Constitutional and Legislative Considerations in Retroactive Lawmaking

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THE PROBLEM of determining the constitutional limits of retroactive legislation has always been approached with the implicit assumption that "retroactivity" is a distinct legal phenomenon with its own, almost unique, set of constitutional difficulties.[1] The thesis of this Article is that questions of retroactive law are essentially questions of substantive due process, and that any attempt to treat retroactivity as a special category to which special rules are to be applied is wasted effort.

In the first section the meanings of retroactivity are discussed. The second will examine some decisions of the Supreme Court, in order to discover the basic factors usually involved in determining the constitutionality of those laws commonly regarded as retroactive. These factors will then be used to explain and justify a few patterns that have emerged from the Court's long involvement with this sort of legislation. The last two sections, necessarily brief because based more on speculation than on examination of judicial experience, will deal with two rather special types of retroactive law.

I

THE TWO MEANINGS OF "RETROACTIVE"

Probably the major source of confusion in discussions of retroactive law is that one word, "retroactive," is used in two different senses. The term is used both (1) to describe a particular basis of selection for the direct imposition of legal effects and (2) as a description of particular kinds of effects which may occur when a new law is imposed on society. Clear analysis dictates that the two senses be kept distinct, and in order to do this an attempt will be made to define the different uses of "retroactive."

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[1] It is admitted, of course, that the constitutionality of "retroactive" legislation may depend on any of several provisions of the Constitution. See text at notes 22–25 *infra*. *Cf.* Hochman, *The Supreme Court and The Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693–97 (1960).

A. "Method Retroactivity"

Perhaps the first definition that comes to mind is that a retroactive law is one that imposes, in terms, rights and duties on the occurrence of past events. As can readily be seen, however, this definition is of little use because it permits laws with the same effect to be retroactive or nonretroactive depending on how they are phrased.[2] This conclusion is not surprising, since a moment's reflection shows that rights and duties can only exist in the present; speaking of imposing them on past occurrences is merely a shorthand way of stating present rights and duties are imposed so as to achieve a situation equivalent to what would have existed had certain other rights and duties existed in the past. Thus a tentative definition, not dependent on phrasing, may be, "All laws that make present rights and duties depend on past events." This is the definition used by Bryant Smith, a leading writer in the field.[3]

The phrase, "depends on past events," can give trouble. For example, does it go so far as to include a law the effect of which depends on an existing legal relation that was created by a past event? No one has as yet analyzed the exact form of dependence on past events that will render a law "retroactive," but it is at least reasonably certain that most who have used the above definition of retroactive did not intend to give the quoted phrase the all-inclusive meaning just suggested, for they have failed to discuss many of the kinds of laws that this broad interpretation would include, for example, laws that change the legal consequences of being a "fiduciary" or "employee," or laws that tax or regulate the use of property. And Smith expressly rejected the definition, "All laws that extinguish or impair rights acquired under past law," as too broad.[4]

The phrase, "depends on past events," will not be explored any further, since the problem is not important for the purposes of this Article. Enough has already been said to show that the concept of retroactivity has not been precisely analyzed in the literature to date and to suggest, perhaps, that the concept is not capable of precise analysis. "Method-retroactivity" will hereinafter refer only to laws that make rights or duties depend on past events in the narrow sense of dependence on events that have occurred and terminated before the laws were enacted. This definition is at least exact enough to be workable within the confines of this Article.

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[2] *Compare* "A toll of ten cents is hereby imposed for crossing the Jamestown Bridge, effective as of last January," *with* "A special levy to lift the mortgage on the Jamestown bridge is hereby imposed on each citizen, the amount of which shall equal ten cents multiplied by the number of crossings made by such citizen since last January."

[3] Smith, *Retroactive Laws and Vested Rights*, 5 TEXAS L. REV. 231 (1927). See also Amberg, *Retroactive Excise Taxation*, 37 HARV. L. REV. 691, 694–95 (1924); Ballard, *Retroactive Federal Taxation*, 48 HARV. L. REV. 592, n.1 & 592–94 (1935); Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 HARV. L. REV. 30, 30–31 (1939).

