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The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking

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Retroactive lawmaking has long challenged the presuppositions underlying our democratic system. On the one hand, retroactive lawmaking conflicts with rule-of-law aspirations: the power to apply laws retroactively permits lawmakers to dash the settled expectations of those governed by prior rules. On the other hand, forbidding retroactive lawmaking denies legislators a potentially valuable weapon to attain social and political goals. Why prohibit current legislators from adjusting laws in light of economic or technological developments?

In the criminal context, the Supreme Court has heeded the rule-of-law concerns by strictly prohibiting any retroactive lawmaking. Under the Ex Post Facto Clause,[1] the Court has struck down not only enactments that criminalize conduct that was lawful when undertaken, but also those enactments that have the effect of lengthening an offender's stay in prison.[2] In contrast, the Court has sanctioned legislative flexibility in the civil context, permitting the legislature to trample upon the reliance interests of individuals and companies almost at will.[3] Given the Court's stance in criminal procedure cases generally,[4] its rigid

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1. The ex post facto restrictions apply to both federal and state laws. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1. By retroactivity, I refer to the commonly used definition of altering the legal status of acts that were performed before the new law was passed. *See, e.g.*, Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1499 (1994) (specifying that a "court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); Weaver v. Graham, 450 U.S. 24, 31 (1981) (noting that the "critical question is whether the law changes the legal consequences of acts completed before its effective date"); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) (employing similar definition); Saul X. Levmore, *The Case for Retroactive Taxation*, 22 J. LEGAL STUD. 265, 266 (1993) (same); Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 381-83 (1977) (same). This definition must be distinguished from retroactive effects, for most prospective legislation, particularly in the civil context, has retroactive impact on previous conduct such as investments.

2. *See, e.g.*, Miller v. Florida, 482 U.S. 423, 435-36 (1987) (holding that application of revised sentencing guidelines to petitioner, whose crime occurred before their effective date, violated Ex Post Facto Clause); *Weaver*, 450 U.S. at 35-36 (holding that application of statute reducing good-time credits of petitioner, whose crime occurred before statute's effective date, violated Ex Post Facto Clause).

3. *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 734 (1984) (upholding retroactive effective date of withdrawal liability provisions of Multiemployer Pension Plan Amendments Act); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18-19 (1976) (upholding retrospective liability for disabilities of former employees under Coal Mine and Safety Act of 1969).

4. *See, e.g.*, Sandin v. Connor, 115 S. Ct. 2293, 2300 (1995) (curtailing liberty interests enjoyed by prisoners); Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (holding warrant not needed if investigative officer can determine contraband nature from "plain feel"); Brecht v. Abrahamson, 507 U.S. 619,

prohibition against retroactive lawmaking in criminal matters is almost as difficult to fathom as is its permissiveness in civil cases, particularly in light of the resurgence of concern for property rights.[5] Indeed, the similarities between the two contexts are striking.

First, concern for the rule of law should be as applicable in the civil context as in the criminal. As Justice Scalia recently stated, "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[6] Individuals enjoy more freedom of action when legal obligations are clear. Nonetheless, in the economic realm courts have allowed Congress to impose new liability retroactively, including increasing employer liability for pensions of former employees[7] and mandating that owners clean up the waste that others have deposited on their property.[8] The retroactive change must meet the simple test of rationally serving a public purpose. In contrast, courts consistently prevent states from applying newly configured sentencing schemes to prisoners who previously committed offenses, irrespective of the magnitude of the state interests implicated.[9]

Second, when examined from a social contract or individual rights perspective, the Supreme Court's dichotomous approach is similarly bewildering. As James Madison declared over two hundred years ago, "ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation."[10] Yet the Court has permitted Congress to ride roughshod

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638 (1993) (requiring habeas petitioners to meet more difficult standard in demonstrating that alleged constitutional violations influenced outcome of trial); Wilson v. Seiter, 501 U.S. 294, 303 (1991) (restricting availability of Eighth Amendment claim against prison officials); Florida v. Bostick, 501 U.S. 429, 439-40 (1991) (finding no seizure when law enforcement authorities questioned individual in bus, blocked his path, and prevented bus's departure).

5. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2321-22 (1994) (holding that city requirement forcing landowner to dedicate portions of property as condition for building permit constituted "taking" under Fifth Amendment); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992) (holding that regulation barring property owner from erecting permanent habitable structures on land constituted "taking" unless state showed principles of nuisance or other property law prohibited intended use); Nollan v. California Coastal Comm'n, 483 U.S. 825, 839 (1987) (holding that conditioning rebuilding permit on grant of easement constituted "taking" not justified by land use regulation).

6. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

7. *See, e.g.*, *Pension Benefit Guar. Corp.*, 467 U.S. at 717.

8. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

9. *See, e.g.*, Miller v. Florida, 482 U.S. 423, 435-36 (1987) (holding that application of revised sentencing guidelines violates Ex Post Facto Clause); Lindsey v. Washington, 301 U.S. 397, 401-02 (1937) (holding that application of amended statute authorizing maximum and minimum sentences violates Ex Post Facto Clause).

10. THE FEDERALIST No. 44, at 301 (James Madison) (Jacob E. Cooke ed., 1961). Justice Story similarly stated that "retrospective laws . . . neither accord with sound legislation nor with the fundamental principles of the social compact." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (Melville M. Bigelow ed., 1994) (1891).

Academics have also argued that the Court's deference to retroactive lawmaking in the civil context has needlessly sacrificed individual rights for political expediency. They warn of the Court's abdication of its role of setting limits on legislative power. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 53

over the reliance interests of individuals, corporations, and states to the tune of millions of dollars, while preventing states from altering the conditions of an inmate's incarceration when only the remotest of reliance interests is present. Moreover, historians forcefully argue that the Court's understanding of retroactive lawmaking has been shaky from the outset, for many of the leading political figures and jurists at the United States' founding roundly condemned legislative retroactivity in both the criminal and civil contexts as equally pernicious.[11]

In this article, I argue that, despite concerns common to the criminal and civil contexts, a plausible line can be drawn between retroactive lawmaking in the two spheres based on interest group theory. In civil matters, the political process protects against overreaching through retroactive lawmaking far more than it does in criminal matters. Indeed, the potential for retroactive lawmaking may promote good government in civil areas by diluting the attractiveness of rent seeking—attempts by interest groups to obtain government largesse. I assume, along with others,[12] that minimizing legislators' self-interest in enacting laws benefits the public, whether the self-interest stems from the importunings of influential lobbyists or, more generally, legislators' desire to maximize their chances for reelection. My objective, however, is neither to demonstrate that retroactive lawmaking in the civil context is always wise nor to suggest that all retroactive adjustments in the criminal context are vindictive. Rather, I hope to show that there is good reason to be more suspicious of retroactive majoritarian lawmaking in the criminal context and more receptive to limited retroactivity in the civil.

Part I of this article sketches the Supreme Court's dissimilar approaches to

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(1964) ("Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a retroactive law is truly a monstrosity. . . . To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose."); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 789-91 (1936) (noting that some judicial opposition to retroactive legislation stemmed from idea that such legislation could not be reconciled with natural law principles); Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1071-75 (1993) (calling for more stringent review of retroactive measures because of "the inherent injustice of retroactive laws . . . [and] the deeply rooted jurisprudential and constitutional aversion to retroactivity").

11. For the most comprehensive account, see 1 WILLIAM W. CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324-51 (1953). In short, their argument is that the term "ex post facto" as used at the time of the founding protected against retroactive laws in both the civil and criminal contexts; that state constitutional provisions concerning ex post facto prohibitions had been applied in both contexts; and that state and federal judges in early cases referred to the bar as equally applicable in both contexts. Even after the Supreme Court held in Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), that the Ex Post Facto Clause prohibited retroactivity in criminal cases only, Justice Johnson authored a long appendix to a later case, Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 414 (1829) (Johnson, J., dissenting), tracing what he considered to be the Court's error, and urging reexamination of the doctrine. *Id.* at 681; *see also infra* text accompanying notes 71-73.

12. See the discussion in Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 807 (1993).

retroactivity in the civil and criminal contexts. Despite the lack of any overarching theory, the Court under the Ex Post Facto Clause has been stringent in striking down legislative measures that enhance penalties for those previously incarcerated. Under the Due Process Clause, the Court has been comparatively lenient in permitting retroactivity when economic interests are at stake, whether in the tax, pension, or regulatory fields.

Part II examines the contrasting retroactivity doctrines and evaluates possible explanations for the divergence. The magnitude of the state's interest in retroactive application of civil and criminal laws cannot be distinguished in any a priori fashion—the state's interest in both contexts can be substantial. Retroactive lawmaking can comport with democratic ideals by allowing a current majority to be free from the controlling grasp of majorities past. Nor is the divergence in doctrine easily explained by the individual interests at stake. Despite the insistence of the Supreme Court and commentators that the principle of fair warning underlies the Court's ex post facto jurisprudence, the reliance interest in civil cases is far more pronounced. Although the liberty interest at stake in criminal cases is often greater, the difference does not currently trigger more demanding review for criminal laws that are prospective in operation.[13]

Rather, as I explain in Part III, the most salient distinction between the two contexts lies in the operation of the political process. Retroactivity in the civil context generally has three interrelated attributes not present in criminal cases. First, those burdened by potential lawmaking can often lobby to squelch retroactive legislation when it is contrary to their interests. The common concern over retroactive application enhances the ability of those disadvantaged to band together in an effective lobbying effort. Second, the potential for retroactivity likely raises the price of lobbying activities. As a result, those who wish to extract or retain benefits from legislators must be prepared to pay more for their gains than would otherwise be the case. Finally, permitting limited retroactivity can check legislative abuses by raising the prospect that a subsequent regime will force current legislators (or their allies) to disgorge benefits they obtained while in power. On balance, interest group theory suggests powerful reasons why we should be more skeptical of retroactive lawmaking in the criminal context and more open to limited retroactivity in economic affairs.

I. THE SUPREME COURT'S DISCORDANT SCRUTINY OF RETROACTIVE LEGISLATION

A. RETROACTIVE LAWMAKING IN THE CRIMINAL CONTEXT

The Constitution prohibits both Congress and the states from passing any "ex post facto Law."[14] Despite the historical ambiguity as to whether this prohibi-

13. *See infra* text accompanying note 128.

14. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

tion applies to civil transactions,[15] there is historical consensus that the clause prohibits governments from enacting laws that either criminalize conduct that was permissible when committed or enhance the punishment for illegal conduct after the fact. The Supreme Court first addressed the clause in *Calder v. Bull*,[16] explaining that the clause should be viewed as an "additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation."[17] In *Calder*, Justice Chase stated that the prohibition applied to

> 1st. Every law that makes an action done before the passing of the law; and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[18]

Congress and state legislatures have rarely threatened the core of the Ex Post Facto Clause, which prohibits criminalizing an action that was innocent when done or increasing the severity of a crime's classification (felony v. misdemeanor) after the fact.[19] The last two prongs of the *Calder* analysis have generated many more controversies. Although in recent years the Court has restricted the prohibition's impact on changes in the rules of evidence and procedure,[20] overall, it has vigorously enforced the prohibition against changes in the law that have the potential to increase an offender's stay in prison, even if no palpable issue of reliance is present.

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15. *See supra* note 11; *infra* text accompanying notes 54-73.

16. 3 U.S. (3 Dall.) 386 (1798).

17. *Id.* at 390 (opinion of Chase, J.).

18. *Id.*

19. A close parallel can be drawn to the judiciary's early rejection of the British tradition of recognizing a common law of crimes. In United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812), the Court held that federal courts lacked the power to punish crimes that were not first established by Congress. *Id.* at 34. *But see* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 (arguing that despite *Hudson & Goodwin* a federal common law of crimes has arisen due to congressional enactment of complex crimes that courts must interpret and apply in a common-law-like fashion).

20. *Compare* Thompson v. Utah, 170 U.S. 343, 355 (1898) (barring retrospective application of state law requiring only eight instead of twelve jurors) *and* Kring v. Missouri, 107 U.S. 221, 235-36 (1883) (prohibiting retroactive repeal of state rule treating conviction for lesser included offense as acquittal of greater offense) *with* Collins v. Youngblood, 497 U.S. 37, 52 (1990) (upholding statute authorizing state appellate court to reform unauthorized verdicts without remanding for new trial) *and* Dobbert v. Florida, 432 U.S. 282, 296-97 (1977) (upholding retroactive alteration of death penalty procedure changing roles of judge and jury in sentencing).

With respect to the allowable range of sentences imposed after conviction, the Court in *Miller v. Florida*[21] invalidated retroactive application of a change in sentencing regulations that presumptively increased the offender's sentence.[22] The offender could have received the same sentence under either scheme, but the likelihood of a stiffer sentence was greater with the new law. The Court invalidated retroactive application of the revised regulations, reasoning that any change in the sentencing structure that disadvantaged an offender violated the Ex Post Facto Clause.[23] Similarly, in *Lindsey v. Washington*[24] the Court held that a state could not retrospectively change a discretionary sentence of up to fifteen years to a mandatory fifteen-year sentence.[25] Every appellate court to consider the issue has similarly invalidated retroactive application of the new federal sentencing guidelines,[26] which, despite their name, are mandatory.[27]

The Court has also prohibited retroactive changes that impose greater legal obstacles to early release. For instance, in *Weaver v. Graham*[28] the Court asserted that a state's retroactive change in its good-time credit policy violated the Ex Post Facto Clause as long as the change "constricts the inmate's opportunity to earn early release."[29] Because the new good-time credit policy made it more difficult for most inmates to accumulate credits, the Court invalidated its retroactive application.[30] Moreover, the Court has invalidated retroactive operation of statutes even when the obstacle to early release was triggered only by conduct after enactment of the law. For instance, in *Greenfield v. Scafati*,[31] the Court prohibited Massachusetts from retrospectively altering its good-time credit system so that any inmate violating parole would be unable to accumulate good-time credits upon return to prison.[32] And in *Warden v. Mar-*

21. 482 U.S. 423 (1987).

22. *Id.* at 429-36.

23. *Id.* at 432-33.

24. 301 U.S. 397 (1937).

25. *Id.* at 400-02.

26. *See, e.g.*, United States v. Gerber, 24 F.3d 93, 95 (10th Cir. 1994) (holding that Ex Post Facto Clause bars retroactive application of amended guideline provision); United States v. Seacott, 15 F.3d 1380, 1384 (7th Cir. 1994) (same); United States v. Morrow, 925 F.2d 779, 783 (4th Cir. 1991) (same); *see also* United States v. Lambros, 65 F.3d 698, 700 (8th Cir. 1995) (invalidating retroactive application of sentencing provision for drug offenders), *cert. denied*, 116 S. Ct. 796 (1996).

