative scheme supports that result." *Pittsburgh & Midway Coal v. Dept. of Rev.*, 776 P.2d 1061 (Ariz. 1989). Utah, like Arizona, has also adopted a legislative scheme which mandates refunds of taxes which the state has collected and to which it is not entitled.

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<sup>20</sup> Defendants' claim of "a strong basis for reliance" on *Christensen v. Tax Commission*, 591 P.2d 445 (Utah 1979) is misplaced. Df bf p. 41. The case addressed the distinction between an exemption and a deduction in light of Utah's exemption of state retirement income. By no stretch of the imagination was the Court presented with a challenge to the legality of the tax scheme under federal law.



When Utah adopted an individual income tax in 1931 (Laws of Utah 1931, Ch. 44), it followed much of the federal income tax system and continued to amend its law to keep pace with changes in the federal tax system. (See: Backman, *Utah's Proposed Federally-Based Income Tax Act*, 1971 Utah L. Rev. 493).

In 1970, Utah amended its constitution to allow full incorporation by reference of federal tax law and procedure into Utah tax law, a procedure now followed by almost all states. Utah Constitution, Art. XIII § 12. This full incorporation was accomplished by the Utah Individual Income Tax Act of 1973, now U.C.A. § 59-10-101 et. seq.<sup>21</sup> Among the provisions of the new Act was a remedy for "refund of overpayments", patterned after federal tax law. U.C.A. § 59-10-529 (as amended 1973). See Addendum Exhibit 4. Compare with I.R.C. § 6511 (1954 Code as amended).

Utah's income tax refund statute provides for refund of any "overpayment" of income taxes upon the filing of a return or claim<sup>22</sup> within three years of the due date of the return:

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<sup>21</sup> The result of this simplification is that the State is "piggybacked" onto the federal system and the Utah Tax Commission handles "very few" state income tax matters. (Deposition of Jerry Larrabee, Appeals Supervisor, Utah State Tax Commission, R. 1161, p. 8).

<sup>22</sup> The Commission designed a special form for use by federal retirees in this case. See: Exh. 2. The purpose of this form was to protect the rights of class members without requiring the expense and trouble of an amended return before determination of the legal issues in this appeal.

(1) In cases where there has been an overpayment of any tax imposed by this chapter . . .

\* \* \*

(6) Any balance shall be refunded immediately to the taxpayer.

U.C.A. § 59-10-529(1) and (6).<sup>23</sup>

This statutory remedy is the clear legislative scheme for refunds of all income taxes. It should be enforced. As the Utah Supreme Court has said:

**It certainly would be a delusion to require a taxpayer to pay the tax, seek a review, and if he prevails, not allow him to get it back. The most elemental principles of justice dictate the implication that if he pays the tax and follows the procedure set out in the Sales Tax Act, and is sustained in his contention that the tax is unlawful, it must be refunded. (emphasis added).**

*Pacific Intermountain Express v. State Tax Commission*, 7 Utah 2d 15, 315 P.2d 549, 552 (1957).

**B. DEFENDANTS DO NOT DENY THAT PLAINTIFFS HAVE COMPLIED WITH THE REFUND PROVISIONS OF § 59-10-529 OR THAT ITS REMEDY APPLIES TO PLAINTIFFS, YET THEY RAISE AN OLD PROTEST REMEDY AS PLAINTIFFS' SOLE REMEDY.**

Defendants do not deny Plaintiffs' compliance with the income tax refund statute, U.C.A. § 59-10-529, either by the individual members of the class who filed 55,000 claims, R. 606, or by class representatives who filed class claims for refund on behalf of the class. R. 456-463, 593. When answering Plaintiffs' Amended

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<sup>23</sup> The full text of § 59-10-529 is included at Addendum Exh. 4.

Complaint, Defendants admitted class representatives filed claims in behalf of the class.<sup>24</sup>

Neither do Defendants deny that the income tax refund remedy (§ 529) applies to Plaintiffs' federal retiree claims. To the contrary, every public communication from the Commission has urged federal retirees to protect their rights to refunds under § 529. R. 130, 916-934. For this purpose, the Commission designed and circulated a special simplified claim form used by thousands of federal retirees and by the class to "protect their rights" in the event Utah's law was invalidated by the courts. R. 1163, p. 26, R. 593. See Addendum Exh. 2. In announcing its simplified form, the Commission reminded retirees of the three year claim period of the refund statute. (Tax Bulletin 2/90, R. 930, Addendum Exh. 3; see also Conclusions of Law, R. 1131). When it appeared that many retirees had missed the three year period for refunds of their 1985 taxes under § 529 because of confusion as to their rights and remedies (some even filed claims for a refund on napkins, which the Commission accepted. R. 1163, p. 26), the Utah Legislature, with encouragement from the Commission, extended the 1985 claim period to April 16, 1990. 1990 Utah Laws, Ch. 21 §§ 1 to 3, effective

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<sup>24</sup> Plaintiffs alleged in paragraph 16 of their Amended Complaint: "Plaintiffs have filed claims for tax refunds with Defendants on behalf of the Plaintiffs and all others similarly situated for the years 1985, 1986, 1987 and 1988." Defendants admitted this allegation. R. 88, 257.

February 21, 1990.<sup>25</sup> This Act had the express purpose of extending the three year limit for claims under § 59-10-529(7) for the 1985 tax year to allow Plaintiffs "access to the refund adjudication process." *Id.* Therefore, Defendants claim that the protest statute is Plaintiffs' sole remedy contradicts the views of the legislature and the Commission.

Even the Commission's continuing insistence on its jurisdiction to decide refund claims under § 529 testifies of its clear application to Plaintiffs. "The administrative remedies provided at U.C.A. § 59-10-531 through 535 are complete, adequate and speedy". Df bf p. 31. Undaunted, Defendants still assert the payment under protest provisions of the old protest statute (§ 59-1-301) found among the miscellaneous sections of tax code to be Plaintiffs' sole remedy, with its six month limitation for tax paid under protest (§ 78-12-31). Df bf pp. 25-26.

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<sup>25</sup> The full text of the law reads:

"Notwithstanding the general provisions of Subsection 59-10-529(7), the filing deadline for persons claiming personal income tax refunds for tax year 1985 based on the U.S. Supreme Court decision *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500 (March 28, 1989), is extended to April 16, 1990.

**This act addresses only questions of access to the refund adjudication process caused by the timing of the *Davis v. Michigan* decision.** It does not affect the merits of any pending or future refund litigation.

In enacting this law, the Legislature does not waive any legal right, claim, or defense of the state, its officers, or its employees; nor does the Legislature acknowledge or admit any legal obligation or liability in connection with the pending or future appeals or litigation arising from the decision in *Davis v. Michigan*.

Laws 1990, Ch. 21. (emphasis added).

**C. PROTESTS ARE NOT REQUIRED FOR REFUNDS OF INCOME TAX "OVERPAYMENTS".**

With its incorporation of federal tax law and procedure<sup>26</sup>, Utah has adopted a system which rejected a protest requirement for income taxes more than sixty years ago. In *Moore Ice Cream Co. v. Rose*, 289 U.S. 373 (1933), after the federal government repealed the law requiring payments under protest, litigation ensued regarding the date the law became effective. With reference to the protest requirement the U.S. Supreme Court said,

In this situation the Government was unjustly enriched at the expense of the taxpayer when it held onto monies that had been illegally collected, whether with protest or without. So at least the lawmakers believed, and gave expression to that belief, not only in the statute, but in Congressional reports. Senate Report, No. 398, 68th Congress, First Session, pp. 44, 45;<sup>27</sup>

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<sup>26</sup> Incorporation of federal tax law and procedure has the express purpose to "conform to the extent practicable, certain of the existing rules of procedure under and for the administration of Utah's individual income tax law to corresponding rules of administration and procedure described by federal income tax laws, with a view to the reduction of effect, promotion of better understanding of requirements and a greater consistency between state and federal procedures and administration." U.C.A. § 59-10-102 (emphasis added). See also: *Christensen v. State Tax Commission*, 591 P.2d 445, 448 (Utah 1979) (the main purpose of incorporating federal income tax law into Utah law is to make the forms and procedures consistent).

<sup>27</sup> "The U.S. Senate Report contained the following:  
Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer

*Id.* at 378.

Commenting on how the new law repealing the protest requirement corrected what the court felt to be a serious injustice, the Court said:

A high-minded Government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience. There was no thought to discriminate between payments made and those to come. A fine sense of honor had brought the statute into being. We are to read it in a kindred spirit.

*Id.* at 379.

The Arizona Supreme Court similarly rejects a rule requiring a protest for the recovery of tax refunds.

We know of no good purpose served by such a rule. It is argued that the "under protest" requirement puts the taxing authority on notice that it might not be able to keep the tax, and therefore, it could hold the tax and not spend it until the matter is ultimately determined. But in this case, the state has conceded that this abstract reason for the rule does not apply. The state has not relied on these tax payments to its detriment.

Moreover, the rule would promote a senseless practice. All taxpayers would be advised to pay all taxes "under protest" just to cover themselves. It is not likely that the state or any other taxing entity would hold all such taxes in abeyance pending future resolution.

*Pittsburgh & Midway Coal v. Dept. of Rev.*, 776 P.2d 1061, 1063 (Ariz. 1989).

The protest rule especially makes no sense in the payment of income taxes. Because almost all taxes are collected by withholding, the employee probably never knows when the tax is

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who was not well informed." *Moore Ice Cream* at 378.

submitted. To whom should a protest be made and how often? Who would note the protest among millions of computer-processed returns? This is not the case where a taxpayer delivers a check to a revenue agent along with a letter of protest and then waits for a phone call from the local tax authority.

Federal tax law resolved the protest issue long ago; Utah was well advised when it incorporated the federal system.

**D. REFUNDS OF INCOME TAX "OVERPAYMENTS" UNDER § 59-10-529 INCLUDE TAXES UNLAWFULLY COLLECTED.**

With its statutory incorporation of federal income tax definitions and procedures, Utah incorporates the federal definition of "overpayment".<sup>28</sup> The federal definition of the word "overpayment" was at issue in *Jones v. Liberty Glass Company*, 332 U.S. 524 (1948), when a taxpayer brought suit to recover a payment of income tax alleged to have been illegally assessed. The U.S. Supreme Court defined tax "overpayment" to include those tax payments made as a result of error in law:

In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used. See *Rosenman v. United States*, 323 U.S. 658, 661, 89 L.Ed. 535, 539, 65 S.Ct. 536. Hence we read the word "overpayment" in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. **Whatever**

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<sup>28</sup> "Any term used in this chapter has the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required." U.C.A. § 59-10-103(2).

**the reason, the payment of more than is rightfully due is what characterizes an overpayment. (emphasis added).**

*Liberty Glass* at 531.

The holding of *Liberty Glass* is codified in I.R.C. § 6401(c) (1954 Code). The Utah counterpart reads: "If there is no tax liability for a period in which an amount is paid as income tax, the amount is an overpayment." U.C.A. § 59-10-529(12).

Under any characterization, retroactive invalidation of Utah's tax on federal retirees for the years 1985-1988 is a ruling on tax liability. See: Conclusions of Law, R. 1131, 1132, pp. 13-14.

The Commission recognizes the breadth of the "overpayment" definition and treats as an overpayment any amount not properly due. An overpayment is simply a mathematical calculation between what the taxpayer paid and what he should have paid. Depo. of Commission Chairman Richard Hansen, R. 1159, pp. 21-22. "I don't know that it (the definition of overpayment) would even be an issue." *Id.* at 22. Commissioner Roger Tew agrees that the reasons for the overpayment are irrelevant.

