

# STATUTORY RETROACTIVITY: THE FOUNDERS' VIEW

ROBERT G. NATELSON\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	490
II. KINDS OF RETROACTIVITY .....	494
III. LEGAL HISTORY AS SEEN FROM THE FOUNDING .....	499
A. Roman Law .....	499
B. The Anti-Retroactivity Policy in England and Early America .....	502
C. Violations of the Anti-Retroactivity Policy in the 1780s .....	504
IV. DISCUSSION OF RETROACTIVITY IN THE CONSTITUTIONAL DEBATES .....	505
A. Curative Laws .....	505
B. Asset-Diminishing Laws .....	506
C. Weak Retroactivity .....	509
D. Strong Retroactivity .....	514
E. The Debate Over the Meaning of 'Ex Post Facto Laws' .....	517
F. Plugging the Retroactivity Gap .....	522
V. CONCLUSION .....	527

*In an appropriate case, therefore, I would be willing to reconsider Calder and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause.*

Justice Clarence Thomas<sup>1</sup>

---

\* Professor of Law, University of Montana; Senior Research Fellow, Initiative and Referendum Institute; Senior Fellow in Western Studies, the Independence Institute; J.D. Cornell University; B.A. History, Lafayette College.

I am grateful for the assistance of the following individuals:

For research assistance: Fran Wells and Stacy Gordon, Reference Librarians and Varya Petrosyan, Class of 2003, University of Montana School of Law.

For secretarial assistance: Charlotte Wilmerton, University of Montana School of Law.

1. Eastern Enters. v. Apfel, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) (referring to Calder v. Bull, 3 U.S. 386 (1798)).

I. INTRODUCTION<sup>2</sup>

2. *Repeatedly Referenced Works:* Sources listed in this note are cited repeatedly in this article. The editions and short form citations used for these works are as follows:

JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* (1787) [hereinafter ADAMS] (Only the first volume of this three volume set had been published by the time of the Constitutional Convention, but the other two followed quickly.);

AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) [hereinafter AMAR];

WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765) [hereinafter BLACKSTONE];

William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947) [hereinafter Crosskey];

JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (5 vols; 1941 ed. inserted in 2 vols.) [hereinafter ELLIOT];

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (4 vols.) (Max Farrand ed., 1937) [hereinafter THE RECORDS OF THE FEDERAL CONVENTION];

ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul Leicester Ford ed., 1892) [hereinafter FORD, ESSAYS];

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul Leicester Ford ed., 1888) [hereinafter FORD, PAMPHLETS];

Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 HASTINGS L.J. 1245 (2002) [hereinafter Harrington];

Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) [hereinafter Hochman];

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (18 vols. projected; not all completed) (Merrill Jensen et al. eds., various dates) [hereinafter DOCUMENTARY HISTORY];

THE WRITINGS OF JAMES MADISON (10 vols.) (Gaillard Hunt ed., 1900) [hereinafter MADISON, WRITINGS];

Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267 (1988) [hereinafter McConnell];

FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985) [hereinafter McDONALD];

Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL. STUD. 373 (1977) [hereinafter Munzer];

CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* (1994) [hereinafter RICHARD];

THE FEDERALIST PAPERS (Clinton Rossiter Ed., 1961) [hereinafter THE FEDERALIST];

COLLEEN A. SHEEHAN & GARY L. MCDOWELL, *FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS: 1787-88* (1998) [hereinafter SHEEHAN];

Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936) [hereinafter Smead];

THE COMPLETE ANTI-FEDERALIST (7 vols.) (Herbert J. Storing ed., 1981) [hereinafter STORING];

Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329 (2000) [hereinafter Troy].

The Ex Post Facto Clauses<sup>3</sup> are not the only protection against retroactive legislation embodied in the U.S. Constitution. The much-discussed<sup>4</sup> case of *Eastern Enterprises v. Apfel*,<sup>5</sup> which examined retroactive liability imposed by the Coal Industry Retiree Health Benefit Act of 1992,<sup>6</sup> was decided on the basis of the Fifth Amendment's Takings Clause<sup>7</sup> and Due Process Clause,<sup>8</sup> not on ex post facto grounds. The ex post facto provisions were inapplicable because under the Supreme Court's 1798 decision in *Calder v. Bull*,<sup>9</sup> they ban only retroactive *criminal* laws.

The Coal Industry Retiree Health Benefit Act required certain companies formerly in the coal mining business to fund health benefits for retired miners and their widows. The plaintiff in *Eastern Enterprises* had left the coal business many years before and argued that, as to it, the Act was unconstitutionally retroactive. The plaintiff found little sympathy from Justices Stevens,<sup>10</sup> Breyer,<sup>11</sup> Souter, or Ginsburg, who thought the provisions in the Act had been within the plaintiff's expectations, and who would have sustained the Act on due process grounds. Justice O'Connor, joined by Justices Scalia, Rehnquist, and Thomas concluded that, as applied to the plaintiff, the law was invalid as an uncompensated seizure of property in violation of the Takings Clause.<sup>12</sup> Justice Kennedy was the swing vote: In his opinion the proper constitutional framework for the case was the Due Process Clause, and the due process guarantee had been violated.<sup>13</sup> Thus, a majority of five justices concluded that the law was impermissibly retroactive, but on two differing grounds—neither of them ex post facto. Justice Thomas may have been dissatisfied. It was in his *Eastern Enterprises* concurrence that he expressed interest in reconsidering *Calder*.

---

3. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto law shall be passed."—referring to laws passed by Congress) & art. I, § 10, cl. 1 ("No state shall . . . pass any . . . ex post facto Law . . .").

4. See, e.g., Symposium: *When Does Retroactivity Cross the Line?* Winstar, *Eastern Enterprises and Beyond*, 51 ALA. L. REV. 933 (2000).

5. 524 U.S. 498 (1998).

6. 26 U.S.C.A. § 9706 (West 2002).

7. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

8. "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." *Id.*

9. 3 U.S. (3 Dall) 386 (1798).

10. *Eastern Enter.*, 524 U.S. at 550-53 (Stevens, J., dissenting).

11. *Id.* at 553-68 (Breyer, J., dissenting).

12. *Id.* at 504-38.

13. *Id.* at 539-50 (Kennedy, J., concurring and dissenting).

A strong policy against retroactive lawmaking runs throughout other parts of the Constitution besides those at issue in *Eastern Enterprises*. Article I, Section 10 includes, in addition to the ban on state ex post facto laws, proscriptions against state laws issuing paper money, making "any Thing but gold and silver Coin a Tender in payment of Debts," or "impairing the Obligation of Contracts."<sup>14</sup> That these measures were considered a package directed at a cluster of related ills is clear from a reading of the constitutional debates.<sup>15</sup> Anti-retroactivity policy was also a motivation for limiting state taxation of imports and exports<sup>16</sup> and for the design of the federal system.<sup>17</sup> That this policy pervades so much of the Constitution suggests it was strongly felt, and central to the constitutional bargain.

For the Constitution was, indeed, a political bargain. As I have noted elsewhere,<sup>18</sup> the process that led to adoption was one of public negotiation: Congress authorized the national convention, whose members argued among themselves until they had produced a public offer. In each state, the public debated whether to accept the offer, that is, whether to ratify the Constitution. The substance of that debate has been preserved for us in letters, newspapers, pamphlets, and broadsides, and in recorded orations at public meetings, including the state ratifying conventions.

We know from the record that by early 1788, it appeared that the anti-federalists might be able to block ratification in pivotal states—New York, Massachusetts, and Virginia—and in some lesser states, notably North Carolina and Rhode Island. Opponents of the Constitution had drawn blood by pointing out purported defects such as the

---

14. U.S. CONST. art. I, § 10 ("No State shall . . . emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any . . . ex post facto Law, or law impairing the Obligation of Contracts . . .").

15. E.g., ELLIOT, *supra* note 2, at 486 (James Wilson, speaking at the Pennsylvania ratifying convention); "Civis," *An Address to the Freemen of South Carolina on the Subject of the Federal Constitution*, in SHEEHAN, *supra* note 2, at 21, 26 (treating Article I, Section 10 as a unit and as "hard on debtors who wish to defraud their creditors").

16. U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."). George Nicholas, a Virginia federalist, identified this as serving an anti-takings purpose, which some founders identified with retroactivity. 4 ELLIOT, *supra* note 2, at 482-83.

17. THE FEDERALIST NO. 10, *supra* note 2, at 83-84 (Madison); see also THE FEDERALIST, NO. 62, *supra* note 2, at 378 (probably Madison) (defending the Constitution's Senate as reducing "facility and excess of lawmaking").

18. Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2003).

vague nature of the General Welfare Clause,<sup>19</sup> the lack of a bill of rights, and the uncertain extent of the Ex Post Facto Clauses.<sup>20</sup> In the face of anti-federalist gains, the federalists sought to reassure the faithful, win undecided voters, and persuade or neutralize moderate anti-federalists. In the course of their campaign, therefore, proponents portrayed the document as furthering the values and principles that all parties shared. They made numerous representations about the meaning of various constitutional provisions.<sup>21</sup> Thus, the stated views of participants on both sides of the debate are relevant sources of information,<sup>22</sup> with federalist representations particularly valuable on some issues.<sup>23</sup>

This Article focuses on the founding generation's anti-retroactivity policy and how that policy can inform our understanding of the Constitution's anti-retroactivity clauses. The historical evidence allows us to reach the following conclusions with a fair degree of confidence:

- Most speakers and writers in the debates showed great aversion to retroactive lawmaking.
- This was even more true of federalists than of anti-federalists.
- The anti-retroactivity policy was indeed central to the constitutional bargain, for the federalists prescribed the Constitution as a cure for retroactivity while the relatively few and unsuccessful apologists for retroactivity opposed ratification in part because of the Constitution's anti-retroactivity policy.

The historical evidence also allows us to reach the following conclusions with somewhat less certainty:

- Although some participants, especially early in the debate, understood the Ex Post Facto Clauses to include civil as well as criminal matters, ultimately the "basis of the bargain" was that

---

19. U.S. CONST. art. I, § 8, cl. 1.

20. See discussion *infra* Part IV(E).

21. *E.g.*, THE FEDERALIST NO. 41, *supra* note 2, at 263-64 (James Madison, reassuring the public of the narrow scope of the General Welfare Clause).

22. Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2003). I do not dispute that some views are more relevant than others. For example, the views of Alexander Hamilton, which were near the edge of the political spectrum, cf. CHINARD, *supra* note 2, at 228 (Hamilton expressing his preference for the British form of government), are probably less representative than those of an elected official such as Governor Edmund Randolph of Virginia. Relevance also can be divined by the centrality of the role the specific actor played. However, such issues of relative importance are not weighed in this article, since practically all participants shared the two values discussed here.

23. *E.g.*, Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. \_\_\_\_ (2003) (forthcoming).

those Clauses prohibited only retroactive criminal laws. In other words, *Calder v. Bull* was correctly decided.

- The anti-retroactivity clauses applicable to the states in Article I, Section 10 were important provisions, to be strictly enforced.

- The Fifth Amendment Takings and Due Process Clauses, which were not applicable to the states, were added to the Constitution partly because limiting the Ex Post Facto Clauses to criminal laws left citizens without sufficient protection against Congressional retroactivity on civil matters.

- Of the three separate positions the Justices staked out in *Eastern Enterprises*, Justice Kennedy's analysis probably mirrored most closely the "original understanding," both as to the applicable clause for reviewing the statute (the Due Process Clause of the Fifth Amendment) and as to the appropriate amount of reviewing rigor (fairly strict; not deferential to Congress).

As used in this Article the terms "retrospective law" and "retroactive law" are synonymous. The former was the term in use at time of the Founding.<sup>24</sup> The latter is, of course, the more common phrase today.

## II. KINDS OF RETROACTIVITY

Laws arguably retroactive are not all alike but fall into various categories. In this Article, we shall refer from time to time to the following scheme: (1) curative laws, (2) laws that alter the future consequences of previous acts in unexpected ways, but do not change pre-existing obligations between people, (3) laws that unexpectedly alter the future consequences of previous acts so as to change pre-existing obligations prospectively, and (4) laws that unexpectedly alter the consequences of previous acts retrospectively.

The first category of retrospective laws consists of *curative laws*. The defining characteristic of curative measures is that they do not upset settled expectations; rather, they usually are designed to protect expectations.<sup>25</sup> For example:

---

24. Samuel Johnson's dictionary of 1755 defines "retrospective" as "looking backwards." No entry appears for "retroactive." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (no pagination).

25. Hochman, *supra* note 2, at 693 ("A retroactive statute, by remedying an unexpected judicial decision, may actually effectuate the intentions of the parties.").

Dean Edward S. Stimson noted that retroactive legislation generally has been upheld under the Due Process Clauses where "[t]here has been no change of position, omission to change or commitment in reliance upon the law in force at the time." Edward S. Stimson, *Retroactive Application in Law—A Problem in Constitutional Law*, 38 MICH. L.