[4] Smith, *supra* note 3, at 232–33.

B. "Vested Rights Retroactivity"

"Retroactive" is also used to describe an effect which occurs when a new law is imposed on society. If the effect of a law is substantially to disturb patterns of conduct that represent substantial investments in labor or property or to remove valuable rights, rights of action or even liberties,[5] then the law is "retroactive" in this second sense.[6] Perhaps the most quoted passage in the field uses the term in this manner. Justice Story, in *Society for the Propagation of the Gospel v. Wheeler*,[7] stated that "retroactive" embraced not only laws that were "enacted to take effect from a time anterior to their passage," but also covered "all statutes, which, though operating only from their passage, affect vested rights and past transactions . . . ."[8] Courts and legal writers, when thinking of retroactivity of this sort, often speak of "affecting vested rights." Since it provides a convenient shorthand, "vested rights retroactivity" will be used throughout this Article in contrast to method retroactivity. References to "retroactive" that do not state which of its two senses is intended will mean method retroactivity. Whether a law is vested-rights retroactive is a question of fact which can only be answered after examining the interaction between the law and the society upon which it is imposed. The interaction is sometimes easy to foresee, however. It can confidently be predicted that a law delaying the collection of debts for one year will have a substantial impact on a commercial society such as ours. On the other hand, it was early held in response to the enactment of allegedly "retroactive" divorce laws that marriage contracts were "not the kind of contract" covered by the contract clause.[9]

Even a law imposing general rules of conduct, applicable only to the future, may be strongly vested-rights retroactive if, in the society in which the law will be effective, certain classes of individuals have made substantial commitments of property or labor in anticipation of engaging in the proscribed conduct. The effect of the eighteenth amendment on those who had invested in a liquor business illustrates this fact, as do other more common examples of laws that render illegal conduct which a party to a contract is under a duty to perform.[10]

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[5] See, *e.g.*, FHA v. The Darlington, Inc., 358 U.S. 84 (1958).

[6] See, *e.g.*, Brown, *Vested Rights and the Portal-to-Portal Act*, 46 MICH. L. REV. 723, 732–34 (1948).

[7] 22 Fed. Cas. 756 (No. 13,156) (C.C.D.N.H. 1814). Here a state statute gave one who was a defendant in an action for the recovery of land a right to restitution for improvements if he had been in possession in good faith for more than 6 years. It was held invalid under the state constitution as applied to actions commenced within 6 years of enactment.

[8] *Id.* at 767.

[9] Maynard v. Hill, 125 U.S. 190 (1888).

[10] See, *e.g.*, Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911).

C. The Relation Between the Two Meanings

It is commonly assumed that there is a close connection between the two senses of retroactivity. An analysis of the case law will be bypassed for the moment in order to paraphrase the kind of reasoning that leads to this conclusion:[11] (1) Individuals commonly act so as to achieve advantageous results. (2) Retroactive laws change the legal results of acts after these acts have been performed. (3) Therefore retroactive laws defeat reasonable expectations and are undesirable. The weakness in the chain is that it oversimplifies. First of all, a great deal of activity which has or may have substantial legal consequences is undertaken regardless of these consequences.[12] For example, the vast majority of persons undoubtedly earn as much money as they can without regard to how much income tax they will be required to pay. And nearly everyone would drive reasonably carefully whether or not the local law permits the defense of contributory negligence.

A more basic fallacy in the argument, however, is its implicit[13] assertion that method-retroactive laws are more likely than others to defeat expectations. This assertion seems to rest, in turn, on the assumption that an act, once done, achieves its legal results instantaneously and full-blown. In fact, this is rarely the case, especially in property and contract transactions. A purchaser of property obtains a cluster of legal relations which project indefinitely into the future. A party to a contract does likewise. And all kinds of less formal relationships are entered, modified, or terminated with a view of both the present and future legal consequences of such action. To pick out just one example, the purchaser of real estate makes certain assumptions about the level of property taxes, the treatment of capital gains under the federal income tax laws, the continued maintenance of police and fire protection in his vicinity, the likelihood of urban renewal or similar eminent-domain proceedings on or about his property, the judicial interpretations of the mutual duties of landlord and tenant at common law and of the clauses in his lease which seek to modify these duties, and so on, virtually *ad infinitum*. Whether a law will interfere with any of the many kinds of patterns of conduct or continuing legal relations which exist at any given moment is a question that, as was shown in the discussion of vested-rights retroactivity, can be answered only by examining both the law and the society upon which it will be imposed; a generalization based solely on some abstract quality in the law is not helpful.