[I]t really has been a non-issue. . . the term "overpayment" is probably generic and that's how we have approached that. If you were entitled to a refund of your ultimate tax liability, it is established to be less than the amount that you paid in, we entered the provisions for a refund decision, but. . . I am unaware of any case that we have had before us where that has ever been raised as an issue. . . in the income tax area.

Depo. of Roger Tew, Tax Commissioner, R. 1163, p. 28.

The Supreme Court of Colorado recently decided its federal retiree refund case by ordering refunds. When asked to avoid the



statutory remedy for refunds of income tax overpayments, the Court refused:

The plain reading, and only reasonable interpretation, of [the refund statutes] is that the General Assembly intended to refund any tax illegally collected under U.C.A. § 39-22-104(4)(g) to the affected taxpayers. Faced with such plain legislative intent, it is both unnecessary and outside our judicial role to look to whether refunds are good policy or whether a balancing test, such as *Chevron*, favors retroactive or prospective application of our holding that U.C.A. § 39-22-104(4)(g) was unconstitutional.

*Kuhn v. State Dept. of Revenue*, 817 P.2d 101, 110 (Colo. 1991).

**E. UNDER UTAH LAW, THE PROTEST REMEDY HAS NO APPLICATION WHERE A MORE SPECIFIC STATUTORY REMEDY EXISTS AND AN ADMINISTRATIVE PROCEDURE IS ESTABLISHED.**

Defendants' view of the protest statute as Plaintiffs' sole remedy is contrary to the holding and position taken by the Commission in *Pacific Intermountain Express Co. v. State Tax Commission*, 7 Utah 2d 15, 316 P.2d 549 (1957). There, the taxpayer paid allegedly unlawful sales taxes under protest and filed an action directly in district court in reliance on the protest statute, U.C.A. § 59-11-11 (1953) (now renumbered at U.C.A. § 59-1-301). The Commission moved to dismiss for failure to state a claim, raising the more specific sales tax remedy to be Plaintiffs' exclusive remedy. The trial court agreed and dismissed the protest complaint; the Utah Supreme Court upheld the dismissal.

In its opinion, the Court compared the protest and sales tax remedies.

It is to be noted that U.C.A. § 59-11-11<sup>29</sup> is of ancient origin. It has existed in our law since statehood, and sets out the historical method of contesting payment of taxes. It is general in its terms; has usually been applied to disputes over property taxes and is found in the "miscellaneous" provision of the tax code. On the other hand, § 59-15-12 to 15, upon which the Tax Commission relied, are of more recent origin, being part of the Sales Tax Act itself which was enacted in 1933; and are explicit as to the manner in which a taxpayer dissatisfied with a sales tax assessment may challenge it.

*Id.* at 551.

The Commission correctly argued that the more specific sales tax act must control over the general protest remedy.

. . . supporting this view are the basic rules pertaining to statutory construction: that in case of conflict, a later enactment is controlling over an earlier one; and that express provisions of statutes take preference over general ones.

*Id.* at 551.

Now, Defendants make the same arguments rejected in *Pacific Intermountain Express*. They claim § 59-1-301, enacted in 1898 (Df bf p. 22), and found among the "Miscellaneous Provisions" of the Tax Code, should control over the specific refund provisions of the Income Tax Act, enacted in 1973. § 59-10-529. But, Utah continues to follow the rule that new statutes, when relating to the same subject matter as existing statutes, are "deemed controlling as it

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<sup>29</sup> Section 59-11-11 has been renumbered as § 59-1-301, but the protest statute remains virtually unchanged.

is a later expression of the Legislature," *Ellis v. Utah State Retirement Bd.*, 757 P.2d 882, 884, 885 (Utah App. 1988)<sup>30</sup>.

Defendants raise what they claim to be a contrary rule in *State v. District Court*, 102 Utah 290, 115 P.2d 913 (1941) and *Shea v. Tax Commission*, 101 Utah 209, 120 P.2d 274 (1941). Both cases involved refunds for diesel fuel taxes invalidated in *Carter v. State Tax Commission*, 98 Utah 96, 96 P.2d 727 (1939).

In the State case, the taxpayer had actually paid the fuel taxes under protest and the court was determining the appropriate statute of limitations. Even though the protest statute clearly required a six (6) month limitation, the court was badly divided. A two Justice plurality reluctantly applied the six month statute only because: 1) no other statutory remedy was provided for fuel tax refunds, and 2) the shorter statute helped resolve a "cloud on the right of the state to use taxes" paid under protest because the

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<sup>30</sup> If the Utah Legislature had intended the protest statute to be the sole remedy for unlawfully collected income taxes, or if it had any dispute with the application of specific tax remedies over the general protest remedy, it missed a perfect opportunity when it completely revised Title 59 in 1987. Among the many changes made (see Appendix A to Title 59 showing 1987 revisions), the legislature added a remedy (59-13-202) to the Motor Fuel Tax Act, moved the protest remedy (59-11-11) to the property tax act (59-2-101 et seq; protest renumbered as 59-2-141), and made stylistic changes in the wording of the income tax refund remedy. Laws of Utah 1987, Chapters 2 through 6. The legislature missed another opportunity in 1988 when it removed the protest remedy from the Property Tax Act and placed it back in the miscellaneous tax provisions (renumbered as 59-1-301), in apparent recognition that the Property Tax Act already included a specific remedy (59-2-1313) while chapters imposing other taxes had no remedy. Laws of Utah 1988 Ch. 3 § 88.

office collecting them was required to segregate all funds paid under protest until the dispute was resolved. The concurring opinion agreed only because the statutory requirement for segregating funds favored a short statute. Two Justices dissented. *Id.* at 915 and 916.

State is distinguishable because income taxes are not fuel taxes and no segregation of income taxes is required. § 59-10-101, et seq.<sup>31</sup>

In *Shea*, the plaintiffs had not paid the fuel taxes under protest, and the Court attempted to find another remedy in the wording of the fuel tax statute authorizing the return of any fuel taxes "collected through error." The Court found the word "error" was too narrow to encompass unlawful collections. The Court held the protest statute to be the exclusive remedy for refunds of unlawful fuel taxes because no alternative remedy existed.

These cases do not conflict with the later (1957) rule of *Pacific Intermountain Express*, *supra*. *State* and *Shea* dealt with diesel fuel taxes collected under a statute allowing no other clear remedy. The Court in *Pacific Intermountain Express*, *supra*, addressed the issue of two apparent and conflicting remedies. When two remedies are apparent, the more specific later enactment applies. *Id.*

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<sup>31</sup> Utah has not segregated Plaintiffs' income tax payments. Depo. of Roger Tew. R. 1163, p. 37.

Though the protest remedy continues to apply to taxes with no administrative remedies for refunds,<sup>32</sup> it cannot apply to defeat claims under the clear income tax refund provisions of § 59-10-529.

**F. UTAH HAS NEVER REQUIRED PAYMENT UNDER PROTEST FOR INCOME TAX REFUNDS; TO DO SO NOW WOULD BE UNFAIR.**

Defendants cannot show one example of a protest requirement being raised as a bar in Utah to an income tax refund. The issue is not raised by the Commission, which has not applied protest requirements to income tax challenges:

Q. In the income tax context, have you ever barred a refund to a taxpayer because the taxpayer failed to pay under protest?

A. Not to my knowledge. I don't -- when I say that, I don't remember it coming up, the question of whether paid under protest or not. The cases that I have been involved in has been a matter of looking as to whether or not they owed it. The question of whether it was paid under protest has not been an issue.

Depo. of Richard Hanson, Tax Commission Chairman, R. 1159, pp. 22-23.

Like the federal system, Utah offers a three year period in which either the state or the taxpayer can change the calculations on the original income tax return for any justifiable reason. U.C.A. §§ 59-10-529, 536.

As this Court has said:

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<sup>32</sup> Those taxes imposed in Title 59 which offer no specific refund remedy include the: equivalent property tax (59-3-101 et. seq.), privilege tax (59-4-101 et. seq.), gross receipts tax (59-8-101 et. seq.), admitted insurers tax (59-9-101 et. seq.), cigarette and tobacco tax (59-14-101 et. seq.), educational funding tax (59-14c-101 et. seq.) and wine and liquor tax (59-16-1 et. seq.).

It certainly would be a delusion to require a taxpayer to pay the tax, seek a review, and if he prevails, not allow him to get it back. (emphasis added)

*Pacific Intermountain* at 552.

**G. THE EXISTENCE OF NO PROTEST REMEDY IN 1987 BELIES DEFENDANTS' CLAIM THAT IT WAS AND IS PLAINTIFFS' SOLE REMEDY.**

As Defendants concede, the legislature in 1987 removed the payment under protest statute, U.C.A. § 59-11-11 (1977) from the miscellaneous section of the tax code and placed it in the Property Tax Act. Df bf p.22, ftnt 1. In 1988, the legislature again placed a payment under protest remedy among the miscellaneous tax provisions but also left the protest remedy intact in the Property Tax Code. Thus, no payment under protest remedy existed for the 1987 tax year except in connection with the payment of property taxes. Plaintiffs' only remedy for 1987 is a claim for refund under U.C.A. § 57-10-529. This action of the legislature is unexplainable if it viewed the protest remedy to be Plaintiffs' sole remedy.

**H. PAYMENT UNDER PROTEST IS AN ALTERNATE REMEDY FOR THE 1988 TAX YEAR. PLAINTIFFS PAID TAXES UNDER PROTEST IN 1988.**

As a precaution, Plaintiffs both protested the 1988 collection of taxes and claimed a refund under the normal income tax refund procedures in § 59-10-529. Defendants have never objected to Plaintiffs' protest claim and the trial court allowed a refund under either or both sections.

No particular form of tax protest is required in Utah. *Murdock v. Murdock*, 113 P. 330 (Utah 1911) sets forth the standard to which a tax protest must conform:

No particular form of protest is required by the statute. Nor is it required that a protest be in writing. From the facts as admitted by the treasurer, she clearly understood that the portion of the taxes which were claimed by Heber City were paid under protest because they were claimed to be illegal for the reason that the sheep upon which they were levied at no time were within the territorial limits of said city. What more could be required? When the statute prescribes no special conditions in making a protest, it would seem that the courts can require none.

*Id.* at p. 332.

The purpose of requiring payment under protest is to alert public officials of a challenge to the amount of revenue they may receive and thus have available to budget, which may make sense in a property tax context, but serves no purpose in an income tax setting.<sup>33</sup> But "where there was an existing controversy, known to the public officials,...there is no question but that the tax collecting authorities had knowledge of which tax the 'paid under protest' referred to." *Peterson v. Bountiful City*, 477 P.2d 153, 156 (Utah 1970). The extensive attention given to the *Davis* ruling by the press in March and April of 1989 and the Commission's public response clearly indicate Defendants' awareness of the protest.

The Commission has consistently viewed filing an amended return asking for a refund as tantamount to filing under protest.

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<sup>33</sup> The State of Utah does not attempt to segregate income taxes paid under protest. R. 1163, p. 37.

This is precisely the position taken by the Commission at trial. Referring to the April 5, 1989 press release, defendants stated in a memorandum filed with the trial court:

There has been no foreclosure of opportunity for refund. In fact, the press release states that if any taxpayer disagrees with the Commission's assessment, **they may file their taxes under protest** to preserve any rights they may have. (emphasis added).

R. 175. The fact the press release said nothing about "paying under protest" indicates the Commission recognized the filing of an amended return as constituting payment under protest.

The Commission, having openly instructed Plaintiffs to file amended tax returns to protect their legal rights and recognizing the amended returns as a filing of taxes under protest, has acknowledged Plaintiffs' protest and should now be estopped from denying that tax payments were made under protest for the 1988 tax year by Plaintiffs.