*Illustration No. 1.* A law effective on February 1 states that marriage certificates are valid only if a particular seal is affixed to them. Bill and Bertha are married on March 1, but their certificate does not have the seal affixed because the law is new and unfamiliar, and the seals have not yet been manufactured. The seals become generally available on April 1. On May 1, the legislature adopts a law validating all marriages entered into without the seal between February 1 and April 1.<sup>26</sup>

Sometimes there are factual disputes about whether a law really is curative or impairs settled expectations. If, for example, on March 15, Bill, bitterly bothered by Bertha and learning of the invalidity of his prior marriage, marries Betty instead, neither Bill nor Betty are likely to think of the law as curative.<sup>27</sup> In *Eastern Enterprises*, the division between the majority and the dissent arose in part because the dissent believed the law was really a curative one—that it impaired none of the coal company's expectations while protecting those of the former miners.<sup>28</sup>

During the constitutional debates, an essayist writing under the pseudonym "Remarker"<sup>29</sup> cited an example of a justified (because curative) retrospective law: a statute retroactively reversing an executive branch policy at variance with existing expectations.<sup>30</sup>

Laws in each of the remaining three categories of retroactivity impinge on settled expectations in some way.

---

REV. 30, 38 (1939). See also W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 226 (1960) (stating that reliance and loss are necessary to obtain relief against changes in the law).

26. Troy, *supra* note 2, at 1336-37. See also Munzer, *supra* note 2, at 379.

27. Cf. Munzer, *supra* note 2, at 384 ("Similarly, the curative act might retroactively make a man a husband, but perhaps not entitle him to have reopened the estate of a decedent under whose will he would have taken.").

28. 524 U.S. 498, 551 (1998) (Stevens, J., dissenting).

29. Most of the public debate over the Constitution in the newspapers, pamphlets, and broadsides (single sheets) was carried out under assumed names. As to the real names of the authors, we know some with certainty, some by conjecture, some not at all. In this article, the assumed name assigned each reference is placed in quotation marks within parentheses following the reference.

The most common source of assumed names was ancient Rome, especially the Roman Republic, with which the founding generation strongly identified. See generally Richard, *supra* note 2. Arguments bore the names of Cato, Brutus, Popicola, Caesar, and so forth. The series of essays best known today—The Federalist Papers—was written by Alexander Hamilton, James Madison, and John Jay under the common Roman name Publius.

30. 5 DOCUMENTARY HISTORY, *supra* note 2, at 734, 739 ("Remarker").

The next category consists of measures that alter the future consequences of previous acts in unexpected ways other than changing pre-existing private obligations. The primary effect of such laws is to diminish the value of some people's assets. We usually think of these "asset-diminishing laws" as subject to takings analysis rather than retroactivity analysis. However, prominent members of the founding generation classified them as retrospective or ex post facto laws.<sup>31</sup> The most obvious example of an asset-diminishing law is one confiscating privately-owned real estate without compensation—a phenomenon the founding generation had experienced.<sup>32</sup> Another illustration is a sharp and unforeseeable property tax increase, where the property concerned does not enjoy an equal or greater corresponding benefit from the increase.<sup>33</sup> A controversial recent example is legislation throwing alternative livestock (i.e., game) ranchers out of business without compensation.<sup>34</sup> The following illustration demonstrates the effect of an asset-diminishing law on an on-going business:

*Illustration No. 2.* In 2001, Frank bought the stock of a small corporation called Frankly Lending Corp., which makes high-interest loans to customers with poor credit histories. Frankly's income stream comes from the interest portion of monthly repayment installments. Throughout 2001 and 2002, Frankly regularly charged customers 12 percent interest. In 2003, the legislature imposed a usury limit forbidding future loans at rates in excess of 10 percent. The law does not affect currently-existing contracts. It does, however, severely diminish Frankly's expected future cash flow, and therefore reduces the present value of Frank's corporate stock.<sup>35</sup>

This law's adoption, after Frank had already invested in the corporation, negatively and unexpectedly impacted the value of his previous investment decision.<sup>36</sup> Looking at the matter in that way, we

---

31. *Infra* note 100 and accompanying text.

32. MCDONALD, *supra* note 2, at 90-93.

33. Troy, *supra* note 2, at 1330.

34. *E.g.*, MONT. CODE. § 87-4-407(1), 87-4-412 (prohibiting operation of an alternative livestock ranch without a license, but prohibiting renewal or issuance of licenses; the measure was adopted in Montana by citizen initiative 143).

35. See Hochmann, *supra* note 2, at 693 ("A prospective statute may equally defeat reasonable expectations . . .").

36. Of course, sometimes the future adoption of such a law is foreseeable so that the amount Frank paid for his stock will have been discounted accordingly. In times of great legal uncertainty, the value of all potential investments will be accordingly depressed.



can see why some of the founders considered such a law retrospective.<sup>37</sup>

The third category of retroactive laws are those that unexpectedly alter the prospective force of pre-existing obligations. They purport to affect only the future, although they rely on past acts for their future effects.<sup>38</sup> Modern writers have dubbed such measures "weakly retroactive."<sup>39</sup> We can modify the preceding Illustration to demonstrate the effect:

*Illustration No. 3.* The facts being otherwise the same as in Illustration No. 2, the legislation affects *pre-existing* contracts by reducing the interest rate on *future* installments to the new legal rate of 10 percent. The law reduces Frankly's future cash flow, and therefore the present value of the business.

Instances of weakly retroactive laws familiar to the founders were "pine-barren" laws and other tender acts, installment laws, stay laws, and similar debtor-relief measures.<sup>40</sup> Each of these reduced the value of creditors' assets by weakening the obligation of contracts. However, weakly retroactive laws may affect non-contractual obligations as well.<sup>41</sup> For example, in the case of *Kean v. Clark*<sup>42</sup> a federal

---

37. *Infra* note 100 and accompanying text.

38. See Hochmann, *supra* note 2, at 692 ("However, a statute may be retrospective even if it does not purport to have effect prior to its enactment; this is true, for example, of a statute which declares preexisting obligations unenforceable in the future.")

39. The terms "strong" and "weak" retroactivity appear in Troy, *supra* note 2 (passim); Sherry Young, *Is "Due Process" Unconstitutional? The NCAA Wins Round One in Its Fight Against Regulation of Its Enforcement Proceedings*, 25 ARIZ. ST. L.J. 841, 887 n.328 (1993); Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1428 (1984).

For other recognitions of the distinction between strong and weak retroactivity, see Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123, 1131 (2000) (calling them "primary" and "secondary" retroactivity); Note, *Retroactive Application of Statutes: Protection of Reliance Interests*, 40 ME. L. REV. 183 (1988). Cf. Munzer, *supra* note 2, at 383 (stating that the "strong" interpretation of retroactivity changes the validity or invalidity of a past act as of the date of the act, while the "weak" interpretation alters it only as of the date of the statute's adoption).

This category, together with asset-diminishing retroactivity, is called "vested rights retroactivity" or "method retroactivity" in W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 217-18 (1960) and "secondary retroactivity" in Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123, 1131 (2000). See also Troy, *supra* note 2, at 1338 (discussing Justice Scalia's definition of secondary retroactivity).

Some writers prefer to avoid such distinctions. See, e.g., Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1289 n.155 (2000).

40. *Infra* Part III.C.

41. Troy, *supra* note 2, at 1335 (classifying federal "Superfund" legislation as weakly retroactive).

district court considered a Mississippi law that not only changed petition requirements for citizen initiative petitions, but applied the change to an initiative that already had qualified for the ballot, thereby ending the state's obligation to place the measure before the voters. The court in *Kean* held that the state could not alter its existing obligation in this way.<sup>43</sup> In *Eastern Enterprises*, the majority considered the legislation at issue to be weakly retroactive (although the court did not use that term) because, based on past acts, it expanded prospectively and in an unexpected way the obligations of the plaintiff toward its former employees.<sup>44</sup>

A fourth category of enactments are those that unexpectedly alter the consequences of earlier conduct retrospectively—for example, as of a date before enactment of the law. This date usually—but not necessarily—is the date of the conduct:

*Illustration No. 4.* The facts being otherwise the same as in Illustrations 2 and 3, the 2003 legislation lowers the legal rate of interest to 10 percent effective July 1, 2001. Loans with interest rates exceeding the legal rate entered into or existing after June 30, 2001 have their interest rates reduced to 10 percent as of the date of the loan. Frankly Lending Corp. must refund to the borrowers any interest in excess of 10 percent collected after June 30, 2001.

Legal writers have labeled this form of retroactivity, “strong retroactivity.”<sup>45</sup> Other examples of strongly retroactive statutes are measures imposing additional tax on income received before enactment of the law<sup>46</sup> or imposing tort liability based on acts done before enactment of the law. A strongly retroactive statute may be criminal

---

42. 56 F. Supp. 2d 719 (S.D. Miss. 1999).

43. A number of other cases have invalidated efforts to apply election rule changes to previous elections. Generally, the ground for disallowance is the Due Process Clause of the Fourteenth Amendment. Usually the change arises from a retroactive alteration of a former judicial interpretation or administrative practice rather than adoption of a new statute. See, e.g., *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (change in previous administrative practice); *Scheer v. City of Miami*, 15 F. Supp. 2d 1338 (S.D. Fla. 1998) (new judicial interpretation); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (invalidating retroactive absentee ballot rule change).

A particularly blatant example of a retroactive rule change by judicial interpretation that was not, however, challenged in federal court is *Marshall v. Montana*, 975 P.2d 325 (Mont. 1999) (overruling retroactively its prior election law holdings and imposing unprecedented new interpretation to invalidate an election already held).

44. 524 U.S. 498, 499 (1998).

45. *Supra* note 38.

46. See, e.g., Brian E. Raftery, Comment, *Taxpayers of America Unite! You Have Everything to Lose: A Constitutional Analysis of Retroactive Taxation*, 6 SETON HALL CONST. L.J. 803 (1996); *Helvering v. Gerhardt*, 304 U.S. 405 (1937), noted in Note 24, CORNELL L.Q. 611 (1939); Troy, *supra* note 2, at 1334-35.

in nature, as if, in Illustration No. 4, the 2003 statute had imposed fines or imprisonment on anyone accepting interest in excess of the legal rate after June 30, 2001. The founding generation was familiar with strong criminal retroactivity: John Dickinson referred to an example during the national Constitutional convention.<sup>47</sup>

### III. LEGAL HISTORY AS SEEN FROM THE FOUNDING

#### A. Roman Law

The founders' discussions of retroactive legislation were informed in part by previous legal history. As a practical matter, their legal history began with the Bible, but I have not been able to find them resorting to biblical references while discussing retrospective laws. Roman law was another matter. At the national convention at least three delegates—Judge Oliver Ellsworth of Connecticut, Governor Edmund Randolph of Virginia, and Daniel Carroll of Maryland—referred to the opinions of civilian jurists on *ex post facto* laws.<sup>48</sup>

This was in character, because while the founders were not, by and large, Roman law scholars, they were intensely interested in Roman law, ideas, and examples.<sup>49</sup> Their common law and equity, although not based squarely on civilian concepts, had borrowed liberally from them.<sup>50</sup> The founding generation's favorite law book, Blackstone's Commentaries, is chock-full of references to Roman jurisprudence.<sup>51</sup> So it is no surprise that some founders knew of the civilian policy against retroactive government decision making.

Examples of that policy abound. A Roman maxim reported in the early third century states that, "What the law permits in the past, it bans for the future."<sup>52</sup> Another maxim reported during the same era may, as Professor Elmer Smead suggested,<sup>53</sup> apply to public as well as private law: "No one can change his plan to the injury of another."<sup>54</sup> A

47. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 448.

48. *Id.* at 328 (Edmund Randolph); *id.* at 376 (Oliver Ellsworth & Daniel Carroll).

49. See, e.g., Robert G. Natelson, "A Republic, Not a Democracy?" Initiative, Referendum and the Constitution's Guarantee Clause, 80 TEX. L. REV. 807, 815-20 (2002); see generally RICHARD, *supra* note 2.

50. See, e.g., Smead, *supra* note 2, at 776 (transmission of Roman law to common law through Bracton).

51. E.g., 1 BLACKSTONE, *supra* note 2, at \* 4, \* 5, \*73-\*74, \*455, *et passim*.

52. DIG. 1.3.22 (Ulpianus, Ad Editum 35) ("Cum lex in praeteritum quid indulget, in futurum vetat."). All translations in this article are mine.

