Roger Williams University Law Review

Volume 3 | Issue 1 Article 2

Fall 1997

Symposium: Retroactivity of Law: Foreword: The Dual Dichotomy of Retroactive Lawmaking

Matthew P. Harrington
Roger Williams University School of Law

Symposium: Retroactivity of Law

Foreward: The Dual Dichotomy of Retroactive Lawmaking

Matthew P. Harrington*

It is not unreasonable, perhaps, to assume that when courts and legislatures create positive law such laws will operate prospectively, at least in the sense that they will not attempt to alter the legal effect of actions taken in the past. On the face of it, there is something unsettling about the possibility that lawmakers might change the rules whilst the game is in progress. Why, it might be asked, should judges or legislators be able to upset the reasonable expectations of parties acting in good faith and in reliance on the law existing at the time of a particular transaction? The idea that laws might change in such a way as to alter the consequences of transactions long completed, or to make past conduct illicit, seems "unfair" or "unjust." After all, have not people *relied* on the law? Is it *fair* to penalize them after the fact?

A new rule of law may be seen to have three different temporal effects.[1] At one extreme, a law might operate in an entirely prospective fashion, affecting only transactions and conduct occurring after the effective date. At the other extreme, a law might have a purely retroactive effect. In such a case, the law changes the character or the effect of an action taken or completed in the past. Action legally taken in the past is now made either illegal or is burdened *in the past*. Between the two extremes are laws whose effects are secondarily retroactive. A law that operates with secon-

* Assistant Professor of Law, Roger Williams University. B.Th., McGill University; J.D., Boston University; LL.M., University of Pennsylvania.

1. *See* Jan G. Laitos, *Legislative Retroactivity*, 52 Wash. U. J. Urb. & Contemp. L. 81, 86-87 (1997).

dary retroactivity affects the legality of past private action *in the future*, after the applicable date of the law.[2]

Prospective laws are generally considered more fair, while retrospective laws are more efficient.[3] Prospectivity has the advantage of providing notice to affected parties, giving them the opportunity to conform transactions or conduct to a new legal reality. Retrospectivity, on the other hand, allows a lawmaker to revisit past transactions or conduct and fine-tune the legal regime, creating a closer fit between the law and the conduct it is designed to reach.[4]

As a result, there is always some controversy attending the promulgation of a legal rule that might affect past transactions or relationships. Whether the rule will have retroactive, or merely prospective, application is an important concern. Yet, the legal system currently tolerates a great deal of retroactivity. There is, in fact, a dual dichotomy attendant with the problem of retroactivity. The first dichotomy concerns the level of retroactivity tolerable in legislative and judicial lawmaking. The second involves the distinctions inherent in civil and criminal lawmaking.

Considering the problem of retroactivity requires, first, an analysis of the distinctions between judicial and legislative action. It is generally assumed that judicial processes operate retrospectively, while the legislature acts prospectively. The problem with this rather neat division is that it may be too facile. Temporal dis-

---

2. *See id.* A temporal distinction between "primary" and "secondary" retroactivity has been criticized as "analytically incoherent." Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1069 (1997). And there is some justification for this criticism, for very few laws can be divided so easily. It may, in fact, be better to analyze legal rules in regard to a continuum of retroactivity. *See id.* at 1067-73. Yet, the Supreme Court itself has relied on a binary approach, analyzing statutes on the basis of whether they are retroactive or prospective in effect. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 836-38 (1990); *see also* National Med. Enters., Inc. v. Sullivan, 957 F.2d 664 (9th Cir. 1992) (analyzing Medicare regulation in terms of primary and secondary retroactivity). Nonetheless, the binary approach seems a reasonable means of analyzing the question of retroactivity in spite of the problems that may be associated with it.

3. *See* Fisch, *supra* note 2, at 1084; *see also* Micheal J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. Pa. L. Rev. 47, 63-87 (1977).

4. *See generally* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143, 2154-58 (1996) (discussing governmental interest in retroactive lawmaking).

tinctions lose force when one considers that judicial decisions frequently have a prospective effect, while at the same time, legislative enactments may have legitimate retroactive consequences, particularly for example, where economic legislation is at issue.