#### **I. NEITHER LACHES OR WAIVER BAR PLAINTIFFS' CLAIMS.**

Defendants assert the trial court erred in not barring Plaintiffs' claims by laches and waiver. Df bf pp. 44-47. Defendants' assertions are without merit for the following reasons.

1. Defendants cannot show any injury they have suffered. *Papanikolas Brothers Enter. v. Sugarhouse Shopping Center Assoc.*, 535 P.2d 1256, 1260 (Utah 1975). Defendants have collected an illegal tax for 40 years and have thus been enriched at the expense of Plaintiffs. No matter when in the last 40 years Plaintiffs brought this action, they could claim a refund back three years.



It would not have mattered if Plaintiffs had brought this action twenty years ago. Defendants have only benefitted by the extra length of time they have collected illegal taxes.

2. Laches is an equitable defense which "refuses to lend its aid to a party whose conduct is inequitable." *Rohr v. Rohr*, 709 P.2d 382 (Utah 1985). Since Defendants unlawfully collected taxes, equity will not respond to their cry for help.

3. Defendants cannot show lack of diligence on the part of members of the Plaintiff class, *Papanikolas Brothers*, supra, unless they can show how retirees, some whom did not even retire until after 1985, could have brought a claim 20 or 30 years ago before their claim was ripe.

4. Defendants argue that because the language of § 111 was clear, Plaintiffs were not diligent in challenging this statute sooner. Defendants apparently argue there exists a higher standard for taxpayers to study and analyze a clear tax law than exists for the Commission itself.

5. Laches or waiver should not defeat a specific clear refund statute with a specific statute of limitation cutting off the rights of taxpayers to obtain a refund. In the statute, the legislature has expressed the period during which inaction is acceptable. Inaction standing alone should never defeat a cause of action within the statutory period of limitations.

6. To say that any one taxpayer by acting within the statute of limitations caused the total burden to the state is a fallacy.

Any delay by one taxpayer cannot result in more than one refund. Laches could only be addressed on an individual claim basis.

Defendants' defenses of laches and waiver must fail.

**VIII. DEFENDANTS IMPROPERLY ASK THE COURT TO CRAFT A NEW REMEDY IN PLACE OF TAX REFUND STATUTES (BUT EQUITY FOLLOWS THE LAW).**

Defendants inexplicably ask this Court to apply the state doctrine of retroactivity to relieve Utah from its statutory duty to pay refunds even if *Davis* is retroactive under federal law. Df bf pp. 84-89. That equity allows a court to deny *stare decisis* effect to its own law-reversing decisions is not disputed; but here, Defendants urge the Court, in the guise of equity to deny effect to a retroactive decision of the U.S. Supreme Court and to emasculate Utah's tax refund statute because State Government would rather spend Plaintiffs' wages elsewhere.

Even if Utah had the power of selective secession from the laws of the Union<sup>34</sup>; it could not re-define equity to nullify the laws and Constitution of Utah, or the Constitution of the United States.

**A. THE TAX REFUND STATUTE IS THE VOICE OF THE PEOPLE OF UTAH.**

Defendants complain that federal minimum due process does not mandate refunds, and that "Utah needs to do nothing more." Df bf

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<sup>34</sup> Utah is an inseparable part of the Federal Union and the Constitution of the United States is the "Supreme Law of the Land." *Utah Constitution*, Article 1, § 3. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Claflin v. Houseman*, 93 U.S. 130, 136 (1876).

p. 85. Defendants miss the point. Utah HAS done more, it HAS enacted tax refund statutes. [cf. *McKesson v. Florida*, 110 S.Ct. 2238, 2258, ftnt 36). "The State is free, of course, to provide broader relief as a matter of State law than is required by the Federal Constitution."].

All political power is inherent in the people . . ." Utah Constitution, Art. I, § 2, and the people have chosen through elected representatives to refund income taxes improperly collected. U.C.A. § 59-10-529. This is the voice of the people of Utah and is their codification of equity.

**B. THE CONSTITUTION OF UTAH PROTECTS A CLEAR STATUTORY REMEDY FROM EROSION BY POLITICAL EXPEDIENCE.**

Defendants call the income tax refund statute "draconian" and claim the district court "abused its discretion in ordering refunds". Df bf pp. 84-86.

Defendants would not claim abuse of discretion if this case had involved only one or even a thousand claims. The refund remedy is too plain and obvious to bar individual claims. What Defendants mean when they call refunds "draconian" is that, this time, there are too many taxpayers with too many claims. The case is politically uncomfortable and inexpedient, and Defendants hope the court will carve an exception into the refund statute for big cases involving too many claims.

But, the tax refund statute applies the same whether a refund is claimed by one taxpayer or by thirty-four thousand, and the Utah Constitution will buttress the statutory remedy.

Utah's constitutionally mandated separation of powers, Utah Constitution, Art. V, § 1 (more specific in the U.S. Constitution) prohibits a court from acting in equity to carve exceptions in a plain statute to meet hardship in a particular case; to do so would be "a usurpation of legislative power". *Smith v. Schwartz*, 21 Utah 126, 60 P. 305 (1899). See also *State v. Johnson*, 44 Utah 18, 137 P. 632 (1913); *State v. Bishop*, 717 P.2d 261 (Utah 1986). The wisdom or policy of a tax statute does not concern the courts of Utah. *Judge v. Spencer*, 15 Utah 242, 48 P. 1097 (1897); see also *Utah Manufacturers Ass'n. v. Stewart*, 82 Utah 198, 23 P.2d 229 (1933). There is no authority in government which can invalidate a constitutional statute. *Kimball v. Grantsville City*, 19 Utah 368, 57 P.1 (1899); *State ex rel. Breeden v. Lewis*, 26 Utah 120, 72 P. 388 (1903).

Utahn's have a guaranteed "remedy by due course of law", Utah Constitution, Art. I, § 11. To the extent Defendants deny one federal retiree a tax refund because there are too many others also claiming refunds or because he is a member of a less deserving group, they offend Utah's guarantees of equal protection and uniform operation of laws. Utah Constitution, Art. I, §§ 2 and 24.

**C. FEDERAL DUE PROCESS DEMANDS A REMEDY.**

Once a constitutional decision applies and renders a state tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered.

ATA at 2339.

Defendants claim to have complied with federal due process by providing pre-deprivation hearings, and therefore "need do nothing more". Df bf p.85. But, Utah's pre-deprivation proceedings require the payment of a tax before court review and are therefore deficient.<sup>35</sup> *McKesson Corp. v. Florida*, 110 S.Ct. at 2251.

When a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post-deprivation procedure to provide a "clear and certain remedy," *O'Connor*, 223 U.S. at 285, for the deprivation of tax monies in an unconstitutional manner.

*Id.* at 2258.

Our decision today in *McKesson* makes clear that once a state's tax statute is held invalid under the Commerce Clause, the state is obligated to provide relief consistent with federal due process principles.

ATA at 2332.

Where a state can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern.

*Id.* at 2333.

The State's interest in financial stability does not justify a refusal to provide relief.

*McKesson* at 2257.

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<sup>35</sup> Utah's pre-deprivation process requires a taxpayer to raise claims of unlawful taxation before a Commission with no power to declare the validity of laws; the taxpayer must pay the tax before gaining access to a court empowered to grant a remedy. U.C.A. §§ 59-1-501 through 505.

We reject respondents' intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or monies useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds.

*Id.* at 2557 (ftnt 35)

**D. EQUITY FOLLOWS THE LAW.**

Defendants see the equities in their favor because "Utah simply had no reason to doubt the validity of the exemption". Df bf p. 62. But, reading § 111 would have given them reason to doubt, especially in view of Utah's settled position that retirement benefits are deferred compensation. As the trial court observed, "No person and no government can be excused by ignorance of the law, even widespread ignorance." *Conclusions of Law*, p. 19, R. 1137.

Defendants further urge the court to "balance the relative benefit to any individual plaintiff . . . against the relative harm to the state". Df bf p. 63. One State Supreme Court Justice has considered the equity posed by federal retiree tax refund claims:

I am unable to see the "inequity" involved in requiring the State to return any money it has unconstitutionally taken from the plaintiffs. In my view, the fact that the State is experiencing financial difficulties has little to do with whether it would be inequitable to require the State to refund the plaintiffs' money. Nothing in the record before us indicates that the plaintiffs, federal pensioners and military personnel, are experiencing any less financial difficulties than the State of North Carolina. Further, unlike the State, the plaintiffs do not have the power of taxation at their disposal when attempting to deal with their financial difficulties. There simply is nothing "inequitable" or wrong

about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so. I believe it is entirely equitable and just to apply the rule announced in *Davis* retroactively so as to require that the State return any taxes it has unconstitutionally collected from the plaintiffs.

*Swanson v. State*, 407 S.E. 2d 791, 797 (N.C. 1991) (Dissent by J. Mitchell, joined by C.J. Exum and J. Frye) (the majority noted only that the state was in "dire financial straits" and that refunds would therefore be inequitable. *Id.* at 794.)

Defendants also unfairly ask a single taxpayer's need for return of his money to be weighed against the state's obligation to all class members. The proper balancing must weigh a refund to a taxpayer against the cost to the state of that single refund. This is NOT one large case; this is thirty-four thousand small cases.

Taken to its conclusion, Defendants' argument is that if the state unlawfully taxes a sufficiently large number of taxpayers, it should be excused.

Defendants argue, using figures stricken by the trial court as irrelevant, that the cost of nearly \$104 million (a figure Plaintiffs believe to be much, much too high) would create a financial hardship to the State. (This also assumes that all class members will claim their refund, a fact disproved in those states in which federal retiree refunds have been given). Defendants' numbers are impressive in a vacuum, but would amount to only 2.7%

of the State's \$3.8 billion 1992 budget.<sup>36</sup> This percentage is smaller than the margin of accuracy in the state budget projections. Defendants' conclusions about the cutback of services and "staggering" tax increases are also pure speculation. (Plaintiffs also contest Defendants' assertion that the State has current fiscal problems. *Id.* Fiscal problems are relative, of course, and invite a comparison to the fiscal problems of retirees on fixed incomes).

As Defendants suggest, a comparison of the relative benefit to each taxpayer with the burden to the state is (though unfair) illuminating. Defendants' figures (for 1988) yield an average refund of about \$478.00 per year per taxpayer.<sup>37</sup> For a taxpayer on a fixed retirement of \$20,000.00 per year, the unlawful taxes he or she paid and wants back for four years amounts to more than 2.7% of his or her annual income. The 2.7% impact on the State is small relative to the impact on the taxpayer. In relative terms, the total cost of refunds to the State of 2.7% of its annual budget is equivalent to \$540.00 in a \$20,000.00 income. Unpleasant, yes, but not financially devastating.

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<sup>36</sup> Plaintiffs request judicial notice of Utah's 1992 budget of \$3.8 billion, with a \$34 million surplus from 1991 and a \$56.7 million "rainy-day fund". See, e.g., *Deseret News* Article, "Utah's Finances in Good Shape as National Economy Struggles", January 6-7, 1992, p. D5.

<sup>37</sup> See: footnote 40.



What can be fairly said is that the State has other places it would rather spend the money it has unlawfully collected. But, a taxpayer on a fixed income also has other needs he or she would prefer to spend money on than to pay unlawful taxes. The fulcrum for the decision is not what the state would rather do, but what it must do.

Defendants see inequity in asking other taxpayers in Utah to absorb the cost of retiree refunds. Plaintiffs see in this result the fairness that should have existed at the time of taxation. Asking Utah to spread its tax burden to those who should have paid the cost in the first place is not inequitable, it is just. And, it should not be forgotten that other taxpayers in Utah have reaped the benefit of unlawful taxes on federal retirees since enactment of the law in 1947.

