Roger Williams University Law Review

Volume 3 | Issue 1 Article 5

Fall 1997

# Note, Resurrecting the Challenge Against Retroactive Estate Tax Legislation: Acquiescing to the Holding of United States v. Carlton - Over My Dead Body

Matthew D. Slepkow
*Roger Williams University School of Law*

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation
Slepkow, Matthew D. (1997) "Note, Resurrecting the Challenge Against Retroactive Estate Tax Legislation: Acquiescing to the Holding of United States v. Carlton - Over My Dead Body," *Roger Williams University Law Review*: Vol. 3: Iss. 1, Article 5.
Available at: http://docs.rwu.edu/rwu_LR/vol3/iss1/5

This Symposia is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

# Note

# Resurrecting the Challenge Against Retroactive Estate Tax Legislation: Acquiescing to the Holding of *United States v. Carlton*—Over My Dead Body

## INTRODUCTION

*Nothing is certain but death and the taxes.*[1]

Two topics which often cause consternation in people of many ages are death and taxes. Death is inauspicious for obvious reasons, and even honest pragmatists detest paying taxes.[2] However, as the old adage asseverates, both are facts of life. Death is the price we must pay for living, and "[t]axes are what we pay for civi-

1. The origin of this proverb is uncertain, but it first appeared in a collection of proverbs entitled, *Collectanea*, compiled by V.S. Lean in 1904. Treasury of World Masterpieces: Dictionary of Quotations and Proverbs 403 (D.C. Browning ed., Octopus Books Ltd. 1982) (1951).

2. As Ralph Waldo Emerson once wrote, "[o]f all debts men are least willing to pay the taxes." Ralph Waldo Emerson, *Compensation*, *in* Essays 1830-1840. History abounds with notable examples of tax evaders, even among otherwise honorable members of society. Coincidentally, or possibly consequently, Emerson was the chief mentor of one of the most influential conscientious objectors to the payment of a tax, Henry David Thoreau. *See* The Columbia Encyclopedia 2737 (Barbara A. Chernow & George A. Vallasi eds., 5th ed. 1993). Thoreau expressed his individuality and made a symbolic statement about man's natural freedom when he refused to pay a poll tax that supported the Mexican War. *See id.* Thoreau led a solitary life of passive civil disobedience that had far-reaching effects on the future, including the nonviolent human rights movements led by Gandhi and Martin Luther King, Jr. *See id.* at 2737-38; *see also* Henry David Thoreau, Civil Disobedience (F.H. Revell Co., 1964) (discussing passive resistance of civil government).

lized society."[3] Despite the inevitability of both, each is dreaded in its own right; in combination, the two begin to overwhelm the psyche.

The federal estate tax is the epitome of such a combination. It imposes a tax "on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States."[4] The "taxable estate" is maximized for the government's benefit by beginning with the broadest definition of "gross estate" that appears in any section of the Internal Revenue Code.[5] Although "gross estate" is comprehensively defined, Congress did decide to permit deductions for certain transfers that could have remained within the gross estate, e.g., bequests to a surviving spouse;[6] transfers for public, charitable or religious uses;[7] and certain expenses, indebtedness and taxes.[8] However, the broad scope of the property interests that do get included in the gross estate far outweighs the benefit of these deductions, e.g., general powers of appointment,[9] transfers with a retained life estate,[10] transfers taking effect at death,[11] rev-

3. Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927), *quoted in* The Quotable Lawyer 299 (David S. Shrager & Elizabeth Frost eds., 1986).

4. I.R.C. § 2001 (1997).

5. *See id.* § 2031. "The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." *Id.*

6. *See id.* § 2056 (granting an unlimited marital deduction for any amounts transferred outright to a surviving spouse).

7. *See id.* § 2055.

8. *See id.* § 2053.

9. *See id.* § 2041. A general power of appointment is the power to designate the person or persons who will receive property or the income derived therefrom. The person holding the power need not be the owner of the property or have any other rights in the property. This section is constructed broadly to include powers of appointment that were exercised or released. *See id.* § 2041(a)(2). Furthermore, merely allowing the power to lapse is considered a release and would therefore be included. *Id.* § 2041(b)(2). However, a slight exemption is granted to the extent that the transfer does not exceed the greater of $5000 or 5% of the aggregate value of the assets over which the power could have been exercised at the time of the lapse. *See id.*

10. *See id.* § 2036.

11. *See id.* § 2037.

ocable transfers,[12] proceeds of life insurance[13] and adjustments for transfers within three years of the decedent's death.[14]

The Supreme Court has determined that Congress clearly possesses the authority to impose an estate tax even though the Constitution does not explicitly grant such power.[15] Without challenging this conclusion, the intriguing tack is to examine the policy of having such a tax. Naturally, the goal of the tax is to raise revenue—a power explicitly granted to Congress, out of practical necessity, in the Constitution.[16] However, the rationale for choosing to raise revenue by imposing a tax upon a person after death rather than as an income tax is more amorphous and difficult to defend. Even under the Supreme Court's succinct defense of Congress's broad authority to tax,[17] this authority is less defensible in the realm of an estate tax:[18] "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action. Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits."[19] Assuming the person paid income taxes proportionate

12. *See id.* § 2038.

13. *See id.* § 2042. Life insurance proceeds, even those payable directly to a designated beneficiary are included in the gross estate if the "decedent possessed at his death any of the incidents of ownership," and such incidents include the power to change the beneficiary, the power to cancel the policy, the power to pledge the policy for a loan, and the possibility that the proceeds might possibly revert to the decedent's estate. *Id.*

14. *See id.* § 2035. This is the most expansively inclusive section because it brings back into the gross estate any interest in property that was transferred by the decedent within the three years immediately preceding the decedent's death if that interest would have been included under sections 2036, 2037, 2038 or 2042, if the interest had been retained by the decedent. *See id.* § 2035(a), (d)(2).

15. *See* Knowlton v. Moore, 178 U.S. 41, 56 (1900).

16. *See* U.S. Const. art. I, § 8, cl. 1.

17. The Court views congressional power in the arena of taxation as nearly plenary. "Although the Supreme Court has struck down a variety of statutes because of their retroactive effects, it has never struck down an income tax provision on this ground, and no modern Court has held any federal tax provision illegal." Saul Levmore, *The Case for Retroactive Taxation*, 22 J. Legal Stud. 265, 270 n.12 (1993). However, even Levmore admits, at least implicitly, there may be a distinction between income tax treatment, and estate and gift tax treatment. *See id.* at 271 n.12 ("The few cases that do strike down retrotaxes involve retroactive estate and gift tax provisions.").

18. In a similar vein, other authors argue that gift tax laws deserve a higher level of scrutiny than income tax amendments. *See, e.g.*, Pat Castellano, Comment, *Retroactively Taxing Done Deals: Are There Limits?*, 43 U. Kan. L. Rev. 417 (1995).

19. Welch v. Henry, 305 U.S. 134, 144 (1938).

to the benefits enjoyed during life, what further benefits does the corpse enjoy? Presumably, the benefit being taxed is the right to transmit property to survivors at death,[20] but this may be viewed more as a necessity than a right considering the fact that you cannot take it with you.[21]

Congress enacted the general provisions of our current federal estate tax scheme in 1916 out of the crisis of World War I, but the policy of the tax was already deeply embedded in the ideal of America—equal opportunity for all.[22] Rather than permitting the accumulation of wealth to be passed from one generation to the next, the estate tax seeks to redistribute the wealth and to prevent the aggrandizement of family fortunes. As President Theodore Roosevelt told Congress in 1906, " 'the prime object should be to put a constantly increasing burden on the inheritance of those

20. This is the distinct definition of an estate tax as compared to an inheritance tax which is a tax imposed on the privilege of receiving property from a decedent at death. *Compare* Black's Law Dictionary 550 (6th ed. 1990) *with id.* at 783. However, one might ponder whether an estate tax would be foregone if property did remain with the decedent. For instance, when the decedent is buried wearing jewelry, does the value of the jewelry get exempted from the value of the gross estate because it is not transferred at death? The obvious Internal Revenue Service answer is no. The IRS argues that the tax is on the *right* to transfer and not the *actual* transfer of property. This accepted interpretation taxes the decedent in the proposed scenario for a benefit she does not exercise and enjoy. Therefore, the *right* to transmit her wealth is illusory. In all circumstances, the IRS taxes the decedent as if the entire gross estate is passed on to the survivors. The decedent has no *right* to avoid the estate tax by taking property to the grave.

