Retroactive Civil Legislation

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INTRODUCTION

In June, 1994, the U.S. Supreme Court upheld the federal government's retroactive revision of an estate tax law, leaving the estate of Willametta K. Day with a $631,000 loss. Despite the loss being the direct result of the late Ms. Day's executor, Jerry Carlton, acting in reliance on the correct and only reading of the original statute, the Supreme Court held that the retroactive amendment was neither harsh nor oppressive because "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary." The Court only required that Congress' purpose be reasonably related to a legitimate governmental purpose in order for the retroactive legislation to pass constitutional muster.

What a pretty pass we have come to. A little more than twenty years ago Justice Marshall wrote for a unanimous Court in Grayned v. City of Rockford. Because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly and must provide explicit standards for those who apply them.

This is redolent with decency, the sort of decency we all believe the founding fathers built into the Constitution, the sort of decency society should be founded on. But, sadly, the 1994 Supreme Court seemed to have little more than expediency on its mind in Carlton. Justice Scalia accurately described it as "bait-and-switch taxation" but nevertheless concurred with the decision.
Despite its never expressly saying so, the reasoning in Carlton makes it clear that the Supreme Court has changed its jurisprudence of retroactive legislation. At such a juncture, a summary and assessment is called for. The history and variety of prior arguments and decisions needs to be surveyed and summarized. The nature and extent of the Court's jurisprudential change need to be articulated clearly and the consequences estimated. These are the goals of this article.

The Constitution contains prohibitions against the enactment of *ex post facto* laws at both the federal and state level. Part I covers the history of the interpretation of *ex post facto* laws, from the arguments over the drafting and ratification of the Constitution, through the establishment of the bifurcated approach to criminal and civil law. Part II traces the development of alternative grounds for policing retroactive civil legislation, up to the Supreme Court's 1994 decision in Carlton. Part III examines Carlton against the background of this century's retroactive tax cases. Part IV concludes the article with a summary of the potential consequences should Carlton and its standard survive as law and offers a framework for an alternative analysis more in keeping with equity and tradition.

I. THE EARLY UNITED STATES HISTORY, FROM THE ARGUMENTS OVER THE DRAFTING OF THE CONSTITUTION THROUGH THE ESTABLISHMENT OF THE BIFURCATED APPROACH TO CRIMINAL AND CIVIL LAW

A. The Constitutional Convention

The U.S. Constitution, in Sections 9 and 10 of Article I, expressly prohibits both federal and state governments from enacting *ex post facto* laws. These sections provide:

No bill of attainder or *ex post facto* law shall be passed.11
No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts 12

Although the ban on *ex post facto* legislation has come to be interpreted as reaching criminal law only, it is a legitimate question whether or not that was the interpretation intended by the Framers.13

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Ginsburg. *Id.* at 2020-24. Justice O'Connor concurred separately. *Id.* at 2024-26 (O'Connor, J., concurring). Justice Scalia, joined by Justice Thomas, also concurred separately. *Id.* at 2026-27 (Scalia, J., concurring).

10. It is now settled that the *ex post facto* prohibitions do not reach civil law. *See* Oliver P Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV 315, 315 (1921) ("This doctrine of *Calder v. Bull* is so well settled as to have become one of the commonplaces of American constitutional law.").
11. U.S. CONST. art. I, § 9, cl. 3.
13. *See generally* Field, *supra* note 10, at 317-22 (describing the legislative debates during
At the constitutional convention there was considerable sentiment about having no mention of _ex post facto_ laws in the Constitution. As Madison records, on Wednesday, August 22, 1787, the following was said at the convention:

Mr. Gerry and Mr. McHenry moved to insert, after the second Section Article 7 the clause following, to wit: "The legislative shall pass no bill of attainder, nor any _ex post facto_ law."  

Mr. Gerry urged the necessity of this prohibition, which he said was greater in the National than the State Legislature; because the number of members in the former being fewer, they were on that account the more to be feared.  

Mr. Gouverneur Morris thought the precaution as to _ex post facto_ laws are necessary but essential as to bills of attainder.  

Mr. Ellsworth contended that there was no lawyer, no civilian, who would not say that _ex post facto_ laws were void of themselves. It cannot, then, be necessary to prohibit them.  

Mr. Wilson was against inserting anything in the constitution, as to _ex post facto_ laws. It will bring reflection on the constitution and proclaim that we are ignorant of the first principles of legislation, or our constitutional government that will be so.  

The section relating to bills of attainder was agreed to without dissent. Bills of attainder are retrospective laws and clearly are criminal only. Would they have drawn such a sharp distinction between bills of attainder and _ex post facto_ laws if the latter, too, were thought to pertain only to criminal laws? But discussion of the _ex post facto_ prohibition continued:

Mr. Carroll remarked that experience overruled all other calculations. It had proved that, in whatever light they might be viewed by civilians or others the State Legislatures had passed them, and they had taken effect.
Could he have been talking about criminal laws only? The discussion continued:

Mr. Wilson. If these prohibitions in the State Constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle, but will differ as to its application.

Mr. Williamson. Such a prohibitory clause is in the Constitution of North Carolina; and though it has been violated, it has done good there, and may do good here, because the Judges can take hold of it.

Dr. Johnson thought the clause unnecessary, and implying an improper suspicion of the national legislature.

Mr. Rutledge was in favor of the clause.19

McHenry's notes for the same day are more condensed:

Gouverneur Morris Willson Dr. Johnson etc thought the first [prohibition of ex post facto laws] an unnecessary guard as the principles of justice law et[c] were a perpetual bar to such. To say that the legislature shall not pass an ex post facto law is the same as to declare they shall not do a thing contrary to common sense—that they shall not cause that to be a crime which is no crime.20

On Tuesday, August 28, 1787, Madison recorded the following [Colonel Mason had been talking about the need for the federal government to interfere with contracts, for example, in statutes of limitations on promissory notes]:

Mr. Wilson. The answer to these objections is, that retrospective interferences only are to be prohibited.

Mr. Madison. Is not that already done by the prohibition of ex post facto laws which will oblige the Judges to declare interferences null and void?21

Of this exchange, Field wrote:

[Madison] is evidently of the impression that ex post facto applies to civil as well as to criminal matters. It is odd that no member of the Convention took the trouble to inform him that he was laboring under a serious misapprehension.22

The discussion continued:

Mr. Rutledge moved instead of Mr. King's motion, to insert "nor pass bills of attainder nor retrospective laws 23

20. 1 BENTON, supra note 15, at 987. The note apparently uses crime as an example only (although this might be disputed) since no mention had yet been made to limit ex post facto laws to criminal laws only. It is somewhat similar in this respect to the popular passage from Blackstone. See 1 WILLIAM BLACKSTONE, COMMENTARIES *46. See also infra notes 33-34.
22. Field, supra note 10, at 319.
23. 1 BENTON, supra note 15, at 1084; 2 FARRAND, supra note 15, at 440; MADISON JOURNAL,
Rutledge's motion carried, seven to three.\textsuperscript{\ref{24}} At this stage it seems fairly clear that the prohibition of \textit{ex post facto} legislation was understood to apply to both civil law and criminal law. It is clear, for example, that Madison and Wilson were using \textit{ex post facto} and \textit{retrospective} as synonyms, interchangeably.\textsuperscript{\ref{25}}

However, that night, Mr. Dickinson, "a lawyer of repute,"\textsuperscript{\ref{6}} did some homework, the results of which Madison reported the next day, Wednesday, August 29, 1787:

Mr. Dickinson mentioned to the House that on examining Blackstone's Commentaries, he found that the term "\textit{ex post facto}" related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases; and then some further proposition would be requisite.\textsuperscript{\ref{27}}

If Dickinson thought this limited, criminal connotation was generally understood, would he have made this pronouncement? There is no indication that his reliance on Blackstone was held authoritative at that time and controlling of the meaning of this language in the inchoate constitution. Field—who uses "in the technical sense" as meaning "\textit{ex post facto}" restricted to criminal laws only—wrote:

It is hard to escape the conclusion that at least the members of the convention did not have in mind the technical meaning of \textit{ex post facto} laws.\textsuperscript{\ref{28}}

When the subject came up again, Friday, September 14, 1787, the exchange suggests a stand-off, both as to meaning and intent:

Colonel Mason moved to strike out from the clause (Article 1, Sect. 9,) "No bill of attainder, nor any \textit{ex post facto} law, shall be passed," the words nor any "\textit{ex post facto}" law. He thought it not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature; and no Legislature ever did or can altogether avoid them in Civil Cases.

Mr. Gerry seconded the motion; but with a view to extend the prohibition to "civil cases," which he thought ought to be done.\textsuperscript{\ref{29}}

\textit{supra} note 16, at 621.


\textsuperscript{\ref{25}} As to Madison's report of the difference between his report and that of the printed record, Farrand argues on the basis of other memoirs that the record, not Madison's report, was accurate. See 2 FARRAND, \textit{supra} note 15, at 440 n.19. This merely emphasizes the lack of a distinction in the usage of those present.

\textsuperscript{\ref{26}} Field, \textit{supra} note 10, at 320.

\textsuperscript{\ref{27}} MADISON JOURNAL, \textit{supra} note 16, at 625-26; 3 MADISON PAPERS, \textit{supra} note 14, at 1400.

\textsuperscript{\ref{28}} Field, \textit{supra} note 10, at 320.

But the motion was unanimously defeated. On the basis of records of the
convention, Field wrote:

[The Framers] did not give evidence of using the term *ex post facto* in a technical
sense. The tendency seemed to be to impart a civil meaning to the term; there is
no evidence of the term being used in different connections.\(^{30}\)

It is worth examining what Blackstone actually wrote that motivated Mr.
Dickinson and Alexander Hamilton in *The Federalist*,\(^{31}\) and later bolstered
significant arguments of the Supreme Court on the *ex post facto* prohibition.\(^{32}\)
As will be seen, it scarcely justifies the restricted interpretation we have been left
with. Blackstone wrote:

There is still a more unreasonable method than this, which is called making of laws
*ex post facto*; when after an action (indifferent in itself) is committed, the legislator
then for the first time declares it to have been a crime, and inflicts a punishment
upon the person who has committed it. Here it is impossible that the party could
foresee that an action, innocent when it was done, should be afterwards be
converted to guilt by a subsequent law he had therefore no cause to abstain from
it, and all punishment for not abstaining must of consequence be cruel and unjust.
All laws should therefore be made to commence *in futuro*, and be notified before
their commencement; which is implied in the term "*prescribed.*"\(^{33}\)

The criminal punishment here is an illustrative argument, not a limitation. No
one doubts that the most egregious abuse of retroactive legislation would be
criminal.

That the reasoning is completely general can be seen from the immediately
preceding passage, which is focussed on the need for notice so that denizens can
follow governmental edicts.

It is likewise "a rule *prescribed.*" Because a bare resolution, confined in the
breast of the legislator, without manifesting itself by some external sign, can never
be properly a law. It is requisite that this resolution be notified to the people who
are to obey it. But the manner in which this notification is to be made, is matter
of very great indifference. It may be notified, *viva voce*, by officers appointed for
that purpose, as is done with regard to proclamations, and such acts of parliament
as are appointed [46] to be publicly read in churches and other assemblies. It may
lastly be notified by writing, printing, or the like; which is the general course taken
with all our acts of parliament. Yet, whatever way is made use of, it is incumbent
on the promulgators to do it in the most public and perspicuous manner; not like

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(1 Dall.) 386, 396 (1798).
33. 1 *BLACKSTONE, supra* note 20, at *46.*
Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people.34

Neither Blackstone’s argument nor the emperor Caligula’s practice was limited to criminal laws. Blackstone’s only limitation in this paragraph is that the action subject to the retroactive legislation be “indifferent in itself.”35 That is, that the action not be something the common law, or common morality, would constrain without the aid of statute. The restriction then is on the sort of statute that gives notice otherwise unavailable, and not merely declaratory of common law.36 Nor need we take this analysis of Blackstone’s writing as peculiar to the late twentieth century Justice Johnson, in his commentary on the meaning of the term “ex post facto” following the 1829 case Satterlee v. Mathewson,37 made these very arguments and more.38

Further evidence of the generally accepted meaning of ex post facto entertained by the politically active in 1787 comes from a letter by Messrs. Ellsworth (later to become Chief Justice of the Supreme Court) and Sherman to the Governor of Connecticut about the draft constitution. Regarding the restraints on states’ issuing paper money, Ellsworth and Sherman included the language: “or impairing the obligation of contract by ex post facto laws.”39 Clearly this use of ex post facto could not be limited to criminal laws only.

Among the writings of those opposed to the constitution, there is a curious argument, indicative of a broader understanding of the scope of ex post facto. One letter writer, “Centinel”, specifically opposed the inclusion of the ex post facto prohibition.40 Generally, he argued, governments ought not pass ex post facto laws “as they are generally injurious and fraudulent; Yet there are occasions when such laws are not only just but highly requisite.”41 His example was that “the Congress under the new constitution are precluded from all controld

34. Id. at **45-46.
35. Id. at *46.
37. 27 U.S. (2 Pet.) 380, 416 n.a (1829) (Johnson, J., concurring).
38. Justice Johnson’s commentary begins by giving a brief history of linguistic usage of the term ex post facto. Id. at 416a-b n.a. Following this linguistic history, he continues with a long inventory of secondary sources. Id. at 416b n.a. Then he uses recent precedent, and he quotes Justice Raymond to the effect that he would not apply a stock registration statute retroactively. Id. at 416b n.a (citing Wilkinson v. Meyer, 88 Eng. Rep. 127 (K.B. 1723)).
39. 3 FARRAND, supra note 15, at 99-100; Field, supra note 10, at 331.
41. Id.
[sic] over transactions prior to its establishment,” which will leave “public defaulters” with “unaccountable millions” of uncollectible United States debt.Apparently some believed that the prohibition was placed in the constitution precisely for the purpose of relieving such debtors of their obligations to the federal government. One writer, named “a Countryman,” clearly took this to be Centinel’s argument: “[H]owsoever, my old neighbour from Pennsylvania tells me, that this ex post facto law business was put in, not because it was a bad thing, but to place it out of our power of calling to account, people who have the public monies in their hands” These arguments may look implausible at first glance, but they presuppose an understanding of the ex post facto prohibition in accord with that of almost everyone at the convention, at least, namely, that it reached civil as well as criminal legislation.

The appearance of paranoia in these anti-federalist arguments is dispelled when one reviews the records of the state ratifying conventions. The ex post facto prohibition caused a lively debate in Virginia, and it was entirely to do with the redemption of Continental paper dollars. Continental dollars counted as governmental debts, promissory notes of the government, but they had depreciated greatly, according to George Mason “to a thousand for one.” Some states and some individuals had vast hordes of the paper, presently worthless, but if redeemed at face value, worth an amount which “will surpass the value of the property of the United States.” The states of course recognized that to redeem the paper in specie would require a tax falling on them.

42. Id.
44. For a record of the debate, see 3 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 460-81 (J.B. Lippincott ed., 1941) (2d ed. 1836).
45. Id. at 472.
46. At the time, Patrick Henry:

asked gentlemen who had been in high authority, whether there were not some state speculations on this matter. He had been informed that some states had acquired vast quantities of that money, which they would be able to recover in its nominal value of the other states.

Mr. MADISON admitted there might be some speculations on the subject. He believed the old Continental money was settled in a very disproportionate manner.

47 Id. at 471.
48 Id. at 473. Mr. Henry said, “[h]ere is an enormous demand, which your children, to the tenth generation, will not be able to pay.” Id. at 474.

As they [the states] could not emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass ex post facto laws, or impair the obligation of contracts,—though these restrictions were founded on good principles, yet he feared they would have this effect; that this state would be obliged to pay for her share of the Continental money, shilling for shilling.
wanted was called a scaling law, making the paper worth only its market value, rather than its face value. However, this would be an *ex post facto* law, accordingly prohibited. James Madison replied to Patrick Henry's opening salvo,\(^4\) but in terms of Article 6, and without mention of the *ex post facto* prohibition.\(^5\) The reply seems peculiarly inapt, for Article 6 seems only to reinforce the obligation to redeem in specie, exactly what was causing the problem. What was needed was an *ex post facto* law devaluing the Continental paper dollars, but that was prohibited by the proposed constitution. George Mason stated all this in no uncertain terms.\(^5\) Madison's response was to defend

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*Id.*

49. Mr. Henry's concern was that:

[The states] could not emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass *ex post facto* laws, or impair the obligation of contracts,—though these restrictions were founded on good principles, yet he feared they would have this effect; that this state would be obliged to pay for her share of the Continental money, shilling for shilling. He asked gentlemen who had been in high authority, whether there were not some state speculations on this matter. He had been informed that some states had acquired vast quantities of that money, which they would be able to recover in its nominal value of the other states.

*Id.* at 471.

50. *Id.* at 471-72. Mr. Madison's argument proceeded as follows:

Mr. Madison admitted there might be some speculations on the subject. He believed the old Continental money was settled in a very disproportionate manner. It appeared to him, however, that it was unnecessary to say anything on this point, for there was a clause in the Constitution which cleared it up. The first clause of the 6th article provides that "all debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the Confederation." He affirmed that it was meant there should be no change with respect to claims by this political alteration; and that the public would stand, with respect to their creditors, as before. He thought that the validity of claims ought not to diminish by the adoption of the Constitution. But, however, it could not increase the demands on the public.


51. See 3 ELLIOT, *supra* note 44, at 472-73. Mr. Mason's argument concerned the following:

The clause which has been read, as a sufficient security, seemed to him satisfactory as far as it went; that is, that the Continental money ought to stand on the same ground as it did previously, or that the claim should not be impaired. The money had at last depreciated to a thousand for one. The intention of state speculation, as well as individual speculation, was to get as much as possible of that money, in order to recover its nominal value. The means, says he, of settling this money, were in the hands of the old Congress. They could discharge it at its depreciated value. Is there that means here? No, sir, we must pay at shilling for shilling, or at least at the rate of one for forty. The amount will surpass the value of the property of the United States. Neither the state legislatures nor Congress can make an *ex post facto* law. The nominal value must therefore be paid. Where is the power in the new government to settle this money so as to prevent the country from being ruined? When they prohibit the making of *ex post facto* laws, they will have no authority to prevent our being ruined by paying that money at its nominal value.
Article 6, but still he made no mention of Article I, Sections 9 or 10. Henry came right back, eloquent, if prolix:

The question arising on the clause before you is, whether an act of the legislature of this state, for scaling money, will be of sufficient validity to exonerate you from paying the nominal value, when such a law, called ex post facto, and impairing the obligation of contracts, is expressly interdicted by it. Your hands are tied up by this clause, and you must pay shilling for shilling; and, in the last section, there is a clause that prohibits the general legislature from passing any ex post facto law; so that the hands of Congress are tied up, as well as the hands of the state legislatures.

This money might be scaled, sir; but the exclusion of ex post facto laws, and laws impairing the obligation of contracts, steps in and prevents it.

There can be no mistaking that all who had spoken so far, Patrick Henry, James Madison, George Mason, and George Nicholas, had no doubt that the proposed constitution’s ex post facto prohibitions extended to this civil matter.

At this stage, Governor Randolph entered the fray, arguing strenuously that there was no danger because the ex post facto prohibition applied to “criminal matters alone.” Randolph stated, “[e]x post facto laws, if taken technically, relate solely to criminal cases [because] [t]he same clause provides that no bill of attainder shall be passed. It shows that the attention of the Convention was drawn to criminal matters alone.” He then continued to argue that the Continental dollars were debts of the federal Congress, not of the states, so the states’ inability to make scaling laws because of the prohibition on impairing the obligation of contracts did not matter. The Congress could make an ex post facto law. George Mason replied with an harangue:

Without some security against it, we shall be compelled to pay it to the last particle of our property. Shall we ruin our people by taxation, from generation to generation, to pay that money? Should any ex post facto law be made to relieve us from such payments, it would not be regarded, because post facto laws are interdicted in the Constitution. The clause under consideration does away the pretended security of the clause which was adduced by the honorable gentleman. This enormous mass of worthless money, which has been offered at a thousand for one, must be paid in actual gold and silver at the nominal value.

Id.

52. Id. at 473.
53. Id. at 473-75.
54. Id. at 477 (“Have they the right to make ex post facto laws? No, sir!”).
55. Id.
56. Id. See 3 FARRAND, supra note 15, at 328. The argument so obviously fails to prove the ex post facto prohibition is exclusively criminal as to look disingenuous; in the adjacent section 10, considered concurrently, the ex post facto provision was adjacent to the obviously commercial interdiction of laws impairing the obligation of contracts. Equally then, the Convention was focusing on civil matters alone.
57. 3 ELLIOT, supra note 44, at 478-79.
58. Id.
They cannot pay it any other way than according to the nominal value; for they are prohibited from making *ex post facto* laws; and it would be *ex post facto*, to all intents and purposes, to pay of creditors with less than the nominal sum which they were originally promised. But the honorable gentleman has called to his aid technical definitions. He says, that *ex post facto* laws relate solely to criminal matters. I beg leave to differ from him. Whatever it may be at the bar, or in a professional line, I conceive that, according to the common acceptation of the words, *ex post facto* laws and retrospective laws are synonymous terms. Are we to trust business of this sort to technical definition? The contrary is the plain meaning of the words. Congress has no power to scale money. Whatever may be the professional meaning, yet the general meaning for *ex post facto* law is an act having retrospective operation. This construction is agreeable to its primary etymology Will it not be the duty of the federal court to say that such laws are prohibited? This goes to the destruction and annihilation of all citizens of the United States, to enrich a few. Are we to part with every shilling of our property, and be reduced to the lowest insignificancy, to aggrandize a few speculators?