Utah's argument of the inequity of requiring it to honor its tax refund obligations is reminiscent of the many divorced fathers who appear in court every week arguing that they should not have to pay child support because they have re-married and their new family needs the money more.

Nothing has been said about the cost to the State of failing to restore what it has unlawfully taken. Equity considers more than money, and the cost to the state in avoiding its obligation is much greater than money. Equity should concern itself with the loss of confidence and respect for law by those who must pay the State's bills, the taxpayers. Should not they be left with

confidence that, if the State has improperly taxed their income, the State will give it back?

No honorable government would keep taxes to which it is not entitled, and the legislative scheme supports that result.

*Pittsburgh & Midway Coal v. Dept. of Revenue*, 776 P.2d 1061 (Ariz. 1989).

In the best and final sense, equity is what the people of Utah have provided: income tax refunds. Where rights are settled, "equity follows the law." *Protrka v. Palmer*, 423 P.2d 514, 246 Or. 467 (1967); *Jarvis v. State Land Dept.*, 479 P.2d 169, 106 Ariz. 506 (1970); *Independent School Dist. No. 89 v. Oklahoma City Federation of Teachers*, 612 P.2d 719 (Okla. 1980).

**IX. THE TRIAL COURT HAD JURISDICTION TO GRANT THE RELIEF SOUGHT AND PROPERLY WAIVED EXHAUSTION OF ADMINISTRATIVE REMEDIES**

**A. THE COURT'S JURISDICTION IS BEST DETERMINED BY THE RELIEF SOUGHT.**

Plaintiffs filed refund claims with the Commission. When these were denied and the Commission's public position was clear, Plaintiffs filed a class action for declaratory relief. With this case pending, the Commission continued administrative action on refund claims. Plaintiffs sought relief from further administrative remedies under U.C.A. § 63-46b-14 and the court so ordered. R. 251. Ignoring this order, the Commission attempted to compel five class members to participate in formal hearings addressing the retroactivity of the *Davis* decision. These five objected and petitioned for an injunction enforcing the court order

that members of the class need not exhaust administrative remedies.

R. 292. The Commission objects that the court meddled in its affairs.

The Court prefaced its consideration of jurisdiction by describing the relief sought:

Plaintiffs claim tax refunds for the tax years 1985, 1986, 1987 and 1988 on the basis of overpayment under U.C.A. § 59-10-529(7). Plaintiffs pray for 1) a declaratory order that Utah's taxation of federal retirees was unlawful for all tax years in dispute, and 2) an order compelling Defendants to recognize Plaintiffs' class claims for refund, and to compute and pay refunds.

Conclusions of Law, p. 7, R. 1125. Defendants do not dispute this.

Defendants do not challenge the Court's jurisdiction to review Plaintiffs' claims that the 1988 taxes were paid under protest and should be refunded under U.C.A. § 59-1-301; neither do they challenge the Court's authority to certify a class action.

Defendants challenge the trial Court's jurisdiction on only two grounds: 1) jurisdiction to grant declaratory relief, and 2) jurisdiction to issue an order compelling action by the Commission (mandamus). Df bf p. 36.

**B. THE DISTRICT COURT HAS JURISDICTION TO ISSUE A DECLARATORY ORDER.**

The District Court has jurisdiction to determine the validity of the tax, the availability of refunds, the propriety of the class claims for refund and to issue a declaratory order resolving those issues pursuant to the Utah Declaratory Judgment Act.

Conclusions of Law, p. 7, R. 1125.

The District Court's jurisdiction is broad. "The district court has original jurisdiction in all matters civil and criminal, not excepted in the Constitution and not prohibited by law." U.C.A. § 78-3-4 (as amended 1988). The District Court's authority to issue declaratory orders is protected under the Utah Declaratory Judgment Act, U.C.A. § 78-33-1 et seq. U.C.A. § 78-33-1 provides:

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for.<sup>38</sup>

Section 78-33-2 provides:

Any person . . . whose rights, status or other legal relations are effected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.

On this issue, Defendants take a position contrary to that taken by the Utah Tax Commission in *Washington County v. State Tax Commission*, 103 Ut. 73, 133 P.2d 564 (1943). In that case, the taxpayers claimed a statute giving a tax exemption to irrigation properties to be unconstitutional. The taxpayer filed an original

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<sup>38</sup> Defendants cite this statute for the proposition that a district court has such power only "within its respective jurisdiction." Df bf p. 36. They do not see the statute as the grant of jurisdiction it is. Evidently, this circuitous reasoning arises from a typographical error in Defendant's quotation of the statute. The qualifying term "within their respective jurisdictions" has obvious reference to the geographical jurisdictions (venues) of the individual districts, since all have the same subject matter jurisdiction. Defendants have misread "jurisdictions" to be in the singular.

proceeding seeking a writ of prohibition in the Utah Supreme Court, alleging the Commission to be without authority to apply a statute which is unconstitutional. *Id.* at 565. The Supreme Court agreed that "the Commission has the authority to apply (the statute) only if that section is constitutional." *Id.* at 565. The Court then reviewed other remedies available to the taxpayer to determine the legality of the tax. The Commission argued "that the petitioners have an adequate remedy under the declaratory judgment statutes or by injunction" to contest validity of the tax in district court. *Id.* at 566.

The Court agreed that the first two provisions of the Declaratory Judgment Act (now U.C.A. § 68-33-1 and 2):

do expressly authorize district courts to determine the validity of statutes which affect the rights, status, or other legal relations of the person bringing the action.

The court saw, however, unfairness in requiring the taxpayers to seek a declaratory order in District Court because:

the Commission could proceed pursuant to [the challenged statute] while the declaratory action was pending. Thus, the petitioner might be injured, even though they prevailed in the declaratory judgment proceeding.

*Id.* at 566.

Because of this unfairness and possible prejudice to the taxpayers in being forced to litigate their claims in both the district court and the Commission, the Supreme Court decided the issue. *Id.* at 566. The Court's jurisdiction to grant declaratory relief is to be liberally construed with the purpose of settling

and affording "relief from uncertainty and insecurity with respect to rights. . ." U.C.A. § 78-33-12.

A declaratory action in district court is a long established method in Utah for contesting unlawful taxes. See: *Crystal Car Line v. State Tax Comm'n*, 174 P.2d 984 (1946) (all claimants should be joined if possible).

**C. THE DISTRICT COURT HAD JURISDICTION TO COMPEL ACTION BY THE COMMISSION (MANDAMUS).**

In addition to an order declaring Utah's tax scheme to be unlawful, Plaintiffs sought an order compelling the Commission "to recognize Plaintiff's class claims for refund, and to compute and pay refunds." Conclusions of Law, p. 7, R. 1125.

The trial court described the basis for its jurisdiction:

Jurisdiction in the District Court to compel action by an administrative agency through writ of mandamus is protected by Art. VIII, § 5 of the Utah Constitution which provides the "district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs." This is recognized in U.C.A. § 78-3-4 which gives district court judges "power to issue all extraordinary writs necessary to carry into effect their orders, judgments, and decrees.

Conclusions of Law, p. 8, R. 1126.

The court also has jurisdiction to supplement its declaratory order with "further relief . . . whenever necessary or proper". U.C.A. § 78-33-8. This chapter, U.C.A. § 78-33-1 et seq. is to be "liberally construed and administered." U.C.A. § 78-33-12.

Defendants correctly recognize that an extraordinary writ (mandamus) is appropriate only where no other "plain, speedy or

adequate remedy exists". Df bf p. 36. The administrative process before the Commission was arguably plain and possibly speedy. But, no adequate remedy existed for Plaintiffs before the Commission, for the reasons discussed in the following sections. Therefore, the trial court properly enforced its declaratory order with an order in the form of mandamus.

**D. THE TRIAL COURT PROPERLY RELIEVED PLAINTIFFS OF THE REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES.**

From the beginning of this dispute, the only administrative remedy offered Plaintiffs was a formal hearing before the Commission with direct appeal to the Utah Supreme Court. R. 303-310, 919. At the time the trial court granted waiver of administrative remedies, thousands of retirees were attempting to protect their rights at various stages of the pre-hearing process, but the express intent of the Commission was to rule on the issues at a formal hearing.

Defendants insistence on a formal adjudicative proceeding before the Commission led Plaintiffs to seek relief from exhaustion of further remedies. The trial court, applying U.C.A. § 63-46b-14 (1987), relieved Plaintiffs of further administrative proceedings before the Commission.

**1. The trial court had authority in U.C.A. § 63-46b-14 to relieve Plaintiffs of further administrative remedies.**

Authority for the court to relieve Plaintiffs of the requirement to exhaust administrative remedies is found in the Utah

Administrative Procedures Act. U.C.A. § 63-46b-14(2)(b)(i) and (ii) reads:

The court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if: (i) administrative remedies are inadequate; or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

After examining the facts, the trial court ruled that further exhaustion would "result in irreparable harm disproportionate to the public benefit." R. 250-252. The court also could have concluded on the same facts that the administrative remedies were inadequate.

**2. Further proceedings before the Commission would have caused the taxpayers irreparable harm.**

Initially, thousands of Plaintiffs began in the administrative process moving toward a formal hearing before the Commission which was publicly committed to the view that the *Davis* decision did not require refunds and the matter would be decided by the courts. R. 130.

In considering the burdens imposed by this process, the trial court noted Defendants' concession that the Commission had no administrative procedures to protect members of the class. R. 251. The Court also noted the older age of Plaintiffs, the size of the class, the small amount of average refunds and the cost to



Plaintiffs of further proceedings pursuant of claims before the Commission.<sup>39</sup>

The court found particularly important "the older age of many of the Plaintiffs." R. 250. At one of the hearings in the trial court, the judge said the following to counsel for the parties:

One of the things that distresses me in this case, and I will tell you both this, is that we're dealing with retired persons, we are dealing with persons who are subject to age infirmities and maturity, . . .

R. 1157, p. 11

Also apparent was the unfairness in requiring Plaintiffs to litigate their claims in two forums. As the court observed in *Washington County v. State Tax Commission*, (*supra*), a declaratory

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<sup>39</sup> Defendants challenge these findings for lack of evidence. Df bf p. 91. But the number of retirees affected, 34,000, was publicly announced by the Commission itself (R. 130), and Defendants used this number in making projections. R. 723. This figure went unchallenged by Defendants when it was set forth in the Statement of Material Facts set forth in Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment. R. 397. Judge Young referred twice to the 34,000 figure when questioning one of Defendants' attorneys during a hearing. R. 1157, pp. 9 and 11. Defendants have never questioned this figure until now, for the first time on appeal. Defendants also ignore an unchallenged affidavit from Chairman of the Utah Coalition of Federal Retirees fixing the class size at about 34,000. R. 241. As to age, Defendants cite to the Federal Civil Service Act which provides for "regular retirement at age 62 or 60, depending on years of service." Df bf p. 28. Until now, no one has challenged the court's finding, based on notice of law, observation, and arguments of council that the majority of retirees are of advanced age. As to the small size of individual claims in relation to the cost of pursuing the claim, arguments of this before the trial court were never contested. R. 215, 237. Defendants provided information from which computation of the average return was made. Projections for 1988 refunds, for example, totalled \$16,253,000. R. 725. With 34,000 potential claimants, the average refund would only be \$478.00 per claimant.

action properly filed in district would not, of itself, terminate the administrative procedures.

While such proceeding might be adequate to test the validity of the statutes in question, the Commission could proceed pursuant to [the challenged statute] while declaratory action was pending. Thus, the petitioners might be injured even though they prevailed in the declaratory judgment proceeding.

*Washington County* at 566.