In the alternative case, where a decedent has made a completed transfer that will be included in her estate because it was made within three years of death, *see* I.R.C. § 2035, the insistence that the estate tax is based upon the right to transfer causes a contradiction if applied retroactively. "If the taxpayer has already completed the transaction, a tax upon the privilege of consummating it is a contradiction in terms. The taxpayer has no choice in the matter." Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301, 342 (1996) (quoting Julius H. Amberg, *Retroactive Excise Taxation*, 37 Harv. L. Rev. 691, 694-95 (1924)).

21. See *supra* note 20 for a discussion of the difference between the privilege to transfer and the necessity to transfer. While this theory seems to undercut the rationale for any imposition of an estate tax, it may actually strengthen the position that retroactive changes in the estate tax are not offensive. *See Welch*, 305 U.S. at 147 ("[T]here are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not the voluntary act of the taxpayer.") The argument preys on the proverb which introduces this Note. Since everyone will inevitably die, any tax incurred upon death is unavoidable, and thus, does not violate due process.

22. *See* Boris I. Bittker et al., Federal Estate and Gift Taxation 5 (7th ed. 1996).

swollen fortunes which it is certainly no benefit to this country to perpetuate.' "[23] The general sentiment is that the amassing of wealth equates to the amassing of power: a condition which threatens the fiber of a democratic society. Even though this theory seeks to protect the common blue-collar worker, the concept still offends one's sense of decency.[24] In fact, people who spend their lives working hard and paying income taxes are even more upset than those who inherit immense wealth, by the idea that, if they are successful and fortunate enough to create a large estate,[25] further taxes will be due upon death.

Take this natural reaction to the concept of an estate tax, add the notion of the finality and sanctity of death, then throw in the idea of retroactive lawmaking, and you have created an odious amalgamation. People have recognized the unjustness of retroac-

---

23. *Id.* at 3 (quoting 17 Works of Theodore Roosevelt 434 (1925)). President Roosevelt advocated not only an estate tax, but also one that implemented a progressive rate. He would be pleased with the current transfer tax rate schedule which begins at 18% and rapidly increases, finally topping off at 55% for all estates over three million dollars. *See* I.R.C. § 2001(c). From 1941 to 1976, the top tax rate was as high as 77%. *See* Bittker et al., *supra* note 22, at 6.

24. In a recent article regarding the possibility that Congress will eliminate the estate tax altogether, Senator Robert Packwood is on record as saying, "foes [of the estate tax] are motivated by a 'passionate' sense of the tax's unfairness. It is . . . simply 'an American opposition.' " Jackie Calmes, *Washington Is Moving To Alter the Certainty of Death and Taxes*, Wall St. J., Apr. 28, 1997, at A1, *available in* 1997 WL 2418576. Though the idea is gaining support in Congress, it is unlikely that the estate tax will be dropped entirely because, in order to balance the budget, an estimated one hundred billion dollars would have to be found elsewhere to make up for the losses over just the next five years. *See id.*

25. The pivotal amount at present is $600,000 because a unified credit of $192,800, which equals the tax due on $600,000, is available to every decedent. *See* I.R.C. § 2010. This seems like an amount beyond the reach of many citizens, but considering the breadth of property interests included in the taxable estate, *see supra* notes 9-14 and accompanying text, and the low cost of large insurance policies which will be included, *see id.* § 2042, the threshold is often unexpectedly broached by average working families. For this reason, in a recent push to have the estate tax eliminated, "support has grown, and a coalition covers florists, bakers and RV-camp owners among others." Calmes, *supra* note 24, at A1. Although the estate tax did not get eliminated, this year Congress passed the Taxpayer Relief Act of 1997, which does reduce the burden of estate taxes. *See* Act of January 7, 1997, Pub. L. No. 105-34. The act provides incremental increases in the unified credit so that the maximum amount which can be sheltered from estate taxes becomes $625,000 in 1998, $650,000 in 1999, and eventually peaks at $1,000,000 in the year 2006. *See id.* Unfortunately, and even more significantly in the face of the 105th Congress's munificent tax changes, Congress retains the power to lower or eliminate the amount sheltered by the credit, even in a retroactive manner and even for a mere change of mind. *See* United States v. Carlton, 512 U.S. 26 (1994).

tive lawmaking since the development of the social contract. In the *Federalist Papers*, Madison declared "ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation."[26] Similarly, in Justice Story's classic commentaries on the Constitution, he observed that "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation, nor with fundamental principles of the social compact."[27] In the 1798 seminal case on ex post facto, *Calder v. Bull*,[28] Justice Chase summarized the argument from natural law: "The purposes for which men enter into society will determine the nature and terms of the social compact . . . . The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such [retroactive] acts of legislation; and the general principles of law and reason forbid them."[29]

Even in the face of this apparent categorical abhorrence for retrospective legislation, the majority and two concurring opinions in *Calder v. Bull* all distinguished criminal acts from civil acts, and held that the Ex Post Facto Clause only prohibited retroactive application in the criminal sphere.[30] The Court has maintained this distinction without exception for the past two hundred years, and now it "is so well settled as to have become one of the commonplaces of American constitutional law."[31] Additionally, since the New Deal Era, the modern Court has been utterly deferential to the legislature, especially in the area of economic legislation, and even when the legislation has involved retroactivity or touched a right arguably within the protection of substantive due process.[32]

In the field of taxation, the Court should subject retroactive legislation to a heightened level of scrutiny because, as Chief Jus-

26. The Federalist No. 44, at 301 (James Madison) (Jacob E. Cooke ed., 1961).

27. 2 Joseph Story, Commentaries on the Constitution of the United States § 1398 (5th ed. 1891).

28. 3 U.S. (3 Dall.) 386 (1798).

29. *Id.* at 388.

30. *See id.* at 390, 397 (Paterson, J., concurring), 399 (Iredell, J., concurring).

31. Oliver P. Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 315 (1921), *quoted in* Ricciardi & Sinclair, *supra* note 20, at 301 n.10. *But see* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143 (1996) (attacking the criminal/civil distinction, especially in light of the resurgent defense of private property rights by the Court).

32. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1063-64 (1997).

tice Marshall declared, "the power to tax involves the power to destroy."[33] However, the Court has always been lenient with regard to the federal taxing power, placing it in "a league of its own,"[34] even during the peak of the Court's scrutiny of economic legislation during the *Lochner* era. Nevertheless, estate taxes are in their own realm within taxation, and retroactive estate tax laws should be restricted because the person they destroy has already passed from this world and has no recourse.[35] Yet, even retroactive estate tax regulations receive great deference from the Court.[36] Despite the modern trend of the Court to extend substantive due process protections to rights implied within the concepts of life and liberty,[37] the Court continued to reject the due process challenge against retroactive legislation based on an expanded definition of property in *United States v. Carlton*[38]—this time explicitly in regard to estate taxation.[39] Though the concordant outcome reached

33. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 431 (1819).

34. *See* Andrew C. Weiler, *Has Due Process Struck Out? The Judicial Rubber-stamping of Retroactive Economic Laws*, 42 Duke L.J. 1069, 1082-88 (1993).