Further complicating the analysis is the issue of whether the lawmaking at issue affects liberty interests commonly impacted by criminal law or whether merely economic interests are at stake. The Supreme Court has been surprisingly rigid in its approach to retroactive legislation in the criminal context. Where economic legislation is concerned, however, the Court has been quite lenient in permitting a great deal of retroactivity.

Yet, in analyzing the problem of retroactivity, courts have not often focused on the question of fairness, at least in an ethical or normative sense. In the criminal context, retroactivity analysis frequently centers on whether legislation violates the Constitution's prohibition on ex post facto laws. In the civil context, on the other hand, questions of due process usually predominate.

Through the years, the Supreme Court has had the opportunity to consider retroactive lawmaking in the context of judicial,[5] legislative[6] and administrative[7] lawmaking.

I. ADJUDICATIVE RETROACTIVITY

It is generally asserted that legislative rules operate prospectively and judge-made rules operate retrospectively.[8] Indeed, adjudicative retroactivity has been the norm throughout the span of the Anglo-American legal law tradition. The distinction has frequently been based on the fact that courts and legislatures are cre-

5. *See* Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) (holding that retroactivity in judicial lawmaking is acceptable).

6. *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that federal statutes should be considered presumptively prospective unless a clear intent to act retroactively is shown); *see also* United States v. Carlton, 512 U.S. 26 (1994) (upholding an amendment to federal tax laws creating retroactive tax liability on past transactions).

7. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (holding that administrative agencies have prospective rulemaking power only).

8. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 311-12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.") (quoting United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982)) (internal quotation marks omitted); Fisch, *supra* note 2, at 1057.

ated to address different sets of problems. Judicial processes are better able to resolve problems affecting limited numbers of parties with claims turning on retrospective issues. Legislatures, on the other hand, are best suited to address complex, multi-faceted, open-ended issues involving a variety of interests and parties.[9]

Proscribing prospective decision-making on the part of courts has the advantage of preventing them from becoming superlegislatures. Requiring that judicial lawmaking processes operate retrospectively constrains judges and counters the anti-majoritarian impact of an unelected, but tenured, judiciary.

Beginning in the 1960s, the Supreme Court altered the traditional view that judicial decisions operate retroactively.[10] In *Chevron Oil v. Huson,*[11] the Court adopted a discretionary approach to adjudicative retroactivity in the civil context.[12] The Court permitted a rule to operate prospectively whenever the new rule of law had the effect of "overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."[13]

In the 1980s, however, the Supreme Court retreated from the idea that judicial decisions might have a purely prospective effect. In *Griffith v. Kentucky*,[14] the Court rejected the *Chevron Oil* test for criminal cases, holding that a discretionary approach to retroactivity was inappropriate in the criminal context because the Constitution prohibits applying different rules to similarly situ-

---

9. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. Rev. 941, 950-51 (1995); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 381-93 (1978) (discussing the role of retroactivity in judicial decisions).

10. *See* Linkletter v. Walker, 381 U.S. 618 (1965) (adopting a discretionary approach to retroactivity in criminal cases); *see also* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962) (discussing discretionary approaches to retroactivity).

One reason for this retreat seemed to lie in the Court's unwillingness to permit new rules of law from drastically altering settled legal relations. More specifically, "[t]he Court's departure from the general rule of adjudicative retroactivity was initially spurred by its reluctance to apply the Warren Court's criminal procedure decisions of the 1960s in a manner that would free the numerous defendants who had been convicted before the announcement of the new legal standards." Fisch *supra* note 2, at 1059 (citation omitted).

11. 404 U.S. 97 (1971).

12. *See* Fisch, *supra* note 2, at 1059.

13. *Chevron Oil*, 404 U.S. at 106 (citations omitted).

