Public Rights, Private Rights, and Statutory Retroactivity

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Introduction

In their ideal forms, legislation is prospective and general, while adjudication is retrospective and particular. To many, then, it comes as a surprise to learn that despite using a presumption of statutory prospectivity, the Supreme Court also employs a general principle allowing retroactive civil statutes if the legislature is sufficiently clear, subject only to deferential due process scrutiny. The Court thus approved retroactive imposition of black lung benefits in Usery v. Turner Elkhorn Mining Co., and substantial retroactive withdrawal penalties for a company that had briefly participated in a multi-employer pension plan in Concrete Pipe and Products v. Construction Laborers' Pension Trust. The Court reasons that reprobating retroactive economic legislation would reprise Lochner-era substantive due process.

Modern scholarship generally supports the indulgence toward statutory retroactivity, arguing that all changes in legal rules, whether nominally retrospective or prospective, defeat expectations based on the prior state of the law. Nor,

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1. See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 272, 293 (1994) (holding that prospectivity remained the "appropriate default rule" for civil legislation and refusing to apply retroactively changes to remedies for violations of employment discrimination statute); cf. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules for criminal procedure are to be applied retroactively to all cases not yet final, even when such rules are "a 'clear break' with the past") (citation omitted).
4. See, e.g., Turner Elkhorn, 428 U.S. at 15 ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.").
5. See, e.g., Michael J. Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. Pa. L. Rev. 47, 49–63 (1977) (arguing that because changes in tax laws alter the value of existing assets or defeat expectations, the line between nominally retroactive and nominally prospective
according to some, are the distinctions between legislative and judicial lawmaking sufficient to support the traditional allowance of retroactivity as to the latter but not the former. 6

On further examination, however, one finds that the Court's professed tolerance for express statutory retroactivity is not especially robust. The Court has sometimes invalidated retroactive legislation relying on separation of powers, Contracts Clause, 7 or takings analysis, in addition to due process. Thus in Plaut v. Spendthrift Farm, the Court, relying on separation of powers, disapproved of legislation allowing the reopening of securities fraud judgments dismissed on statute of limitations grounds. 8 And in Eastern Enterprises v. Apfel, it disallowed retroactive imposition of lifetime employee health benefit liabilities, with four Justices relying on takings rationale 9 and one relying on due process. 10

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6. See Fisch, supra note 5, at 1082 ("The antiquated fiction that judges find law and legislators make it does not provide a sufficiently nuanced framework for determining rules of retroactivity."); Saul Levmore, Changes, Anticipations, and Reparations, 99 Colum. L. Rev. 1657, 1672 (1999) (stating that there is little reason to expect that the dividing line between the legislature and court will track instances where retroactivity is appropriate).


9. 524 U.S. 498, 529-37 (1998) (plurality opinion) (using regulatory takings analysis to invalidate retroactive pension liabilities). Eastern Enterprises withdrew from the coal industry in 1965. Under a 1992 statute, the Social Security Administrator assigned to Eastern liability for health care premiums for over 1000 retired miners based on Eastern's status as the employer for whom the workers had worked the longest among pre-1978 signatories of certain agreements. Id. at 517. None of the benefit plans to which Eastern Enterprises had been a party provided lifetime guaranteed benefits. Id. at 530-31.

10. Id. at 547-50 (Kennedy, J., concurring in judgment and dissenting in part) (using due process as the rationale for invalidating the pension provisions of the Coal Act); see Thomas W. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 906, 976-77 (2000) (reasoning that the takings analysis used by the Eastern Enterprises plurality was inappropriate where discrete assets were
One might turn to the historical treatment of retroactive legislation for the guidance lacking in modern case law. At first glance, however, the older case law seems as ad hoc as the modern decisions. On the one hand, the antiretroactivity norm is sometimes portrayed as the animating principle of the entire pre-New Deal era. For example, the pre-New Deal Court expansively interpreted the Contracts Clause to disallow retroactive alterations of public and private contracts. On the other hand, the nonretroactivity principle is fraught with exceptions. The Marshall Court, for example, was willing to allow retroactive legislation that took away seemingly vested rights in *United States v. Schooner Peggy*—a case frequently relied on in the modern era in support of legislative retroactivity. Additionally, in *Stockdale v. Insurance Cos.*, the Court approved retroactive taxation.

This Article provides an account of the Court's historical retroactivity jurisprudence that it hopes will make the past seem more organized and accessible; it will then suggest that the traditional framework might usefully be applied to modern case law. The Article will add the categories of public and private
rights to the mapping of retroactivity and prospectivity onto judicial and legislative functions. This addition will help to resolve some of the seeming contradictions of the older case law. The explanatory force of the categories of public and private rights will also highlight that the separation of powers concerns underlying the requirement of legislative prospectivity can only be applied by taking into account the substantive rights at issue.

Part I will briefly discuss the general nonretroactivity principle and provide definitions of public rights, private rights, and retroactive legislation. Part II will discuss the differing results for the nonretroactivity principle for public and private rights. Part III will address some seeming exceptions to the ban on retroactive legislation affecting private rights in the areas of contracts, legislative overruling of judgments, and taxation. Part IV will briefly explore why the Court and scholars see the New Deal as a watershed in allowing legislative retroactivity. Part V will discuss how the older doctrines might be used to bring order to the modern cases.

I. THE GENERAL RETROACTIVITY PRINCIPLE AND SOME DEFINITIONS

A. THE GENERAL NONRETROACTIVITY PRINCIPLE AS AN ASPECT OF SEPARATION OF POWERS

Our system operates under a general assumption that legislatures act prospectively and generally, while courts act retrospectively and particularly. There is also a substantive element to the division of functions between legislature and judiciary. This is most obvious in the criminal context, where the doctrine of separation of powers is most stringently applied. Even beyond restrictions on core interests in liberty, however, the judiciary acted as the special guardian of private rights, and also as the branch that, consistent with due process, was empowered to divest such private rights retroactively. The legislature had more plenary control over prospective rules and public rights. These different

16. Cf. Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1855) (“[D]ue process of law’ generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet, this is not universally true.”) (citations omitted).

17. See, e.g., Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908) (“A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . . Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.”); see also New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 370–71 (1989) (quoting Prentis); D.C. Court of Appeals v. Feldman, 460 U.S. 462, 477 (1983) (same); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 92 (Da Capo Press 1972) (1868) (“[T]o compare the claims of parties with the law of the land before established[] is in its nature a judicial act . . . . [T]o pass new rules for the regulation of new controversies[] is in its nature a legislative act; and if these rules . . . do not look wholly to the future, they violate the definition of a law as ‘a rule of civil conduct,’ because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated.”) (footnote omitted).
substantive realms for the legislature and judiciary help to sort out nineteenth-century retroactivity jurisprudence, particularly in areas where the Court appeared indulgent to retroactivity while still maintaining the division of functions among the branches. To understand more fully these divisions, however, one needs definitions of public and private rights.

B. DEFINITIONS OF PUBLIC AND PRIVATE RIGHTS

Private rights typically included an individual’s common law rights in property and bodily integrity, as well as in the enforcement of contracts. The remedy for a violation of private rights was damages measured by private loss or injunctive relief to prevent the private loss. Many saw such rights as those that “would belong to their persons merely in a state of nature.” Whether or not these rights are distinctive because of their prepolitical origins, however, the American legal tradition has given them special stature. While the concept of private rights may seem familiar, this Article uses the term public rights in a sense that may be both familiar and unfamiliar. In the latter part of the twentieth century, public rights took on a broad connotation of constitutional or statutory claims asserted in the perceived public interest against government or regulated parties. The nineteenth century, however, conceived of public rights in a narrower sense, to mean claims that were owned by the government—the sovereign people as a whole—rather than in persons’ individual capacities. This meaning could be found in part in Locke and


20. 1 Blackstone, supra note 18, at *119; see also id. at *125, *134 (suggesting that the set of “absolute” rights “inherent in every Englishman” reflected “either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience, or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals”); id. at *120 (asserting “that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals”).

21. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 171 (1803) (assuming readers’ familiarity with “the absolute rights of individuals”); 2 James Kent, Commentaries on American Law 1 (1827) (“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.”).

22. See generally Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284, 1316 (1976) (defining public law litigation as having the object of vindication of constitutional and statutory policies and claiming that public law litigation derives its legitimacy from its responsiveness to “the deep and durable demand for justice in our society”).

23. See 4 Blackstone, supra note 18, at *5 (distinguishing “the right[s] of an individual” and “the public rights and duties, due to the whole community, considered as a community, in it[s] social aggregate capacity”).

Blackstone, and was used in various areas, including standing, retroactivity, and Article I courts.

Included in public rights were the following:

1. proprietary interests of government, such as in public lands and governmental buildings, analogous to the private rights of individuals;
2. interests in exercising delegated governmental power;
3. the governmental interest in enforcing penal and regulatory law, including the law of public nuisance;
4. purely statutory (that is, non-common-law) claims of individuals; and
5. taxation.

Statutes may create duties owed to individuals beyond those recognized at common law and provide that individuals may seek compensation measured by individual loss for their breach. Such statutory or related entitlements have

25. See, e.g., 4 BLACKSTONE, supra note 18, at *5 (discussing "the public rights and duties, due to the whole community").
27. See Murray's Lessee v. Hoboken Land & Improvement Co. 59 U.S. (18 How.) 272, 283-84 (1855) (using public rights concept to justify lack of judicial process before issuance of a distress warrant attaching an embezzling custom officer's property); Caleb Nelson, Adjudication in the Political Branches (unpublished manuscript, on file with the author) (using traditional distinctions between public and private rights to explain the disputes that administrative actors have historically been permitted to adjudicate on their own and the disputes that instead required judicial power).
28. Cf. Commonwealth v. Beaumarchais, 7 Va. (3 Call) 122, 169 (1801) (Pendleton, P.J.) (referring to claims upon the state treasury as "claims against the public").
29. See infra text accompanying notes 64–82.
30. Public nuisance typically encompassed the interests in free passage on waterways and highways, as well as various forms of corruption of public morals such as maintenance of lotteries. See 4 BLACKSTONE, supra note 18, at *6 (describing a public nuisance such as digging a ditch across a public highway as "a common offence to the whole kingdom and all his majesty's subjects"); see also Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829) (Walworth, C.) (describing "[t]he right to navigate the public waters of the State and to fish therein, and the right to use the public highways," as public rights held by the people at large rather than by any individual citizen); Woolhandler & Nelson, supra note 26, at 701 n.50 (citing authorities).
31. See infra text accompanying notes 112–24.
32. See infra text accompanying notes 157–79; cf. Murray's Lessee, 59 U.S. (18 How.) at 283–84 (discussing that judicial process was not required for collection of taxes as a matter of a public right held by the government). Taxation obviously involves impositions on private rights, as discussed infra text accompanying notes 163–64. The Court in the early twentieth century invalidated some taxes for retroactivity but backtracked in the early 1930s. Compare Nichols v. Coolidge, 274 U.S. 531, 542 (1927) (disallowing under the Fifth Amendment the application of a 1918 act to certain inter vivos gifts not made in contemplation of death), with Miliken v. United States, 283 U.S. 15, 24 (1931) (approving application of the 1918 Act to gifts made in contemplation of death in 1916), discussed in Troy, supra note 5, at 33–34.
some aspects of both private and public rights.\textsuperscript{33} (The nineteenth century did not employ the term statutory entitlement, but the concept was still there.) Unlike purely public rights, these entitlements could be thought of as belonging to discrete individuals because the government had parceled them out in that way. Unlike core private rights, though, they originated with the state rather than the individual.\textsuperscript{34}

Such entitlements for standing purposes were accommodated to private rights.\textsuperscript{35} For purposes of retroactivity as well as for purposes of agency adjudication, however, these entitlements were generally treated as public rights. They are therefore included in the list of public rights above.

C. DEFINING RETROACTIVITY

Before proceeding further, this Article must define retroactivity. Some modern judges and even more modern scholars see the retroactivity-prospectivity line in the civil context as logically illusory, because all legal change may defeat expectations, creating winners and losers.\textsuperscript{36} This view comports with some characterizations of \textit{Lochner}-era doctrines, whereby any economic regulation that exceeded a narrowly defined police power was a taking (and hence retroactive) in that it changed the terms of ownership of property.\textsuperscript{37} The difference between the earlier and modern views would only be that under older views, both prospective and retroactive economic regulation might be similarly repugnated, while under modern views both are similarly allowed.\textsuperscript{38}

This Article, however, will address a smaller area of retroactivity proper; it puts aside takings of tangible property and prospective regulation that may diminish the value of property interests, although it occasionally will advert to laws changing the rules for the acquisition or loss of tangible property. This Article principally addresses what modern scholarship calls primary retroactiv-

\begin{itemize}
\item \textsuperscript{33} See, e.g., Merrill, \textit{supra} note 10, at 954–95 (using modern cases to distinguish between constitutional treatment of three different categories of property: (1) a core set of rights, closely associated with “common-law property interests,” that are insulated from legislative as well as executive deprivations; (2) a broader category of “entitlements” that are protected against arbitrary deprivation by the executive but that the legislature may destroy; and (3) an even broader category consisting of “everything relevant to calculating a person’s material wealth or net worth,” which enjoys the weakest protection).
\item \textsuperscript{34} See 1 Blackstone, \textit{supra} note 18, at *120 (noting that in contrast to the “absolute” rights of individuals, “[s]uch rights as are social and relative result from, and are posterior to, the formation of states and societies”).
\item \textsuperscript{35} See generally Woolhandler & Nelson, \textit{supra} note 26.
\item \textsuperscript{36} See, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976) (“[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.”).
\item \textsuperscript{37} See Kainen, \textit{supra} note 11, at 89–89, 126–33 (arguing that the \textit{Lochner} era, by extending the concept of vestedness to include all valuable property rights, was transitional from an older protection of vested rights from retroactive legislation to a newer substantive due process analysis).
\item \textsuperscript{38} See id. at 141 (indicating that \textit{Lochner}-era substantive due process paved the way for treating vested rights as having no special immunities from legislative change).
\end{itemize}
ity—"altering the past legal consequences of past actions." More specifically included are legislative creation of criminal or civil liability for completed acts, significantly lessening or adding onto the burdens of past contracts (particularly debt contracts), legislative termination of accrued claims for relief whether or not the subject of a pending action, and legislative undoing of final judgments no longer subject to appeal.

II. THE NONRETROACTIVITY PRINCIPLE AND ITS APPLICATION TO PRIVATE AND PUBLIC RIGHTS

This Part will first provide some examples of relatively easy cases prohibiting the application of retroactive legislation to private rights. It will then address the allowance of retroactive legislation as to the categories of public rights outlined above, starting with retroactive legislation impairing government's proprietary rights (category one, supra). It then moves on to the interrelated areas of interests in exercising governmental power, interests in enforcing the penal and nuisance law, and interests in enforcing statutory law more generally (categories two, three, and four). This discussion will cover all the major categories of public rights listed in the definitional section in Part I.A., excepting taxation. The discussion of taxation is included in Part III, which addresses areas that appear to be exceptions to the general rule that the legislature could not retroactively affect private rights.

A. DISALLOWANCE OF RETROACTIVE LEGISLATION DIVESTING PRIVATE RIGHTS

This Article's opening examples of reprobated retroactivity will comport with observations of others—including Professor Kainen in an insightful article—that retroactivity was particularly forbidden for "vested" rights. The vested


40. Otherwise unexceptionable police power regulation might have the effect of prohibiting performance of a contract, or modifying it, without violating the Contracts Clause. Cf. Phila., Balt. & Wash. R.R. v. Schubert, 224 U.S. 603, 608-11 (1912) (holding that the Federal Employers' Liability Act could invalidate a previously entered contract whereby the employee waived his right to sue if he collected benefits under the railroad's relief fund); Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 485-86 (1911) (holding that there was no due process problem in Congress's disallowing use of free passes, even when such a pass had been validly given as part of a past settlement for a personal injury claim).

41. See Kainen, supra note 11, at 109-11 (describing nineteenth-century nonretroactivity jurisprudence as directed to vested rights, and also distinguishing property from mere expectancies, and rights from remedies). But cf. Robert L. Hale, The Supreme Court and the Contract Clause (pt. 1), 57 Harv.
label, however, as many have observed, often seems conclusory. What is more, a right might be vested as against executive encroachment but not against legislative divestiture. As Justice Samuel Nelson noted a few years before his elevation to the Supreme Court, some rights were vested even as against “the plenitude of power of the legislative department.” Other rights were “vested as it regards every other body or power except the government,” but could be abrogated by the legislature. Although also suffering from nominalism, the public-private line may provide a more useful dividing line for the allowance of legislative retroactivity than the vested-nonvested line. Alternatively, one may see the public-private line as shedding light on what rights might be considered vested for purposes of disallowing legislative abrogation.