53. Smead, *supra* note 2, at 775 n.3.

54. DIG. 50.17.75 (Papinianus, Quaestiones 3).

third provided, "The penalty for a past wrong is never increased ex post facto."<sup>55</sup>

The Roman jurist Marcianus has left us a concrete example of a rule against asset-diminishing retroactivity. Under Roman law, the former master of a freed slave, as patron, enjoyed inheritance rights in the freedman's estate. Occasionally, however, the emperor would seek to honor the freedman by retroactively granting him the rights of a freeborn citizen—and thus more testamentary freedom. Obviously, bestowing such an honor on a freedman would prejudice his patron's expectancy. According to Marcianus:

Sometimes also a freedman obtains ex post facto by intervention of the law the [higher] status of a freeborn person, as if for instance the freedman should be restored by the emperor to his birthright. "Restored" because he is restored to the [naturally free] birth of all people,<sup>56</sup> not to the condition in which the particular person was born. Then he has all the benefits of the law—and if he had been freeborn, then his patron could not succeed him as heir. *Therefore the emperors do not readily restore one to freeborn status unless the patron consents.*<sup>57</sup>

In other words, the emperor did not proceed so as to interfere with the expectations of the patron. Civil law commentators known to the founders wrote more extensively about the inadvisability of asset-diminishing retroactivity.<sup>58</sup>

In public law, the anti-retroactivity principle withered in the autocratic glare of the later Empire, becoming by 440 C.E. no more than a presumption: "Laws and imperial decisions give structure to

55. DIG. 50.17.138.1 (Paulus, Ad Edictum 27). The term used for "wrong" (*delicti*, a form of *delictus*) generally applies to tort law rather than public wrongs.

56. Reflecting Roman acceptance of the natural law position, accepted also at the Founding, that people are born free. J. INST. 1.3.2.

57. DIG. 40.11.2 (Marcianus, Institutes 1) (emphasis added):

*Interdum et servi nati ex post facto iuris interventu ingenui fiunt, ut ecce si libertinus a principe natalibus suis restitutus fuerit. Illis enim utique natalibus restituitur, in quibus initio omnes homines fuerunt, non in quibus ipse nascitur, cum servus natus esset. Hic enim, quantum ad totum ius pertinet, perinde habetur, atque si ingenuus natus esset, nec patronus eius potest ad successionem venire. Ideoque imperatores non facile solent quemquam natalibus restituere nisi consentiente patrono.*

I have translated this passage loosely to make it intelligible to the reader not schooled in classical Roman principles.

58. McConnell, *supra* note 2, at 281 (citing Grotius, Pufendorf, Burlamaqui, Vattel, and Van Bynkershoek as favoring compensation for property takings, treated as part of "retroactivity" *infra passim*).

future affairs, and do not revisit past matters, *unless they expressly apply to past time and matters currently pending.*"<sup>59</sup>

In Roman jurisprudence the phrase "ex post facto" is not necessarily associated with a retroactivity problem.<sup>60</sup> Moreover, the phrase more often appears in a private law than in a public law context.<sup>61</sup> Its approximate meaning is "due to [or "out of"] a later occurrence." In both meaning and usage the phrase "ex post facto" is somewhat analogous to the Anglo-American expression, "due to a condition subsequent." For example, if a father with a daughter under his power permitted her to have a *peculium* (personal savings and property) and gave her some slaves, and the father later emancipated her without taking away the *peculium*, the emancipation (the condition subsequent) rendered the gift of slaves complete ex post facto.<sup>62</sup> On the other hand, a promise by X to Y not to sue Y or Z was invalid as to the non-party Z—and was not validated ex post facto when Z became Y's heir (the condition subsequent) and for other purposes stepped into Y's shoes.<sup>63</sup> (In Roman law, a decedent's heir was the successor of the decedent for a wide range of purposes. These are only a few of the many private law appearances of the phrase "ex post facto" in classical and late Roman legal texts.)<sup>64</sup>

---

59. CODE JUST. 1.14.7 (Impp. Theodosius II & Valentinianus III) ("*Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit.*") (emphasis added).

60. In Latin, the expression is grammatically an odd one—first because the word *post* is interposed between the preposition (*ex* = out of) and its noun (*facto*) and secondly because *post* is used as an adverb meaning "afterwards."

61. A putative predecessor of that term, *ex jure post facto*, does not appear in the Roman texts I consulted. Cf. Crosskey, *supra* note 2, at 564.

62. DIG. 39.5.31.2 (Papinianus, Responsa 12) ("*Pater, qui filiae, quam habuit in potestate, mancipia donavit et peculium emancipatae non ademit, ex post facto donationem videbatur perfecisse.*").

63. DIG. 2.14.17.4 (Paulus, Ad Edictum 3) ("*Si pactus sim, ne a me neve a titio petatur, non proderit titio, etiamsi heres extiterit, quia ex post facto id confirmari non potest. hoc iulianus scribit in patre, qui pactus erat, ne a se neve a filia peteretur, cum filia patri heres extitisset.*"). A translation with a somewhat different sense is offered in 1 THE DIGEST OF JUSTINIAN 67 (Alan Watson, ed. 1985) ("If I have made a pact that no claim will be made against me or Titius, it will not benefit Titius even if he becomes my heir, because it cannot be made valid by a subsequent event.").

64. E.g., DIG. 4.6.17pr. (Ulpianus, Ad Edictum 12) (giving usucaption—what we call adverse possession—effect ex post facto); DIG. 7.1.57pr. (Papinianus Responsa 7) (outlining ex post facto effect of suit to set aside a will); DIG. 12.1.8 (Pomponius, Ex Plautio 6) (validating a loan through a subsequent event); DIG. 23.5.10 (Paulus, Quaestiones 5) (subsequently redeemed dowry validates earlier sale ex post facto); DIG. 30.41.2 (Ulpianus, Ad Sabinum 21) (invalidating separate legacy of marble and columns because attachment to building invalidates legacy and it is not validated ex post facto because of later separation); DIG. 34.5.15 (Marcianus, Regulae 2) (invalidating transfer by later repudiation);

### B. The Anti-Retroactivity Policy in England and Early America

The common law soon incorporated the Roman bias against retrospective governmental decision making. As early as the thirteenth century, Bracton adopted the constructional preference against retroactivity in his book "On the Laws and Customs of England."<sup>65</sup> Edward Coke's treatise on Littleton reported how English courts could evade retroactive tort liability. Littleton had put a case in essentially the following form: A disseisor wrongfully evicts A from A's land. The disseisor enfeoffs B, C, and D by deed as joint tenants, but makes livery of seisin only to B and C. B and C then die. By the subsequent Statute of Gloucester, the disseisee's writ for damages should lie against D, the surviving "co-tenant" among the disseisor's transferees. However, because D was innocent of any wrongdoing, the statute is not applied retroactively against him.

On which Coke comments:

Here it appeareth, that acts of parliament are to be so construed, as no man that is innocent or free from injurie or wrong, be by a literall construction punished or endamaged; and therefore in this case, albeit the letter of the statute is generally to give dammages against him that is found tenant . . . yet because he waived the estate, and never agreed to the feoffment, nor tooke any profits, he shall not be charged with dammages.<sup>66</sup>

In a succeeding volume, Coke adds, "This [Statute of Gloucester] extendeth to alienations made after the statute, and not before, for it is a rule and law of parliament that regularly *nova constitutio futuris formam imponere debet, non praeteritis*"<sup>67</sup>—that is, a new decision

---

DIG. 35.2.47pr. (Ulpianus, Ad Edictum 79) (stating that installments exceeding permitted legacy amount retroactively abates prior amounts paid); DIG. 35.2.56.1 (Marcellus, Digest 22) (expanding decedent's estate by post-will acquisition); DIG. 41.1.43.2 (Gaius, Ad Edictum Provinciale 7) (opining that where co-owned slave acquires another slave before paying, the owner who pays ex post facto owns the acquired slave); DIG. 43.24.7.4 (Ulpianus, Ad Edictum 71) (stating that a subsequent fire does not ex post facto validate property damage inflicted if the damage would have been permitted had there been a fire before the damage); DIG. 45.1.124 (Papinianus, Definitiones 2.) (stating that the nature of a binding promise [stipulatio] was not changed ex post facto before the date due for performance if before that date it doesn't appear that the promisor is going to be able to perform); CODE JUST. 5.6.3pr. (Emperor Gordianus, deciding that a properly contracted marriage was not vitiated by a subsequent occurrence); CODE JUST. 8.55.2 (Emperor Probus, deciding that subsequent destruction of written instrument by fire does not invalidate it ex post facto).

65. Smead, *supra* note 2, at 775-78.

66. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 360a (1853).

67. *Id.* at 292.

should give structure to future matters, not past ones. Notice how this language parallels the Roman maxim cited above.<sup>68</sup>

Other English jurists known to the founding generation reflected the same bias against retroactivity. William Blackstone, the legal writer most influential among that generation, opined that, "All laws should be therefore made to commence *in futuro*, and be notified before their commencement."<sup>69</sup> Blackstone was highly critical of *ex post facto* laws:

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 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.<sup>70</sup>

It is uncertain from this passage whether Blackstone meant to say that all *ex post facto* laws were criminal in nature, or whether he was using criminal law as merely an illustration. However, as was true of Roman writers (and some English ones<sup>71</sup>), Blackstone most commonly used the term *ex post facto* in a private or civil law context unrelated to the public law anti-retroactivity policy. Blackstone's work refers to *ex post facto* legitimation of offspring by marriage,<sup>72</sup> voiding of a deed by a "matter *ex post facto*,"<sup>73</sup> a shifting of an executory use from one person to another by an event *ex post facto*,<sup>74</sup> the failure of later events to validate *ex post facto* a void surrender of a lease,<sup>75</sup> and a grant of legal separation after a marriage by reason of a condition *ex post facto*.<sup>76</sup>

---

68. ("Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari. . . ."). See *supra* note 59 and accompanying text.

69. 1 BLACKSTONE, *supra* note 2, at \*46.

70. *Id.*

71. See *Calder v. Bull*, 3 U.S. 386, 392 (1798), which provides some examples. (I have not, however, in independent study of the work of Fearn have been able to verify the court's citations. Either they, or I, may be in error.) See also Crosskey, *supra* note 2, at 545.

72. 1 BLACKSTONE, *supra* note 2, at \*455 (italics in original).

73. *Id.* at \*308.

74. *Id.* at \*334.

75. *Id.* at \*368.

76. *Id.* at \*95.

In America, the policy against public law retroactivity came to be enshrined in Confederation-era state constitutions, with or without the accompanying term "ex post facto." The Delaware Declaration of Rights prohibited "retrospective laws punishing offenses."<sup>77</sup> The Maryland and North Carolina Declarations of Rights asserted, in identical language, "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made."<sup>78</sup> In addition, the Constitution of Massachusetts required compensation for property takings.<sup>79</sup> Finally, the Northwest Ordinance, adopted by the Confederation Congress in 1787, contained provisions both against uncompensated takings and against laws impairing the obligation of existing contracts.<sup>80</sup>

### C. Violations of the Anti-Retroactivity Policy in the 1780s

The dislocations of the 1780s induced the states to adopt a variety of debtor-protection measures, mostly of a weakly retroactive kind.<sup>81</sup> "Installment" and "stay" laws allowed debtors to postpone payments on amounts already due. The states issued paper money that quickly depreciated, then adopted tender laws that required creditors to accept the notes at face value. "Pine barren" laws allowed debtors to pay debts in near-worthless property such as the pine-barren lands

---

77. DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES, art. I, § 9, cl. 3 (1776).

78. See MD. CONST., DECLARATION OF RIGHTS, art. XV (Nov. 11, 1776), Avalon Project at Yale Law School, available at <http://www.yale.edu/lawweb/avalon/states/ma02.htm> (last visited Oct. 29, 2002); N.C. CONST., DECLARATION OF RIGHTS, art. XXIV (Dec. 18, 1776), available at <http://www.yale.edu/lawweb/avalon/states/nc07.htm> (last visited Oct. 29, 2002).

79. MASS. CONST., DECLARATION OF RIGHTS, art. X (1780): ("And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."). available at <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Nov. 19, 2002).

80. The Northwest Ordinance provided in part:

[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.

NORTHWEST ORDINANCE, art. 2, Avalon Project at Yale Law School, available at <http://www.yale.edu/lawweb/avalon/nworder.htm> (last visited, Nov. 19, 2002).

81. A vivid account of these events, with copious citations to historians, is found in Justice Sutherland's dissent in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453-58 (1934).



of South Carolina.<sup>82</sup> Other undesirable property also became legal tender: The federalist writer "Cassius" denounced laws that resulted in a situation in which "some honest creditors in Massachusetts, have been paid in *old horses* and *enormous rocks*, in return for money loaned upon interest."<sup>83</sup> As documented below, most participants in the constitutional debates, especially but not limited to federalists, attributed to these measures many of the economic and diplomatic difficulties the United States then faced.<sup>84</sup>

With that background in mind, we turn to the constitutional debates.

