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 SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

If I thought that "substantive due process" were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation. Although there is not much precision in the concept "`harsh and oppressive,'" which is what the Court has adopted as its test of substantive due process unconstitutionality in the field of retroactive tax legislation, see, *e.g.*, *United States* v. *Hemme*, 476 U. S. 558, 568–569 (1986), quoting *Welch* v. *Henry*, 305 U. S. 134, 147 (1938), surely it would cover a retroactive amendment that cost a taxpayer who relied on the original statute's clear meaning over $600,000. Unlike the tax at issue in *Hemme*, here the amendment "without notice, . . . gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." 476 U. S., at 569.

The Court attempts to minimize the amendment's harshness by characterizing it as "a curative measure," quoting some post-legislation legislative history (another oxymoron) to show that, despite the uncontested plain meaning of the statute, Congress never meant it to apply to stock that was not owned by the decedent at the time of death. See *ante*, at 5–6. I am not sure that whether Congress has treated a citizen oppressively should turn upon whether the oppression was, after all, only Congress' "curing" of its own mistake. Even if it should, however, what was done to respondent here went beyond a "cure." The

retroactivity not only hit him with the tax that Congress “meant” to impose originally, but it caused his expenditures incurred in invited reliance upon the earlier law to become worthless. That could have been avoided, of course, by providing a tax credit for such expenditures. Retroactively disallowing the tax benefit that the earlier law offered, without compensating those who incurred expenses in accepting that offer, seems to me harsh and oppressive by any normal measure.

The Court seeks to distinguish our precedents invalidating retroactive taxes by pointing out that they involved the imposition of new taxes rather than a change in tax rates. See *ante*, at 8–9. But eliminating the specifically promised reward for costly action *after* the action has been taken, and refusing to reimburse the cost, is even more harsh and oppressive, it seems to me, than merely imposing a new tax on past actions. The Court also attempts to soften the impact of the amendment by noting that it involved only "a modest period of retroactivity." *Ante*, at 6. But in the case of a tax-incentive provision, as opposed to a tax on a continuous activity (like the earning of income), the critical event is the taxpayer's reliance on the incentive, and the key timing issue is whether the change occurs after the reliance; that it occurs immediately after rather than long after renders it no less harsh.

The reasoning the Court applies to uphold the statute in this case guarantees that *all* retroactive tax laws will henceforth be valid. To pass constitutional muster the retroactive aspects of the statute need only be "rationally related to a legitimate legislative purpose." *Ante*, at 9. Revenue raising is certainly a legitimate legislative purpose, see U. S. Const., Art. I, §8, cl. 1, and any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers that goal. I welcome this recognition that the Due Process Clause does not prevent retroactive taxes, since I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process, see *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. ___, ___ (1993) (slip op., at 2) (SCALIA, J., concurring in judgment).

I cannot avoid observing, however, two stark discrepancies between today's due process reasoning and the due process reasoning the Court applies to its identification of new so-called fundamental rights, such as the right to structure family living

arrangements, see *Moore* v. *East Cleveland*, 431 U. S. 494 (1977) (plurality opinion), and the right to an abortion, see *Roe* v. *Wade*, 410 U. S. 113 (1973). First and most obviously, where respondent's claimed right to hold onto his property is at issue, the Court upholds the tax amendment because it rationally furthers a legitimate interest; whereas when other claimed rights that the Court deems fundamental are at issue, the Court strikes down laws that concededly promote legitimate interests, *id*., at 150, 162. Secondly, when it is pointed out that the Court's retroactive-tax ruling today is inconsistent with earlier decisions, see, *e.g.*, *Nichols* v. *Coolidge*, 274 U. S. 531 (1927); *Blodgett* v. *Holden*, 275 U. S. 142 (1927); *Untermeyer* v. *Anderson*, 276 U. S. 440 (1928), the Court dismisses those cases as having been "decided during an era characterized by exacting review of economic legislation under an approach that `has long since been discarded.'" *Ante*, at 8, quoting *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). But *economic* legislation was not the *only* legislation subjected to "exacting review" in those bad old days, and one wonders what principled reason justifies "discarding" that bad old approach *only as to that category*. For the Court continues to rely upon "exacting review" cases of the *Nichols*-*Blodgett*-*Untermeyer* vintage for its due-process "fundamental rights" jurisprudence. See, *e.g.*, *Roe*, 410 U. S., at 152–153, 159 (citing *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), and *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925)); see also *Griswold* v. *Connecticut*, 381 U. S. 479, 483 (1965) ("[w]e reaffirm the principle of the *Pierce* and the *Meyer* cases").

The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called "economic rights" (even though the Due Process Clause

explicitly applies to "property") unquestionably involves policymaking rather than neutral legal analysis. I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.