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[11] See especially Amberg, *supra* note 3, at 692–94.

[12] One should perhaps also remember that many acts are taken in ignorance of possible legal consequences.

[13] The implication consists in this: if it were believed that all laws had an equal tendency to disappoint expectations, a separate demonstration of this tendency as to retroactive legislation would not be undertaken.

It is not surprising that the two senses of retroactive should be confused. Any law, no matter what its method of selection, that impairs property or contractual arrangements entered into before the law was enacted and without the realization that such a law would be passed does impair the legal efficacy of arrangements entered into in the past. Moreover, approached from the viewpoint of method retroactivity, the oversimplified reasoning just set out seems to disclose a cause-and-effect relationship between the method by which a law imposes its duties and rights and its impact on "vested rights." Finally, merger of the two concepts in the minds of legal thinkers was undoubtedly encouraged by the fact that the most obviously unjust "retroactive laws"—for example, assessing a toll long after a ship has passed though the canal[14]—are retroactive in both senses. It is essential, however, that the two meanings be kept distinct. Whatever merit there may be in the argument that method retroactive laws have the greater tendency to disrupt patterns of planned conduct, the quantum of truth is too small to warrant the false emphasis this assumption places on examining a law in isolation from its social context.

The case law has not followed the above analysis. The balance of the Article, therefore, will be concerned with those kinds of laws that have traditionally been regarded as retroactive, whether or not they would be included within the definition of method-retroactive.

II

CONSTITUTIONAL CRITERIA FOR JUDGING RETROACTIVE LAW

A. The Prohibition Against Direct Taxes

It has been asserted[15] that a method-retroactive tax, unless it is supportable under the special constitutional provision for income taxes,[16] must be apportioned among the States on the basis of population in order to be constitutional. The reasoning employed is that a tax based on past events is, by definition, unavoidable at the time the taxing measure is enacted and therefore "direct" in the constitutional sense.[17] No retroactive law has yet been invalidated on this ground, however, and at least one decision[18] since this test was first suggested has upheld a tax that would seem to be invalid under it. An estate tax was levied on the dead husband's share in a tenancy by the entirety which he and his wife had obtained long before the

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[14] See, *e.g.*, Forbes Pioneer Boat Line v. Board of Comm'rs, 258 U.S. 338 (1922).

[15] See Amberg, *supra* note 3; see also Ballard, *supra* note 3, at 593, where such a result bas been called a "possibility."

[16] U.S. CONST. amend. XVI.

[17] U.S. CONST. art. 1, § 9, cl. 4.

[18] Third Nat'l Bank & Trust Co. v. White, 287 U.S. 577 (1932).

federal estate tax was enacted. The applicable common law made the survivorship interest in such an estate inalienable without the consent of both spouses, so as to the husband the tax was an "absolute and unavoidable demand."[19] However, the husband and wife were treated as a "community of interest," and the direct-tax issue was not argued. Furthermore, when the Court in *Untermyer v. Anderson*[20] held invalid a gift tax on a transfer completed before the tax was enacted, the opinion failed to mention the direct-tax objection, relying instead on the due process clause.

The direct-tax limitation, even if literally enforced, is of small practical importance, since it is restricted to the retroactive imposition of non-income taxes which, if levied prospectively, would be avoidable, and Congress has apparently never felt the need to use this revenue device. The limitation might have some importance, however, if used to prohibit a curative statute[21] in the excise-tax area. But if the issue should arise, it would seem that the purpose of the legislation—to restore a legal structure to which private ordering, based on choice, had already been accommodated—would remove it from the direct-tax ban.