An area where the courts unsurprisingly forbad retroactivity included laws that changed the rules by which property was acquired and lost. Legislatures have always had power to enact prospective laws governing changes in land ownership, such as the formalities for conveyance and rules of adverse possession, even though such rules affect private rights and may alter aspects of the common law. Even though some form of private property regime may be hard-wired into our government, many of the specifics are subject to prospective legislative rules. Thus courts have frequently said that no one acquires a vested interest in the rules of the common law.

That private rights are involved, however, has been understood to mean that legislatures cannot make such laws retroactive. Thus, while state legislatures could relax the requirements for adverse possession in the future, they could not provide that past acts meeting the new requirements had already effected the transfer of property; likewise, while state legislatures could change their

42. See, e.g., McNulty, supra note 39, at 20 & n.19 (criticizing vested rights as simply referring to rights protected from legislative interference without providing a useful test for their prior identification).
43. People v. Morris, 13 Wend. 325, 328 (N.Y. Sup. Ct. 1835).
44. Id. at 329; see also Merrill, supra note 10, at 963–64, 988 (describing “procedural due process property” as irrevocable by the executive and judiciary but legislatively revocable).
45. Even those who believe that “[t]he original of private property is probably founded in nature” have always acknowledged that “the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society.” 1 BLACKSTONE, supra note 18, at *134; see also In re Dorsey, 7 Port. 293, 1838 Ala. LEXIS 62, at *31–32 (1838) (argument of counsel) (“The doctrine will not be contested, that the legislature may settle the course of descents of land; the nature, extent, and qualification of estates; the manner and form of acquiring estates; the solemnities and obligations of contracts; the rules for the exposition of wills and deeds, &c. &c.”); JAMES MADISON, Essay on Property, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478, 479 (1884) (noting that “property depend[s] in part on positive law”).
46. See, e.g., Second Employers’ Liab. Cases, 223 U.S. 1, 50 (1912) (citing several cases for this proposition, in a decision approving a congressional workers’ compensation statute for railroad employees).
47. See, e.g., Proprietors of the Kennebec Purchase v. Laboree, 2 Me. 275, 288 (1823) (relying upon general provisions of the Maine Constitution to invalidate an attempt by the Maine legislature, in adopting a new adverse-possession statute, “to operate on past transactions, and to give to facts a
Inheritance laws prospectively, they could not declare that property that had already descended to A now belonged instead to B. Retroactive laws of this sort were often said either to deprive people of property without "due process of law" or to cross the line between "legislative" and "judicial" power. These two formulations drew on the same idea: the process that was considered "due" for an authoritative disposition of core private rights involved "judicial" application of the standing laws, and the separation of powers kept legislatures from supplying this process.

In addition to restricting the temporal scope of application of new rules character which they did not possess at the time they took place"); see also Wood v. Lovett, 313 U.S. 362, 369 n.12 (1941) (disapproving of substantial alteration by subsequent legislation of rights acquired by a purchaser at a tax sale); Union Pac. R.R. Co. v. Laramie Stockyards, 231 U.S. 190, 200-02 (1913) (holding that a federal statute providing that lands as to which the railroad had been granted a right of way would now be treated as if they had been granted in fee would violate due process if interpreted to mean that adverse possession claims had already run against the railroad); Webster v. Cooper, 55 U.S. (14 How.) 488, 504 (1852) ("[P]roperty cannot, by a mere act of the legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect.").

48. See, e.g., Nat'l Metro. Bank of Wash. v. Hitz, 12 D.C. (1 Mackey) 111, 121 (1881) (declaring that a statute with such retroactive effect would be "rather a sentence than a law," and would violate the Due Process Clause of the Fifth Amendment), rev'd on other grounds, 111 U.S. 722 (1884); McDaniel v. Correll, 19 Ill. 226, 228 (1857) (holding that the legislature could not retroactively validate a proceeding, otherwise void, that had divested legatees of their rights under a will, stating: "The effect of the act upon them is precisely the same as if it had been declared, in direct terms that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs at law of the testator, according to our law of descent. This it will not be pretended that they could do directly...."); Greenough v. Greenough, 11 Pa. 489, 494-95 (1849) (holding that the legislature improperly acted judicially in attempting to validate prior defective wills); see also, e.g., Jones v. Meehan, 175 U.S. 1, 32 (1899) ("The title to the strip of land in controversy, having been granted by the United States to the elder chief... by the treaty... and having descended... to his eldest son and successor as chief, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be devested by any subsequent action of... Congress, or of the Executive Departments.").

49. See, e.g., Davidson v. New Orleans, 96 U.S. 97, 102 (1877) (approving the challenged assessments, but noting that a statute that transferred property from A to B would violate due process); Taylor v. Porter, 4 Hill 140, 148 (N.Y. Sup. Ct. 1843) (invalidating a state law that allowed a private party to build a road on another's property).

50. See, e.g., Newland v. Marsh, 19 Ill. 376, 382 (1857) ("The citizen cannot be deprived of his property by involuntary divestiture of his right to it, or by such transfer of it to another, except by judgment of law; and the legislature, having no judicial power, cannot impart to their enactments the force of a judicial determination."); see also Simeon Nash, The Constitutionality of Retrospective Laws, 2 W.L.J. 170, 174 (1844) (attacking retroactive legislation as "a gross usurpation in most cases upon the judicial power").

51. See John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493, 511, 558 n.46 (1997) (crediting Professor Wallace Mendelson for "explain[ing] that the early vested rights due process cases were understood by their authors primarily in terms of the constitutional structure of separated powers," in that "[l]egislative deprivations were seen as an attempt to exercise the judicial power"); Wallace Mendelson, A Missing Link in the Evolution of Due Process, 10 Vand. L. Rev. 125, 133 (1956) ("If not universally recognized, so well established was the nexus between separation and due process on the eve of the Civil War that the two could be presented in Sedgwick's well-known treatise as virtual equivalents.").
governing property rights, the prohibition on legislative retroactivity disallowed substantial changes in the terms of existing contracts. The Contracts Clause forbade state legislative impairments of contracts, and the Court indicated that similar restrictions might apply to congressional impairments under the due process clause.\footnote{52} The Court struck down state debtor-relief laws and similar state statutes purporting to alter the terms of previously executed contracts,\footnote{53} as well as statutes that substantially eliminated the remedies available to enforce those terms.\footnote{54} The Court also understood the Clause to cover certain agreements between the state and private parties, even though embodied in statutes.\footnote{55} The Clause, by its terms as well as by its interpretation, however, only applied to legislative impairments. Judicial impairments of contractual rights were thus not violations of the Contracts Clause, consistent with the idea that private rights might be modified retroactively by judicial process.\footnote{56}

Also reprobated as beyond legislative power were statutes imposing new liabilities retroactively. The Ex Post Facto and Bill of Attainder clauses explicitly forbid retroactive penal impositions.\footnote{57} While these clauses as interpreted by the Court did not cover most instances of civil liability, Circuit Justice Story's formulation of forbidden retroactivity as a matter of general or New Hampshire law in \textit{Society for the Propagation of the Gospel v. Wheeler} was widely accepted; a retroactive law included one that "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."ootnote{58}

And as a matter of state or general common law, state

\footnote{52. See, e.g., United States v. Cent. Pac. R.R. Co., 118 U.S. 235, 240–41 (1886) (indicating that to construe a newer act to allow withholding of payments as to additional parts of the road would violate the railroad's constitutional rights, where the contract between the United States and the railroad had previously been interpreted by the Court to authorize the government to retain payment for services only as to the portions of the road that the government had aided in building); Twenty Per Cent. Cases, 87 U.S. (20 Wall.) 179, 187 (1873) (construing a congressional statute repealing a raise for government employees as not applying to services rendered before the repeal and noting that a state's attempt to reduce pay retroactively would violate the Contracts Clause); cf. Lynch v. United States, 292 U.S. 571, 579 & n.7 (1934) (disallowing abrogation of government insurance policies and citing authority); Choate v. Trapp, 224 U.S. 665, 678 (1912) (disallowing under the Fifth Amendment congressional repeal of a tax exemption on Indian lands).


\footnote{54. See, e.g., Bronson v. Kinsie, 42 U.S. (1 How.) 311, 319–20 (1843) (holding that twelve-month redemption period and requirement that judicial sales be for at least two-thirds of appraised value would violate the Contracts Clause if applied to pre-existing mortgages).


\footnote{56. The federal courts in diversity, however, frequently employed the general common law in declining to follow state precedents that impaired contractual obligations. See, e.g., Gelpcke v. Dubuque, 68 U.S. 175, 206 (1863) (holding, in a diversity case, that bonds invalidated by the state supreme court were indeed valid).

\footnote{57. U.S. CONST. art. I, § 9, para. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, para. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law . . . .").

\footnote{58. 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (discussing New Hampshire or general law); see also Troy, supra note 5, at 5 (discussing Story's formulation).}
Public Rights, Private Rights, & Retroactivity

Legislatures generally could not create rules of decision requiring people to pay money damages for acts that had been lawful when undertaken.\(^{59}\)

The Supreme Court had few occasions to apply this proposition as a matter of general constitutional law or due process during the nineteenth century, for legislatures rarely attempted to impose pure retroactive liabilities.\(^{60}\) In the early twentieth century, however, such occasions arose, and the Court struck down under the Contracts and Due Process Clauses state attempts to add to liabilities—for example, to require pension benefits for workers no longer employed.\(^{61}\)

B. Allowance of Retroactivity for Public Rights

1. Governmental Proprietary Rights

Matching some of the easy cases for prohibitions on the retroactive taking of private rights were the easy cases when public rights might be retroactively divested. The most obvious cases are where the government had proprietary rights that resembled the rights of individuals. For example, the state legislature

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\(^{59}\) See Falconer v. Campbell, 8 F. Cas. 963, 969 (C.C.D. Mich. 1840) (No. 4,620) (indicating as a matter of general constitutional law that state legislatures “can not, by legislation, create an obligation on a past transaction” or “subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility”); Coosa River Steamboat Co. v. Barclay & Henderson, 30 Ala. 120, 127 (1857) (“It is not within the power of legislation to create a cause of action out of an existing transaction, for which there was, at the time of its occurrence, no remedy.”); Coffin v. Rich, 45 Me. 507, 514–15 (1858) (“Legislatures... have no constitutional power to enact retrospective laws which... create personal liabilities... A statute making members of corporations personally liable for the corporate debts is clearly within this definition, and therefore can be held to operate prospectively only.”); Inhabitants of Medford v. Learned, 16 Mass. (15 Tyng) 215, 217 (1819) (construing a statute that made paupers liable to reimburse towns for money spent on their support to cover only future expenditures because “no legislator could have entertained the opinion, that a citizen, free of debt by the laws of the land, could be made a debtor merely by a legislative act, declaring him one”); see also Cooley, supra note 17, at 369 (agreeing that it is “quite beyond the power of legislation” to “create a new contract for the parties,” and that “he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment.”).

\(^{60}\) Cf. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 621–22 (1994) (“Perhaps the baldest kind of retroactive legislation would be a statute defining officially a primary duty, out of whole cloth, after the event, and providing sanctions for non-compliance with it... Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922), seems to come as close as any to furnishing an example of such a statute.”) The Court allowed validation or reinstatement of defective contractual liabilities. See infra Part III.A.

\(^{61}\) See, e.g., R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 348–50 (1935) (holding that Congress violated due process in imposing new pension obligations with respect to past service by employees); Detroit United Ry. v. Michigan, 242 U.S. 238, 253 (1916) (finding a Contracts Clause violation in providing that the streetcar’s contract to charge a single fare within the city would extend to newly annexed towns); see also Ga. Ry. & Power Co. v. Decatur, 262 U.S. 432, 440 (1922) (invalidating, to the extent the city had extended its borders, city’s attempt to hold the railroad to a maximum intercity fare); Forbes Pioneer Boat Line v. Bd. of Comm’rs of Everglades Drainage Dist., 258 U.S. 338, 340 (1922) (disallowing legislative attempt to validate illegal toll); cf. Hale, supra note 41, at 514–15 (discussing cases of extension of contractual liabilities). In addition, a few cases disallowed certain retroactive aspects of the estate and gift taxes, although earlier cases involving income taxes could have supported a retroactive application. See, e.g., Nichols v. Coolidge, 274 U.S. 531, 542–43 (1927) (disallowing application of estate tax to an inter vivos gift completed well before legislation and death).
could cancel an escheat to the state. It might allow a money judgment in its favor to be reopened, just as a private party might give up property rights or waive a res judicata defense.

2. Interests in Exercising Delegated Government Power

a. Public Versus Private Corporations. In addition to governmental proprietary rights, public rights included the interest in governing or exercising delegated governmental power. Conventional wisdom maintained that no one could have a private right of political power; the people to whom state legislatures granted such powers held them simply as “a public trust, to be executed not for the benefit or at the will of the trustee, but for the common weal.”

In keeping with this principle, legislatures could freely change the terms of legislatively granted charters to public—but not private—corporations.

For private corporations, the Contracts Clause had proved a robust source of protection from legislative attempts to change the terms of legislative acts of incorporation. In the foundational Dartmouth College case, the Court nullified the New Hampshire legislature’s attempt to substitute governmental officials and politically appointed trustees for the self-perpetuating board provided by the college’s original charter. Later cases similarly invalidated state legislation that attempted to tax business corporations to which state legislatures provided tax exemptions in their initial charters.

Charters for public corporations, however, were a different matter. When the state legislature chartered a municipality or county, neither the corporation itself...
nor its individual inhabitants acquired any vested right in the political powers that the state had delegated to it. Indeed, a major issue in *Dartmouth College* was whether the institution should be treated as a public corporation (as the New Hampshire Supreme Court held in refusing to protect the college’s charter against subsequent amendment by the state legislature) or a private one (as the federal Supreme Court held in deciding that once the charter issued, the legislature could not unilaterally alter it). It was widely acknowledged that later state laws could freely amend or even rescind municipal charters. By the same token, courts also upheld legislation retroactively declaring the meaning of such charters; although so-called “explanatory statutes” might be thought to “interfere[e] with the proper functions of the court,” where private rights were at stake, the meaning of a municipal charter “was a matter concerning the public, and was strictly within the province of the legislature.”

**b. Unexpired Terms of Public Office.** Related to the issue of whether corporations exercised public or private rights was the question of whether statutory offices ought to be treated as establishing private rights in the officeholder. Officers made arguments that appointments to offices gave rise to enforceable contracts, similar to private corporate charters. The Court, however, eventually accommodated claims to public office to municipal charters, extending the

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68. See *John F. Dillon, Commentaries on the Law of Municipal Corporations* 448–55 (5th ed. 1911) (discussing what is now referred to as “Dillon’s Rule,” that municipalities are public corporations with only such powers as state constitutions and legislatures accord them).


70. See *Dartmouth College*, 17 U.S. (4 Wheat.) at 650.

71. See *Cooley*, supra note 17, at 191–92 (citing cases); see also, e.g., *Coles v. County of Madison*, 1 Ill. 154, 160 (1826) (“Those [corporations] that are of a private nature, and not general to the whole community, the legislature can not interfere with. The grant of incorporation is a contract. But all public incorporations which are established as a part of the police of the state, are subject to legislative control, and may be changed . . . or repealed, to suit the ever varying exigencies of the state. Counties are corporation[s] of this character, and are, consequently, subject to legislative control.”); E.B. Schultz, *The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations*, 36 Mich. L. Rev. 385, 396–99, 408 (1938) (exploring whether municipalities could assert proprietary rights against states and generally concluding they could not); Comment, *The Continuing Validity of the Contract Clause of the Federal Constitution*, 40 S. Cal. L. Rev. 576, 579 (1967) (noting the early development of the rule that laws as to the administration of government were not protected contractual relations for purposes of the Contract Clause).


73. *Hawkins v. Commonwealth*, 76 Pa. 15, 18 (1873). Eminent domain powers delegated to private corporations similarly fell into the public rights category. See *W. Union v. Louisville & Nashville R.R. Co.*., 258 U.S. 13, 20 (1922) (distinguishing legislative attempts to change result in cases that affected private rights, from legislation “directed to that which is conceived to concern the public interests; and exertion of power in the public interest of which the companies are the instruments or agents”); *Flanigan v. Sierra County*, 196 U.S. 553, 560 (1906) (holding that a county’s right to tax had been extinguished by state’s repeal of the particular county taxing power, such that under state law the county could not collect tax that had accrued under prior law); *Balt. & Susquehanna R.R. Co. v. Nesbit*, 51 U.S. (10 How.) 395, 402 (1851) (approving, on direct review, the state legislature’s grant of a new trial in a condemnation case brought by railroad).
principle that a private party could not obtain private rights in delegated political power.