Madison replied again, very calmly, but again without mentioning *ex post facto* laws. Mason and Randolph had another brief and rather desultory exchange, adding nothing, and the discussion moved to the prohibition on states’ laying import or export tariffs.

In North Carolina, the problem seems to have been not so much the Continental paper dollars, but the state’s own paper. Mr. Cabarrus and Mr. Bloodworth raised the issue, asking “if the payment of sums now due be *ex post facto*?” The reply is striking, as it came from Mr. Iredell, later a Justice on the Supreme Court, one of the four justices to decide *Calder v Bull*. Iredell replied:

> There is nothing in the Constitution which affects our present paper money. It prohibits, for the future, the emitting of any, but it does not interfere with the paper money now actually in circulation in several states. There is an express clause which protects it. It provides that there shall be no *ex post facto* law. This would be *ex post facto*, if the construction contended for [by Carbarrus] were right.

The *ex post facto* prohibition was mentioned at only one other state ratifying convention, New York’s. There, a Mr. Lansing proposed an amendment confining the ban on *ex post facto* legislation to criminal laws only, so that it “shall not be construed to prevent calling public defaulters to account.” Such a proposal, of course, only makes sense if the general understanding was otherwise. As Field wrote, the records of the state conventions only confirm the

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59. *Id.*
60. *Id.* at 480-81.
61. *Id.* at 481-82.
62. 4 *ELLIO T*, *supra* note 44, at 184. Mr. Carbarrus suggested that it was. *Id.*
63. *Id.* at 185.
64. 2 *ELLIO T*, *supra* note 44, at 407.
inescapable impression we get from the records of the federal convention: "One can hardly feel that the term ex post facto was intended to be limited to criminal cases when it was embodied in the text of the Constitution." In fact, only Dickinson, Randolph, and Lansing mentioned a restricted meaning and many others spoke in terms that could only make sense in the broader meaning that includes civil legislation at least as much as criminal. Those present day scholars who advocate interpreting the Constitution only according to the original meaning of its terms should, accordingly, have to acquiesce in a non-restrictive meaning of the ex post facto provisions.

B. Early Cases Defining the Scope of Ex Post Facto


It was not long before any doubt about whether the scope of the ex post facto prohibition included civil legislation was resolved by the Supreme Court. Calder v. Bull is usually considered to be the origin of the accepted interpretation of the constitution's ban on ex post facto laws in Article I, Sections 9 and 10, applying only to criminal laws. As such, it is hardly a very sound basis for such a severe limitation on our rights, or correspondingly, such an expansion of governmental power.

On March 21, 1793, the Court of Probate for Hartford, Connecticut, refused to admit the will of Normand Morrison to probate. That meant that certain lands that Morrison had devised to Mrs. Bull would instead pass by intestate succession to Mrs. Calder. However, "[t]he legislature of Connecticut, on the 2d Thursday of May, 1795, passed a resolution or law, which, set aside [that] decree." The probate court held a new hearing at which it admitted the will and the land went to Mrs. Bull. The Calders appealed through the Connecticut appellate courts, but to no avail. They sought relief in the U.S. Supreme Court.
Court, claiming that the Connecticut legislature's action of the second Thursday of May, 1795, was a violation of Article I, Section 10 of the U.S. Constitution. As presented by the Court, "[t]he sole inquiry is, whether this resolution or law of Connecticut, having such operation [divesting Calder and wife], is an ex post facto law, within the prohibition of the federal constitution?"

However, this was not the only question, nor the only grounds, upon which the decision of the Connecticut courts was affirmed. Early colonial Connecticut had no separate courts of appeal. The legislature filled that role exclusively until 1762. In 1762, the Connecticut legislature created an appellate system. As Justice Paterson put it, the power "of granting new trials was, by a legislative act, imparted to the superior and county courts." But that act created concurrent only, not exclusive appellate jurisdiction in those courts; the legislature did not give up its traditional appellate jurisdiction. Justice Paterson stated:

But the act does not remove or annihilate the pre-existing power of the legislature, in this particular; it only communicates to other authorities a concurrence of jurisdiction, as to the awarding of new trials. And the fact is, that the legislature have, in two instances, exercised this power, since the passing of the law in 1762. They acted in a double capacity, as a house of legislation, with undefined authority, and also as a court of judicature, in certain exigencies.

As Justice Iredell pointed out, appellate authority in a legislative body is not so strange. "In England, we know that one branch of the parliament, the House of Lords, not only exercises a judicial power, in cases of impeachment, and for trial of its own members, but as the court of dernier resort This ultimate appellate jurisdiction in an otherwise legislative body remains to this day in England and much of the British Commonwealth.

The point of this argument was straightforward enough: in granting a new trial in its "resolution or law on the 2d Thursday of May, 1795," the Connecticut legislature was exercising its appellate and not its legislative power. Justice Iredell was quite unequivocal about this case being an exercise of judicial power:

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73. Id. at 387
74. Id.
75. Id. at 395 (Paterson, J., concurring). Justices Paterson and Iredell began their separate opinions on this point. Id. at 395, 398. It is the only ground used by Justice Cushing in his separate opinion. Id. at 400. Chief Justice Ellsworth and Justice Wilson did not take part in the opinion.
76. Id. at 395 (Paterson, J., concurring).
78. Id.
79. Id. at 398 (Iredell, J., concurring).
80. Id. at 386.
The power [to superintend the courts of justice], however, is judicial in its nature, and whenever it is exercised, as in the present instance, it is an exercise of judicial not of legislative authority. 81

As an exercise of judicial power, as Justice Cushing put it, "it is not touched by the federal constitution." 82 Three of the four justices deciding Calder treated this as at least coordinate with the constitutional argument; one of these three, Justice Cushing, deemed it the only point worthy of consideration. Thirty years later, in a detailed review of the case, Justice Johnson concluded from a careful reading of the opinions that "all the judges who sat on the case of Calder vs. Bull, concurred in the opinion" that the Connecticut legislature was exercising judicial, not legislative power; 83 the entire ex post facto argument in the case was pure dictum. 84

If Calder had not come up in the first decades of the Court, this ground would have been dispositive. The Court would have avoided the ex post facto clauses on the standard wisdom that if there are dispositive grounds that do not require constitutional interpretation, they are to be preferred. Why, then, did the justices not take this course in 1798? Why did they feel constrained to address the Calders' constitutional argument? Apparently because the Calders made the argument and the Court was otherwise deciding against them. 85 As Justice Paterson wrote:

But as this view of the subject [ie, that the resolution was a judicial rather than a legislative act] militates against the plaintiffs in error, their counsel has contended for a reversal of the judgment, on the ground, that the awarding of a new trial was the effect of a legislative act, and that it is unconstitutional, because an ex post facto law.

So, according to the lead opinion of Justice Chase, "[t]he sole inquiry" was "whether this resolution or law of Connecticut is an ex post facto law, within the prohibition of the federal constitution?" 87

81. Id. at 398 (Iredell, J., concurring) (emphasis added).
82. Id. at 400 (Cushing, J., concurring).
84. Id. ("I then have the right to deny that the construction intimated by three of the judges, in the case of Calder vs. Bull, is entitled to the weight of an adjudication. Nor is it immaterial, to observe, that an adjudication upon a fundamental law, ought never to be irrevocably settled by a decision that is not necessary and explicit.").
85. This too is a very British view. The courts of Great Britain, right through to the House of Lords, are constrained to resolve cases within the boundaries of the arguments made by counsel; counsel can thus frame issues for decision even when other, established grounds are available. See ALAN PATERSON, THE LAW LORDS 45-49 (1982).
86. Calder 3 U.S. (3 Dall.) at 396 (Paterson, J., concurring).
Justice Chase began the analysis in *Calder*, not with a definition of *ex post facto* law, for that is exactly what was at stake, but with an explanation of why the prohibition was made part of the Constitution:

The prohibition against their making *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, the other less punishment. These acts were legislative judgments; and an exercise of judicial power. 88

Justice Chase then gave examples of *ex post facto* laws and mentioned their justification only with derision: "To prevent such and similar acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any bill of attainder, or any *ex post facto* law."89 From this start, he stated his view as to "what law is to be considered an *ex post facto* law, within the words and meaning of the Federal Constitution," the "meaning and intention"90 of the *ex post facto* ban: "but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states, shall not pass laws, after the fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it."91 The *ex post facto* prohibition supports the security of a person "from punishment by legislative acts, having a retrospective operation. I do not think it was inserted, to secure the citizen in his rights either of property or contracts."92

This, of course, is just a bald statement of position, not an argument. The argument that *ex post facto* applied to criminal laws only follows immediately and is, in fact, the only argument found in this and the other opinions, and it is repeated several times.93 Justice Chase wrote:

The prohibitions not to make anything 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 secure 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. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have

88. *Id.* at 389. Justice Iredell made a somewhat similar use of history, saying that retroactive laws are about crimes because in Europe, history shows how easily tyrants can abuse the power to make retroactive laws and punishments. *Id.* at 398-400. As such, the argument rests on the drama of examples. Does history not show abuse of abuse of retroactive civil laws? *See id.*

89. *Id.* at 389.

90. *Id.* at 390.

91. *Id.*

92. *Id.*

93. Because of the references to coinage, it is clear that the argument was addressed to Article I, Section 10's prohibition on state *ex post facto* legislation.
enumerated, were unnecessary, and therefore, improper; for both of them are retrospective.94

Justice Chase repeated the argument a couple of pages later:

If the prohibition to make no ex post facto law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts; and not to pass any law impairing the obligation of contracts, were improper and unnecessary.95

Justice Paterson made the same argument:

Again, the words of the constitution of the United States are, "That no state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts." Article I., §10. Where is the necessity or use of the latter words, if a law impairing the obligation of contracts, be comprehended within the terms ex post facto law?96

This is all there is in the four opinions of Calder that one might call an argument. It is hardly very persuasive. On the contrary, it is a patently weak argument, surely not robust enough to support the expansive, unchecked retrospective legislative power it licenses. The weakness lies in its completely ignoring the prohibition on bills of attainder.

Bills of attainder and bills of pains and penalties were ex post facto criminal laws, the former inflicting capital punishment, the latter, lesser punishments. By the time of the drafting of the constitution, the term "bills of attainder" was used to include both.97 Justices Chase and Paterson's argument, in its own terms,

94. Calder 3 U.S. (3 Dall.) at 390.
95. Id. at 393. The argument here is preceded by the following statement of policy, intimating how tenuous the federal Supreme Court felt its power was at that time: "If the term ex post facto law is to be construed to include and prohibit the enacting any law, after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen." Id.
96. Id. at 397. With express respect to Justice Paterson's form of the argument, near contemporary Justice Johnson wrote:

But with all deference, I must contend, that if anything is to be deduced from the arrangement of the three instances of restriction, the argument will be against him. For by placing "ex post facto laws" between bills of attainder, which are exclusively criminal, and laws violating the obligation of contracts which are exclusively civil, it would rather seem that ex post facto laws partook of both characters, was common to both purposes.

Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416d n.a (1829). Ex post facto would thus fall under the familiar interpretive maxim noscitur a sociis.

97 Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867) ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.").
works precisely as well to distinguish *ex post facto* legislation from the criminal bills of attainder and bills of pains and penalties as it does to distinguish it from laws impairing the obligation of contracts.\footnote{98}{Looking at the argument of *Calder v. Bull* "in its own terms" is essential. It makes sense or not, is convincing or not, only according to the meanings of terms used to the authors (in so far as it is possible for us to glean what that is). Different definitions of bills of attainder and bills of pains and penalties have been promulgated. Bills of attainder were defined in *Cummings v. Missouri*. See *Cummings*, 71 U.S. (4 Wall.) at 323. The *Cummings* definition has good continuation with the argument that doing these things legislatively usurps a judicial function, and with it the protections such as presumption of innocence, burden of proof, right to jury, right to confront, etc. Many suggest that they include forfeiture of estates as well as the ascribed criminal penalty. See, e.g., Laurence H. Tribe, American Constitutional Law § 6-26, at 482 (2d ed. 1988). Blackstone included corruption of the blood in his description of attainder: "By attainder also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer heritable." 2 Blackstone, supra note 20, at *251. Later, however, Blackstone gives corruption of blood and forfeiture as the meaning of "attaint"—the consequences of attainder—and says attainder follows from conviction for capital offenses. 4 Blackstone, supra note 20, at **1036-40. It is purely prospective! It is separate from the conviction and punishment and so can be separately reversed by act of parliament for any reason or none. Id. at *1040. If the Framers followed Blackstone's confusion with corruption of the blood then there may also be a redundancy in the prohibition in Article III, Section 3 of the U.S. Constitution. See U.S. Const. art. III, § 3.}

Both Justices, rightly or wrongly, thought *ex post facto* laws and bills of pains and penalties were the same.\footnote{99}{Justice Johnson in his 1829 commentary points out that their secondary sources thought so too. *Satterlee*, 27 U.S. (2 Pet.) at 416b n.a.}

Justice Chase's identification of the two concepts is explicit:

> The prohibition against their making *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, the other less punishment.\footnote{100}{Id. at 396.}

However it is possible, if implausible, that Justice Paterson meant "*ex post facto* law," as used in the constitution, to cover only what was previously covered by "bills of pains and penalties." He wrote, "The words, *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains and penalties."\footnote{101}{Id. at 396.} If so, he and the constitutional drafters chose an extremely deceptive way to express it, especially when there was a precise term ready at hand. On this unlikely hypothesis, only Justice Chase demolishes his own argument. More likely both justices, in their own terms, fall into the same error.

In form, the argument goes like this: "A constitution or statute prohibits $X$, $Y$ and $Z$. If $Y$ were the same as or within the scope of $Z$, then there would be a redundancy, the same thing would be being prohibited twice. But we are entitled
to presume that the drafters intended to add something each time they used new or different words. Thus, we are entitled to presume that X, Y, and Z have different meanings.” If this argument form is valid as used in Calder to show that ex post facto laws cannot be about coinage or impairing the obligation of contracts, then by parity it must also be an adequate demonstration that they cannot be criminal laws either. Retrospective criminal laws had already been covered by the prohibition on bills of attainder.102

To refute Justices Chase and Paterson’s argument conclusively, one still must show that there are some areas of behavior subject to potential retrospective legislation, but not covered by bills of attainder or contracts. Examples are scarcely difficult to come up with: Calder v Bull provides one; tax law, as in United States v. Carlton,103 provides another.104 As Justice Paterson took pains to point out, “retrospective laws of every description neither accord with sound legislation, nor the fundamental principles of the social compact”, and “[t]here is neither policy or safety in such laws; and therefore, I have always had a strong aversion against them.”105 Surely the founding fathers, at the time of drafting the constitution closely aware of the evils of tyranny, felt the same. Why

102. Quoting Blackstone, as does Justice Paterson, does not help where Blackstone was writing against a clean slate, not about the meaning of a particular list in a written prohibition.

Judge Blackstone’s description of the terms is clear and accurate. “There is, says he, a still more unreasonable method than this, which is called making of laws, ex post facto, when, after an action, indifferent in itself, is committed, the Legislator, then, for the first time, declares it to have been a crime, and inflicts a punishment on the person who has committed it. Here it is impossible, that the party could foresee, that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment for not abstaining, must, of consequence, be cruel and unjust.”

Id. (citations omitted). It is also interesting to note that precisely the opposite argument could be made under the maxim noscitur a sociis—indeed it was made by Governor Randolph in the Virginia ratification debate. He argued that precisely because the ex post facto prohibition came along with the bill of attainder prohibition, that showed that the former must also be about criminal matters: “The same clause provides that no bill of attainder shall be passed. It shows that the attention of the Convention was drawn to criminal matters alone.” 3 Elliot, supra note 44, at 477 The argument so obviously fails to prove the ex post facto prohibition exclusively criminal as to look disingenuous. In the adjacent Section 10, considered concurrently, the ex post facto provision was adjacent to the obviously commercial interdiction of laws impairing the obligation of contracts. Equally then, the Convention was focusing on civil matters alone.

104. Justice Johnson provides the following examples:

This Court has had more than once to toil up hill in order to bring within the restriction on the states to pass laws violating the obligation of contracts, the most obvious cases to which the constitution was intended to extend its protection: a difficulty, which it is obvious might have been avoided by giving the phrase ex post facto its original and natural application.

105. Calder 3 U.S. (3 Dall.) at 397
else would they have included such comprehensive lists in the prohibitions of Article I, Sections 9 and 10.\footnote{106}

The same form of argument arises again when Justice Chase distinguishes the \textit{ex post facto} prohibition from the Due Process Clause of the Fifth Amendment:

The restraint against making any \textit{ex post facto} laws was not considered by the framers of the constitution, as extending to prohibit the depriving a citizen even of the vested right to property; or the provision “that private property should not be taken for public use, without just compensation,” was unnecessary.\footnote{107}

Inescapably, the Fifth Amendment would cover \textit{ex post facto} takings without compensation, and the Due Process Clause has become the principal basis for attacking retrospective legislation.\footnote{108} But, in the form used by Justice Chase, the argument does no better than in its previous use to restrict \textit{ex post facto} laws to the criminal. The Fifth Amendment was necessary for present and prospective takings not otherwise constitutionally prohibited.\footnote{109}

There is one further argument of this form undermining the restrictive interpretation of \textit{ex post facto} in Calder.\footnote{110} It is hornbook law that to be criminal an act must be done with criminal intent, \textit{mens rea}. Can one act with criminal intent when what one does is not a crime? An act innocent when committed cannot be intentionally criminal, and retroactive legislation cannot change an actor’s state of mind. Thus, in a real sense, if the \textit{ex post facto} prohibition of Article I, Sections 9 and 10 covers only criminal legislation, then it is entirely redundant. But this redundancy would not reach civil actions, in which intent is not crucial.

What about reliance? Is not a citizen entitled to rely upon the present state of the law and to shape her behavior accordingly without fear of the state? Calder made such an argument:

\footnote{106 Professor Tribe argues the following: Certainly the early experience of England with bills of attainder and \textit{ex post facto} laws had demonstrated the willingness of Parliament to mandate the forfeiture of private estates as a penalty for actions which were lawful when committed; and cases such as Cummings and Galvan v. Press evidence the continued resourcefulness of legislative bodies in fashioning civil disabilities which provide “punitive” goals. Thus, if the objective of insuring the legislatures operate only prospectively when the rights of individuals might be adversely affected is to be served in any meaningful sense, the constitutional inhibition of \textit{ex post facto} laws cannot be restricted to penal legislation.}{\scriptsize Tribe, supra note 98, § 10-2, at 637 n.30.}

\footnote{107 Calder 3 U.S. (3 Dall.) at 394 (citations omitted).}{\scriptsize See discussion infra part III.}

\footnote{108 See Bryant Smith, \textit{Retroactive Laws and Vested Rights II}, 6 Tex. L. Rev. 409, 419 (1928).}{\scriptsize One is made well aware of the need for such an amendment when one reads Justice Iredell's confident assertion that “private rights must yield to public exigencies” such as the building of highways, “fortifications, light-houses, and other public edifices” on private lands, with only a passing nod to “allowing [the deprived owners] a reasonable equivalent.” Calder 3 U.S. (3 Dall.) at 400 (Iredell, J., concurring).}
It is further urged, that if the provision does not extend to prohibit the making any law, after a fact, then all *chooses in action*; all lands by devise; by execution; by judgments, particularly in *torts*; will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and therefore, that the true connection and meaning of the prohibition is, that the states pass no law to deprive a citizen of any right vested in him by existing laws.111

The answer to this argument looks like faith alone: "[B]ut they won't do that!" Justice Chase: "It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction."112 *Carlton*, at least, shows this faith is misplaced. There is no other interpretive reasoning in the opinions of *Calder*. There are, however, various statements of sentiment, almost of policy. For example, Justice Cushing's brief opinion gives an alternative to the act being merely judicial. He argued that the act in question "is maintained and justified by the ancient and uniform practice of the state of Connecticut."113 Justice Chase nervously deferred: "If the term *ex post facto* law is to be construed to include and prohibit the enacting any law, after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen."114 One gets the feeling that the justices were wary of exercising their power over a state supreme court and were looking for ways to avoid such a confrontation.

Although many of the Framers of the Constitution, whose triumph of vision it was, were still alive, Justice Chase paid scant respect to their intentions and the meaning they gave to the words "*ex post facto*." He did not stop at the dubious conclusion that the prohibition of Sections 9 and 10 of Article I should reach only criminal laws; he distinguished among criminal laws those few to which it should be limited:

I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law, but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime.115

Where in the record of the federal convention or of the states' ratifying conventions is the warrant for such further incursion into the obvious and natural scope of the words "*ex post facto*"? It may be that we, along with Justice Chase,
would prefer that it were so, but he seems to have read a restriction into the Constitution's language by brute force.