14. 479 U.S. 314 (1987).

ated defendants depending on when their case reached the courts.[15] The Court subsequently appeared to limit the applicability of *Chevron Oil* in civil cases with its decision in *James B. Beam Distilling Co. v. Georgia*[16] for reasons similar to those put forth in *Griffith*.[17] The retreat from pure prospectivity was complete in *Landgraf v. USI Film Products*,[18] when the Court declared that its holding in earlier cases established a "firm rule of retroactivity."[19]

The Supreme Court's relatively brief flirtation with adjudicative prospectivity has left the state of the law on this point rather muddled. It is not at all clear whether there is any viability left in the doctrine of discretionary non-retroactivity. What is clear is that due process concerns have not been persuasive in limiting the retroactive effect of judicial lawmaking.[20] Retroactivity thus remains an important component of judicial lawmaking. Decisionmaking in the judicial context is, therefore, "simply a step in the process begun with the articulation of a prospective rule."[21] Retrospective adjudication is, then, an important component of any prospective legislative agenda because a prospective rule "gains force largely by virtue of expectations respecting its retrospective enforcement."[22]

Prospective adjudication, on the other hand, is subject to at least two constitutional objections.

---

15. *Id.* at 322-23.

16. 501 U.S. 529 (1991).

17. *Id.*

18. 511 U.S. 244 (1994).

19. *Id.* at 279 n.32. To be sure, the principle of pure prospectivity seems to have departed as idly as it arrived, for the decision in *Landgraf* does not really explain why the non-retroactivity principle is rejected. The case does not explicitly overrule *Chevron Oil*. Instead, the majority simply declares the end of pure prospectivity. *See id. Cf.* Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) (holding that the Court's interpretation of a rule of federal law is controlling and retroactive).

20. *See* Fisch, *supra* note 2, at 1075.

> Even when the experiment with prospective adjudication under the *Chevron Oil* test presented the opportunity for the Justices to use due process arguments in support of nonretroactivity, none did so. Those Justices who defended adjudicative non-retroactivity based on considerations of fairness, notice, and reliance never argued that these factors were of constitutional magnitude.

Id.

21. Cass, *supra* note 9, at 954.

22. *Id.* at 955. Cass notes, however, that "the perfectly clear prospective rule is chimerical." *Id.* at 956.

In the first place, pure non-retroactivity runs afoul of the case or controversy requirement.[23] A decision that does not affect the rights of the litigants before the court, but instead announces a purely prospective rule applicable to future litigants, cannot be said to be consistent with the federal court's obligation to decide only cases and controversies.[24]

Pure prospectivity is also arguably in conflict with the doctrine of separation of powers. While the principle of *stare decisis* ensures that almost every judicial decision will have some prospective effect, judges possess only "the power to 'say what the law is' [and] not the power to change it."[25] In Justice Scalia's view, retroactivity is necessary to separate the judicial function from the legislative:

> Fully retroactive decisionmaking [is] considered a principal distinction between the judicial and the legislative power: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases."[26]

The idea that retroactivity is necessary to separate the legitimate functions of the branches of government finds expression in the current debate over legislative retroactivity as well.

II. LEGISLATIVE RETROACTIVITY

The Supreme Court has relied on a variety of constitutional provisions in analyzing the problem of legislative retroactivity. In the civil context, the Court first used the Contracts Clause[27] to strike down state legislation that was primarily retroactive in ef-

---

23. *See* Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy" and "a federal court [lacks] the power to render advisory opinions.").

24. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 547 (Blackmun, J., concurring); *see also* Fisch, *supra* note 2, at 1075 (discussing the constitutional objections to retrospective adjudication).

25. *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring) (citation omitted).

26. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union *91 (Boston, Little, Brown & Co. 1868)) (alteration in original).

27. U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). This clause does not apply to the federal government.

fect.[28] In several early cases, the Justices invalidated state legislation that sought to alter contract rights granted by the states.[29] Primary retroactivity was not only prohibited where the offending statute attempted to alter relations between the state and a private party,[30] but also where such legislation sought to alter exclusively private arrangements.[31] Yet, except for a brief period of activity during the Great Depression, the Contracts Clause fell into disuse as a means for assessing the validity of legislative enactments.[32]

The Takings Clause[33] has more recently been used to analyze retroactivity, mainly in cases where a particular legislative enactment is alleged to have the effect of taking private property for

28. The Contracts Clause was designed to prevent state legislatures from interfering with private contractual arrangements. The Framers recognized that the new nation's economic future rested on its ability to provide a stable economic environment. The primary purpose of the Contracts Clause, therefore, was to prevent state legislatures from passing debtor relief laws and, thereby, provide some measure of security to investors. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934) (Hughes, C.J.); *see also* Robert L. Hale, *The Supreme Court and the Contract Clause* (pts. 1-3), 57 Harv. L. Rev. 512, 621, 852 (1944) (discussing the Framers' role in limiting state power to pass laws regulating contracts for property).

29. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (striking down a statute that attempted to change the provisions of a charter granted to a private college); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (invalidating a statute repealing a tax exemption granted by the legislature some years earlier); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (striking down a Georgia statute rescinding an earlier statutory grant of land).

30. *See Dartmouth College*, 17 U.S. (4 Wheat.) 518; *see also* Piqua Branch of the State Bank v. Knoop, 57 U.S. (16 How.) 369 (1853) (invalidating a statute revoking tax exemption received by earlier legislation).

31. *See* Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122 (1819) (voiding a New York debtor relief statute). *But cf.* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1825) (holding valid a debtor relief statute with prospective effect).

32. One of the main reasons for the decline in Contracts Clause cases was simply that states began to draft charters and statutes with reservations allowing the state the right to alter or amend the charter in the future. A closely related factor was the onset of the Court's "substantive due process" phase, wherein the Court took upon itself to assess legislation in light of its inherent or fundamental fairness. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Mugler v. Kansas, 123 U.S. 623 (1887); Munn v. Illinois, 94 U.S. 113 (1877). *But see, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250-51 (1978) (using the Contracts Clause to invalidate legislation altering an employer's obligation to fund a pension plan).

33. U.S. Const. amend V; *id.* amend. XIV.

public use.[34] A retroactive enactment might even be struck down as a Bill of Attainder if it were so particularized as to fall within the scope of the Constitution's prohibitions on such laws.[35]

The validity of *economic* legislation is today most frequently reviewed under the terms of the Due Process Clause.[36] With the end of the *Lochner* era,[37] courts are less likely to strike down legislation if there is a rational relationship between the law and a legitimate government purpose. In fact, the Court has asserted that economic legislation comes with a "presumption of constitutionality" and this is the case even where such legislation upsets settled economic expectations or imposes a new duty or liability on past acts.[38] One asserting a due process violation has the burden of establishing that the legislature has acted in an "arbitrary and irrational way."[39] Economic legislation is, therefore, not subject to close scrutiny under the Due Process Clause. Rather, it is enough that the legislation at issue have some rational economic basis for its enactment:

---

34. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (recognizing that, if state regulations burdening land use not proscribed by existing state rules, then the affected landowner may make a takings claim for compensation); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (holding that the Takings Clause does not bar retrospective application of a federal health and safety act where such application spreads business costs in a rational manner); *see also* Gerald Gunther, Constitutional Law 465-90 (12th ed. 1991) (discussing limits of the Takings Clause as a means of restraining retroactivity).

35. U.S. Const. art. I, § 9, cl. 3; *id.* § 10, cl. 1; *see, e.g.*, United States v. Lovett, 328 U.S. 303 (1946) (invalidating a federal statute discontinuing salaries of certain government employees).

36. There are, in fact, two Due Process Clauses, one applying to the federal government, U.S. Const. amend V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."), and a second applicable to the states, U.S. Const. amend XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."). This Article will use the term "Due Process Clause" to refer to both clauses collectively.

37. In *Lochner v. New York*, 198 U.S. 45, 64 (1905), the Supreme Court struck down a state law limiting the workweek for bakers. The so-called *"Lochner* era" was characterized by a refusal on the part of the Court to sanction legislation altering economic relations in the absence of a substantial state interest. Retroactive legislation was, therefore, frequently invalidated. *See* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 102-23 (1993) (contrasting the *Lochner* era approach to retroactivity with the modern approach).

38. *Usery*, 428 U.S. at 15-16.

39. *Id.* at 15.

> [R]etroactive legislation does not have to meet a burden not faced by legislation that has only future effects. "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.[40]

The Supreme Court has usually used the Ex Post Facto Clauses to test the validity of legislation in the *criminal* context. The Constitution actually contains two Ex Post Facto Clauses, one of which applies to the states,[41] and the other to the federal government.[42] In *Calder v. Bull*,[43] the Court determined that the Ex Post Facto Clauses only prohibit the passage of retroactive criminal laws. They are no bar to retroactive civil statutes, since these are adequately dealt with by the Contracts Clause.[44]

---

40. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984) (citation omitted) (quoting *Usery*, 428 U.S. at 16-17).