The Court thus rejected governmental officers' claims that new, lower statutory pay rates and shorter terms of office could only go into effect after the officers had served out their unexpired terms under the statutes in effect when they took office. In Butler v. Pennsylvania, for example, the Court rebuffed a Contracts Clause claim of canal commissioners whose pay rates were statutorily reduced several months into their one-year term.\(^{74}\) The Court distinguished between contracts that "fixed private rights," on the one hand, and, on the other, engagements undertaken by the state "for the benefit of all . . . to be varied or discontinued as the public good shall require" such as "the selection of public officers, who are nothing more than agents for the effectuating of such public purposes."\(^{75}\) Such a result was duplicated in many state courts; as a Missouri Court stated:

In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. Not so in the American States; [offices created by the legislature] are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact.\(^{76}\)

\(^{74}\) 51 U.S. (10 How.) 402, 418 (1852) (rejecting, on direct review, Contracts Clause claim both as to reducing pay and shortening term of office); cf. Taylor v. Beckham, 178 U.S. 548, 577 (1900) (holding, on direct review, that no right protected by the Constitution had been denied when the persons who won the popular vote for governor and lieutenant governor were displaced by others in an election contest decided by the state legislature, noting that constitutional provisions providing for offices could be changed). The Court in Taylor stated, "[G]enerally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or contract right." \(^{75}\) Id. (footnote collecting cases omitted); see also United States v. Fisher, 109 U.S. 143, 145 (1883) (holding that the salary of a judge of Wyoming territory could be reduced); United States v. Guthrie, 58 U.S. (17 How.) 284, 301 (1854) (holding that the Circuit Court of the District of Columbia had no power to compel the Secretary of the Treasury to pay a Minnesota territory judge for the remainder of his unexpired four-year term, after he was replaced at the President's instance); Ex part Hennen, 38 U.S. (13 Pet.) 230, 259-60 (1839) (allowing a federal district judge as appointing officer to remove clerk of court and noting that ancient usages did not govern tenure of office).

\(^{75}\) Butler, 51 U.S. (10 How.) at 416. Designated pay for past services would not be subject to such retroactive divestiture. See id. at 416 (noting that that the "promised compensation for services actually performed and accepted, during the continuation of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity"); cf. Taylor, 178 U.S. at 577 ("Nor are salary and emoluments property, secured by contract, but compensation for services actually rendered."); The Twenty Per Cent. Cases, 87 U.S. (20 Wall.) 179, 187 (1873) (interpreting congressional statute as not meaning to reduce previously granted additional pay that was not yet collected, noting that there would be a Contracts Clause violation were a state to attempt to reduce pay retroactively); United States v. Heth, 7 U.S. (3 Cranch) 399, 412–14 (1806) (holding that customs collectors could receive their commissions at prior rate for goods that were bonded before Congress lowered the rate).

\(^{76}\) Citations to cases and treatises are collected in State ex rel. Attorney Gen. v. Davis, 44 Mo. 129, 131 (1869); see also Jones, Purvis & Co. v. Hobbos, 63 Tenn. 113, 123–24 (1874) (holding that the legislature could abolish the office of the public printer before the end of the two year appointment);
That unexpired terms of public office were subject to legislative divestiture may seem inconsistent with the discussion of vested rights in *Marbury v. Madison.* There, Marshall indicated that Marbury’s appointment as a justice of the peace for the District of Columbia had become effective when his commission was signed by President Adams and sealed by Secretary of State Marshall. Emphasizing that the statute authorizing this appointment called for each justice of the peace “to continue in office five years,” Marshall concluded that President Jefferson had no power to revoke the appointment and that Secretary of State Madison had a legal duty to deliver Marbury’s commission. Marshall expressed this conclusion by saying that Marbury’s appointment had “vested in the officer legal rights, which are protected by the laws of his country.”

It is possible that Marshall saw assuming a public office as creating rights that could not be divested even by the legislature, similar to the Court’s treatment of private corporate charters. But *Marbury* perhaps illustrates some of the problems with use of the term vested. Statutory entitlements might be vested in the weak sense as against executive intrusion while not being vested in the strong sense against legislative termination; it is not clear in which sense Marshall meant the right was vested. The issue of whether Marbury’s office was legislatively defeasible was not presented because the statute under which Marbury was appointed remained in force. Later cases would make clear that statutes creating public offices would not give rise to enforceable claims for continuation in office after their repeal.

3. Governmental Enforcement Interests

Public rights not only included the rights of public corporations and officers to exercise governmental powers, but also the governmental interest in enforcing the penal and regulatory law. The ex post facto and bill of attainder clauses prohibit the state and federal governments from making acts criminal that were not at the time the defendant committed them, and these prohibitions are seen as central separation of powers safeguards. Thus, the private right of liberty was protected from retroactive legislative divestiture. But the public’s interest in criminal enforcement could be retroactively divested without damage to separation of powers. Indeed, absent explicit savings clauses, the Court held that if the legislature repealed a criminal law or forfeiture, pending and potential prosecutions for acts that occurred under the repealed

Conner v. Mayor of New York, 5 N.Y. 285, 301 (1851) (upholding legislative provision of salary in place of collected fees during the term of the elected county clerk).

77. 5 U.S. (1 Cranch) 137 (1803).
78. See id. at 162.
80. *Marbury,* 5 U.S. (1 Cranch) at 162.
81. See id. at 154–55 (discussing the appointment under the particular statute).
82. See supra note 74. In *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 105–06 (1938), the Court recognized that a tenured teacher had Contracts-Clause-protected rights acquired under a later-repealed state tenure law, quoting Indiana decisions that distinguished employees from public officers. *Id.* at 106.
83. See *U.S. Const.* art. 1, §§ 9–10.
law abated. Statutory law expressed a malleable concept of the public interest, and the repeal indicated that the public interest was no longer served by enforcement; lenity was also thereby accorded.

This retroactive abatement extended even to cases where individuals, such as commissioned officers and crews with claims of prize, had monetary interests in the recovery of fines and forfeitures. The Court held that the legislative repeal of such fines and forfeitures ended attempts at collection, whether by private or public actors. In *Maryland v. Baltimore & Ohio Railroad*, for example, a county on direct review complained that state legislation impaired contractual obligations by repealing *pendente lite* legislation requiring the railroad to build certain lines and attaching penalties for noncompliance. The Court easily rejected the Contracts Clause claim, not only because a political subdivision could not complain of the legislature’s taking away its supposed rights, but also because the legislature “was dealing altogether with matters of public concern and interfered with no private right; for neither the commissioners, nor the county, nor any one of its citizens, had acquired any separate and private interest which could be maintained in a court of justice.”

The 1801 case of *Schooner Peggy*, often cited as supporting a presumption of retroactive statutory application, was itself a public rights case. The circuit court had condemned the *Peggy* after a commissioned United States ship lawfully seized it as an armed French vessel. As a result of the seizure and judgment of condemnation, the officers and crew of the American vessel became entitled to half the proceeds of the forfeiture. While the case was pending in the Supreme Court, however, the September 30, 1800 treaty with France, providing that ships should be restored if “not definitively condemned,” went into effect. The officers and crew claimed that they remained entitled to the prize. It was in this context that Marshall stated that courts “must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered.”

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84. See, e.g., Yeaton v. United States, 9 U.S. (5 Cranch) 281, 283 (1809) (noting that it was well settled that, absent a special provision, a sentence could not be entered under a repealed law).
85. See, e.g., Norris v. Crocker, 54 U.S. (13 How.) 429, 437 (1851) (holding that no judgment can be rendered on suit for a penalty after the repeal of a penalty, whether it goes in whole or part to an individual). But cf. Steamship Co. v. Joliffe, 69 U.S. (2 Wall.) 450 (1865), discussed infra text accompanying notes 122–24.
86. 44 U.S. (3 How.) 534, 549 (1845).
87. Id.
88. Id. at 550.
90. The circuit court noted that the *Peggy* was a trading vessel primarily armed for self-defense. *Schooner Peggy*, 5 U.S. at 105–06.
91. Id. at 103–05 (statement of the case).
92. Id. at 107.
93. Id. at 104.
94. Id. at 110.
It is true that the opinion seemed to endorse broader retroactivity. Marshall expressly observed that “if... a law intervenes” while a case is pending on appeal “and positively changes the rule which governs,” then “the law must be obeyed” unless it is unconstitutional. He also suggested that it could be constitutional for federal treaties to sacrifice “individual rights, acquired by war,” even when those rights would otherwise have been considered “vested” in private citizens. And while indicating that “in mere private cases between individuals” a court would struggle against a retroactive construction, he did not categorically rule out retroactivity even for such cases.

Modern judges have read this language broadly, as licensing the retroactive operation of both federal treaties and federal statutes that retroactively impair core private rights. Yet while the treaty at issue in Schooner Peggy unquestionably operated retroactively (in that it changed the legal consequences of past acts), the rights that it extinguished were only statutory entitlements to share in a forfeiture and not core private rights. That fact was central to early understandings of what Chief Justice Marshall had held. Antebellum courts freely cited Schooner Peggy for the propositions that “the repeal of the law imposing a penalty is itself a remission”; that the same principle could also bar appellate courts from affirming a judgment for the penalty; and that repeal could eliminate the entire penalty even if prior law had called for the penalty to be divided between the public and individual informers.

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95. Id.
96. Id. (adding that “if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation”). But cf. Prevost v. Greneaux, 60 U.S. (19 How.) 1, 7 (1856) (indicating that property rights could vest in a way that insulated them even from the treaty power).
97. 5 U.S. (1 Cranch) at 110; see also Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236 (1796) (indicating that treaties might divest private rights).
98. See infra notes 225–31; Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 281–83 (1969) (citing Schooner Peggy for a presumption of statutory retroactivity as to cases still pending on appeal, such that notice requirements for eviction would be required although not in place at the time the housing authority began the eviction proceedings); see also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226–27 (1995) (invalidating the application of a statute reopening final judgments, and no longer using a presumption favoring retroactivity, but rather citing Schooner Peggy for the proposition that it was the obligation of the Court on appellate review to give effect to Congress’s latest enactment if it is explicitly retroactive); cf. Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711, 715 (1974) (citing Schooner Peggy for a presumption of applying current law to cases on appeal, thus supporting award of statutory attorney’s fees against a school board).
99. See Schooner Rachel v. United States, 10 U.S. (6 Cranch) 329, 330 (1810) (making a general order of restitution of condemned property after the statute on which the lower court’s decision was based was repealed); Yeaton v. United States, 9 U.S. (5 Cranch) 281, 283 (1809) (refusing to enforce penalty after law which created the forfeiture had expired).
100. Maryland v. Balt. & Ohio R.R. Co., 44 U.S. (3 How.) 534, 552 (1845) (citing Schooner Peggy for the proposition that “[t]he repeal of the law imposing the penalty, is of itself a remission”).
101. Wall v. State, 18 Tex. 652, 697 (1857) (acknowledging the principle although noting that a savings clause was present in this case); see also Keller v. State, 12 Md. 322, 326 (1858) (reversing conviction where the applicable act was repealed pending appeal).
102. See Allen v. Farrow, 18 S.C.L. (2 Bail.) 584, 587 (1832) (“[T]he statute, under which the penalty is sought to be recovered, must be of force at the rendition of the judgment . . . .”). But cf. Little v. Watson, 32 Me. 214, 224–25 (1850) (reading Schooner Peggy as allowing sacrifice of private rights by treaty).
The retroactive abatement of penalties also applied to cases in which the penalty was attached to a private loss by the claimant. For example, in holding that a slave owner’s action for a penalty under a fugitive slave law abated on repeal of the penalty, the Court stated, “[a]s the plaintiff’s right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject matter. And in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law.”

State court decisions similarly allowed for retroactive repeal of the supracompensatory penalties attached to core private rights, as distinguished from actions for the private rights themselves.

In addition to claims for statutory penalties, public nuisance was an action to vindicate the public’s rights—for example, to unobstructed use of highways and waterways. Similar to some actions for penalties, private parties might be allowed to pursue such actions. The private party, however, would only be entitled to bring a public nuisance action if he or she could show an individualized injury distinct from that of the general public. Although injunctive relief that a party might seek alleviated a particularized harm, the rights retained their public nature such as to make them easily defeasible by legislation. Thus in the Wheeling Bridge case, the State of Pennsylvania, having won a decree in the United States Supreme Court enjoining the bridge on a theory that the state had suffered a private injury allowing it to bring a public nuisance claim, lost the benefit of its decree when Congress subsequently authorized the bridge.

Although Pennsylvania claimed that Congress could not “annul the judgment of the court already rendered,” the Court accepted this proposition only as applied to “adjudication upon the private rights of the parties,” such that the award of costs could not be altered. The prospective decree, however, was not based on a private right, but had rested upon “the public right of the free navigation of the river” and had given Pennsylvania no private rights that were protected

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104. See, e.g., Oriental Bank v. Freeze, 18 Me. 109, 112 (1841) (agreeing that “when a party, by the statute provisions, becomes entitled to recover a judgment in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount, which may be so recovered, does not become vested till after judgment”); Bay City & E. Saginaw R.R. Co. v. Austin, 21 Mich. 390, 410–11 (1870) (holding that a tort plaintiff’s statutory right to recover double damages was a penalty “dictated by legislative views of public policy” and not “a private personal claim... inextinguishable by repeal before judgment,” and concluding that the legislature could therefore eliminate it at any point before judgment, although “[b]eyond all doubt [the plaintiff’s] right to a judgment for single damages was secure against legislative attack”); Cooley, supra note 17, at 362 n.2 (“[T]hat which is given as a penalty may be taken away at any time before recovery of judgment.”); see also Webster v. Cooper, 55 U.S. (14 How.) 488, 503 (1852) (indicating that the line of Maine decisions that includes Oriental Bank reflect “sound principles of constitutional jurisprudence”).
105. See Woolhandler & Nelson, supra note 26, at 701 & n.50 (citing authorities).
106. Id.
107. Id. at 702.
108. Id.
110. Id. at 431.
against federal legislative impairment.\textsuperscript{111}

4. Statutorily Created Interests More Generally

As was evident in the area of statutory penalties, the Court saw statutory interests as temporary policy that had much weaker claims against retroactive divestiture than core private rights.\textsuperscript{112} This attitude extended even to statutory claims not involving penalties.\textsuperscript{113} For example, in \textit{Louisiana ex rel. Folsom v. Mayor of New Orleans},\textsuperscript{114} the Court rejected Contract Clause and Due Process challenges to a new limitation on municipal taxing authority that would make it harder to collect prior damages judgments under a state law that had made municipalities liable for property damages due to riot.\textsuperscript{115} The Court reasoned that the law imposing municipal liability for riot was "simply a measure of legislative policy, in no respect resting upon contract, and subject, like all other measures of policy, to any change the legislature may see fit to make, either in the extent of liability or in the means of its enforcement."\textsuperscript{116} Justice Bradley in concurrence distinguished the judgment on the purely positive law entitlement from "an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured."\textsuperscript{117} The latter was founded on "an absolute right" that the legislature could not take away without violating the Fourteenth Amendment.\textsuperscript{118} Similarly, in the \textit{Chinese Exclusion Case},\textsuperscript{119} Justice

\begin{footnotes}

\textsuperscript{111} \textit{Id.} While injunctive decrees as to private rights are also subject to modification for changes in the law, it is doubtful that the Court would have readily approved legislation that attempted to reverse a judgment as to a private nuisance.

\textsuperscript{112} \textit{See, e.g.}, \textit{Maryland v. Balt. & Ohio R.R.}, \textit{44 U.S. (3 How.)} 534, 549 (1845) (stating that "if the policy which at the time induced" the state legislature to prescribe a railroad's route and provide a penalty for the railroad's noncompliance "was afterward discovered to be a mistaken one, and likely to prove highly injurious to the residents of the state, it had unquestionably the power to change its policy"); \textit{see also} Raymond S. Smethurst & Reuben S. Haslam, "\textit{Portal-to-Portal} and Other Retroactive Liabilities", \textit{15 GEO. WASH. L. REV.} 131, 163--68 (1947) (arguing that statutory rights were not vested rights until reduced to final judgments).