The extraordinary remedy of a Writ of Prohibition in the Supreme Court, recognized by this Court in *Washington County* is now supplemented by U.C.A. § 63-46b-14, which serves the same purpose.

Ultimately, determination of the issues in a formal Commission hearing with a record appeal would also have deprived Plaintiffs of their due process right to a plenary hearing before a fair and impartial tribunal and of their right to a remedy by due course of law.

**3. Further proceedings before the Commission were not justified by the incidental public benefit to be gained.**

Defendants presented no evidence of any public benefit by proceeding before the Commission. The Commission was not an impartial quasi-judicial body after it publicly announced refunds would not be granted unless ordered by the courts. R. 79, 130, 595, 598. To all the world, the Commission no longer appeared impartial.

Any remaining public benefit was an illusion only. The Commission had no authority to invalidate Utah's tax laws, *Shea v.*

*State Tax Commission*, 102 Utah 209, 120 P.2d 274, 275 (1941), so it was not empowered to grant the refund remedy taxpayers sought.

**E. COMMISSION HEARINGS COULD NOT HAVE AFFORDED PLAINTIFFS "DUE PROCESS" OR "REMEDY BY DUE COURSE OF LAW."**

For almost three years, Defendants have urged (tried to compel) Plaintiffs to pursue their claims for refund before the Commission.<sup>40</sup> Defendants claim sole jurisdiction in the Commission to determine the retroactivity of the *Davis* decision, decide the validity of Utah's tax laws, and to consider the availability of refunds. Df bf p. 35. If the Commission does not have sole jurisdiction, Defendants claim it to have primary concurrent jurisdiction to proceed first. Df bf pp. 30-37.

However, the threshold issue in this case is the validity of Utah's tax scheme for retirees. As set forth below, consideration of that issue in a formal hearing before the Commission with record appeal to the Utah Supreme Court would deny Plaintiffs their rights to due process and remedy by due course of law. Intervention of the district court was necessary.

**1. Tax Commission hearings could not provide due process.**

Due process is guaranteed by the Fourteenth Amendment to the Constitution of the United States and by the Utah Constitution Art.

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<sup>40</sup> The Commission's eagerness to claim full jurisdiction has puzzled Plaintiffs in view of Defendants' contention that Plaintiffs' sole remedy was to pay their taxes under protest and pursue refunds in the district court (U.C.A. § 59-1-304). Df bf pp. 20-27.

1, § 7. The protections are substantially similar. *Untermeyer v. State Tax Commission*, 102 Utah 214, 129 P.2d 881 (1942). These protection do not mandate a court hearing if the administrative process provides a fair opportunity to be heard. *Id.* As a minimum, due process requires a fair hearing before an impartial tribunal. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, (1976).

The Commission was not impartial, having answered the inquiries of hundreds of retirees, R. 1163, p. 23, with a press release defining Utah's response to the *Davis* decision.

We view the Supreme Court ruling as applying to tax years beginning in 1989. **The Commission takes the same position as other states with similar laws, that refunds of past taxes paid by federal employees are not mandated by the (Davis) decision.** (emphasis added).

State Tax Commission Press Release, Issued by Chairman Roger Tew, April 5, 1989, R. 79, 130, 595. (Addendum Exh. 1). The trial court relied heavily on the Commission's want of impartiality in denying Defendants' Motion to Dismiss on the issue of jurisdiction and exhaustion of remedies. R. 250.<sup>41</sup>

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<sup>41</sup> The 1989 Utah tax return information booklet, for example, sent to all Utah taxpayers included a "Note to Federal Retirees: . . . the issue of . . . refunds of state taxes paid in preceding years will be decided by the Court." Specific "statutory notices" sent to federal retirees filing amended tax returns contains the same information. R. 919, 923. Defendants attempt to distance themselves from the statutory notices by saying they were from the audit division of the Commission and do not reflect a decision by the Commission. Df bf pp. 32 and 33. But, the action by the audit division was dictated by the Commissioners. Deposition of Clyde Nichols, Executive Director, R. 1160, p. 5. In arguments on the issue of administrative remedies, Defendants again affirmed that "the Tax Commission's view is that the *Davis* case applies . . . only to taxes after that date (prospective only). R.

Plaintiffs also faced the disconcerting problem of being forced to plead their case before commissioners who were named personal defendants in Plaintiffs' pending § 1983 civil rights action, and in opposing attorneys ostensibly arguing for the State before the Commission but representing the Commission in court on the same issues.<sup>42</sup> This is not due process.

**2. Tax Commission hearings could not provide a remedy by due course of law.**

Article I, § 11 of the Utah Constitution mandates that, in Utah:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

This guarantee has no analogue in the federal constitution and is not synonymous with due process. *Berry v. Beech*, 717 P.2d 670, 674 (1985). The focus of this protection is on a fair remedy, and mandates that individuals not be "arbitrarily deprived of effective remedies designed to protect basic individual rights". *Id.* at 675.

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1158, p. 10.

<sup>42</sup> The Attorney General's office advised the Commissioners and assisted them in formulating a policy in dealing with *Davis*. R. 1159, p. 31. The Attorney General's office is representing the Commission in this lawsuit and following their clients' wishes in denying refunds. If this matter was sent to the Commission for a hearing, the same office that advises the Commission would be arguing the Commission's position in front of the Commission. R. 1159, p. 32. Such a proceeding does not have the appearance of fairness.

An administrative proceeding may substitute for a court action, but may not be used to divest a citizen of a remedy. See generally *Celebrity Club, Inc. v. Utah Liquor Control Comm'n Utah*, 657 P.2d 1293, 1296 (Utah 1982); *Industrial Comm'n v. Evans*, 52 Utah 394, 409, 174 P.2d 825, 829 (1918).

The Commission had no authority to address the necessary threshold issue of the legality of Utah's tax on federal retirees. The Commission is required by law to administer and enforce the tax laws of the state. U.C.A. § § 59-1-210(5), and 59-10-544(1). It has no discretionary power to decide what laws to enforce or to rule laws invalid. The Commission is not empowered to determine questions of legality or constitutionality of legislative enactments. *Shea v. State Tax Comm'n*, 102 Utah 209, 120 P.2d 274, 275 (1941).

In *Walker Bank & Trust Co. v. Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964), this court held that an appeal through an administrative agency was not a pre-requisite to bringing an action in district court since the question before the court was one strictly of law.

We agree that, under most circumstances, exhaustion of administrative remedies is required before legal action may be taken. However, this only applies where the discretion of an administrative officer or body, acting pursuant to statutory directive is in question. It does not apply when, as here, the administrative officer or body, acts without the scope of his or its defined statutory authority. The question here involved, being strictly one of law, is for the courts and an appeal to the Board of Examiners would have been futile and useless.

*Id.* at 595.<sup>43</sup>

Because this case is a direct and frontal attack on the lawfulness and constitutionality of the state income tax law<sup>44</sup> as applied to federal retirees, and because the Commission does not have power to rule on a constitutional issue, any proceeding before the Commission would have been meaningless. "It is a basic tenet of the law that one should not be required to do a useless thing." *In Re: Tanner*, 549 P.2d 703, 706 (Utah 1976). For Plaintiffs to seek a remedy before the Commission would be futile since the Commission could not offer the relief sought by Plaintiffs. And, with no remedy available, Plaintiffs would have been denied access to the courts without a "remedy by due course of law". Utah Constitution, Article I, § 11.

**F. CONSIDERATION OF THE RETROACTIVITY OF A U.S. SUPREME COURT DECISION IS OUTSIDE THE SCOPE OF THE TAX COMMISSION'S AUTHORITY AND EXPERTISE.**

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<sup>43</sup> This language is similar to that found in *Silver v. State Tax Comm'n*, 168 Utah Adv. Rep. 10 (Sup. Ct. August 30, 1991), wherein the Court said: "The interpretation of the language of § 59-14A-92 is a pure question of law upon which the technical expertise of the agency and its experience in administering the tax laws will be of no real assistance."

<sup>44</sup> This is not the "mere introduction of a constitutional issue" addressed in *Johnson v. Retirement Bd.*, 621 P.2d 1234, 1237-8 (Utah 1980), and *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539-40, 78 S.Ct. at 450, cited at Df bf p. 35. Defendants argue that the Commission could avoid the constitutional question by finding that the statute of limitations had expired, but this ignores the Commission's public position that a three year statute applied to federal retiree refund claims are long enough to cover Plaintiff's filings. R. 930. Apparently, the Commission desires jurisdiction to change its mind. Df bf at pp. 25-27.

Defendants overriding defense to refunds is their claim that *Davis* is not retroactive. R. 641-664, Df bf pp. 39-62. They insist that the Commission should have heard and decided this issue. Df bf p. 35. Though the Commission does not even claim the authority to invalidate laws<sup>45</sup>, Defendants claim it has the unique prerogative and ability to declare a U.S. Supreme Court opinion to have prospective-only application.<sup>46</sup>

Though the Commissioners must have knowledge of tax policy, they need no legal training. U.C.A. § 59-1-202. Yet, the Commission claims within its authority and expertise a uniquely judicial function: to interpret and apply the federal law of retroactivity, a uniquely judicial doctrine.

Even if the Commission had the expertise and legal authority to administer federal law, it would yet lack the power to relieve a court decision of its retroactive (*stare decisis*) effect. Such judicial functions are not even distant cousins to the Commission's statutory charge "to administer and supervise the tax laws of the State." U.C.A. § 59-1-210.

**G. THE COMMISSION COULD NOT HAVE PROTECTED THROUGH ITS PROCEDURES ALL MEMBERS OF THE CLASS.**

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<sup>45</sup> Deposition of Roger Tew, R. 612. Their sole law changing authority is to transmit recommended changes to the governor. U.C.A. § 59-1-210(22).

<sup>46</sup> Apparently, they would claim the same authority to deny retroactive effect to a Utah Supreme Court opinion which they viewed as burdensome to the Utah Treasury.



Well educated, informed and financially fixed federal retirees probably filed timely individual claims for refund. These individuals may have been able to pursue their claims through proper procedures and could have appealed, through their lawyers, the complex legal issues of the case.<sup>47</sup> But, options for these few individuals would leave thousands of others with no meaningful option at all.

Class actions allow protection for those plaintiffs who could not protect themselves. Many federal retirees are in hospitals or nursing homes, or are too poor or too unsophisticated to properly file claims. Many, probably most, could not justify the expense of hiring an attorney or CPA to properly pursue their individual claims. R. 303-310. Many were undoubtedly misled by the public pronouncements of the Commission, whom they viewed as impartial and authoritative, telling them that *Davis* did not mandate refunds. For those reasons, and more, the representative Plaintiffs pursued a class action.

Defendants now argue that all similarly situated retirees could have been protected through a declaratory action before the Commission pursuant to U.C.A. § 63-46b-21 (1989) and Utah Admin. R. 861-1-5A(Q). Df bf p. 32. This is not true. Even if the Commission had the authority to consider the complex legal issues,

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<sup>47</sup> However, the cost of such a proceeding would make such an undertaking financially unrealistic and undoubtedly is what caused members of the Plaintiff class to resist efforts to individually proceed before the Commission. R. 303-310.

and to invalidate Utah's tax law (it has no such authority), it has never had the ability to make rulings affecting the rights of parties not before it. A declaratory order that would substantially prejudice the rights of a person who would be a necessary party may be issued **only if that person consents in writing.** U.C.A. § 63-46b-21(3)(b). To date, no person has consented.

Obtaining the written consent of all retirees who would be bound by the decision would have been outrageously burdensome compared to the simpler class action procedure in court. In view of this, the Court's acknowledgement of Defendants' concession was justified:

Defendants concede that the Utah State Tax Commission has no administrative procedures to consider and process a class action that would preserve and protect the rights of and grant relief the representative members of the class seek.