35. In point of fact, any levy of an estate tax is in essence retrotaxation because it is a tax after death upon wealth accumulated during life. While this concept alone is sufficient to offend many people, the retroactive application of a statute passed after one's death that imposes a new tax burden on the decedent's estate may be characterized as Kafkaesque. While this description alludes to the bizarre and illogical nature of such a retroactive application, see in particular Kafka's own express concerns in "The Problem of Our Laws." Franz Kafka, *The Problem of Our Laws*, *in* The Complete Stories 437 (Nahum N. Glatzer ed., 1971) ("[N]evertheless it is an extremely painful thing to be ruled by laws that one does not know.").

36. *See, e.g.*, United States v. Carlton, 512 U.S. 26 (1994); United States v. Hemme, 476 U.S. 558 (1986); Milliken v. United States, 283 U.S. 15 (1931).

37. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (striking down a local ordinance that limited occupancy of dwellings to members of the same "family," where "family" was basically defined as related individuals, because "personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); Roe v. Wade, 410 U.S. 113 (1973) (upholding a woman's right to an abortion because the privacy rights implicated trigger protected liberty interests); Griswold v. Connecticut, 381 U.S. 479 (1965) (preserving a married couple's right to use contraception as within protected liberty interests); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that procreation is a basic liberty deserving constitutional protection).

38. 512 U.S. 26 (1994).

39. Without retracing the denouement of the Court's active role during the *Lochner* era, it is sufficient for the present purposes to note that "since 1937 the Court's abandonment of *Lochner*-style substantive due process review of economic regulation has been unequivocal." Geoffrey R. Stone et al., Constitutional Law 807 (2d ed. 1991).

by all nine judges in *Carlton* may be correct for different reasons,[40] the troubling holding of the case sends a vivid message despite the muddled language of the opinion. The Court declares that a rational relationship to a legitimate purpose will be sufficient to uphold a retroactive estate tax regulation.[41] The Court grants the highest level of deference to Congress and appears to forget its role as characterized by Chief Justice Holmes when he stated, "[t]he power to tax is not the power to destroy while this Court sits."[42]

Part I of this Note traces the history of due process challenges to retroactive economic legislation and the standards created by the Court to assess such attacks. This section concludes by resuscitating the due process argument from the perspective of property's fundamental qualities and the trend of the modern Court to expand substantive due process. Part II sets forth the facts of *Carlton*, the unique test established by the Ninth Circuit Court of Appeals, and the Supreme Court's holding which rejected the Ninth Circuit's reasoning and reaffirmed the precedent of total deference to Congress in the area of economic legislation, prospective or retroactive. This section also elucidates the concurring opinions of Justices O'Connor and Scalia to provide the foundation for the argument which follows. Part III illuminates several flaws of the holding in *Carlton*, and proposes to limit congressional authority within the estate tax field because this domain is inundated with fundamental rights and can be differentiated from other areas of economic legislation. Part IV agrees that the outcome in *Carlton* may be accurate, but illustrates the potentially devastating effects of the Court's deficient reasoning. This Note concludes that the estate tax field is sufficiently distinct from other areas of economic legislation, and even from other tax fields. Therefore, it should receive unique treatment. The Court should reexamine its position because the taxation of estates presents an opportunity for the Court to begin to circumscribe Congress's current nearly unrestricted power to tax retroactively.

40. *See infra* Part IV.
41. *See Carlton*, 512 U.S. at 31-32.
42. Panhandle Oil Co. v. Mississippi *ex rel* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

## I. Black Letter Law of *Calder v. Bull* Becomes Carte Blanche for Congress

Retroactive legislation appears to offend the natural law of decency, the principles inherent in the creation of the social compact and the underlying tenets of the Constitution. Man has recognized the unfairness of retrospective laws and harbored hostility toward them as far back as ancient Greece.[43] Prohibition of laws which attempt to affect prior actions is a building block of the social compact upon which our Republic rests.[44] Comments by the Framers evince their scorn for retroactive legislation and buttress the assertion that the original intent of the Constitution was to prohibit all attempts at retroactive lawmaking.[45]

Several clauses of the Constitution seem, some even explicitly, to bar retroactive laws categorically: the Ex Post Facto Clause, the Bill of Attainder provision, the Contracts Clause, the Takings Clause and the Due Process Clause. Yet, despite the text of the Constitution and the appeal of a universal rejection of retroactive laws, the Supreme Court never has wavered from its *Calder v. Bull* averment that retroactive legislation is permissible in the civil con-

43. *See* Laura Ricciardi, Comment, *The Aftermath of* United States v. Carlton: *Taxpayers Will Have to Pay for Congress's Mistakes*, 40 N.Y.L. Sch. L. Rev. 599, 603 (1996) (citing Aristotle, The Politics (Sir Ernest Barker Trans., 1947) and quoting St. Thomas Aquinas, Summa Theologica 145 (R.J. Henle trans., Univ. of Notre Dame Press 1993) (1273)) ("[I]n order for a law to obtain the power of obligating which is proper to a law, it must be applied to those who are to be directed by it. This application takes place by being made known to them by promulgation. Therefore, promulgation is necessary for law to have its binding force."). By necessary implication, no law should be given retrospective effect because people should not be obligated to laws of which they have no notice.

44. *See supra* text accompanying notes 26-29.

45. Many law review articles provide quotations evidencing the Framers' language and intent that the Constitution prohibit all retroactive legislation. For the most extensive discussion, see Ricciardi & Sinclair, *supra* note 20, at 302-12. One Framers' intent argument unique to the estate tax field, and not presented elsewhere, stems from the slogan of the American Revolution itself, "No Taxation Without Representation." The essence of the argument is that altering the tax laws to increase the tax burden on the estate of a person who is no longer living is taxation without representation. This type of taxation is patently unfair for the same reason that the revolutionary battle cry originated. The taxed party, in the case of estate taxes, the decedent, has no recourse. For a fuller explication of this argument, see *infra* Part III.B.

text—a holding which is now two hundred years old.[46] Though viable challenges may still be available under each constitutional theory, this Note deals only with a unique attack from the due process perspective in the estate tax field.

In the beginning of this century, due process challenges fared well in the areas of attempted retroactive estate and gift taxes.[47] As the Court's strict review of economic regulations burgeoned in the aftermath of *Lochner v. New York*,[48] it appeared retroactive tax legislation faced an insurmountable hurdle. With the demise of the *Lochner* era, however, the Court's deference to congressional authority in the realm of all economic legislation blossomed. Two early indicators of the Court's deferential shift were *Milliken v. United States*[49] and *Welch v. Henry*.[50]

In *Milliken*, the decedent made an inter vivos gift of corporate stock to his children in 1916.[51] At the time of the gift, the Revenue Act of 1916 contained a provision which included this gift in the gross estate of the decedent because it was considered a transfer in contemplation of death.[52] In 1918, a new act increased the rate at which the transfer in question would be taxed.[53] When the donor father died in 1920, the Commissioner insisted on taxing the gift at the higher rate.[54] Milliken claimed the application of the statute to his case denied him due process because it was retroactive.[55] The Court recited its precedent established in *Nichols v. Coolidge*[56] and *Untermeyer v. Anderson*[57] that taxation of completely vested

46. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). The Court has occasionally struck down specific retroactive civil legislation as unconstitutional, but never as a violation of the Ex Post Facto Clause. *See supra* text accompanying notes 30-32.

47. *See, e.g.*, Untermeyer v. Anderson, 276 U.S. 440 (1928) (invalidating a retroactive gift tax on due process grounds); Blodgett v. Holden, 275 U.S. 142 (1927) (holding a retroactive gift tax invalid because of the "unreasonableness" with regard to a completed transfer); Nichols v. Coolidge, 274 U.S. 531 (1927) (finding a retroactive estate tax unconstitutional because its application was "arbitrary and capricious").

48. 198 U.S. 45 (1905).

49. 283 U.S. 15 (1931).

50. 305 U.S. 134 (1938).