27. *See* Mistretta v. United States, 488 U.S. 361 (1989).

28. 450 U.S. 24 (1981).

29. *Id.* at 35-36.

30. *Id.*

31. 277 F. Supp. 644 (D. Mass. 1967), *aff'd per curiam*, 390 U.S. 713 (1968).

32. *Id.* at 644-45; *see also* Williams v. Lee, 33 F.3d 1010, 1013-14 (8th Cir. 1994) (prohibiting retroactive application of new statute enhancing penalty for violating parole, despite offender's notice), *cert. denied*, 115 S. Ct. 1393 (1995); United States v. Meeks, 25 F.3d 1117, 1123 (2d Cir. 1994) (striking down, on ex post facto grounds, retroactive application of revised federal supervised release statute, 18 U.S.C. § 3583(g) (1994), which enhanced the penalty for drug use during supervised release, even though the offender was on notice of the enhanced penalty before using drugs); United States v. Paskow, 11 F.3d 873, 883 (9th Cir. 1993) (same); United States v. Parriett, 974 F.2d 523, 527 (4th Cir. 1992) (same); Fender v. Thompson, 883 F.2d 303, 307 (4th Cir. 1989) (barring application of statute

rero[33] the Court stated that parole eligibility is annexed to the original sentence, presumably implying that a retroactive postponement of parole eligibility violates the Ex Post Facto Clause.[34] Thus, pursuant to the Ex Post Facto Clause, the Court has denied legislatures the ability to apply changes in criminal penalties retroactively.

B. RETROACTIVE LAWMAKING IN THE CIVIL CONTEXT

In sharp contrast to the Supreme Court's stringent approach to retroactivity in the criminal context, the Court has been surprisingly permissive in upholding Congress's efforts to upset settled expectations in the civil context. Far from the categorical approach used in striking down any alteration to good-time credit policies or sentencing frameworks, the Court has generally sustained any retroactive enactment in the economic sphere that is supported by a plausible public purpose.

In light of the Supreme Court's early decision not to prohibit civil retroactive lawmaking under the Ex Post Facto Clause,[35] retrospective legislation can only be prohibited if it violates some other constitutional norm. Although particular retroactive lawmaking can be challenged under the Bill of Attainder Provi-

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depriving inmates sentenced to life imprisonment, who escaped from prison, of the opportunity to earn parole upon their return). *But see* United States v. Reese, 71 F.3d 582, 590 (6th Cir. 1995) (upholding, in contrast to *Meeks*, *Paskow*, and *Parriett*, retroactive application of newly revised federal supervised release statute because the defendant "is merely being required to serve time not for the original crime, but for the violation of supervised release"), *cert. denied*, 116 S. Ct. 2529 (1996).

33. 417 U.S. 653 (1974).

34. *Id.* at 663. Appellate courts have applied *Marrero*'s logic to invalidate laws that retroactively place new legal impediments to obtaining parole. *See, e.g.*, Schwartz v. Muncy, 834 F.2d 396, 398 (4th Cir. 1987) (invalidating retroactive application of new parole law which delayed inmate's ability to earn parole); United States *ex rel.* Graham v. United States Parole Comm'n, 629 F.2d 1040, 1044 (5th Cir. 1980); Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977).

The Supreme Court's decision in California Department of Corrections v. Morales, 115 S. Ct. 1597 (1995), alters the analysis somewhat, although the extent is unclear. When Morales was sentenced to an imprisonment term of between 15 years and life for the murder of his wife in 1980, he was entitled to parole reviews annually thereafter. *Id.* at 1600. California subsequently changed its law in 1981 to authorize the California Board of Prison Terms to defer parole hearings for up to three years for prisoners convicted of more than one offense involving the taking of a life. *Id.* After Morales was initially denied parole in 1989, the Board, in reliance on the new parole law, set Morales's subsequent hearing three years later. *Id.*

The Supreme Court held that the mere increase in intervals between parole hearings did not constitute an increase in punishment within the meaning of the Ex Post Facto Clause. *Id.* at 1605. Without calling into question the continuing vitality of *Weaver*, *Miller*, and *Lindsey*, the Court reasoned that California's change in parole policies was aimed merely at " 'reliev[ing] the [Board] from the costly and time-consuming responsibility of scheduling parole hearings' for prisoners who have no reasonable chance of being released." *Id.* at 1602 (quoting *In re* Jackson, 703 P.2d 100, 106 (Cal. 1985)). Indeed, inmates in Morales's situation evidently could petition the parole board for expedited consideration of parole in extraordinary circumstances. The Court concluded by finding that the 1981 amendment "creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes," and that "there is no reason to think that such postponement would extend any prisoner's actual period of confinement." *Id.* at 1605.

35. *See infra* text accompanying notes 54-70.

sion,[36] the Contracts Clause,[37] or the Takings Clause,[38] courts analyze generalretroactive lawmaking in the economic sphere under the Due Process Clause.[39]

Review of economic legislation under the Due Process Clause has its roots in the *Lochner* era.[40] During that period, the clause protected against legislative readjustments to commercial life that were not based upon substantial state interests or that were not well-tailored to achieve the asserted state purpose. Courts were less likely to uphold legislation with retroactive reach.[41] But activist review diminished in part due to the conviction that common law entitlements were not sacrosanct—and that legislation imposing new obligations might be more just than leaving the existing distribution of power and wealth undisturbed. Substantive due process review remains today, but only as a reminder that legislation in the economic realm cannot be arbitrary or blatantly irrational. If a rational relationship exists between the law and a legitimate government objective, then the statute will be upheld.[42] Moreover, retroactivity alone does not make legislation irrational.

Thus, applying the Due Process Clause, the Supreme Court in *Usery v. Turner Elkhorn Mining Co.*[43] stressed that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."[44] This rule applies even if the legislation readjusting benefits and burdens "upsets otherwise settled expectations . . . [or] impose[s] a new duty or liability based on past acts."[45] The Court has required only that the legislative decision to make the change retroactively be reasonable: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered

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36. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; *see* United States v. Lovett, 328 U.S. 303, 315 (1946) (striking down, as bill of attainder, statutory provision that discontinued salaries of some government employees).

37. U.S. CONST. art. I, § 10, cl. 1; *see* Allied Structural Steel v. Spannaus, 438 U.S. 234, 250-51 (1978) (striking down, as violation of Contracts Clause, state act that altered employer's obligations to fund pension plans).

38. U.S. CONST. amend. V. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

39. The Due Process Clause demands that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V, § 1; *id.* amend. XIV, § 1.

40. Lochner v. New York, 198 U.S. 45, 64 (1905) (striking down limitation of workweek for bakers); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 374 (1935) (invalidating compulsory retirement and pension system). For academic commentary, see generally James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

41. *See* Kainen, *supra* note 40, at 102-23 (discussing contrast between force of retroactivity principle in *Lochner* and modern eras).

42. *See, e.g.*, Williamson v. Lee Optical Inc., 348 U.S. 483, 491 (1955) (upholding statute preventing opticians from replacing lenses except on written prescription of ophthalmologist or optometrist).

43. 428 U.S. 1 (1976).

44. *Id.* at 15.

45. *Id.* at 16.

by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."[46]

In *Turner Elkhorn*, the Court upheld Congress's decision to require mine operators to cover employees' disability and death benefits, even when they had left employment prior to passage of the act.[47] The Court concluded that imposition of retroactive liability "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor."[48] Similarly, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,[49] the Court upheld Congress's decision to impose retroactive liability on employers withdrawing from certain multiemployer pension plans.[50] The Court reasoned that the retroactivity was rational "to prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute."[51] The Court now applies the same test to changes in the tax code, requiring only that the decision to make an enactment retroactive be rational.[52] In the Court's view, retroactive

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46. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984). Congress legislated with even greater retroactive reach under the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. § 9701 (1994), mandating that current and former coal operators contribute to a combined health benefits fund on a proportionate basis. Congress included coal operators who had not signed a collective bargaining agreement for health benefits since 1950, many of whom had not mined coal for the past 30 years. The courts of appeals have upheld the Act despite challenges based on the Act's retroactivity. *See, e.g.*, Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir. 1996); *In re* Chateaugay Corp., 53 F. 3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995); Barrick Gold Exploration, Inc. v. Hudson, 47 F.3d 832, 837-38 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995).

47. 428 U.S. at 19-20.

48. *Id.* at 18.

49. 467 U.S. 717 (1984).

50. *Id.* at 734.

51. *Id.* at 731.

52. *See* United States v. Carlton, 114 S. Ct. 2018, 2022 (1994). The Supreme Court's decision in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), crafted a narrow exception to the general rule in *Turner Elkhorn*. The Court held that, although the Due Process Clause does not protect against retroactive measures generally, Congress cannot reopen a final judgment entered by a court without violating the separation of powers doctrine. *Plaut*, 115 S. Ct. at 1463.

In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 360-62 (1991), the Supreme Court established a new way of determining the statute of limitations period for § 10(b) securities actions. In many jurisdictions, the *Lampf* rule diminished the period of time during which plaintiffs could challenge securities fraud. Under the Supreme Court's jurisprudence, that new rule would be applied fully retroactively, despite the reality that it might upset the expectations of plaintiffs relying on the statute of limitations rule in their jurisdictions. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 541 (1991) (holding previous decision by Court invalidating statute must be applied retroactively to similar statute challenged in action arising out of facts antedating decision). Congressional reaction was swift. In order to reinstate the securities claims against the Michael Milkens and Ivan Boeskys of the industry, Congress amended the Securities Exchange Act of 1934. 15 U.S.C. § 78aa-1 (1994). Congress's retroactive enactment attempted to restore any rights plaintiffs might have enjoyed prior to the *Lampf* decision. Any case dismissed on the basis of *Lampf* would be reinstated pursuant to legislative direction.

In *Plaut*, the Supreme Court approved Congress's decision to lengthen the statute of limitations period retroactively. *Plaut*, 115 S. Ct. at 1458. But the Court held that reopening a case at the direction of Congress would violate the separation of powers doctrine: "By retroactively commanding the federal courts to reopen final judgments," *id.* at 1453, Congress impermissibly infringed upon the

application of laws permits the legislature needed flexibility in addressing pressing social and political concerns.[53]

The distinction between the Supreme Court's approach to retroactivity in the civil and criminal contexts is manifest. Majoritarian concerns triumph when financial matters are at stake—the Court demands that retroactive legislation altering economic rights satisfy only a standard of reasonableness. But the Court brushes aside concern for legislative flexibility in the criminal context, prohibiting states from retroactively applying changes to sentencing and release policies such as the good-time credit program in *Weaver*, the sentencing provision in *Miller*, and the parole policies in *Greenfield*. In the criminal context, rule-of-law concerns predominate.

II. SOME POSSIBLE, BUT ULTIMATELY UNPERSUASIVE, JUSTIFICATIONS FOR THE COURT'S RETROACTIVITY JURISPRUDENCE

Unless the Supreme Court's discordant approaches to criminal and civil retroactive legislation can be justified by principled distinction, the Court should either prohibit all retroactive rulemaking or defer across the board to the outcome of the political process. This Part considers several possible ways to reconcile the contrasting approaches to retroactive lawmaking.

A. HISTORY

Perhaps the divergent approaches are best understood as a historical anomaly. Although there may be little contemporary reason to treat retroactivity differently in the criminal and civil contexts, those concerned with fidelity to the Framers' conception might call for more vigorous judicial review in the criminal sphere. Even for originalists, however, the historical record makes the hypothesis difficult to accept.[54]

At the time the Constitution was drafted, many leading statesmen assumed that the ex post facto prohibitions in the Constitution referred equally to the

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judiciary's power under Article III to say what the law is. Thus, Congress can retroactively expand or constrict periods of limitation, just as it can alter the employer liability under *Turner Elkhorn* and *Gray*—as long as it respects the finality of judicial decisions.

53. Despite the relaxed review, the Court has crafted a clear statement rule, requiring a plain statement from Congress before interpreting a provision to apply retroactively. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1508 (1994) (finding no clear congressional intent to apply § 102 of the Civil Rights Act of 1991 to pending cases). This interpretive canon, by forcing Congress to state explicitly that it is acting retroactively, raises the costs of passing retroactive legislation. To this extent, the Court has manifested skepticism toward retroactive legislation in the civil context. Although that skepticism may be overbroad, see *infra* text accompanying notes 164-210, the costs of separately identifying when civil retroactivity should be encouraged are likely too high. Regardless, if Congress makes plain its intent to apply a new rule retroactively, only limited review under the Due Process Clause is warranted.

54. Neither does a clear answer emerge from a textual perspective. The Ex Post Facto Clause does not target criminal laws explicitly and therefore could easily apply to civil as well as criminal legislation.

criminal and civil contexts.[55] Newspaper articles,[56] legal dictionaries,[57] and legal treatises[58] addressed the dangers of ex post facto laws without differentiating between the two contexts.

Consideration of the events preceding the enactment of the ex post facto prohibitions also supports a more general application. In the period of governance under the Articles of Confederation, state legislatures passed economic measures, particularly legal tender laws, that seriously disrupted the settled expectations of prominent financial leaders.[59] The drafters may well have included the Ex Post Facto Clause to promote stability and quiet the fears of mercantile interests.[60]

Furthermore, after ratification of the Constitution, state court cases referred to the Ex Post Facto Clause as applying to civil matters. For instance, the New Jersey Supreme Court in *Taylor v. Reading*[61] held that the legislature could not require debts to be satisfied in continental money if specie had previously been mandated.[62] And in the federal circuit court case of *Van Horne's Lessee v. Dorrance*,[63] Justice Patterson's position assumed the applicability of an ex post facto challenge to civil legislation, but rejected the challenge on the merits.[64]

Thus, the Supreme Court's restrictive reading of the Ex Post Facto Clause in *Calder v. Bull*[65] was a surprise to many observers.[66] In *Calder*, the plaintiff challenged the Connecticut legislature's decision to grant a new hearing in the probate court after the time for appealing an adverse probate judgment in the ordinary courts had expired.[67] The Court upheld the Connecticut practice.[68] Justice Chase concluded that the clause was not "inserted to secure the citizen in his private rights, or either property, or contracts . . . [but rather] to secure the

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55. For analysis, see CROSSKEY & JEFFREY, *supra* note 11, at 324-25 (discussing understanding of ex post facto laws at time of Constitutional Convention); Oliver Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 322-31 (1920-21) (same); Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 324-36 (1992-1993) (same).

56. CROSSKEY & JEFFREY, *supra* note 11, at 325-30.

57. *Id.* at 330.