Order on Defendants' Motion to Dismiss, paragraph 2.D. R. 251.

**H. IN DECIDING LEGAL ISSUES, THE COURT DID NOT STOP THE COMMISSION FROM DOING WHAT IT DOES BEST.**

Having decided the legal issues and concluding that refunds should be paid to class members, the Court returned the matter to the Commission to pay refunds. R. 1141. All class members who desire refunds will now need to file amended income tax returns which the Commission can challenge, audit and review through its administrative process. The court has only preserved for all class members their right to do so.

All considered, this is a very fair division of responsibilities between the Court and the Commission.

**I. THE TRIAL COURT PROPERLY ENFORCED ITS ORDER RELIEVING EXHAUSTION OF ADMINISTRATIVE REMEDIES WITH A TEMPORARY INJUNCTION.**

Ignoring the court's February 20, 1990, Order waiving further exhaustion of administrative remedies by members of the class, the state on May 30, 1990, attempted to compel five class members to appear at a formal hearing on their refund claims. R. 292. By this procedure, the Commission intended to bind all other retirees to its decision. R. 223.

The five class members sought relief from the hearing, reaffirming their inclusion in the class and protesting the cost and burden of a separate proceeding in light of their small refund claims. R. 303-310.

On June 8, 1990, the trial court enjoined for 45 days<sup>48</sup> the holding of administrative hearings by the Commission to allow class members time to opt out of the class and pursue individual claims if they desired. R. 367. The Commission was specifically directed to proceed with hearings on those who opted out of the class. R. 367. Defendants now object, claiming the "Tax Injunction Act bars the District Court from enjoining Commission proceedings." Df bf p. 38. Defendants' reliance on this act is misplaced. U.C.A. § 59-1-704 only restricts suits filed "for the purpose of restraining

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<sup>48</sup> The 45 days having expired, the issue is now moot.

the assessment or collection of any tax, penalty, or interest imposed" by the provisions cited. The statute has no application to an injunction enforcing a court order waiving exhaustion of administrative remedies, for a refund of taxes already collected.

When the court ruled that Plaintiffs need not exhaust administrative remedies the Commission had no business trying to compel further remedies. The district courts have authority and "power to issue all extraordinary writs and other writs necessary to carry into effect their orders. . ." U.C.A. § 78-3-4 (as amended 1988).

**X. THE TRIAL COURT PROPERLY DEFINED THE CLASS.**

Defendants' first argument on appeal is that the trial court erred in defining the class to: 1) include the 1984 tax year, 2) include military retirees, and 3) include taxpayers who did not personally protest their 1988 taxes. Df bf, pp. 19-21.

Defendants' objections regarding the inclusion of the 1984 tax year confuse the class definition with the relief ultimately granted. Though initially included in the class, 1984 taxpayers have no valid claim to a refund and were excluded from the final class definition. R. 01121.

Defendants' objections to inclusion of military retirees in the class is unfounded. Claims presented by military retirees present the same "questions of law or fact common to the class" required under Rule 23(a) of the Utah Rules of Civil Procedure.

Defendants' objection is not really a class definition objection; they raise an issue of substantive law. Consideration of this issue shows no legal distinction to exist between claims of military retirees and civil service retirees<sup>49</sup>. See: § XI, *supra*.

Defendants' objection to inclusion in the class of those who did not personally file protest claims raises two issues: 1) whether a protest is necessary, and 2) whether the actions of several thousand class members including class representatives suffice for all members of the class?

The first issue is an attempt to eliminate all refunds for the years 1985 through 1987 and is Defendants' principal dispute. See: § VIII, *supra*.

To the extent defendants raise the second issue, Defendants flay at the purpose of a class action.

The size of the class and even the propriety of a class action were dictated by the declaratory relief sought in the district court.

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration...

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<sup>49</sup> Even the Commission sees no distinction between military and civilian retiree claims. When asked if the Commission distinguished the two claims, Commissioner Roger Tew answered: No. I think our premise, from the very beginning, was that while the Davis decision did not specifically address military, we found no reason to except it. Depo. of Commissioner Roger Tew, R. 1163, p. 40.

U.C.A. § 78-33-11. The obvious mechanism for accomplishing the legislative mandate in this case was through a class action which Defendants do not challenge.

In addition to the mandate of § 78-33-11 is the provision of U.C.A. § 59-10-529(7) allowing claims to be filed by the taxpayers' "legal representative". Among the many "legal representative(s)" who may act for a taxpayer are court appointed representative plaintiffs. Their actions in filing "class claims" for refund, in protesting the tax and their later filing of a class "Protective Claim" for refund on March 30, 1990, on a form prepared and authorized by the Commission on behalf of all "class representatives and class members similarly situated" (R.593) protects the class.

The filing of class actions in state district court to obtain refunds of illegal taxes were encouraged twice by the Utah Supreme Court during the 1980's. [See: *Utah Rest. Ass'n v. Davis Cty. Bd. of Health*, 709 P.2d 1159 (Utah 1985). "We conclude that any action for a refund must be brought either by each food service...or by a plaintiff suing on behalf of all the establishments as a class..." and *Olson v. Salt Lake City Sch. Dist.*, 724 P.2d 960, 963 n.1 (Utah 1986), citing *Utah Rest. Ass'n*.]

Courts have permitted taxpayers to file class action suits under statutory refund provisions which are similar to those contained in Utah law. In *Santa Barbara Optical Co., Inc. v. State*

Bd. of Equalization, 120 Cal. Rptr. 609, 47 Cal.App.3d 244 (1975),

the California Appeals Court states as follows:

We conclude claimant, as used in Section 910, must be equated with the class itself and therefore reject the suggested necessity for filing an individual claim for each member of the purported class. To require such detailed information in advance of the complaint would severely restrict the maintenance of appropriate class actions - contrary to recognized policy favoring them. We do not believe the claims statutes were intended to thwart class relief.

Moreover, treating the class as a claimant is consistent with the treatment of the class for purposes of filing the complaint. While Section 422.40 of the code of Civil Procedure requires a complaint to name the parties, it is settled that the pleading need only establish the existence of an ascertainable class rather than name each member of the class. (citations omitted).

*Id.* at 611-612.

The purposes of a protest requirement, if any existed, (and if the claim requirement contained in § 59-10-529(7) does not apply) are to provide the commission with an opportunity to evaluate the merits of a claim and to place it on notice as to the potential liability. The filing of this suit as a class action, the filing of the class claim for refund by counsel for the Plaintiffs and the filing of more than 55,000 amended income tax returns and/or claims for refund by Plaintiffs satisfied these purposes.

The trial court's certification of the class also reflects the intent of the legislative and commission to protect as many federal retirees as possible. The legislature affirmatively extended the limitation for refund claims specifically for this case, and the

Commission's actions have consistently indicated an attempt to cover everyone.<sup>50</sup>

**XI. MILITARY RETIREES WERE PROPERLY INCLUDED IN THE CLASS SINCE MILITARY RETIREMENT PAY IS DEFERRED COMPENSATION.**

Defendants argue that military retirement pay is not deferred compensation, but represents reduced pay for reduced service. Thus, Defendants conclude military retirement pay is current compensation and not retirement compensation. Df bf p. 29. Defendants apparently contend the Utah tax was discriminatory only as to the **nature** of the compensation and not its **source** and is therefore a valid tax under *Davis*.<sup>51</sup>

In response to *McCarty v. McCarty*, 453 U.S. 210 (1981), a case dealing with the status of military retirement pay, Congress passed the Uniform Services Former Spouses' Protection Act (USFSPA), 10

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<sup>50</sup> See, e.g., Deposition of Commissioner Roger Tew: "We were very concerned that the right of people to challenge and to participate in a challenge be preserved...."

I think our motivation was, we did not want to put people to the requirement of having to fill out an amended return, which in some cases may involve them having to go hire an accountant, etc., to do that, if in fact they did not prevail in final appeal. R.1163.

<sup>51</sup> The U.S. Supreme Court in *Davis* recognized that, "a tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's [Utah's] does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Davis* at 817.



U.S.C. § 1408,<sup>52</sup> principally to overrule *McCarty* and, thus, allow states to divide military retirement pay as marital property. *Greene v. Greene*, 751 P.2d 827, 830 (Utah App. 1988).<sup>53</sup> It is clear Congress, in passing the USFSPA, viewed military retirement pay as exactly that, retirement pay, and not reduced pay for reduced services.

Other state supreme courts confronting the military retirement issue in *Davis* related litigation have analyzed the military retirement pay issue and concluded that military retirement pay is deferred compensation.

While it is true that Congress may have intended some portion of military retirement benefits to be current compensation for responsibilities accrued after retirement, see, e.g., *McCarty*, 453 U.S. at 224 n.16, the overall scheme of the retirement benefits is akin to a civilian pension earned by the service member for years of active service. For example, in the army members are not allowed to draw retirement pay unless they have served a specified period of active service, normally twenty years. 10 U.S.C. § 3911 (1988). Retirement terminates the right to active duty pay and allowances. 37 U.S.C. § 204(a) (1988). In addition, the amount of retirement pay is directly proportional to the number of years spent on active duty. (cites omitted).

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<sup>52</sup> 10 U.S.C. § 1408(c)(1) (1983) reads "[A] court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

<sup>53</sup> Defendants urge the court to ignore *Greene* because the Court must apply federal law in determining the retroactivity of a constitutional decision. Df bf p. 29, ftnt 4. While it is true the retroactivity of a constitutional decision is a matter of federal law, *ATA*, 110 S.Ct. at 2330, *Greene* is helpful in its analysis of whether military retirement pay is deferred compensation. *Greene* recognized that retired military personnel receive retirement pay.

*Kuhn v. State Dept. of Revenue of State of Colo*, 817 P.2d 101, 108 (Colo. 1991) [Also see *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286, 291 (1991), wherein Arkansas reached the same result: "We...believe that those cases which hold that military pay is actually deferred compensation or in the nature of a pension represent the better reasoned application of the law."].

Because military retirement pay is only received by one who serves at least twenty years in the military and because, as a general rule, retired military personnel do not provide any current service to the armed forces, military retirement pay has all the similarities of civilian retirement pay. This issue in the context of *Davis* litigation is now pending before the U.S. Supreme Court.<sup>54</sup>

**XII. DEFENDANTS HAD MADE ALL OBJECTIONS TO THE PROPOSED FINAL ORDER AT THE TIME IT WAS SIGNED BY THE TRIAL COURT.**

Defendants claim the trial court "did not allow Defendants the prescribed time to object to Plaintiffs' Amended Proposed Findings, Conclusions, and Partial Summary Judgment". Df bf p. 89.

The facts surrounding the signing of the Partial Summary Judgment are as follows: On March 26, 1991, Plaintiffs mailed to the Court and to Defendants, "Proposed Findings, Conclusions and

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<sup>54</sup> In Arkansas, the state supreme court ordered refunds to all federal retirees, including military retirees. The State of Arkansas appealed the military refund issue to the U.S. Supreme Court. *Pledger v. Bosnick*, *supra*. petition for cert. filed (U.S. Sept. 3, 1991) (No. 91-375). In Kansas, the state supreme court denied the military retirees refunds under *Davis*. The military retirees appealed to the U.S. Supreme Court which granted certiorari. *Barker v. State of Kansas*, 815 P.2d 46 (Kan. 1991) Cert. granted, 60 U.S.L.W. 3395 (U.S. Nov. 27, 1991) (No. 91-611).