41. U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law.").

42. U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

43. 3 U.S. (3 Dall.) 386 (1798).

44. *See id.* at 390.

> I do not think [the Ex Post Facto Clause] was inserted to secure the citizen in his private rights, of either [private] property, or contracts. The prohibitions not to make any thing but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to protect private rights; but the restriction not to pass any ex post facto law, was to secure the person of the subject from injury, or punishment, in consequence of such law.

Id.

The Supreme Court's assertion in *Calder* that the Ex Post Facto Clause applied only to the criminal context seems to be at odds with the views expressed of many of the Framers. It seems clear that the members of the Constitutional Convention expected that the Ex Post Facto Clause would apply equally to the civil and criminal context. *See* Leonard W. Levy, Original Intent and the Framers' Constitution 65-74 (1988) (discussing *Calder*'s conflict with the Framers' expectations); *see also* Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 324-36 (1992-1993); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315, 322-31 (1922).

Some years after *Calder*, Justice Johnson attached an appendix to his dissent in *Saterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 414-16 (1829) (Johnson, J., dissenting), in which he strenuously argued that *Calder* was wrongly decided to the extent that it excluded civil legislation from the constitutional prohibition on ex post facto lawmaking, *id.*

Ex post facto laws are those which criminalize conduct that was lawful when performed, or which impose a harsher penalty for unlawful conduct than was applicable at the time the unlawful act was committed.[45] The Supreme Court has been careful, however, to separate ex post facto criminal laws, which are of necessity retroactive in nature, from other laws having secondary retroactive effects.[46] Every ex post facto law must of its nature be retrospective, but not every retroactive law is an ex post facto law.[47] Thus, while legislatures may not increase the punishment or create a new crime for a past act, they may enact a statute lessening the

---

45. Ex post facto laws include:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. (3 Dall.) at 390.

46. *Compare* Miller v. Florida, 482 U.S. 423 (1987) (prohibiting a retroactive change in sentencing regulations that had the effect of increasing an offender's sentence); Weaver v. Graham, 450 U.S. 24 (1981) (striking down a statute reducing "good time credits" available to a prisoner); Lindsey v. Washington, 301 U.S. 397 (1937) (barring a retroactive change in a law that replaced a discretionary fifteen year sentence with a mandatory fifteen year sentence); Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967), *aff'd* 390 U.S. 713 (1968) (per curiam) (prohibiting a state from retroactively altering "good time" policy), *with* Malloy v. South Carolina, 237 U.S. 180 (1915) (upholding a statute changing a penalty from death by hanging to death by electrocution); Duncan v. Missouri, 152 U.S. 377 (1894) (upholding a statute altering rules of criminal procedure where a change did not affect the defendant's substantive rights).

47. An interesting case demonstrating the difficulties facing courts seeking to decide whether a criminal statute is primarily retroactive in effect is *Dobbert v. Florida*, 432 U.S. 282 (1977). Here, the defendant, Dobbert, was convicted of a capital offense, but the statute under which he was convicted was found to be constitutionally defective in the way it imposed the death sentence. *See id.* The state legislature subsequently enacted a new statute and the defendant was again sentenced to death. The Supreme Court upheld the second sentence on the grounds that Dobbert had notice of the application of the death sentence. The Court regarded the second statute as "ameliorative" in that it actually made the imposition of the death sentence more difficult. *Id.* at 294. The dissent argued, however, that the second statute was an ex post facto law, at least with respect to Dobbert, since there was not a constitutionally valid death penalty in effect at the time he committed his crime. The second statute was, then, entirely retroactive in nature. *See id.* at 304-11 (Stevens, J., dissenting).

penalty for, or making lawful, past conduct that was unlawful when committed.[48]