58. *Id.* at 331.

59. I borrow here from CROSSKEY & JEFFREY, *supra* note 11, at 325-42; *see also* Aiken, *supra* note 55, at 331-32.

60. CROSSKEY & JEFFREY, *supra* note 11, at 325-26; *see* Aiken, *supra* note 55, at 328.

61. The case is unreported, but it is discussed in State v. Parkhurst, 9 N.J.L. 427, 444 (1802).

62. CROSSKEY & JEFFREY, *supra* note 11, at 340.

63. 2 U.S. (2 Dall.) 304 (1795).

64. *Id.* at 319-20.

65. 3 U.S. (3 Dall.) 386 (1798).

66. *See* CROSSKEY & JEFFREY, *supra* note 11, at 347-50. For instance, Justice Hugh Henry Brackenridge of the Pennsylvania Supreme Court wrote that the decision "confining *ex post facto* to a criminal case . . . *is incorrect.* Ex post facto law[s] . . . embrace[] civil contracts as well as criminal acts." *Id.* at 350; *see also* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 65-74 (1988) (discussing how Court's decision in *Calder* conflicts with intent of Framers).

67. In this respect, the facts in *Calder* resemble those in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995), except that the federal doctrine of separation of powers is inapplicable. *See also supra* note 52.

68. *Calder*, 3 U.S. at 390.

person of the subject from injury or punishment, in consequence of such law."[69] Justices Iredell and Patterson agreed with Justice Chase's analysis, and Justice Cushing saw no need to reach the ex post facto issue.[70]

Thirty years later, Justice Johnson noted his vehement disagreement with *Calder*. In dissenting from the Court's opinion in *Saterlee v. Matthewson*,[71] which dismissed a challenge to retroactive application of a property measure, Justice Johnson included an appendix in which he sharply criticized the Court's analysis of the Ex Post Facto Clause in *Calder*.[72] He concluded that the far sounder view was that the clause applied to civil as well as criminal matters.[73] Thus, although the *Calder* Court's limitation has been rigorously followed since the decision, the pre-*Calder* record of the Ex Post Facto Clause's adoption and interpretation provides little principled reason to differentiate retroactivity in the criminal and civil contexts.

B. GOVERNMENTAL INTERESTS

The Court's dichotomous approach cannot be explained on the basis of the strength of the government's interests in legislating retroactively. The political allure of retroactivity in both criminal and civil contexts is substantial.[74]

At first glance, the state's interest in applying criminal measures retroactively might appear suspect because a penalty cannot deter misconduct unless it exists at the time the actor is deciding whether to engage in the conduct.[75] Some deterrent impact arguably results from the knowledge that the legislature can criminalize particular conduct or enhance the penalty of particular crimes in the future—the first bite at the apple will not necessarily be free. Nonetheless, the potential for retroactive enhancement is too uncertain to exert much deterrent force,[76] except in marginal cases. By itself, therefore, the deterrence rationale

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69. *Id.*

70. *Id.* at 394-400.

71. 27 U.S. (2 Pet.) 380 (1829) (addressing legislative change to relationship between owner and tenant of real estate).

72. *Id.* at 681.

73. *Id.* at 681-87.

74. Any particular Congress may well be indifferent as to whether to ban retroactive lawmaking. There is a basic trade-off between desiring the power to change what prior legislatures have done and immunizing a current Congress's acts from the retrospective reach of legislatures to follow. Each Congress ideally would want it both ways—enjoying retroactive authority for itself, while prohibiting retroactive measures in the future in order to ensure greater power. The first several Congresses, however, would presumably choose to ban retroactive lawmaking because they could not take advantage of such power to the same extent as their successors. Even though it is not clear whether any Congress (after the first several) would choose a retroactivity or nonretroactivity rule as a matter of first principles, Congress today would unquestionably exercise retroactive power if authorized in the criminal context, as it has in the civil.

75. *Cf.* Warren v. United States Parole Comm'n, 659 F.2d 183, 189 (D.C. Cir. 1981) (noting that the Ex Post Facto Clause "assures that the legislature can make recourse to stigmatizing penalties of the criminal law only when its core purpose of deterrence could thereby possibly be served"), *cert. denied*, 455 U.S. 950 (1982).

76. Deterrence depends heavily upon the certainty that the penalty will be applied. FRANKLIN E.

provides only limited support for legislating retroactively in the criminal context.

But legislators apply statutes in the criminal context retroactively for reasons other than deterrence. For retributivist reasons, legislators might want to punish conduct that, while blameworthy, was not illegal when committed.[77] Moreover, to the extent that the legislature desires to mete out punishment based on the magnitude of harm created, retroactive punishment allows the legislature to create a tighter fit between the harm caused by the antisocial acts committed and ultimate punishment. Retroactivity in the criminal context would permit the legislature to calibrate punishment to the facts of particular cases.

Furthermore, viewed from the perspectives of rehabilitation and incapacitation, retroactive laws can be beneficial. For instance, legislators might determine that a particular class of offenders has a greater recidivist tendency than previously understood, and therefore wish to lengthen the sentences for that class. Or, they might determine that prior parole policies have failed to sort those prisoners who can become productive members of society from those who will likely resort again to crime.[78] Alternatively, they might assess the progress certain prisoners have made in order to determine whether release is in the public interest.[79] Retroactive legislation can be of obvious public benefit in these contexts.

Administrative convenience and consistency provide additional reasons for retroactive lawmaking in the criminal context. The legislature might wish to apply new policies to those already incarcerated so that all prisoners would be treated under the same legal regime. Different rules governing different prisoners can generate bureaucratic headaches and undermine a penological goal of

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ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 158-72 (1993); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961-62 (1966); Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences Between Student Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 138 (1994).

Legislatures could, however, meet a goal of specific deterrence in legislating retroactively. If a particular offender seems likely to commit another offense upon release, the state could extend his or her sentence.

77. For instance, shortly after ratification of the Constitution, the new government attempted to prosecute attempted bribery and counterfeiting, despite the lack of laws prohibiting that conduct. *See, e.g.*, United States v. Worrall, 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766) (prosecution for attempt to bribe Revenue Commissioner); United States v. Smith, 27 F. Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323) (prosecution for counterfeiting U.S. notes).

78. Most of the state legislatures that have required certain classifications of offenders to take DNA blood tests for inclusion in law enforcement data banks have tested those offenders convicted before the effective date of the act. *See, e.g.*, Jones v. Murray, 962 F.2d 302 (4th Cir.) (upholding in part retroactive application of DNA testing requirement), *cert. denied*, 506 U.S. 977 (1992); *see also* Parton v. Armontrout, 895 F.2d 1214 (8th Cir.) (invalidating state's decision to retroactively condition parole release on an inmate's successful completion of a sexual offender rehabilitation program), *cert. denied*, 498 U.S. 879 (1990).

79. For a general discussion of the limited allure of rehabilitative justifications for punishment, see FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981); Stephen D. Sowle, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 498-501 (1994-1995) (discussing modern prison conditions).

treating all prisoners alike. Retroactive lawmaking in the criminal context, if sanctioned, would unquestionably meet substantial governmental objectives.

This is not to slight the justifications for retroactive lawmaking in the civil context. The legislature may rectify omissions, prevent unfairness, and maintain the integrity of state or federal programs.[80] Courts have upheld retroactive enactments designed to improve Michigan's compensation benefits law,[81] to allocate litigation costs more fairly,[82] to impose sanctions on employers withdrawing from pension plans,[83] to impose liability on coal mine employers for employee disabilities due to black lung disease,[84] to prevent serious financial consequences for the United States Treasury from unexpected judicially imposed liability,[85] and to improve the efficacy of numerous tax schemes.[86] Similarly, several environmental statutes now impose liability on owners of property where hazardous waste has been dumped, even though the property was purchased by individuals prior to enactment of the new environmental laws.[87]

Retroactivity is a necessary, or at least useful, tool in all of the above contexts to help a legislature meet its policy objectives. *Plaut v. Spendthrift Farm, Inc.*[88] further illustrates the potential role for retroactive lawmaking. Vast fortunes

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80. Courts originally approved retroactive measures if they fell under the rubric of curative legislation designed to fix some legislative error or confusion. *See* Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Paramino Lumber Co. v. Marshall, 309 U.S. 370, 379 (1940); *see also* Hochman, *supra* note 1, at 704-06. The category of curative legislation is malleable and is easily extended to cover legislative omissions and mistakes.

81. *See* General Motors Corp. v. Romein, 503 U.S. 181 (1992); *cf.* Patlex Corp. v. Mossinghoff, 758 F.2d 594 (Fed. Cir.) (upholding retroactive application of statute designed to promote the integrity of the patent system by facilitating reexamination of patents previously issued), *modified*, 771 F.2d 480 (Fed. Cir. 1985).

82. *See* United States v. Sperry Corp., 493 U.S. 52 (1989).

83. *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984).

84. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); *see also supra* text accompanying notes 47-48.

85. In 1947 Congress enacted the Portal-to-Portal Act, 29 U.S.C. § 258, to reverse a decision by the Supreme Court construing the Fair Labor Standards Act to expand exponentially the liability of the government and other employers for work performed by employees during the Second World War. The courts of appeals upheld the retroactive measure. Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3d Cir. 1949); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

86. *See, e.g.*, United States v. Carlton, 114 S. Ct. 2018 (1994) (limiting availability of deduction for proceeds of sales of stock to employee stock ownership plans); United States v. Hemme, 476 U.S. 558 (1986) (upholding transitional rule between old and new gift and estate tax statute); United States v. Darusmont, 449 U.S. 292 (1981) (applying new minimum tax provision retroactively).

87. *See, e.g.*, 42 U.S.C. § 6928(a), (h) (1994); *see also id.* § 9607 (imposing retroactive liability on handlers and transporters of hazardous waste); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) (rejecting challenge to retroactive application of Act), *cert. denied*, 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986) (same); United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528 (E.D. Cal. 1992) (same). *But see* United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) (federal Superfund law cannot be applied retroactively to recover clean-up costs for conduct that took place prior to its enactment).

88. 115 S. Ct. 1447 (1995).

were made during the 1980s by dint of the junk bond, which unquestionably was legal at the time.[89] But many believe that junk bond investments were, in large part, a mirage that fueled overspeculation and led directly to the collapse of businesses, investment houses, and savings and loans alike.[90] Congress responded to the crisis by imposing stricter requirements on the thrift industry.[91] But a legislature might meet additional policy objectives by recapturing some of the money made by financiers during the period. Levying civil sanctions against those who benefitted from the junk bond craze, even if the conduct was entirely legal during that time period, seems justified. Otherwise the comparatively blameless taxpayer must shoulder the entire financial burden for the collapse of the savings and loan industry.[92]

Retroactive legislation in the tax context in particular may have greater economic advantages to the government than tax legislation with only a prospective effect.[93] In determining which revenue measures to adopt, Congress can calculate the needed revenue more accurately if the tax is retroactive. Fewer projections are required. Congress can be more confident in ascertaining the revenue of a ten-percent surcharge on *last* year's income tax than in predicting revenue from an income tax increase for future years. Congress can also utilize retroactivity to avoid unintended incentive effects that are usually inevitable with prospective taxes. A retroactive charge might minimize the capital that individuals and businesses invest in loopholes and other devices to circumvent the tax laws.[94]

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89. Brokers lobbied long and hard to try to keep it that way. BROOKS JACKSON, HONEST GRAFT 96-97 (1990) (explaining that the Drexel firm contributed $253,500 in the 1986 congressional campaign alone); *see also* Shadburne-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995) (upholding Oregon's retroactive enlargement of a statute of repose allowing certain IUD users to maintain claims against manufacturers), *cert. denied*, 116 S. Ct. 1289 (1996); Wesley Theological Seminary v. United States Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989) (similarly upholding retroactive enlargement of statute of repose), *cert. denied*, 494 U.S. 1003 (1990).

90. *See, e.g.*, STEPHEN PIZZO ET AL., INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS (1989); John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 45 (1986); Don More, Note, *The Virtues of Glass-Steagall: An Argument Against Legislative Repeal*, 1991 COLUM. BUS. L. REV. 433, 447.

91. *See, e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1464(t) (1994) (prohibiting use of goodwill to meet capital reserve requirements).

92. *Cf.* Jonathan Chait, *Wizards; Politics and Culture,* NEW REPUBLIC, Mar. 18, 1996, at 46 (suggesting, somewhat facetiously, that we should balance the budget by recapturing money from past "unnecessary tax cuts and spending increases"). Indeed, a similar goal presumably motivated Congress to require former coal operators to assume some of the health care costs for employees who never even worked for their firms. *See supra* note 46. In upholding the Act despite its retroactivity, the Seventh Circuit recently explained that, as a matter of distributive justice, the operators "bear some degree of responsibility" and "benefitted from the labor of retired mine workers the same as companies still operating in the coal industry." Davon, Inc. v. Shalala, 75 F.3d 1114, 1124-25 (7th Cir. 1996).

93. Too much change, whether retroactive or prospective, may be harmful. *See infra* note 118. If all laws were subject to rapid change, the climate would obviously be poor for investment. But this concern should not obscure the potential economic benefits that limited retroactivity can achieve.

94. *See* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 607-08 (1986) (discussing incentives created by setting retroactive effective dates for new provisions in tax code); Levmore, *supra* note 1, at 273-77; *cf.* David A. Dana, *Natural Preservation and the Race to*

Finally, with respect to governmental interests, retroactive lawmaking can be defended on majoritarian grounds in both criminal and civil contexts. The propriety of retroactive lawmaking turns on which legislative judgment to privilege: the initial legislative decision to authorize (or the implicit decision to permit) the prior conduct, or the subsequent legislative decision to impose some new obligation upon the prior conduct. On balance, there are sound reasons to prefer the product of the contemporary legislature.

The legislature's identity changes over time. Births, deaths, immigration, and emigration all transform the political community, resulting in an influx of newcomers. Those individuals have not participated in the earlier decisions authorizing particular private actions, or decisions permitting those actions to proceed unchecked. Retroactivity enhances the ability of a current majority to fashion policies responsive to contemporary interests. A current majority need not be ruled by the dead hand of majorities past. A prior decision to permit junk bond financing, or to use asbestos, should not bind future legislators.

Moreover, a legislature may never have fully considered the dangers of junk bond financing or asbestos insulation. Such practices should be subject to regulation with retroactive effect if a contemporary majority deems it wise. The majority in power can best assess which acts should be considered antisocial, including those that have taken place in the past.[95] The current legislative majority has accumulated more information than its predecessor and thus, through retroactivity, can arguably adjust policy much more precisely. A subsequent legislature should be able to learn from its predecessor's mistakes and take action accordingly, whether in the civil or criminal context.