#### IV. DISCUSSION OF RETROACTIVITY IN THE CONSTITUTIONAL DEBATES

##### A. Curative Laws

The constitutional debates do not include much discussion of curative laws, but such as there was, was mostly positive. A prominent example, at least by anti-federalist lights, was the proposed "scaling" (payment at less than face value) of public debt. Many anti-federalists considered "scaling" to be curative because few public creditors still relied on repayment at face value—the original paper holders already had been devastated, and generally had sold out for pennies on the dollar; the current holders were mostly speculators who should be grateful for anything they could get.<sup>85</sup> Another example cited of a useful curative law was a statute that retrospectively reversed an executive branch decision at variance with prevailing understanding and expectations.<sup>86</sup> Popular approbation of curative retroactivity was a problem for the federalists. Anti-federalists charged that the Constitution's Ex Post Facto Clauses would render curative laws impossible.<sup>87</sup>

---

82. 4 ELLIOT, *supra* note 2, at 157 (William Davie, speaking at the first North Carolina ratifying convention).

83. *E.g.*, 5 DOCUMENTARY HISTORY, *supra* note 2, at 479, 482 ("Cassius") (emphasis in original). *See also id.* at 587, 589 ("A Friend to Honesty," referring to old horses and "almost every thing else" as legal tender).

84. *Infra* notes 117-18 and accompanying text.

85. *See, e.g.*, 3 ELLIOT, *supra* note 2, at 474 (Patrick Henry, at the Virginia ratifying convention, arguing against the Constitution: "You will cry out that speculators have got it at one for a thousand, and that they ought to be paid so. Will you then have recourse, for relief, to legislative interference? They [the legislature] cannot relieve you, because of that [ex post facto] clause.").

86. 5 DOCUMENTARY HISTORY, *supra* note 2, at 734, 739 ("Remarker").

87. *E.g.*, *infra* notes 124-30.

## B. Asset-Diminishing Laws

Most politically active people in the founding generation seem to have agreed that government should have power to regulate for the public welfare even if regulation reduced the value of some people's assets and investments.<sup>88</sup> On the other hand, they believed such regulation could go too far both in scope and mutability, and if this happened, government should compensate those injured. This had been the view of their favorite legal writer, William Blackstone.<sup>89</sup>

Perhaps even more importantly, it was the view of their most cherished contemporary political philosopher, Baron Montesquieu—cited frequently<sup>90</sup> and referred to recurrently by all sides in the constitutional debates as “the celebrated Montesquieu,”<sup>91</sup> “the great Mon-

88. See MCDONALD, *supra* note 2, at 9-36 (listing accepted ways of regulating property and economic activity).

89. 1 BLACKSTONE, *supra* note 2, at \*140:

In this and similar cases, the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an accordant, except that the county courts are generally authorised to judge of the propriety of opening the road. The compensation to be allowed is assessed by a jury, assembled by virtue of a writ of ad quod damnum exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price. . . .

90. In newspaper columns, e.g.: THE FEDERALIST NO. 47, *supra* note 2, at 301 (Madison) and No. 78, at 466 (Hamilton). See also 2 DOCUMENTARY HISTORY, *supra* note 2, at 158, 162 (“Centinel”); 14 *id.* at 119, 120 (“Brutus”); 2 ELLIOT, *supra* note 2, at 352 (Hamilton at the New York ratifying convention); 3 ELLIOT, *supra* note 2, at 84 (Edmund Randolph, at Virginia ratifying convention); *id.* at 247 (George Nicholas at the same convention); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, in 2 DOCUMENTARY HISTORY, *supra* note 2, at 618, 229.

In convention debates, e.g.:

Massachusetts: 2 ELLIOT, *supra* note 2, at 13 (Fisher Ames), 14 (same), 16-17 (Christopher Gore), 126-28 (James Bowdoin).

New York: *Id.* at 224 (Melancton Smith).

Pennsylvania: *Id.* at 421 (James Wilson), 482 (same).

Virginia: 3 ELLIOT, *supra* note 2, at 84 (Edmund Randolph), 165 (Patrick Henry), 279 (William Grayson), 280 (same), 288 (same), 294 (Edmund Pendleton).

91. E.g., THE FEDERALIST NO. 9, *supra* note 2, at 73, NO. 43, *supra* note 2, at 277, NO. 47, *supra* note 2, at 301 and NO. 78, *supra* note 2, at 466. See also ANTI-FEDERALIST NOS. 2 (William Grayson); 14 (“Cato”); 47 (“Centinel”); 54 (“Brutus”); 55, Part 1 (“Federal Farmer”); 61 (“Federal Farmer”); 64, Part 3 (“Cincinnatus”); 67 (“Cato”); 73 (“William Penn”) in THE ANTI-FEDERALIST PAPERS (MORTON BORDEN ED. 1965), available at <http://www.constitution.org> (last visited Nov. 19, 2002).

tesquieu,"<sup>92</sup> "M. Montesquieu . . . whom we all revere."<sup>93</sup> On the subject of asset-diminishing laws, The Celebrated One had been unambiguous in his condemnation:

Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. . . .

Thus when the public has occasion for the estate of an individual, it ought never to act by the rigour of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual who treats with an individual.<sup>94</sup>

A major theme of the federalist campaign was that the proposed Constitution would require government to respect and protect investment-backed expectations. Madison, writing for an audience in New York, decried asset-diminishing laws amid other forms of retroactivity, and prescribed the new Constitution as a cure:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs<sup>95</sup> in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every

---

92. 2 ELLIOT, *supra* note 2, at 340 (John Williams, speaking at the New York ratifying convention); 3 ELLIOT, *supra* note 2, at 612 (John Dawson, speaking at the Virginia ratifying convention); 8 DOCUMENTARY HISTORY, *supra* note 2, at 293, 294 ("An Impartial Citizen").

93. 5 DOCUMENTARY HISTORY, *supra* note 2, at 676 ("Mark Antony," a federalist writer).

94. 2 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 570 (Thomas Nugent, trans., rev'd by J.V. Pritchard, 1900).

95. Job: "A low mean lucrative busy affair." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (no pagination).

subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.<sup>96</sup>

A more specific discussion of asset-diminishing retroactivity came from George Nicholas of Virginia. Nicholas was a state legislator, a former acting state attorney general,<sup>97</sup> and a federalist leader at the Virginia ratifying convention. He advocated Congressional control of inspection duties because, he said, past practice "[had thrown] the burdens on a part of the community."<sup>98</sup> Was it not fair, he asked, "[I]f the inspection law obliges the planter to carry his tobacco to a certain place, that he should receive a compensation for the loss, if it be destroyed?"<sup>99</sup> Both Nicholas and James Iredell of North Carolina reassured their respective audiences that the Ex Post Facto Clauses in the new Constitution would render property safe from government expropriation.<sup>100</sup>

Paper money and tender laws were weakly retroactive, but much of the attack on them arose from their purely asset-diminishing feature. Numerous participants decried the inflation in bills of credit that had wiped out the value of savings denominated in dollars. The

---

96. THE FEDERALIST NO. 44, *supra* note 2, at 282-83. See also THE FEDERALIST NO. 10, *supra* note 2, at 84 (Madison) (decrying proposals for equal division of property); THE FEDERALIST NO. 62, *supra* note 2, at 380 (probably Madison) ("The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government."); THE FEDERALIST NO. 72, *supra* note 2, at 436 (Hamilton) (arguing for less mutability in government so there is less mutability of measures); THE FEDERALIST NO. 73, *supra* note 2, at 443-44 (Hamilton) ("It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation."); Rev. James Madison to James Madison, c. Oct. 1, 1787 (expressing hope that the Constitution would "be ye Means of giving Stability & Vigour to ye State Govts., & prevent those frequent Vacillations from one iniquitous or absurd Scheme to another, wch. has destroyed all Confidence amongst Individuals.").

97. 8 DOCUMENTARY HISTORY, *supra* note 2, at 528.

98. 3 ELLIOT, *supra* note 2, at 482.

99. *Id.* at 483. See U.S. CONST. art. I, § 10, cl. 2.

100. 8 DOCUMENTARY HISTORY, *supra* note 2, at 369, 371 (Nicholas); 16 DOCUMENTARY HISTORY, *supra* note 2, at 164 (Iredell).

victims had been "widows and orphans"<sup>101</sup> and "the patriotic and virtuous part of the community."<sup>102</sup> This concern gave additional force to the Constitution's prohibitions of state paper money and of tender laws<sup>103</sup> and of state interference in pre-existing private contracts.<sup>104</sup>

Finally, the Constitution offered protection against asset-diminishing laws in the form of the governmental structure it erected. Thus, the division of powers through federalism<sup>105</sup> and the institution of a slowly changing Senate<sup>106</sup> would discourage the unwise and shifting public policies that fostered asset-diminishing retroactivity.

### C. Weak Retroactivity

A weakly retroactive law is one that prospectively alters existing obligations and liabilities among citizens.<sup>107</sup> As noted earlier,<sup>108</sup> after the Revolutionary War, state legislatures had enacted a variety of such measures, primarily for debtor relief: "installment" laws, "stay" laws, and tender laws making bills of credit or other undesirable property legal tender for debts. Federalists such as Alexander Hamilton acknowledged the need for equitable mollification of "hard bargains," in which, "though there may have been no direct fraud or deceit . . . yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties."<sup>109</sup> Moreover, the Constitution itself authorized Congress to adopt "uniform Laws on the subject of Bankruptcies."<sup>110</sup> Yet Hamilton,<sup>111</sup> as

---

101. *E.g.*, 2 ELLIOT, *supra* note 2, at 171 (Charles Turner, speaking at the Massachusetts ratifying convention); 4 ELLIOT, *supra* note 2, at 306 (Charles C.C. Pinckney, speaking at the South Carolina ratifying convention); 3 ELLIOT, *supra* note 2, at 207 (Edmund Randolph, speaking at the Virginia ratifying convention); 5 DOCUMENTARY HISTORY, *supra* note 2, at 687, 689 ("A Friend to Honesty") (denouncing the "stripping the widows and fatherless, of their livings"); 9 DOCUMENTARY HISTORY, *supra* note 2, at 565-66 ("A Planter") (decrying paper money and tender laws as ruining the unprotected widow and orphan).

102. "Centinel," Letter IV, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 317-18 ("the evils of the depreciation of paper money, which fell chiefly upon the patriotic and virtuous part of the community"). On the asset-diminishing effects of paper money, see also 2 ELLIOT, *supra* note 2, at 486 (James Wilson, speaking at the Pennsylvania ratifying convention).

103. U.S. CONST. art. I, § 10, cl. 1.

104. *Id.*

105. THE FEDERALIST NO. 10, *supra* note 2, at 83-84 (Madison).

106. See generally THE FEDERALIST NO. 62, *supra* note 2, at 378 (probably Madison) (defending the Constitution's Senate as reducing "facility and excess of lawmaking").

107. See *supra* notes 37-38 and accompanying text.

108. See *supra* notes 81-84 and accompanying text.

109. THE FEDERALIST NO. 80, *supra* note 2, at 480 (Hamilton).

110. U.S. CONST. art. I, § 8, cl. 4.

111. *E.g.*, THE FEDERALIST NO. 7, *supra* note 2, *passim*.

well as virtually every other federalist who addressed the subject—and a fair number of anti-federalists as well<sup>112</sup>—passionately denounced the far-reaching state debtor relief legislation. They saw such measures as (1) immoral, (2) damaging to the economy, (3) damaging to interstate harmony, and (4) injurious to foreign relations.

Weakly retroactive laws were immoral, they argued, because they enabled people to evade their just responsibilities. James Madison wrote of the “pestilent effects of paper money on the . . . morals of the people.”<sup>113</sup> At the Massachusetts ratifying convention, Charles Turner charged that “paper money, and the practice of privateering, have produced a gradual decay of morals; introduced pride, ambition, envy, lust of power; produced a decay of patriotism, and the love of commutative justice.”<sup>114</sup> At the Pennsylvania ratifying convention, Jasper Yeates charged that paper money, tender laws, and laws infringing the obligation of contracts had “impaired” the “principles of morals.”<sup>115</sup> Yet the entire nation had not become a slough of iniquity—not Georgia: The *Pennsylvania Gazette* of April 30, 1788 reported that although the Georgia state government had issued depreciated paper money and adopted a tender law, “yet the shame, that would attend the wicked conduct of cancelling a debt on such terms, prevents any tenders from being made.”<sup>116</sup>

---

112. E.g., “Brutus,” Letter XIV, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 330; FORD, PAMPHLETS, *supra* note 2, at 279, 283 (“Federal Farmer”); 4 STORING, *supra* note 2, at 131 (“Candidus”—Benjamin Austin—proposing as part of an alternative plan to the Constitution a list of reforms that, inter alia, ban paper money and tender laws); 2 ELLIOT, *supra* note 2, at 336 (Melancton Smith, speaking at the New York ratifying convention); “Agrippa,” No. 3, in FORD, ESSAYS, *supra* note 2, at 59 (obliquely criticizing tender laws on the ground that “acts made to favour a part of the community are wrong in principle”); “Centinel,” Letter IV, in 14 DOCUMENTARY HISTORY, *supra* note 2, at 317-18 (“the evils of the depreciation of paper money, which fell chiefly upon the patriotic and virtuous part of the community”); James Monroe, *Some Observations on the Constitution*, in 9 DOCUMENTARY HISTORY, *supra* note 2, at 844, 860 (opposing state bills of credit).