51. *Milliken*, 283 U.S. at 18.

52. *See id.* at 18-19.

53. *See id.* at 19.

54. *See id.*

55. *See id.* at 18-20.

56. 274 U.S. 531 (1927).

57. 276 U.S. 440 (1928).

gifts prior to enactment of a statute taxing such transfers was "so palpably arbitrary and unreasonable as to infringe the due process clause."[58] Then, with sleight of pen, the Court stated that "a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied."[59] Marking the end of the apparent categorical reproach for retroactive estate and gift tax laws, the Court declared that "[i]t is necessary to consider the nature of the tax and of the decedent's gift."[60] Since the amended statute of 1918 was based on the same policy rationale as the 1916 act when it was adopted, the Court held that the donor was forewarned of the tax and the "mere increase in the tax" was insufficient to cause constitutional infirmity.[61]

Seven years after *Milliken*, the Court revisited the issue of retrotaxation and formulated a more definitive test in *Welch v. Henry*. In 1933, Welch received corporate dividends in a manner which permitted a deduction on his Wisconsin state income tax return at the time of the distribution and at the time for filing the return on March 15, 1934.[62] The Wisconsin legislature passed an act on March 27, 1935, which "laid new taxes for the years 1933 and 1934," and eliminated the provision under which Welch had claimed the dividends as a deduction.[63] In response to Welch's due process challenge, the Court reiterated the language of *Milliken* and appended a more explicit standard to it. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation."[64] The indeterminate "harsh and oppressive" formula-

58. *Milliken*, 283 U.S. at 20-21 (citing *Untermeyer*, 276 U.S. 440; *Nichols*, 274 U.S. 531).

59. *Id.* at 21.

60. *Id.* at 22.

61. *Id.* at 24. This reasoning presents an interesting twist in the *Carlton* case which is expounded below, *see infra* Part II. Though the denial of the deduction in *Carlton* can be equated to a mere increase in the tax, the policy behind the amendment is arguably distinct from the policy responsible for the original statute. The original statute provided a broad deduction for transfers to Employee Stock Ownership Plans as an incentive to increase such transfers and help employees gain ownership within companies. The amendment restricting the deduction to stock owned by decedents immediately prior to death was enacted solely to enhance the national fisc—an entirely different rationale than under the original enactment.

62. *See* Welch v. Henry, 305 U.S. 134, 141 (1938).

63. *Id.* at 141-42.

64. *Id.* at 147.

tion became the touchstone for judicial review of due process attacks on retroactive taxation.

In the line of cases dealing with other economic regulations, the Court has repeatedly stated that a presumption of validity exists, and the critical test is whether the "legislature has acted in an arbitrary and irrational way."[65] In the 1984 case of *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,[66] the Court expressly declared that the two standards, "harsh and oppressive" and "arbitrary and irrational," though different in verbiage, entail the same analysis.[67] The analysis is merely low level scrutiny to determine whether the statute has a rational legislative purpose. The *Pension Guaranty* decision states that an added burden exists for laws having a retroactive effect, "[b]ut that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[68]

From the initial proclamation of the standards to the present, the Court has continued to lower the necessary criterion while the level of deference has increased.[69] In *Carlton*, despite avowals to the contrary, the Court has finally ceded carte blanche to Congress with regard to revenue raising taxation[70]—as if there is any other kind.

---

65. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

66. 467 U.S. 717 (1984).

67. *Id.* at 733 ("[A]lthough we have noted that retrospective civil legislation may offend due process if it is 'particularly 'harsh and oppressive,'' that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn.*") (citations omitted).

68. *Id.* at 730.

69. For a thorough examination of the Court's analysis of economic legislation pre-*Lochner* and post-*Lochner*, see James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87 (1993). Professor Kainen depicts "*Lochner* era substantive due process as a transitional period with strong links to its antecedent and successor forms of constitutional economic rights protection. . . . *Lochner* era substantive due process grew out of retroactivity jurisprudence, transforming it in accordance with a critique with which the modern era has significant affinity." *Id.* at 123.

70. United States v. Carlton, 512 U.S. 26 (1994). The majority attempts to limit its holding by labeling the amendment in question a "curative measure." *Id.* at 31. But Justice O'Connor's concurrence observes that all amendments to existing statutes are "curative," otherwise the original would not need amending. *See id.* at 36 (O'Connor, J., concurring). The majority also clings to its prior distinction between "wholly new taxes" and mere changes in existing tax laws. *See id.* at 34. For a discussion of the illusory quality of the distinction, see *infra* note 99. The argument was shaky when the Court first posited it in *United States v. Darusmont*, 449 U.S. 292, 300 (1981), to distinguish the early cases of *Blodgett* and *Un-*

Before beginning the analysis of *Carlton*, a brief summary of its relationship with the current state of substantive due process is necessary. The Court has been continually increasing the scope of individuals' protected rights in life, liberty and property, through the Due Process Clause. The Court has stretched the language of the Fifth Amendment to include implied rights, so long as the right is considered "fundamental."[71] During this period, the Court has been heedful of its progression, itself remarking that:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. . . . [T]here is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.[72]

Despite this cognizance of the potential dangers, the Court continues to extend the constitutional protections. In a case heard the same term as *Carlton*, the Court upheld the rights of a private property owner against a land use regulation.[73] Yet somehow in *Carlton*, the Court was able to determine that property rights which conflict with tax legislation do not trigger a higher level of scrutiny, even when the regulation has retroactive effect.

---

*termeyer* which involved the first gift tax. Now, after nearly a century since the inception of the gift and estate tax schemes, there is nothing that could not be argued is only an alteration of the existing regulatory tax structures. Justice Scalia is unmistakably correct when he remarks, "[t]he reasoning the Court applies to uphold the statute in this case guarantees that all retroactive tax laws will henceforth be valid." *Carlton*, 512 U.S. at 40 (Scalia & Thomas, JJ., concurring).

71. *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990) (denying a constitutional right to die because the right to withdraw life-sustaining treatment is not fundamental); Roe v. Wade, 410 U.S. 113 (1973) (upholding the right to an abortion because a woman's privacy interest is sufficiently fundamental to be encompassed in the meaning of a protected liberty interest); Griswold v. Connecticut, 381 U.S. 479 (1965) (preserving a married couple's right to use contraception because marital privacy is fundamentally within the "penumbra" of protected liberty interests).

72. Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977).

73. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

## II. FACTS AND HOLDING OF *CARLTON*: COURT UPENDS CARLTON'S WIN IN THE NINTH

Willametta K. Day died on September 29, 1985.[74] Jerry W. Carlton was the executor of her estate, and the estate tax return was not due until December 29, 1986 because a six month filing extension had been obtained.[75] On behalf of Day's estate, Carlton purchased 1.5 million shares of stock in MCI Communications Corporation for a total price of $11,206,000 on December 10, 1986.[76] Two days later, he sold all of the shares to the MCI Employee Stock Ownership Plan for $10,575,00, despite realizing a loss of $631,000.[77] These transactions enabled Day's estate to claim a deduction for half of the stock sale proceeds, $5,287,000, which had the effect of reducing the estate tax by $2,501,161.[78] The estate claimed the deduction pursuant to section 2057 of the Internal Revenue Code in effect at the time which read:

> (a) General Rule—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate an amount equal to 50 percent of the proceeds of any sale of any qualified employer securities to—
>
> (1) an employee stock ownership plan, or
>
> (2) an eligible worker-owned cooperative.[79]

On February 26, 1987, a bill was introduced in each chamber of Congress, at the Internal Revenue Service's request, to "clarify" the fact that the deduction was limited to securities owned by the decedent immediately before death.[80] Section 2057 was amended on December 22, 1987, with an effective date as if it had been included in the original legislation as follows:

> (1) In General.—For purposes of this section, the proceeds of a sale of employer securities by an executor to an employee stock ownership plan or an eligible worker-owned cooperative