Thus, the legislature may have substantial interests in applying statutes retroactively in both the civil and criminal contexts. The question in both contexts is whether such interests outweigh the potential harm to the individual and society.

C. RULE-OF-LAW CONCERNS

Although there are potentially pressing governmental interests for retroactive lawmaking in both the civil and criminal contexts, some might argue that rule-of-law considerations militate more forcefully against permitting retroactivity in the criminal context than in the civil. Barring retroactivity comports with rule-of-law concerns by preventing the legislature from singling out individuals for criminal sanctions in response to news of horrifying antisocial acts. Responding to constituent pressure, legislators might attempt to punish offensive behavior that would otherwise escape punishment based on existing statutes. A requirement of prospectivity minimizes the possibility that legislators can use

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Develop, 143 U. PA. L. REV. 655, 677-81 (1995) (warning of overdevelopment as response to risk of government change in policy in natural preservation context).

95. Retroactive lawmaking in this context has a parallel impact to a judge's finding of liability. Judges are not bound by decisions of their predecessors other than through stare decisis, and retroactive lawmaking also allows a legislature to effect public policies more responsive to contemporary needs.

the criminal law to target particular individuals or groups based on prior conduct.

But restraining the government's capacity to target individuals or groups seems critical in the civil as well as in the criminal context. Through retroactive measures, Congress can single out particular individuals to bear the brunt of regulatory initiatives and revenue measures.[96] Indeed, legislators have subjected those convicted of crimes to retroactive civil sanctions in addition to the criminal penalties imposed.[97] Requiring legislation to be prospective protects against targeting disfavored individuals or groups for disadvantageous treatment. Thus, from a rule-of-law perspective, a ban on retroactive lawmaking appears fundamental in both contexts.

Some might argue that the risk of vindictiveness in the criminal context is more acute. Lurid examples of crime inflame passions (of legislators and constituents) in a way that financial dealings, even if scandalous, do not. And legislatures may be motivated by nonpunitive rationales in acting retroactively in the civil sphere.[98] One could assert, therefore, that the rule of law is at least of somewhat greater concern in the criminal context due to the enhanced possibility of arbitrary retroactive legislation.

Yet, many view civil legislation as more prone to abuse because of the prospect of legislative self-dealing.[99] Legislators can enact retroactive regulatory measures to reward influential contributors, pay back key constituents for prior support, or punish opponents. Legislators maximize their chance of reelection, in part, by pleasing important constituents and amassing a large financial war chest.[100] Legislators may therefore have greater financial incentives to engage in retroactive lawmaking in the civil context than in the criminal. Requiring rigorous adherence to the rule of law in civil contexts therefore arguably protects against favoritism or graft as well as against punishment.[101]

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96. *Cf.* Lynch v. United States, 292 U.S. 571 (1934) (discussing Congress's power to repudiate certain life insurance policies issued under congressional auspices during World War I); News Am. Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988) (overturning statute prohibiting the FCC from granting a waiver of cross-ownership rules to one identifiable entity). Indeed, many enactments, particularly in the administrative context, give rise to both criminal and civil penalties. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407, 2412 n.9 (1995) (discussing civil and criminal penalties for violation of Endangered Species Act); *see also* Sanford N. Greenberg, *Who Says It's a Crime:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. ___ (forthcoming 1996).

97. *See, e.g*, De Veau v. Braisted, 363 U.S. 144, 159-60 (1960) (upholding retroactive ban on ex-felons holding certain union jobs); Harisiades v. Shaughnessy, 342 U.S. 580, 593 (1952) (upholding retroactive decision to deport individual based on prior conduct).

98. *See supra* text accompanying notes 80-87.

99. *See infra* text accompanying note 130-31.

100. There is reason to be suspicious of civil enactments, whether import restrictions or farm subsidies, for such enactments might reflect private rather than public interest legislation. For an informative look at influence peddling, see JACKSON, *supra* note 89 (exploring influence of PAC money).

101. Legislators might be tempted to use criminal legislation as a vehicle for gaining support from key constituents or contributors. There might be special-interest legislation in the criminal context as

Thus, even if retroactive criminal laws pose a particular danger because of the potential for vindictiveness, retroactive civil legislation presents a greater risk of self-dealing.[102] On balance, when examined in light of rule-of-law concerns, retroactivity in the civil context should be just as problematic as in the criminal setting. Retroactive laws in both contexts may subject particular individuals or groups to disadvantageous treatment.

D. RELIANCE INTERESTS

In addition to guarding against targeted legislation, rule-of-law concerns also protect individual autonomy. Individuals should be able to rely on existing law when ordering their affairs. Clear legal obligations maximize an individual's freedom of action. The Supreme Court's disparate approaches to retroactive lawmaking, however, cannot be defended on the basis of reliance interests. Although judges[103] and academics[104] have defended the Court's elaboration of ex post facto doctrine on such grounds, the threat to reliance interests is far stronger in most civil contexts.

1. Reliance in the Criminal Context

Some notion of individual liberty certainly lies at the heart of the Ex Post Facto Clause. But the conventional justification for the clause—demanding fair notice—is conceptually flawed and descriptively inaccurate. Not only is it questionable whether we should always safeguard an offender's reliance interest, but courts have even invoked the Ex Post Facto Clause when no reliance interest is conceivably present.[105]

An offender's reliance interest is most significant when the legislature criminalizes conduct that was permissible when undertaken. Arguably, before insider

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well. Private prison industries can lobby for longer sentences, DNA labs can lobby for funding for DNA testing, *see* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 3796, 14131-34 (1994), and businesses can lobby for laws criminalizing their competitors' actions. But, overall, there is a far greater chance that legislators will have a financial incentive in civil matters where the financial stakes are usually much greater.

102. In other words, to the extent that we do not trust Congress, barring retroactive lawmaking would be beneficial in constraining Congress's current power, even though such a ban would, in effect, increase the power of prior Congresses. Whatever the impact, my principal contention is that such mistrust would call for similar treatment in the criminal and civil contexts, contrary to prevailing practice.

103. Although judges have used phrases such as "reliance," Miller v. Florida, 482 U.S. 423, 430 (1987); Weaver v. Graham, 450 U.S. 24, 28 (1981); Ewell v. Murray, 11 F.3d 482, 485 (4th Cir. 1993), and "fair warning," *Weaver*, 450 U.S. at 28, the Court has never explained how those phrases relate to any underlying conception of the Ex Post Facto Clause.

104. *See, e.g.*, CROSSKEY & JEFFREY, *supra* note 11, at 324 (focusing on notice concerns); Aiken, *supra* note 55, at 324-25 (stressing importance of notice); Hochman, *supra* note 1, at 696 (arguing that reliance is relevant, though not controlling, factor); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 443, 463 (1982) (focusing on notice requirement in light of liberty interest at stake); Bryant Smith, *Retroactive Laws and Vested Rights*, 6 TEX. L. REV. 409, 417-19 (1928) (stressing fair notice and adverting to fear of arbitrary legislative rule).

105. *See supra* text accompanying notes 31-32.

trading can be punished by criminal sanctions, those engaged in such trading should be aware of the potential for criminal penalties. Yet the requirement of notice, on which reliance interests depend, is largely a fiction. Most members of society cannot understand statutory or regulatory requirements without considerable legal help.[106] We routinely punish individuals who have had no actual notice that they were violating IRS regulations, mail fraud statutes, or usury laws.

Moreover, society may not wish to protect reliance in many criminal law settings. Even if combining particular drugs has not been criminalized, knowingly selling dangerous hallucinogens should not necessarily be protected.[107] In traditional criminal law jargon, ignorance of the law is no excuse if the conduct is *mala in se*, or wrongful in itself. Criminal law doctrine in general does not demand actual notice,[108] and safeguarding reliance when the conduct is wrongful seems bizarre.[109]

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106. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 83-87 (1968); John C. Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985). In McBoyle v. United States, 283 U.S. 25 (1931), Justice Holmes stated:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27.

107. *See also* Kahan, *supra* note 19, at 415-16 (agreeing that protecting reliance interest in criminal context is not always normatively desirable).

108. The Supreme Court has never inquired into whether an offender actually relied on a particular statutory scheme prior to committing an offense. No empirical evidence has been demanded (or likely exists) demonstrating that offenders rely on the details of a state's good-time credit or parole policy before committing an offense.

In Greenfield v. Scafati, 277 F. Supp. 644 (D. Mass. 1967), *aff'd per curiam.*, 390 U.S. 713 (1968), inmates were on constructive notice of the enhanced penalties for parole violation, at least before engaging in conduct violating parole. Many lower courts have followed the logic in *Greenfield*, holding the issue of the offender's notice to be totally irrelevant. *See, e.g.*, United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994); Paskow v. United States, 11 F.3d 873 (9th Cir. 1993); United States v. Parriett, 974 F.2d 523, 527 (4th Cir. 1992) (holding that "[t]he fact that Parriett was 'on notice' of the consequences of [violation of conditions on supervised release] during the term of his supervised release does not serve to insulate the statutory revision from review under the *ex post facto* clause"); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Beebe v. Phelps, 650 F.2d 774 (5th Cir. 1981).

109. In the *mala in se* context, constructive notice might be more relevant than reliance itself. The concern is not for the individual interest, but for the systemic protections flowing from such notice. Commentators believe that the rationale underlying the principle of legality or fair notice turns on limiting the power of the police and prosecutors, not on protecting individual reliance interests. *See* Jeffries, *supra* note 106, at 205-09. When the standards of criminal conduct are set beforehand—and individuals are thus subject to constructive notice—administrative officials will be less likely to apply criminal prohibitions in an arbitrary or vindictive manner. The problem with a vague loitering statute is not so much the lack of notice to individuals as the implicit license afforded to police officials to enforce the statute arbitrarily.

If Congress establishes the standard of criminal conduct, there is less concern for overreaching by police and prosecutors. Congressional action circumscribes the discretion of enforcement officials, as long as the standard of conduct, even if applied retroactively, is clear. Thus, the constructive notice argument does not explain why the legislature should be prohibited from enacting laws retroactively.

Reliance may be more important in *mala prohibitum* settings, when Congress retroactively creates a regulatory crime. If the prohibition does not reach blameworthy conduct, then notice serves a critical role. Before a legislature outlaws spray painting on abandoned buildings,[110] for instance, or riding a bicycle without a bell,[111] individuals should have the opportunity to refrain from those activities. In the absence of the ex post facto ban, there would be a legitimate fear of overdeterring primary conduct.[112] But the ex post facto protections apply far more broadly than just to the category of regulatory crimes, and virtually no cases have arisen in the regulatory crime setting.

The reliance interest explanation is even more tenuous in cases challenging legislative decisions to increase punishment. These cases constitute by far the largest category of ex post facto challenges. All offenders in such cases know, or should know, that their conduct is illegal. The only possible reliance or notice issue arises by virtue of the offender's lack of knowledge of the penalty he or she will receive if caught and convicted. As one appellate court has explained, "Principles of fairness thus require that this actor, in making his decision whether to act, be fully informed as to . . . what type of punishment one guilty of the criminal act can expect."[113] Few offenders, however, know or even could know the punishment they would receive, and it is doubtful whether any such knowledge should serve as a condition precedent to punishment.

With respect to knowledge, few actors calculate the potential penalties before they engage in prohibited conduct, or engage in conduct that risks particular prohibited results. Any calculation is particularly difficult because offenders planning one crime may end up committing another because of unexpected obstacles such as a locked door or an armed police officer. Offenders are also not likely to know the difference between larceny and theft, or between aggravated assault and assault.

Even aside from the problem of knowing (ahead of time) exactly which crimes will be committed, offenders are unlikely to predict accurately the punishment for any particular crime. Most people in society, I suspect, understand the rough range of penalties for premeditated murder, but there is far less awareness of the range of punishments for other crimes like embezzlement or fraudulent use of food stamps. Given the prosecutor's discretionary choice of

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110. *Cf.* Russ Buettner, *Rudy's Take on Crime*, NEWSDAY, July 8, 1995, at A37 (explaining that New York City criminalizes graffiti and forbids sale of spray paint to minors); Lee Davis, *Court Would Speed Up Petty Crime Cases*, PROVIDENCE J.-BULL., May 8, 1995, at 16. *See generally* Lambert v. California, 355 U.S. 255 (1957) (stating that conduct should not be penalized if most members of community would not realize that conduct could be unlawful).

111. *See* People v. Kail, 501 N.E.2d 979 (Ill. App. 1986), *cert. denied*, 484 U.S. 827 (1987).

112. Perhaps reliance is also important in *mala in se* contexts because of the fear of legislative errors in making the judgment as to what is blameworthy. Judicial review could help ensure that retroactive application of any new criminal prohibitions be limited to the *mala in se* context. *See* Kahan, *supra* note 19, at 403.

113. Dale v. Haeberlin, 878 F.2d 930, 935 (6th Cir. 1989), *cert. denied*, 494 U.S. 1058 (1990).

charges to file, the labyrinthine operation of sentencing guidelines, and the availability of complex good-time credit programs within prisons, few offenders are likely to predict with any precision their actual stay in prison. Any goal to afford fair notice of sentencing provisions, therefore, seems unattainable.

It is also debatable whether an individual's understanding of the potential penalties should be at all relevant. It is a peculiar form of reliance interest that limits punishment for offenders who knowingly engage in blameworthy conduct on the ground that, had the offender understood the penalties to be higher, he or she would not have committed the proscribed conduct.[114] We might not wish to protect any cost-benefit analysis undertaken by contract assassins, either because of our moral condemnation of murder, or because we need not worry about deterring socially useful conduct in that context.

In short, if we were concerned primarily with reliance interests, the scope of the ex post facto protections would be vastly different. The Ex Post Facto Clause would prevent retroactive application of regulatory crimes. But it would not block retroactive criminalization of blameworthy conduct or constrain much retroactive implementation of enhanced penalties. The ban on retroactive legislation in the criminal context, therefore, cannot be justified on the basis of the reliance interests at stake.

2. Reliance in the Civil Context

In the civil context, retroactive legislation may far more directly undermine reliance interests. Individuals' financial expectations and investments can be dramatically sundered by applying new laws retroactively. Much more than those subject to the good-time credit program in *Weaver* or the sentencing scheme in *Miller*, firms and individuals may have explicitly relied upon existing law in pursuing particular deals or litigation.[115] Individuals have lost fortunes

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114. Nonetheless, there may be some instances in which an offender's reliance interest should be protected. Those speeding generally do so knowing that the penalty will be relatively mild, and we may be lenient toward (though not condone) an individual's cost-benefit calculus that results in relatively minor violations of the law. However, the connection overall between reliance on particular punishments and commission of crimes is weak at best. *Cf.* Prater v. United States Parole Comm'n, 802 F.2d 948, 953 (7th Cir. 1986) (en banc) (noting that "[t]he decision whether to commit a crime (or which crime to commit) is unlikely to be much influenced by the details of the criminal justice system").