113. THE FEDERALIST NO. 43, *supra* note 2, at 281.

114. 2 ELLIOT, *supra* note 2, at 31. The text may be corrupt. “Commutative justice” normally was a favorable term, meaning “that honesty which is exercised in traffick, and which is contrary to fraud in bargains.” SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (no pagination). Perhaps “love” should be “lack.”

115. 2 DOCUMENTARY HISTORY, *supra* note 2, at 436.

116. On the ill-effects of weakly retroactive measures on morality, see, e.g., 4 ELLIOT, *supra* note 2, at 306 (General Pinckney, speaking at the South Carolina ratifying convention); “State Soldier,” Essay V, in SHEEHAN, *supra* note 2, at 128, 133-34; “Atticus,” Letter IV, in SHEEHAN, *supra* note 2, at 340-42 (“They clamor for tender-acts, paper-money, and all the engines of fraud.”); “A Citizen of America” (Noah Webster), *An Examination into the Leading Principles of the Federal Constitution*, in SHEEHAN, *supra* note 2, at 373, 376-77 (stating that paper money proposal in Maryland would, if adopted, create “a whole catalogue of frauds”); “An American” [Tench Cox] to Richard Henry Lee, Jan. 3, 1788, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 173-74; “America” [Noah Webster], in *id.* at 194-201; Benjamin Rush to Jeremy Belknap, February 28, 1788, in 16

Second, by impairing confidence among people, it was said that weakly retroactive laws had severely damaged the economy.<sup>117</sup> The Rev. James Madison, a cousin of the future President, while expressing reservations about some of the Constitution's provisions, allowed that the Constitution:

will most probably be ye Means of restoring our national Credit, wch. certainly is now at a very low Ebb. It will also give more Stability & Vigour to our State Govts., & prevent

---

DOCUMENTARY HISTORY, *supra* note 2, at 250-51; "Publicola," in *id.* at 435, 439; George Washington to Jonathan Trumbull, Jr., July 20, 1788, in 18 DOCUMENTARY HISTORY, *supra* note 2, at 273-74 ("There is no State or Description of men but would blush to be involved in the Paper-Money Junto of that Anarchy [Rhode Island]. God grant that honest men may acquire an ascendancy before irrevocable ruin shall confound the innocent with the guilty."); Tench Coxe & Nalbro Frazier to Stephen Blackett, July 11, 1788, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 255, 256. Other examples may be found at 5 DOCUMENTARY HISTORY, *supra* note 2, at 642-43 (Zabdiel Adams); 5 DOCUMENTARY HISTORY, *supra* note 2, at 687-89 ("A Friend to Honesty"); 8 DOCUMENTARY HISTORY, *supra* note 2, at 369 (George Nicholas).

117. See, e.g., FORD, PAMPHLETS, *supra* note 2, at 279, 283 ("Federal Farmer"); James Madison, *Notes for Speech Opposing Paper Money*, in THE FOUNDERS' CONSTITUTION, art. 1, § 10, cl. 1, Document 2 (Philip B. Kurland & Ralph Lerner, eds. 1986); 2 ELLIOT, *supra* note 2, at 170-71 (Charles Turner, speaking at the Massachusetts ratifying convention); *id.* at 492 (James Wilson, speaking at the Pennsylvania ratifying convention); 3 ELLIOT, *supra* note 2, at 76 (Edmund Randolph, speaking at the Virginia ratifying convention); Hugh Williamson, *Remarks on the New Plan of Government*, in FORD, ESSAYS 393, 402; *The Report of Connecticut's Delegates to the Constitutional Convention*, Oct. 25, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 470-71; "Aristides" [Alexander Contee Hanson], in 15 DOCUMENTARY HISTORY, *supra* note 2, at 522, 538; "Publicola," 16 DOCUMENTARY HISTORY, *supra* note 2, at 435, 439; *Pennsylvania Gazette*, April 30, 1788, in 17 DOCUMENTARY HISTORY, *supra* note 2, at 411-12; David Ramsey, *Oration*, June 5, 1788, in 18 DOCUMENTARY HISTORY, *supra* note 2, at 158, 162 (praising bans on paper money, tender laws, bills of attainder, ex post facto laws, and impairments of contracts); Harrison Gray Otis, *Oration*, July 4, 1788, in *id.* at 224, 226 (praising ban on tender laws); Tench Coxe & Nalbro Frazier to Stephen Blackett, July 11, 1788, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 255-56; 5 DOCUMENTARY HISTORY, *supra* note 2, at 162, 165 ("A Dialogue Between Mr. Schism and Mr. Cutbrush") (criticizing tender acts and suspension laws on economic grounds).

*Cf.* 2 DOCUMENTARY HISTORY, *supra* note 2, at 436 (Jasper Yeates, speaking at the Pennsylvania ratifying convention):

If state governments are prevented from exercising these powers [weakly retroactive laws], it will produce respectability, and credit will immediately take place. Laws respecting the general interests of trade will take place, commerce will flourish, shipbuilding will revive again, taxes will be lessened the landed interest, the superfluities of life will be taxed, and the luxuries of the rich will defray a considerable part to the national burthen. We shall be respectable in the eyes of Europe. Our credit will again extend itself. Foreigners will trust us. Congress alone with the powers given them by this system, or similar powers, can effect these purposes.

most of those iniquitous Interferings in private Contracts, wch. destroy all Confidence amongst Individuals.

Third, federalists argued that state legislatures had employed weakly retroactive laws as weapons to attack and retaliate against creditors from other states.<sup>118</sup> Hamilton, for example, wrote that, "Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of [interstate] hostility."<sup>119</sup>

Finally, weakly retroactive laws were seen as damaging to foreign relations because such laws were being turned into weapons against foreign businessmen.<sup>120</sup> Governor Edmund Randolph of Virginia assailed the most notorious offender: "Rhode Island—in rebellion against integrity—Rhode Island plundered all the world by her paper money."<sup>121</sup> Federalists argued that one of the chief virtues of the Constitution was that it would abolish this sort of state defalcation.<sup>122</sup>

The force of the Constitution's principle against weakly retroactive laws is underscored by the fact that those who ventured to defend

---

118. James Madison, *Notes for Speech Opposing Paper Money*, in THE FOUNDERS' CONSTITUTION, art. 1, § 10, cl. 1, Document 2 (Philip B. Kurland & Ralph Lerner, eds. 1986); 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 100 (Letter of Roger Sherman and Oliver Ellsworth to the Governor of Connecticut, Sept. 26, 1787); 2 ELLIOT, *supra* note 2, at 498 (James Wilson, speaking at the Pennsylvania ratifying convention); Hugh Williamson, *Remarks on the New Plan of Government*, in FORD, ESSAYS, *supra* note 2, at 393, 403. Related to this was the point that if there was to be paper money, it should be issued by the national government for purposes of uniformity. David Ramsey, *An Address to the Freeman of South Carolina*, in FORD, ESSAYS, *supra* note 2, at 371, 374.

119. THE FEDERALIST NO. 7, *supra* note 2, at 65 (Hamilton).

120. James Madison, *Notes for Speech Opposing Paper Money*, in THE FOUNDERS' CONSTITUTION, art. 1, § 10, cl. 1, Document 2 (Philip B. Kurland & Ralph Lerner eds., 1987), available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_10\\_1s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_10_1s2.html) (last visited Dec. 9, 2002); 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 100 (Letter of Roger Sherman and Oliver Ellsworth to the Governor of Connecticut, Sept. 26, 1787); "A Foreign Spectator," (Nicholas Collin), in SHEEHAN, *supra* note 2, at 406, 433 (stating that state paper money and tender laws could provoke wars with foreign powers); Hugh Williamson, *Speech at Edenton, N.C.*, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 201, 203-04.

121. 3 ELLIOT, *supra* note 2, at 28.

122. See, e.g., Rev. James Madison to Thomas Madison, Oct. 1, 1787, in 9 DOCUMENTARY HISTORY *supra* note 2, at 30 (arguing that an advantage of the Constitution is that it would end state interference with contracts); 8 DOCUMENTARY HISTORY, *supra* note 2, at 394, 396 ("An Old Planter") (Constitution will cure problems of breach of public contracts, defrauding of creditors, paper money, tender laws); *id.* at 647, 652 ("State Soldier") (praising Constitution's bans on paper money and interference with private contracts); 9 DOCUMENTARY HISTORY, *supra* note 2, at 655, 677 ("A Native of Virginia") (weakly retroactive laws are "so great a political injustice, that the Constitution here requires of the States, that they will forever relinquish the exercise of a power so odious"). Similar sentiments are expressed in *id.* at 719, 727 ("A Freeholder").



weak retroactivity all opposed ratification. Foremost among this group were George Mason and Patrick Henry. Mason thought that the Ex Post Facto Clause would apply to prohibit weakly retroactive laws, but that sometimes "necessity and the public safety require them."<sup>123</sup> Madison thus reported Mason's argument at the national convention:

This is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential—He mentioned the case of limiting the period for bringing actions on open account—that of bonds after a certain <lapse of time,>. . .<sup>124</sup>

When Mason could not get the convention to drop the prohibition on weak retroactivity,<sup>125</sup> he cited that as a reason he had moved into opposition.<sup>126</sup>

During the ensuing Virginia state convention, Patrick Henry made the Constitution's anti-retroactivity policy a centerpiece of his argument against ratification:

Mr. HENRY apologized for repeatedly troubling the committee with his fears. But he apprehended the most serious consequences from these restrictions on the states. As they could not emit bills of credit, make any thing 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.<sup>127</sup>

Again and again he raised this argument.<sup>128</sup>

Nor were Mason and Henry alone. While many anti-federalists applauded the Constitution's policy against weak retroactivity, others saw this as a reason to reject the document.<sup>129</sup> Accordingly, federal-

---

123. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 640.

124. 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 440.

125. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 617.

126. *Id.* at 640. See also 2 STORING, *supra* note 2, at 13 ("Objections to the Constitution of Government formed by the Convention"); 3 ELLIOT, *supra* note 2, at 472, 479-80, 529 (George Mason, speaking at the Virginia ratifying convention).

127. 3 ELLIOT, *supra* note 2, at 471.

128. *Id.* at 318-19 ("It sounds mighty prettily to gentlemen, to curse paper money and honestly pay debts. But apply to the situation of America, and you will find there are thousands and thousands of contracts, whereof equity forbids an exact literal performance. Pass that government, and you will be bound hand and foot."). See also *id.* at 461, 473-75.

129. *E.g.*, ANTI-FEDERALIST NO. 44 ("Deliberator") in THE ANTI-FEDERALIST PAPERS (MORTON BORDEN ED. 1965), at <http://www.constitution.org> (last visited Nov. 19,

ists<sup>130</sup> and foreigners<sup>131</sup> commonly ascribed resistance to the Constitution as due to advocates of weakly retroactive measures such as paper money and tender laws.

#### D. Strong Retroactivity

A law is strongly retroactive if it changes the consequences of earlier conduct as of a date before the date of enactment—usually, but not necessarily, as of the date of the conduct.<sup>132</sup> During the constitu-

---

2002) ("No state can give relief to insolvent debtors, however distressing their situation may be, since Congress will have the exclusive right of establishing uniform laws on the subject of bankruptcies throughout the United States; and the particular states are expressly prohibited from passing any law impairing the obligation of contracts."); 4 ELLIOT, *supra* note 2, at 289-90 (Rawlins Lowndes, speaking at the South Carolina ratifying convention). See also "Genuine Information" [Luther Martin], Letter VI, in 15 DOCUMENTARY HISTORY, *supra* note 2, at 374, 378-70; Letter VIII, in *id.* at 433, 435-36; "Centinel," Letter XVI, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 218 (retrospective laws "generally injurious and fraudulent," but sometimes "not only just but highly requisite."). Other Maryland anti-federalists who advocated debtor-relief measures were Martin and Samuel Chase. 17 DOCUMENTARY HISTORY, *supra* note 2, at 73 n.3. A more moderate view was expressed by "Agrippa" in Letter XVIII. He argued that states ought to be allowed to issue bills of credit, but without tender laws. FORD, ESSAYS, *supra* note 2, at 19.