III. The Dual Dichotomy of Retroactive Lawmaking

The Supreme Court's approach to legislative retroactivity is almost schizophrenic. In the criminal context, the Court has been strident in striking down legislation that criminalizes or increases the penalties for past acts. In the civil context, however, the Court has been almost somnolent, permitting a wide degree of retroactivity where economic legislation is concerned. It is clear that, where economic interests are at stake, the Court permits majoritarian concerns to win out. Economic legislation need only satisfy a standard of reasonableness.[49] In the criminal context, on the other hand, "rule of law concerns" predominate, preventing retroactivity from infecting legislation designed to impact liberty interests.[50]

A number of reasons have been put forward for this dichotomy. Rule of law concerns are frequently cited as the primary reason for the difference in approaches. Preventing retroactivity in the criminal context eliminates the possibility that the legislature might single out particular individuals or political opponents for punishment. Yet, it seems clear that retroactivity in the civil context might be equally punitive—legislatures might punish individuals or opponents equally effectively by making disfavored individuals bear the cost of regulatory or revenue measures.

It is also argued that individuals should have the right to rely on the law existing at the time of a transaction, and that legislative changes which penalize or alter the character of past conduct violate the principle of individual autonomy inherent in a liberal democracy.[51] There is, in other words, a reliance interest present

48. *See Calder*, 3 U.S. (3 Dall.) at 391; *see also* Rooney v. North Dakota, 196 U.S. 319, 325 (1905) (holding that a statute that does not create a new offense nor increase the penalty of an existing offense, but rather "mitigates the rigor of the law in force at the time a crime was committed," does not violate the Ex Post Facto Clause); *supra* note 45 (defining ex post facto laws).

49. *See* Krent, *supra* note 4, at 2152.

50. *Id.*

51. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring); *Weaver*, 450 U.S. at 28-29; *see also* Bryant Smith, *Retroactive Laws and Vested Rights*, 6 Tex. L. Rev. 409, 417-19 (1928) (discussing the requirement of fair notice).

that is sufficient to limit most lawmaking to a prospective application.

Fairness concerns also dictate that one should have notice of changes in the law.[52] Giving individuals fair notice not only allows them to predict the consequences of their conduct; it also increases respect for the rule of law itself. Unbridled retroactivity leads to a conception of law as an arbitrary exercise of raw power.

Retroactivity analysis requires a more nuanced approach, however. While a concern for fairness and adequate notice is certainly important, the doctrine of retroactivity cannot be easily cabined into a strictly temporal construct. In the first place, almost all lawmaking has retrospective effects. This is particularly true of economic legislation. Nominally prospective lawmaking can substantially affect the value of assets already purchased as much as any purely retrospective enactment.[53] As a result, a "binary construct," wherein rules are categorized as either retroactive or prospective, is artificial and "too facile."[54]

Moreover, a number of commentators have demonstrated that fairness, notice or rule of law concerns do not adequately address the problems of determining the validity of a particular legal rule. It is not at all clear, for example, that retroactivity in criminal lawmaking affords any greater opportunity for vindictiveness than might be present in the civil context; retroactivity in both contexts may subject disfavored groups or individuals to unfair treatment.[55]

---

52. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931).

53. *See* Saul Levmore, *The Case for Retroactive Taxation*, 22 J. Legal Stud. 265, 266-67 (1993); *see also* Cass, *supra* note 9, at 956-57.

> Plainly, in a world of positive costs, all decisions have both retrospective and prospective effects, changing the immediate fortunes of some people while also changing the future behavior of others. Legislative rules, even if effective only at a future date, alter the expected value of particular classes of property—including human capital—at the moment of enactment (if not sooner). The change in expected future values necessarily changes the *present* value of the affected property. Judicial decisions, especially on matters for which authoritative precedents and formal rules leave particularly wide scope for interpretation, are routinely understood to do more than simply adjust the immediate fortunes of litigants. These determinations also suggest a course of future decisions and thus are expected to alter behavior in the future. A rigid separation of decisions with backward-looking and those with forward-looking effects, thus, cannot be sustained.

Id. (citations omitted).

54. Fisch, *supra* note 2, at 1067.

55. *See* Krent, *supra* note 4, at 2160.