74. *See Carlton*, 512 U.S. at 28.
75. *See id.*; *see also* I.R.C. § 6075 (providing that estate tax returns must be filed within nine months of the decedent's death).
76. *See Carlton*, 512 U.S. at 28.
77. *See id.*
78. *See id.*
79. I.R.C. § 2057 (1986), *repealed by* Omnibus Budget Reconciliation Act of 1989, § 7304(a), 103 Stat. 2352.
80. *See Carlton*, 512 U.S. at 29 (citing I.R.S. Notice 87-13, 1987-1 C.B. 432, 442; 133 Cong. Rec. 4145 & 4293 (1987)).

shall not be treated as qualified proceeds from a qualified sale unless—

(A) the decedent directly owned the securities immediately before death . . . .[81]

In accord with the amended provisions of section 2057, the Internal Revenue Service disallowed the deduction claimed by Carlton and asserted a tax deficiency because Day did not own the MCI stock before her death.[82] In a stipulation between the parties, Carlton acknowledged that he conducted the stock transactions specifically to avail the tax benefits of section 2057.[83] After paying the deficiency plus an additional $996,953.18 in interest, Carlton challenged the retroactive application of the 1987 amendment to the 1986 transaction as a violation of the Due Process Clause of the Fifth Amendment.[84]

The Ninth Circuit analyzed the litany of Supreme Court cases dealing with due process challenges to retroactive legislation and determined that the "harsh and oppressive" standard must govern in this case because "[c]ourts 'must 'consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.' ' "[85] The circuit court also recognized that outside of the tax realm, "a statute must be 'arbitrary and irrational' to violate due process,"[86] but in application by the Supreme Court the two standards are equivalent.[87] From its thor-

81. Omnibus Budget Reconciliation Act of 1987, § 10411(a), 101 Stat. 1330-432.

82. *See Carlton*, 512 U.S. at 29.

83. *See id.* at 28-29. This fact does not bear on the appropriateness of Carlton's actions because attempts to minimize taxes through any legal means are justified. *See* Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) ("Any one may so arrange his affairs that his taxes shall be as low as possible; . . . there is not even a patriotic duty to increase one's taxes . . . . [I]t is of no consequence that it was all an elaborate scheme to get rid of [estate] taxes . . . .").

84. *See* Carlton v. United States, 972 F.2d 1051, 1055 (9th Cir. 1992).

85. *Id.* (quoting United States v. Hemme, 476 U.S. 558, 568-69 (1986) (quoting Welch v. Henry, 305 U.S. 134, 147 (1938))).

86. *Id.* at 1056 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

87. *See id.* (citing Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984) ("[A]lthough we have noted that retrospective civil legislation may offend due process if it is 'particularly 'harsh and oppressive,' ' that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in *Turner Elkhorn*.") (citations omitted)).

ough examination of the pertinent cases,[88] the Ninth Circuit derived two critical questions to determine whether a retroactive application of a tax law violated the enunciated standard. "First, did the taxpayer have actual or constructive notice that the tax statute would be retroactively amended? Second, did the taxpayer rely to his detriment on the pre-amendment tax statute, and was such reliance reasonable?"[89] The application of this two-part test led the Ninth Circuit to conclude a violation of due process had occurred because: (1) the transaction was completed in December 1986, before the first notice of the proposed change in January 1987; (2) the tax advantages of section 2057 reasonably induced Carlton to engage in the transaction; and (3) the estate irretrievably lost $631,000.[90]

---

88. The court discussed the three critical cases from the beginning of the century where retroactive tax legislation was found to be a violation of due process. *See id.* at 1056-57 (reviewing Untermeyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927); Nichols v. Coolidge, 274 U.S. 531 (1927)). Then the court canvassed the modern trend of cases which reject due process challenges to retroactive applications of revenue acts. *See id.* at 1058-59 (dissecting United States v. Hemme, 476 U.S. 558 (1986); United States v. Darusmont, 449 U.S. 292 (1981); Welch v. Henry, 305 U.S. 134 (1938)).

89. *Id.* at 1059.

90. *See id.* at 1059-60. For a succinct defense of the Ninth Circuit's opinion prior to the Supreme Court decision in the case, see Robert C. DeGaudenzi, Note, *Death is Still Certain, But Are Taxes?: An Examination of the Due Process Limitations on Retroactive Tax Legislation After* Carlton v. United States, 67 St. John's L. Rev. 327 (1993).

Between the time of the district court decision and the circuit decision in *Carlton*, the District Court of the Eastern District of Louisiana decided a case on the same critical issue. *Ferman v. United States*, 790 F. Supp. 656 (E.D. La. 1992). The court examined the same cases as the Ninth Circuit, but concluded in the following manner:

> The court sympathizes with and is instinctively inclined towards the position advocated by the plaintiff. It seems fundamentally wrong for federal taxing authorities to be permitted a retroactive application of a tax in the face of the clear and unambiguous language of a statute. . . . In any event, . . . Congress is constitutionally able to change and modify our nation's tax laws at will.
>
> But, granting such amendments retroactive effect in such a way as to adversely affect completed conduct by a citizen smacks of totalitarianism through taxation. It seems fundamentally wrong for Congress to be permitted to make any of its pronouncements retroactive to the detriment of even one citizen for even one moment.
>
> Such circumstance, however, seems to be the law . . . .

*Id.* at 662-63. The court feels duty bound to permit the retroactive application of the amendment based upon the high deference standard enunciated repeatedly by

The Supreme Court trumped all of the reasoning of the majority opinion of the Ninth Circuit by distinguishing the case law and dismantling the proposed test.[91] The Court characterized the cases relied upon by the Ninth Circuit as part of an era that " 'has long since been discarded.' "[92] To the extent the three cases the circuit court had examined in finding the violation of due process, *Nichols v. Coolidge, Blodgett v. Holden*[93] and *Untermeyer v. Anderson,* still retained any persuasiveness, they were distinguished from *Carlton* because each involved the imposition of a "wholly new tax."[94] *Blodgett* and *Untermeyer* revolved around the creation of the first gift tax, and *Nichols* centered around the inclusion in the decedent's gross estate transfers made prior to death but intended to take effect at death.[95] All of these were novel ideas for the time period, but the amendment in *Carlton* which had retroactive effect cannot be considered new because it merely made an addition to an existing statute.[96]

---

the Supreme Court. In the next and penultimate paragraph of the opinion, the court begs a higher court to overturn its decision and alter the state of the law.

> In all candor, the court, in this instance, sincerely hopes that, should its judgment be appealed, the court (or courts) above will find error in this ruling. Thus, . . . the language in section 2057's 1986 version may be explained by inadvertence and error, this court opines the hope that the appellate courts might treat this court's ruling in a similar way; that is, while not inadvertent, the ruling is nonetheless in error.

*Id.* at 663.

91. *See* United States v. Carlton, 512 U.S. 26, 33-34 (1994).

92. *Id.* at 34 (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) and referring to the *Lochner* era of "exacting review of economic legislation").

93. 275 U.S. 142 (1927).

94. *See Carlton*, 512 U.S. at 34.

