SUPREME COURT OF THE UNITED STATES

No. 92–1941

UNITED STATES, PETITIONER *v.* JERRY W. CARLTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 13, 1994]

JUSTICE O'CONNOR, concurring in the judgment.

The unamended 26 U. S. C. §2057, which allowed taxpayers to reduce the taxable estate by buying securities and reselling them to employee stock ownership plans (ESOPs), made it possible to avoid estate taxes by structuring transactions in a certain way. But the tax laws contain many such provisions. See, *e.g.*, 26 U. S. C. §2055 (allowing deductions from taxable estate for transfers to the government, charities, and religious organizations). And §2057 was only the latest in a series of congressional efforts to promote ESOPs by providing tax incentives. See, *e.g.*, 26 U. S. C. §133 (partial income tax exclusion for interest paid to banks on ESOP loans); 26 U. S. C. §1042 (allowing certain taxpayers to defer capital gains taxes on sale of securities to ESOPs).

Thus, although respondent Carlton may have made a "purely tax-motivated stock transfe[r]," *ante*, at 7, I do not understand the Court to express any normative disapproval of this course of action. As executor of Willametta Day's estate, it was entirely appropriate for Carlton to seek to reduce the estate taxes. And like all taxpayers, Carlton was entitled to structure the estate's affairs to comply with the tax laws while minimizing tax liability. As Learned Hand observed with characteristic acerbity:

> “[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. Therefore, if what was done here, was what was intended by [the statute], it is of no consequence that it was all an elaborate scheme to get rid of [estate] taxes, as it certainly was.” *Helvering* v. *Gregory*, 69 F. 2d 809, 810 (CA2 1934) (citations omitted), aff'd, 293 U. S. 465 (1935).

To say that Carlton did nothing wrong in claiming the deduction does not, of course, answer the question whether Congress deprived him of due process by amending §2057. As we have noted, “the retroactive aspects of economic legislation, as well as the prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by rational means.” *General Motors Corp.* v. *Romein*, 503 U. S. ___, ___ (1992) (slip op., at 9) (internal quotation marks omitted).

The Court finds it relevant that, according to prominent Members of the tax-writing committees of each House, the statute as originally enacted would have cost the Government too much money and would have allowed taxpayers to avoid tax by engaging in sham transactions. See *ante*, at 5–6. Thus, the Court reasons that the amendment to §2057 served the legislative purpose of “correct[ing]” a “mistake” Congress made the first time. *Id.*, at 6. But this mode of analysis proves too much. Every law touching on an area in which Congress has previously legislated can be said to serve the legislative purpose of fixing a perceived problem with the prior state of affairs—there is no reason to pass a new law, after all, if the legislators are satisfied with the old one.

Moreover, the subjective motivation of Members of Congress in passing a statute—to the extent it can even be known—is irrelevant in this context: it is sufficient for due process analysis if there exists *some* legitimate purpose underlying the retroactivity provision. Cf. *FCC* v. *Beach Communications, Inc.*, 508 U. S. ___, ___ (1993) (slip op., at 7–9).

Retroactive application of revenue measures is rationally related to the legitimate governmental purpose of raising revenue. In enacting revenue measures, retroactivity allows "the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision." *Welch* v. *Henry*, 305 U. S. 134, 149 (1938). For this reason,

> "[i]n enacting general revenue statutes, Congress almost without exception has given each such statute an effective date prior to the date of actual enactment. . . . Usually the `retroactive' feature has application only to that portion of the current calendar year preceding the date of enactment, but [some statutes have been] applicable to an entire calendar year that had expired preceding enactment. This `retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation. We may safely say that it is a customary congressional practice." *United States* v. *Darusmont*, 449 U. S. 292, 296–297 (1981) *(per curiam)*.

But "the Court has never intimated that Congress possesses unlimited power to `readjust rights and burdens . . . and upset otherwise settled expectations.'" *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U. S. 211, 229 (1986) (concurring opinion) (brackets omitted), quoting *Usery* v. *Turner Elkhorn*

Mining Co., 428 U. S. 1, 16 (1976). The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose. For example, a "wholly new tax" cannot be imposed retroactively, *United States* v. *Hemme*, 476 U. S. 558, 568 (1986), even though such a tax would surely serve to raise money. Because the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them. See *Welch* v. *Henry*, *supra*, at 147.

Although there is also an element of arbitrariness in retroactively changing the rate of tax to which the transaction is subject, or the availability of a deduction for engaging in that transaction, our cases have recognized that Congress must be able to make such adjustments in an attempt to equalize actual revenue and projected budgetary requirements. In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. See *United States* v. *Hemme*, *supra*, at 562 (1 month); *United States* v. *Darusmont*, *supra*, at 294–295 (10 months); *United States* v. *Hudson*, 299 U. S. 498, 501 (1937) (1 month). In *Welch* v. *Henry*, *supra*, the tax was enacted in 1935 to reach transactions completed in 1933; but we emphasized that the state legislature met only biannually and it made the revision "at the first opportunity after the tax year in which the income was received." 305 U. S., at 151. A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions. But in keeping with Congress' practice of limiting the retroactive effect of revenue measures (a practice that may reflect Congress' sensitivity to the

due process problems that would be raised by overreaching), the December 1987 amendment to §2057 was made retroactive only to October 1986. Given our precedents and the limited period of retroactivity, I concur in the judgment of the Court that applying the amended statute to respondent Carlton did not violate due process.