\textsuperscript{113} \textit{Cf.} \textit{Hart & Sacks}, \textit{supra} note 60, at 628 (noting the general rule at common law that repeal of a statute extinguished all claims arising under it, and that the rule was unqualified as to public rights of action, but that general savings statutes have undone this result).

\textsuperscript{114} \textit{109 U.S. 285} (1883).

\textsuperscript{115} \textit{Id.} at 288--89.

\textsuperscript{116} \textit{Id.} at 288; \textit{see also id.} at 291 (Bradley, J., concurring) ("[R]emedies against municipal bodies for damages caused by mobs, or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease.").

\textsuperscript{117} \textit{Id.} at 291.

\textsuperscript{118} \textit{Id.} As indicated by the reference to tort, the distinction was not limited to one of contractual versus noncontractual obligations, but encompassed natural versus positive ones. Thus, in an opinion rejecting a challenge to retroactive validation of contracts by femes coverts, the Court referred to dower as "not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away [prior to the death of the husband]." Randall v. Kreiger, \textit{90 U.S. (23 Wall.)} 137, 148 (1874) (upholding legislation that validated a deed of land that had not fully complied with the formalities for a feme covert).

\textsuperscript{119} \textit{130 U.S. 581} (1889).
\end{footnotes}
Field upheld congressional abrogation of Chinese immigrants' previous statutory rights of return to the United States, and distinguished "[b]etween property rights not affected by the termination or abrogation of a treaty, and expectations or benefits from the continuance of existing legislation."\(^{120}\)

At times, the Court seemed to treat individualized statutory causes of action as not subject to retroactive legislative abrogation, but generally did so by finding the right was not purely statutory but was founded in contract or other natural obligation such as liability for tortious damage to person or property. In *Steamship Co. v. Joliffe*,\(^{121}\) for example, the Court allowed a boat pilot to collect a half-fee for the improper refusal of his services even after repeal of the statute under which he claimed.\(^{122}\) The Court, however, reasoned that the half-fee was in consideration of services tendered, and a quasi-contract, rather than a penalty.\(^{123}\) Three of the seven justices hearing the case, however, dissented, arguing that the right did not grow out of contract, but was purely statutory, and therefore abated upon repeal.\(^{124}\)

### III. SEEMING EXCEPTIONS

Thus far, the cases for allowing statutory retroactivity fall on the public rights side of the public/private divide. The legislature having more control over governmental property, delegations of governmental power, enforcement actions, and statutory rights, it might more easily retroactively take away such rights as opposed to more traditional common law interests. That said, one must explain cases in which the Court appeared to allow the retroactive divestiture of private rights. One major category is cases allowing legislative instatement or reinstatement of defective contractual liability, and another is cases allowing state legislative grant of new trials. Ultimately, analysis of these two categories will, in different ways, reinforce the protections for private rights, and the understanding that the legislature could not retroactively divest them. A third category is taxation, which this Article previously has included as a public right; it is discussed in this Part due to its creating a retroactive liability.

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120. *Id.* at 610; cf. *Chew Heong v. United States*, 112 U.S. 536, 541 (1884) (interpreting prior statute that restricted reentry to those with certificates as not intended to apply retroactively and quoting language from the Chinese treaty that recognized "the inherent and inalienable right of man to change his home and allegiance").

121. 69 U.S. (2 Wall.) 450 (1864).

122. *Id.* at 456–58; cf. *Ettor v. City of Tacoma*, 228 U.S. 148, 155–56 (1913) (relying, on direct review, on *Joliffe* to invalidate a law retroactively taking away liability of a railroad to abutting landowners for consequential damages to property). In *Ettor*, the Court acknowledged that there was not a common law right to such consequential damages, but reasoned that the statutory claim was for injury to property. *Id.* at 157–58; cf. *Crane v. Hahlo*, 258 U.S. 142, 146–47 (1922) (holding that narrowing the right to judicial review on the purely statutory claims of damages for a change in grade did not violate due process).


124. *Id.* at 464 (Miller, J., dissenting) (noting that only four of the seven Justices hearing the case concurred in the majority opinion and arguing that rights not growing out of contract, but that exist solely by statute, generally abate when the statute is repealed).
A. REINSTATING DEFECTIVE CONTRACTUAL LIABILITIES

Cases allowing for the legislative instatement or reinstatement of defective contractual rights tend to follow a similar pattern. A creditor and debtor entered into a voluntary contract for valuable consideration. But a statute provided a defense to payment on the contract—for example, a statute of limitations might bar collection on the debt. When the statute was repealed, however, the Court had no trouble with reviving the debt that would have been barred. This was because the common law private right of contract in a sense trumped the more aleatory statutory impediment to recovery.

 Ware v. Hylton was an early and typical case in which the Court allowed legislative recognition of defective contractual liabilities. Virginia legislation of 1777 had confiscated British debts, and provided debtors with absolution by paying such claims into the state treasury with devalued local currency. A debtor who had availed himself of this procedure claimed a defense when a British creditor sued him after peace was restored. The 1783 treaty provided that creditors could meet “no lawful impediment to the recovery” of debt, and the Court held the treaty could retroactively divest the debtor of his private right of non-liability acquired under Virginia law prior to the treaty.

Language in Ware indicates that sacrifice of both public and private property may be necessary to obtain peace, and Ware has been used to support broad political branch power to impair private rights in the foreign affairs context. But Ware restored rights to the British creditor that the Contract Clause would have protected had the Constitution been in force. Confiscation of debts during war, said Justice Paterson, was “unjust and impolitic .... The gain is, at most, temporary, and inconsiderable; whereas the injury is certain and incalculable, and the ignominy great and lasting.” The construction of the treaty “for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign.” Thus the treaty’s retroactivity itself undid retroactivity effected by the prior Virginia law.

A similar theme of validating contracts emerged in other cases where the Court arguably allowed the legislature retroactively to divest private rights. Retroactive legislation might confirm a sale or debt for valid consideration that

125. 3 U.S. (3 Dall.) 199 (1796).
126. Id. at 220–21 (opinion of Chase, J.).
127. Id. at 221.
129. Ware, 3 U.S. (3 Dall.) at 239, 250 (opinions of Chase, J. and Paterson, J.).
130. Id. at 236 (opinion of Chase, J.) (“Surely, the sacrificing public, or private, property, to obtain peace cannot be the cases in which a treaty would be void.”).
131. Cf. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 39 (1985) (stating that Chase’s opinion “established that Congress could do by treaty what it might lack power to do by legislation and that it could disturb vested rights retroactively” (footnote omitted)).
132. Ware, 3 U.S. (3 Dall.) at 254 (opinion of Paterson, J.).
133. Id. at 256.
a party was attempting to weasel out of due to a failure to comply with a statutory formality. For example, in Wilkinson v. Leland, an out-of-state executrix, without opening the requisite Rhode Island probate proceeding, sold her deceased husband's Rhode Island land for valuable consideration to pay debts of the practically insolvent estate. Pursuant to the sales contract, she subsequently obtained state legislation confirming the transfer. Her daughter's heirs, however, argued that the property had vested in the daughter (as devisee at the time of her father's death), that it had remained so vested due to the sale's being void for lack of a probate proceeding at the time of sale, and that legislation could not divest a previously vested property right. The Court did not disagree with any of these propositions, but reasoned that the legislation was "not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties." Cases allowing retroactive validation of arguably ultra vires corporate and municipal bonds manifested a similar desire to enforce contracts "by clothing them with forms which are essential to their enforcement, but not to their existence." The municipal bond cases also reflected state legislative control

134. 27 U.S. (2 Pet.) 627 (1829).
135. id. at 629.
136. id. at 654–55.
137. id. at 648.
138. id. at 661. The Court was referring, at least in part, to effectuating the estate's creditors' rights. The Court also reasoned that the vesting of the estate in the heirs was subject to estate debts, which the land had been used to pay. Id. at 658–59; see also Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110–11 (1834) (finding, on direct review, no Contracts Clause violation in Pennsylvania legislation's validation of a prior transfer by a feme covert that had not been according to legislatively required forms); cf. Randall v. Kreiger, 90 U.S. (23 Wall.) 137, 147–48 (1874) (allowing for legislative confirmation of a contract selling land for substantial consideration owned by the husband of a feme covert, noting that the territorial legislature had judicial powers and also that the act confirmed rather than impaired a contract); Satterlee v. Matthews, 27 U.S. (2 Pet.) 380, 412 (1829) (finding, on direct review, no constitutional infirmity with state legislation that changed the result in a land claim by recognizing a landlord/tenant relationship that the state supreme court had previously held did not subsist and noting that a law giving validity to a void contract does not impair a contract). Watson had the added problem that the legislation was subsequent to the opposing party's winning two prior ejectment actions. Watson, 33 U.S. (8 Pet.) at 89–91; see also McFaddin v. Evans-Snider-Buel Co., 185 U.S. 505, 508 (1902) (finding no Fifth Amendment infirmity with a law that validated a purchase-money mortgage on cattle such as to trump the claims of a judgment creditor who had knowledge of the mortgage); Mechanics' & Traders' Bank v. Union Bank, 89 U.S. (22 Wall.) 276, 296, 298 (1874) (holding that the provisional court that rendered judgment on a debt was not unconstitutionally established and that any want of jurisdiction had been validated by later legislation). See generally Kainen, supra note 11, at 133–34 (discussing allowance of retroactive recognition of remedies for pre-existing equitable rights, pursuant to a right/remedy dichotomy that may seem odd to modern observers).
139. Read v. City of Plattsmouth, 107 U.S. 568, 575 (1883) (holding that legislation validating city bonds that had exceeded city's borrowing power for which consideration was paid did not impose a burden on the city without consent or consideration); see also Bd. of County Comm'rs v. Lewis, 133 U.S. 198, 202 (1890) (holding that bonds issued by fraudulently organized county were valid because county was subsequently recognized by legislature); Bolles v. Town of Brimfield, 120 U.S. 759, 762–63 (1887) (holding that subsequent legislation ratified municipal corporation's bond issuance); Anderson v. Twp. of Santa Anna, 116 U.S. 356, 364 (1886) (holding that subsequent legislation validated township election authorizing subscription of railroad stock); County of Otoe v. Baldwin, 111 U.S. 1, 11, 15
over public corporations, discussed above.\textsuperscript{140}

It might be argued that in recognizing contractual rights where none formerly existed the legislatures were effectively retroactively creating a contractual liability.\textsuperscript{141} The Court, however, saw enforcement of contracts—even those whose imperfections left them outside of Contract Clause protections—as on a higher scale than statutes imposing formalities or that otherwise provided defenses to liability for voluntary agreements. Unlike such changeable positive-law requirements, the Court viewed contractual rights as having prepolitical underpinnings.\textsuperscript{142} Thus, in enforcing a legislatively-validated contract that arguably was beyond the powers authorized in the corporate charter when entered, the Court noted:

\begin{quote}
The objection that a contract is illegal, and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The courts, from public considerations, refuse their aid to enforce obligations which contravene the laws or policy of the State. When the Legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection.\textsuperscript{143}
\end{quote}

The above-quoted principle found further expression in cases allowing extensions of statutes of limitations for debts and actions on judgments.\textsuperscript{144} In an 1885

\textsuperscript{140} See, e.g., New Orleans v. Clark, 95 U.S. 644, 652–55 (1877) (agreeing that a good argument existed that bonds had been invalid prior to the validating legislation, but finding no problem with the state’s requiring a municipality to pay a just demand based on valid consideration).

\textsuperscript{141} See, e.g., Hale, supra note 41, at 514 (observing that enlarging the obligation of contract would deprive a person of property as surely as impairing the obligation, and noting that this was Justice Johnson’s position in Satterlee v. Mathewson, 27 U.S. (2 Pet.) 380 (1829)); Nash, supra note 50, at 176–77 (arguing against retroactive legislative recognition of rights that effectively took away complete defenses).

\textsuperscript{142} Cf. Forbes Pioneer Boat Line v. Bd. of Comm’rs of Everglades Drainage Dist., 258 U.S. 338, 340 (1922) (Holmes, J.) (disallowing statute retroactively to approve illegal tolls and noting that no one would claim that a “claim for goods sold could be abolished without compensation”); Randall v. Kreiger, 90 U.S. (23 Wall.) 137, 148 (1875) (in upholding validity of legislative validation of contracts without formalities for females coverts, noting that dower was not a natural right but wholly given by law and could legislatively be taken away prior to death of husband).


\textsuperscript{144} See, e.g., Sturges v. Carter, 114 U.S. 511, 518–19 (1885) (upholding the application to time before enactment legislation extending treasurers’ ability to collect on false returns for four years, and noting that penalties had not been made retroactive); see also Kainen, supra note 11, at 89 (noting a right/remedy distinction in retroactivity); Slawson, supra note 39, at 242–43 (discussing twentieth century statute of limitations cases); cf. Ogden v. Blackledge, 6 U.S. (2 Cranch) 272, 275 (argument of counsel), 279 (1804) (holding that where the plaintiff British creditor’s action had not lapsed at the time
case reviewing a state judgment and finding no constitutional infirmity in statutory revival of an expired debt claim, the Court noted:

We certainly do not understand that a right to defeat a just debt by the statute of limitation is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation... founded in public needs and public policy, are arbitrary enactments by the law-making power... [N]o right is destroyed when the law restores a remedy which had been lost.145

As to the claim of a property right in the bar of the statute, the Court stated, "It is no natural right. It is the creation of conventional law."146 And when a state legislature repealed a usury law providing that a violating creditor could recover no interest, the Court allowed recovery of interest at the legal rate on a debt incurred while the old law was in force, reasoning:

[T]he right of the defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of the obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by subsequent statute, be taken away.147

the 1715 seven-year statute of limitations was repealed, it was not barred, and ignoring legislation after the action was filed to the effect that the 1715 legislation was not repealed).

146. Id.; see also id. at 623 (distinguishing acquisition by adverse possession). Statutes of limitations that revived expired purely statutory claims, however, might be seen as creating new liabilities and thus forbidden. See William Danzer & Co. v. Gulf & Ship Island R.R. Co., 268 U.S. 633, 637 (1925) (holding that Fifth Amendment due process would be violated by allowing revival of an Interstate Commerce Commission damages claim through retroactive application of a longer limitations period); cf. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314–16 (1945) (Jackson, J.) (allowing revival of an expired cause of action on ground that it was not purely statutory, although suggesting non-formalistic due process limits on retroactivity).

147. Ewell v. Deggs, 108 U.S. 143, 151 (1883). The court also reasoned that avoiding all interest was a penal provision and therefore presumptively not to be enforced once the law was repealed. See id. at 150. In keeping with its preference for enforcing contracts, the Court was more wary of shortening limitations periods on contract actions than lengthening them. It thus tended to interpret statutes that reduced limitations periods to give a claimant the amount of time under the new limitation starting from its passage; alternatively, a new limitation period could apply if a reasonable period were still left. See Mitchell v. Clark, 110 U.S. 633, 643 (1884) (noting that even in cases where the Contracts Clause was applicable, it was all right to shorten the statute of limitations if there were still a reasonable time in which to bring suit); Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 599, 600 (1873) (holding that two-year limitation on bringing an action on a judgment should, as to a previously-entered judgment, start from the enactment of the new statute and indicating that shortening a limitation to immediately bar an action would be unconstitutional); cf. Murray v. Gibson, 56 U.S. (15 How.) 421, 423–24 (1854) (apparently following state cases, holding that three year limitation on putting in evidence of an out of state judgment was not applicable to a prior judgment, even though apparently over three years had passed even after the shorter limitation went into effect); Smead, supra note 11, at 796 (indicating that courts would require at least a reasonable time to file actions previously accrued under a new limitation).
B. LEGISLATIVE GRANTS OF NEW TRIALS

Cases in which the court allowed state legislatures to grant new trials are perhaps the most egregious example of the Court's allowing state legislatures retroactively to divest private rights. The Court on direct review of state court decisions refused to invalidate such practices beginning with its 1798 decision in Calder v. Bull. The Connecticut legislature, as was true of some colonial assemblies and other early state legislatures, exercised judicial as well as legislative powers, and passed statutes purporting to set aside particular judgments and order new trials. On direct review, the Court held that the Constitution's Ex Post Facto Clause only referred to criminal legislation and did not forbid the Connecticut legislature's grant of a new trial that resulted in undoing a prior judgment decreeing property to the Calders. In subsequent cases on review from the state courts, the Court continued to tolerate this practice, including in a case as late as 1889.