95. *See id.*

96. *See id.*; *see also supra* note 70. The distinction the Court attempts to draw between taxes that are "wholly new" and ones that are mere alterations of existing tax statutes is itself wholly illusory, or at best, a mere variation on arbitrariness. The Court bases the distinction on the fact that the cases which struck down retroactive tax statutes, viz., *Blodgett* and *Untermeyer*, arose from the "Nation's first gift tax." *Carlton*, 512 U.S. at 34. However, now that taxes are imposed on income, estates and gifts, it appears that any increase in the tax burden within one of these broad categories will merely be an alteration and not a wholly new tax. If the majority is correct, then the media and the American public were too harsh on George Bush because he did keep his campaign promise of "Read my lips—no *new* taxes." President George Bush, Address at the Republican National Convention (Aug. 18, 1988). The majority offers no support for making the distinction between a new tax and a statutory change that has the effect of increasing the tax burden in a new manner. Justice Scalia recognized the hollow reasoning of the majority and undermined the distinction by postulating that a change in a tax rate may be

As for the innovative two-part test of the Ninth Circuit, the Court discarded the principles of reliance and notice as non-dispositive in less than a half page.[97] Despite Carlton's uncontested reliance and the fact that his "reading of the original statute on which he relied appears to have been correct," his reliance was insufficient to show constitutional infirmity because "[t]ax legislation is not a promise."[98] Additionally, the Court pointed out that detrimental reliance often occurs in legislation which has only a prospective effect but disturbs settled expectations.[99] The Court dismissed the lack of notice issue on similar grounds because a taxpayer must be aware the government might change the tax regulations in any manner that better implements a current taxation scheme.[100] In short, the Court gave little credence to the reasoning of the Ninth Circuit, and summarily sustained Congress's au-

---

even more harsh and oppressive than a new tax. *See Carlton*, 512 at 40 (Scalia & Thomas, JJ., concurring). Alluding to the facts of *Carlton* as "bait-and-switch taxation," Justice Scalia declared that "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, . . . than merely imposing a new tax on past actions." *Id.* at 39-40.

97. *See Carlton,* 512 U.S. at 33-34.

98. *Id.* at 33. Though not stated explicitly, the thrust of this argument stems from the fact that a person cannot successfully challenge retroactive tax legislation based upon a contract theory. There is no offer or promise by the government, no vested right in the individual, and therefore, no valid attack based upon detrimental reliance.

The Court's reference to the "relied-upon expectations of individuals" is curious considering the fact stated by the Ninth Circuit that " '[f]ederal courts have long been hostile to legislation that interferes with settled expectations.' " Carlton v. United States, 972 F.2d 1051, 1057 (9th Cir. 1992) (quoting Licari v. Commissioner, 946 F.2d 690, 693 (9th Cir. 1991)). The modern Supreme Court is not beyond the scope of this comment, itself many times relying upon the notion of settled expectations, even to uphold Fifth Amendment attacks against legislation. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("[A]s we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.") (alteration in original)); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1988) ("We have recognized the importance of honoring reasonable expectations in property interests."); *cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful *solely* because it upsets otherwise settled expectations.") (emphasis added).

99. *See Carlton,* 512 U.S. at 33-34.

100. *See id.* at 34.

thority to enact any retroactive tax which is "justified by a rational legislative purpose."[101]

Language also exists in the majority opinion regarding the "curative" nature[102] of the retroactive amendment at issue, but Justice O'Connor's concurrence harped on this formulation with the obvious observation that "this mode of analysis proves too much."[103] Every amendment and even new laws relating to an area of previous regulation can be characterized as "curative" because "there is no reason to pass a new law, after all, if the legislators are satisfied with the old one."[104] Realizing that she had annihilated the majority's attempt to ratchet up the limitations on Congress's retroactive lawmaking power beyond the low standard of a rational basis, and observing that any tax measure may be considered "rationally related to the legitimate governmental purpose of raising revenue,"[105] Justice O'Connor based her concurrence on the limited time period of the retroactivity.[106] In attempting to place some restraint on the ability of Congress to upset settled expectations retroactively, Justice O'Connor concluded that the fourteen month look back period in *Carlton* was consistent with prior decisions.[107]

Justice Scalia, with whom Justice Thomas joined concurring, appears to have written in a flabbergasted tone because the major-

---

101. *Id.* at 31 (quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

102. *Id.*

103. *Id.* at 36 (O'Connor, J., concurring).

104. *Id.*

105. *Id.* at 37. It is a truism that any regulation designed to collect a tax is a revenue raising measure, and the amendment in *Carlton* eliminated a deduction which equates to collecting more tax dollars. Interestingly, however, the original statute's purpose was clearly not to raise revenue, as it was designed from the start to permit large deductions.

106. *See id.* at 38-39 (O'Connor, J., concurring).

107. *See id.* Justice O'Connor believes the common link among the cases in which the due process challenge was upheld is the relatively short time frame of the retroactive application. *See id.* at 39 (citing United States v. Hemme, 476 U.S. 558 (1986) (one month); United States v. Darusmont, 449 U.S. 292 (1981) (ten months); United States v. Hudson, 299 U.S. 498 (1937) (one month)). Yet, the focus of this analysis is inappropriate because the devastating effect of retroactive laws occurs without regard to time constraints. When a retroactive change in the tax infrastructure destroys the estate plan of a decedent who died even one week prior to the enactment, Justice O'Connor's formulation offers no solace. The flaw of creating a time period restraint is exposed by the argument presented *infra* Part III.B.

ity holding is inconsistent with precedent and the apparent modern trend of the Court.[108] The argument Justice Scalia articulated should have led members of the Court to reach the opposite conclusion, but he *concurred* because he does not believe the Due Process Clause of the Constitution ever accords individuals "substantive due process."[109] Justice Scalia made the argument that this type of case seems to fit within the framework of "fundamental rights" jurisprudence which the modern Court has been developing under the guise of substantive due process.[110] Although not the basis of his decision because he does not agree with the underlying premise, Justice Scalia rebuked his colleagues in the majority for "picking and choosing among various rights to be accorded 'substantive due process' protection" and "the categorical and inexplicable exclusion of so-called 'economic rights.' "[111] Though in stern opposition to the non-textual approach preserving substantive rights through the Due Process Clause, Justice Scalia concluded his attack by stating that the text of the Fifth Amendment does not differentiate between life, liberty or property.[112]

## III. Fundamental Criticisms of the Court's Reasoning in *Carlton*

The majority opinion in *Carlton* comports with the Court's current laissez-faire stance toward economic legislation, but it grants Congress too much leeway and overlooks two important distinctions: (1) even in the Court's own view certain property rights are deemed "fundamental," and (2) the unique quality of estate taxation deserves special treatment.

108. *See Carlton*, 512 U.S. at 39 (Scalia & Thomas, JJ., concurring).

109. *See id.* "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." *Id.* "[T]he 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 . . . ." *Id.* at 40.

110. *See id.* at 40-41.

111. *Id.* at 41.

112. *See id.* at 42. The text of the Fifth Amendment reads in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ." U.S. Const. amend. V.

A. *Property Can Be Fundamental Too*

The three rights explicitly protected by the Due Process Clause of the Fifth Amendment are life, liberty and property.[113] No differentiation exists among the terms within the text, but the Court has repeatedly afforded these three classes of individual rights differing degrees of protection.[114] "Life" and "liberty" have been broadly interpreted to include marriage and family life,[115] the right to procreate in the future[116] and the right to enjoy intercourse without procreating in the present.[117] The Court has granted protection to these extensions because of their classification as "fundamental rights." In determining which rights are fundamental, the Court looks to those which are "deeply rooted in this Nation's history and tradition."[118]

While property rights traditionally have not been afforded the expansive protection of the other preserved rights, the fact that property rights are "deeply rooted" in this country is more of a maxim than an assertion. Unlike the rights protected under the modern trend of substantive due process law which are deemed implied within the concepts of life and liberty, "property" is listed expressly in the Due Process Clause of the Fifth Amendment.[119] And

---

113. U.S. Const. amend. V.

114. Though a full hermeneutic study would be needed to compare originalism versus non-originalism theories of the Constitution's text, it is unnecessary to the present discussion because both sides believe the text controls, and the text is explicit in this regard.

115. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (invalidating a city ordinance that limited occupancy to one "family" with a "family" defined as limited categories of related individuals); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a Connecticut statute that prohibited any person, including married couples, from using contraceptive devices).

116. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that procreation is a "basic liberty" because it is "fundamental to the very existence and survival of the race").