130. E.g., "The Landholder" No. 12 (Oliver Ellsworth), in FORD, ESSAYS, *supra* note 2, at 196, 197-98; "Curtiopolis," in 15 DOCUMENTARY HISTORY, *supra* note 2, at 399, 402; Spurious Luther Martin, Address No. V, in 17 DOCUMENTARY HISTORY, *supra* note 2, at 69; Henry Knox to John Sullivan, April 9, 1788, in *id.* at 40-41 (stating that the "Rhode Island people are riveted to the works of paper money and darkness—They will reject the New Constitution."); Pennsylvania Gazette, May 7, 1788, in *id.* at 414-15 (stating that opposition in South Carolina "is expected from the framers of the instalment, pine-barren, valuation and legal tender laws."); "A Patriotic Citizen," 18 DOCUMENTARY HISTORY, *supra* note 2, at 7, 11; Thomas Ruston to George Washington, Aug. 17, 1788, in *id.* at 335-36; 4 DOCUMENTARY HISTORY, *supra* note 2, at 26-27 (Henry Knox, predicting paper money advocates will oppose constitution); 5 DOCUMENTARY HISTORY, *supra* note 2, at 82, 85 ("One of the People") (claiming that the public should consider anti-federalists' views on paper money and tender acts); 4 DOCUMENTARY HISTORY, *supra* note 2, at 176-77 (satirical dialogue between anti-federalists opposing Constitution to protect paper money and tender acts); *Id.* at 202-03 (a similar dialogue); *id.* at 236, 240 (William Symmes, Jr., predicting that principal opposition to the Constitution will arise from its ban on paper money, tender laws, etc.); *id.* at 259, 262 ("One of the People") (stating that anti-federalists are "almost to a man" either Tories, employees of the Confederation, or advocates of tender acts and paper money); *id.* at 315 ("Massachusetts Centinel," making a similar charge); 9 DOCUMENTARY HISTORY, *supra* note 2, at 565-66 ("A Planter") (denouncing anti-federalist as favoring paper money and tender laws); James Madison to George Nicholas, April 8, 1788, in *id.* at 707, 710 (claiming that the pro- and anti-Constitution factions in Rhode Island were determined by who was for paper money).

131. Comte de Moustier to Comte de Montmorin, May 29, 1788, in 18 DOCUMENTARY HISTORY, *supra* note 2, at 143-44 (opposition in South Carolina comes from those favoring paper money); Martin Oster to le Marechall de Castries, October 19, 1787, in 8 DOCUMENTARY HISTORY, *supra* note 2, at 83-84 (claiming Patrick Henry's opposition comes from favoring paper money).

132. See *supra* notes 44-46 and accompanying text.

tional debates, such laws were roundly blasted by almost everyone. This can be seen from the comments made about *ex post facto* laws, a category that everyone acknowledged included strongly retroactive measures, even if some thought the phrase included other forms of retroactivity as well.<sup>133</sup> For example, at the national convention, leading delegates such as Gouverneur Morris, Judge Oliver Ellsworth, and James Wilson thought it unnecessary to proscribe adoption of *ex post facto* laws, because they were inherently void.<sup>134</sup> Ellsworth said 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."<sup>135</sup> James Wilson thought that once the general public saw in the Constitution a ban on such laws, it might encourage ridicule: "It will bring reflexions [*sic*] on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."<sup>136</sup>

The subsequent public debate also witnessed widespread denunciations (from both federalists and anti-federalists) of *ex post facto* laws<sup>137</sup> and of retrospective laws generally.<sup>138</sup> "*Spare us, good Lord . . .*

---

133. *Infra* Part IV.E.

134. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 375-76.

135. *Id.* at 376. See also "The Landholder" No. 6, in FORD, ESSAYS, *supra* note 2, at 161, 163.

136. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 376. See also *id.* at 378-79:

G. Morris Willson Dr. Johnson etc thought the first an unnecessary guard as the principles of justice law et[c] were a perpetual bar to such—To say that the legis. 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 . . . .

137. Among federalists, see, e.g., "Atticus," Letter IV, in SHEEHAN, *supra* note 2, at 344 (stating that *ex post facto* laws are "destructive of all right"); "State Soldier," Essay III, in SHEEHAN, *supra* note 2, at 364, (stating that such laws can be "rendered highly useful to, and a great improvement on, the *art of speculation*. But in all other cases they have ever been considered a great curse, since they can only be productive of a halter to the innocent and ignorant.") (emphasis in original); reprinted in 8 DOCUMENTARY HISTORY, *supra* note 2, at 483; James Iredell, *Answers to Mr. Mason's Objections to the New Constitution* in FORD, PAMPHLETS, *supra* note 2, at 333, 368 (stating that *ex post facto* laws have been "the instrument of some of the grossest acts of tyranny that were ever exercised"). See also Letter XVI, in 17 DOCUMENTARY HISTORY, *supra* note 2, at 342, 347; 8 DOCUMENTARY HISTORY, *supra* note 2, at 492-94 ("An Impartial Citizen") (discussing *ex post facto* laws at length); and 9 DOCUMENTARY HISTORY, *supra* note 2, at 655, 675 ("A Native of Virginia") (stating that such laws are "dangerous in their principle, and oppressive in their execution"). Among anti-federalists, see, e.g., 4 STORING, *supra* note 2, at 131 ("Candidus," an anti-federalist, proposing alternative Constitution with ban on *ex post facto* laws); 6 STORING, *supra* note 2, at 86 ("Brutus," writing that "I was pleased to find that this new government would be prevented from making lords, and *ex post facto* laws"); "Federal Farmer," Letter IV, in FORD, PAMPHLETS, *supra* note 2, at 310,

from the power of ex post facto laws, and from everlasting damnation," wrote the author of *The New Litany*, published on February 21, 1787.<sup>139</sup> Some writers were explicit that their criticism of ex post facto laws rested partly on their belief that such laws could be *civil* as well as criminal. For example, at a time when the issue of speculation in public securities had captured widespread attention, "State Soldier" (a federalist) assailed ex post facto laws partly on the ground that they were "highly useful to, and a great improvement on, the *art of speculation*."<sup>140</sup>

Even though some of the Constitution's drafters thought strongly retroactive laws were, in the words of Oliver Ellsworth, "void of themselves," they decided to insert the two ex post facto bans as a precaution.<sup>141</sup> As James Madison wrote:

Bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights. . . .<sup>142</sup>

---

314, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 2, at 42, 45 (calling ex post facto laws a violation of the compact between citizens and their government).

138. *E.g.*, Joseph Barrell to Nathaniel Barrell, Dec. 20, 1787, in 5 DOCUMENTARY HISTORY, *supra* note 2, at 490-91; 15 DOCUMENTARY HISTORY, *supra* note 2, at 49-50 ("retrospective laws"! a Cursed power, which the most abandoned Despot alone would wish to possess; and none but the most abject Slaves could possibly endure").

139. 8 DOCUMENTARY HISTORY, *supra* note 2, at 399; 16 DOCUMENTARY HISTORY, *supra* note 2, at 178.

140. SHEEHAN, *supra* note 2, at 364, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 2, at 483 (emphasis in original). See also "Civis," *An Address to the Freemen of South Carolina on the Subject of the Federal Constitution*, Feb. 4, 1788, in SHEEHAN, *supra* note 2, at 450, 456 (treating Article I, Section 10 as a unit "hard on debtors who wish to defraud their creditors").

141. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 376 (at the urging of Daniel Carroll and Hugh Williamson).

142. THE FEDERALIST NO. 44, *supra* note 2, at 282. It should be noted that Madison had not accepted the proposition that ex post facto laws are only criminal.

## E. The Debate Over the Meaning of 'Ex Post Facto Laws'

During the debates, the question soon arose as to whether a constitutional prohibition of ex post facto laws was targeted at civil as well as criminal measures. As we have seen, Roman and English jurists had employed the phrase "ex post facto" in both civil and criminal contexts. On the other hand, it did not follow that the phrase "ex post facto laws" must refer to civil as well as criminal statutes. Blackstone had illustrated the phrase only in a criminal context, and the constitutions of Maryland and North Carolina used it in a criminal sense as well.<sup>143</sup> Yet several recent popular publications had assumed that ex post facto laws could be civil.<sup>144</sup>

The constitutional debates began with no consensus on the subject. When ex post facto laws were first mooted at the national convention on August 22, the fact that several delegates thought such laws were void of themselves<sup>145</sup> suggests a criminal context only, since civil retroactivity was a fact of life in several states. Other delegates pointed out that states actually had passed ex post facto laws; because there was no history of *criminal* ex post facto laws in the states, those delegates must have been thinking of civil ex post facto.<sup>146</sup> Furthermore, on August 28, James Madison himself suggested that ex post facto laws could be civil.<sup>147</sup> On the following day, however, John Dickinson, having consulted Blackstone, informed the convention that according to the master, an ex post facto law had to be criminal.<sup>148</sup>

---

143. See MD. CONST., DECLARATION OF RIGHTS, art. XV (Nov. 11, 1776), Avalon Project at Yale Law School, available at <http://www.yale.edu/lawweb/avalon/states/ma02.htm> (last visited Oct. 29, 2002) and N.C. CONST., DECLARATION OF RIGHTS, Article XXIV (Dec. 18, 1776), available at <http://www.yale.edu/lawweb/avalon/states/nc07.htm> (last visited Oct. 29, 2002).

144. Crosskey, *supra* note 2, at 540-43.

145. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 376 (Oliver Ellsworth, and apparently Gouverneur Morris and James Wilson). See also *id.* at 379 (James Wilson, Dr. Johnson, Gouverneur Morris).

146. *Id.* at 376 (Hugh Williamson, Daniel Carroll).

147. *Id.* at 440. See also James Madison to Edmund Randolph, April 10, 1788, in 17 DOCUMENTARY HISTORY, *supra* note 2, at 63, reprinted in MADISON, WRITINGS, *supra* note 2, at 117-18.

148. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 448. In an apparently unfinished article found among his papers at his death, Professor William Crosskey claimed that Madison later fabricated this portion of his notes to further his view that the Commerce Clause was interstate rather than plenary in nature. William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248 (1967). I do not find his argument convincing. We have, for example, Edmund Randolph's testimony on the floor of the Virginia ratifying convention that the majority of the national convention accepted the more restricted meaning of the phrase. 3 ELLIOT, *supra* note 2, at

This probably settled the matter for most delegates, but not for George Mason. He rejected the conclusion that ex post facto laws were criminal only,<sup>149</sup> and on September 14, he moved to strike one of the two Ex Post Facto Clauses as over-broad because such laws were occasionally necessary.<sup>150</sup> Elbridge Gerry seconded the motion "but with a view to extend the prohibition to 'Civil cases', which he thought ought to be done."<sup>151</sup> That Mason's motion was rejected<sup>152</sup> could be interpreted to mean the convention wanted the clauses to cover civil cases and thought it sufficiently clear that they did so. However, this is unlikely in view of the previous convention colloquy, which had revealed that some delegates believed that ex post facto laws were by nature criminal only. If the delegates had wanted the clauses to extend to civil issues, the appropriate thing for them to do would have been to accept Gerry's suggestion—which they declined to do.<sup>153</sup> The most plausible inferences, therefore, are that the majority of delegates (1) had been convinced by Dickinson's representation that ex post facto laws were criminal only and (2) wanted to so limit the clauses.<sup>154</sup>

After the Constitution had been published, however, opponents, led by George Mason, argued that the ex post facto bans were too broad because they prohibited civil as well as criminal legislation and weak as well as strong retroactivity.<sup>155</sup> "Whatever it may be at the bar, or in a professional line," Mason said, "I conceive that, according to the common acceptation of the words, ex post facto laws and retrospective laws are synonymous terms."<sup>156</sup> On February 23, 1788, the anti-federalist essayist "Centinel" claimed that one effect of the Ex Post Facto Clauses would be to prevent public financiers such as Robert Morris, William Bingham, and Thomas Mifflin from being legally accountable for money they owed the public.<sup>157</sup> By "Centinel's"

---

477. The notes of William McHenry corroborate that the delegates thought of ex post facto in a criminal context. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 378.

149. 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 617.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. That this was not unanimous can be seen from Mason's comments and also *The Report of Connecticut's Delegates to the Constitutional Convention*, Oct. 25, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 2, at 470-71 ("impairing the obligation of contracts by ex post facto laws.").

155. See, e.g., George Mason, *Objections to this Constitution of Government*, in 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 2, at 637-40, re-printed in FORD, PAMPHLETS, *supra* note 2, at 327, 331-32; 3 ELLIOT, *supra* note 2, at 472, 481, 529 (at the Virginia ratifying convention).

156. 3 ELLIOT, *supra* note 2, at 479.