The reliance argument is similarly flawed. Few actors "rely" on criminal statutes when deciding upon a course of conduct: "given the prosecutor's discretionary choice of charges to file, the labryrinthine operation of sentencing guidelines, and the availability of complex good-time credit programs within prisons, few offenders are likely to predict with any precision their actual stay in prison."[56] The irony, however, is that economic actors do rely on legislative enactments when ordering their affairs to a far greater degree than criminal actors; yet the Supreme Court has never sought to protect the reliance interest in the civil context to the same extent as it has in the criminal.[57]

Determining the validity of a retroactive lawmaking is, therefore, more complicated than merely determining whether a rule has "primary" or "secondary" retroactive effects. The inadequacy of a purely temporal distinction has led a number of scholars to attempt a re-examination of the underlying justifications for retroactivity. Most recognize that some element of retroactivity seems inherent in all lawmaking, and argue that the real task is to set forth a means to determine the degree of retroactivity that is appropriate under the circumstances. In *United States v. Carlton*,[58] Justice Scalia essayed an answer by hinting that retrospective legislation may be invalid if it is "too retroactive."[59] Somewhat related to this line of reasoning is the argument put forward by one scholar that courts should use an "equilibrium approach." This ap-

---

56. Krent, *supra* note 4, at 2162-63; *see also* John Calvin Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985) (arguing that the demise of strict construction and the comtemporaneous rise in judicial discretion in interpreting penal statutes has led to sometimes unpredictable sentencing of criminals).

57. *See* United States v. Carlton, 512 U.S. 26, 30-31 (1994).

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . .
>
> To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . 'The retroactive, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former . . . .' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

Id. (citations omitted).

58. 512 U.S. 26.

59. *Id.* at 39-40.

proach requires that courts address the problem of retroactivity by focusing on the degree to which a new rule of law disturbs the legal context into which the new rule is inserted.[60] Under this theory, the introduction of a new legal rule should be disfavored where it disrupts a relatively stable legal context.[61] Where the legal context is unstable, legal change is predictable, and thus permissible to a greater extent.[62] Still others assert that some degree of retroactivity is desirable because it is efficient in that it increases aggregate wealth.[63]

The articles which follow address the prism of criminal lawmaking.

Professor Dan Kahan begins the analysis with "two claims and a puzzle." He first challenges liberal arguments against retroactivity on the grounds that an absolute prohibition on retroactivity would actually restrict, rather than expand, society's liberty interests. In addition, Professor Kahan argues that American criminal law tolerates exactly the type of retroactivity that the liberal conception says is intolerable. Professor Kahan then puts forth the proposition that the Ex Post Facto Clause serves a channeling function, confining retroactive lawmaking to the judiciary, the institution best able to wield the power wisely.

Professor Harold Krent continues this line of thought by analyzing the problem of retroactivity in judicial lawmaking in light of the Supreme Court's decision in *Bouie v. City of Columbia*.[64] *Bouie* held that the Due Process Clause made ex post facto principles applicable to judicial lawmaking. Thus, an unforeseeable judicial enlargement of a criminal statute might run afoul of the Ex Post Facto Clause in the same way as a legislative enactment.[65] Professor Krent, however, shows that courts have utilized several devices to avoid *Bouie*'s impact. He then investigates the Supreme Court's

60. Fisch, *supra* note 2, at 1097-118.

61. *See id.* at 1105-08.

62. *See id.* at 1108-18. This analysis bears some relationship to reliance theories of retroactivity, although the strict binary temporal construct is abandoned.

63. *See* Michael J. Graetz, *Retroactivity Revisited*, 98 Harv. L. Rev. 1820, 1825 (1985); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 615-616 (1986); Levmore, *supra* note 53, at 273-78. Kaldor-Hicks efficiency is the relevant theory of efficiency in this regard. *See generally* Richard A. Posner, Economic Analysis of Law 14-17 (5th ed. 1997) (discussing the economic advantages of retroactive lawmaking).

64. 378 U.S. 347 (1964).

65. *Id.* at 353-54.

rather contradictory approach to retroactivity in the judicial and legislative contexts, and concludes that the interest group theory provides the most plausible explanation for the difference.

Together, these two articles help illuminate the dual dichotomy that infuses the problem of retroactivity. More importantly, they go a long way toward explaining just how retroactivity may be more comfortably accommodated in our system of lawmaking.