_Calder v. Bull_ then, is a very weak reed upon which to found a tradition of constitutional interpretation. Arguably all its argument about the _ex post facto_ provision is dictum; in so far as it is not, only Justice Chase pursued the restriction to criminal statutes with any enthusiasm, with two other justices merely acquiescing. Interestingly, at the time, only two state constitutions, those of Maryland and North Carolina, used _ex post facto_ in the restrictive sense. In 1830, Justice Johnson wrote, "Maryland first used it in this restricted sense, and North Carolina copied from Maryland; and if evidence of contemporaries may be relied on, Mr. Chase was one of the committee who reported the constitution of Maryland; and thus stands the authority for the restricted use." In a famous and oft-cited opinion, New York's Chancellor Kent pointed out that _Calder_ failed to come to grips with the essential problem—although it holds that the Constitution's prohibitions of _ex post facto_ laws pertain only to criminal law—

> [L]aws impairing previously acquired civil rights are equally within the reason of that prohibition, and equally to be condemned. [T]here is no distinction in principle nor any recognized in practice, between a law punishing a person criminally for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction exists only in the degree of oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other.\(^{117}\)

A mere thirty years after _Calder_, Justice Johnson concluded that "the case of _Calder_ vs. _Bull_ cannot claim the pre-eminence of an adjudged case upon this point, and if adjudged was certainly not sustained by reason or authorities."\(^{118}\)

2. Fletcher v Peck

The reasoning of _Calder v. Bull_ came up for Supreme Court review a mere twelve years later in _Fletcher v. Peck_.\(^{119}\) Peck sold certain land to Fletcher, "lands which were part of a large purchase made by James Gunn, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of the state."\(^{120}\) Fletcher, the purchaser, sued Peck for breach of covenants in the deed of sale.\(^{121}\) Apparently Gunn had bribed the Georgia legislature with gifts of the land it was about to sell him.\(^{122}\) So bad was the transaction that a later legislature rescinded the initial granting

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119. 10 U.S. (6 Cranch) 87 (1810).
120. _Id_. at 127.
121. _Id_. at 127-28.
122. _Id_. at 132.
legislation. But in the meantime, there had been intermediate transferees between Gunn and Peck, so Peck could plausibly maintain that he had taken the land as an innocent bona fide purchaser. According to Chief Justice Marshall, in such circumstances the burden on the state must be great. Marshall stated that "[t]he legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must find its vindication in a train of reasoning not often heard in courts of justice."

Chief Justice Marshall began, as did Justice Chase in Calder, with a discussion of natural law arguments, but did not rest the decision invalidating the retrospective legislation on these arguments. Georgia, as one of the United States, is subject to the positive limitations on its power found in the Federal Constitution, one limitation being that "the constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Since the original grant of land to Gunn was by contract, a "law annulling" that conveyance "would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances." But the Chief Justice did not let the decision rest on the prohibition against laws impairing the obligation of contracts. He continued with a discussion of ex post facto laws that ran directly counter to the opinions in Calder:

An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate or any part of it, shall be seized for a crime which was not declared by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an ex post

123. Id. at 128-30.
124. Id. at 131-32.
125. Id. at 132.
126. Id.
128. Fletcher 10 U.S. (6 Cranch) at 133-35. Justice Johnson, in a dissenting opinion, would have relied on natural law grounds. Id. at 143 (Johnson, J., dissenting) ("I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.").
130. Id. at 137
It forfeits the estate of Fletcher for a crime not committed by himself.\textsuperscript{131}

Whether this statement is dictum is as difficult to determine as whether the \textit{ex post facto} line of reasoning in \textit{Calder} is dictum. Neither statement is essential to the decision, but both seem to have been the principal focus of their author's attention. But, whether essential or not, Chief Justice Marshall's argument here is significantly contrary to Justice Chase's argument in \textit{Calder}. If the state cannot take a person's property for hitherto innocent conduct, now seen as criminal, should the state be permitted to take the property of a person who is presently innocent and was innocent at the time the retrospective bill took effect?

As of 1810, then, the scope of the \textit{ex post facto} prohibition could not conclusively be assumed to be limited to criminal laws only. No adequate argument for such a restriction had yet been made, and Chief Justice Marshall had offered powerful reasons against it. Justice Johnson took every available opportunity to argue against the limitation.\textsuperscript{132} For example, in 1827 he wrote:

\textit{By classing bills of attainder, \textit{ex post facto} laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. It is true, that some confusion has arisen from the opinion, which seems early, and without due examination, to have found its way into the Court; that the phrase \textit{“ex post facto,”} was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise; for neither in its signification or uses is it thus restricted. It applies to civil as well as to criminal acts.}\textsuperscript{133}

As Justice Johnson predicted, the limitation to criminal legislation only would become a source of difficulty and strained reasoning.\textsuperscript{134}

\textbf{C. Other Cases}

Nevertheless, in 1854, when the Supreme Court upheld a retrospective change in estate tax law, it relied entirely on \textit{Calder v. Bull} and its own view of the original intent of the framers.\textsuperscript{135} The Court stated that \textit{“[t]he debates in the federal convention upon the constitution show that the terms \textit{ex post facto} laws...”}

\begin{itemize}
  \item \textsuperscript{131} \textit{Id.} at 138.
  \item \textsuperscript{132} He even created an otherwise unavailable opportunity by writing an extensive critique appended to the 1829 report when the case prompting it was not suitable. \textit{See} Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416 n.a (1829) (Johnson, J., concurring).
  \item \textsuperscript{133} Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 286 (1827).
  \item \textsuperscript{134} He wrote that the limitation is \textit{“[an] unhappy idea, that the phrase \textit{‘ex post facto,} in the Constitution of the United States, was confined to criminal cases exclusively; a decision which leaves a large class of arbitrary legislative acts without the prohibitions of the constitution.”} Satterlee, 27 U.S. (2 Pet.) at 416 (Johnson, J., concurring).
  \item \textsuperscript{135} Carpenter v Pennsylvania, 58 U.S. (17 How.) 456, 463 (1854).
\end{itemize}
were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning.\textsuperscript{136} The Court thus revived and reinforced Justice Chase's restrictive interpretation without further argument, relying on cites to Calder, and, astoundingly, Fletcher v. Peck.\textsuperscript{137} The statute in question explained, and so extended, the meaning of a term in a prior statute, thus applying an estate tax statute to property that would previously not have been within its scope.\textsuperscript{138}

After the Civil War, the Court ran into the difficulties Johnson had forecast. Lacking a constitutional inhibition, the Court had to strain reason and, perhaps credulity, in order to prevent clear retributive injustice. The difficulty arose with "test oaths" in order to be permitted to hold "any office of honor [or] trust" like teacher, lawyer, church officer, or priest, a person had to take an oath to the effect that he had never acted or spoken against the United States, or even sympathized with anyone who did, or moved out of state to dodge a draft or a host of other things, many of which were not then and still are not in themselves crimes.\textsuperscript{139} The government argued that these were merely licensing requirements, well within its powers, and in no way either criminal or retrospective. Justice Miller, writing for a four-person dissent in both Cummings v. Missouri\textsuperscript{140} and Ex Parte Garland,\textsuperscript{141} stated: "As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding."\textsuperscript{142} If the proceeding was not criminal, the argument goes, then it was not within the scope of the ex post facto prohibition, and, therefore, permissible. But the choice facing any supporter of the South in the recent war was perjury or unemployment.

Had the majority in Cummings or Garland a general ex post facto prohibition in its constitutional repertoire, the task would have been considerably easier: it would have had to show only that the effect of the "test oath" requirements was retroactively to change the legal status of past actions. But, with Calder's restrictive interpretation firmly in place, the majority faced the additional hurdle of showing that an apparently civil professional licensing requirement was in fact penal. We may sympathize with the majority's motives and objective, but its

\textsuperscript{136} Id. (citations omitted).
\textsuperscript{137} Id.
\textsuperscript{138} Id. Notice, in passing, that there was no action that Carpenter, the executor of the will of William Short, or the late William Short himself while alive, could have taken in reliance on the prior state of the law other than to move out of the jurisdiction. Thus, the prima facie appeal of Carpenter as precedent for Carlton is illusory.
\textsuperscript{140} 71 U.S. (4 Wall.) 277 (1866).
\textsuperscript{141} 71 U.S. (4 Wall.) 333 (1867).
\textsuperscript{142} Id. at 392.
reasoning is still strained. "[These] disabilities must be regarded as penalties—they constitute punishment. Disqualification from office may be [a] punishment." The majority refused to limit the meaning of "punishment" to deprivation of life, liberty, or property. Punishment is the function of criminal law, so these "licensing laws" are really criminal in function, even if not in appellation.

The point is a clear one: virtually any criminal law could be rephrased as civil. For example, the first federal statute exercising control over the use of and trade in marijuana was simply a tax statute, the Marihuana Tax Act of 1937. That Act required:

[Anyone] importing, producing, selling or in any other way dealing with the drug to pay an occupational tax and to register with the Internal Revenue Service and all transferees of marijuana are required to file a written order form and to pay a transfer tax, $1 per ounce if registered and a prohibitive $100 per ounce if not registered.

If the simple "Rumpelstiltskin" device of "naming and claiming" can take a statute out of the scope of a constitutional prohibition, then the constitution is a weak safeguard indeed. As Justice Field wrote in Cummings:

[It] is one of form only, and not of substance. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

Yet one could equally say that most civil statutes could equally be rephrased as criminal, and that this, more than anything, is what the 1867 Supreme Court majority did.

More generally, however, the point of this argument is that the distinction drawn so carefully between civil and criminal laws in _Calder_ and its progeny is essentially vacuous. A legislature determined to make retroactive criminal prohibitions can formulate a civil statute to the same effect; the federal licensing statute in _Ex Parte Garland_ is an example. Conversely, a determined court...

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143. _Cummings_, 71 U.S. (4 Wall.) at 320.

144. _Id._


146. _Id._ at 1061.

147 _Cummings_, 71 U.S. (4 Wall.) at 325.

can take a retroactive civil statute and rephrase it as criminal in order to bring it under the Constitution's prohibitions; arguably Justice Field’s opinions in *Cummings* and *Garland* are examples. If, as one writer put it:

*Ex post facto* laws and bills of attainder, twin sisters of legislative oppression, directed for the most part at political offenders, were so vivid in the political background of the framers of the constitution and so obnoxious to their ideals of justice as to call for an express constitutional prohibition.

then, as interpreted, the *ex post facto* ban in Article I, Sections 9 and 10, is peculiarly ineffective. Professor Tribe makes this very point:

Certainly the early experience of England with bills of attainder and *ex post facto* laws had demonstrated the willingness of Parliament to mandate the forfeiture of private estates as a penalty for actions which were lawful when committed; and cases such as *Cummings* and *Galvan v. Press* evidence the continued resourcefulness of legislative bodies in fashioning civil disabilities which serve "punitive" goals. Thus, if the objective of insuring the legislature’s operate only prospectively when the rights of individuals might be adversely affected is to be served in any meaningful sense, the constitutional prohibition of *ex post facto* laws cannot be restricted to penal legislation.

Showing a civil law to be criminal in function and thus subject to the *ex post facto* prohibition was one strategy; another was to shoe-horn retroactive state civil legislation into the contract mold, thus subjecting it to the prohibition against state "law impairing the obligation of contracts." In 1861, California enacted a statute licensing pilots in San Francisco. The statute included a provision stating that if a pilot offered his services and was refused, he was still "entitled to one-half pilotage fees." On November 1, 1861, pilot Joliffe offered services to the steamship Golden Gate. He was refused and sued for one half the fee. Since that time, a new 1864 statute repealed the 1861 statute, but

(1912) (upholding a West Virginia statute which allowed for additional prison time for past offenses); *McDonald v. Massachusetts*, 180 U.S. 311, 312-13 (1901) (upholding a Massachusetts statute requiring a 25-year prison sentence for habitual criminals); *Hawker v. New York*, 170 U.S. 189, 200 (1898) (finding a New York statute that made it criminal for an ex-felon to practice medicine did not conflict with Article I, Section 10 of the U.S. Constitution). But see *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246-47 (1957) (concluding that New Mexico’s statute requiring candidates for the state bar have good moral character may only be satisfied by current behavior, not past bad acts).

149 *Smith*, *supra* note 110, at 412.
150 *Tribe*, *supra* note 98, § 10-2, at 637 n.30.
151 U.S. CONST. art. I, § 10.
152 See *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450, 455 (1864).
153 *Id.*
154 *Id.* at 455-56.
155 *Id.* at 456. This is not so unreasonable as it may now seem: pilotage was valuable for the
was in all relevant respects similar. There could not have been a contract, because the services were refused, so the repeal of the statute did not, *prima facie*, impair the obligation of contracts. But, according to Justice Field, it was a *quasi* contract, a contractual remedy provided by law and he gave normal *quasi* contract illustrations. So, the statute of 1864 repealing the prior law could not affect rights in place under the old law and the pilot prevailed. In dissent, Justice Miller argued that "a right of action not growing out of contract, but which is solely dependent upon a statute, ceases and determines with the statute on which it depends." Had the Supreme Court not been constrained by the narrow reading imposed on the Constitution's *ex post facto* prohibitions, it would not have needed such contortions to reach the just and equitable result.

Despite these difficulties, the restriction of *Calder* had become ingrained in our jurisprudence by the end of the Civil War and has remained in place to this day. In 1990, Chief Justice Rehnquist wrote, accurately:

> Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the Constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them.

> The Court has consistently adhered to the view expressed by Justices Chase, Paterson and Iredell in *Calder*.

Safety of many vessels, and a pilot had to go to considerable expense and sometimes danger to meet ships off-shore and bring them in. That expense would be incurred whether or not the services were accepted.

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156. *Id.* at 458.
157. *Id.*
158. *Id.* at 455-63.
159. *Id.* at 458.
160. *Id.* at 464 (Miller, J., dissenting).
161. *See*, *e.g.*, *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 166-67 (1812). *Cf.* *Maynard v. Hill*, 125 U.S. 190, 214 (1888) (finding that a marriage is not a private contract and, thus, an Oregon statute forbidding the passage of laws that impaired a private contract did not provide a divorced wife with an interest in land her ex-husband had settled upon prior to the divorce). Presumably *New Jersey v. Wilson* was one of the cases to which Justice Johnson was referring when he wrote:

> This Court has had more than once to toil up hill in order to bring within the restriction on the states to pass laws violating the obligation of contracts, the most obvious cases to which the constitution was intended to extend its protection; a difficulty, which it is obvious, might have been avoided, by giving the phrase *ex post facto* its original and natural application.

Yet retroactive legislation is no less harsh and oppressive, no less contrary to our intuitions of justice and the history of jurisprudence because it is merely civil and not criminal. Nor does the restrictive interpretation of the phrase “ex post facto law” change the evident intent of the Framers. “By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property”164. The judicial system has had to develop alternative techniques for policing obnoxious retroactive civil legislation. This policing began with natural law arguments, and developed into due process rationales under the Fifth and Fourteenth Amendments. Arguably this approach has been better, allowing greater judicial sensitivity to legislative exigencies, as well as to variations in oppressive impact. We turn in the next section to these alternate approaches.

II. ALTERNATIVE GROUNDS FOR POLICING RETROACTIVE CIVIL LEGISLATION

There is a long tradition of hostility to retroactive legislation among the most prominent of jurisprudential thinkers. As early as 353 B.C. in Athens,165 Demosthenes called such a statute “the most disgraceful and scandalous ever enacted in your assembly,”166 even though the statute in question benefited, not penalized, its particular subjects.167

The roots of this hostility were made patently clear by the thirteenth-century Aristotelian theologian, St. Thomas Aquinas:

Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.168

Here, St. Thomas makes the fundamental argument against retroactive legislation: A person ought not to be bound by a law of which he could not have notice, and no written law can be promulgated retrospectively.

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167. Id. at 373. See 2 SIR PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 139-40 (1922); Smead, supra note 36, at 775.
168. THE "SUMMA THEOLOGICA" OF ST. THOMAS AQUINAS, Q. 90, Art. 4, at 7-8 (1273).
Four centuries later, foundational social contract theorist John Locke explained, "The Legislative, or Supream Authority, cannot assume to its self a power to Rule by extemporary Arbitrary Decrees, but is bound to dispense Justice, and decide the Rights of the Subject by promulgated standing Laws, and known Authoris d Judges." Locke's reasoning, typical for his time, was to take a hypothetical state of nature ruled by natural law and show how society is derived to alleviate the miseries of natural law. Society requires the denizens of the state of nature to invest all their natural law authority in the new commonwealth. Locke writes, "[T]he community put[s] the Legislative Power into such hands as they think fit, with this trust, that they shall be govern'd by declared Laws, or else their Peace, Quiet, and Property will still be at the same uncertainty, as it was in the state of Nature." Retroactive legislation does not come within Locke's definition of "declared laws" because no legislature can declare a law made now to have stood in the past. Thus, a legislature that enacts retroactive laws creates the uncertainty and insecurity characteristic of the state of nature.

Within the arguments against retroactive legislation, one can detect two strands of thought, both involving notice and reliance. First, there is an analytic argument, looking at the concept of law and its function in society. If law is to guide and delimit behavior, if government is to be able to use legislation as a means of societal ordering and control, then legislation has to be available to

169. In between, others such as Sir Francis Bacon, also wrote of the logical and ethical abhorrence of retroactive laws. See, e.g., FRANCIS BACON, OF THE DIGNITY AND ADVANCEMENT OF LEARNING, in 5 WORKS 97 (aphorisms 47-49) (James Spedding et al. eds., 1864).

170. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 136, at 404 (Peter Laslett ed., rev. ed. 1965) (3d ed. 1698). The drafting of the U.S. Constitution was heavily influenced by the political writings of John Locke. Philosopher C.D. Broad wrote that Locke's principles "were embalmed in the Constitution of the United States which survives like an ancient family ghost haunting a modern sky-scraper." C.D. Broad, John Locke, 31 HIBBERT J. 249, 256 (1933). Of course, we do not regard our constitution as a ghostly relic. But perhaps in Carlton the Supreme Court treats it more as such than as a living, constitutive law.


172. LOCKE, supra note 170, § 136, at 404-05. In the state of nature, the law of nature or unwritten law is found only in the minds of men, thus those who misapply it will not easily be convinced of their mistake absent an established judge. But under the law of nature, each man is judge, interpreter, and executioner of the law; and, the individual, having only single strength, does not have enough strength to defend himself or to punish those who misapply the law. Thus, Locke points out that in order to avoid the inconveniences that disorder men's properties in the state of nature, men form societies to achieve security and defense of their properties through the united strength of the whole society, as well as through binding, "standing Rules by which every one may know what is his." Id. § 136, at 404.

173. Id. § 136, at 404-05.
those whose behavior is subject to that limitation, ordering, and control. If a law has yet to be enacted, limiting or adjusting one’s behavior according to the law is a temporal impossibility. The second strand is normative: it is morally abhorrent to demand a person to behave according to a rule that could not be known, or to take away the benefits of reliance on law that is positively and publicly in place. Retroactive legislation is the paradigm abuse of this precept, ranking with secret legislation, or the arbitrary whim and fancy of a tyrannical despot in abuse of governmental power, or of government by men, not law.

Both strands of thought are brought out by the great twentieth century jurisprude Lon L. Fuller. To illustrate, Fuller described eight ways in which legislatures fail to make law. Three of the ways include:

(2) Failing to make available to the affected party, the rules he is expected to observe; (3) abusing retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change (7) introducing such frequent changes in the rules that the subject cannot orient his action by them.

Fuller argued that failing in any one of these ways would result not only in a morally bad system of law, but also in something that could not properly be called a legal system. “Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted or [that] changed every minute.”

174. As the Supreme Court recently recognized: “To spell out intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer.” United Airlines, Inc. v. McMann, 434 U.S. 192, 203 (1977). The same thinking is behind the requirements of some states that statutes be in a particular language, and that foreign words cannot control English speaking subjects. See, e.g., In re Lockett, 178 P 134, 138 (Cal. 1919) (finding a state statute prohibiting fellation unconstitutional because “fellatio” is not an English word).

175. See Lon L. Fuller, The Morality of Law 38-39 (rev. ed. 1964). Fuller was not sympathetic with the positivism that came out of England. But on the point in question here, foundational utilitarian Jeremy Bentham and Fuller are in complete agreement.

That a law may be obeyed, it is necessary that it should be known; that it may be known, it is necessary that it be promulgated. To promulgate a law, is to present it to the minds of those who are to be governed by it in such a manner as that they may have it habitually in their memories, and may possess every facility for consulting it if they have any doubts respecting what it prescribes. It is true that before laws can be promulgated, they must exist.

176. Fuller, supra note 175, at 39.
177. Id. at 38-39.
178. Id.
179. Id.
The founding fathers were well aware of these arguments. At the very introduction of the language of Article I, Section 9 to the constitutional convention, two of the more prominent jurisprudential thinkers present thought the impossibility and immorality of retroactive legislation too palpable to require an express prohibition. The record states:

Mr. Ellsworth contended that there was no lawyer, no civilian, who would not say, that ex post facto laws were void of themselves. It cannot, then, be necessary to prohibit them.

Mr. Wilson was against inserting anything in the constitution, as to ex post facto laws. It will bring reflection on the constitution and proclaim that we are ignorant of the first principles of legislation, or our constitutional government that will be so.