148. 3 U.S. (3 Dall.) 386 (1798). See generally Robert G. Natelson, Statutory Retroactivity: The Founders' View, 39 Idaho L. Rev. 489, 518–22, 529 (2002) (arguing that the framers generally saw the constitutional prohibitions on ex post facto laws as addressing only criminal statutes but concluding that it is appropriate to analyze statutory retroactivity under due process using fairly strict scrutiny).

149. See, e.g., Calder, 3 U.S. (3 Dall.) at 395 (Paterson, J.) (noting that Connecticut's General Court traditionally exercised legislative, executive, and judicial power). It did not appear that the grant of a new trial in this case was pursuant to specific time limits or other regularized procedures. Cf id. (noting that the Connecticut legislature had used the power to grant new trials twice since 1762).

150. See, e.g., Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 414 (1829) (distinguishing direct review cases from circuit court cases, such as Vanhorn's Lessee v. Dorance, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 1795), and Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156), where decisions against retroactivity were founded on state constitutions).

151. See Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110–11 (1834) (holding there was no federal constitutional violation when legislation, by validating a prior transfer lacking formalities required for a feme covert, undid effects of prior ejectment proceedings by which rival family members had obtained land); Satterlee, 27 U.S. (2 Pet.) at 412–13 (refusing to invalidate state legislation that effectively changed result in a pending dispute over land by recognizing a landlord/tenant relationship continued as to Connecticut titles that the Pennsylvania Supreme Court had said did not subsist; stating that divestiture of vested rights is not forbidden by Constitution unless the action partakes of a impairment of contracts or an ex post facto law); see also Balt. & Susquehanna R.R. Co. v. Nesbit, 51 U.S. (10 How.) 395, 401–02 (1851) (holding that state legislature's grant of new trial in a condemnation proceeding did not violate federal constitutional provisions); cf. id. at 399 (reasoning that the railroad company, not having tendered the amount under the prior judgment and free to decline the property before tender, acquired no vested contractual rights).

152. See Freeland v. Williams, 131 U.S. 405, 414–21 (1889) (rejecting, on direct review, Contract Clause and due process challenges to a West Virginia constitutional provision that property not be seized or sold to satisfy judgments for torts committed as belligerent); see also id. at 412–13 (noting that the West Virginia court had modified the provision so as to take effect through equity actions). The United States Supreme Court noted that it and probably all state courts had recognized belligerent rights as a valid defense. Id. at 419. Harlan in dissent argued that the right to sue for illegal conversion of private property was not a mere statutory right and could not be taken away by the state. Id. at 423 (Harlan, J., dissenting); see also Fleming v. Rhodes, 331 U.S. 100, 106–07 (1947) (holding that the reenactment of price controls could be made retroactive to cover a one-month hiatus before the reenactment so as to allow injunctions against eviction judgments obtained in the interim); Stephens v. Cherokee Nation, 174 U.S. 446, 477–78 (1899) (approving the addition of Supreme Court review to a judgment that was otherwise final); Garrison v. City of New York, 80 U.S. (1874)
In their own backward way, however, these cases reinforce the coincidence of separation of powers and due process concerns. The Court in some of these cases emphasized that the states were following the English practice of allowing the legislature to exercise some judicial powers and that courts could reopen judgments on various equitable grounds. What is more, the occasions to review such practices became increasingly rare as the century progressed, for state courts widely repudiated such practices on separation of powers grounds. As to the federal courts, the founders saw the practice as inconsistent with the Constitution's separation of federal powers, and the Court apparently agreed.

(approving the addition of a means for the city to seek review of a commission's condemnation award and indicating that it was appropriate to vacate the prior decision for irregularity and that the state's power in condemnation did not end until compensation was made).

153. See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 395–96 (1798) (Paterson, J.) (relying on the fact that the Connecticut legislature had traditionally exercised executive, legislative and judicial power); cf. Balt. & Susquehanna R.R. Co., 51 U.S. (10 How.) at 400–01 (indicating that states had general powers to enact retroactive laws and state separation of powers was a question for states).

154. See, e.g., Merrill v. Sherburne, 1 N.H. 199, 217 (1818) (concluding that a statute depriving a private litigant of rights vested by a past judgment constituted a forbidden attempt by the legislature to exercise “judicial” power); Taylor v. Place, 4 R.I. 324, 332 (1856) (agreeing that “to open judgments or decrees obtained in a court, and to allow the substitution of a new... sworn answer... for the purpose and with the effect of reversing the relative condition of the parties to a pending suit, dependent upon the effect of that answer, is an exercise of judicial power”); Bates v. Kimball, 2 D. Chip. 77 (Vt. 1824), 1824 WL 1336, at **6, **12 (asking whether the legislature has “power to vacate or annul an existing judgment between party and party,” and answering this question in the negative); see also De Chastellux v. Fairchild, 15 Pa. 18, 20–21 (1850) (bringing Pennsylvania law into accord with these decisions by overruling a contrary precedent); cf. J. ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 74–78 (describing the Connecticut general assembly's exercise of equity jurisdiction “in controversies of a private and adversary nature,” and condemning this practice as “manifestly unconstitutional”). But cf. Davis v. Ballard, 24 Ky. (1 J.J. Marsh.) 563, 573 (1829) (reaching a different conclusion, albeit under extraordinary circumstances, on the ground that “the judgment of a court can not, with propriety, be denominated the property of any individual”).

155. See, e.g., THE FEDERALIST No. 81 (Alexander Hamilton) (arguing generally against making the Supreme Court a branch of the legislature).

156. The Justices initially refused to approve legislative schemes that allowed for executive or legislative review of court-determined pensions or claims against the government. See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (not reaching this issue), discussed in CURRIS, supra note 131, at 6–7 (noting that five Supreme Court justices sitting on circuit had joined in decisions holding that a scheme giving the Secretary of War review of judicial decisions as to pensions was unconstitutional); cf. United States v. Jones, 119 U.S. 477, 478–79 (1886) (noting that the Article III courts had reviewed Court of Claims judgments only after the repeal of the provision that money not be paid out of the Treasury until the Secretary of the Treasury had estimated an appropriation for it); United States v. Klein, 80 U.S. (13 Wall.) 128, 144, 147–48 (1871) (holding that rights to restoration of property of those pardoned could not be taken away without interfering with judicial and executive powers, and in response to an argument that the right to sue the government was a “matter of favor,” stating that this was “not entirely accurate” given that it was the duty of the government to fulfill its obligations (in this case to return seized property)); Massingill v. Downes, 48 U.S. (7 How.) 760, 768 (1849) (holding inapplicable to a prior federal judgment a state law requiring recordation to establish judgment liens on property outside of the county, noting, “Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment.”). See generally FALON, supra note 63, at 102–03 (discussing the history of the Court of Claims).
C. TAXATION AND PUBLIC RIGHTS

Taxation was an area in which the court allowed moderate retroactive statutory liabilities, particularly in the latter part of the nineteenth century. In *Stockdale v. Insurance Companies*, the Court approved a mid-1870 statute by which Congress attempted to assure that a prior ambiguous statute would be construed to extend the income tax through 1870 rather than only 1869 as certain Justices had interpreted the statute in an earlier decision. The Court held that Congress could impose at least modestly retroactive income taxes. And in a few cases in which municipalities had lacked proper authorization for their initial assessments for street improvements on adjoining lands, the Court found no due process problems with the localities’ later reimposing the assessments on the same properties. Based on such cases as well as more numerous twentieth century precedents, commentators have treated taxation as within a special category for retroactivity.

Taxation is a public right in the sense that the government is the party who owns the claim for the tax, but obviously taxation imposes a liability on private parties. Treating taxation as a public right for purposes of retroactivity thus differs from instances of public rights discussed above in which the legislature allowably divested a party of his interest in enforcing a public right. This same anomaly of treating taxation as a public right also occurred in administrative law cases allowing aspects of tax contests largely to escape review in the Article III or regular court system; the Court famously indicated in *Murray’s Lessee*

157. See, e.g., Troy, supra note 5, at 33 (agreeing with Hochman that there existed a tradition of greater latitude for retroactivity in taxation); Hochman, supra note 15, at 706–07 (indicating that taxation cases had to be treated as a special category); Smead, supra note 11, at 796 & nn.65–66 (discussing taxation and noting cases (primarily twentieth century) that allowed and disallowed retroactive taxation).

158. 87 U.S. (20 Wall.) 323 (1873).

159. In *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 637 (1895), the Court invalidated a congressional income tax as a direct tax that had to be apportioned by state population. See U.S. CONST. art. I, § 2, cl. 3; id. § 9, cl. 4.

160. See Stockdale, 97 U.S. at 331; cf. Locke v. New Orleans, 71 U.S. (2 Wall.) 172, 173 (1866) (stating, on direct review, that a state law that “simply authorized a tax according to a previous assessment” by municipalities was not retroactive and did not deprive anyone of vested rights, and even if it were retroactive, did not violate the Ex Post Facto prohibition).

161. See Spencer v. Merchant, 125 U.S. 345, 352, 354–55 (1888) (approving, on direct review, legislative assessment for street improvements for benefits conferred after prior scheme of assessment had been invalidated by state court for lack of sufficient notice); Mattingly v. District of Columbia, 97 U.S. 687, 691–92 (1878) (treating dismissively a claim that street and sewer improvements in the District of Columbia had not been authorized, and also noting that later legislation referred to the improvements); cf. Seattle v. Kelleher, 195 U.S. 351, 359 (1904) (“A special assessment may be levied upon an executed consideration, that is to say, for a public work already done.”), quoted in Wagner v. Baltimore, 239 U.S. 207, 216 (1915).


v. Hoboken Land and Improvement Company that tax collection was a public right in which Article III courts need not necessarily be involved. 164

In the contexts of both legislative retroactivity and the finality of agency action, the characterization of taxation as a public right entailed greater legislative latitude and a reduced judicial role than for other monetary liabilities. This treatment of taxation as a public right in both these contexts may be explained in part by the absence of a fault principle in imposing tax liabilities, as well as by perceived fiscal necessities.

The Court throughout the nineteenth century guarded against governmental redistribution—that is, transfers of wealth from A to B without fault—and the courts, not the legislatures, were the institutions to make individualized determinations of fault; prohibitions on legislatively imposed retroactive liabilities reinforced this principle. But taxation necessarily took part of one’s previously acquired property based on value or income; its initial exaction thus did not so insistently require courts, nor did retroactivity present so looming a problem as in fault-based exactions. 165 The Court eventually distinguished taxation from “an attempt [of a legislature] retroactively to create a liability in relation to a transaction as to which no liability had previously attached.” 166

Even today when the notion of fault is less central to imposing nontax liabilities, taxes paradigmatically differ from other liabilities in that they do not seek to discourage behavior, 167 and this may provide a continuing justification

164. 59 U.S. (18 How.) 272, 283–85 (1855) (rejecting an Article III challenge to an executive distress warrant against the property of an embezzling customs official).

165. See Welch v. Henry, 305 U.S. 134, 146 (1938) (“Taxation is neither a penalty imposed on the taxpayer nor a liability he assumes by contract.”), discussed in Troy, supra note 5, at 34–35; Seattle v. Kelleher, 195 U.S. 351, 359 (1904) (allowing assessments for public works completed in the past and noting, “The principles of taxation are not those of contract.”); Hochman, supra note 15, at 706 (noting that taxation was not “a penalty or contractual obligation”); see also infra note 210 (discussing defect in administration cases).

166. Graham v. Goodcell, 282 U.S. 409, 426 (1931) (approving a statute extending a limitations period for governmental collection of taxes for cases in which the collector had delayed collection due to the taxpayers’ having filed claims in abatement); see also Forbes Pioneer Boat Line, 258 U.S. at 339 (upholding a due process challenge to a retroactive attempt to validate illegal canal lock tolls, and distinguishing tax cases by noting that “[a] tax may be imposed in respect to past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time[,] the enactment would have been within its power” (citations omitted)).

167. Pigovian taxes are meant to correct negative externalities by discouraging behavior and thus tend to blend into regulation. The instances of mild retroactive taxation that the Court allowed did not involve such sin taxes.

One will frequently be able to distinguish a tax from a disguised nontax liability by referencing the tax base. One can distinguish a tax based on last year’s income, for example, from a “tax” based on the number of workers who worked for a company twenty years ago (and for whom Congress wishes to exact health care costs). Cf. E. Enters. v. Aptel, 524 U.S. 498, 515, 538 (1998) (prohibiting the application of a statute that assigned liability for health care premiums to employer for whom employees had worked the longest prior to 1978). In any event, the Court has allowed only fairly mild tax retroactivity.

For a discussion of government attempts to discourage or control the proceeds of nonprofit conversions to for-profit status by taxation, see John D. Colombo, A Proposal for an Exit Tax on Nonprofit Conversion Transactions, 23 J. Corp. L. 779 (1998).
for mild retroactivity in taxation. The general concept that retroactive liability is unfair because a party no longer has the opportunity to conform his behavior is of less concern in the area of taxation, where conforming behavior to avoid taxation is undesirable. Where tax laws seek to encourage behavior—for example, certain investments—they generally do not seek to modify behavior to such an extent as to encourage transactions lacking nontax economic substance. Thus most modern retroactive taxation is aimed at limiting behavior without underlying nontax economic justification or behavior that occurs while tax laws are pending.

If the absence of a fault principle seemed central to the allowance of retroactive taxation, the fiscal necessity rationale was especially manifest in agency adjudication cases. The Court in Murray's Lessee noted that “there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement” to be made through the courts. The desire to avoid undue judicialization resurfaced in cases allowing administrative finality in routine matters of valuation and assessment in customs collection, and local property taxation.


170. See id. at 231 (defining tax shelters as “a tax-motivated transaction . . . [as to which] one cannot offer an even moderately persuasive story that Congress intended to encourage this particular class of transactions”).

171. See id.


173. See, e.g., Hilton v. Merritt, 110 U.S. 97, 104-06 (1884) (holding that the appraisal by the collectors was not subject to jury review and citing cases); Dickinson, supra note 163, at 274 (noting that the courts in customs cases would review erroneous classification but not valuation); cf. Bartlett v. Kane, 57 U.S. (16 How.) 263, 272 (1853) (“The interposition of the courts, in the appraisement of importations, would involve the collection of the revenue in inextricable confusion.”). See generally Ann Woolhandler, Judicial Deference to Administrative Action—A Revisionist History, 43 Admin. L. Rev. 197, 221–24 (1991) (discussing customs cases).

174. See, e.g., Londoner v. City of Denver, 210 U.S. 373, 380, 385–86 (1908) (finding no constitutional infirmity with excluding the courts from hearing assessment issues assigned to the board of equalization, but holding that due process required notice and an opportunity to be heard before the board).

175. See Kelly v. Pittsburgh, 104 U.S. 78, 80 (1881) (refusing to review an allegation of gross over-assessment as a due process violation after noting that judiciary need not be involved in tax collection and that there was no allegation of improper assessment methods); cf. King v. Mullins, 171 U.S. 404, 429, 436 (1898) (approving a state scheme of land forfeiture for nonpayment of taxes that
The Court, however, often found allegations of less routine forms of illegality—such as use of improper valuation methods as opposed to mere erroneous valuation—as warranting full judicial review. And facial challenges to taxation—as opposed to mere claims that erroneous valuations denied due process—were squarely the province of the judiciary.

This uneasy division between the realms of administrative finality and judicial review reflected the dual nature of taxation as a public right over which the legislature had great control and a private right requiring judicial process. This double identity would be an impetus to the Court's eventual prescriptions of rudimentary process in the executive branch for areas of valuation that did not necessarily require full-blown judicial oversight. This two-sided nature was perhaps also reflected in the Court's indications that only mild retroactivity would be tolerated in taxation.

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The prior discussion illustrates that the nineteenth century Court's retroactivity decisions may be roughly organized along the lines of public rights versus private rights. A legislature retroactively could take away a plaintiff's affirmative public rights claim, including purely statutory claims. The legislature also might impose retroactive liabilities, but these liabilities were based on subsisting common-law rights, particularly contractual rights—thus allowing for correction of defects to voluntary agreements, and revival of contractual actions that had expired under statutes of limitations. In the taxation area, although not based on a subsisting obligation, mild retroactivity was also allowed.

**IV. Supposed Demise of the Older Approach During the New Deal**

As noted at the outset of this Article, the modern Court professes to allow retroactivity in economic legislation when Congress explicitly so provides. This gave the owner a reasonable opportunity to redeem the property and noting, "Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law, as applied to proceedings strictly judicial in their nature, apply equally to proceedings for the collection of public revenue by taxation.

176. See, e.g., Converse v. Burgess, 59 U.S. (18 How.) 413, 415-17 (1855) (affirming a judgment for importers for overpaid duties when appraisers had failed to comply with statutory procedures for inspecting one in ten of the imported goods).