157. 2 DOCUMENTARY HISTORY, *supra* note 2, at 643 (editor's introduction); 16 DOCUMENTARY HISTORY, *supra* note 2, at 217-20. "Centinel" thus assumed the clause ap-

lights, shared by some others,<sup>158</sup> the Ex Post Facto Clauses were the product of a huge financial plot. Even the revered and ailing Benjamin Franklin was accused of being part of it.<sup>159</sup>

Some federalists agreed that ex post facto laws could be civil as well as criminal. In their opinion, however, ridding America of both kinds of retrospective laws would be a good thing. In November, 1787, a writer under the name "One of the Middling Interest" inveighed against both criminal and civil ex post facto laws, and suggested that the federal ban covered both.<sup>160</sup> In March of the following year, the federalist "State Soldier" wrote in a deprecating manner of civil ex post facto.<sup>161</sup> Some federalists praised the Ex Post Facto Clauses because they thought those provisions would prohibit uncompensated takings of property. In February, 1788, George Nicholas of Virginia said they would prevent federal emancipation of the slaves.<sup>162</sup> Two months later, the "State Soldier" wrote,

Under this government [i.e., under the Constitution] neither

---

plied to civil laws. He added, "Government undoubtedly ought to avoid retrospective laws as far as may be, as they are generally injurious and fraudulent: yet there are occasions when such laws are not only just but highly requisite." *Id.*

158. *E.g.*, "Aristocrotis," whose ironic contribution is found at 3 STORING, *supra* note 2, at 196, 211-12.

159. 2 DOCUMENTARY HISTORY, *supra* note 2, at 724 (PENNSYLVANIA GAZETTE, Mar. 19, 1788).

160. 4 DOCUMENTARY HISTORY, *supra* note 2, at 328, 330.

161. SHEEHAN, *supra* note 2, at 364, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 2, at 483, 488 (stating that ex post facto laws "might be rendered highly useful to, and a greate improvement on, the art of speculation"). See also *id.* at 509-11 ("State Soldier," writing that, "Under this government neither the Congress nor the state legislature could, by direct laws, deprive us of any property we might hold under the general law of the land, or punish us for any offense committed previous to the passage of such laws, since they are prohibited from passing ex post facto laws.").

162. *Id.* at 369, 371. One writer, contending for a civil interpretation of ex post facto laws, argued that Nicholas expressed consistent views at the Virginia ratifying convention as well, when responding to Patrick Henry's contention that the ban on state ex post facto laws would prohibit "scaling" of paper money. Note, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 324 (1921). Nicholas said,

[Henry] says there exists the most dangerous prospect. Has the legislature of Virginia any right to make a law or regulation to interfere with the Continental debts? Have they a right to make ex post facto laws, and laws impairing the obligation of contracts, for that purpose? No, sir.

3 ELLIOT, *supra* note 2, at 476.

However, this is but weak evidence for two reasons: (1) Nicholas was simply making the point that the proposed Constitution didn't take away the powers Henry claimed it did, because Virginia did not have them—and Nicholas would be expected to mirror Henry's words while doing so, and (2) Nicholas refers *both* to laws impairing the obligation of contracts and ex post facto laws. It is reasonable to assume that both retrospective civil and criminal laws might be employed in a "scaling" scheme.

the Congress nor state legislature could, by direct laws, deprive us of any property we might hold under the general law of the land, or punish us for any offence committed previous to the passage of such laws, since they are prohibited from passing ex post facto laws.<sup>163</sup>

Yet the majority of federalists addressing the issue treated ex post facto laws as criminal only. A Virginia author, writing as "An Independent Freeholder," responded to Mason in this way:

That the exclusion of ex post facto laws should be made an objection is to me astonishing. I do an action to day which is in itself innocent and prohibited by no law, at a future day you pass a law to punish me for it. Let every man's own mind answer whether this is just.<sup>164</sup>

Writing as Publius, Alexander Hamilton opined that

The establishment of the writ of *habeas corpus*, the prohibition of ex post facto laws, and of TITLES OF NOBILITY, to which we have no corresponding provision in our [New York] Constitution, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.<sup>165</sup>

Similarly, Tench Coxe, perhaps the most influential federalist writer of the time, treated ex post facto laws as if they were exclusively criminal in nature,<sup>166</sup> as did several other federalist authors.<sup>167</sup>

---

163. 8 DOCUMENTARY HISTORY, *supra* note 2, at 509, 511.

164. *Id.* at 325, 327.

165. THE FEDERALIST NO. 84, *supra* note 2, at 511-12.

166. "An American Citizen," *An Examination of the Constitution of the United States*, in SHEEHAN, *supra* note 2, at 459, 470 (discussing ex post facto laws in a criminal context only). See also 13 DOCUMENTARY HISTORY, *supra* note 2, at 431, 433. For Coxe as the most influential federalist writer in the ratification debate, outstripping Hamilton and Madison in influence, see JACOB COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978).

167. *E.g.*, 5 DOCUMENTARY HISTORY, *supra* note 2, at 734, 739 ("Remarker"); 8 DOCUMENTARY HISTORY, *supra* note 2, at 331, 333 ("Civis Rusticus"); *Id.* at 492-94 ("An Impartial Citizen") (discussing ex post facto laws at length). Professor William Crosskey wrote that the "first intimation that the 'ex-post-facto' clauses of the Constitution had been intended to relate to criminal statutes only, was made in the Virginia ratifying convention," Crosskey, *supra* note 2, at 547, and that a Massachusetts Centinel article was the only one that "gave any real indication as to how the 'ex-post-facto' clauses of the



The decision by most federalists to represent *ex post facto* laws as only criminal turned out to be wise politically. Several states ratified only after implicit and explicit federalist representations that the clauses were purely criminal in nature. At the Pennsylvania ratifying convention in late 1787, federalist Thomas McKean asserted that the value of the Bill of Attainder and Ex Post Facto Clauses lay in the fact that "men will not be exposed to have their actions construed into crimes."<sup>168</sup> At the Virginia convention the following June, ratification was jeopardized by Patrick Henry's repeated contentions that the Ex Post Facto Clauses would require "shilling for shilling" redemption of depreciated paper money, thereby profiting speculators at the expense of everyone else.<sup>169</sup> Accordingly, the federalist governor, Edmund Randolph, repeatedly represented that the Ex Post Facto Clauses were targeted at criminal laws only.<sup>170</sup> In July, although the New York convention rejected John Lansing's proposed amendment expressly limiting the clause to criminal statutes,<sup>171</sup> it did adopt a "Declaration of Rights and Form of Ratification" affirming that "the prohibition contained in the said Constitution against *ex post facto* laws, extended only to laws concerning crimes."<sup>172</sup> As far as I have seen, no one defended retroactive *criminal* laws.<sup>173</sup>

To be sure, during the first North Carolina convention two federalists, James Iredell and Stephen Cabarrus, took the opposite tack. Arguing for ratification in a state where paper money was relatively popular, they contended that the Ex Post Facto Clauses protected existing paper by banning weak civil retroactivity.<sup>174</sup> Iredell further suggested that the Clauses protected property owners against other kinds of asset-diminishing laws—specifically those reducing property

---

Constitution were understood." *Id.* at 544. As the foregoing material demonstrates, neither of these statements are correct.

168. 2 DOCUMENTARY HISTORY, *supra* note 2, at 417.

169. 3 ELLIOT, *supra* note 2, at 461, 471, 473-75

170. See, e.g., *id.* at 464-65, 477, 481. According to one source, however, Theodore Sedgwick may have undercut this argument by claiming that repayment of state securities might be governed by the *ex post facto* ban. 7 DOCUMENTARY HISTORY, *supra* note 2, at 1816 (notes of Justus Dwight). However, this source is quite sketchy.

171. 2 ELLIOT, *supra* note 2, at 407.

172. 18 DOCUMENTARY HISTORY, *supra* note 2, at 300; see also 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 194 (U.S. Dep't of State, 1894).

173. The closest thing was Patrick Henry's defense, at the Virginia ratifying convention, of the attainder of Josiah Phillips. However, Phillips' actions had been crimes at the time he allegedly committed them. 3 ELLIOT, *supra* note 2, at 140.

174. 4 ELLIOT, *supra* note 2, at 184-85 (protection of existing paper money).

rights.<sup>175</sup> However, that convention did not rely on the Iredell-Cabarrus representations, since it rejected the Constitution.<sup>176</sup> Otherwise, a public quasi-consensus seems to have developed that the Ex Post Facto Clauses banned only criminal, and not civil, retroactivity.

#### F. Plugging the Retroactivity Gap

Legal historians have pondered the issue of why the adjacent Takings and Due Process Clauses of the Fifth Amendment<sup>177</sup> became part of the Bill of Rights.<sup>178</sup> Both, especially the Takings Clause, seem to fit uncomfortably with the other portions of the Amendment. Moreover, most of the Bill was based on the anti-federalist agenda as crystallized in amendments proposed by the various state ratifying conventions. However, only two conventions had proposed a due process clause (Virginia<sup>179</sup> and North Carolina<sup>180</sup>) and *none* had proposed a takings clause.

Historical records relevant to the issue are scanty.<sup>181</sup> One modern author has suggested that Madison sneaked these clauses into the Fifth Amendment in a feat of "clever bundling."<sup>182</sup> But why?

In my opinion there was no need for stealth,<sup>183</sup> nor would stealth have availed; but there is a need for explanation. Fortunately, the

---

175. 16 DOCUMENTARY HISTORY, *supra* note 2, at 164, reprinted in FORD, PAMPHLETS, *supra* note 2, at 336 (Iredell, stating that the clause ensures "that the tenure of any property at that time held under the principles of the common law, cannot be altered by any future act of the general legislature."). *But see* 3 ELLIOT, *supra* note 2, at 453 (George Mason at the Virginia ratifying convention saying that a tax on slaves would not be ex post facto).

176. 4 ELLIOT, *supra* note 2, at 248-51. North Carolina ratified the Constitution at a second convention held more than a year later. 2 DOCUMENTARY HISTORY, *supra* note 2, at 24.

177. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

178. *See, e.g.*, AMAR, *supra* note 2; Harrington, *supra* note 2; McConnell, *supra* note 2.

179. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 379 (U.S. Dep't of State, 1894) ("That no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.").

180. *Id.* at 268 (the wording was the same as the Virginia provision).

181. McConnell, *supra* note 2, at 281. Thus, one leading legal historian has written a whole book on the history of the Bill of Rights, including two chapters on the Fifth Amendment, but has revealed almost nothing about the Takings or Due Process Clauses. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 180-209 (1999). *But see* 2 DOCUMENTARY HISTORY, *supra* note 2, at 248 (discussing the Due Process Clause very briefly).

182. AMAR, *supra* note 2, at 77-78.

183. *Accord* Harrington, *supra* note 2, at 1293.

ratification history of the Constitution's Ex Post Facto Clauses offers part of the explanation. That history tells us that earlier in the adoption process, first Madison and then others understood these clauses to be guards against both criminal and civil retrospective laws.<sup>184</sup> By this view, the Ex Post Facto Clauses would guard against measures to impair contractual obligations, impose retroactive taxes or retroactive tort liability, or seize property without compensation. This interpretation would render the provisions against tender laws, paper money, and impairment of contracts as surplusage, added merely for additional security.<sup>185</sup>

Such a sweeping prohibition of retrospective laws proved to be too broad to be acceptable to most participants, who believed that curative laws were sometimes desirable. So to obtain approval at the national convention and in the ratification process, most federalists represented that the Ex Post Facto Clauses were purely criminal in nature. Based on previous history, this was not an unreasonable interpretation,<sup>186</sup> and it apparently served as part of the basis of the ratification bargain.<sup>187</sup>

Nonetheless, ratification did not fully resolve the retroactivity issue, for matters had gone too far in the other direction. People who did not want *all* civil retroactivity banned now found the Constitution's protection too narrow. The problem was particularly acute at the national level, for the prohibitions against state paper money, tender laws, and contract-impairment had survived.<sup>188</sup> At the national level, however, the only surviving protection was the structure of the federal government.

Even most anti-federalists would have been concerned<sup>189</sup>—and virtually all federalists. In the event, it was a federalist, James Madi-

---

184. See *supra* notes 148, 150, 156-63 and accompanying text.

185. Cf. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

186. See *supra* Part IV.E.

187. *Id.*

Madison conceded as much in a speech to Congress in 1790. 5 MADISON, WRITINGS, *supra* note 2, at 453 (stating, in a 1790 speech to Congress, "But as *ex post facto* laws relate to criminal, not civil cases, the Constitution itself requires this definition, by adding a like restriction on the States an express one against retrospective laws of a civil nature").

188. According to McConnell, *supra* note 2, at 285, these bans were imposed on the states and not on the federal government because they represented potential state infringements on interstate commerce, a federal concern.