In the first Supreme Court case to visit the subject, Calder v. Bull, both the logical and the normative underpinnings of ex post facto laws came up for discussion. Justice Chase preceded his actual argument with two fascinating paragraphs on natural jurisprudence. He began with the analytic argument that "[t]he nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit" and continued on what "our free republican governments" cannot do. Justice Iredell, in his opinion, took time vigorously to oppose retroactive laws on moral grounds. "If the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice." We see here the struggle of a new Supreme Court in a new nation with a new constitution to settle the underpinnings of the whole interpretive judicial endeavor. Our great fourth Chief Justice, John Marshall, continued the theme in Fletcher v. Peck. There exist, he wrote, "certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded." Although this sort of thinking was not the basis of the decision, it is foundational to the argument. If the state could avoid the first conveyance because it was infected with fraud, "[a]ll titles would be insecure, and the intercourse between man and man would be seriously

181. Id. See 1 BENTON, supra note 15, at 985-86; 2 FARRAND, supra note 15, at 375-76; 3 MADISON PAPERS, supra note 14, at 1399-1400.
182. 3 U.S. (3 Dall.) 386 (1798).
183. Id. at 388.
184. Id. But this thought played no further part in Justice Chase's argument in the case itself.
185. Id. at 399 (Iredell, J., concurring).
186. 10 U.S. (6 Cranch) 87 (1810).
187. Id. at 133.
obstructed, if this principle be overturned." And, to Fletcher's argument that a legislature is competent to repeal an act of a previous legislature, Marshall responded:

But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.  

Justice Johnson based his concurrence solely on such principles, "on the reason and nature of things: a principle which will impose laws even on the Deity. The security of a people against the misconduct of their rulers, must lie in the frequent recourse to first principles, and the imposition of adequate constitutional restrictions." Princpled antipathy to retroactive laws of all kinds is abundant in the writing of these men, the foundational thinkers of our society. But it was not long before analytic complexity came to be written onto this relatively clear and uncluttered jurisprudential slate.

A newly enacted statute can be retroactive in two ways. First, it can by its terms come into effect at a date earlier than its enactment. Second, it can have effects on legal rights and relations established under prior law. Credit for first enunciating this distinction is usually given to Justice Story in the New Hampshire case, Society for the Propagation of the Gospel in Foreign Parts v. Wheeler. At issue in Wheeler was the application of New Hampshire's constitution, in particular the "23rd article of the bill of rights, which declares that 'retroactive laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses.'" Justice Story asked, "What is a retroactive law within the true intent of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past

188. Id. at 133-34.
189. Id. at 135.
190. Id. at 143-44 (Johnson, J., concurring).
191. The distinction is drawn in many articles. See, e.g., Gregory J. DeMars, Retrospectivity and Retroactivity of Civil Legislation Reconsidered, 10 OHIO N.U. L. REV 253, 254-57 (1983) (arguing that "retroactive" should be stipulatively confined to the first sense, and "retrospective" to the second, a wish for a definitional distinction that none of us has the power to fulfill); Stephen R. Munzer, Retroactive Law, 6 J. LEGAL STUD. 373, 375-80 (1977) (calling the two the "strong" and the "weak" senses of "retrospective"); W David Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 CAL. L. REV 216, 216-19 (1960); Smead, supra note 36, at 782; Bryant Smith, Retroactive Laws and Vested Rights, 5 TEX. L. REV 231, 232 (1927).
192. 22 F Cas. 756 (C.C.D.N.H. 1814) (No. 13,156). However, like so many subsequent insights, it was anticipated by Francis Bacon. See BACON, supra note 169, at 97-98.
193. Wheeler 22 F Cas. at 767.
transactions? He argued that a retroactive law could not be limited to the former, because that would be "utterly subversive of all the objects of the provision" and "would enable the legislature to accomplish that indirectly, which it could not do directly." What exactly does he mean? Justice Story's rather cryptic pronouncement needs spelling out, at least to overcome the obvious point: very many, if not all, statutes are retroactive in the second sense. Many laws prospective in operation change legal rights and relations that have been established under prior laws. Take for example a simple zoning ordinance: it will inevitably change property values in some way, disturbing the expectations of persons who had acted in reliance on the preceding zoning or lack of it. If such laws were considered retroactive for the purpose of New Hampshire's constitutional prohibition, then the New Hampshire legislature would be severely limited in its ability to legislate. Retroactivity in this second sense, then, is to be distinguished from that in which, by ante-dating the effectiveness of a statute, the legislature seeks to change the legal character of an action already completed under prior law.

There are two arguments that need to be addressed. First, Justice Story was concerned to establish that, although the first type of retroactive law, effective from a time "anterior to [its] passage," is obviously suspect, the second type, *prima facie* prospective but disturbing previously vested rights, could be equally costly. For example: suppose an investor were to buy seaside property for future development which, at the time of purchase, was within the local land-use planning laws. Subsequently, a change in law directed to conservation prohibits all future development of seaside property. Would not that investor have lost substantially by relying on the state of the law at the time of his purchase? Clearly, the second type of retroactivity can be at least as costly as the first.

Conversely, a statute retroactive in the first sense, by its express terms applying to conduct prior to its enactment, could impose no reliance costs. Curative legislation, making the law in fact what everyone had, erroneously, thought it to

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194. *Id.*

195. *Id.* Justice Story cited with approval the opinion of Chancellor Kent in *Dash v. VanKleeck*, a great opinion but one which neither draws this distinction nor makes this argument. *Id.* (citing *Dash v. VanKleeck*, 7 Johns. 477 5 Am. Dec. 291, 306-13 (N.Y 1811)).


197. At least one commentator, Munzer, argues that it is only in this stronger sense that retroactive legislation is problematic. Munzer, *supra* note 191, at 385-90.

198. See Slawson, *supra* note 191, at 219-20. Similar retroactivity can result from judicial interpretation of statutes. Slawson gives a useful example: In a surprise decision, *Anderson v. Mt. Clemens Pottery Co.*, the Supreme Court held that under the F.L.S.A., the time spent donning work clothes and walking to the work site was part of the work week. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 691-92 (1946). As a consequence, many groups of workers sued for overtime for that time since the effectiveness of the statute. Slawson, *supra* note 191, at 228. Courts uniformly denied such relief and the Supreme Court uniformly denied certiorari. See, e.g., Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).
be is such. Thus, the wrongfulness of retroactivity is not confined to whether it applies expressly to events antenor to its enactment or has effects on behavior planned under prior law.

Justice Story's second point was that prohibiting only the first type of retroactivity "would enable the legislature to accomplish that indirectly, which it could not do directly." Presumably, he had in mind examples like this: under the New Hampshire constitution the legislature could hardly place a tax on inheritances completed in the three years preceding enactment. But, if it were permissible to disturb settled rights, it might enact a levy on all property now owned that was obtained by way of inheritance during those same years. That assessment would be purely prospective on its face, but it would achieve precisely the same end as impermissible retroactive estate tax. If only retroactivity in the first sense were prohibited, the legislature would have achieved indirectly what it could not directly. The result would be every bit as abhorrent as a directly retrospective equivalent. "But if, in the absence of statute, he does something not then taxed and afterwards, when he cannot withdraw, Congress retroactively levies an assessment on this completed act, then he may properly feel that he has been unfairly treated." Yet, the method should work for any statute that would be prohibited as retroactive in the first sense. Justice Story's arguments appear to compel the conclusion that both senses of retroactivity are relevant, at least to New Hampshire's constitutional prohibition.

Yet, almost all legislation disturbs some legal rights settled under prior law. This leaves us with a dilemma: if retroactive legislation is, prima facie, unjust, then almost all legislation is also, prima facie, equally unjust. Justice Story himself must have faced this dilemma: He was generally hostile to retroactivity, but he was surely not equally hostile to legislation itself. One solution is to decide that, ancient and modern jurisprudential wisdom to the contrary notwithstanding, retroactivity itself is not only not objectionable, it is of no

199. For further discussion of curative legislation as an exception to the general antipathy to retroactive legislation, see infra notes 224-239 and accompanying text.
200. Wheeler 22 F Cas. at 767
202. Because of the overlap of jurisdictions, just such a result occurred in Louisville and Nashville R.R. Co. v. Mottley. See Louisville and Nashville R.R. Co. v. Mottley, 219 U.S. 467, 468 (1911). In 1871, Mr. and Mrs. Mottley settled a damages action for free passes on the railway, renewable annually for their lives. Id. at 471. But in 1906 the railway refused to renew, citing a new federal statutory prohibition: The Commerce Act of June 29, 1906, in section 1 prohibited free tickets, and in section 6 mandated uniform rates, banning not only greater or less but also "or different" charges. Id. at 472-74. As the statute did not make "any exceptions of existing contracts," the railway prevailed. Id. at 479. Of course, had it been a state statute, Article I, Section 10 of the U.S. Constitution which prohibits interference with the obligation of contracts, would have prevented this result. See U.S. CONST. art. I, § 10, cl. 1.
204. See 2 JOSEPH STORY, CONSTITUTION § 1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact.").
Some commentators have reached this conclusion, and, unhappily, so has the present Supreme Court. On this view, a statute retroactive in either sense must pass constitutional muster on the same, and no more than the same, criteria as any statute with no retroactive effects at all.

We do not have to give up so easily. After all, it is unlikely that the intuitive abhorrence we all commonly feel, and the general hostility of so many major figures in the history of jurisprudence toward retroactive legislation should be completely unfounded. In light of Justice Story's second argument—that what can be achieved by the first kind of retroactivity can equally be achieved by the second—we should not expect to find differences of sufficient legal significance to enable us to draw a principled distinction between the two kinds of retroactivity. To be sure, ante-dating the effectiveness of a statute to before its enactment seems worse. But this probably reflects only the perception that such legislation is always unjust. Our intuitive judgment is automatically negative, and, unless the new law is curative or unusually trivial, it is certain that somebody will be unfairly hurt. On the other hand, our judgment of prima facie prospective laws which disturb antecedently settled rights cannot be so automatic. As most prospective laws affect some rights and obligations settled under prior law, this would entail the absurdity of automatically judging all statutes negatively. What we should be looking for are criteria for determining, among both kinds of retroactivity, which is to be condemned, which is immoral, which if pursued would be destructive of democratic government.

One popular approach has been to base the distinction on whether the disturbance caused by the legislation is to a right that is vested or not vested. A hint of this idea can be found in the language used by Justice Story in Wheeler when he asked, does the state “affect vested rights and past transactions?” But Justice Story presumably got this part of the idea from the opinion of Chancellor Kent in Dash v. VanKleeck, oft-cited by Justice Story and others. As with so much in our law, the idea probably originated in an opinion of Lord Mansfield. Lord Mansfield wrote: "Here is a right vested: and it is not to be imagined that the legislature could by general words mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of

205. See, e.g., Smith, supra note 110, at 419-20.
207 Such as a statute prospectively raising the speed limit.
209. As Sir Fortunatus Dwarris wrote, laws cannot affect actions prior to their enactment: “It would be monstrous, were it otherwise.” FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 165 (1871).
210. See infra notes 224-39 and accompanying text.
211. Wheeler 22 F Cas. at 767
cost and charge in prosecuting.”

The difficulty with such an approach is that it simply transfers the question onto the distinction between vested and un-vested. How does one decide that? Slawson suggests that “vested rights retroactivity” “disturbs patterns of conduct that represent substantial investments of labor or property.” However, this approach does not fit well with cases such as Cummings and Garland. As the dissent in Garland pointed out: “The right to practise law in the courts as a profession, is a privilege granted by the law, and not an absolute right.” Clearly, putting oneself in a position to apply to practice law requires a “substantial investments of labor and property” Munzer suggests that, when societal background rules reject the retroactivity, then the expectations disturbed by it are entrenched, i.e., vested. But this reasoning is obviously circular: how do we decide when to reject the retroactivity? Circular question begging is exactly the problem with such a definitional approach. As we learned in property and contracts, “vesting” is used to decide when the risk of loss passes, and is

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214. Justice Swayne, one of the dissenters in Cummings and Garland, considered this to be fundamental:

This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to ‘the general principles of law and reason’ and to one of the most vital ends of government.

Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 662 (1871). See Dwarris, supra note 209, at 162 (discussing Westevelt v. Gregg, 12 N.Y. 202, 211-12 (1854) (holding the legislature could not deprive the husband of his legacy where the legacy to the wife was effective before the Married Women’s Property Act but she was not to take possession until after the act); Ray A. Brown, Vested Rights and the Portal-to-Portal Act, 46 Mich. L. Rev. 723, 723-24 n.50 (1948) (“Congress cannot abrogate previously vested rights.”); Ray H. Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Nw. U. L. Rev. 540, 561 (1956) (“If the right is ‘vested’ it is legally protectible, at least for purposes of the rule of construction and probably for purposes of the due process limitation as well.”); Stephen R. Munzer, A Theory of Retroactive Legislation, 61 Tex. L. Rev 425, 439 (1982) (drawing a virtually isomorphic distinction under the new and portentous name “Entrenchment and Disentrenchment”); Slawson, supra note 191, at 218 (“If the effect of a law is substantially to disturb patterns of conduct that represent substantial investments in labor or property or to remove valuable rights, rights of action or even liberties, then the law is ‘retroactive’ in the vested rights sense.”).


218. Munzer, supra note 214, at 439.
readily manipulable to that end. That is, "vesting" has little intrinsic content of its own, it merely labels decisions. As Greenblatt correctly puts it: "[the] vested rights approach is stultifying, for judicial analysis seems to end with scrutiny of the right, so ignoring other real considerations." 219

Practical analyses of legal imperatives often come down to us in the form of maxims, or canons of construction, and so it is with retroactivity. Probably the earliest statement from the U.S. Supreme Court is in United States v. The Schooner Peggy 220 wherein the Court stated that "it is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of the parties." 221 An extensive form of the maxim is given in the oft-cited treatise on statutes, Potter's Dwarri's: 222

The American authorities are quite uniform on the retroactive effect of statutes. The general rule is, that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared, and courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. 223

To this day, the maxim instructs courts to begin their analyses with the understanding that a statute applies from its date of enactment prospectively only unless it expressly states otherwise. Potter mentions other exceptions, the most common of which is curative legislation. 224 The classic example is given by Justice Willes in the English case, Phillips v. Eyre. 225

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220. 5 U.S. (1 Cranch) 103 (1801).
221. Id. at 110. See United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied."); Dash v. VanKleeck, 7 Johns. 477, 5 Am. Dec. 291, 308 (N.Y 1811) ("The very essence of a new law is a rule for future cases. A statute ought never to receive such a construction if it be susceptible of any other"); Phillips v. Eyre, 6 Q.B. 1, 23 (1870) ("Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.").
222. See, e.g., Burgess v. Salmon, 97 U.S. 381, 385 (1878) (citing Dwarri's, supra note 209, at 162-63 n.9).
223. Dwarri's, supra note 209, at 162-63 n.9.
224. Id. Francis Bacon also mentions curative legislation as permissible. In a section captioned "Of the Retroactive Aspect of Laws," he writes that retroactive laws "must be used seldom, and with great caution; for we approve not of a Janus in laws." BACON, supra note 169, at 97 (aphorism 47). But he allows such law if necessary to reach a person "who evades and narrows the words or meaning of a law by fraud and cavil who plots to deceive and upset present laws" Id. (aphorism 48). In the next aphorism he expressly says that confirmatory laws, making express what had been previously understood are valid although retroactive. Id. (aphorism 49).
225. 6 Q.B. 1 (1870).
One instance of retrospective legislation obviously just, to render valid the acts of persons who had fallen honestly into error, and by which infinite actions were killed in embryo, may suffice. When the result of the judgment, finally affirmed by the House of Lords, in the Queen v. Millis, 10 Cl.& F 534, was to declare null and void numerous marriages celebrated in Ireland by Presbyterian ministers and others not episcopally ordained, one effect of the decisions was to disclose, by the new light thrown upon the relations of families previously supposed to be legitimate, a prospect of vast and interminable litigation, springing from a host of vested rights of action of every description. This result was averted (in so far as it was possible without making persons liable to prosecution who were not so liable before) by the Acts 5 & 6 Vict. c.113, 6 & 7 Vict. c.39, and 7 & 8 Vict. c.81, s.83. By these beneficial and just statutes the past marriages were ratified and confirmed from the beginning, for it was in terms enacted that they should "that they be adjudged and taken to have been and to be" of the same force and effect as if canonically had and solemnized.226

Such curative legislation affirms as proper what everyone had taken to be the law anyway: it "restores a situation that was affirmatively anticipated and provided for."227 The contrast is with:

The retrospective Attainder Acts of earlier times, when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous and loosely spoken of as ex post facto laws, were of a substantially different character. They did not confirm irregular acts, but avoided and punished what had been lawful when done.228

The Supreme Court has had many occasions to address such curative legislation, the nearest to seminal being United States v Heinszen & Co.229 Plaintiff Heinszen had paid tariffs on goods it imported into the Philippine Islands.230 The tariffs were exacted by the military administration, but before Congress statutorily authorized,231 or later ratified the prior tariffs.232 Without ratification "it is obvious that the court below correctly held that such tariff exactions were illegal."233 So the question was square: what was the effect of the ratification? Heinszen tried to frame the argument in terms of Congress having power "to retroactively impose tariff duties upon the consummated act of bringing the goods into that country?234 That, the Court said, begs the

226. Id. at 24-25 (citations omitted).
228. Phillips, 6 Q.B. at 25.
229. 206 U.S. 370 (1907).
230. Id. at 382.
231. Id. at 378.
232. Id.
233. Id. at 382.
234. Id. at 385.
question, because the tariffs were exacted at the time the act was done (when the goods were imported) and had been passed along to retail customers. Also, the tariffs would have been legal but for a failure of proper delegation. The Court attributed to legislatures a very general power of ratification: validation of prior official action is allowed, if it comes under some exception. The Supreme Court followed this argument in subsequent cases, such as Charlotte Harbor & Northern Railway Co. v. Welles, although not without limit.

There is a pattern here: the curative legislation that is approved is always of prior actions thought by the parties to be legal when taken, but subsequently found defective because of some collateral problem. It is easy to see how allowing this kind of curative retroactivity is jurisprudentially inoffensive.

There is a similar vein, namely retroactive interpretive statutes, that is a little less clearly proper. In Stockdale v. The Insurance Companies, the paradigm case, the Supreme Court upheld a retroactive statutory gloss on a prior statute. Despite the usual role of legislatures to make law and of courts to construe it, a legislature, the Court said, has the power by statute to "declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the laws." The Court said this power is not without limit, but the limit suggested ignores any retroactive impact: "Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute." It was on just this point that three justices dissented. Justice Strong wrote:

I know that acts declaratory of the meaning of former acts are not uncommon. They are always to be regarded with respect, as expressive of legislative opinion, and, so far as they can operate on subsequent transactions, they are of binding force. But it is well settled they cannot operate to disturb rights vested or acquired before their enactment, or to impose penalties for acts done before their passage, acts lawful when they were done. It is always presumed the legislature had no intention to give them such an effect.

235. Id.
236. Id. at 383-84.
237 Id. at 384-85.
238. 260 U.S. 8, 11-12 (1922).
240. 87 U.S. (20 Wall.) 323 (1873).
241. Id. at 333.
242. Id. at 331.
243. Id. at 332.
244. Id. at 336 (Strong, J., dissenting).
245. Id. at 340 (Strong, J., dissenting).
Given the broad scope for judgment as to whether prior rights have indeed been impacted by a subsequent interpretation, it is difficult to see this particular issue ever being resolvable in formulaic fashion.

The other general class of exceptions to the basic interpretive maxim suggested by the actual outcome of *The Schooner Peggy* is simply geo-political necessity.²⁴⁶ The Trumbull, a United States man-o'-war, had captured the French schooner *Peggy*²⁴⁷. The *Peggy* claimed not to be an enemy, but a mere merchantman, and that the United States and France had a treaty covering her, albeit retroactively.²⁴⁸ Ultimately, the Supreme Court found in favor of *Peggy*, reversing the Circuit Court, because of the importance of the treaty with France and the great national concern about international relations and the rights of war.²⁴⁹ Similar, and even more compelling, is Justice Willes' story of the dashing Captain Denman, who, in 1841, was sent by the governor of Sierra Leone to rescue British subjects being kept in slavery in Gallinas "by a native chief."²⁵⁰ In doing so, Captain Denman freed 300 slaves and wrecked a bit of property for which he was later sued.²⁵¹ "The Queen's government ratified and confirmed what had been done, and that ratification was rightly held to have the effect of exempting Captain Denman from all responsibility."²⁵² One might consider these exceptions to be simply "brute force," always available for cases of extreme moral, social, or political necessity.²⁵³

With these two classes of exceptions, then, the standard maxim of interpretation has remained the basic analytic device. Absent extreme socio-political necessity, and unless curative, a statute is to be read as operating prospectively only. But what of statutes that expressly, by their own terms, operate from a date prior to their date of enactment?

Maxims of interpretation allocate burdens of proof, or of persuasion: The maxim holds unless there is good reason to the contrary. A maxim puts the burden on the party seeking the contrary to come forward and persuade the court.

248. *Id.*
249. *Id.* at 109-10.
250. *See* Phillips v. Eyre, 6 Q.B. 1, 24 (1870).
251. *Id.*
252. *Id.*
253. At least one of the founding fathers, George Mason, foretold this sort of necessity, and thought it a basis for opposing the adoption of a written constitution:

> Both the general legislature and the State Legislatures are expressly prohibited making ex post facto laws; tho' there never was, or can be a Legislature but must & will make such laws, when necessity and the public Safety require them; which will hereafter be a Breach of all the Constitutions in the Union, and afford precedents for other Innovations.

On this argument, we can begin analysis of expressly retroactive statutes with an allocation of the burden of persuasion.