115. In some contexts, courts have safeguarded legislatively created expectations under the Due Process Clause. *See* Perry v. Sindermann, 408 U.S. 593, 602 (1972) (protecting expectations in context of tenure and university hiring). *But see* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding that professor had no legislatively created expectation of renewed employment). Individuals and firms can claim a property interest in rules that give rise to an objective expectation of continuing entitlement. The government cannot thereafter change those rules without affording some protection (how much is unclear) for those relying on the earlier rules. Retroactivity in administrative law is disfavored for similar reasons of safeguarding reliance interests even when no per se property right is involved. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (refusing to permit the Secretary of Health and Human Services to exercise retroactive rulemaking power in absence of clear authorization from Congress); *see also* Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261.

due to retroactive changes in the tax code,[116] and businesses have neared bankruptcy because of new obligations based on prior conduct.[117] Furthermore, society should protect conduct at the margins of the law more in the civil than in the criminal context because of the potential for socially productive investment and manufacturing.[118]

The argument for offering greater protection for reliance interests in the civil context, however, is not airtight. As in the criminal context, the question of reliance begs the issue of whether the individual *should* rely on current law. The Supreme Court has stated in tax cases that reliance is not dispositive in part because tax laws so often change.[119] However, the issue should not be the empirical one of whether laws do change—otherwise the legislature can erode reliance interests merely by enacting many retroactive laws—but the normative question of whether reliance is justified.

Louis Kaplow confronted this issue in a provocative article, arguing that private parties should anticipate and protect themselves against changes in government policy, just as they protect themselves from changes in the private market.[120] Investment decisions should take into account not only future demand, technological innovation, and the behavior of competitors, but also the prospect that governmental policy might change. Investors should discount the value of their investments by the possibility of alteration in the legal regime. Individuals should no more rely on status quo government policies than they rely on market conditions.[121] Indeed, it may be economically inefficient for investors not to internalize the possibility of legal change when making their

116. For instance, a retroactive change resulted in the estate of Willametta K. Day losing a $5,287,000 deduction. United States v. Carlton, 114 S. Ct. 2018, 2021 (1994).

117. *Cf.* Winstar Corp. v. United States, 116 S. Ct. 2432, 2446-47 (1996) (describing how savings and loans were forced to liquidate because of new capital requirements imposed by Congress in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

118. There is little risk of overdeterring primary conduct by retroactive lawmaking in the criminal domain, with the possible exception of *mala prohibitum* crimes. In contrast, retroactivity imposes considerable costs on private ordering in the civil context. Retroactivity might prompt individuals to invest too little out of fear that future retroactive legislation will limit or prevent future profits. Commentators have conjectured that investment currently lags in Russia, in part, because of individuals' inability to rely on ever-changing administrative rules and regulations. *See* Euan Craik, *Investors Bypassing Russia*, MOSCOW TIMES No. 590, Nov. 15, 1994; Wolfgang Hummel, *Southeast Asia Still Way Ahead*, BUS. TIMES, Apr. 13, 1995, at 14.

119. *See, e.g.*, United States v. Darusmont, 449 U.S. 292, 298 (1981) (per curiam) (holding that "[n]obody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress" (quoting Cohan v. Commissioner, 39 F.2d 540, 545 (2d Cir. 1930) (Hand, J.))); Milliken v. United States, 283 U.S. 15, 23 (1931) (noting that a taxpayer "should be regarded as taking his chances of any increase in the tax burden which might result from carrying out the established policy of taxation").

120. *See* Kaplow, *supra* note 94. Kaplow, in turn, built upon the work of Michael Graetz in the tax field. *See, e.g.*, Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 65-66 (1977); *see also* Munzer, *supra* note 104, at 432-35 (sketching similar theory in stressing that case for retroactivity turns in part on whether individuals *should* rely on baseline entitlements).

121. Kaplow, *supra* note 94, at 522-39.

investments, because in the absence of such internalization, they might overinvest. Just as individuals should consider the prospect that the government will tear down their houses prior to making expensive additions, all investors should consider the potential for changes in the legal climate.

Moreover, we accept retroactive imposition of common law liability fairly routinely for actions that were lawful when undertaken, despite reliance interests. Asbestos was widely used as insulation for years. Yet, now we do not hesitate to impose liability for asbestos-related claims even though the objectionable conduct took place prior to any societal (and perhaps scientific) finding of harmfulness.[122] Immunity doctrines may also change, unexpectedly exposing municipalities or individuals to liability.[123] Many judicial decisions impose liability on individuals and firms in ways that they previously failed to anticipate.

On the whole, however, retroactive lawmaking threatens more harm to reliance interests in the civil than in the criminal context, with the possible exception of retroactive criminalization of *malum prohibitum* conduct. A far greater reliance interest is at stake in retroactive tax legislation and in retroactive application of new pension requirements than in retroactive adjustments to sentencing and parole schemes.[124]

Thus, in terms of a reliance interest, the Supreme Court's current jurisprudence has it backwards. There is more reason to prohibit retroactive lawmaking in the civil context, even though the reliance interest at stake may be less worthy of protection than commonly thought.

E. LIBERTY INTERESTS

Despite the more significant reliance interest at stake in the civil context,

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122. For a telling case, see Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539 (N.J. 1982).

123. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 701 (1978) (holding that municipalities can be sued as "persons" under § 1983, overruling prior precedent). Congress has also retroactively stripped state entities of immunity. *See, e.g., In re* Merchants Grain, Inc., 59 F.3d 630, 637 (7th Cir. 1995) (upholding retroactive change in light of legislative goal of strengthening bankruptcy system). Congress's power to affect state immunity has since been limited. *See* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996).

124. In addition, prospective laws can affect reliance interests in both contexts as much as those laws with retroactive reach. In the civil context, a retroactive repeal of the deduction for interest payments on home mortgages would be quite similar in effect to a prospective increase in the property tax rate. Similarly, a retroactive change in liability for past health care benefits for some employees might be less disruptive than a future requirement of mandatory coverage for *all* employees. In the criminal context, recidivist or habitual offender laws, even if nominally prospective, dramatically alter the consequences of prior criminal behavior. Prior to the recent three-strikes-and-you're-out legislation, individuals convicted of two nonviolent felonies could expect that their prior records would, at worst, be unhelpful in negotiating a favorable plea bargain with a future prosecutor, or persuade a future parole board to be less willing to agree to an early release. The consequence upon a subsequent felony conviction might now be dramatic—a change from a maximum of several years in prison to life imprisonment. *See* Jamie Beckett, *Bike Thief's "3 Strikes" Sentence*, S.F. CHRONICLE, May 4, 1995, at A23 (two days after new law took effect, defendant caught with stolen $200 truck and two bicycles sentenced to term of up to life imprisonment); *A Strike Out*, PROVIDENCE J.-BULL., June 3, 1995, at A10 (theft of pizza slice in California triggered sentence of 25 years to life).

retroactive lawmaking threatens a greater liberty interest in the criminal context. Most people would find the threatened loss of ten years' liberty more draconian than the potential loss of ten thousand dollars.[125] That ranking helps explain why there are so many differing procedural protections in the two contexts. The criminal/civil distinction, although at times tenuous, helps define many procedures within our system. Sixth Amendment rights, for example, apply only in the criminal context.[126] The burden of proof varies from "preponderance of the evidence" in most civil cases to "beyond a reasonable doubt" in criminal trials.[127] And, in light of the unique nature of liberty interests, habeas corpus remedies developed and apply almost exclusively in cases of incarceration.

However, on closer examination, the liberty interest argument is not fully satisfactory. To some, the loss of a personal fortune (because of retroactive application of a new tax law) might be more devastating than tacking on an extra six months to a ten-year prison sentence. But more importantly, the liberty interest argument fails as a descriptive matter because *prospective* lawmaking in the criminal context affects identical liberty interests without triggering exacting scrutiny.[128] The legislature can define prospectively a new crime, increase a sentence, change the parole system, or eliminate a good-time credit program free from any heightened judicial scrutiny. Despite the liberty interest at stake, prospective lawmaking in both contexts is reviewed under similar standards. The dissimilar consequences flowing from retroactivity in the two contexts only partially answers, if at all, why lawmaking is forbidden in the criminal context but permitted in the civil.[129]

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125. *See* Munzer, *supra* note 1, at 443 (making this distinction).

126. The criminal/civil distinction in double jeopardy law has started to erode. *See, e.g.*, Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) (holding subsequent proceeding to collect state marijuana tax impermissible under Double Jeopardy Clause); United States v. Halper, 490 U.S. 435, 448-49 (1989) (holding defendant already punished in criminal prosecution may not be subjected to added civil sanction unless the second sanction considered remedial rather than punitive).

127. *See In re* Winship, 397 U.S. 358 (1970) (holding reasonable doubt standard has constitutional status).

128. Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994) (arguing for heightened review); *cf.* John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979) (arguing that some substantive review of criminal prohibitions needed).

129. The arguable individual interest in repose cannot explain the difference between retroactivity in the two contexts. The Ex Post Facto Clause, like the Double Jeopardy Clause, advances the principle of repose by forcing the state to exact one punishment from an offender rather than doling out penalties one dab at a time. *See generally* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 90 (examining the defendant's "interest in being able to conclude his confrontation with society") (quoting United States v. Jorn, 400 U.S. 470, 486 (1971) (Harlan, J.)). While others have addressed a defendant's interest in being free from anxiety, *id.* at 90, in this instance, the finality interest rests on a notion of rehabilitation. When one punishment is prescribed up front, an offender might be able psychologically to accept what is due and work toward reintegrating himself into society. An offender subject to future penalties might not be as able, because of resentment toward a seemingly arbitrary system, to channel his energies toward becoming a functioning contributor to society.

Although the rehabilitative theory has normative allure, it explains little about current penological

Thus, on balance, it is difficult to explain the disparate approaches to retroactive lawmaking in the civil and criminal contexts. The magnitude of the state's interests does not materially differ in either situation, and concern for the rule of law should be (almost) as pressing in one context as in the other. In the civil context, there is unquestionably more concern for protecting a reliance interest. The liberty interest, however, is generally greater in the criminal context.

Taken together, the potential justifications thus far canvassed—protecting rule-of-law concerns, reliance interests, and liberty interests—conceivably (though not overwhelmingly) support a ban on retroactive lawmaking. Conversely, the strong governmental interests implicated, in tandem with concerns for majoritarian flexibility, arguably support permitting retroactivity in both contexts. But examining the relative advantages and disadvantages of retroactivity in the two contexts does not disclose any clear reason for privileging retroactivity in one situation over the other.

III. ROLE OF INTEREST GROUP THEORY IN DIFFERENTIATING CRIMINAL AND CIVIL CONTEXTS

The principal distinction between retroactive lawmaking in the civil and criminal contexts, to the extent one exists, lies not in the strength of the legislature's interest, or even in the type of individual interests affected, but rather in the nature of the legislative process. Although there are sound reasons to be suspicious of retroactive lawmaking in both contexts, the near-categorical ban on retroactive lawmaking in the criminal context can be explained by the inability of the political process to protect against government overreaching. In contrast, we largely trust majoritarian politics to safeguard against arbitrary rule in the civil context, and the potential for retroactive legislation in that context might have additional public-regarding benefits.

According to prevailing interest group theory, interested parties seek regulation in the same way that they seek other commodities. Individuals and groups attempt to purchase beneficial regulation from the legislature by such means as mobilizing support for particular lawmakers, contributing to their campaigns, and throwing lavish parties. The financial and organizational advantages of special-interest groups enable them to devote resources to purchasing regulation more readily than dispersed minorities. Groups that can organize effectively and

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practice. *See supra* note 79. In addition, the Ex Post Facto Clause does not prevent retroactive imposition of new civil sanctions. *See supra* note 97. Moreover, because there is so much uncertainty inherent in parole determinations and good-time credit allocations, the potential for repose seems illusory. There is little reason to believe that a rehabilitative notion underlies the Ex Post Facto Clause, given that rehabilitative notions might favor *lengthening* an offender's term, a result that most assuredly would be struck down. *Cf.* Weaver v. Graham, 450 U.S. 24, 34-36 (1981) (stating that legislature's purpose is irrelevant if effect is to lengthen time in prison). Finally, in the civil context, the analogue to repose is financial certainty, and many have argued that such predictability is critical in structuring a climate conducive to investment. *See supra* text accompanying note 118. The individual interest in repose, therefore, does not persuasively distinguish one context from the other.

have resources to spend possess a substantial advantage in lobbying.[130] Although lobbying may be important as a means of conveying information to members of Congress, it more likely embodies the self-interested efforts of groups intent on obtaining benefits from the legislature. Much legislation arguably stems from interest group lobbying and serves the public interest tangentially, if at all.[131]

Those subject to retroactive criminal and civil legislation are not similarly situated with respect to participating in the political process. Individuals targeted by retroactive criminal legislation have far less ability to organize and influence the legislative process than do those affected by changes in civil rules. That differential influence goes a long way toward explaining the Court's divergent approaches. Banning retroactive lawmaking makes sense if the output of majoritarian politics cannot be trusted.

A. CRIMINAL CONTEXT

Those previously convicted of crimes, or who become the targets of criminal legislation,[132] likely have little clout in the legislature. Legislators need not fear that enacting most criminal measures will dry up campaign coffers. Throughout history, criminal offenders have been from the poorest strata in society.[133]

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130. For an overview of the interest group account, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); DENNIS C. MUELLER, PUBLIC CHOICE II (1989).

131. As discussed previously, *see supra* text accompanying note 12, I assume that, when legislators make choices free from considerations of self-interest, the public benefits.

132. Although individuals who have committed acts that the legislature now wishes to criminalize might lack financial resources with which to mount an effective lobbying campaign, they have every incentive to lobby the legislature to ensure that any criminal prohibitions be prospective in operation. Such individuals will likely have more access than those previously convicted of crimes. Nonetheless, the threatened stigma of proposed legislation might inhibit organizational activities, and legislators may be unwilling to grant access to such individuals because of the perceived unsavoriness of their cause. *See* MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 76-77 (1981). Because (perhaps not coincidentally) legislatures have not criminalized conduct that was innocent when undertaken, I focus in this section primarily on legislation that increases the penalties for crimes previously committed.

133. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 379 n.102 (1993) ("Eighty-five percent of criminal defendants in the District of Columbia financially qualify for court-appointed counsel."); Jeffrey R. Rutherford, Comment, Dzuibak v. Mott *and the Need to Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 987 n.48 (1994) (noting that "[p]ublic defenders represent at least eighty percent of all criminal defendants in Minnesota's two most populated counties"); *see also* KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 701 (1986) (examining relationship between sophisticated jobs and interest group activity); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (analyzing ability of groups to override Supreme Court decisions).

When law enforcement measures proposed in Congress affect monied interests, the political process affords substantial opportunity for protest. In 1986, Congress passed a statute requiring law enforcement agents to obtain a judicial order prior to imposing a pen register, which records a list of all outgoing calls. 18 U.S.C. § 3121. This requirement was the result of the lobbying by telephone companies whose joint interest was to limit law enforcement authorities' unbridled discretion to order pen registers, thereby forcing telephone companies to expend resources. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice: or, Why Don't Legislatures Give*

Moreover, because of their lack of wealth and social prestige, those subject to criminal penalties generally lack access to politicians.[134] Such individuals and legislators are rarely of the same social set. The higher preponderance of minorities among those convicted during the past century has exacerbated the access problem.[135] The current controversy over the wide disparity between penalties for the sale of an ounce of crack versus an ounce of cocaine (punishment for the sale of two hundred to three hundred grams of cocaine is equivalent to punishment for the sale of two to three grams of cocaine base used for crack) highlights the problem of race.[136]

Nor will legislators necessarily lose votes if they are insensitive to the needs of convicted felons. Felons often cannot vote,[137] and they rarely have the ability to form coalitions with other groups seeking influence in the political process.[138] Thus, when deciding whether to apply harsher punishments retroactively or to penalize conduct that was legal when committed, the political process in a sense malfunctions, warranting more exacting judicial review.

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a Damn About the Rights of the Accused?, 44 SYRACUSE L. REV. 1079, 1085-86 (1993). Similarly, Congress passed the Privacy Protection Act of 1980, 42 U.S.C. § 2000(aa), which forbids searches of the offices of one influential group—newspapers—unless the police demonstrate that a subpoena would be ineffective. No other parties, such as accountants, physicians, or neighbors, are protected. *See* Dripps, *supra*, at 1083-85. Indeed, the inability of those who are poor to affect legislation concerning punishments has long been recognized. *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (striking down Oklahoma law mandating sterilization for those committing three or more crimes but exempting financial or political crimes).

134. On the importance of access, see generally HAYES, *supra* note 132, at 76-77; JACKSON, *supra* note 89. Groups are unlikely to form to represent the interests of those previously convicted in part because of the lack of prestige, but also in part because they can promise members so little in the way of tangible benefits. *Cf.* HAYES, *supra* note 132, at 80.

135. *See, e.g.*, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 198 (1993); *Developments in the Law—Race and the Criminal Process—Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 HARV. L. REV. 1494, 1495-96 (1988) (discussing "startlingly disproportionate" number of blacks and other minorities among those imprisoned); Douglas A. Smith et al., *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234 (1984) (discussing racial discrimination patterns in arrests); *see also* SCHLOZMAN & TIERNEY, *supra* note 133, at 250-51 (examining lack of representation of minorities and poor in PACs); Alice E. Harvey, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994) (arguing that disenfranchisement of felons dilutes minority voting power).

136. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2D1.1(c)(10) (1995). Crack has mostly been consumed by members of the African American community, while powdered cocaine has long been a drug of choice among whites. *See* United States v. Coleman, 24 F.3d 37, 38-39 (9th Cir.) (rejecting arguments that disparity in guidelines violated Constitution because of the differential impact on race), *cert. denied*, 115 S. Ct. 261 (1994); United States v. Williams, 982 F.2d 1209, 1213 (8th Cir. 1992) (same).

137. Many states have disenfranchised felons. *See, e.g.*, ALA. CONST. art. VIII, § 182; ARIZ. CONST. art. 7, § 2; DEL. CONST. art. V, § 2; FLA. CONST. § 145; IOWA CONST. art. 2, § 5; KY. CONST. § 145; MD. CONST. art. I, § 4; MISS. CONST. art. 12, § 241; NEV. CONST. art. 2, § 1; N.H. CONST. pt. I, art. II; N.M. CONST. art. VII, § 1; TENN. CONST. art. I, § 5; UTAH CONST. art. IV, § 6; VA. CONST. art. II, § 1; WYO. CONST. art. 6, § 6.

138. Some groups such as the ACLU do represent prisoners' rights, but they rarely lobby against retroactive application of laws, choosing instead to focus their efforts on prison conditions and procedural rights before and during trial.

That malfunction is particularly disturbing given the incentives confronting legislators. Legislators may not be able to withstand the temptation to level new sanctions against offenders in order to curry constituent favor.[139] Legislators recognize that their popularity may largely turn on the public's perception of their toughness against crime.[140] If voters are confused as to how to address the root causes of crime, they may well react by applauding every effort to deal with offenders more harshly. The popularity of the "three-strikes-and-you're-out" legislation can be explained by legislators' pandering to public perception.[141] Indeed, Congress's eagerness to federalize state crimes such as carjacking[142] or drive-by shootings[143] similarly evinces, at least in part, legislative efforts to cater to the public's desire for vigorous action against crime. Congress's enactment of sixty death penalty provisions[144] in the recent Crime Control Act, many of which overlap,[145] provides further testament to the strong interest in gaining votes.[146]

Emotion may also cloud legislative consideration of a great number of other issues, including procedural rights enjoyed by prisoners, prison conditions, and prospective punishment.[147] The danger of unfairly disadvantaging those least likely to represent themselves effectively in the legislature exists every time a rule of criminal procedure is made less favorable to defendants or a sentence is

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139. Legislators, as well as their constituents, readily identify with victims of crime far more than with perpetrators. *Cf.* Dripps, *supra* note 133, at 1079 (discussing why we need judicial review for law enforcement investigative techniques approved by legislatures).

140. As Representative McCollum recently explained, "[f]requent news reports of vicious crimes shock and frighten the public and send policy makers searching for new solutions." Bill McCollum, *The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561, 561 (1995); *see also* CHARLES B. WISE, THE DYNAMICS OF LEGISLATION: LEADERSHIP AND POLICY CHANGE IN THE CONGRESSIONAL PROCESS xi, xii (1991) (addressing how news stories in popular press lead to criminal legislation); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 KAN. L. REV. 503, 504-08 (1995).

In January 1994, more than 40% of Americans surveyed identified crime as the most critical problem facing the nation. Stephen Brown & Judy Pasternak, *A Nation with Peril on Its Mind; Crime Has Become the Top Concern of Many People*, L.A. TIMES, Feb. 13, 1994, at A1.

141. The states of California and Washington recently enacted such legislation, as did Congress in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 3796, 14131-34 (1994)). Most observers doubt these laws will prove effective in reducing crime and many fear the social and economic costs. *See, e.g.*, *supra* note 124.

142. 18 U.S.C. § 2119 (1994); *see also* Stephen Chippendale, *More Harm than Good*, 79 MINN. L. REV. 455, 464-65 (1994) (addressing federal carjacking statute).

143. 18 U.S.C. § 36(b)(2)(A) (1994).

144. David Johnson & Steven A. Holmes, *Experts Doubt Effectiveness of Crime Bill*, N.Y. TIMES, Sept. 14, 1994, at A16.

145. For instance, Congress has authorized the death penalty for killings arising out of destruction of maritime navigational facilities, 18 U.S.C. § 2280(a)(1)(E) (1994), and maritime fixed platforms, *id.* § 2281(a)(1).

146. Although I focus on access to the legislature, the executive branch also shapes legislation. There is little evidence that those convicted of crimes have any more influence with executive branch agencies than they do in the legislature.

147. Legislators often campaign on a plank of "get tough on crime," whether through advocating tough sentencing laws, reducing habeas remedies, or eliminating the exclusionary rule.

lengthened. But it remains the legislature's province to establish criminal liability[148] and to set the framework for criminal punishment. One of the principal functions of any democratic state is to establish a code of criminal laws. Heightened review by the judiciary of prospective legislation might conflict too sharply with norms of majoritarian governance.[149]

Moreover, even though all criminal legislation may suffer from a potential political process defect, the dangers of retroactive lawmaking are greater. Prospectivity ensures that the legislature is at least willing to impose punishment on a larger group of people whose identities are unknown. The generality of the prospective provision helps prevent singling-out and somewhat diminishes the role of heated emotion in prompting legislators to enact new crimes or stiffen the penalty for crimes already on the books.[150] The legislature cannot enact such laws with the purpose of punishing an individual or group that has already committed antisocial acts. In addition, when legislating prospectively, legislators are more likely to act with greater caution and deliberation. Legislators must be willing to risk overdeterrence due to the enhanced penalties[151] and incur greater financial obligation from extending (or authorizing) costly incarceration for an uncertain number of individuals.

To be sure, the Supreme Court has routinely struck down legislation under the Ex Post Facto Clause without any evidence of legislative vindictiveness or antipathy directed toward any particular individual or groups. The good-time credit policy in *Weaver* applied to everyone within Florida's penal system,[152] as did Massachusetts's parole changes in *Greenfield*.[153] The sentencing changes in *Miller* and in *Lindsey* applied to a broad spectrum of individuals committing particular crimes.[154] All the changes applied prospectively as well, removing much of the singling-out problem. Still, the ban on retroactivity might benefit the public even in the context of across-the-board change. It might be that the legislature is willing to increase punishment for those committing future acts only to ensure greater punishment for particular individuals based on prior acts. Although the checks of generality and prospectivity minimize that chance, the Ex Post Facto Clause prevents prospective legislation from being enacted to punish particular individuals for past conduct. Drawing the line to prevent

148. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

149. *But see* Colb, *supra* note 128. Whether for procedural matters or specific criminal law issues, activist review at the margins might still be possible. *See* Dripps, *supra* note 133, at 1095-97.

150. *See* FULLER, *supra* note 10, at 46-49, 51-55. Congress can still create new crimes such as carjacking, but at least those who earlier committed the new offense will not be offered as a sacrifice to the public's demand for crude vengeance.

151. Although the legislature need not worry about overdeterring murders, there may be valid concern for chilling the conduct of corporations in the regulatory crimes context.

152. *See* Weaver v. Graham, 450 U.S. 24, 26-27 (1981).

153. *See* Greenfield v. Scafati, 277 F. Supp. 644, 645 (D. Mass. 1967), *aff'd per curiam*, 390 U.S. 713 (1968).

154. *See* Miller v. Florida, 482 U.S. 423, 427 (1987); Lindsey v. Washington, 301 U.S. 397, 398 (1937).

additional punishment (or criminalization of previously legal conduct) is therefore quite sensible, even if prospective legislation occasionally is just as problematic.[155]

Contrast the situation in which the legislature, instead of enacting a new crime or imposing additional punishment, *repeals* a crime. From an early date, the Supreme Court has held that, although those previously convicted of such offenses need not be released, repeals presumptively apply to all pending cases.[156] Yet the repeal of crimes, just like retroactive application of a new criminal statute, disrupts the settled expectations of some members of society, including local law enforcement officers and victims. In theory, retroactive repeals or amnesties may stem from lobbying by those who stand to gain the most from the repeal. Yet the infrequency of such legislative repeals is a testament to the lack of power that those subject to criminal sanctions wield in the legislature.[157] In comparison to those previously branded as criminals, the law enforcement lobby is powerful and has ample influence to protect its interests in the legislature.[158] Decriminalization ordinarily occurs only with activities that are widespread throughout the community, as with the use of marijuana or abortion services.[159] A ban on retroactive repeals of crime is not needed when the political process adequately protects against overreaching.[160]

Indeed, Congress overrode the Court's presumption that the repeal of a criminal statute abates all pending prosecutions, providing instead that Congress must make plain its intent to derail pending prosecutions.[161] Those charged with

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155. The different judicial reaction to retroactive and prospective criminal laws poses a puzzle beyond the criminal/civil distinction examined in this article. From the perspective of interest group theory, the difference between retroactive and prospective enactments in the criminal context is one of degree, not kind.

156. *See, e.g.*, United States v. Tynen, 78 U.S. (11 Wall.) 88, 95 (1871) (dismissing indictment because of subsequent congressional repeal of criminal enactment); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (penalties should be abated if law amended before final judgment); *see also* United States v. Chambers, 291 U.S. 217, 223-24 (1934) (prosecution for violation of National Prohibition Act cannot continue with repeal of Eighteenth Amendment); Brown v. Walker, 161 U.S. 591, 601 (1896) (addressing legislative power to confer immunity on those committing particular crimes).

157. If an organized crime lobby were as effective today as it appears to have been in Tammany Hall years, exacting review for repeals would be just as warranted as for retroactive increases in punishment.

158. *See* Dripps, *supra* note 133, at 1091-92; Eskridge, *supra* note 133, at 362.

159. In the 1970s, 11 states decriminalized personal use of marijuana. *See* Doug Bandow, *Commentary: Drug Prohibition: Destroying America to Save It*, 27 CONN. L. REV. 613, 617 n.15 (1995). Lobbying by interest groups such as NARAL or NORML may facilitate legislative consideration of decriminalization, even though the groups do not benefit from a compact and easily identifiable constituency. *See also* WISE, *supra* note 140, at 127-50 (discussing the role of ACLU lobbying with respect to criminal legislation).

160. Individual liberty concerns are not pressing when a legislature repeals a crime. Indeed, establishing standing to contest such repeal would be quite difficult. Nevertheless, interest group theory sheds light on the judiciary's comparative activist review in the one context and near total deference in the other.

161. 1 U.S.C. § 109 (1994) (specifying that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide"); *see also* Warden v. Marrero, 417 U.S. 653, 660 (1974) ("Congress

and then convicted of crimes can only gain relief from Congress if they obtain a clear statement in legislation to that effect. The political process amply protects against arbitrary decisions to apply repeals of criminal statutes retroactively.

Thus, activist review under the Ex Post Facto Clause stems at least in part from a process defect.[162] Legislators may have pressing legitimate reasons for lengthening sentences or criminalizing conduct retroactively—those committing antisocial acts *should* often lose in the political process. But we do not trust majoritarian political processes when criminal penalties are applied to identifiable individuals. Even though retroactive measures are beneficial at times, the costs of judicial sorting might be too high. Judges cannot readily distinguish socially desirable from pernicious retroactive legislation. Rather than examine each legislative enactment to ascertain whether it comports with values underlying the Ex Post Facto Clause, the Court has created a prophylactic restraint against legislative overreaching to counteract the inadequacies of the political process to prevent vindictive legislation.[163]

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enacted its first general saving provision . . . to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of all prosecutions. . . ."); Pipefitters v. United States, 407 U.S. 385, 432-35 (1972) (same).