189. Harrington, *supra* note 2, at 1288 ("After all, both federalists and anti-federalists opposed uncompensated takings and were all agreed that property must be secured against government intrusion."); "Centinel," Letter XVI, in 16 DOCUMENTARY HISTORY, *supra* note 2, at 218 (retrospective laws are "generally injurious and fraudulent," although sometimes "highly requisite."); 2 STORING, *supra* note 2, at 262 ("Federal Farmer," listing compensation for takings as among the "unalienable or fundamental

son, who set about to fix the problem. He was ideally suited to do so. By 1790 he had become a member of the House of Representatives in the new government. He was aware of and had accepted explicitly the limits that federalist representations had placed on the Ex Post Facto Clauses.<sup>190</sup> He had, of course, attended the national convention and the Virginia Convention, and as co-author of *The Federalist*, he was knowledgeable about the outcome of the ex post facto debate in New York.<sup>191</sup> He therefore decided to insert contiguous Takings and Due Process Clauses in his draft of what became the Fifth Amendment. The contiguity may have been suggested by the Northwest Ordinance, which took the same approach.<sup>192</sup>

The thrust of the Takings Clause was obviously civil. The accompanying Due Process Clause served criminal law purposes, of course—but it served civil ends as well. Certainly that is suggested by the wording of the due process amendments proposed by the Virginia and North Carolina ratifying conventions:<sup>193</sup> “[N]o freeman ought to be . . .

---

rights in the United States”); 3 STORING, *supra* note 2, at 78-79 (“Federal Republican,” expressing fear that the national government would be a threat to property). *See also* McConnell, *supra* note 2, at 281-82 (attesting to long acceptance of the compensation rule, although not always as a constitutional requirement).

190. *See* 5 MADISON, WRITINGS *supra* note 2, at 453 (stating, in a 1790 speech to Congress that ex post facto laws “relate to criminal, not civil cases”).

191. Recall that ratification in Virginia and New York came only after federalist representations that the Ex Post Facto Clauses were limited to criminal statutes. *See supra* notes 171-73 and accompanying text.

192. *See* NORTHWEST ORDINANCE art. 2 (1787) (“No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.”), available at <http://www.yale.edu/lawweb/avalon/nworder.htm> (last visited Mar. 6, 2003).

193. 4 ELLIOT, *supra* note 2, at 243 (North Carolina); 3 ELLIOT, *supra* note 2, at 658 (Virginia). *Cf.* DE. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES (1776):

10. That every Member of Society hath a Right to be protected in the Enjoyment of Life, Liberty and Property; and therefore is bound to contribute his Proportion towards the Expense of that Protection, and yield his personal Service when necessary, or an Equivalent thereto; but no Part of a Man's Property can be justly taken from him, or applied to public Uses without his own Consent or that of his legal Representatives; Nor can any Man that is conscientiously scrupulous of bearing Arms in any Case be justly compelled thereto if he will pay such Equivalent.

....

12. That every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without Delay, according to the Law of the Land.

*Id.*

disseized of his freehold, liberties, privileges, or franchises . . . but by the law of the land," and by the phrasing of the archetype in Magna Carta.<sup>194</sup> Civil coverage is also suggested by Blackstone's treatment of the matter,<sup>195</sup> and was reflected a year after adoption of the Fifth Amendment, when a famous South Carolina court case applied Magna Carta's due process protection to invalidate an uncompensated taking by state authorities.<sup>196</sup>

Madison's Takings and Due Process Clauses applied only to federal, not state, actions. As Professor Akhil Reed Amar has demonstrated, the Bill of Rights was at least as much about protecting state prerogatives as about protecting individuals.<sup>197</sup> It would have been discordant to interfere with state regulation of property or with the course of civil justice among citizens of the same state.<sup>198</sup> This was so particularly because the federalists had just finishing assuring the public that the Constitution would leave state authorities with exclusive jurisdiction over realty, over most personalty not in commerce, and over the administration of domestic civil justice.<sup>199</sup>

---

194. MAGNA CARTA, 39 ("No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."), *available at* <http://www.yale.edu/lawweb/avalon/medieval/magframe.htm> (last visited Dec. 12, 2002). "Due process of law" was seen as a way of saying much the same thing. 1 BLACKSTONE, *supra* note 2, at \*133-34. See also 3 STORING, *supra* note 2, at 129 ("Philadelphiensis," an anti-federalist author, stating that under the Constitution "the unfortunate citizen has no *magna charta*, no *bill of rights*, to protect him; nay, the prosecution may be carried on in such a manner that even a *jury* will not be allowed him.")

195. 1 BLACKSTONE, *supra* note 2, at \*138-39 (applying due process to property rights).

196. See, e.g., *Bowman v. Middleton*, 1 Bay 252, 1 S.C.L. 152 (S.C. 1792), in which the Court of Common Pleas and General Sessions set aside an uncompensated taking with these words:

*The Court . . . who, after a full consideration on the subject, were clearly of opinion, that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against magna charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, ipso facto, void.*

*Id.*

197. AMAR, *supra* note 2, at 7 and *passim*.

198. Madison's proposed amendments to protect individuals against state powers were rejected.

199. See Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L. J. \_\_\_\_ (2003) (forthcoming). By comparison, the contracts clause applied only to the states. Professor Michael McConnell argues that this was so: (1) to preserve federal control over commerce, and (2) because federal authorities were less likely to impair the obligation of contracts. McConnell, *supra* note 2, at 283-89.

Madison's solution had a kind of symmetry about it. After adoption of the Fifth Amendment, the Constitution's anti-retroactivity policy spanned two separate spectra—one for the national government and one for the states. The national spectrum was as follows: The most acceptable kind of retroactivity—the purely curative—was permitted unconditionally. The next-most-acceptable—pure asset-diminution—was permitted conditionally on payment of just compensation. Weak retroactivity and strong civil retroactivity, which were still less acceptable, were subject to judicial supervision under the Due Process Clause. That way, the court could validate a law found to be curative, and void a law that was not. Finally, criminal *ex post facto* laws, the least acceptable form of retroactivity, were prohibited unconditionally.

The retroactivity spectrum for the states was this: The two most acceptable forms of retroactivity—curative legislation and property takings—were permitted unconditionally. The least acceptable—criminal *ex post facto* laws—were banned unconditionally. The forms in the middle were divided between those that might impede interstate commerce and those that would not. The former were permitted, the latter interdicted.

Madison's solution was not merely symmetrical; it was also popular. This was evidenced by the almost complete lack of opposition to the Fifth Amendment.<sup>200</sup> Madison's success was evidenced further by events a few years later—in *Calder v. Bull*. As a member of the first North Carolina ratifying convention, James Iredell had supported the Constitution on the grounds that the Ex Post Facto Clause would protect property from uncompensated takings.<sup>201</sup> In 1798, however, Iredell found himself on the United States Supreme Court, being asked to determine whether the *ex post facto* bans included civil retroactivity. In contrast to his earlier statements, he concurred with the Court's decision that the bans were criminal only. Iredell added that when retroactive laws affect *private* rights, "justice is done by allow-

---

200. For a discussion of the uncontroversial adoption of the Takings Clause and Third Amendment as designed to protect property, see Harrington, *supra* note 2, at 1282-91. Madison's first draft also included preamble language designed to protect property. *Id.* at 1282-83. The substance of his proposal was not changed much at all. Originally, the anti-civil-retroactivity portions of the amendment read: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation." See THE AMERICAN REPUBLIC: PRIMARY SOURCES 338 (Bruce Frohnen, ed. 2002). The same portions as passed read: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

201. See *supra* notes 175-76 and accompanying text.

ing [those damaged] a reasonable equivalent."<sup>202</sup> In other words, he had traded civil ex post facto for adoption of the Fifth Amendment.<sup>203</sup>

## V. CONCLUSION

One who reads the surviving record of the constitutional debates of 1787-88 cannot avoid the conclusion that the policy against statutory retroactivity was a major force behind the adoption of the U.S. Constitution. Federalists, in particular, viewed as reprehensible all forms of retroactivity except the purely curative. They saw strongly retroactive measures as contrary to the "first principles of legislation." They saw weakly retroactive measures as immoral, responsible for severe damage to the American economy, and deleterious to national unity and foreign relations. They also feared uncompensated seizures of property. The proposed Constitution contained provisions to curb retroactivity, and the federalists promoted it largely for that reason.

Dislike for retroactivity was not limited to the federalists. Many anti-federalists expressed an opposition as firm. However, some anti-federalists thought the Constitution too rigid on that score because it arguably prevented curative retroactivity and certainly impaired retrospective emergency laws, such as state tender acts.

On this issue, as on so many others, the federalists compromised to obtain ratification. At critical moments they represented that the Ex Post Facto Clauses did not bar all forms of retroactivity, but only strongly retroactive criminal laws. These representations helped get the Constitution ratified. Yet these representations also left protection against retrospective lawmaking weaker than most people wanted, particularly at the federal level. So at the first possible opportunity, James Madison partly filled the gap by bestowing on his country the Fifth Amendment Takings and Due Process Clauses.

---

202. *Calder v. Bull*, 3 U.S. 386, 400 (1798) (Iredell, J., concurring).

203. Justice Chase's opinion for the court in *Calder*, while it held that the Ex Post Facto Clauses prohibited only retrospective criminal laws, also identified other actions outside the powers of republican government. Although Justice Chase did not mention the Due Process Clause, his reference to *Magna Carta* (the source of that clause) and the nature of the items on his list suggest that Due Process review is appropriate for them:

... a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

*Id.* at 388.

When Madison's work was complete, the constitutional policy against retroactivity had crystallized into an elegant set of rules. At the state level curative laws and takings were permitted unconditionally, criminal ex post facto prohibited, and civil weak and strong retroactivity permitted except in the realm of commerce and finance, where it was prohibited. At the national level, criminal ex post facto laws were prohibited unconditionally, takings were permitted conditionally on payment of compensation, and the courts were to divide the curative from the merely retroactive under the authority of the Due Process Clause.

To illustrate how we might apply this historical record, we can reconsider two issues arising in *Eastern Enterprises*. The first was whether the Takings Clause or the Due Process Clause was the appropriate medium for review. On this point, it would seem that Justice Kenney and the four dissenters had the better of the argument: the Takings Clause was to be the vehicle for reviewing asset-diminishing laws, while the Due Process Clause was to be the vehicle for reviewing weakly retroactive statutes of the kind at issue in *Eastern Enterprises*.<sup>204</sup>

A second question, pivotal in *Eastern Enterprises*, although not addressed in detail, is whether judicial review of retroactive civil statutes should be rigorous or deferential to the legislature. At this point Justice Stephen Breyer's observation—made in a lecture at New York University—becomes useful: “[The Constitution's] handful of general purposes will inform judicial interpretation of many individual provisions that do not refer directly to the general objective in question.”<sup>205</sup> Certainly, as we have seen, checking retroactivity was one of the Constitution's “handful of general purposes,” and a very powerful and important one. Justice Breyer's generalization, therefore, argues for a rigorous standard for judicial review of retroactive legislation, whether under the Takings, Due Process, Contracts, or Ex Post Facto Clauses.<sup>206</sup> It does not support his insistence in *Eastern Enterprises*

---

204. The Coal Industry Retiree Health Benefit Act was weakly retroactive as to the plaintiff because it did not merely diminish the value of the plaintiff's benefit; it altered prospectively the nature of its obligations to others, based on events occurring before the statute was passed. See *supra* Part I.

205. Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247-48 (2002).

206. Cf. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (which largely gutted the Contracts Clause). In dissent, Justice Sutherland, writing for a minority of four, argued:

An application of these principles to the question under review removes any doubt, if otherwise there would be any, that the contract impairment clause denies to the several states the power to mitigate hard consequences resulting to debtors from financial or economic exigencies by an impairment of the



that the complainant bear "the burden of showing that the statute, because of its retroactive effect . . . unfairly upset its legitimately settled expectations."<sup>207</sup> On the contrary, it would have been more in accord with the spirit of the Constitution to declare freedom from retroactivity a "fundamental right," and require that the statute's defenders show a compelling governmental interest before infringing that right. At the very least, when considering the essentially factual issue of whether the law impairs settled expectations, courts should place the burden of persuasion on the government.<sup>208</sup>

Thus, of all the opinions written in *Eastern Enterprises*, that by Justice Kennedy—implementing a rigorous review of a retroactive statute under the Due Process Clause—seems most faithful to the historical context of the Constitution.

---

obligation of contracts of indebtedness. A candid consideration of the history and circumstances which led up to and accompanied the framing and adoption of this clause will demonstrate conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors especially in time of financial distress.

*Id.* at 453.

207. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 567-68 (1998). Justice Stevens took a similar position. *Id.* at 553.

208. Both the plurality opinion, 524 U.S. at 524, and Justice Kennedy's separate opinion, *id.* at 539, acknowledge that the standard for reviewing a retroactive economic statute is more rigorous than the deferential review applied to prospective economic legislation, although the nature of the higher standard is not spelled out.