B. Due Process

The Supreme Court tests retroactive legislation against three constitutional standards: due process,[22] equal protection of the law,[23] and impairment of the obligation of contracts.[24] No Supreme Court decision in the last 25 years dealing with contracts has been found that did not contain language to the effect that what was said about the contract clause was equally applicable to the claimant's charge that he was being deprived of property without due process of law.[25] The balance of this discussion, therefore, will not treat the contract clause separately from due process or equal protection.

1. Choice and Ex-Post-Facto Law

A useful first step in trying to discover the policies underlying the traditional dislike for retroactive law is to examine a distinct but closely related concept, ex-post-facto law.[26] The Supreme Court in *Calder v. Bull*[27] restricted the constitutional prohibition against ex-post-facto legislation to

[19] See, for use of this formula, Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[20] 276 U.S. 440 (1928).

[21] See text at notes 112–28 *infra*.

[22] U.S. CONST. amends. V; XIV, § 1.

[23] U.S. CONST. amend. XIV, § 1.

[24] U.S. CONST. art. 1, § 10, cl. 1 .

[25] See, *e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934). The commentators are to the same effect. See, *e.g.*, Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 621, 852 (1944); Stimson, *supra* note 3, at 31 n.4.

[26] U.S. CONST. art. 1, § 9, cl. 3; § 10, cl. 1.

[27] 3 U.S. (3 Dall.) 386 (1798).

criminal laws and, despite some recent dissenting opinions by Justice Douglas,[28] has continued this restriction. The essence of the distinction between criminal and civil law is condemnation, and our legal system condemns a man only because he has acted in a certain manner.[29] This limitation of the criminal sanction seems to rest, ultimately, on a belief in free will. A man is a criminal only if he chooses to do that which society calls criminal. Seen from this perspective the absolute ban on ex-post-facto criminal laws is explicable as a ban on condemning a man when the element of choice which society has chosen as its basis of condemnation, *i.e.*, knowledge that an act is criminally wrong, could not have been present.[30]

The ex-post-facto clause in the Constitution is therefore not logically necessary, since a perceptive application of the due-process clause could accomplish the same result. A law one aim of which is moral condemnation bears no reasonable relation to conduct which could not have been influenced by a consideration of its criminal wrongfulness.

On this rationale, the wisdom of *Calder v. Bull* is evident. Choice is seldom an essential condition for the civil imposition of duties or deprivation of rights and liberties, because no one is being morally condemned for having chosen wrongly. The role of choice in the civil law is bound up with many other factors. Even when it has major importance, its operation may not be so easily associated with a particular act as it is in the criminal law. The more general and flexible criteria of due process are therefore probably more appropriate instruments for dealing with civil legislation, since they permit the element of choice to be assessed and weighed along with all the other justifications for imposing legal effects. The Supreme Court has not always been as perceptive as might be desired, however, in dealing with legislation that imposes its effects on the basis of events which can no longer be controlled.

Some recent cases, for instance, arising under the immigration and internal-security laws have dealt with the penumbra of ex-post-facto legislation.[31] The Court upheld deportation based on statutory provisions which

[28] See, *e.g.*, Lehmann v. United States *ex rel.* Carson, 353 U.S. 685, 690 (1957); Marcello v. Bonds, 349 U.S. 302, 319 (1955).

[29] See Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 402–06 (1958).

[30] Defenses and mitigations of crime point to this same conclusion, since in general they are ways of showing the absence or restriction of choice: Insanity (choice restricted due to mental defect), self-defense (choice restricted by danger to self), and provocation (choice restricted by the force of justified and intense emotion) are examples drawn from the law concerning intentional homicide. Of course, the requisite opportunity to know can be satisfied other than by statutory enactment. A widely held moral belief will validate a subsequently enacted statute to the extent that the statute can reasonably be said to be declarative of that belief.