177. See, e.g., Poindexter v. Greenhow, 114 U.S. 270, 302-03, 306 (1884) (directing a state court to make a tort remedy available to a taxpayer whose goods were seized upon tender of state coupons despite legislative repeal of the action); Deshler v. Dodge, 57 U.S. (16 How.) 622 (1853) (allowing a writ of replevin to contest an unconstitutional state law in spite of the remedy's apparent unavailability under state law); id. at 633 (Catron, J., dissenting) (objecting to the majority's allowing a federal-court action against the collector despite requirement of state law that a writ of replevin should not issue without an affidavit that the property had not been taken for any tax). Both of these cases involved taxation or collection of taxes in violation of the Contracts Clause. See generally Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 YALE L.J. 77, 132-38 (1997) (discussing remedies for customs and illegal taxation).

178. See, e.g., Londoner, 210 U.S. at 385-86 (in requiring enhanced notice and opportunity to be heard, noting that the landowner did not have the right to object in the courts to the assessment).

turn of events is said to have arisen from the supposed lessons of the New Deal. In Usery v. Turner Elkhorn Mining Co., for example, in allowing retroactive Black Lung liabilities, Justice Brennan suggested that hostility to retroactive legislation represented part of a discarded approach to economic legislation.\textsuperscript{180} Retroactive and prospective regulation both adjust "the burdens and benefits of economic life" and thus should be presumptively constitutional.\textsuperscript{181} Similarly Professor Eskridge stated that "[i]n the modern administrative state, with its ubiquitous regulation, the traditional presumption against retroactive legislation ... is not normatively supportable. Historically it rests on a common law conception of vested property and contract rights which did not survive the New Deal."\textsuperscript{182} And even Justice Scalia—unenthusiastic about retroactivity but perhaps even less enthusiastic about substantive due process—has indicated a willingness to allow retroactive liabilities if Congress is sufficiently clear, thus also tending to lump together prospective and retrospective economic legislation.\textsuperscript{183}

Other than a general hostility to anything that smacks of substantive due process, one might ask what specifically about the New Deal would lead to allowance of retroactive legislation. To explore this issue, this Article first addresses the decline at high levels of generality of the categories that supported the older retroactivity jurisprudence. Second, this Article addresses the application of such thinking to cases in the 1930s and 40s within the range of retroactivity proper. The cases allowing legislative retroactivity, while important, may suggest that modern decisions overemphasize the New Deal support for statutory retroactivity.

A. DECLINE OF THE GENERAL CATEGORIES

It is true that during the New Deal, the categories that supported the older jurisprudence were somewhat undermined—public/private, judicial/legislative,

\textsuperscript{180} 428 U.S. 1, 15–16 (1976).
\textsuperscript{181} Id. at 15; see also Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 646 (1993) (approving a retroactive pension withdrawal liability and stating that "legislation readjusting rights and burdens is not unlawful solely because it upsets settled expectations ... even though the effect of the legislation is to impose a new duty or liability based on past acts") (quoting Turner Elkhorn, 428 U.S. at 16); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986) (holding that a retroactive pension withdrawal liability is not an uncompensated taking in violation of the Fifth Amendment).
\textsuperscript{182} Eskridge, supra note 11, at 269; see also Fisch, supra note 5, at 1063–64 (indicating that the nonretroactivity principle declined with the New Deal erosion of substantive due process); Charles Tiefer, Did Eastern Enterprises Send Enterprise Responsibility South?, 51 ALA. L. REV. 1305, 1305 (2000) ("Since the end of the Lochner era, constitutional tolerance of policy-based civil retroactivity has been the governing law."); cf. Daniel E. Troy, Toward a Definition and Critique of Retroactivity, 51 ALA. L. REV. 1329, 1350 (2000) (criticizing these developments and noting that, "[a]t least since the New Deal era, most ... constraints on [legislative retroactivity, such as] the Contract, Takings, and Due Process Clauses ... have been narrowly construed").
\textsuperscript{183} See Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (Scalia, J., concurring) (agreeing that there is a presumption of legislative prospectivity that may be overcome by clear statement).
and retroactive/prospective. First, the Progressive and New Deal eras saw attacks on the distinction between public and private rights—as Professor Horwitz has described. Robert Hale argued that private rights allowed private coercion of those lacking sufficient resources to survive and that such private rights were enforced by governmental coercion. Morris Cohen similarly reasoned that private property was a form of sovereignty over others, in that the owner could command the services of those not economically independent. By 1940, according to Professor Horwitz, the public/private line was in dispute, as law came to be “understood as a delegation of coercive public power to individuals, [that] could only be justified by public policies.”

The implication that even traditional private rights were positively derived contributed to undermining the distinctions between the legislative and judicial branches because both could be seen as engaged in lawmaking. Lochner critics commonly argued that the courts effectively were legislating a laissez-faire regime in the guise of protecting private rights. And once one sees the judiciary as making law retroactively, it might not seem particularly worse for the legislature to do so. The rise of administrative agencies with their mixed functions and uncertain location in tripartite government further undermined strict notions of separation of functions and powers.

What is more, Professor Kainen has written persuasively that the Lochner era helped to make irrelevant the idea of non-retroactivity. He focuses on literature that did not so much attack the retroactivity/prospectivity divide as the notion

187. See Horwitz, supra note 184, at 1426.
188. See Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”); see also New State Ice Co. v. Liebmann, 285 U.S. 262, 300 (1932) (Brandeis, J., dissenting) (criticizing the Court’s striking down the state restrictions on competition in the manufacture and sale of ice); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting) (voicing a similar criticism of the Court’s striking down the state limitations on the maximum weight of bread as “an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review”).
189. There were some articles from the period that focused on retroactivity. See Bryant Smith, Retroactive Laws and Vested Rights, 5 TEX. L. REV. 231, 232–36, 247 (1927) (noting problems with the idea of retroactivity and numerous contradictions in the case law; and concluding that courts might be advised openly to base their decisions on policy and justice where there was no precedent, although also suggesting that there might be some categories that might be teased out); Comment, The Variable Quality of a Vested Right, 34 YALE L.J. 303, 307 (1925) (attacking vested rights notion as “less legal than political and sociological,” and noting that private property had been effectively taken in both the retroactive curative acts cases as well as in police power cases); see also Ray H. Greenblatt, Judicial Limitations on Retroactive Legislation, 54 NW. U. L. REV. 540, 554 (1956) (arguing that retroactivity problems should proceed like other due process cases, balancing the private and governmental interests).
of vested rights. He suggests that the changing concept of property from vested rights to any legal interest of value made it impossible to delineate interests that should receive special protection. This notion in turn suggested that all economic legislation affecting any legal interest should be subject to the same substantive due process analysis.

B. RETROACTIVITY DECISIONS

1. Debtor Moratoria

If one follows the decline of these categories—public/private, legislative/judicial, and retroactive/prospective—to logical extremes, one might conclude that retroactive legislation is a fine idea; the New Deal Court, however, was not so extreme. The principal manifestation of the Court’s greater liberality toward retroactivity proper was its approval of debtor moratoria. Such approval

Well-known works by Benjamin Wright and Robert Hale on the Contracts Clause were fairly tame. Benjamin Fletcher Wright, Jr., The Contract Clause of the Constitution 258–59 (1938) (discussing the need “to reconcile the respective spheres of individual and social interests”); Hale, supra note 41, at 891–92 (arguing that debt moratoria, while impairing contracts, helped to preserve the property of the debtor from forced sale).

When the Court struck down the Railroad Pension Act on Commerce Clause and retroactivity grounds in Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935), the critiques of the case primarily focused on the Commerce Clause grounds. Id. at 375–84 (Hughes, J., dissenting in part) (criticizing the Commerce Clause reasoning of the Court). Hughes agreed with the majority that the inclusion of workers who had left service within one year prior to the act who might never be reemployed was arbitrary and beyond congressional power, id. at 389, although he believed that pensions based on employees’ past service were constitutional, id. at 391. See also Thomas Reed Powell, Commerce, Pensions, and Codes, 49 Harv. L. Rev. 1, 26 (1935) (criticizing the Commerce Clause reasoning of the Alton court); cf. Constitutional Law—The Railroad Retirement Act—Interstate Commerce—Due Process, 33 Mich. L. Rev. 1214, 1218, 1220–22 (1935) (arguing that pensions based on past years of service were reasonable but that the statute should mitigate initial costs to railroads, and also criticizing the Court’s commerce clause reasoning). See generally Barry Cushman, The Hughes Court and Constitutional Consultation, 1998 J. Sup. Ct. Hist. vol. I, 79, 104 n.96 (collecting authorities that criticized Alton).

In addition, some criticized the cases in which the Court disallowed retroactive taxes; the Court, in any event, quickly backtracked. See Frederick A. Ballard, Retroactive Federal Taxation, 48 Harv. L. Rev. 592, 619 (1935) (considering arguments against retroactive taxation as largely dead and suggesting that while retroactive laws may be generally unjust, “the intricacy of modern taxing acts and practical problems of their administration often make it impossible to segregate effectively interests originating in the future”).

190. Kainen discusses attacks on the notion of vestedness, expectancies, and the right/remedy distinction in the early twentieth century. Kainen, supra note 11, at 113–14. He notes that the “unimportance of retroactivity in modern economic rights protection . . . flows from the collapse of the logic of vesting.” Id. at 119.

191. Id. at 113–14, 126–27, 130.

192. Id. at 89, 119 (indicating that the Lochner and New Deal era recognition that prospective regulation affected the value of existing property undermined the distinctions between retrospective and prospective regulation).

193. This is not to understate the significance of this retrenchment as to the Contract Clause. See Hart & Sacks, supra note 60, at 624 (noting that if even contracts are subject to legislation in the public interest, the same would follow for property rights and other anticipated advantages). See generally Laurence H. Tribe, American Constitutional Law 619 (2d ed. 1988) (noting that the
began with the 1934 decision in *Home Building & Loan Association v. Blaisdell,* in which the Court allowed an extension of a state’s redemption period on foreclosed property that older Contracts Clause jurisprudence would have reprobated; the Court adverted to the “necessity of finding ground for a rational compromise between individual rights and public welfare.” The Court in *Blaisdell* and its early progeny emphasized emergency conditions and the limited period of moratoria as allowing some impairment of private interests. Relying upon such reasoning, the Court, with the agreement of Brandeis and Cardozo, continued to strike down debtor relief statutes not tailored to addressing emergency conditions.

Contracts Clause had been relatively dormant during the *Lochner* era, with due process doing much of the work.)


195. *Blaisdell,* 290 U.S. at 433–34 (noting that *Barnitz v. Beverly,* 163 U.S. 118 (1896), did not allow creating and applying rights of redemption as to existing contracts, but that the measure at issue in *Barnitz* was less qualified than that at issue in *Blaisdell*).

196. *Id.* at 442. Robert Hale’s later article on the Contract Clause used similar reasoning. *See generally Hale, supra note 41,* at 891–92 (suggesting that contractual rights too might have to give way to the public interest and that debtors’ interests in property might be protected by foreclosure moratoria).

197. *See Wright,* supra note 65, at 248 (“A number of recent decisions indicate that the Court is unwilling to carry the *Blaisdell* doctrine as far as many persons expected. Not all statutes for the purpose of aiding distressed debtors but those only which carefully safeguard the interests of creditors appear likely to receive the Court’s approval.”).

198. *See Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 591–92, 601–02 (1935) (Brandeis, J.) (striking down unanimously under the Fifth Amendment an application of bankruptcy provisions for the sale of foreclosed property to the bankrupt at appraised value, or alternatively, for a five year delay of foreclosure upon payment of a court-determined rent), *discussed in Comment, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause,* 125 U. PENN. L. REV. 167, 186 (1976); *see also Lynch v. United States,* 292 U.S. 571, 579 (1934) (Brandeis, J.) (striking down unanimously under due process congressional abrogation of War Risk Insurance policies, notably in the same year as the Court decided *Blaisdell*); *Hart & Sacks,* supra note 60, at 625 (characterizing *Lynch* as “the leading case on the power of Congress to impair contractual rights”).

199. *See W.B. Worthen Co. v. Kavanaugh,* 295 U.S. 56, 60–62 (1935) (Cardozo, J.) (unanimously invalidating provisions limiting foreclosures, reasoning that “[n]ot even changes of the remedy may be pressed so far as to cut down the security of a mortgage without modification or reason or in a spirit of oppression”).

200. *See Treigle v. Acme Homestead,* 297 U.S. 189, 197 (1936) (Butler, J.) (unanimously striking down a state law that modified savings and loans payment requirements to withdrawing shareholders, noting that “[t]hough the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive”); *W.B. Worthen Co. v. Thomas,* 292 U.S. 426, 431 (1934) (Hughes, C.J.) (unanimously striking down application of a new legislative exemption from garnishment for life insurance to a previously acquired judgment lien, noting the lack of any limitations on the exemption and the lack of reference to conditions apposite to emergency relief). The foregoing cases are discussed in Cushman, supra note 194, at 36–37. Cushman also discusses several later nonunani-
The 1945 decision in *East New York Savings Bank v. Hahn*, however, seemed to water down the requirements of limited time periods and tailoring to emergency conditions. Justice Frankfurter for the majority seemed to indicate that emergency conditions were not necessarily required for the legislature to continue a debt moratorium and that the Court should respect the wide domain of the legislature in determining the necessity of legislation even when private contracts were involved. While *Blaisdell* had talked of the need to compromise private rights and the public interest, *Hahn* seemed to question the concept of private rights. The "governing constitutional principle," Frankfurter stated, was that "when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State to safeguard the vital interests of its people . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."

Whether due to an assumption that the Court would defer to legislative judgments, or to debtor relief legislation fading as an issue with the end of

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*mous cases. See, e.g., Wood v. Lovett, 313 U.S. 362, 371-72 (1941) (invalidating the application of the repeal of a statute providing that irregularities in the tax proceedings would not invalidate title where title had been acquired under the now-repealed law).  
201. 326 U.S. 230, 233-34 (1945) (approving extension of mortgage moratorium law and giving wide discretion to the legislature to determine the necessity of such extensions); see also Veix v. Sixth Ward Ass'n, 310 U.S. 32, 38-39 (1940) (allowing permanent legislation changing the rights of building and loan shareholders to withdraw funds when they were insufficient, relying in part on the state's police power to regulate financial institutions). Veix indicates that the legislation's not being temporary was all right and notes that though "[t]he emergency of the depression may have caused the 1932 legislation . . . the weakness in the financial system brought to light by that emergency remains." *Id.* at 39. See also *Trave*, supra note 193, at 619 (observing that the protections of the clause lay practically forgotten for three decades, and citing *Hahn* for the proposition that the Court seemed to treat contracts as having no special constitutional status).  
202. *Hahn*, 326 U.S. at 234-35 (deferring to legislative judgment as to whether economic conditions justified extension of a foreclosure moratorium as to mortgages executed before July 1, 1932, and noting that "[j]ustification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933").  
203. *Id.* at 232 (internal quotations omitted); see also *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 514-15 (1942) (Frankfurter, J.) (approving the application of a state municipal bankruptcy statute to municipal bonds issued before such legislation, and rejecting "doctrinaire talk" about rights and remedies in favor of reasoning that the creditors were not necessarily worse off).  
204. See Comment, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. Pa. L. Rev. 167, 179 (1976) (noting in 1976 that "post-Blaisdell" commentators generally agree that the contract clause has largely been subsumed in the 'rational relation' test used in fourteenth amendment substantive due process decisions" (citations omitted)); Comment, *The Continuing Validity of the Contract Clause of the Federal Constitution*, supra note 71, at 589 (concluding that state, and to some extent federal, courts still utilized the Contracts Clause despite its supposed demise, although also concluding that it perhaps served to add greater specificity to due process); see also *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965) (citing *Hahn* for deference to the legislature in approving state's lessening of redemption period to five years on land bought from the state, as applied to land forfeited after the act, and that had remained unredeemed for five years thereafter).
the financial crisis and the increasing federal presence in bankruptcy, the Contracts Clause went largely into hibernation. When the Supreme Court, in the late 1970s, dusted off the Clause to invalidate state legislation diluting the security for public bonds, the dissenters argued that the New Deal allowed for such abrogation subject only to minimal scrutiny. The New Deal settlement, however, was perhaps less than clear.