Notwithstanding the present Supreme Court's indifference, retro-dating the effectiveness of a statute to before its enactment is \textit{prima facie} improper. In cases of such legislation, including proposals for it, the burden of justification should be on the defender (or proponent). On the other hand, no unusual burden should fall on the defender or proponent of \textit{prima facie} prospective legislation; law-making in the present political climate is sufficiently difficult without such added inhibition. But, retroactive effects of sufficient magnitude should, if demonstrated, count as damning.

Given the allocation of burdens of persuasion, what sort of criteria should count toward making the argument? The first, and most obvious, place to look is to the main sources of the general abhorrence of retroactive law-making. "Reliance" and its near relation "notice" help: One cannot be bound by a law of which one could not have notice and, correspondingly, one ought to be able to rely on law of which one takes notice as a guide to present behavior. These terms do not distinguish the two kinds of retroactivity: The law not yet having been enacted at the time in question, nobody could have notice of it, and, in either type of retroactivity, the victim acted, if at all, in reliance on a prior state of the law. Whether the change be by retroactive substitution of another law, or by subsequent denial of the benefits of the action, would seem to matter little to the victim. But on these grounds we can eliminate a large class of laws from these objections, namely those governing behavior which does not depend on legal guidance.

One would not ordinarily seek advice as to the state of the law before deciding whether negligently to inflict emotional distress. Nor would one even look to the state of warranty law before buying a newspaper—no more than would the news vendor seek advice before selling it, or before replacing it if it had no print on the inside pages. In matters of the decencies of everyday life, even in the sophistication of today's commercial world, notice comes from what it is to behave as a reasonable person, and reliance is on other persons' doing so. Resort to the statute books is hardly relevant. Most behavior is probably of this kind. With respect to legal governance, we might call it "non-reliance" behavior.\textsuperscript{254} If the legislature seeks to change a current practice of social life, it has to give notice, clearly and loudly. Otherwise, everyone will go on doing what they were used to doing anyway.\textsuperscript{255} A legislated retroactive revolution in non-reliance behavior seems oxymoronic. But there are also statutes that restate what had been the accepted standards of behavior in the community. Such statutes, when applicable to non-reliance behavior, need little notice, and retro-dating seems of

\textsuperscript{254} Of course, this sort of behavior is to be anthropologically, not legally, defined. What counts as non-reliance behavior is determined, with perfect circularity, by what is non-reliance behavior.

\textsuperscript{255} It seems very difficult to change social habits. Think of the governmental efforts to make people drive at no more than 55 m.p.h. on highways. It was hugely publicized and hugely unsuccessful. Even to this day, very few people have acquiesced.
little significance. Where reliance on and notice of the statute law is not of practical importance, retroactivity becomes quite clearly demarcated: it should be irrelevant or of dispositive consequence according to how the legislation in question affirms or attempts to revise accepted social practice.

Retroactivity begins to matter when the behavior governed is of the kind that people usually do not undertake without legal advice and planning. The two examples used above illustrate. Estate planning is a paradigm area: for the most part, decisions in this area are governed by state probate and tax laws. For example, the Uniform Code Commissioners, in their introductory essay to the 1993 revision of the Uniform Probate Code, state that "ease of administration and predictability of result are prized features of the probate system." Wisely, the New Hampshire constitution would prevent a retro-dated change in the tax structure. Notwithstanding the Supreme Court's decision in United States v. Carlton, nobody can formulate and implement sensible plans except on a law that is what it says it is. What would prevent the indirect method of achieving the same end? If the federal government were acting, the law would be constitutionally prohibited. As one commentator noted:

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. [The tax] becomes in effect a direct assessment upon the property itself simply because of ownership, and as such is unconstitutional if unapportioned among the states.

Apparently the indirect method, prohibited to the federal government, could be used in New Hampshire absent Justice Story's argument.

The second example, the property developer who invests in seaside real estate but is prevented from developing it by a subsequently enacted conservation law,

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256. It is for this reason that retroactivity of curative statutes, saying what everyone thought had been said before, is felt to be more tolerable, less problematic than other types of retroactivity statutes. See supra text accompanying notes 224-39.

257 Introductory Essay to U.P.C. (1993). Similarly, in Sullivan v. Burkin, Justice Wilkins (one of the intellectual leaders of the Massachusetts Supreme Judicial Court, and the one who appears to have made a specialty of estate planning and trust matters), writing for a unanimous court refused to change the outdated and inequitable position of Kerwin v. Donaghy when he wrote: "The bar has been entitled reasonably to rely on that rule [of Kerwin v. Donaghy] in advising clients. In the area of property law, the retroactive invalidation of an established principle is to be undertaken with great caution." Sullivan v. Burkin, 460 N.E.2d 572, 576 (Mass. 1984) (citing Kerwin v. Donaghy, 59 N.E.2d 299 (Mass. 1945)).


259. 114 S. Ct. 2018, 2023 (1994) ("An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.").

260. Amberg, supra note 201, at 694-95. Article I, Section 9, Clause 4 of the U.S. Constitution states: "[N]o Capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4.
is obviously taken from *Lucas v. South Carolina Coastal Council*,261 addressed by the Supreme Court in 1992. In *Lucas*, the Court found the deprivation of economic value to be a taking which, if uncompensated, would violate the Fifth Amendment.262 Justice Scalia wrote, “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”263 What is too far? So far “we have generally eschewed any ‘set formula’” for determining how far is too far, preferring to “engag[e] in essentially ad hoc, factual inquires.”264 But two situations are takings: (1) where the regulation requires physical invasion; and (2) where it “denies all economically beneficial or productive use of land.”265 As a means of policing retroactive legislation, this is rather insensitive, but it is still an inhibition to a legislature grossly and punitively abusing its power.

Deprived of the *ex post facto* prohibition, it was not initially clear how courts could police the abuse of retroactive civil legislation. But, by the end of the nineteenth century, the natural law themes on which the founding fathers had relied found a clear home in the due process provisions of the Fifth and Fourteenth Amendments.266 Traces can be found as early as 1819 in the opinions of Justice Johnson, but it was always clear that interpretation by the Court was essential if the due process provisions were to mean anything at all.267 In 1855, the Court affirmed this principle, writing:

> The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest it was not left to the legislative power to enact any process which might be devised.268

The due process clauses thus “protect the citizen against all mere acts of power.”269

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262. Id. at 1019.
263. Id. at 1017.
264. Id.
265. Id.
266. See U.S. Const. amend. V (“No person shall be deprived of life, liberty, or property, without due process of law ”); U.S. Const. amend. XIV § 1 (“[N]or shall any state deprive any person of life, liberty, or property without due process of law ”).
267. See, e.g., Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819) (“[T]he good sense of mankind has at last settled down to this: that [the due process provisions] were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by established principles of private right and distributive justice.”).
268. Murray’s Lessees v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) (determining that due process comes from the English tradition of common law and the *Magna Carta*).
269. Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Westervelt v. Gregg, 12 N.Y. 202, 212 (1854)).
In 1933, this understanding of the role of the Due Process Clauses in our government was given stable formulation by the Court: "[T]he guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."\(^{270}\) What it means for a statute not to be "unreasonable, arbitrary or capricious," or how the relationship between means and ends is to be assessed in reality will vary substantially with the subject matter and with the social attitudes prevalent at a particular time, and on a particular court. But an early theme relevant to retroactivity was that, at the time of enactment, those subject to legislation should be able to take some action to protect themselves.\(^{271}\) Not surprisingly, the two traditional themes of notice and reliance have been fundamental: without notice, one cannot protect oneself; and actions taken in legitimate reliance on the prior state of the law ought not to be upset by subsequent legislation.

That notice is necessary to the validity of law, at least in a morally legitimate regime is, as has been pointed out, a fundamental of the oldest and most settled jurisprudence.\(^{272}\) Our federal courts have held that the requirement of notice is an integral factor in due process analysis. In Lambert v. California,\(^{273}\) the Court stated: "Engraamed in our concept of due process is the requirement of notice."\(^{274}\) One cannot have notice of a law yet to be enacted, so, as Blackstone said, "All laws should therefore be made to commence in futoro, and be notified before their commencement."\(^{275}\) The notice requirement is closely connected with reliance: one cannot plan one's affairs on the basis of laws one does not know about,\(^{276}\) and one who relies on present law should not be accountable for so doing when the law is changed.\(^{277}\)

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271. See Ochoa v. Hernandez Y Morales, 230 U.S. 139, 153-54 (1913) (holding that legislation affecting property while the owners "were infants and unable to protect themselves" was a violation of the Due Process Clause).
273. 355 U.S. 225, 229 (1957) (holding that a Los Angeles felon registration ordinance violated due process when applied to an individual who lacked actual knowledge of her duty to register and finding that if the Court were to uphold the ordinance, "the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community").
274. Id. at 228 ("Notice is sometimes essential so that a citizen has a chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed.").
275. 1 BLACKSTONE, supra note 20, at *46. See Smith, supra note 110, at 418-19.
276. See People v. Hudy, 538 N.Y.S.2d 197, 201 (N.Y App. Div. 1988) ("One purpose of the rule is to assure that citizens have fair warning of what conduct will be punished so that they may tailor their conduct accordingly.").
Reliance on law—law of which we have deliberately taken notice—is not an ordinary part of everyday life. But for all those areas of social behavior in which we seek advice, or look to statutes and precedent (tax planning, estate planning, securities, and so on), for all the reliance areas, reliability of the law is essential. If law cannot be relied on, all planned action becomes insecure and speculative, expectations uncertain. This is one of the greatest jurisprudential deficiencies of ex post facto legislation, a deficiency which makes it so suspect under the Due Process Clauses.

It follows that where there is no reliance on the law of the moment, a retroactive change will do no harm. Such was the case with the typical curative legislation, at least in decisions through 1994, which made the law conform retroactively to what people had mistakenly relied upon. A good example came when the Supreme Court interpreted a statute so as to require employers to pay huge amounts of arrearages in pay at overtime rates—a decision which came as a surprise to all. Congress relieved the burden with the Portal-to-Portal Act of 1947, with an obviously retroactive effect. Yet nobody, neither worker nor employer, had relied on the prior law as the Court surprisingly interpreted it to be, so no settled rights were disturbed nor expectations defeated; the courts upheld it against due process challenge. It would also follow that if a person had relied on the prior state of the law—the state of the law retroactively displaced—but to no detriment, then there would be no cause for complaint. The Supreme Court found this to be the case in United

278. For example, we do not consult the law books or a lawyer about whether or not to commit a tort like battery or negligent infliction of emotional distress. To do so would be simply absurd, and similarly for (numerically) most contracts.

279. Lord Mansfield limited it to commerce when he stated: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon." Vallejo, 98 Eng. Rep. at 1017 (emphasis added).

280. See Lican v. Commissioner, 946 F.2d 690, 693 (9th Cir. 1991) ("Federal courts have long been hostile to legislation that interferes with settled expectations.").


282. Contra Ettor v. City of Tacoma, 228 U.S. 148, 157-58 (1913) (holding the retroactive repeal of a compensation statute was an unconstitutional violation of the due process clause despite the absence of reliance, because the right to compensation was a vested property right).


284. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 691-93 (1946) (holding that the time spent donning work clothes and walking to the work site was part of the work week).


States v. Heinszen & Co,\textsuperscript{287} where the costs of the retroactively established import duty had been passed along to customers when incurred.\textsuperscript{288} In exactly that vein, the Supreme Court demanded that taxpayers complaining of a retroactive imposition of a sales tax show that they had incurred a loss and not simply passed the cost of the tax along to their buyers because retroactivity is of no harm to a person who has already been repaid the cost.\textsuperscript{289}

Prior to 1994 and United States v. Carlton,\textsuperscript{290} the most important recent case was Usery v. Turner Elkhorn Mining Co.\textsuperscript{291} This case is a clear progenitor of Carlton, beginning a progression towards the present disregard for retroactivity. At issue was a federal statute requiring coal mine operators to pay benefits to miners who had incurred or died from "black lung disease" and their dependents a statute with clearly retroactive effects.\textsuperscript{292} The majority's argument began as if there were no difference between retroactive and prospective legislation, placing the burden on the complainant to show the legislation is "arbitrary and irrational."\textsuperscript{293} However, the Court immediately drew a sharp distinction between retroactive and prospective legislation: \textit{"It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective 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."}\textsuperscript{294} What, then, is the peculiarity of retrospective legislation that warrants a different standard of due process from prospective legislation?

\"[T]he justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger and that even if they did know of the danger their conduct may have been taken in reliance upon the current state of the law, which imposed no liability \textsuperscript{296}\) One could hardly wish for a clearer, more explicit acknowledgement of the critical role that reliance plays in assessing retroactivity under the Due Process Clauses of the Fifth and Fourteenth Amendments. Upholding the \textit{retroactive} aspects of the statute as constitutional then required a special argument.\textsuperscript{297}

\textsuperscript{287} 206 U.S. 370 (1907).
\textsuperscript{288} Id. at 385.
\textsuperscript{289} United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 402 (1934) ("[There is no] infringement of due process of law. If the taxpayer has borne the burden of the tax, he can readily show it. If he has shifted the burden to the purchasers, they are the real parties in interest.").
\textsuperscript{290} 114 S. Ct. 2018 (1994).
\textsuperscript{291} 428 U.S. 1 (1976).
\textsuperscript{292} Id. at 5-6.
\textsuperscript{293} Id. at 15-16.
\textsuperscript{294} Id. at 16-17.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 17.
\textsuperscript{297} The Court was able to uphold the \textit{retroactivity} of the statute on the theory that it placed a fair allocation of the burden of suffering on those involved as the Court found that the statute was "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." Id. at 18.
In two subsequent cases, Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,\(^\text{298}\) and United States v. Sperry Corp.,\(^\text{299}\) the Court followed Usery in this procedure. Both focused explicitly on the retroactive aspects of the statutes in question as being distinct from the prospective aspects.\(^\text{300}\) Interestingly, in all three of these cases it is difficult to find any actual \textit{ex ante} reliance.

The trend started in \textit{Usery} definitely was more generous to legislatures in drawing due process limits. But none of these cases went so far as to disregard the retroactive aspect as such and its distinguishing marks, absence of notice and detrimental reliance. For that we had to wait until \textit{Carlton}.

### III. CARLTON AND ITS IMMEDIATE PREDECESSORS

In United States v. Carlton,\(^\text{301}\) the Supreme Court changed course, without saying it was doing so, and upheld against a due process challenge a retroactive amendment to the Tax Reform Act (TRA).\(^\text{302}\) The retroactive amendment removed an estate tax deduction (the ESOP proceeds deduction),\(^\text{303}\) which, under pre-amendment law, was available to estates that made "qualified sale[s]" to employee stock-ownership plans (ESOPs).\(^\text{304}\)

The relevant statute in \textit{Carlton}, the TRA of 1986, became law on October 22, 1986.\(^\text{305}\) Section 1172 of the TRA, codified as section 2057, allowed an estate

\begin{footnotes}
300. In Pension Benefit Guaranty Corp., the Multiemployer Pension Plan Amendments Act of 1980 had explicit retroactive application, justified intentionally by the felt need to inhibit the exodus of employers from pension plans because of the greater burdens it imposed. Pension Benefit Guaranty Corp., 467 U.S. at 723-24, 730-31 (citing 29 U.S.C. §§ 1381-85 (1980)). One might properly hold one's nose at this, but it is an argument specifically and explicitly about the retroactive aspects only. Sperry Corp. dealt with the allocation of funds from the settlement of the Iranian crisis in 1979-81. Sperry Corp., 493 U.S. at 55-56. The retroactivity was justified by the need to allocate burdens equitably among the various claimants to the limited funds available. \textit{Id.} at 64. A rationale somewhat similar to that was used in Usery v. Turner Elkhorn Mining. See \textit{Usery}, 428 U.S. at 18. Again, the focus of this part of the argument was explicitly on the retroactivity. All the cases were said to be concerned with federal economic policy, and "the strong deference accorded legislation in the field of national economic policy is no less applicable when the legislation is applied retroactively." Pension Benefit Guaranty Corp., 467 U.S. at 729. It is rather difficult to envision what federal legislation is not concerned with national economic policy. See, \textit{e.g.}, United States v. Lopez, 115 S. Ct. 1624, 1657 (1995) (Breyer, J., dissenting).
302. \textit{Id.} at 2024.
305. \textit{Id.} Section 1172(a) of the Tax Reform Act of 1986 provided the following:

\textbf{SEC. 2057. SALES OF EMPLOYER SECURITIES TO EMPLOYEE STOCK OWNERSHIP PLANS OR WORKER-OWNED COOPERATIVES.}

(a) \textit{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 qualified proceeds of a qualified sale of employer securities.

(b) **Qualified sale.**

For purposes of this section, the term "qualified sale" means any sale of employer securities by the executor of an estate to—

1. an employee stock ownership plan described in section 4975(e)(7), or
2. an eligible worker-owned cooperative (within the meaning of section 1042(c)).

(c) **Qualified proceeds.**

For purposes of this section—

1. In general. The term "qualified proceeds" means the amount received by the estate from the sale of employer securities at any time before the date on which the return of the tax imposed by section 2001 is required to be filed (including any extensions).
2. Proceeds from certain securities not qualified. The term "qualified proceeds" shall not include the proceeds from the sale of any employer securities if such securities were received by the decedent—
   (A) in a distribution from a plan exempt from tax under section 501(a) which meets the requirements of section 401(a), or
   (B) as a transfer pursuant to an option or other right to acquire stock to which section 83, 422, 422A, 423, or 424 applies.

(d) **Qualified proceeds from qualified sales.**

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 shall not be treated as qualified proceeds from a qualified sale unless—
   (A) the decedent directly owned the securities immediately before death, an
   (B) after the sale, the employer securities—
      (i) are allocated to participants, or
      (ii) are held for future allocation in connection with—
         (I) an exempt loan under the rules of section 4975, or
         (II) a transfer of assets under the rules of section 4980(c)(3).
2. No substitution permitted. For purposes of paragraph (1)(B), except in the case of a bona fide business transaction (e.g., a substitution of employer securities in connection with a merger of employers), employer securities shall not be treated as allocated or held for future allocation to the extent that such securities are allocated or held for future allocation in substitution of other employer securities that had been allocated or held for future allocation.

(e) **Written statement required.**

1. In general. No deduction shall be allowed under subsection (a) unless the executor of the estate of the decedent files with the Secretary the statement described in paragraph (2).
2. Statement. A statement is described in this paragraph if it is a verified written statement of—
   (A) the employer whose employees are covered by the plan described in subsection (b)(1), or
   (B) any authorized officer of the cooperative described in subsection (b)(2), consenting to the application of section 4979A with respect to such employer or cooperative.

(f) **Employer securities.**

For purposes of this section, the term "employer securities" has the meaning given such term by section 409(1).

(g) **Termination.**

This section shall not apply to any sale after December 31, 1991.
tax deduction for half the proceeds of "any sale of employer securities by the executor of an estate" to an employee stock ownership plan (ESOP). In December 1986, Jerry Carlton, executor of the estate of Willametta K. Day, relying on section 2057, purchased "employer securities," sold them to an ESOP at a loss of $631,000, and claimed a deduction on the estate tax return. In January 1987, the Internal Revenue Service (IRS) issued Notice 87-13, stating, inter alia, that pending the adoption of clarifying legislation, the IRS would only recognize deductions claimed under section 2057 where the decedent had "directly owned" the securities before death. Following the IRS’s lead, Congress amended section 2057 in December 1987—one year after the pertinent facts in Carlton had occurred. The 1987 amendment provided that in order to qualify for the deduction, the securities sold to an ESOP must have been directly owned by the decedent "immediately before death." The amendment applied retroactively as if it had appeared in the original version of the TRA of 1986, and Carlton’s deduction was denied. The estate was left with a loss of $631,000.

Carlton, as executor, paid taxes on the proceeds of the ESOP transaction and subsequently filed a refund claim with the IRS. When the IRS denied his refund claim, Carlton filed a refund action in district court. The district court granted the government’s summary judgment motion, but the Ninth Circuit reversed and remanded with instructions to enter judgment in Carlton’s favor.

The Supreme Court reversed the Ninth Circuit, holding that the Ninth Circuit applied an "unduly strict standard" to the December 1987 retroactive amendment of section 2057. While acknowledging that the executor had neither constructive nor actual notice that the 1986 version of section 2057 would be retroactively amended, and that the he detrimentally relied on the plain meaning

308 Id. at 2021.
313 Carlton v. United States, 972 F.2d 1051, 1055 (9th Cir. 1992).
315 Carlton, 972 F.2d at 1055.
316 Id.
317 Id.
318 Id. at 1062.
319 Carlton, 114 S. Ct. at 2024.
of the 1986 version of section 2057, the Court held constitutional the 1987 amendment’s retroactive application using the lowest due process standard. The retroactive application was supported by a legitimate legislative purpose furthered by rational means. Thus, the Court applied the same low-level constitutional standard—rationality review—to retroactive tax legislation as it does to prospective economic legislation.

In the light of the prior history of retroactivity jurisprudence, both in and out of the Supreme Court, this decision is more than mildly surprising. But before further exploring the rationales offered in the opinions, we briefly review Carlton’s predecessors in the area of taxation. This review puts Carlton in the appropriate precedential context as well as showing the continuity of underlying thought in tax and non-tax retroactivity law, at least through the spring of 1994.