162. Interest group theory also sheds light on the comparative tolerance for retroactive application of judicial changes in criminal enactments. Although courts have held that the Due Process Clause restrains judges from applying unforeseeable constructions of criminal enactments retroactively, *see, e.g.*, Bouie v. City of Columbia, 378 U.S. 347 (1964), they have increasingly strained to find such changed interpretations to be foreseeable. *See, e.g.*, United States v. Burnom, 27 F.3d 283, 284 (7th Cir. 1994) (judicial interpretation did not mark clear break with prior practice); Lustgarden v. Gunter, 966 F.2d 552, 554 (10th Cir.) (finding judicial interpretation of sex offender parole statute foreseeable), *cert. denied*, 506 U.S. 1008 (1992); United States v. Ruiz, 935 F.2d 1033, 1035 (9th Cir. 1991) (reliance on withdrawn appellate decision did not give rise to due process claim); United States v. Kincaid, 898 F.2d 110, 111 (9th Cir. 1990) (Supreme Court overruling of circuit court precedent as to sentencing did not give rise to due process claim).

Judges trust themselves more than legislatures not to give vent to vindictiveness in construing particular criminal enactments. Federal judges, at least, do not face electoral disapproval because of their lifetime tenure. They are insulated to a considerable degree from the pressure confronting legislators to be tough on crime. Moreover, retributivist impulses are tempered by a desire for prestige within the profession and by the judicial ethos of objectivity. *Judicial* retroactive lawmaking, in contrast to retroactive legislation, can serve the public by accomplishing aims such as closing loopholes that legislators, but for the Ex Post Facto Clause, might seek in legislating retroactively. *Cf.* Kahan, *supra* note 19, at 347. Interest group theory helps illuminate both the gulf between judicial doctrine governing criminal and civil retroactive lawmaking and the substantial distinction between retroactive legislation and changes in judicial construction that have a similar effect.

163. A combination of concern for protecting liberty interests and limiting arbitrary governmental power may well support the ex post facto ban, even if not justifying the doctrine that has evolved in all particulars. The ban prevents singling out; limits the role of emotion in criminal legislation; forces the state to exact only one punishment for each offense; and may foster the offender's ultimate reintegration into society. Drawing the line to prevent retroactive application of any law imposing greater obstacles to an inmate's early release from prison reflects a sensible, prophylactic means to prevent vindictive increases of punishment. *Compare* Weaver v. Graham, 450 U.S. 24, 35-36 (1981) (barring retroactive application of new laws that "constrict[] the inmate's opportunity to earn early release") *with* United States v. Reese, 71 F.3d 582, 588-91 (6th Cir. 1995) (retroactive application of new laws permissible if punishment increased for act committed after conviction but subsequent to passage of law), *cert. denied*, 116 S. Ct. 2529 (1996).

B. CIVIL CONTEXT

Retroactive lawmaking affects individuals and groups in the civil context quite differently. First, unlike in the criminal context, groups targeted by retroactive civil legislation can often form effective coalitions to repulse any retroactive initiative. Threatened legislative retroactivity facilitates organizational efforts by identifying those who will suffer because of the proposed law. Groups affected should be more able to organize effectively against the proposal, and in comparison with those subject to retroactive criminal legislation, groups targeted by civil retroactivity are likely to be wealthier and more powerful.[164]

Second, in contrast to the criminal context, retroactivity in the civil context can result in increased lobbying costs by reducing the gains from each successful lobbying effort. By diminishing the effectiveness of lobbying, retroactivity in the civil context can benefit the public as a whole. Rent seeking is far less prevalent in the criminal context, and increasing lobbying costs is unlikely to have as positive an effect.

Third, as a related matter, the potential for retroactive lawmaking serves as a constant reminder to legislators that some payouts to allies or themselves may be recaptured in the future. Potential retroactive criminal liability would likely have less beneficial impact. In short, the inability of those targeted by retroactive criminal legislation to organize effectively, as well as retroactivity's salutary impact on rent seeking in the civil context, arguably explain (or justify) why courts have imposed far more stringent controls on retroactivity in the criminal context.

1. Identifiability

With retroactivity, identifying those who will suffer from proposed legislation is easier—there is less guesswork.[165] Once affected individuals are identified, organizational costs should diminish. The potential losses from the legislation will be palpable, and those affected therefore have a clear incentive to join forces to oppose the proposal. Identifiability facilitates organization, and with better organization, targeted groups can make more lucrative offers to legislators, and legislators can negotiate more efficiently for such payments.[166] As Saul Levmore suggested,

> [t]he point is not, of course, that with regard to an issue pitting two or three potential losers against hundreds of thousands of other citizens, the few will so overcome their numerical disadvantage with organizational efficiency that we should predict repeated losses for the masses. Instead, the idea is that the

164. *See supra* text accompanying notes 133-34.

165. Some uncertainty might remain if the statutory requirements are ambiguous. Evidently, this was the case with the Superfund legislation in 1980. *See infra* note 182.

166. *See* Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL. STUD. 73, 82-85 (1991).

> organized few will have power out of proportion to their number. In contrast, the majority will have trouble overcoming collective action problems.[167]

Consider Congress's attempts to repeal the Mining Law of 1872. To develop mining and encourage internal migration west, Congress provided that any "valuable" minerals found on federal land would essentially be for the taking. Under the Mining Law, no royalties need be paid, and with only a five-hundred-dollar investment, a miner (or corporation) can buy the land outright at prices ranging between $2.50 and $5.00 an acre.[168] In principal part, the law has not been amended since its inception. Moreover, insufficient laws arguably exist to prevent externalities such as stripping the land, polluting nearby streams, or damaging the water table.[169] Three million acres have been "sold" to private entities under the 1872 Mining Law,[170] generating countless billions in profits made by mining interests. One recent example is illustrative. In 1994, American Barrick Resources Corporation of Canada purchased 1950 acres in Nevada for under ten thousand dollars. The potential value of the gold situated beneath the land exceeds three billion dollars.[171]

Mining interests have an obvious incentive to combat any measure that repeals (retroactively or otherwise) the favorable provisions of the 1872 Mining Law. Those corporate interests threatened by repeal of the law are relatively easily identified, even if some speculation remains as to who will be interested in future mining on public lands. Those likely to be affected can band together to exert political pressure beyond what their considerable economic clout would otherwise afford. In contrast, those benefitting from repeal constitute a classic dispersed majority—taxpayers and anyone downriver from the mines. Although such individuals might favor repeal and might be willing to support some repeal measures, they are at a competitive disadvantage in the lobbying process, because they are less easily identified than the mining interests, and because they have far less at stake than do the defenders of the status quo.

No Congress has ever considered rescinding the rights that mining interests have already acquired under the mining law.[172] Those affected would be more readily identifiable than those that would be affected by a gradual phase-out of the federal mining program. The incentive for mining companies to block any retroactive change is clear.

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167. *See* Levmore, *supra* note 1, at 279.

168. The $5.00 price is for lode claims, and the $2.50 price is for placer claims. Each claim is confined to 20 acres, 30 U.S.C. §§ 23, 35 (1994), but there is no limit on the number of claims each person or entity can file.

169. *See, e.g.*, CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992); George C. Coggins, *Livestock Grazing on the Public Lands: Lessons from the Failure of Official Conservation*, 20 GONZ. L. REV. 749, 753-57 (1984-1985).

170. *See* WILKINSON, *supra* note 169, at 49.

171. *See* Tom Kenworthy, *A Court-Ordered 'Gold Heist': Babbitt Uses Federal Land Transfer to Urge Reform of 1872 Mining Act*, WASH. POST, May 17, 1994, at A5.

172. Rescinding already-conferred property rights would likely violate the Takings Clause.

In 1994, however, the Clinton Administration targeted the 1872 law for revision, hoping to end the bonanza for the mining industry, while not threatening to disturb vested rights under the program. Interior Secretary Bruce Babbitt described the reform as one of the primary goals of his stewardship of the Department of the Interior.[173] Predictably, mining interests lobbied long and hard to kill reform efforts.[174] More surprisingly, the House came within forty-five votes of exempting one particular mining company, Brush Wellman, from the proposed reforms that would have required higher fees and royalties.[175] Brush Wellman planned to develop mining operations for beryllium on some 2500 acres of Utah desert, with a potential value to the company of fifteen billion dollars. With just $131,336 in campaign contributions to members of Congress by Brush Wellman executives, lobbyists, and committees, the company was almost able to protect its development plans from any subsequent congressional revision of the law.[176] The continuing controversy over the mining bill illustrates how the political process—with all of its warts—safeguards (perhaps too well) against civil retroactivity.

This is not to suggest that there are always adequate protections against retroactivity in the legislature. At times, the legislature singles out comparatively powerless individuals for adverse treatment,[177] or acts retroactively in a way that harms a dispersed group.[178] A retroactive repeal of Section 501(c)(3) status for particular private schools or religious groups, for instance, might be problematic.[179] Even when those threatened by potential legislation are identifiable—such as all those receiving a child care tax credit in 1995—they may not have the money, organization, or numbers to block an adverse proposal. But, in general, retroactivity is associated with identifiability. And, the more identifiable the group harmed by legislative proposals, the greater the likelihood that such a group can organize effectively, influencing the legislative process beyond what

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173. *See* Mark Shaffer, *"Throw the Bums Out": 2000 Protest Mining Bill*, ARIZ. REPUBLIC, Aug. 29, 1993, at A19; *Reform for the Public Lands*, N.Y. TIMES, Aug. 11, 1993, at A14.

174. *See U.S. Mining Leader Urges Campaign to Block Reform*, REUTERS, Nov. 18, 1993, *available in* LEXIS, Nexis Library, Wires File; Mike Conway, *Legislation Guts Environmental Protection and Common Sense*, CHAPEL HILL HERALD, May 18, 1995, at 4 (warning that the mining lobby paid politicians $17 million between 1987 and 1994); Shaffer, *supra* note 173.

175. Keith Epstein, *Fortune Hidden Under Desert*, CLEV. PLAIN DEALER, May 22, 1994, at A1.

176. *Id.*

177. *Cf.* United States v. Lovett, 328 U.S. 303, 305 (1946) (singling out government employees for disadvantageous treatment by discontinuing salaries).

178. *E.g.*, Lynch v. United States, 292 U.S. 571 (1934) (limiting Congress's repudiation of obligations to several hundred policyholders of insurance contracts issued under congressional auspices during World War I). Prospective legislation can harm identifiable interests as well, as the mining example attests.

179. *Cf.* Hernandez v. Commissioner, 490 U.S. 680, 683 (1989) (disallowing certain payments made to Church of Scientology as charitable deduction); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding IRS rejection of tax-exempt status of religious university because of racially discriminatory policies).

its political influence would otherwise yield.[180]

Thus, to a significant extent, the political process protects against retroactive lawmaking in financial matters. Judicial oversight is not as critical given the access and advantages that those targeted by retroactive lawmaking likely have in the halls of the legislature.

Nor is all retroactive civil legislation that finally emerges from a legislature necessarily suspicious. One possibility is that when groups such as mine owners are targeted by successful retroactive legislation, we should be more confident that the legislation is public-regarding because it was passed over the opposition of an organized, influential interest group. There is no warrant for enhanced review in these situations, unless the retroactive measure was obtained by an even more compact, influential group. Accordingly, courts have sensibly afforded only minimal scrutiny to challenges to the retroactive portions of the Federal Coal Mine Health and Safety Act of 1969 and the Coal Industry Retiree Health Benefits Act of thirteen years later.[181]

Another possibility is that an interest group can agree to a civil retroactivity proposal in exchange for a legislative concession on a different issue. For instance, those affected by proposed Superfund legislation might have agreed to retroactivity provisions in the 1980 legislation on the condition that prospective payments to the fund be substantially reduced.[182] Activist review of the retroactivity portion of the statute would then afford the interest group more than it bargained for.

Finally, the statute, as in the criminal context, could target dispersed or disliked groups for disadvantageous treatment.[183] For instance, those convicted of certain crimes have been saddled retroactively with civil registration requirements and preclusion from certain vocations.[184] Activist review is most warranted in this context. Yet, just as when reviewing prospective legislation, judges might have difficulty distinguishing a justifiable from unjustifiable civil retroactive enactment burdening a discrete group. Judicial errors, as well as more systemic bias in the judicial process,[185] seem to argue for a prophylactic

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180. The identifiability of those harmed by retroactive lawmaking helps explain the popularity of grandfather clauses, which legislatures utilize to calm opposition to reforms. *See generally* Kaplow, *supra* note 94; Levmore, *supra* note 1.

181. *See supra* text accompanying notes 47-48 and note 46.

182. *See generally* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS—FROM NIXON TO CLINTON 154-62 (1994); Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 22-23 (1982).

183. *Cf.* Perry v. United States, 294 U.S. 330 (1935) (congressional repudiation of obligation to redeem war bonds); Lynch v. United States, 292 U.S. 571 (1934) (congressional repudiation of insurance contracts issued under congressional auspices during World War I).

184. *See, e.g.*, Deveau v. Braisted, 363 U.S. 144 (1960).

185. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (arguing that judicial process is open to influence, if not capture, by interest groups).

rule affording minimal scrutiny to retroactive measures in the civil context.[186] Moreover, some retroactive enactments are checked by other judicial doctrines, such as the Contracts[187] and Takings Clauses.[188]

On balance, there are sound reasons to tolerate legislative retroactivity in the civil context. The political process protects against legislative overreaching, and more activist review might reward interest groups at the expense of the public weal.

Although interest group theory is of relatively recent vintage,[189] the relationship between retroactivity and political process protections may well have been understood by the founding generation. The political safeguards against retroactive lawmaking did not likely escape the Justices' attention in *Calder*. There, both parties to the will contest had presented arguments before the state legislature about whether a new probate hearing should be convened.[190] The legislative process was open to both parties and likely resembled what we would consider today a typical judicial (or administrative) hearing.

In rejecting the retroactivity challenge, Justice Iredell invoked an analogy to a suit over a discriminatory tax. The only recourse available to those objecting to taxes was the political process:

> We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a Government, in ancient or modern times, more free from danger in this respect than the Governments of America.[191]

Justice Chase similarly argued that "[i]t is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community."[192] Chase's presumption, however, did not carry over into the criminal context. Part of the Justices' concern may well have been pragmatic—they clearly believed that the federal and state governments could not function expeditiously without the power to make civil laws retroactive.[193] But Justices Chase and Iredell appeared

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186. The relaxed scrutiny afforded by *judicial* retroactive lawmaking in the criminal context may well stem from the relative immunity of judges from the emotion or political pandering that affects legislative deliberation in the retroactive criminal context. *See supra* note 162.