Partial Summary Judgment".<sup>55</sup> Defendants filed "Objections to Proposed Findings of Fact, Conclusions of Law, and Partial Summary Judgment" on April 3, 1991. R. 1087. Plaintiffs mailed to the Court and to Defendants a "Reply to Defendants' Objections to Proposed Findings of Fact, Conclusions of Law and Partial Summary Judgment" on April 10, 1991. R. 1094. Also on April 10, 1991, Plaintiffs mailed to the Court and to Defendants an "Amended Proposed Findings, Conclusions and Partial Summary Judgment." Df bf p. 89.<sup>56</sup> The trial court acknowledged receiving the "Amended Proposed Findings, Conclusions and Partial Summary Judgment" in its Minute Entry of April 15, 1991, R. 1110, and approved the same "to be the final order of the Court." *Id.* Only minor changes were made in the different versions of the Proposed Findings, Amended Findings and Final Findings submitted to the trial court. These changes were set forth in a cover letter to the Court with a courtesy copy going to Defendants' counsel.

Defendants claim they were deprived of the right to object under Rule 4-504(2) of the Utah Code of Judicial Administration because the Court signed the final order prior to Defendants objecting. However, as an examination of Defendants' "Objections to Proposed Findings of Fact, Conclusions of Law and Partial

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<sup>55</sup> This document does not currently appear in the record, but is being added by amending the record.

<sup>56</sup> This document is not found in the record, but is being added pursuant to amendment.

Summary Judgment" bears out, Defendants did object and those objections are on the record. R. 1087. After the Court signed the Findings, Conclusions and Partial Summary Judgment on April 16, 1991, Defendants filed another objection entitled "Defendants' Objections to Plaintiffs' Amended Proposed Findings, Conclusions and Partial Summary Judgment." R. 1143. This second objection simply renewed the objections made in the first objection and did not object to one additional finding that had not already been objected to. There was no error in signing the final Order because Defendants cannot point to any prejudice. All their rights in the trial court and on appeal have been protected. Defendants cannot and do not identify any objections they would have made had more time elapsed.

**XIII. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' 42 U.S.C. § 1983 CIVIL RIGHTS ACTION.**

In *Dennis v. Higgins, Director, v. Nebraska Department of Motor Vehicles*, 111 S.Ct. 865 (1991), the U.S. Supreme Court held Nebraska's collection of motor carrier taxes to be a violation of the commerce clause to support a 42 U.S.C. § 1983 (hereafter "\$ 1983") civil rights action against state taxing officials. In doing so, the Court summarized the law of § 1983.

Last Term, in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. \_\_\_\_\_ (1989), we set forth three considerations for determining whether a federal statute confers a "right" within the meaning of § 1983:

"In deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does

no more than express a congressional preference for certain kinds of treatment.' *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981). [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987). [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff. *Id.* at 430; see also *Id.* at 433 (O'Connor, J. dissenting) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975))." *Id.* at \_\_\_\_\_. See also *Wilder v. Virginia Hospital Association*, 496 U.S. \_\_\_\_, \_\_\_\_ (1990) (slip op. at \_\_\_\_).

*Id.* at 871.

Plaintiffs meet all three tests applied to § 111. Defendants' defense, and the holding of the trial court, was that state officials enjoy a "qualified immunity" and cannot be sued for actions taken in their official capacity.

In *Hafer v. Melo*, \_\_\_\_ U.S. \_\_\_\_, 60 USLW 4001 (Case No. 90-681, decided Nov. 5, 1991), the Supreme Court rejected the qualified immunity given state officials acting within their official capacity. In sustaining a § 1983 action against the Auditor General of Pennsylvania for violation of civil rights, the court held:

State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them. *Ibid.* By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person." Cf. *id.*, at 71, n. 10 ("[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State'" (quoting *Graham*, 473 U.S. at 167, n. 14)).

*Hafer* seeks to overcome the distinction between official and personal-capacity suits by arguing that § 1983 liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when injuring the plaintiff. Under *Will*, she asserts, state officials may not be held liable in their personal capacity for actions they take in their official capacity. Although one Court of Appeals has endorsed this view, see *Cowan v. University of Louisville School of Medicine*, 900 F.2d 936, 942-943 (CA6 1990), we find it both unpersuasive as an interpretation of § 1983 and foreclosed by our prior decisions.

Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation, custom, or usage." 42 U.S.C. § 1983. The requirement of action under color of state law means that *Hafer* may be liable for discharging respondents precisely because of her authority as Auditor General. We cannot accept the novel proposition that this same official authority insulates *Hafer* from suit.

*Id.* USLW at p. 4003.

Defendants' attempts to distinguish these cases from Plaintiffs' reliance on § 111 and the *Davis* decision should be read in light of Justice Kennedy's characterization of the *Dennis* rule:

. . . the Court's rationale creates a § 1983 cause of action when a State violates the constitutional doctrine of intergovernmental tax immunities, *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989) (violation of statute "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity. (emphasis added)).

*Dennis*, *supra*, 111 S.Ct. at 877.

In addressing an appeal of the grant of a motion to dismiss, a reviewing court accepts as true the factual allegations contained in the amended complaint. *Lowe v. Sorenson Research Co.*, 779 P.2d 668 (Utah 1989). The facts alleged in Plaintiffs' amended

complaint described a course of conduct by the individually named defendants which was designed to deprive Plaintiffs of their "rights, privileges and immunities secured by the constitution and laws" of the United States. § 1983. The allegations include:

1. Defendants had between March 28, 1989 and April 17, 1989 during which to inform Plaintiffs that they could file a claim for refund with Defendant Utah State Tax Commission. R. 92.

2. Knowing Utah's taxation scheme violated Title 4 U.S.C. 111, Defendants intentionally and publicly misrepresented to Plaintiffs that the Davis case had no application in Utah, that Utah's taxation scheme was not in violation of Title 4 U.S.C. 111, and that Plaintiffs need not file a claim for refund for the 1985 tax year. R. 92.

3. Knowing Utah's taxation scheme was similar to Michigan's and that it violated Title 4 U.S.C. Section 111, Defendants proceeded to collect taxes from Plaintiffs for the tax year 1988, which collection was unlawful, illegal, and amounted to an overpayment of taxes. R. 95.

4. Defendants had between March 28, 1989 and April 17, 1989 during which to inform Plaintiffs that no taxes would be due or collected as a result of income received by Plaintiffs during 1988 from federal retirement sources or to correctly inform Plaintiffs of the proper procedure under Utah law to receive a refund of taxes collected under an unconstitutional and illegal law. R. 95.

5. Between March 28, 1989 and April 17, 1989, Defendants Hal Hansen, Joe Pacheco, Roger Tew, Blaine Davis and Clyde Nichols deprived Plaintiffs of their rights, privileges, or immunities secured by the Constitution or laws of the United States in violation of Title 42 U.S.C. Section 1983. R. 97.

6. By releasing inaccurate and misleading information, Defendants conspired to deny Plaintiffs of the equal protection and exercise of Plaintiffs' equal privileges and immunities under the Constitution or laws of the United States in violation of Title 42 U.S.C. Section 1983. R. 97.

These allegations, if proven, would establish a course of conduct engaged in by Defendants which acted to deprive them of rights and immunities protected under the laws of the United States.

The trial court's dismissal of Plaintiffs' § 1983 action should be reversed.

**XIV. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES AND COSTS OF RETURN PREPARATION SHOULD BE SUSTAINED.**

Plaintiffs' award of attorneys' fees from Defendants should be sustained under the § 1983 civil rights claim. The cost of return preparation is a proper award of consequential damages under § 1983.

The court coupled its declaratory order with an order in mandamus compelling the Commission to recognize and pay refund claims. The court may include with the mandamus order an award of damages and costs. "Costs" in a mandamus proceeding include attorneys' fees. *Colorado Dev. Co. v. Creer*, 80 P.2d 914 (1938).

**XV. FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES IS ESSENTIAL TO THE SECURITY OF INDIVIDUAL RIGHTS AND THE PERPETUITY OF FREE GOVERNMENT.**

"Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Utah Constitution, Art. I § 27. The provisions of the Utah Constitution are "mandatory and prohibitory", and are not simply words of advice. *Id.*, Art. I § 26; See: *Berry v. Beech*, 717 P.2d at 676.



As we celebrate this Fourth of July, we are reminded that one of the sparks which ignited the Revolutionary War was the abusive manner in which the colonists were being taxed by the King. Our forefathers fought and won independence from a King who extracted excessive taxes, and the Constitution was drafted to protect the people from such abuses.

*Beam v. Georgia*, 382 S.E. 2d 95 (Ga. 1989) (Smith, Justice, concurring in part and dissenting in part.)

Thirty-four thousand taxpayers stand before this Court with small but honest claims. These Utahns paid their taxes with the trust good people have in good government: that the state would not tax them wrongly, and if the state discovered a mistake, it would give those taxes back. The state, they trust, would not be less honorable than its citizens who must timely pay their debts, sometimes with tremendous difficulty. But, honorable people remain honorable, even when it hurts.

Now, their state acknowledges its mistake, but says it would be a financial burden to pay tax refunds. So, a seventy-eight year old retiree in Payson finds herself with a \$1,100.00 claim the state says it cannot afford to pay. She does not know the other 34,000 retirees. What she knows is that she has honestly paid her taxes and debts all her life and believes that laws must not be broken. Nothing is more fundamental to our free government than the basic trust between the government and each citizen, the taxpayer who pays its bills.

The fundamental purpose of laws in a democracy is to protect the rights of each solitary citizen against the whims and perceived

needs of all the rest. The fundamental danger in flattening the law when the majority feels burdened is that we are all, sometimes, in the minority.

This case presents an unusual and timely opportunity for recurrence to these fundamental principles.

#### CONCLUSION

The trial court's Partial Summary Judgment should be affirmed. The trial court's earlier dismissal of Plaintiffs' § 1983 action should be reversed and the case should be remanded for further proceedings.

DATED this 14 day of January, 1992.

LYON, HELGESEN, WATERFALL & JONES



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JACK E. HELGESEN



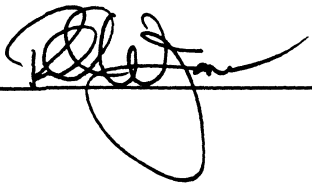
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RICHARD W. JONES

**CERTIFICATE OF DELIVERY**

I hereby certify that I hand delivered four true and correct copies of the foregoing document this 15 day of January, 1992, to the following:

R. Paul Van Dam  
Attorney General  
L.A. Dever  
Brian L. Tarbet  
John C. McCarrey  
Assistant Attorneys General  
36 South State Street, 11th Floor  
Salt Lake City, Utah 84111



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**A D D E N D U M**

**EXHIBIT 1**

Utah State Tax Commission  
Heber M. Wells Building  
160 East 300 South  
Salt Lake City, Utah 84134

CONTACT PERSON: Lee Shaw

FOR IMMEDIATE RELEASE

TELEPHONE: 530-6104(o) 532-6432 (h)

DATE: April 5, 1989

SUPREME COURT RETIREMENT RULING WILL HAVE IMPACT IN UTAH

The Utah State Tax Commission has received numerous inquiries concerning the recent U. S. Supreme Court ruling on a Michigan law which granted a tax exemption to state and local government retirees but taxed federal retirees.

The initial assessment by the Tax Commission is that Utah's law is very similar to Michigan's and that the ruling will have an impact in Utah.

Many questions coming to the Tax Commission have deal with three general areas: How should federal retirees treat their retirement income this year for state income taxes? Will there be refunds on state taxes paid in past years? Should federal retirees amend their tax returns protect their rights under the statute of limitations?

According to Tax Commissioner Roger C. Tew, "Our position is that all Utah taxpayers should file their taxes as they would normally file under current Utah law. We view the Supreme Court ruling as applying to tax years beginning in 1989."