In the late 1920s, Justice McReynolds authored a string of opinions in which the U.S. Supreme Court struck down retroactive gift tax statutes. The first, Nichols v. Coolidge, involved a gift tax in the amount of $34,662.65. Between 1907 and 1917, Mrs. Coolidge and her husband transferred real estate and personal property to trustees. The Coolidges also transferred property directly to their five children with a lease back provision at nominal rent and with a provision for annual renewals until notice to the contrary. At Mrs. Coolidge’s death in 1921, most of the property the trustees had held had passed out of their

320. Id.
321. Id.
322. Id. ("Because we conclude that retroactive application of the 1987 amendment to § 2057 is rationally related to a legitimate legislative purpose, we conclude that the amendment as applied to Carlton’s 1986 transactions is consistent with the Due Process Clause."). See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 91 (1978) (applying rationality standard to a statute limiting to $560 million the aggregate liability of the atomic energy industry for a single nuclear accident); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (applying rationality standard to prospective legislation that made it a misdemeanor to engage in the business of debt adjustment except as incident to the lawful practice of law); Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955) (applying rationality standard to prospective legislation, which, inter alia, prevented opticians from fitting eyeglasses into frames without a prescription from an ophthalmologist or optometrist).
326. 274 U.S. 531 (1927).
327 Id. at 533.
328. Id.
329. Id.
330. Id.
possession. But in 1919, Congress amended the federal estate tax law of the amendment, which taxed as part of a decedent’s gross estate transfers “intended to take effect in possession or enjoyment at or after [the decedent’s] death” (whether such transfer or trust [was] made or created before or after the passage of th[e] act).

In **Nichols**, the Court held that the retroactive gift tax statute in question was so arbitrary and capricious that it amounted to confiscation and thus offended the Fifth Amendment. The Court considered that the transferor: (1) had no constructive or actual notice that Congress would tax as part of her estate transfers that would not take effect in possession until after her death; (2) that the transferor had acted in good faith, i.e., the gifts had not been made in contemplation of death to avoid estate tax; and (3) that the grantees’ interests had been vested, and thus were beyond recall, for as long as twelve years before the 1919 statute was enacted. Congress' legitimate purpose for imposing the tax was alone insufficient to save the retroactivity of the statute.

In the next term, in **Blodgett v. Holden**, the Court again entertained the question of whether Congress had the power to tax gifts made before the relevant tax measure had been proposed to the legislature. In January 1924, Blodgett made inter vivos gifts, not in contemplation of death, of property valued at over $850,000. The relevant gift tax provision was presented to Congress on February 25, 1924 and became effective June 2, 1924. The tax applied

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331. *Id.*

332. *Id.* at 534. The amendment was codified as the Revenue Act of February 24, 1919. Revenue Act of 1918, ch. 18, § 402(c), 40 Stat. 1057, 1097 (1919).

333. Such transfers were to be taxed according to their value at the time of the grantor’s death. **Nichols**, 274 U.S. at 533.

334. *Id.* at 534-35 n.* (quoting Revenue Act of 1918, ch. 18, § 402(c), 40 Stat. 1057 1097-98 (1919)).

335. *Id.* at 542-43.


337 *Id.* (“The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death.”).

338. *Id.* at 533, 538.

339. *Id.* at 540-43 (explaining that although Congress may properly attempt to equalize taxation of testamentary dispositions whether such dispositions were made by will or intestacy or were merely testamentary in effect, the “mere desire to equalize taxation cannot justify a burden on something not within congressional power”). The Court cited **Frick v. Pennsylvania** to illustrate that Congress attempted to do through the “back door,” what it could not properly do through the “front door,” i.e., Congress attempted to measure a tax upon dispositions of property that Congress had no power to tax. *Id.* at 540-41 (citing Frick v. Pennsylvania, 268 U.S. 473, 494 (1925)).

340. 275 U.S. 142 (1927).

341. *Id.* at 147

342. *Id.* at 146.

343. *Id.* at 146-47

344. *Id.* at 145.
retroactively, as if it were effective January 1, 1924.\textsuperscript{345} The Court relied on \textit{Nichols} and held that the June 2nd statute was arbitrary and invalid under the Due Process Clause of the Fifth Amendment.\textsuperscript{346} The Court reasoned: "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."\textsuperscript{347}

Later in the same term, in \textit{Untermyer v. Anderson},\textsuperscript{348} the Court again considered a taxpayer’s constitutional challenge to the Act of June 2, 1924.\textsuperscript{349} Isaac Untermyer made gifts on May 23, 1924—ten days before the Act in question became effective and eighty-eight days after the bill was introduced in Congress.\textsuperscript{350} The Court said that \textit{Blodgett} and \textit{Untermyer} were analogous, and to the extent the cases were distinguishable, the differences were not material.\textsuperscript{351} The main difference was that Blodgett made his transfers before the provisions were presented to Congress,\textsuperscript{352} thus possibly without notice of the prospective change in law, whereas Untermyer made his transfers three months after the provisions had been presented to Congress and while the conference report on the bill was pending.\textsuperscript{353}

Congress made the challenged gift tax provisions applicable to gifts made during the entire 1924 calendar year, but the Court held that "so far as applicable to bona fide gifts not made in anticipation of death and fully consummated prior to June 2, 1924, those provisions [were] arbitrary and invalid under the [D]ue [P]rocess [C]lause of the Fifth Amendment."\textsuperscript{354} The Court explained that the mere fact that the gifts were made while the relevant provisions were in the final stage of progress through the legislature was insufficient to either distinguish \textit{Untermyer} from \textit{Blodgett} or to remove the arbitrary nature of the statute.\textsuperscript{355} Accepting any other view would have created barriers to both the interpretation and practical application of the statute and would have prevented understanding of the burden imposed.\textsuperscript{356} As in \textit{Nichols} and \textit{Blodgett}, the Court pointed out the taxpayer’s interest in knowing when and how he becomes liable for taxes.\textsuperscript{357}

\begin{itemize}
  \item \textsuperscript{345} Id. (citing Revenue Act of 1924, ch. 234, §§ 319-24, 43 Stat. 253, 313-16 (1924)).
  \item \textsuperscript{346} Id. at 147 Four of the justices believed that the statute was unconstitutional because retroactive. Id. at 144-47 Meanwhile, four other justices believed that the statute was inapplicable. Id. at 147-49.
  \item \textsuperscript{347} Id. at 147.
  \item \textsuperscript{348} 276 U.S. 440 (1928).
  \item \textsuperscript{349} Id. at 444.
  \item \textsuperscript{350} Id. ("Untermyer made his gift some three months after [the retroactive tax] provisions were first presented and while the conference report upon the bill was pending.").
  \item \textsuperscript{351} Id. at 445.
  \item \textsuperscript{352} Id. at 444. \textit{See} \textit{Blodgett v. Holden}, 275 U.S. 142, 146-47 (1927).
  \item \textsuperscript{353} \textit{Untermyer} 276 U.S. at 444. The report entered the Senate on May 22, 1924 and passed both houses on May 25, 1924. Id. at 444-45.
  \item \textsuperscript{354} Id. at 445.
  \item \textsuperscript{355} Id.
  \item \textsuperscript{356} Id.
  \item \textsuperscript{357} Id.
\end{itemize}
Thus, where the taxpayer "cannot foresee and ought not to be required to guess the outcome of the pending measures," Congress must notify the taxpayer of his obligations. Also, because the "future of every bill while before Congress is necessarily uncertain," the taxpayer is not liable until Congress has definitively expressed its will through final action. The pattern so far is clear: notice and reliability are essential to the taxpayer and must be respected by the legislature.

In 1930, Justice McReynolds authored the opinion in *Cooper v. United States* in which the Court upheld a retroactive income tax statute, the Revenue Act of 1921. The Court's reasoning might have been anticipated. On November 1, 1921, Mrs. Cooper's husband transferred to her stock with a fair market value of $210 per share, which he had purchased in 1918 at $113.50 per share. On November 7, 1921, Mrs. Cooper sold the stock at $210 per share and recognized $36,670 as gain derived from the sale. She paid income taxes for the capital gains with the 1918 price as basis, but brought suit to recover it.

Had the legislation in question not been retroactive, she would have been able to recover the tax. But the statute was made effective January 1, 1921. The key section required a transfer of basis from donor to donee for gifts made after December 31, 1920. Mrs. Cooper challenged this retroactive application. Citing Nichols, Blodgett, and Untermyer, she argued that section 202(a) should not have been construed as applicable to transactions completed before the enactment of the statute and that if the section were construed to apply where both gift and sale were completed before such enactment, the section was arbitrary and capricious, and thus, violated the Due Process Clause. But, the

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359. Id. at 446.
360. 280 U.S. 409 (1930).
361. Id. at 412.
362. Id. at 410.
363. Id.
364. Id.
365. Id. (citing Revenue Act of November 23, 1921, ch. 136, § 202(a)(2), 42 Stat. 227, 229 (1921)).
366. Id.
367. Id. The key section is Section 202(a) which provided:

That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift

Id. (quoting Revenue Act of November 23, 1921, ch. 136, § 202(a), 42 Stat. 227, 229 (1921)).
368. Id. at 411.
369. Id. (citing Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927); Nichols v. Coolidge, 274 U.S. 531 (1927)).
Court distinguished those recent cases. Justice McReynolds stated: "None of these cases is in point; they give no consideration to the power of Congress to require that taxable income should include profits from transactions consummated within the year." Apparently, the Court viewed the holdings in the earlier gift tax cases narrowly, i.e., as not dispositive in retroactive income tax cases.

The following year, 1931, the Supreme Court decided *Milliken v United States*, another case involving the retroactive gift tax statute at issue in *Nichols*. In December, 1916, petitioner's decedent made *inter vivos* transfers of stock to his children. The transferor died March 5, 1920. The government considered the gifts to have been made in contemplation of death. So, under section 402(c) of the Revenue Act of 1918, the Commissioner included the stock in the decedent's estate and collected the tax. The rates in the retroactive amendment, the 1918 Act, were higher than those in the original version of the statute, the 1916 Act. Petitioners challenged the tax as being "illegally exacted under the decedent's estates provisions of the Revenue Act of 1918." Section 402(c) provided for the inclusion of the value of property in the gross estate:

> [T]o the extent of any interest therein of which the decedent has at any time made a transfer in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act).

The Court relied on, *inter alia*, *dicta* in *Nichols* in holding that the inclusion in the gross estate of the value of gifts made in contemplation of death to secure equality of taxation and to prevent evasion of taxes is a permissible classification of an appropriate subject of taxation.

371. *Id.* at 412.
372. The Court, however, suggested that the tax year of enactment was the limit of permissible retroactivity. *Id.* at 411-12. The one year limitation was to be taken up by Justice O'Connor in *Carlton*; but what its justification was and accordingly whether it could, on that basis, be applicable to the *Carlton* facts—an income tax case—requires further explanation, at least as of 1930. See United States v. Carlton, 114 S. Ct. 2018, 2025 (1994).
373. 283 U.S. 15 (1931).
374. *Id.* at 19-20 (analyzing the applicability of the Revenue Act of 1918, ch. 18, § 402(c), 40 Stat. 1057, 1097 (1919)).
375. *Id.* at 18. At that time, the Revenue Act of September 8, 1916 was in effect. *Id.*
376. *Id.*
377. *Id.* at 19.
378. *Id.* (noting that under section 402(c) of the Revenue Act of 1918, for purposes of the tax, the stock was valued at the time of the decedent's death).
379. *Id.*
380. *Id.* at 18.
381. *Id.* at 19.
382. *Id.* at 20. The Court considered the nature of both the tax and the decedent's gift. *Id.* at
The Court upheld the 1918 statute stating: "Underlying the present statute is the policy of taxing gifts [made in contemplation of death] equally with testamentary dispositions, for which they may be substituted, and the prevention of evasion of estate taxes by gifts made before, but in contemplation of death." Here, the Court determined that public policy, as well as the parallel 1916 gift and estate tax rate and valuation provisions, gave the decedent notice of the taxes that would be assessed on the particular gifts, and thus, that the decedent took a risk in making the transfers.

In 1938, the Supreme Court clarified this apparent muddle in Welch v. Henry when it returned to the question of the constitutionality of a retroactive income tax provision. The Wisconsin statute at issue imposed a tax on dividend income that had formerly been excluded from taxation. According to the Court, the taxpayer suffered no detriment because he had not incurred any extra expense or changed his conduct in any way in reliance on the tax law as it stood before retroactive amendment. Accordingly, the tax was not so "harsh and oppressive as to transgress the constitutional limitation." The Court stated: "We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one." However, the Court stated in dicta that Welch would have been a different case if the transaction taxed had been "completely vested before the enactment of the taxing statute [and if] the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event."

Notice and reliance—or reliability—are key. In Milliken, the gift in contemplation of death was made anticipating some tax: a different applicable rate would be unlikely to have determined the donor’s giving or choice of

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22. "By [the 1916 Revenue Act], Congress had adopted the well understood system of taxation of transfers of property at death, already existing in 42 states." Id. (citations omitted). Sections 202(b) of the 1916 Act and 402(c) of the 1918 Act, laid a tax on gifts made in contemplation of death, computed at the same value and rate as property that had been part of the donor’s estate passing at death. Id. “As of 1916, 29 states and one territory imposed taxes on gifts in contemplation of death at the same rate as on estates passing at death.” Id. at 22 n.2. Most provided for appraisal of the property as of the date of the decedent’s death. Id.

383. Milliken v. United States, 283 U.S. 15, 24 (1931) (referring to the tax at issue as one to be supported as “an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent’s estate at death”).

384. Id. at 23.
385. Id.
386. 305 U.S. 134 (1938).
387. Id. at 141.
388. Id.
389. Id. at 148.
390. Id. at 147
391. Id. at 148.
392. Id. at 147

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It is not as transparently clear in Cooper, but the basic idea that one is unlikely to refuse income because of a different tax rate reconciles the line of cases. Justice McReynold’s limitation of the retroactivity of the income tax at issue in Cooper to one year and the distinction between vested and non-vested wealth made in Welch and the Nichols line of cases makes sense: absent notice, the taxpayer is likely to, indeed is invited to, spend in reliance outside such limits. This thinking was confirmed when, after a hiatus of more than forty years, the Court returned to retroactive tax legislation in 1981.

In United States v. Darusmont, the taxpayer unsuccessfully challenged a retroactive change that increased the minimum tax on a completed sale of real estate. Unlike the taxpayers in the cases from the first half of the twentieth century, Darusmont did not actually know of or rely on the relevant pre-amendment law. Darusmont “conceded that when he was considering the various ways in which he could dispose of the Texas property, he was not aware of the existence of the minimum tax.” Should it have made a difference? The Court said he had constructive notice: Darusmont was “hardly in a position to claim surprise at the 1976 amendments to the minimum tax. The proposed increase in rate had been under public discussion for almost a year before its enactment.” The Court also pointed out that the petitioner was in a far different position from one who had no reason to suspect that any transactions of the sort would be taxed at all. The 1976 amendments merely “decreas[ed] the allowable exemption and increas[ed] the percentage rate of tax.”

The final retroactive tax case before Carlton confirms these traditional jurisprudential themes. In United States v. Hemme, the Court decided a challenge on due process grounds to a statute that retroactively applied a tax on gifts. Like the taxpayer in Welch, the petitioners did not rely on the statute in question, and the Court focused on this fact in upholding the

395. Welch, 305 U.S. at 147.
399. Id. at 294-95.
400. See Untermyer 276 U.S. at 440; Blodgett, 275 U.S. at 142; Nichols, 274 U.S. at 531.
401. Darusmont, 449 U.S. at 295.
402. Id. (emphasis added).
403. Id. at 299 (citing S. REP. No. 938, 94th Cong., 2d Sess. 108-14 (1976); H.R. REP. No. 658, 94th Cong., 1st Sess. 130-32 (1975)).
404. Id. at 300.
405. Id. at 299.
407 Id. at 564.
408. See Welch v. Henry, 305 U.S. 134, 142 (1938).
statute.409 Like Darusmont, the Court held that Hemme had constructive notice.410 The Court noted that "[section] 2035 had long been in effect at the time [the decedent] made his gift, and it is [section] 2035 that contains the principle retroactive feature involved in this case, requiring the estate to reach back and embrace a gift made over 2 years previously."411 Also like Darusmont, the Court pointed to the implausibility, or lack of detriment, of any claimed reliance because the taxpayers "still have paid estate taxes of $655.16 less than they would have paid had the 1976 act never been passed" and thus, "the retroactive aspect of the law could not be said to be oppressive or inequitable."412

IV THE CARLTON CASE

On October 22, 1986, the Tax Reform Act (TRA) of 1986, codified as 26 U.S.C. § 2057, became law.413 Section 2057 provided, inter alia, that an estate could deduct half the proceeds of a sale of securities to an ESOP from a decedent’s gross estate.414 The effect of the ESOP proceeds deduction was to place half of that part of the estate that consisted of money received from the sale of securities to an ESOP beyond the reach of the federal estate tax.415 Between passage of the TRA on September 27, and the 99th Congress’ adjournment on October 18, 1986, the legislature considered hundreds of potential amendments to the TRA.416 Among the numerous proposed amendments, only one was related to section 2057—deletion of an extraneous "is."417 The government has never disputed that "no bill or resolution was introduced that would have added any condition to the availability of the new section 2057 deduction other than those contained in the statute itself during the period between passage of the TRA and adjournment on October 18, 1986."418
Jerry W Carlton, as executor of the estate of Willametta K. Day, specifically relied on section 2057 of the TRA when, on December 10, 1986, he purchased 1.5 million shares of MCI Communications Corporation at an average price of $7.47 per share, for a total price of $11,206,000. Two days later, the MCI ESOP agreed to purchase the shares from the estate at $7.05 per share, which was not only below the price at which Carlton purchased the shares, but also approximately twenty-six cents below the average market price that day. Thus, the MCI ESOP, a qualifying ESOP under section 2057, purchased the shares for $10,575,000, $631,000 below the estate's purchase price. Carlton would neither have bought nor sold the stocks in question, and the MCI ESOP would not have received a discount, if not for the section 2057 deduction.

Carlton timely filed the estate tax return on December 29, 1986, deducting fifty percent of the proceeds of the sale to the ESOP, $5,287,000 from the gross estate pursuant to section 2057. The section 2057 transaction with the MCI ESOP saved the Day estate $2,501,161 in taxes. On January 5, 1987, the IRS stated in an advance version of Notice 87-13 that, pending the enactment of a clarifying statute, it would not honor a deduction pursuant to section 2057 if the decedent had not owned the securities in question immediately before death (the “decedent ownership requirement”). This notice was officially published on January 26, 1987. On February 26, 1987, a bill was introduced in the 100th Congress to enact into law the decedent ownership requirement. Under the caption “Congressional Clarification of Estate Tax Deduction for Sales of Employer Securities,” the bill became law (the “1987 amendment”) on December 22, 1987 and retroactively applied the decedent ownership requirement as if the original version of the TRA contained such a requirement.

419. Id. Willametta K. Day died on September 29, 1985, and Jerry W Carlton was duly appointed executor of her will. Id. Due to a filing extension, not at issue in Carlton, Day’s estate tax return was not due until December 29, 1986. Id. at 1053-54. Thus, in terms of timeliness, the Day estate was eligible for the section 2057 deduction. Id. at 1053.
420. Id. at 1054.
421. Id.
422. Id.
423. Id.
424. Id.
426. Id.
427. Id. He then paid a net estate tax of $18,752,250. Id.
428. Id. at 1055.
429. Id. at 1054 (discussing I.R.S. Notice 87-13, 1987-1 C.B. 332).
430. Id. Thus, the decedent ownership requirement did not appear in the 1986 version of section 2057 or in any amendments to the TRA proposed before the 99th Congress adjourned. Id.
requirement. The net deficiency attributable to Carlton's section 2057 claim was $2,501,161. This was the only deficiency in dispute in the case.

Carlton paid the total deficiency ($3,385,333) plus interest ($996,953), and filed a refund claim for the amount of the deficiency attributable to the ESOP proceeds deduction. The claim was denied, and, on October 11, 1990, Carlton filed a refund action in the United States District Court for the Central District of California for $2,501,161 plus interest, costs, and attorney's fees. In the district court, the parties agreed to an order narrowing the potential issues. The government conceded that under section 2057 as passed in 1986, the estate was entitled to the ESOP proceeds deduction and that if the 1987 amendment's retroactive application violated the Due Process Clause of the Fifth Amendment.

430. Id. at 1054-55. The 1987 Amendment read as follows:

SEC. 10,411. CONGRESSIONAL CLARIFICATION OF ESTATE TAX DEDUCTION FOR SALES OF EMPLOYER SECURITIES.

(a) Intent of Congress in Enacting Section 2057 of the Internal Revenue Code of 1986. Section 2057 (relating to sales of employer securities to employee stock ownership plans or worker-owned cooperatives) is amended by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively, and by inserting after subsection (c) the following new subsection:

(d) Qualified Proceeds From Qualified Sales.

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

(A) the decedent directly owned the securities immediately before death, and
(B) after the sale, the employer securities—
   (i) are allocated to participants, or
   (ii) are held for future allocation in connection with
   (I) an exempt loan under the rules of section 4975, or
   (II) a transfer of assets under the rules of section 4980(c)(3).

(2) No substitution permitted. For purposes of paragraph (1)(b), except in the case of a bona fide business transaction (e.g., a substitution of employer securities in connection with a merger of employers), employer securities shall not be treated as allocated or held for future allocation to the extent that such securities are allocated or held for future allocation in substitution of other employer securities that had been allocated or held for future allocation.