187. U.S. CONST. art. I, § 10.

188. U.S. CONST. amend. V.

189. *See, e.g.*, MUELLER, *supra* note 130; MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

190. Calder v. Bull, 3 U.S. (3 Dall.) 386, 386 (1798).

191. *Id.* at 400.

192. *Id.* at 394.

193. Justice Chase warned that the Ex Post Facto Clause, if applied to civil cases, "will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen." *Id.* at 393. Justice Iredell cautioned that "[w]ithout the possession of this power the

willing to trust the political process on financial matters.[194]

In light of identifiability advantages, one might wonder why we do not see more legislative proposals for retroactive *benefits*. In the criminal context, those convicted of crimes rarely have the clout to urge retroactive repeal of criminal provisions or harsh sentencing laws.[195] But in the civil context, organized groups should be able to lobby more successfully for retroactive relief, by virtue of identifiability and financial incentives. Occasionally, a group successfully lobbies for retroactive payment of damages, usually to compensate for an injury previously suffered at the government's hands.[196] A ban on retroactivity might be defended in light of the need to prevent retroactive rent seeking.

Irrespective of the potential gains, mining interests, automobile manufacturers, and others apparently do not often lobby to extract retroactive advantages. Several factors explain the lack of retroactive rent seeking. First, retroactive benefits can be difficult to obtain other than through cash payments or exemption from prior regulatory requirements. An automobile company cannot ask for a retroactive import quota. A rancher will have difficulty convincing legislators to make cash payments to effect a retroactive cut in grazing fees on public land. Retroactive relief in the form of direct monetary payments is harder to acquire through political means. The absence of retroactive benefits or windfalls therefore might be understood on political grounds—it is simply more difficult to obtain such benefits in a naked fashion. Second, most regulatory measures seek to influence behavior, whether by encouraging companies to comply with pollution abatement measures or by encouraging farmers not to grow certain crops. Such regulation can serve as a guise for legislative rents, as many have argued.[197] Nonetheless, no pretense at changing behavior can be made if the legislation is retroactive, and accordingly, despite the expediency of identifiability, groups cannot likely obtain legislative benefits retroactively.[198]

Thus, retroactive lawmaking is in part self-regulatory. Those targeted by such unfavorable measures have an organizational advantage in blocking retrospec-

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operations of Government would often be obstructed, and society itself would be endangered." *Id.* at 400. Crosskey has suggested that the Justices were concerned about potential retroactive application of a bankruptcy law that was then pending. CROSSKEY & JEFFREY, *supra* note 11, at 347.

194. Justice Cushing asserted that the Connecticut legislative action posed no ex post facto problem because it was a judicial act. *Calder*, 3 U.S. at 403. The protections inherent in the judicial process might have shaped his thinking.

195. *See supra* text accompanying notes 132-28.

196. *See, e.g.*, Texas City Disaster Relief Act, ch. 864, 69 Stat. 707 (1955) (permitting recovery for those injured by city-levelling explosion due in part to government's arguable negligence in implementing plan to export fertilizer to Europe).

197. *See, e.g.*, Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

198. *See generally* Levmore, *supra* note 1. It is more difficult to obtain new legislation than to block someone else's proposal. The conservative force in our legislative process impedes interest groups as they seek to overcome legislative inertia and obtain benefits, whether retroactively or prospectively. *See* SCHLOZMAN & TIERNEY, *supra* note 133, at 314-15.

tive proposals. Their organizational advantage might not be dispositive, but it helps explain why we have less reason to fear retroactive lawmaking than might otherwise be the case. Activist review is far less attractive when mine owners lose in the legislative process than when legislation targets those previously convicted of crimes.

2. Increased Lobbying Costs

Lobbying has a longstanding, if sometimes questionable, pedigree. Groups form to apprise legislators of the groups' preferences. Armed with such knowledge, legislators can more faithfully serve their constituents' needs. To the extent possible, legislators can accommodate their constituents' conflicting goals.

But groups also ply pressure upon legislators to force them to vote according to the groups' preferences. Lobbying can involve different kinds of pressure, often including financial inducements of one type or another. Interest groups can help fund a legislator's reelection campaign, contribute to the candidate's colleagues, or employ a legislator's friends and family members. Suffice it to say, the link between lobbying by interest groups and the public interest is tenuous at best.

Because advantageous programs obtained by interest groups are subject to repeal, lobbying loses some of its luster. A group must lobby not only in the current legislature, but in all future legislatures to ensure that farm or grazing-rights subsidies are retained. If the reward is sufficiently large, as under the Mining Law of 1872, expending increased funds on lobbying might be rational. Indeed, because of forces such as inertia, interest groups have legitimate confidence that legislatures are unlikely to unravel subsidy programs once enacted.[199] The identifiability of those potentially affected by repeal, as discussed previously, further diminishes the likelihood that any proposed repeal will pass. And, through devices such as delegation, members of Congress can publicly distance themselves from such hand-outs, while reaping rewards from the interest group that benefits.[200]

Yet, if the legislature can both end subsidy programs *and* enact legislation to recapture prior subsidies, the costs of lobbying increase. Groups with significant potential financial gains will still play the lobbying game, trusting that the ultimate benefits they can attain through lobbying are worth the calculated risk. The rewards for mining companies are so large that they are more than willing to gamble that legislators will never force them, after the fact, to share the wealth generated from minerals on public lands. Each increase in the cost of lobbying, however—whether because of taxes, registration requirements, or

199. *See supra* note 198.

200. *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

permitted retroactivity—should decrease lobbying activity in the aggregate.[201] At the margin, some interest groups will find the lobbying route less attractive because of the potential for recapture, and consequently they might choose to channel their resources into more productive activities, such as research and development.[202]

Legislators arguably can recoup any loss to themselves by extracting rent on more occasions.[203] Legislators can obtain favors from interest groups not only by passing new legislation but also by threatening to undo existing legislation retroactively.[204] Legislators face a trade-off between decreasing the value of each deal and increasing the number of potential deals. From a legislator's perspective, however, the need to engage in more frequent selling of the office has several drawbacks. Each transaction exposes legislators to adverse public opinion, and each transaction diverts the legislator from other potentially more important (or lucrative) tasks. Commentators have suggested that legislators maximize their chances for reelection more by serving constituents than by pleasing interest groups.[205] The smaller the expected rent, the less likely that

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201. *Cf.* Macey, *supra* note 197, at 493-505 (arguing that destabilizing interest group deals in legislation will reduce lobbying activity).

202. As lobbying costs increase, large firms might be able to monopolize the lobbying process because of the comparative advantage such firms have in diversifying risk. Even if their lobbying efforts ultimately fail on the mining law, they might balance that loss with a successful lobbying effort on import duties. Thus, there is a danger that lobbying by large companies might replace the current "democratic" lobbying by many groups, both big and small. Hence, legislative pork would be channeled exclusively to huge interests. There is little evidence, however, that raising lobbying costs leads to such monopolies. Large companies have been unable to corner the lobbying market. Wealthy groups can be out-hustled by energetic smaller groups that can win with a more effective strategy or ideological argument. *See* SCHLOZMAN & TIERNEY, *supra* note 133, at 103-06 (explaining that, from the perspective of interest groups, the size of the group's overall budget is only marginally linked to its ultimate success—factors such as contacts, reputation, and ability to form coalitions are more important); *see also* Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1331-32 (1993) (explaining that wealthiest interest groups not necessarily the most successful in lobbying market). Moreover, even if increasing the cost of lobbying produced greater monopolization of the lobbying process by the largest firms, there is no evidence that such firms could extract more rent from legislators.

203. *See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); *see also* R. Beck et al., *Rent Extraction Through Political Extortion: An Empirical Examination*, 21 J. LEGAL STUD. 217 (1991) (testing and confirming in part McChesney's theory of rent extraction).

204. Banning retroactive measures would therefore limit occasions for lobbying. *Cf.* J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155, 1167-71 (1989) (arguing that congressional commitment to pay compensation for changes in the tax code would minimize lobbying). Yet, given that prospective measures can so plainly affect the value of past investments, it is doubtful whether a ban on retroactivity would reduce significantly the amount of lobbying activities. A threatened repeal of a subsidy program offers legislators limitless theoretical possibilities to extract rent even without a potential for recapturing subsidies previously paid. A monetary pledge not to change laws (such as through liquidated damages)—as advocated by Ramseyer and Nakazato—would pose additional problems in terms of enforceability and in terms of assessing the optimal level of the pledge.

205. *See, e.g.*, MORRIS P. FIORINA, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39-47, 86-93 (2d ed. 1989).

legislators will engage in the process.[206] The ultimate impact remains speculative, but there is a fair chance that retroactivity, by diminishing the attractiveness of lobbying, results in less lobbying and less rent creation.

Permitting retroactive measures might increase lobbying costs in the criminal context as well. But as suggested previously,[207] there is far less lobbying over criminal enactments, both because there is less money at stake and because those targeted are unable to mount successful efforts in the legislature.

Thus, in contrast to the criminal context, permitting retroactive civil lawmaking likely dampens lobbying efforts to seek legislative rent. Due to blocked access, lobbying in the criminal context generally is not as profitable and poses far less of a social problem.

3. Restraint on Legislative Self-Dealing

Retroactivity not only diminishes the attractiveness of lobbying, it also has the potential to help check legislative self-dealing. Any outrageous payoffs to trusted contributors might be recaptured by legislators' successors in office, depending upon operation of the Takings Clause. Laws that unconscionably line the legislators' own pockets are similarly subject to future legislative disgorgement.

A principal justification for retroactive lawmaking, therefore, is conceptually akin to one of the values underlying the separation of powers doctrine: ensuring that the legislature cannot both make and execute the laws. In the absence of such separation of functions, theorists fear that the legislature could too easily exempt itself from the operation of general rules.[208] Legislators who cannot permanently shield themselves from the law's reach are more likely to take into account the perspective of ordinary citizens subject to the law.[209] The prospect of retroactive lawmaking furthers that ideal by reminding legislators that they cannot be guaranteed any irreversible payoff from their legislative efforts. Any doubling of salary, interest-free loans from the House bank, or suspicious book deals may be subject to both ethical inquiries and future financial penalties. What goes around comes around.

Sanctioning retroactive criminal legislation would not have a similar heuristic

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206. *See* Eric Rasmusen & J. Mark Ramseyer, *Cheap Bribes and the Corruption Ban: A Coordination Game Among Rational Legislators*, 78 PUB. CHOICE 305 (1994) (explaining that when legislators vote for private interest statutes they impose an externality on every other legislator, yet they cannot coordinate votes to demand bribes that compensate for that externality). Legislators might benefit from rules prohibiting retroactive measures in the civil context, but they cannot bind their successors in office. Collective action problems might even prevent them from obtaining agreement from their colleagues.

207. *See supra* text accompanying notes 132-38 & note 101.

208. *See, e.g.*, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 151-52 (T. Nugent trans,. 1949) (1st ed. 1750); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 143, at 76 (C.B. MacPherson ed., 1980) (1690). *See generally* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 127-30 (1984).

209. *See* Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 434 (1987).

value. Many transactions between legislators and their constituents might be unethical, but not necessarily criminal. Moreover, although legislators might fear that their successors would retroactively deem their conduct (or that of favored constituents) criminal, executive branch prosecutors must still agree to bring charges. That factor makes the prospect of future criminalization less likely. At the federal level, some legislative conduct is shielded from criminal liability under the Speech and Debate Clause, as long as the conduct is tied to "legislative acts."[210] Retroactivity in the criminal law context would therefore check legislative overreaching less appreciably than in the civil context.

CONCLUSION

The Supreme Court's approaches to retroactive lawmaking in the criminal and civil contexts present a fundamental contrast. In the criminal context, the Court overrides the product of the majoritarian legislature to preserve rule-of-law concerns, while in the civil context, the Court welcomes reasonable majoritarian initiatives, even if retroactive.

Distinguishing between retroactivity in the civil and criminal contexts is not as spurious as the focus on fair warning and reliance interests might suggest. The Court's more activist stance in the criminal context can be explained on political process grounds. Those committing crimes have little or no influence in the legislature, and legislators can too readily enhance criminal penalties as a means of appearing tough on crime to their constituents. On balance, the risk of vindictive legislation outweighs the benefits that can be attained through retroactive crime creation or increased penalties. Indeed, barring retroactivity might improve prospective lawmaking by removing legislators' temptation to punish particular individuals more severely by enacting across-the-board measures increasing every offender's liability.

In contrast, retroactivity in the civil context is checked by the ability of those targeted to organize collectively to block any retroactive measure or obtain a commensurate benefit elsewhere. Retroactivity enhances identifiability, which minimizes the possibility that the legislature will act retroactively in the first instance. Potential retroactivity also increases the costs to interest groups or legislators bent on extracting rent through the legislative process. That effect is not as beneficial in the criminal context, for there is simply less rent to obtain when lobbying for criminal prohibitions, and affected individuals generally lack the influence or money to launch an effective lobbying campaign. In short, because retroactive lawmaking can further so many legitimate public policy

210. Doe v. McMillan, 412 U.S. 306, 312 (1973) (holding that conduct within sphere of legitimate legislative activity shielded from civil and criminal liability); United States v. Johnson, 383 U.S. 169, 180 (1966) (holding that speech on House floor not basis for criminal liability); United States v. Swindall, 971 F.2d 1531, 1543 (11th Cir. 1992) (holding that privilege protects against questioning by prosecution directed at representative's knowledge of congressional proceedings), *cert. denied*, 114 S. Ct. 683 (1994). The protection of the Speech and Debate Clause does not similarly shield state legislators from federal prosecution. United States v. Gillock, 445 U.S. 360, 373 (1980).

goals, the Court defers to the political process when it can be relied upon to accommodate the interests at stake. But when the political process cannot be trusted, the Court bars retroactive lawmaking to protect against the risk of arbitrary or vindictive rule.

This is not to suggest that legislatures should engage in retroactive lawmaking in the civil context liberally. Such lawmaking unquestionably permits a legislature to calibrate its regulations so as to single out disfavored citizens, and it allows lawmakers to brush aside the reliance interests of those who fail to anticipate legal change. Yet, the political process preceding economic legislation safeguards (to some extent) against the potential evils of retroactivity. Interest group theory therefore helps explain and justify the Supreme Court's sharply divergent approaches to retroactive legislation in the civil and criminal contexts.