2. Agency Action

The ambiguous separation of powers status of the administrative agencies seemed to encourage laxness regarding retroactivity during the New Deal era. In a line of cases beginning early in the century, the Court, without much reasoning, sometimes approved legislation validating administrative actions that, when taken, had exceeded delegated authority. Additionally, in the 1940


208. See United States Trust, 431 U.S. at 60–61 (Brennan, J., dissenting) (arguing that the Court's decision could signal a return to substantive due process); see also Allied Structural Steel v. Spannaus, 438 U.S. 234, 259 n.7 (1978) (Brennan, J., dissenting) (faulting the majority's Contracts Clause decision for its substantive due process roots).

209. See United States Trust, 431 U.S. at 27–28 (majority opinion) (noting that the only time the Court sustained an alteration to a municipal bond contract in the twentieth century was in Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942)); see also Cushman, supra note 189, at 36–37 (discussing moderate results in Contracts Clause cases following Blaisdell); Hochman, supra note 15, at 714 (noting that debtor relief legislation was more likely to be approved if temporary and during an emergency).

210. The effects of the greater complexities in government on retroactivity were already evident during the Lochner era, when there was a rise in "defect in administration" cases. See Slawson, supra note 39, at 238–42. Older cases had sometimes allowed the legislature to correct a defect in executive or judicial authority, particularly where a change in governmental form or transfer of jurisdiction left lacunae. See, e.g., Freeborn v. Smith, 69 U.S. (2 Wall.) 160 (1865) (allowing Congress retroactively to redress its lack of provision for Nevada's territorial cases pending before the Supreme Court when it admitted Nevada as a state). A series of cases coming out of the Civil War approved retroactive validation of executive acts, but the Court generally premised those holdings on determinations that the
decision *Paramino Lumber Company v. Marshall*, the Court rejected a challenge to a special bill reopening a final agency-adjudicated Longshoreman and Harborworkers’ award when the worker claimed his injuries turned out to be more substantial than at the time of the initial award.\(^{211}\) And in the 1944 case *Addison v. Holly Hill Fruit Products*, Justice Frankfurter wrote a decision approving retroactive rulemaking to fill a gap created by the partial judicial invalidation of an agency exemption from wage and hour legislation.\(^{212}\) The Court noted that equity courts had found ways to escape the “mechanical concepts of the common law,” and that “court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice.”\(^{213}\)

*Paramino Lumber* had few progeny and modern cases suggest that it is not good law.\(^{214}\) And while the agencies engaged in some retroactive rulemaking after *Holly Hill*,\(^{215}\) the Court in 1988 disapproved retroactive agency rulemak-

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executive had the power to perform the acts when done even without legislative validation. See *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87, 92, 96–97 (1874) (holding that the license fees imposed by the Treasury Department for trading with the insurrectionary states were within a prior congressional authorization, and were also subsequently confirmed by Congress); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (indicating that President’s authorization of blockade was likely legal even without its congressional validation); see also *Mechanics’ and Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 296–97 (1874) (disallowing an action to recover money paid under a judgment of the provost marshal, and noting that prior cases had held such courts were within the power of conquest).

The Court in the early twentieth century became increasingly cavalier in allowing retroactive legislative delegations. See, e.g., *Rafferty v. Smith, Bell & Co.*, 257 U.S. 226, 232 (1921) (approving congressional ratification of export taxes from the Philippines); *Tiaco v. Forbes*, 228 U.S. 549, 556 (1913) (approving retroactive legislation allowing deportation from the Philippines, and finding it “unnecessary to consider whether the Governor General had authority by virtue of his office ... or whether, if he had not, he had immunity from suit for such an official act done in good faith”); *id.* at 556–57 (adverting to inherent power of sovereigns to deport aliens, and to the fact that it is often done summarily); *United States v. Heinszen & Co.*, 206 U.S. 370, 383–86 (1907) (holding that Congress could retroactively validate a tariff that had been illegal because of the lack of Congressional or Presidential delegation to the Philippine Commission, reasoning that the United States had the power to authorize the tariff). See generally *Graham & Foster v. Goodcell*, 282 U.S. 409, 426 (1931) (collecting cases). In *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District*, 258 U.S. 338 (1922), however, Justice Holmes, speaking for a unanimous court, found a due process violation in the Florida legislature’s attempt to validate a toll retroactively and indicated that prior cases such as *Tiaco* had perhaps gone too far. *Id.* at 339–40. While retroactive legislative approval of executive actions can present serious legitimacy concerns, some such cases may be accounted for, as Holmes said, by the idea that “constitutional principles must leave some play to the joints of the machine.” *Id.* at 340.


213. *Id.* at 620–21 (quoting, in part, United States v. Morgan, 307 U.S. 183, 191 (1939)). The Court here also relied in part on the “defect in administration” cases. See *id.* at 621.

214. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 225 (1995) (disallowing congressional reinstatement of cases that federal courts had dismissed on statute of limitations grounds as final); cf *INS v. Chadha*, 462 U.S. 919, 964–66 (1983) (Powell, J., concurring) (reasoning that the defect with the legislative veto in the case was that Congress was exercising adjudicatory powers).

215. *See Richard J. Pierce, Jr., Administrative Law Treatise* § 6.7, 361–63 (2002) (noting that the decision in *Bowen v. Georgetown Univ. Hosp.* 488 U.S. 204 (1988), was a significant and undesirable change to prior practice). Pierce particularly points to the congressional practice of making significant economic and tax legislation retroactive to the date of first committee consideration to avoid the
ing lacking explicit congressional authority that had been allowed in *Holly Hill.* These developments may reflect the Court's efforts securely to locate agencies in the executive branch rather than between the branches, and its stiffening of requirements to separate functions within agencies.

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Thus, the New Deal legacy for retroactivity is mixed. To be sure, the foundations of the older retroactivity jurisprudence in the distinctions between public and private rights, between legislative and judicial lawmaking, and between retroactivity and prospectivity were weakened. On the other hand, decisions addressing retroactivity proper were not dramatic, and some eventually fell into disfavor.

V. THE MODERN ERA

A. LOSS OF THE OLDER APPROACH

If the New Deal era saw some decline in the categories that supported older retroactivity jurisprudence, it was the modern era that saw this reasoning pushed to logical yet not necessarily wholly desirable conclusions. In the 1970s, the Court began its own brand of retroactivity that had been virtually unknown in any earlier era: the imposition of retroactive non-tax statutory liabilities. This tolerance for retroactive liability (at least where Congress is explicit) has to a large degree continued into the present. Thus the Court has approved retroactive Black Lung benefits and retroactive pension withdrawal liabilities, and it has denied certiorari in numerous Superfund and related environmental cases.

Modern "transitions" scholarship, moreover, amplified and extended the critiques of the distinctions that underlay older retroactivity jurisprudence, particularly the distinction between retroactive and prospective regulation, as temporal distortion of transactions. *Id.* at 360; see also Luneberg, *supra* note 39, at 125, 154 (discussing pre-*Bowen* lower court cases and reporting results of his survey that there had been considerable retroactive regulation).

216. *See Bowen,* 488 U.S. at 208–09 (holding that an agency's retroactive rulemaking requires specific congressional authorization, but not mentioning *Holly Hill*). In his concurrence, Justice Scalia argued that *Holly Hill* was the only Supreme Court case that the government cited supporting the use of retroactive rulemaking. *Id.* at 222 (Scalia, J., concurring). But *cf.* Luneberg, *supra* note 39, at 123–25 (discussing ICC v. Am. Trucking Ass'n, 467 U.S. 354 (1984), as another case where the Court perhaps countenanced retroactive regulations).


218. *See Troy,* *supra* note 5, at 36 & nn.65–69 (noting caselaw allowing some retroactivity up to the 1960s, although also noting the Court's relative moderation pre-1969); Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights,* 1995 Pub. Int. L. Rev. 87, 88 (noting that the judicial activism of the Warren Court era undermined the basic distinctions between judicial and legislative acts, beginning with constitutional criminal procedure decisions not made fully retroactive, and later by ignoring the presumption favoring statutory prospectivity).

well as between judicial and legislative lawmaking. A line of modern law and
economics scholarship initiated by Michael Graetz and Louis Kaplow and
dilated upon by others sees prospective and retroactive regulatory changes as
essentially equal. Both may upset expectations, creating economic winners and
losers.\textsuperscript{220} Parties should be encouraged to anticipate legal change, whether
nominally retroactive or prospective.\textsuperscript{221}

This leveling of prospective and retroactive regulation implicitly or explicitly
sees legislative and judicial lawmaking as somewhat commensurate. Jill Fisch,
for example, has argued that "'[t]he antiquated fiction that judges find law and
legislators make it does not prove a sufficiently nuanced framework for determin-
ing rules about retroactivity."\textsuperscript{222}

While modern scholarship has amplified the attacks on the retroactive/
prospective and judicial/legislative lines, the traditional distinction between
public and private rights seems to have fallen so out of favor that no one
discusses it. But obscuring the old concepts of public rights and private rights\textsuperscript{223}
has contributed to the lenient modern attitude toward retroactivity, inter alia, by
leading to a mischaracterization of older cases as allowing generally for statu-
tory retroactivity when they could be read only as allowing such retroactivity as
to public rights.\textsuperscript{224} Manifesting the loss of the older concept of public rights was
the Court's modern misinterpretation of \textit{Schooner Peggy}.\textsuperscript{225} There, the Marshall
Court had allowed the retroactive deprivation of a forfeiture claim—a core
public right in the sense of a penalty for breach of a duty owed to the

\textsuperscript{220} See Michael J. Graetz, \textit{Retroactivity Revisited}, 98 Harv. L. Rev. 1820, 1822 (1985) (noting his
previous contribution that all changes in the law have an economic impact on the value of existing
assets); Kaplow, supra note 5, at 511 (arguing that all changes in governmental policy impose gains and
losses on those who prior to the change had taken action with long term consequences, and that risks of
legal change are not that different from risk in the market, such that it is better to rely on the market
than on transition relief); see also Fisch, supra note 5, at 1067 (claiming that the concept of
retroactivity is indeterminate and that we should understand retroactivity as a range of temporal options
rather than a binary construct); id. at 1079 ("[R]ecognizing that most new rules impose some
retroactive effects undermines the claim that retroactive legislation necessarily violates the Due Process
or Takings Clauses.").

\textsuperscript{221} See Levmore, supra note 6, at 1658 (describing scholarship as moving from a reliance
orientation hostile to retroactivity to an anticipation orientation that is more hospitable to retroactivity).

\textsuperscript{222} Fisch, supra note 5, at 1082; see also Pierce, supra note 215, at 360–61 (arguing in support of
retroactive rulemaking that courts and agencies that act judicially make retroactive rules); Kaplow,
supra note 5, at 515 (noting ubiquity of retroactivity in judicial decisions); Levmore, supra note 6, at
1672 (stating that there is little reason to expect that the dividing line between the legislature and court
will track instances where retroactivity ("aggressive change") is appropriate).

\textsuperscript{223} See supra text accompanying notes 184–87; cf. Richard B. Stewart & Cass R. Sunstein, \textit{Public
Programs and Private Rights}, 95 Harv. L. Rev. 1193, 1234 (1982) (describing a "public values"
account of the common law that sees the common law as "antithetical to a conception of public values
in which distributional decisions and other basic social choices are made through an open and
democratic process").

\textsuperscript{224} Cf. Kainen, supra note 11, at 112 (noting that the modern era lacks a logical framework for
analyzing retroactivity, whereas older cases used concepts of right/remedy, vested rights/expectancies,
and equitable rights/legal rights to determine when retroactivity was appropriate).

\textsuperscript{225} United States v. \textit{Schooner Peggy}, 5 U.S. (1 Cranch) 103 (1801).
government. The Warren Court, however, saw *Schooner Peggy* as justifying a general presumption\(^2\) (which the Court later rejected) that legislative enactments should apply retroactively, particularly if the Court saw the case as forwarding the public interest.\(^2\) And even Justice Scalia, while instrumental in reversing the presumption of statutory retroactivity that the Court read from *Schooner Peggy*, nevertheless interpreted that case as generally allowing Congress to impose retroactive legislation if it made itself sufficiently clear.\(^2\) Similarly, he read the *Portal to Portal Case*,\(^2\) which took away accrued overtime claims under the Fair Labor Standard Act, as precedent for retroactive deprivation of “vested rights”\(^2\)—if Congress was clear enough—when that case might be more narrowly read as allowing divestment of accrued statutory causes of action.\(^2\)

**B. THE SURVIVAL OF THE OLDER APPROACH**

For all the current talk of there being little difference between retroactive and prospective regulation, and of judicial and legislative functions as providing no clear dividing line, these core separation of powers categories continue to govern much of what legislatures and the courts do and to provide important restraints on government. Congress continues to legislate primarily prospectively, and the Court presumes that is what Congress intends to do.\(^2\) And,

\(^{226}\) Cf. Luneburg, *supra* note 39, at 115 (noting that the Court was inconsistent in its use of presumptions as to prospectivity and retroactivity between 1965 and 1984).


\(^{228}\) See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 226–27 (1995) (citing *Schooner Peggy* for the proposition that it was the Court’s obligation on appellate review to give effect to Congress’s latest enactment if the law is explicitly retroactive); Kaiser Aluminum v. Bonjorno, 494 U.S. 827, 845–47 (1990) (Scalia, J., concurring) (reading *Schooner Peggy* as calling for retroactivity only where Congress plainly says so); *cf.* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (Stevens, J.) (citing *Schooner Peggy* as a case of explicit statutory retroactivity).

\(^{229}\) Battaglia v. Gen. Motors Corp., 169 F.2d 254 (2d Cir. 1948).

\(^{230}\) See *Landgraf*, 511 U.S. at 292 (Scalia, J., concurring) (stating the majority’s vested rights approach was inconsistent with cases such as *Portal to Portal* that took away a substantive right entirely).

\(^{231}\) See Raymond S. Smethurst & Reuben S. Haslam, 15 GEO. WASH. L. REV. 131, 163–68 (1947) (arguing for this interpretation of *Portal to Portal*); see also *Merrill*, *supra* note 10, at 989 (arguing that the appropriate approach to determine the constitutionality of revoking a cause of action looks to the underlying interest that the cause of action vindicates); Timothy P. Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Company and the “Government-as-Monopolist” Theory of the Due Process Clause*, 31 EMORY L.J. 491, 510 (1982) (noting that one might say causes of action are only considered property derivative of the underlying interests).

\(^{232}\) See *Landgraf*, 511 U.S. at 265–73 (majority opinion). The Court has also reinforced requirements of judicial retrospectivity on direct review. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that new constitutional rules for the conduct of criminal prosecutions would apply to all
while the public/private rights distinction is not one generally discussed in either retroactivity case law or scholarship, this distinction continues to have some explanatory force for when retroactive legislation will be upheld or struck down. Older decisions employing the public/private distinction allowed legislatures retroactively to repeal penalties and statutory entitlements not yet reduced to final, unappealable judgments. They allowed prospective changes affecting injunctive judgments in public nuisance actions. They forbade significant retroactive changes in previously entered debt contracts, and generally repudiated retroactive statutory liabilities, with the exception of mild retroactivity for taxes.

Modern case law follows these divisions in a rough way. Some cases indicate that even an individualized statutory claim that is not reduced to judgment may be retroactively divested. In the Portal to Portal Case, for example, the Court allowed Congress to revoke statutory claims for overtime pay that had already accrued. More recently, a district court dismissed, pursuant to retroactive congressional legislation, an antitrust action challenging the Match Program which places medical graduates in residencies. Congress also may divest generalized statutory claims analogous to older public nuisance claims—such as those of statutory beneficiaries seeking greater agency enforcement against a regulated industry.

Contrasting with statutory claims, retroactive changes to private rights by way of changing contractual terms and imposing new liabilities sometimes evoke the Court’s disapproval. For example, the Court in United States v. Winstar found a due process violation when Congress tried to divest from savings and loans institutions favorable accounting rules that the regulators had promised to induce the banks to take over failing institutions. And in United

233. Battaglia, 169 F.2d at 259–62; cf. Smiley v. Citibank, 517 U.S. 735, 739–40, 747 (1996) (allowing Comptroller of Currency’s regulation that late charges on credit cards were part of the interest, thus preempting the plaintiffs’ pending state statutory and common law actions). The Court in rejecting a retroactivity objection in Smiley relied on the fact that the transaction occurred when there was no clear agency guidance. Id. at 744 n.3. See generally Richard Fallon, Of Legislative Courts, Administrative Agencies and Article III, 101 Harv. L. Rev. 915, 980–81 (1988) (arguing that, in spite of benefits and other statutes’ expressly precluding judicial review of issues of law, all questions of law should be subject to review); Daniel Meltzer, Congress, Courts and Constitutional Remedies, 86 Geo. L.J. 2537, 2573 (1998) (arguing that presence of a liberty interest does not always require broad judicial review, for example, in immigrant exclusion cases).