117. *See Griswold*, 381 U.S. 479. *But cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (holding there is no fundamental right to engage in homosexual sodomy).

118. *Moore*, 431 U.S. at 503; *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (supporting the parent's constitutional right to make child rearing decisions by describing the parental role as "an American tradition"); Griswold, 381 U.S. at 496 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (finding a constitutional basis to invalidate the ban on contraceptives by labeling the traditional family relationship as "fundamental as our entire civilization").

119. It has been pointed out that even "[a] cursory examination of the Constitution reveals a deeply rooted concern for property rights." Michael J. George, *Digging Up New Revenue: Retrospective Estate Taxation and the Omnibus Budget*

yet, only in the recent past have property owners begun to receive increased protection through the Court's more intensive review of regulations.[120] One of the most pronounced examples of the Court's heightened scrutiny of regulations regarding property is *Dolan v. City of Tigard*,[121] heard the same term and decided just eleven days after *Carlton*.

The complex facts of *Dolan* and the precise reasoning of the Court are unimportant to the present discussion because the case involved dedication rights which constituted an uncompensated taking of property.[122] The pertinence of the case is the level and process of scrutiny instituted by the Court in reviewing a state action which infringed upon the rights of a private property owner. The Court asked whether an "essential nexus" existed between the dedication and a legitimate state interest.[123] Finding that a nexus did exist, the Court went further and examined "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development."[124] For this analysis, the Court discarded the traditional presumption of validity and placed the burden of proof upon the city.[125] If limited to its facts, *Dolan* may only stand for the proposition that legislation which interferes with a property owner's specific right to exclude others triggers a higher level of scrutiny. However, it remains an example of a substantive property right protected under the guise of due process.

---

*Reconciliation Act of 1993*, 96 W. Va. L. Rev. 971, 1007 (1994) (citing U.S. Const. art. I, § 2, cl. 3; art. I, § 9, cl. 3-7; art. I, § 10, cl. 2; art. IV, § 2, cl. 1; art. VI, cl. 1; amend. III-V & X). George's following statement bluntly summarizes why the fundamental quality of property rights is simply a constitutional maxim. "Rights in property are an enumerated and thus fundamental due process right." *Id.* at 1009.

120. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a taking of property had occurred when a zoning ordinance banned construction on Lucas's coastal lots, and establishing a categorical rule that a taking occurs whenever all beneficial use of land is denied by regulation); Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (holding that the Coastal Commission's conditioning of a building permit on the granting of an easement constituted a taking because it did not substantially advance a legitimate state interest).

121. 512 U.S. 374 (1994).

122. *Id.*

123. *Id.* at 386 (applying the basic test the Court had formulated in *Nollan*, 483 U.S. at 837).

124. *Id.* at 388.

125. *See id.* at 392.

Justice Stevens, joined by Justices Blackmun and Ginsburg, dissented in *Dolan* and criticized the majority specifically for the potential precedent setting value of the case in the sphere of substantive due process. Justice Stevens stated that "[e]ven more consequential than its incorrect disposition of this case, however, is the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades ago."[126] Justice Stevens expressed concern that the Court was taking a more active role in defending the substantive property rights of individuals and reducing the amount of deference normally accorded legislative actions in this area. To prevent the natural progression of the argument in other applications, Justice Stevens beseeched that this case "not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era."[127]

Without espousing the expansive and overburdening approach of the Court in the *Lochner* era, at least one other area exists in which the Court should not blindly defer to Congress—retroactive estate taxes. When a person dies, the only tangible item left behind is the person's property. One basic tenet of property law is that a person's fundamental property rights include the right of disposition.[128] Furthermore, the power to control the disposition of one's property upon death is a right entrenched in American jurisprudence.[129] The transfer of property from a decedent to those

---

126. *Id.* at 405 (Stevens, Blackmun & Ginsburg, JJ., dissenting) (referring to the *Lochner* level of review of economic legislation and citing Ferguson v. Skrupa, 372 U.S. 726 (1963)).

127. *Id.* at 409.

128. *See* 73 C.J.S. *Property* § 6 (1983).

> Furthermore, the term comprises all rights which are incident to the use, enjoyment, and *disposition of tangible things* .... Property is considered to be the highest right which a man can have to anything, real or personal; it has been referred to as a perfect and exclusive right. The right of property is a *fundamental*, material, inherent, and inalienable right, that is to say, a basic civil right.

*Id.* § 6-7 (emphasis added) (citations omitted).

129. *See* 79 Am. Jur. 2d *Wills* § 1 (1975) ("The right to dispose of property by will at death is of ancient origin.... The American law of wills is based upon, or at least strongly influenced by, the foregoing English statutes [Statute of Wills and Statute of Frauds] ...."). The importance of fulfilling the decedent's desired disposition of property is fortified by the courts' consuetudinal deference to the testator's intent and the low level of mental capacity and competence needed to execute a will. *See* John Ritchie et al., Decedents' Estates and Trusts 154 (8th ed. 1993) ("Testamentary power has been granted in plenary fashion in all states and has been curtailed in relatively few major aspects.").

people of her selection encompasses both of these historically protected rights. The fact that the selected transferees are most often family members adds a third layer of aegis because "the institution of the family is deeply rooted in this Nation's history and tradition."[130] It is this special conglomeration of essential, dare I say "fundamental," property rights which are violated by retroactive estate tax regulations.

Cognizant of the implications of finding a fundamental right, the majority opinion in *Carlton* did not even address these issues, choosing instead to avoid any risk of being chided for second-guessing Congress in the province of economic legislation. Overconcerned with being dubbed a "*Lochnerian* super-legislature," the majority refused to recognize the fundamental rights inherently involved when estates are taxed retroactively.

B. *Estates Are Special Too*

Due to its uniqueness, the estate tax field provides an excellent tableau upon which the Court could begin to rewrite its review of retroactive civil legislation. The Court could maintain consistency with its other substantive due process decisions and institute a policy of stricter scrutiny with respect to retrospective estate taxation, and yet, limit the new standard to this particular field. Aside from entailing rights that appear to be fundamental, the retroactive estate tax domain should be set apart to receive special treatment for at least three reasons.

First, an estate tax is different than an income tax because there is no reciprocal benefit for the burden of paying an estate tax. The Court has described taxation in general as merely "the means by which government distributes the burdens of its cost among those who enjoy its benefits."[131] This justification is sensible with regard to the individual who benefits from the civilized society that enables her to earn income and to dispose of it as she desires. However, no such reciprocal benefit inheres in the estate tax. Assuming the income tax imposes a burden precisely equal to the benefits enjoyed during life, a rather conservative assumption

130. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

131. Welch v. Henry, 305 U.S. 134, 144 (1938). The same opinion also stated that "[i]t is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens." *Id.* at 146.

given current tax rates, the burden of the estate tax would have to be matched by a benefit accruing after death. Since the income tax exacted already took into account the benefit of being able to dispose of property as desired, any tax on the right to transfer property at death would amount to a double tax. This consequence is not unique to estate taxes as it occurs with other transactions such as gifts substantial enough to require a gift tax to be paid and purchases which necessitate the payment of a sales tax. Rather than crafting an argument which attacks the validity of all of these forms of tax, the point is simply that estate tax legislation could justifiably be scrutinized under a different lens than income tax regulations.