(b) Effective Date.

The amendments made by subsection (a) shall take effect as if included in the amendments made by section 1172 of the Tax Reform Act of 1986.


431. Carlton, 972 F.2d at 1055.

432. Id.


434. Id.

435. Id.

436. Id.
Amendment, then Carlton was entitled to judgment. Carlton conceded that if the 1987 amendment could be retroactively applied to his transaction consistent with due process, the estate would not be entitled to the ESOP proceeds deduction, there would be no other grounds for claiming the refund, and the government would be entitled to judgment. The district court granted the government’s motion for summary judgment, holding that the retroactive application of the 1987 amendment did not violate the Due Process Clause because the amendment did not impose a “wholly new tax.” The issue of the constitutionality of the retroactivity of the 1987 amendment could not have been more clearly presented to the Ninth Circuit and Supreme Courts.

A. Due Process Standard: Rationality Review—How Not to Balance the Government Interests and the Individual’s Interests

Both the Ninth Circuit and the Supreme Court reviewed de novo the constitutionality of the 1987 amendment to 26 U.S.C. section 2057. Unlike the Ninth Circuit, the Supreme Court did not adopt the single standard it had consistently applied over the past half century to determine whether the retroactive application of the tax statute complied with due process. Where the Ninth Circuit weighed the “nature of the tax and the circumstances in which it [was] laid” in order to determine whether the retroactivity was so “harsh and oppressive” as to be unconstitutional, the Supreme Court applied the rational basis test generally applied to “retroactive” economic legislation. The Supreme Court stated, “[P]rovided 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.” In deferring to the legislature under such circumstances, the Court enhanced Congress’ powers to enact, inter alia, retroactive tax legislation and thereby limited individuals’ rights.

437 Id.
438 Id.
439 Id. The district court also rejected the petitioner’s Contract Clause and Takings Clause arguments, and Carlton did not raise those issues on appeal. Id.
440 United States v. Carlton, 114 S. Ct. 2018, 2021 (1994); Carlton, 972 F.2d at 1055 (citing Licari v. Commissioner, 946 F.2d 690, 692 (9th Cir. 1991)).
441 Carlton, 114 S. Ct. at 2022.
443 Carlton, 114 S. Ct. at 2022.
444 Id. (quoting Pension Benefit Guaranty Corp., 467 U.S. at 729-39).
445 Contra Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (noting that “[t]here was a time when the Due Process Clause was used by this court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy”).
Further, as Justice Scalia pointed out in his concurrence, the new standard the majority applied
guarantee[d] that all retroactive tax laws [would thereafter] be valid. To pass
constitutional muster the retroactive aspects of the statute need only be “rationally
related to a legitimate legislative purpose.” Revenue raising is certainly a legitimate
legislative purpose and any law that retroactively adds a tax, removes a deduction,
or increases a rate rationally furthers that goal.446

In other words, the Court equated the standard used for retroactive laws with that
used for prospective laws, ignoring the previously critical factors of notice and reliance.447 But nowhere did the Court acknowledge that it was doing so. The
Court said that retroactive legislation has to meet a burden different from that
faced by prospective legislation; yet it never mentioned what that different burden
might be.448 The Court stated that both prospective and retroactive legislation
must meet the test of due process and that the justifications for the former may
be insufficient for the latter.449 Nevertheless, it opined that the rational basis
test is applicable to retroactive legislation.450 How does the rational basis test
or the standard used here differ from one the court would apply to a prospective
statute?

B. Nature & Circumstances

As might be expected, the Supreme Court and the Ninth Circuit both rejected
the notion of a per se rule of invalidity where a statute applied retroactively.451
The Supreme Court reasoned that, where the original version of section 2057 had
no decedent ownership requirement, “any estate could claim the deduction simply
by buying stock in the market and immediately reselling it to an ESOP, thereby
obtaining a potentially dramatic reduction in (or even elimination of) the estate
tax obligation.”452 Of course, that was precisely what the statute plainly
authorized, and it served Congress’ purpose of promoting ESOPs. It may look

446. Carlton, 114 S. Ct. at 2027 (1994) (Scalia, J., concurring) (citations omitted). See THE
FEDERALIST No. 84, supra note 31, at 629.
447. See supra text accompanying notes 393-412. See also Welch v. Henry, 305 U.S. 134, 147
(1938); Untermeyer v. Anderson, 276 U.S. 440, 445-46 (1928); Blodgett v. Untermeyer, 275 U.S. 142,
147 (1927); Nichols v. Coolidge, 274 U.S. 531, 542 (1927).
448. Carlton, 114 S. Ct. at 2022 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17
(1976)).
449. Id.
451. Id. at 2026. “The Supreme Court has ‘made clear that some retrospective effect is not
necessarily fatal to a revenue law. Thus retroactivity alone will not condemn a congressional
enactment.’ United States v. Carlton, 972 F.2d 1051, 1056 (9th Cir. 1992) (emphasis added)
(citations omitted). “We do not doubt the power of Congress to apply legislation retroactively to
the time such legislation was introduced or even to the time such legislation was proposed by the
executive branch.” Id. at 1062.
irrational to indulge a tax expenditure of $2.5 million to give an ESOP a price
discount of some $600,000, but both the Court's decision and the 1987
amendment merely limited the availability of this irrationality, neither changed it.
But included in the legislative history was a Committee Report statement
acknowledging the clarity of the original section 2057 and claiming it
misrepresented congressional intent: "As drafted, the estate tax deduction was
significantly broader than what was originally contemplated by Congress in
enacting the provision. The committee believes it is necessary to conform the
statute to the original intent of Congress in order to prevent a significant revenue
loss under the [TRA]."453 The Court thus concluded that the 1987 amendment
was adopted as a "curative measure" permitting retroactivity 454
Characterizing the amendment as a mere cure, however, is not a justification.
To the contrary, it shows exactly the danger of reasoning by labels. Previously,
courts, including the Supreme Court, had approved retroactive curative legislation
that covered prior actions thought by the parties to be legal when taken, but
subsequently found defective because of some collateral problem.455 This same
verbal sleight of hand allowed the Court to ignore reasons for allowing curative
legislation to be retroactive: that parties had erroneously acted in reliance on the
law's being as now revised.456 So, the Court simply ignored not only the
executor's lack of notice (constructive and actual), but also the financial burden
imposed on the Day estate ($631,000).457 Moreover, as Justice O'Connor reasoned, labeling the amendment a cure will always lead the Court to
conclude that the retroactivity served a legitimate legislative purpose:

Every law touching on an area in which Congress has previously legislated can be
said to serve the legislative purpose of fixing a perceived problem with the prior
state of affairs—there is no reason to pass a new law, after all, if the legislators are
satisfied with the old one.458

Neither the Supreme Court nor the Ninth Circuit made much of the district
court's argument for validity where the amendment did not apply a "wholly new"

453. Carlton, 972 F.2d at 1055. See H.R. REP. NO. 391(II), 100th Cong., 1st Sess. 1045
455. See, e.g., Charlotte Harbor & Northern Railway Co. v. Welles, 260 U.S. 8, 10 (1922); United States v. Hemszen & Co, 206 U.S. 370, 382 (1907). Thus, a valid retroactive "curative
measure" has consistently been defined as legislation that applied retroactively in order to meet the
expectations of the interested parties, not of the legislature. See supra text accompanying notes
224-239.
457 Id. at 2026 (Scalia, J., concurring) ("The Court attempts to minimize the amendment's
harshness by characterizing it as a 'curative measure' [H]owever, what was done to respondent
here went beyond a 'cure. The retroactivity not only [restored] the tax that Congress 'meant' to
impose originally, but it caused his expenditures [$631,000] incurred in invited reliance upon the
earlier law to become worthless.").
Both refused to adopt either a *per se* rule of invalidity or a *per se* rule of validity on the grounds that the statute was retroactive and the statute did not impose a wholly new tax. In considering the nature of the tax and the circumstances in which it was laid, the appellate court perceived no "rigid standard of constitutionality in the decided cases" and thus was "guided by the more flexible criteria delineated by the Supreme Court in *Welch v. Henry*." Following precedential tradition, the Ninth Circuit analyzed *Carlton* on two factors, notice and reliance:

From the earlier retroactive tax cases, two circumstances emerge as of paramount importance in determining whether the retroactive application of a tax is unduly harsh and oppressive. 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?

The Supreme Court rejected its historical approach to retroactive gift and estate tax statutes, dismissing *Nichols, Blodgett,* and *Untermyer* as cases decided during "an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" With one swift stroke of the
pen, the Court relieved itself of adhering to precedent, history, and tradition. Moreover, in dismissing the Nichols line of cases in this way, the Court not only relied on dicta stated in Ferguson v. Skrupa, but also misapplied that dicta to the facts of the gift and estate tax cases. The Ferguson Court referred to Lochner v New York and its progeny, cases that involved the Supreme Court's practice of striking down laws it thought "unreasonable, that is, unwise, or incompatible with some particular economic or social philosophy". However, in Nichols, Blodgett, and Untermyer, the Supreme Court did not

Justice Scalia wrote:

The picking and choosing among various rights to be accorded 'substantive due process' protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called 'economic rights' (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policy making rather than neutral legal analysis. I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.

Carlton, 114 S. Ct. at 2027 (Scalia, J., concurring).

466. See Untermyer 276 U.S. at 445-46; Blodgett, 275 U.S. at 147; Nichols, 274 U.S. at 541-42.

467. 372 U.S. 726, 730 (1963) (concluding that it is not the judiciary's function to strike down state laws on policy grounds so long as those laws do not conflict with the federal constitution).

468. Carlton, 114 S. Ct. at 2022 (applying a rational means test usually applied to retroactive economic legislation, thereby providing great deference to the legislature).

469. 198 U.S. 45 (1905).

470. Ferguson, 372 U.S. at 729 (citing Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 516-17 (1924) (finding unconstitutional a Nebraska law setting the weight of loaves of bread); Adkins v. Children's Hosp., 261 U.S. 525, 554 (1923) (striking down a District of Columbia law establishing minimum wages for women); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (prohibiting "yellow dog" contracts)). Lochner v. New York involved a New York law that limited the hours which a bakery employee could work to 10 per day and 60 per week. Lochner, 198 U.S. at 46 n.1. The Court struck down the statute as an abridgement of "liberty of contract," and thus a violation of due process. Id. at 64. The Lochner case is distinguishable from the Nichols line of cases. In Lochner the Supreme Court did not accept Congress' asserted purposes for enacting the law, e.g. that bakers need protection for safety reasons and health reasons. Id. at 57 Instead, the Court only considered the legislature's actual motive. Id. at 64. Second, the Court did not defer to legislative fact finding. Id. Finally, the Court required a "close fit" between the statute and the legislature's actual purpose. Id. at 57-58. The Court stated:

It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employ[ee]s (all being men, sui jurs), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employ[ee]s. Under such circumstances the freedom of master and employ[ee] to contract with each other in relation to their employment [cannot] be prohibited or interfered with, without violating the Federal Constitution.

Id. at 64 (emphasis added). Arguably, the Court substituted its laissez faire view of economics for the asserted will of the legislature.
question the "wisdom, need, or appropriateness of the legislation." For example, the Court did not hold that it was unwise, unnecessary, or inappropriate for Congress to prevent revenue loss. Instead, it considered whether the retroactive feature of each statute, which not only denied the particular taxpayers the opportunity to comply with the new laws but also caused them to rely detrimentally on the pre-amendment law, rendered the statutes "arbitrary and irrational."

C. Notice

A common thread that runs through the cases in which the Supreme Court upheld the challenged retroactive statute is that the taxpayer had either actual or constructive notice that her transfers or income would be taxed. Unlike those

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471. Ferguson, 372 U.S. at 730.
472. See Untermyer 276 U.S. at 444-45; Blodgett, 275 U.S. at 147; Nichols, 274 U.S. at 542-43.
473. Both the Ninth Circuit and the Supreme Court viewed the harsh and oppressive standard the same as the arbitrary and irrational standard. See Carlton v. United States, 972 F.2d 1051, 1056 (9th Cir. 1992) ("The 'harsh and oppressive' standard does not differ from the prohibition against arbitrary and irrational legislation that [the Supreme Court] clearly enunciated in Turner Elkhorn." (quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co, 467 U.S. 717 733 (1984)), rev'd, 114 S. Ct. 2018 (1994). See also United States v. Carlton, 114 S. Ct. 2018, 2022 (1994) (stating that while Welch and Hemme used the harsh and oppressive standard, the formulation, however, "does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy" (quoting Pension Benefit Guaranty Corp., 467 U.S. at 719-20)).
474. See United States v. Hemme, 476 U.S. 558, 571 (1986); United States v. Darusmont, 449 U.S. 292, 299 (1981); Milliken v United States, 283 U.S. 15, 23 (1931). But see Licari v. Commissioner, 946 F.2d 690, 695 (9th Cir. 1991) (noting that although the statute in question failed to warn petitioners that their conduct would subject them to increased penalties, petitioners' bad faith conduct relieved the statute of its harsh and oppressive nature). In Licari, petitioners underpaid their taxes and challenged a statute that retroactively increased the penalty rate for such illegal conduct from 10% to 25%. Id. at 692. In upholding the statute, the Court carefully pointed out:

Here we are not presented with a case in which an individual acted in accordance with the law as it stood at the time only later to be subjected to a penalty; instead, those subjected to the increased penalties, like the Licari's knew at the time that they filed their return that they were not acting in accordance with the law and could be subjected to a fine. Under these circumstances, we do not find imposition of the increased penalty unduly 'harsh and oppressive.'

Id. at 695. Contra Untermyer v. Anderson, 276 U.S. 440, 445-46 (1928) (striking down a retroactive statute where the taxpayer completed gifts after the retroactive amendment was proposed to Congress but before it was enacted); Blodgett v. Holden, 275 U.S. 142, 147 (1927) (striking down a retroactive statute where the taxpayer made gifts before the provision in question was even presented to Congress for consideration); Nichols v. Coolidge, 274 U.S. 531, 542 (1927) (striking down retroactive statute where the Court found that taxpayer had neither actual nor constructive notice that the trust corpus would be taxed as part of her estate when she created the trust 12 years
taxpayers, Carlton had neither constructive nor actual notice of the 1987 amendment imposing the decedent ownership requirement when he completed the MCI ESOP transaction in 1986.\textsuperscript{475} The decedent ownership requirement was not part of the proposed amendments that Congress considered before it adjourned on October 18, 1986.\textsuperscript{476} The first proposal to amend section 2057 to include a decedent ownership requirement was not made until January 5, 1987 \textsuperscript{477} Congress did not consider the bill to enact the IRS proposal until February 26, 1987 \textsuperscript{478} "Hence, no act of the executive or legislative branch would have given any forewarning of the 1987 amendment at the time the MCI ESOP transaction occurred."\textsuperscript{479}

The government relied on two fleeting references in congressional documents in arguing that Carlton should have been put on constructive notice of the amendment to the TRA.\textsuperscript{480} However, the references merely stated that the ESOP proceeds deduction would be available to a decedent who sold her company to an employee group.\textsuperscript{481} Nowhere in the legislative history did it state that the ESOP proceeds deduction would be limited to such a situation.\textsuperscript{482}

Moreover, of the two references, one was in a pamphlet written by the staff of the Joint Committee of Taxation in September 1985 \textsuperscript{483} The court of appeals said, "[T]he pamphlet does not purport to speak for Congress or even a Congressional Committee, and was prepared over a year before passage of the TRA. Its value as legislative history is doubtful."\textsuperscript{484} In support of its position, the government also referred to a floor statement made by Senator Russell Long, "which was at best ambiguous."\textsuperscript{485} The court of appeals concluded that Carlton did not have constructive notice that an amendment proposing a decedent ownership requirement would be forthcoming.\textsuperscript{486}

Unlike the Ninth Circuit, the Supreme Court did not consider Carlton's lack of notice regarding the decedent ownership requirement to be material.\textsuperscript{487} The
federal statute can be relied on for planning, nor is any citizen secure from the perfectly secret law of future retroactive legislation. For very good reason, then, the court of appeals "flatly reject[ed] the government's premise that a taxpayer cannot rely on the clear and unequivocal text of the tax code, but instead must speculate on the unspoken and inchoate intentions of Congress."503

Should Carlton have taken constructive notice from the tax expenditures involved? The numbers do not suggest it. In the context of other huge tax incentives to encourage the development of ESOPs—$56.8 billion increasing to $88.9 billion for fiscal year 1990504—section 2057 as first enacted would cost a mere $1.4 billion,505 an amount that should not have raised any eyebrows.506

But should a taxpayer contemplating action according to the undisputedly plain language of the statute have to investigate such econometrics? The Ninth Circuit stated that, "[E]ven if it were reasonable to expect that before a taxpayer would take a deduction plainly available to him under the tax code, he would research the estimated tax expenditure associated with such deduction, the tax expenditure created by the ESOP proceeds deduction as originally enacted was entirely plausible."507

503. Carlton v. United States, 972 F.2d 1051, 1060 (9th Cir. 1992) ("The federal government has long sought to promote employee ownership of shares in the employers. Section 2057 was enacted to induce taxpayers to sell shares at a discounted price to an ESOP thus furthering the public policy of employee ownership."), rev'd, 114 S. Ct. 2018 (1994).

504. Id.

According to the Joint Committee on Taxation, [t]he tax expenditure for qualified plans is the largest single item of tax expenditures. For the fiscal year 1986, the tax expenditure for employer maintained qualified plans (including Keogh plans) is estimated to be $56.8 billion and this expenditure is projected to increase to $88.9 billion for fiscal year 1990.


507. Id. at 1060. Carlton would have had to hire an attorney to research the legislative history. Such research would have been time consuming and costly, and perhaps, inconclusive. Even if Carlton had done all possible research in 1986, he would have discovered the legislative purpose (to promote employee ownership) and a variety of other statutes that Congress had enacted for the same purpose: He would have found legislation dealing with other "qualified plans," including pension and profit-sharing plans, which had the intended purpose and effect of raising $55.4 billion for the benefit of employees. _Id._

Carlton's research might also have turned up other legislation the federal government enacted to encourage employee ownership. _See, e.g.,_ 26 U.S.C. § 133 (1984) (excluding from taxable income half the interest from bank loans made to an ESOP in order to finance the purchase of
reasonably nor detrimentally relied on the original version of the legislation. Unlike those taxpayers, Carlton reasonably and detrimentally relied on section 2057 as enacted in 1986. As the Ninth Circuit stated: "The very fact that Carlton engaged in a costly transaction for no other reason than the inducement provided by the new section 2057 makes this case significantly different from those rejecting a due process challenge to a retroactively applied revenue law."

For example, in Welch, the retroactive statute returned the taxpayer to the position he would have been in had the Wisconsin legislature not been giving corporations special tax treatment all along. The petitioner in Welch had incurred no out-of-pocket expenses due to the original statute. On the other hand, Carlton, as executor, relied to his detriment on the original version of section 2057, losing $631,000. Unlike the taxpayer in Welch, Carlton was not returned to the status quo.

But the problem with the Supreme Court’s action in Carlton goes beyond denying a person who acted in good faith a substantial refund to which he was entitled. In upholding the retroactive decedent ownership requirement, the Court sanctioned a legislative strategy accurately named "bait and switch" taxation by Justice Scalia. If this strategy is secure from constitutional scrutiny, no

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496. See Cooper v. United States, 280 U.S. 409, 411 (1930) (stating that a taxpayer suffers no detriment in having to include in his or her taxable income the gain derived from the receipt and subsequent sale of stock even where the gain was realized when it was not taxable). See also United States v. Hemme, 476 U.S. 558, 571 (1986) (concluding there could be no detrimental reliance where the taxpayer actually saved over $600); United States v. Darusmont, 449 U.S. 292, 295 (1981) (finding no reliance where taxpayer was not aware of the original minimal tax); Welch, 305 U.S. at 148 (noting that the taxpayer did not incur any extra expenses or in any way change his actions in reliance on the law as it read before enactment of the retroactive amendment); Milliken, 283 U.S. at 23 (finding that the taxpayer "take[s] his chances" on retroactivity of the tax statute).

497. Carlton, 972 F.2d at 1059-60.


499. Id. Unlike the retroactive amendment in Carlton, the challenged amendment in Welch did not require the plaintiff to pay any out-of-pocket expenses but merely to include additional dividend income in his taxable income. Id. at 143.

500. Carlton, 972 F.2d at 1061.

501. Id. at 1059-60 ("The very fact that Carlton engaged in a costly transaction for no other reason than the inducement provided by the new section 2057 makes this case significantly different from those rejecting a due process challenge to a retroactively applied revenue law.").

502. See United States v. Carlton, 114 S. Ct. 2018, 2026 (1994) (Scalia, J., concurring). In the Ninth Circuit, Judge O'Scannlain wrote:

As intended, the Day estate succumbed to the lure and sold shares to the MCI ESOP at a substantial discount. Section 2057 worked. An ESOP was able to buy more shares at a lower price than before. Then, when the private actor had completed the socially desirable action of selling shares at a discount to an ESOP the government reneged on its end of the deal. It was too late for Carlton to undo his sale to the MCI ESOP. The $631,000 was gone forever, irretrievable.