235. See Robertson v. Seattle Audubon Soc’y, 503 U.S. 429, 438 (1992) (concluding that Congress had merely amended the Northwest Timber Compromise and had not changed the results under the old law). These cases may generally be justified without regard to retroactivity analysis on the ground that injunctive relief, given its prospective nature, is generally subject to modification if there is a change in the law. See also Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 Mercer L. Rev. 697, 719–20 (1995) (discussing Seattle Audubon and noting the difficulties of distinguishing when Congress is telling the courts how to resolve specific litigation or is changing a generally applicable rule).

States Trust Co. v. New Jersey, the Court used heightened Contracts Clause scrutiny to invalidate a state law diluting the security for Port Authority bondholders. While sometimes allowing retroactive non-tax statutory liabilities, the Court’s refusal in Eastern Enterprises v. Apfel to uphold a retroactive imposition of liability on employers to provide lifetime health benefits for miners, shows continuing discomfort with out-of-pocket retroactive exactions.

Thus, it would not be a major adjustment were the Court to become somewhat more categorical in its application of retroactivity analysis, supplementing the general requirement of legislative prospectivity with disinterred notions of public and private rights. This approach would suggest lenient scrutiny for retroactive legislation affecting traditional public rights, including statutory entitlements, but strict scrutiny for retroactive legislation imposing on private rights (excepting taxation). The current presumption against statutory retroactivity could remain intact, but Congress could much more easily take away retroactively accrued statutory claims than accrued traditional private rights claims.

C. DEFENSE OF THE OLDER CATEGORIES

In recommending a return to an older style of retroactivity jurisprudence, this Article perhaps must undertake to defend the categories that supported it—that is, the retroactive/prospective, judicial/legislative, and public/private distinctions. This Article, however, will not undertake an elaborate defense of the prospective/retrospective distinction as mapped onto the legislative/judicial divisions, for others have already done so. First, some scholars recognize that

639–42 (1985) (refusing to apply newer, looser regulations as to use of federal funds to relieve the state of its duty to repay funds, reasoning, inter alia, that grants were in the nature of contracts); John Cibinic, Jr., Retroactive Legislation and Regulation of Federal Government Contracts, 51 ALA. L. REV. 963, passim (2000) (arguing that the federal government should be held more strictly to its contracts); Tiefer, supra note 182, at 1305–07 (noting that the Court finds retroactivity more palatable in a tort than contract-like setting). For a critique of Winstar, see Eric A. Posner, Courts Should Not Enforce Government Contracts (John M. Olin L. & Econ. Working Paper No. 132, 2d Series, 2001), available at http://law.uchicago.edu/Lawecon/wknppprs_126-150/132.EAP.govt_contracts.pdf.

237. 431 U.S. 1, 29 (1977); see also Landgraf, 511 U.S. at 271 (noting that contractual and property rights have been of particular concern for retroactivity analysis); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 246–50 (1978) (invalidating under the Contracts Clause the application of a state law that retroactively imposed a shorter pension vesting period than provided under the employer’s plan).

238. See supra text accompanying notes 2–3; cf. McKesson Corp. v. Div. of Alcohol, 496 U.S. 18, 40 (1990) (discussing possibility of retroactive taxation “to the extent consistent with constitutional restrictions” as a remedy for illegally exempting only in-state products).


240. See Ronald A. Cass, Judging: Norms and Incentives of Retrospective Decisionmaking, 75 B.U. L. REV. 941, 994–96 (1995) (lending support to more formalist accounts of judicial decision-making and concluding that the insulation of the judiciary from “strong decision-specific incentives” makes it appropriate for the courts to make decisions that “visit costs on individuals in circumstances where ability to adjust to those costs is strictly circumscribed”).

241. See, e.g., Natelson, supra note 147, at 529 (suggesting that retroactive civil legislation generally should evoke strict scrutiny).
retroactive rules differ from prospective in the ability to conform one’s behavior to avoid liability,242 and that it is possible to distinguish primary from secondary retroactivity, or at least to recognize degrees of retroactivity.243 And the line between legislative and judicial lawmaking continues to prove useful, even for many scholars who seem to renounce formal separation-of-powers lines for analysis of retroactivity. Many have concluded that different institutional settings and incentives make judicial retroactivity much less likely to lead to abuse and more likely to maximize utility than legislative retroactivity.244 According to several scholars, notably Kyle Logue, the case for retroactivity is more easily justified as encouraging optimal behavior if there is “progress” in the law rather than if changes are the result of shifting political winds,245 and such progress is

242. See Cass, supra note 240, at 953 (noting that there are few avenues for evading the impact of retroactive rules, and that “the retrospective decision commonly removes benefits currently enjoyed, taking away property now held or liberty now accustomed. Although an unrealized gain of $20,000 is the economic equivalent of a $20,000 loss incurred, few actually experience these phenomena as equivalent.” (citations omitted)).

243. See Cass, supra note 240, at 957 (noting that while retroactivity and prospectivity are not strictly divided, there are differences in degree); Saul Levmore, The Case for Retroactive Taxation, 22 J. LEGAL STUD. 265, 269 (1993) (suggesting that one may scale meaningful differences of degree of retroactivity of taxation that match commonly held intuitions); Troy, supra note 182, at 1343, 1346–49 (noting the danger of placing power to impose retroactive rules in a politically accountable body and providing responses to several arguments for treating retroactive laws like prospective laws).

244. Jill Fisch, for example, argues that it should be the nature of the legal change rather than the nature of the decisionmaker that determines retroactivity. See Fisch, supra note 5. She nevertheless concludes that judicial legal changes will rarely upset a “stable equilibrium” and thus (with some exceptions) may appropriately be applied retroactively. Id. at 1107–08. Saul Levmore, although stating that there is no reason that the propriety of aggressive change should track the judicial/legislative line, see Levmore, supra note 6, at 1672, nevertheless states that his “intuition is that, on the margin, change is and should be more aggressively imposed when it comes at the hands of judges rather than legislators.” Id. at 1684; see also McNulty, supra note 39, at 61 (noting, despite espousing a nonformalist approach to intertemporal conflicts of law, that “[t]he application of legal rules not expressed at the time the behavior or events took place is more tolerable if this application occurs in case-by-case adjudications in which a hearing of individual arguments precedes the decision and in which precedents and rules can be distinguished if they are inapt.”); cf. Cass, supra note 240, at 994 (concluding that the “salutary insulation of judges against strong decision-specific incentives” promotes predictable decision-making in decisions with retrospective effect); Kaplow, supra note 5, at 602 (noting that problems of abuse of power are minimized in the common law evolution of tort rules, because it is difficult for courts to apply a new rule to a select few); Logue, supra note 169, at 248 (noting that the limits on judicial policymaking prevent large scale illegitimate redistribution).

245. See Logue, supra note 169, at 214 (reasoning that arguments that transitions policies should give incentives to anticipate legal changes have little force if the changes merely represent a change in the political power structure); see also Richard A. Epstein, Beware of Legal Transitions: A Presumptive Voice for the Reliance Interest, 13 J. CONTEMP. LEGAL ISSUES 69, 87 (2003) (noting that the prevalent view as to product liability—that manufacturers should anticipate changes in liability rules—assumes that the new rules are better than the old); Levmore, supra note 6, at 1659 (“Aggressive change is more attractive the more new law is in fact good law, the more this good law would have been yet better if enacted or confirmed to earlier, the more new losers have informational advantages, and the more likely it is that new losers will facilitate good law rather than work wastefully or successfully to block it.”); J. Mark Ramseyer & Minoru Nakazato, Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow, 75 VA. L. REV. 1155, 1166 (1989) (noting that Graetz and Kaplow should be indifferent to grandfathering tax rules if one does not assume that changes are improvements). Professor Kaplow, while seeing the loosening of the assumption of legal progress as complicat-
more likely in judicial decisionmaking than legislative.\textsuperscript{246}

The principal category in need of additional defense would therefore be the public/private line. This would be particularly so to the extent that the public/private line distinguishes between statutory and common law rights, making the former easier to abrogate than the latter.\textsuperscript{247} One might claim, however, that such distinctions are no longer relevant in our constitutional jurisprudence. One might further argue that the distinction is normatively undesirable and would reinstate a form of substantive due process.

First, the higher valuation of traditional common law rights over statutory rights is not discarded, but remains pervasive in our jurisprudence. As noted above, even the modern retroactivity cases in a rough way reflect the public rights/private rights distinction, including Congress's greater ability retroactively to abrogate statutory claims than to change contracts or impose new backward-looking liabilities.

What is more, the greater importance of traditional common law rights over statutory entitlements is pervasive in due process analysis. Thomas Merrill, for example, has shown how the law of takings and due process distinguishes traditional ownership interests in property (defined in part by a right to exclude) that are protected from takings without just compensation, from statutory entitlements that receive procedural due process but not takings protections.\textsuperscript{248} Similarly, the possibility that the Constitution requires monetary remedies for certain wrongs is much more insistent for traditional common law interests\textsuperscript{249}

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  \item [\textsuperscript{246}] Professor Logue observes that while arguments that the common law evolves toward economic efficiency are not "wholly persuasive," few have claimed that legislation moves toward progress. Logue, supra note 169, at 247. Logue would allow retroactivity where the changes resemble common law decisionmaking, as in the area of closing tax loopholes. Id. at 215, 233–34. Logue also thinks tort law is an area where, particularly because of scientific progress, one might also expect improvement in the law. Id. at 250–52.
  \item [\textsuperscript{247}] Most people would probably find allowing retroactivity as to rights that are more clearly owned by government, as in retroactive abatement of enforcement or changes to municipal charters, less objectionable.
  \item [\textsuperscript{248}] Merrill treats statutes imposing retroactive taxes and liabilities as affecting property within his broadest category—substantive due process property—although he notes that such retroactivity requires separate justification. See Merrill, supra note 10, at 894.
  \item [\textsuperscript{249}] See Parratt v. Taylor, 451 U.S. 527 (1981), discussed in Richard H. Fallon, Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 311 (1993) (discussing the Parratt line of cases as indicating that a federally adequate scheme of remedies for certain wrongs must be available in state courts); see also Poinsetter v. Greenhow, 114 U.S. 269, 303 (1884) (disallowing state abrogation of tort remedies against state official who had seized property to collect taxes for which state coupons had been tendered, and stating that "[n]o one would contend that a
than for claims for statutory benefits.\textsuperscript{250} And for purposes of when Congress can abrogate sovereign immunity under § 5 of the Fourteenth amendment, the Court has distinguished mere statutory claims (for example, for false advertising under the Lanham Act) from claims arising from systemic deprivations of traditional property interests.\textsuperscript{251} And even though both traditional and statutory entitlements may be protected by procedural due process, traditional interests (for example, in avoiding OSHA fines)\textsuperscript{252} are likelier to receive a higher level of protection, and to require Article III review than claims to statutory benefits (for example, veterans benefits).\textsuperscript{253}

That we have in the past and continue to provide more protection for traditional common law interests does not fully respond to the issue of whether we ought to provide such protections. But as Stephen Williams pointed out in his critique of new property concepts, traditional property interests are distinguishable from statutory entitlements in important ways that make them worthier of greater protection. Even if in a sense positively derived, traditional property that results from one's labor and voluntary exchange more securely
protects individuals from the state than do statutory entitlements.\textsuperscript{254} What is more, Williams points out that treating more traditional property interests on par with entitlements will tend to lessen the protections that traditional property has provided as a bulwark against government.\textsuperscript{255}

Finally, one must respond to the claim that to reinstate the public/private distinction in retroactivity law is to reinstate substantive due process. This is true, although it is also true in other areas where traditional property interests receive more protection than statutory rights. The Constitution, including the due process clauses, was written against a backdrop of such heightened protections for traditional common law interests.\textsuperscript{256} The requirement of legislative prospectivity, moreover, is a requirement of procedural regularity for certain types of rights—a form of procedural due process located under separation of powers.\textsuperscript{257} And neither procedural due process nor separation of powers can operate meaningfully if one pays no regard to the nature of the substantive rights at stake, as illustrated by the extremes of criminal prosecution on the one hand and the dispersal of governmental largesse on the other.\textsuperscript{258} One must necessarily give some interests more weight than others in figuring out the realms of lesser and greater legislative versus judicial control. One can decide to determine the value of these substantive interests on an ad hoc basis, as the Court currently does in its retroactivity jurisprudence, with traditional distinctions lurking in the background. Alternatively, one might use a more transparent and categorical approach to rights protection, accepting some inevitable over and under inclusion.

The strongest argument for retroactive liabilities is that they evoke proper incentives by making actors foresee that they may have to internalize costs that the law in force at the time they act allows them to externalize.\textsuperscript{259} Indeed, the

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\item \textsuperscript{255} \textit{Id.} at 13; see also Epstein, \textit{supra} note 245, at 74 (arguing that a primary mission of the Constitution is to preserve liberty and property, and that the common law rules of property and contract provide an appropriate baseline for judging legal rules).
\item \textsuperscript{256} See \textit{supra} text accompanying note 21.
\item \textsuperscript{257} Cf. Note, \textit{Rediscovering the Contract Clause}, 97 HARV. L. REV. 1414, 1415, 1426–27 (1984) (arguing that the best model for the Contracts Clause is one of "institutional regularity," which preserves the legislative role of acting prospectively and generally). The Supreme Court frequently asserts that it does not police state separation of powers. But notions of procedural and substantive due process are often infused with notions of the appropriate institutional arrangements for certain types of impositions, even in civil cases. See, e.g., Chi., Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 458 (1890) (requiring judicial review of allegation that agency had set confiscatory rates).
\item \textsuperscript{258} Cf. Harold J. Krent, \textit{The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking}, 84 Geo. L.J. 2143, 2145 (1996) (suggesting that the less stringent prohibitions on civil than criminal retroactivity "may promote good government in civil areas by diluting the attractiveness of rent seeking—attempts by interest groups to obtain government largesse").
\item \textsuperscript{259} Cf. Gary Schwartz, \textit{New Products, Old Products, Evolving Law, Retroactive Law}, 58 N.Y.U. L. REV. 796, 826–828 (1983) (noting in the context of product liability law some circumstances in which the prospect of retroactive liability will lure the defendant into taking precautions, but also suggesting
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Court and many commentators are most likely to countenance retroactive liabilities when they seem to have a decent fit with past externalized costs. But decisions about such fits with past wrongs are better made by courts under existing liability schemes. It is true that disallowing legislative retroactive liabilities will leave some costs externalized and sacrifice some desirable deterrence. One should compare the unfairness and inefficiency of this result, however, to the unfairness and inefficiency of a legal system that treats retroactive legislation as normal.

CONCLUSION

One suspects that scholars feel comfortable recommending statutory retroactivity because they trust that, despite their recommendations, it will remain exceptional. The Court's patchwork of decisions allowing and disallowing statutory retroactivity manifests a similar ambivalence. This Article suggests that the traditional categories of public and private rights might be used to channel this ambivalence into a more coherent scheme for deciding when statutory retroactivity is constitutional.

that "when the goal of tort law is to influence defendant behavior, it is a dubious practice to apply a novel rule retroactively; the less foreseeable the rule at the time the defendant acted, the more dubious the practice."); id. at 799–802 (arguing that product liability law evolved more slowly than many have supposed).

260. See, e.g., Thompson, supra note 219, at 1262 (suggesting that in analyzing takings the Court should and does look at whether the particular property owners' actions or status justify the burdens on the property); cf. Bernard W. Bell, In Defense of Retroactive Laws, 78 Tex. L. Rev. 235, 249–50 (1999) (reviewing Daniel E. Troy, Retroactive Legislation (1998)) (arguing for a cost internalization rationale for retroactive legislation, although also noting possible distortion of producing too little of a good in the present because too much was produced in the past); Jan G. Laitos, The New Retroactivity Causation Standard, 51 Ala. L. Rev. 1123, 1159 (2000) (suggesting that retroactive laws may be successfully challenged if they impose burdens on property owners to correct social problems not caused by them). But cf. Logue, supra note 169, at 224 (noting problems of incentives-based approaches based on rational expectations).

261. See, e.g., Concrete Pipe & Prod. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 605, 637, 645 (1993) (denying constitutional challenges to the application of a federal statute imposing "withdrawal liability" on a company that had participated in a multiemployer pension plan for only three and a half years, where the company's employees had not yet earned vested benefits by the time of the company's withdrawal from the plan, and the liability imposed would be equivalent to 46% of shareholder equity).