Second, the attendant conditions of an estate tax reinvigorate the argument that retroactive application of laws upsets settled expectations to a greater degree than purely prospective laws. Concededly, prospective legislation may have a profoundly undesirable effect on settled property expectations. This alone will not be sufficient to cause constitutional infirmity unless the burden borne by the individual outweighs the benefit of the new regulation. The classic test of whether a government's exercise of its police power violates the Takings Clause of the Fifth Amendment illustrates the point. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[132] Although the standard is vague because it offers no guidance as to what is considered "going too far," the central idea is that at some point the government regulation becomes too oppressive upon individuals to be constitutional.[133]

Retroactive application of estate tax regulations surpasses the level of interference permitted under this standard. The fact that the person is dead decisively alters the equation. No opportunity exists for the decedent to recoup losses in the future. Anything removed from the estate will be lost forever without recourse. A

---

132. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

133. Though the analysis of a due process attack on the application of a statute is different than the analysis of a takings claim, the basic idea remains constant in both. "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not *unduly oppressive upon individuals*." Lawton v. Steele, 152 U.S. 133, 137 (1894), *quoted in* Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590 (1962) (emphasis added).

carefully crafted estate plan established to transmit wealth to the next generation and to provide for the needs of the decedent's family, perhaps to support minor children or disabled relatives, can be ruined without the decedent having the opportunity to generate an alternate course of action. Potentially destroying a legacy created through a lifetime of turmoil is too high a price to be exacted from an individual, especially one who is already dead.

The reason that retrospective legislation is oppressive with regard to estate taxes, viz., the decedent's lack of remedy or recourse, is also the basis of the third anomalous feature of retroactive estate taxation. Specifically, retroactive estate taxation amounts to taxation without representation. A decedent cannot voice an objection to the imposition of a new tax or a change in an existing tax rate. If Congress decides to increase the tax burden retroactively upon estates, all of the people who have already died but whose estates will be subject to the tax will be controlled by a government under which they have no representative recourse. Our Republic is founded on the majoritarian regime which serves to counteract the powers of the government. For example, Congress could not impose an income tax rate of seventy-five percent without causing a revolt. Most Americans would believe that it was not worth toiling away at their jobs only to give the government three-quarters of their income. The potential backlash from even the proposal of such a tax makes the premise of this hypothetical rather dubious. However, the idea is not so far-fetched in the minds of Congress with regard to estate taxes. For thirty-five years, from 1941 to 1976, the top tax rate for estates was seventy-seven percent.[134] One explanation for this seemingly excessive burden is that the constituents it affected were all dead. Of course, those who would be subject to the tax upon death and who were still living should have taken action, but the procrastinating attitude of most Americans prevailed because the issue was never imminently pressing to a large number of voters. Though the people are to blame for permitting the situation to continue, Congress derives its authority from the people; and therefore, Congress should not have the ability to do to individuals after death what it could not do to them during life, viz., subject a person's property to oppressive regulations without fear of recourse.

134. *See* Bittker et al., *supra* note 22, at 6.

The atypical fact that estate taxes by nature are levied upon deceased individuals creates an unparalleled oppressiveness when retroactive application is permitted. This unique feature of the estate tax not only allows, but implores, the Court to examine retroactive estate tax legislation for justification beyond a mere rational relation to a legitimate purpose.

## IV. *CARLTON* OUTCOME IS FACTUALLY ADEQUATE, BUT ITS IMPLICATION IS UNACCEPTABLE

The Court could alter its position by accepting the arguments presented herein without upsetting the holding in *Carlton*. The Court could institute a heightened level of scrutiny for cases of retroactive estate taxation and the outcome of *Carlton* could remain unchanged even under the new regime.

The case is distinguishable in a manner that makes the outcome palatable and consistent with an even more stringent review. Two crucial elements of the factual scenario create the distinction. First, Willametta Day's death on September 29, 1985 predated the adoption of the original statute on October 22, 1986, allowing a deduction for sales to employee stock option plans (ESOP) which her executor, Carlton, tried to utilize.[135] Thus, although the stock transfer occurred after October 22, 1986, Carlton attempted to benefit Day's estate through an essentially retrospective application of the deduction statute. Since the deduction was not available at the time of Day's death, she should not be able to gain the benefits of a subsequent change any more than she should be subject to the detriments of one. Second, the issue only arose due to independent actions taken by Carlton in his capacity as executor. This stands in contrast to the situation in which a person establishes a strategic estate plan during life for the executor simply to effectuate after death. If Day had created a specific course of action for Carlton to follow, it would not have included the type of transaction in question because the ESOP deduction did not exist during Day's lifetime. For these factual reasons, Carlton would not obtain a favorable decision even under strict scrutiny of the legislation. Ironically, it would be the strict bar on retroactive application which would prevent Day's estate from benefiting from the subsequent adoption of the ESOP deduction.

135. *See* United States v. Carlton, 512 U.S. 26, 28-29 (1994).

Despite this defense of the outcome in *Carlton*, the Court's analysis remains flawed and its deferential attitude in need of revision. For purposes of emphasizing the *Carlton* Court's faulty reasoning and the thrust of the arguments just presented, assume the following scenario. On January 1, following an election year in which a majority of incumbents lose their positions, Congress passes legislation which changes the estate tax scheme. First, the unified credit and the marital deduction are eliminated so that all estates will be subject to the tax.[136] Second, the regulation imposes a flat estate tax rate of eighty percent. Third, the effective date of the amendments is one year prior to the date of enactment.

Under the Court's current approach, any due process challenge to these provisions will fail. The elimination of the unified credit and marital deduction may be dubbed a curative measure based upon congressional findings that too much revenue is being lost through spouses creating credit shelter trusts.[137] The exorbitant flat rate is justified as a needed measure to help reduce the national debt—clearly a rational relationship to a legitimate purpose. None of the changes are considered "wholly new" because they are amendments to existing statutes. And finally, the modest retroactive time period of one year is customary and within acceptable limits according to the Court.[138]

Unfortunately, the Court's analysis does not consider the adverse effects on the fundamental property rights of the people who died in the year prior to the adopted amendments. First, those decedents are subject to taxation without representation because the majority of the representatives were elected after their deaths. Second, the sudden increased tax burden likely will overwhelm many decedents and their families. Having the liquidity to pay the estate taxes is often one of the biggest problems facing the survivors. A well-designed estate plan accounts for this predicament,

---

136. *See* I.R.C. §§ 2010, 2056; *see also supra* notes 6, 25.

137. A common estate planning technique is to create a marital trust and a credit shelter trust to ensure that the decedent's entire unified credit is utilized or "sheltered." In short, the credit shelter trust is funded with the maximum amount of property that can be transferred on without incurring an estate tax as calculated by a fractional or pecuniary formula. The marital (spousal) trust is funded with all of the remaining property and no estate taxes are due at the time of the first spouse to die because of the unlimited marital deduction for property transferred to a spouse. *See* I.R.C. § 2056.

138. *See Carlton*, 512 U.S. at 32-33.

but likely would be rendered inadequate by the severity of the amendments. Third, all estate plans centered around the common credit shelter trust are ruined without opportunity to remedy the situation. The effect is that many beneficiaries of credit shelter trusts will not receive sufficient funds for their own maintenance and support, especially in the cases of minor or mentally disabled beneficiaries. In sum, the retroactive tax amendments devastate even carefully designed and correctly strategized estate plans under the tax scheme in effect at the time of their execution. The new capricious congressional mandates utterly disrupt and rearrange the decedent's intended proprietary disposition.

## CONCLUSION

In *Carlton*, the Court continued to portray the submissive wife to Congress's husbandry in the arena of retrospective civil legislation. *Carlton* presented the Court with the opportunity to begin placing restrictions upon the apparent unfettered authority of Congress to tax, even retroactively, under the auspices of raising revenue. Though the Court did not seize the occasion, contrary to common belief and despite the 9-0 decision, this Note has shown that the due process challenge to retroactive legislation is not dead, at least in regard to estate taxation. Individuals have no alternative but to continue creating estate plans based upon the current tax structure. The Court has a constitutional basis, and as characterized by this Note, a constitutional duty, to evaluate critically congressional enactments which retroactively create, modify or delete estate tax provisions. By splicing the unique attendant conditions of estate taxation with the fundamental property interests involved, a thread is created that should be woven into the modern trend of protecting individuals' basic civil rights through the Court's looming expansive interpretation of substantive due process.

Matthew D. Slepkow