Carlton, 972 F.2d at 1060.
required consideration of reliance in conjunction with the plain and unequivocal language of the statute on which Carlton relied, and consideration of the complete absence of notice of the retroactive 1987 amendment in determining whether the statute was constitutional. 514

Not only did the Supreme Court fail to attach significance to the issue of reliance, but it also failed to acknowledge that the government’s curative measure cost Willametta Day’s estate $631,000. Rather than addressing the issue of detrimental reliance, Justice Blackmun addressed the issue of the government’s power to tax and the individual’s duty to pay taxes. 515 He wrote, “Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.” 516 Then, Justice Blackmun quoted Justice Stone, who explained in Welch:

Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contracts. It 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. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process 517

Thus, Justice Blackmun simply ignored the fact that in Carlton the retroactive amendment had consequences beyond tax liability. The retroactive amendment did “penalize” Carlton for furthering the public policy of increasing employee ownership. Notwithstanding that the Supreme Court believed the Day estate was not entitled to the tax deduction under the 1987 amendment, 518 at the very least, the estate still should have been able to recover the money it lost as a result of complying with the plain meaning of the original statute. 519

Second, the government argued that selling the shares at a loss was not a condition precedent to qualifying for the deduction, and thus, it should not have been a factor in determining whether retroactive application of the decedent ownership requirement was unduly harsh and oppressive. 520 In theory, the government was correct. However, in practice, the seller had to provide the purchaser (ESOP) with an incentive, in the form of a discount, to purchase the

514. Justice Blackmun’s statement dismissing reliance also ignores the difference between relying on the plain meaning of a statute and relying to one’s detriment on the plain meaning of a statute. If the estate had suffered no loss from the sale of the shares to the ESOP, but merely was required to pay the tax deficiency, then one might say that the Supreme Court’s analysis was not suspect. However, here, the Court’s analysis was further suspect because it omitted a material fact—that Carlton, acting as a fiduciary and thus, trying to benefit the estate by decreasing its tax liability, took a loss of $631,000 in order to reduce such liability by $2.5 million. Id. at 2021.
515. Id. at 2023.
516. Id.
517 Id. (quoting Welch v. Henry, 305 U.S. 134, 146-47 (1938)).
518. Id. at 2024.
520. Id.
shares from him in a large block rather than on the open market.\textsuperscript{521} In order to qualify for the deduction, the seller needed the cooperation of the ESOP, which had to certify that it had met certain requirements.\textsuperscript{522} Thus, the ESOP had added bargaining power and it could, and would, demand some part of the tax break in the form of a discounted share price. Otherwise, the ESOP would not have helped the estate to comply with section 2057\textsuperscript{523} Moreover, the government conceded that Carlton would not have sold the shares at a discount and, therefore, the ESOP would not have been able to acquire shares at a discount without the section 2057 deduction.\textsuperscript{524}

Overall, the Ninth Circuit held that Carlton reasonably relied on the plain language of section 2057 and had no actual or constructive notice that the statute would be amended in such a way that would contravene the public policy of benefitting ESOPs.\textsuperscript{525} Also, Carlton's reliance was detrimental: the 1987 amendment did not return the estate to the \textit{status quo ante}.\textsuperscript{526} The Day estate lost $631,000.\textsuperscript{527}

The government also contended that the transaction was a sham, that it had no substance. Carlton purchased the shares only two days before he sold them to the ESOP, and he intended the tax benefit to outweigh the loss.\textsuperscript{528} In rejecting the government's argument, Judge O'Scannlain wrote:

\textsuperscript{521} Id.
\textsuperscript{522} Id. \textit{See} 26 U.S.C. \textsection 2057(e) (amended 1988) (repealed 1989).
\textsuperscript{523} \textit{Carlton}, 972 F.2d at 1061.
\textsuperscript{524} Id. at 1054.
\textsuperscript{525} Id. at 1062. In \textit{Welch v. Henry}, the taxpayer challenged legislation that retroactively imposed a tax on certain previously excluded income. \textit{Welch v. Henry}, 305 U.S. 134, 141 (1958). There was no evidence that the taxpayer changed his conduct in reliance on the law as it stood before retroactive amendment. \textit{Id.} at 148. In upholding the statute, the Court refused to assume that an individual would reject corporate dividends even if he or she knew that his or her receipt would later be subjected to a new or an increased tax. \textit{Id.} "The Court stated, however, that a different case would be presented where a transaction was taxed that was "completely vested before the enactment of the taxing statute, and 'the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." \textit{Carlton}, 972 F.2d at 1058 (citation omitted).

The Ninth Circuit literally applied the dicta in \textit{Welch}. First, the court of appeals placed great weight on the fact that Carlton's transaction with the ESOP was "completely vested" before Congress amended section 2057 \textit{Id.} at 1060. Second, the court of appeals stated that its conclusion would most likely have been different if before Carlton had completed the transaction he had notice that section 2057 \textit{would be} amended. \textit{Id.} at 1062. Indeed, the Ninth Circuit would have decided \textit{Carlton} differently if the decedent ownership requirement had been \textit{introduced} before Carlton made the sale to the ESOP or if Carlton had completed the transaction before any statement regarding a decedent ownership requirement was officially published. \textit{Id.} The court explained: "The government has a strong interest in capturing within its taxing powers transactions deliberately rushed through in anticipation of a pending change of law." \textit{Id.} \textit{Contra} United States v. \textit{Carlton}, 114 S. Ct. 2018, 2025-26 (1994) (O'Connor, J., concurring).

\textsuperscript{526} \textit{Carlton}, 972 F.2d at 1061.
\textsuperscript{527} Id.
\textsuperscript{528} Id.
We disagree. The substance was in the transfer of wealth from the Day estate to the MCI ESOP. The Day estate was $631,000 poorer after the transaction than it was before. The MCI ESOP now owns more shares than it would have had it only been able to purchase shares on the open market. The permanently changed position of the parties show that the transaction had substance and reality.\(^{529}\)

Accepting the government's argument that Carlton's transaction was a sham would have been tantamount to protecting all of the government's relevant interests at the expense of all of Carlton's relevant interests. The government sought to promote employee ownership by offering a tax deduction to estates who made "qualified sales" to ESOPs.\(^{530}\) Then, once the estate made such a sale and took a deduction, the government avoided revenue loss by denying the deduction.\(^{531}\) Under this scheme, the government attained its objectives by removing the deduction \textit{ex post facto} and by leaving the estate in a worse position than it would have been in had the government never offered the deduction.\(^{532}\) Here, both the government and the ESOP benefitted from "bait and switch taxation," whereas the estate suffered a loss of more than a half million dollars.\(^{533}\) In effect, the government took $631,000 from the Day estate and gave it to the MCI ESOP.\(^{534}\)

In summary, the Supreme Court in \textit{Carlton} found insignificant the features that hitherto had marked retroactive legislation as suspect. To pass constitutional muster, a retroactive statute must only be "supported by a legitimate legislative purpose furthered by rational means,"\(^{535}\) precisely the standard applied to

\(^{529}\) Carlton v. United States, 972 F.2d 1051, 1061-62 (9th Cir. 1992), \textit{rev d}, 114 S. Ct. 2018 (1994). Justice O'Connor, who concurred in the Supreme Court's judgment, also pointed out that Carlton's purely tax-motivated sale of stock should not have met with disapproval of the Justices. \textit{Carlton}, 114 S. Ct. at 2024 (O'Connor, J., concurring). Carlton, as executor, properly structured the "estate's affairs to comply with the tax laws while minimizing tax liability." \textit{Id}. In support of this point, Justice O'Connor quoted Learned Hand:

\[\text{[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. Therefore, if what was done here, was what was intended by [the statute], it is of no consequence that it was all an elaborate scheme to get rid of [estate] taxes, as it certainly was.}\]

\textit{Id}. (quoting Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), \textit{affd}, 293 U.S. 465 (1935)).

\(^{530}\) \textit{Carlton}, 972 F.2d at 1061.

\(^{531}\) \textit{Id}. at 1059-62.

\(^{532}\) \textit{Id}. at 1061.

\(^{533}\) \textit{Id}. at 1060.

\(^{534}\) "[A]cts directly transferring one man's estate to another" have long been considered paradigms of unconstitutional legislation. Hurtado v. California, 110 U.S. 516, 535-36 (1884).

prospective legislation.\footnote{536} The Court found reliance and the absence of notice, the two features that to this point had differentiated unconstitutional retroactivity, of little constitutional significance.\footnote{537} The Court simply ignored the relationship between these two elements, and ignored or sloughed off precedents that might otherwise have mandated a contrary result.

By denying the relevance of these jurisprudential markers of retroactivity, the Court effectively excluded retroactivity \textit{as such} from due process review. Without explicitly saying so, and in fact, by sophistry amounting to little more than verbal sleight of hand, the \textit{Carlton} Court handed Congress the power to make the ultimate in secret laws, the law that only the prescient can see, the law that catches you \textit{nunc pro tunc}—provided, that is, the statute is not overtly criminal, and is "supported by a legitimate legislative purpose furthered by rational means."\footnote{538} This case gives the legislature an extraordinary power—or does it?

\section*{Conclusion}

Demosthenes thought the greatest evil of retroactive legislation was its appropriation of the power of a previous legislature: if retroactivity is readily available, then the present, or any, legislature’s own power is extremely tenuous, dependent on the grace of successor legislatures.\footnote{539} In this sense, in \textit{Carlton} the Supreme Court allowed the 100th Congress to appropriate the legislative power of the 99th Congress. To be sure, the 100th Congress thought the 99th Congress had made a mistake, but with the authority the Court has now given, a subsequent congress can second guess the 100th, the present, or any other congress, for any reason or none. Legislative power has become as insecure to the legislature as legislation has become to the public.

Reliance is dependent on notice. One cannot act in reliance on a statute of which one is unaware. But sensible, justifiable reliance is also dependent on \textit{reliability}. It would be foolish to take action in reliance on an unreliable verbal formula. The greater the consequence of the action contemplated, the more foolish and the less justifiable is reliance on such a law. In \textit{Carlton}, the Supreme Court has explicitly denied the significance of notice and reliance, hitherto so important in precedent and jurisprudential history. The due process standard required of retroactive legislation is indistinguishable from that required of any other legislation. According to \textit{Carlton}, a future legislature can change the present state of the law \textit{nunc pro tunc} without satisfying any distinctive due process requirements. This, of course, makes all present law unreliable. To plan

\begin{itemize}
\item \footnote{536} Contra Usery v. Turner Elkhorn Minng Co., 428 U.S. 1, 17 (1976) ("The retrospective 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."). \textit{See supra} text accompanying notes 291-97
\item \footnote{538} Carlton, 114 S. Ct. at 2022 (quoting \textit{Usery}, 428 U.S. at 16-17).
\item \footnote{539} Demosthenes’ Speech Against Timocrates (353 B.C.), \textit{supra} note 165, at 373.
\end{itemize}
one's affairs in reliance on federal statutory law is to put oneself at the mercy of the whim of a future congress.

Reliability of the law is a most significant virtue. Reliability really lies behind the doctrine of *stare decisis*: if future decisions did not need to be the same as past ones, we would truly have a government of men, not of laws. Several justices of the Supreme Court, justices who joined the *Carlton* decision, have explicitly acknowledged the importance to the governed of reliability of law as a basis of *stare decisis*. Justice Souter has written that consistency in the Court's decisions on constitutional interpretation is essential to normal personal behavior.\(^{540}\) If consistency in Court decisions—read by few—is essential to ordinary (non-planned) behavior, how much more essential is consistency in statutory language in areas of law in which consultative planning is the norm? Justice Scalia wrote regarding certainty in statutes, "But the whole point of

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[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision acquires an equally rare precedential force to counter the inevitable efforts to overturn it and thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to re-examine a watershed decision would subvert the Court's legitimacy beyond any serious question.

A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

*Id.* at 856, 867-69 (citations omitted). To suggest that a person would have unprotected sexual intercourse in reliance on *Roe v. Wade* would be somewhat out of touch, to say the least. But other persons, such as state legislators, state attorneys general, as well as medical practitioners might indeed rely on that decision, directly or indirectly through legal counsel.
rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability.\textsuperscript{541} Carlton was about the sort of social behavior—estate planning—in which reliability of statutory law and predictability of outcome is at its most important.\textsuperscript{542} After Carlton, consistency in statutory language, and with it the promised “large increase in efficiency and predictability,” has been compromised.

It is difficult to imagine the Court’s jurisprudential attitude in Carlton becoming its accepted, long-term posture. But, as was pointed out by Mr. Carroll at the constitutional convention in 1787\textsuperscript{543} and often since, the passage of some retroactive legislation is inevitable, especially legislation having retroactive effects.\textsuperscript{544} How should the Court use the Constitution’s due process requirements to police retroactive civil legislation?

Had we the power, we would fashion an analysis similar to that adopted by the Court in Contracts Clause cases, requiring the retroactivity of retroactive legislation to be both reasonable and necessary to accomplish a legitimate public purpose in order to pass due process scrutiny under the Fifth and Fourteenth Amendments.\textsuperscript{545} Analysis of what is considered reasonable would focus on reliance and its precondition, notice. Such a rule would place burdens on both the government and the governed, the defenders of the retroactive legislation and its victims.

As always, the first hurdle should belong to the challenger of the government’s action. The victim should have the burden of showing reliance on the state of the law at the time he took action causing loss. Did he or she rely on the displaced prior governing law? Was that reliance justified? Was the reliance crucial to the action taken? Was the reliance to the victim’s detriment? Was it significant? If the loss complained of was caused by the victim acting in significant and justified reliance on the existing state of the law, then the burden should shift to the defender of the retroactive legislation.

We would require the government, in defense of the legislation, to show that its retroactivity was essential to a significant state purpose, antecedently determined, and that it was tailored to minimize unfairness to or oppression of those who might be victimized.\textsuperscript{546} If the state’s purpose in the legislation could


\textsuperscript{542} The introductory essay of the Uniform Code Commissioners to the 1993 revision of the Uniform Probate Code stated that the purpose of the Code was for the “ease of administration and predictability of result are prized features of the probate system.” \textit{Introductory Essay to U.P.C.} (1993).

\textsuperscript{543} See supra text accompanying note 18.

\textsuperscript{544} See supra text accompanying notes 191-219


\textsuperscript{546} In the light of equity as evaluated over history, it would be nice if this could be ‘compelling’ rather than merely ‘significant. However, suggested reforms such as this should minimize the changes required if they are to be plausibly realistic and not just utopian.
be achieved without making the law retroactive, or by making it more reasonably
tailored to its end and minimizing its harmful effects, or if the purpose was not
important, then the loss inflicted on the victim by the retroactive application of
the statute should be held unconstitutional as a violation of the due process
provisions of the Fifth and Fourteenth Amendments.

Such a procedure would account for almost all the Supreme Court’s
retroactivity decisions prior to 1994. How would Carlton come out on this
analysis? Carlton made a very substantial market transaction in explicit reliance
on the state of the law in place. This fact was never disputed. That
transaction cost the estate of which he was executor some $631,000. This,
too, was never questioned. The burden would then shift to the government:
could it show that the retroactivity of the decedent ownership amendment was
essential to an antecedently determined significant state purpose? That depends
on how one calculates the outcomes and over what time period. Recall that the
IRS gave notice of its intent not to honor the prior statute and to seek an
amendment on January 5, 1987 Suppose Carlton had taken his action after
that date: would his reliance on the statute in place have been justifiable? Hardly
On the contrary, it would have been foolhardy Thus, justifiable
reliance for estate transactions such as Carlton’s was possible only between
October 22, 1986 and January 5, 1987 The least deceptive numbers in the
opinions are that section 2057 before its retroactive amendment, would cost the
government some $1.4 billion per annum. But if one reduces the time period
for action on the original section 2057 to the seventy-five days in which reliance
was justifiable, that cost would have to be greatly reduced, perhaps to Carlton’s
transaction alone Given this de minimis cost to the government over the
relevant seventy-five day period—from October 22, 1986 to January 5, 1987—is
the retroactivity of the decedent ownership amendment still essential to a
significant state purpose? Even if one could make the stretch by saying it is, was
the retroactivity tailored to minimize unfairness on or oppression of those who
might be victimized? Could the amendment’s purpose be achieved without

547 We say “almost” because it would not, for example, account for Untermyer v. Anderson. See Untermyer v. Anderson, 276 U.S. 440, 444-45 (1928). See also supra text accompanying notes 350-59.
549 Id. at 1060.
550 Id. at 1054.
551 It is thus that our analysis would run counter to Untermyer See supra text accompanying notes 350-59.
552 This was the date of enactment of section 1172(a) of the Tax Reform Act of 1986. See 26 U.S.C. § 2057 (1986) (repealed 1989). See also supra text accompanying notes 305-14.
553 See supra text accompanying notes 504-06.
554 Notice that the rationality of the whole section 2057 with or without the decedent
ownership requirement is not in question: it is clearly irrational to take a $2.5 million tax cost in
order to give an ESOP a $600,000 market advantage. That irrationality was left intact by the
Court’s decision. See supra text accompanying notes 452-54.
making it retroactive or by making it more reasonably tailored to its end and minimizing its harmful effects? The answer here is clearly "yes." It would have been a simple matter to make the retroactivity date only from the time at which the IRS gave notice to all concerned, January 5, 1987. That would have minimized the detrimental reliance losses of those who acted in good faith on the original invitation.

Must that be all there is? When the burden of the argument, the underlying reason for the repugnance of retroactive legislation, is its "bait-and-switch" quality, should not the victim's remedy be tailored accordingly? One way in which retroactive legislation could pay "due regard" to its unwitting victims would be to provide compensation, if not for their full expectation, at least for losses incurred in justified reliance on the superseded state of the law. Recall the situation in contract law when the grounds for enforcement is detrimental reliance: a very common intuition is that damages should be determined in accordance with their basis, recompense of losses incurred in reliance on the defendant's promise, not the plaintiff's expectation. Perhaps the remedy for the victim of retroactivity in legislation should be similarly tailored. Carlton is an example. If the legislature, despite its many layers of review, was truly mistaken in the language of section 2057, and so the Day estate should not be injured by its reliance thereon; damages in the sum of $631,000, rather than the $2 million greater tax break authorized by the statute, would make it whole.

How could a Court achieve such an equitable outcome? Its very suggestion is likely to bring the instant reaction: statutes are not contracts. But much of the justification for statutes as law is very similar to the justifications for contract: the reliability of statutes and promises makes possible the future planning essential to modern division of labor and commerce. In those cases in which the same reasons apply, could we not apply some of the developed contract jurisprudence to statutes? Unfortunately it would seem not. When interpretation is not in question, a court can only strike the statute as unconstitutional or allow it to survive intact. On the analogy to contract damages, the victim of the retroactivity gets expectancy interest damages or nothing. Reliance damages are not possible.

556. And with it a quote of Justice Stone: "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract." Welch v. Henry, 305 U.S. 134, 146 (1938).
557. However the "public choice" theorists come very close to saying that, for example, a statute is the product of a deal between legislature and special interest. See Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 CARDOZO L. REV 1597, 1603 (1991).
559. See id. Ordinarily, expectation interest damages is essential to the requirement of reliability in contracts, and ordinarily it is one's expectation interest that is served by the reliability of statute law. But just as the are instances in contract enforcement in which reliance rather than expectancy interest damages are appropriate, so we are suggesting is it with statute law.
At present, then, courts are forced into an "all-or-nothing" stance. Constitutional policing through the Due Process Clauses can only knock out the offending retroactivity in its entirety. An equitable compromise in remedy for the harm inflicted by retroactivity can come only from the legislature itself. But if a legislature were to recognize the potential for harm by the desired retroactivity and provide in the statute for reliance interest damages, then a court would not be compelled to invalidate the statute entirely. On the above analysis, the legislation would achieve its end in a more reasonable way, deliberately avoiding undue oppression.

An analogy can be found in depression-era Contract Clause cases. In *W.B. Worthen Co. v. Kavanaugh*, the Supreme Court struck down a state statute that changed default provisions on defaulted municipal bonds as impairing the obligation of contract. But the Court was clearly offended by the statute's "studied indifference to the interests of the mortgagee," and less extreme measures would have sufficed. This was demonstrated a few years later in *Faitoute Iron & Steel Co. v. City of Asbury Park*, where, to avoid bankruptcy, the municipality replaced bonds with new ones at lower interest rates and later maturation dates, but nevertheless worth something compared to the old bonds which were worth next to nothing. The Court expressly contrasted the statute with that in *Kavanaugh*: because this was "carefully devised, worked out with scrupulous detail and with due regard to the interests of all creditors, and scrutinized to that end by the state judiciary," it passed muster under Article I, Section 10 of the Constitution.

It would be equitable and appropriate for legislatures to provide a reliance interest remedy in a retroactive statute for those injured by their justified detrimental reliance on the prior state of the law. Failing that, courts evaluating the retroactivity of statutes under the Due Process Clauses of the Fifth and Fourteenth Amendments should look with distaste at the extreme position of Carlton. A more appropriate analysis, justified by a two-hundred-year record of Supreme Court decisions and more than two thousand years of jurisprudential wisdom, focuses on the related requirements of notice and reliability. In all cases distinguishable from Carlton, absence of notice and reliance on the prior, retroactively superseded state of the law should be given due consideration.

562. *Id.* at 63.
563. *Id.* at 60.
564. 316 U.S. 502 (1942).
565. *Id.* at 507.
566. *Id.* at 515. *See East New York Savings Bank v. Hahn, 326 U.S. 230, 234 (1945).*