"The Tax Commission takes the same position as other states with similar laws, that refunds of past taxes paid by federal employees are not mandated by the decision," said Tew.

-MORE-

SUPREME COURT RULING

2-2-2-2

If a taxpayer insists on filing an amended return to protect any legal rights for any year prior to 1989, the Tax Commission requests that the taxpayer print at the top of the tax return form, "Federal Retirement Amendment."

There are approximately 34,000 federal retirees, including military retirees, in Utah. The Tax Commission is finalizing its estimation of the potential revenue implications of exempting these retirees from state income tax, as state retirees are currently exempted. The Commission is also analyzing the amount of potential revenue if state and local government plus education retirees were to be taxed on their retirement benefits. This information should be available later this week.

Any changes in the state's treatment of retirement benefits will have to be considered by the legislature.

Under both the Utah and Michigan laws, federal pensions are taxed the same as those of private industry. But there is no taxation applied to state and local government retirement income or teacher retirement income.

The Supreme Court ruled that the Michigan law "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees.

# # #

**EXHIBIT 2**



**NOTICE TO FEDERAL RETIREES**  
**RE: DAVIS v. MICHIGAN PROTECTIVE CLAIMS**

If you paid income tax on federal retirement benefits for tax years 1985, 1986, 1987, and/or 1988, have not filed amended returns for those years and want to seek a refund, you must protect your claim. To do so you must either file an amended return for each year or complete this form. **To protect claims for 1985 or 1986, this form or amended return(s) must be mailed to the Tax Commission by April 16, 1990.** You may file this form for 1987 and 1988 at a later date, but it must be done within the three-year deadline. Completing this form does not guarantee a refund. It only protects your claim to a refund if a refund is ordered by the courts. If refunds are ordered, you will have to file an amended return to determine the amount of refund due to you.

**PROTECTIVE CLAIM**

I hereby claim a refund of any Utah income tax paid in 1985, 1986, 1987, and 1988 on federal retirement benefits.

1985    1986    1987    1988    (Circle appropriate years)

Name: \_\_\_\_\_  
LastFirstM.I.

Social Security No.: \_\_\_\_\_

Mailing Address: \_\_\_\_\_  
\_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Mail notice to:            Utah State Tax Commission  
                                 160 East Third South  
                                 Salt Lake City, Utah 84134  
                                 Attn: Federal Retiree

1009

**EXHIBIT 3**

# Tax Bulletin

Utah State Tax Commission  
160 East 300 South  
Salt Lake City, UT 84134  
(801) 530-4848 or 1-800-662-4335

## Tax Bulletin 3-90

**Effective Date: February 21, 1990**

### **Re: Protective Claims for Federal Retirees**

The Utah Legislature has passed a bill that extends the statute of limitations to April 16, 1990, for federal retirees filing protective claims for tax year 1985 in response to the *Davis v. Michigan* ruling.

The enclosed Protective Claim form may be substituted for an amended return and only requires federal retirees to provide their names, Social Security numbers, addresses and signatures. One form can provide protection for all of the years in question during the litigation. This form may be photocopied.

However, the Tax Commission emphasizes that protective claims for tax years 1985 and 1986 must be filed by April 16, 1990. If only filing protective claims for 1987 or 1988, the taxpayer may file later than that date, but within the three-year statute of limitations.

The Tax Commission also will honor as protective claims incomplete amended returns and other communications filed earlier by federal retirees.

However, if refunds are ordered by the courts, retirees who either filed the new form or incomplete amended returns will have to file accurate amended returns to determine their correct refund amounts.

Questions regarding this *Tax Bulletin* should be directed to Taxpayer Services, 160 East Third South, Salt Lake City, UT 84134, or by calling (801) 530-4848 or toll free within Utah 1-800-662-4335.

**EXHIBIT 4**

#### **Ch. 4 THE STATES**

##### **§ 111. Same; taxation affecting Federal employees; income tax**

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

## REVENUE AND TAXATION

### **59-10-529. Overpayment of tax — Credits — Refunds.**

(1) In cases where there has been an overpayment of any tax imposed by this chapter, the amount of overpayment is credited as follows:

(a) against any income tax then due from the taxpayer;

(b) against the amount of any judgment against the taxpayer, including one ordering the payment of a fine or of restitution to a victim under Section 76-3-201, obtained through due process of law by any entity of state government;

(c) against any child support obligation which is delinquent, as determined by the Office of Recovery Services in the Department of Human Services, in enforcing, under Title IV-D of the Social Security Act, a court or administrative order for support of a child which has not been reduced to judgment, and after notice and an opportunity for a hearing, as provided in Subsection (2);

(d) as bail, to ensure the appearance of the taxpayer before the appropriate authority to resolve an outstanding warrant against the taxpayer for which bail is due, if a court of competent jurisdiction has not approved an alternative form of payment. This bail may be applied to any fine or forfeiture which is due and related to a warrant which is outstanding on or after February 16, 1984, and in accordance with Subsections (3) and (4).

(2) (a) Subsection (1)(c) may be exercised only if the Office of Recovery Services serves prior written notice on the taxpayer by personal service or certified mail, restricted delivery, stating:

(i) the amount of child support which is alleged to be delinquent; and

(ii) that the overpayment shall be applied to reduce that alleged child support debt unless the taxpayer appears at an administrative hearing before the department and successfully contests the child support debt or the application of the overpayment to that debt.

(b) If an overpayment of tax is credited against a delinquent child support obligation in accordance with Subsection (1)(c) in non-AFDC cases, the Office of Recovery Services shall inform the non-AFDC custodial parent in advance if it will first use any portion of the overpayment to satisfy unreimbursed AFDC or foster care maintenance payments which have been provided to that family.

(c) The Department of Human Services shall establish rules to implement this subsection, including procedures, in accordance with the other provisions of this section, to ensure prompt reimbursement to the taxpayer of any amount of an overpayment of taxes which was credited against a child support obligation in error, and to ensure prompt distribution of properly credited funds to the custodial parent.

(3) Subsection (1)(d) may be exercised only if:

## REVENUE AND TAXATION

- (a) a court has issued a warrant for the arrest of the taxpayer for failure to post bail, appear, or otherwise satisfy the terms of a citation, summons, or court order; and
- (b) a notice of intent to apply the overpayment as bail on the issued warrant has been mailed to the person's current address on file with the commission.
- (4) (a) The commission shall deliver the overpayment applied as bail to the court that issued the warrant of arrest. The clerk of the court is authorized to endorse the check or commission warrant of payment on behalf of the payees and deposit the monies in the court treasury.
- (b) The court receiving the overpayment applied as bail shall order withdrawal of the warrant for arrest of the taxpayer if the case is one for which a personal appearance of the taxpayer is not required and if the dollar amount of the overpayment represents the full dollar amount of bail. In all other cases, the court receiving the overpayment applied as bail is not required to order the withdrawal of the warrant of arrest of the taxpayer during the 40-day period, and the taxpayer may be arrested on the warrant. However, the bail amount shall be reduced by the amount of tax overpayment received by the court.
- (c) If the taxpayer fails to respond to the notice described in Subsection (3), or to resolve the warrant within 40 days after the mailing under that subsection, the overpayment applied as bail is forfeited and notice of the forfeiture shall be mailed to the taxpayer at the current address on file with the commission. The court may then issue another warrant or allow the original warrant to remain in force if:
- (i) the taxpayer has not complied with an order of the court;
  - (ii) the taxpayer has failed to appear and respond to a criminal charge for which a personal appearance is required; or
  - (iii) the taxpayer has paid partial but not full bail in a case for which a personal appearance is not required.
- (5) If the alleged violations named in the warrant are later resolved in favor of the taxpayer, the bail amount shall be remitted to the taxpayer.
- (6) Any balance shall be refunded immediately to the taxpayer.
- (7) (a) If a refund or credit is due because the amount of tax deducted and withheld from wages exceeds the actual tax due, no refund or credit may be made or allowed unless the taxpayer or his legal representative files with the commission a tax return claiming the refund or credit:
- (i) within three years from the due date of the return, plus the period of any extension of time for filing the return; or
  - (ii) within two years from the date the tax was paid, whichever period is later.
- (b) In other instances where a refund or credit of tax which has not been deducted and withheld from income is due, no credit or refund may be allowed or made after three years from the time the tax was paid, unless, before the expiration of the period, a claim is filed by the taxpayer or his legal representative.
- (8) The fine and bail forfeiture provisions of this section apply to all warrants and fines issued in cases charging the taxpayer with a felony, a misdemeanor, or an infraction described in this section which are outstanding on or after February 16, 1984.
- (9) If the amount allowable as a credit for tax withheld from the taxpayer exceeds the tax to which the credit relates, the excess is considered an overpayment.
- (10) A claim for credit or refund of an overpayment which is attributable to the application to the taxpayer of a net operating loss carryback shall be filed within three years from the time the return was due for the taxable year of the loss.
- (11) If there has been an overpayment of the tax which is required to be deducted and withheld under Section 59-10-402, a refund shall be made to the employer only to the extent that the amount of overpayment was not deducted and withheld by the employer.
- (12) If there is no tax liability for a period in which an amount is paid as income tax, the amount is an overpayment.
- (13) If an income tax is assessed or collected after the expiration of the applicable period of limitation, that amount is an overpayment.
- (14) (a) If a taxpayer is required to report a change or correction in federal taxable income reported on his federal income tax return, or to report a change or correction which is treated in the same manner as if it were an overpayment for federal income tax purposes, or to file an amended return with the commission, a claim for credit or refund of any resulting overpayment of tax shall be filed by the taxpayer within two years from the date the notice of the change, correction, or amended return was required to be filed with the commission.
- (b) If the report or amended return is not filed within 90 days, interest on any resulting refund or credit ceases to accrue after the 90-day period.
- (c) The amount of the credit or refund may not exceed the amount of the reduction in tax attributable to the federal change, correction, or items amended on the taxpayer's amended federal income tax return.
- (d) Except as specifically provided, this section does not affect the amount or the time within which a claim for credit or refund may be filed.
- (15) No credit or refund may be allowed or made if the overpayment is less than \$1.
- (16) The amount of the credit or refund may not exceed the tax paid during the three years immediately preceding the filing of the claim, or if no claim is filed, then during the three years immediately preceding the allowance of the credit or refund.
- (17) In the case of an overpayment of tax by the employer under the withholding provisions of this chapter, a refund or credit shall be made to the employer only to the extent that the amount of the overpayment was not deducted and withheld from wages under the provisions of this chapter.
- (18) If a taxpayer who is entitled to a refund under this chapter dies, the commission may make payment to the duly appointed executor or administrator of the taxpayer's estate. If there is no executor or administrator, payment may be made to those persons who establish entitlement to inherit the property of the decedent in the proportions set out in Title 75.
- (19) Where an overpayment relates to adjustments to net income referred to in Subsection 59-10-536 (3)(c), credit may be allowed or a refund paid any time before the expiration of the period within which a deficiency may be assessed.

**63-46b-14. Judicial review — Exhaustion of administrative remedies.**

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.



**78-33-1. Jurisdiction of district courts -- Form -- Effect.**

The district courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

**78-33-2. Rights, status, legal relations under instruments or statutes may be determined.**

Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

**UTAH CONSTITUTION, ART. I, § 2**

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

**UTAH CONSTITUTION, ART. I, § 7**

No person shall be deprived of life, liberty of property, without due process of law.

**UTAH CONSTITUTION, ART. I, § 11**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

**UTAH CONSTITUTION, ART. I, § 24**

No law shall be passed granting irrevocably any franchise, privilege or immunity.

**UTAH CONSTITUTION, ART. VIII, § 5**

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.