[31] Lehmann v. United States *ex rel.* Carson, 353 U.S. 685 (1957) (prior conviction of two crimes involving moral turpitude ground for deportation); Marcello v. Bonds, 349 U.S. 302 (1955) (prior conviction ground for deportation); Galvan v. Press, 347 U.S. 522 (1954) (previous membership in Communist Party ground for deportation).

permit, apparently at the uncontrolled discretion of the Immigration Service, deportation of an alien who has at any time been convicted of certain enumerated offenses[32] or joined the Communist Party.[33] Prior to these cases, deportations based on a finding that the alien was of bad moral character, as evidenced in part by past criminal convictions, were upheld.[34] The recent acts may be read as expressing the legislative judgment that the enumerated acts are conclusive evidence of bad moral character, although this interpretation is hard to reconcile with the grant of discretion to the Service. A more probable interpretation is that Congress regards the activities of which these aliens' actions formed a part as so undesirable that it is willing to deport many who are now innocent of such activities along with the few who are still involved, permitting some discretion in the Service to refrain from deporting the obviously innocent. Whatever motivated Congress, the effect on those deported is clearly initial or additional punishment for past conduct.

The Court felt bound by *Calder v. Bull* and subsequent cases to confine the ex-post-facto bar to criminal prosecutions, and deferred to the strongly established tradition of unfettered congressional control over the entry and presence of aliens in refusing to apply the usual substantive due-process criteria.[35]

The immigration cases are good illustrations of the difficulty in drawing a line between criminal and noncriminal law. Imprisonment of a criminal manifests society's condemnation of him and thereby serves as a warning to all potential criminals; it also removes the evil effects of this particular criminal from the society. However, the objective of the immigration and internal-security laws is removal of the evil effect; the fact that deportation probably punishes the person deported is inherent in the means used to remove the evil, but is not intended as an independent object of the law.

The element of condemnation is meant to be absent from deportation. However, whether other persons will in their minds condemn the person deported because his removal looks like an official condemnation is not entirely within the control of the lawmaker. When the methods of the civil law resemble those of the criminal law, a problem arises from the obvious interaction between the methods of the criminal law and the psychological effect of those methods. The problem cannot be solved by prohibiting the

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[32] Immigration & Nationality Act of 1952 (McCarran Act), §§ 241(a), (d), 66 Stat. 204, 208, 8 U.S.C. §§ 1251(a), (d) (1958).

[33] Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 1008, amending 40 Stat. 1012 (1918), as amended, 54 Stat. 673 (1940) (repealed by 66 Stat. 279 (1952) (now, essentially, Immigration & Nationality Act of 1952 (McCarran Act), § 241(a)(6)(C), 66 Stat. 205, 8 U.S.C. § 1251(a)(6)(C) (1959)).

[34] Mahler v. Eby, 264 U.S. 32 (1924).

[35] See Galvan v. Press, 347 U.S. 522, 530–32 (1954).

use in the civil law of all methods traditional to the criminal law, for occasionally these methods may be necessary in noncriminal situations. The immigration laws may furnish one example. Another example of a noncriminal "removal" which may operate as a great hardship on certain individuals is military conscription.

The injustice of the deportation cases lies not in the failure to apply ex-post-facto principles, but in the far too timid attitude of the courts toward application of the principles of substantive due process. A large degree of congressional control over the entry and presence of aliens could still be exercised without going to the extremes found in these cases.[36]

All ex-post-facto laws are method-retroactive. And the distinguishing feature of an ex-post-facto law, *i.e.*, that it condemns where choice could not have been present, is, when generalized to include all kinds of choice, the distinguishing feature of all method-retroactive laws. A method-retroactive law necessarily eliminates the possibility that its effects can be avoided by a choice of conduct. Method-retroactivity, therefore, plays only this limited role under the due-process clause: when the *only* justification for imposing liability is that a person has *chosen* to conduct himself in a manner called wrong by the law, imposition of the liability after choice is no longer possible removes the only justification for the liability and therefore deprives the person of property without due process of law.

Much tort law, both common-law and statutory, comes within this syllogism.[37] It can be strongly argued that the fact that tort law serves to compensate the injured party does not justify its retroactive application, because the compensatory purpose does not justify imposing liability on a particular defendant. Only when a sufficient reason for imposing liability on a particular defendant is his capacity to spread the cost throughout society or some portion of society in an equitable manner might a retroactive application be justifiable. In this situation, the relevant moment for determining the fairness of imposing liability would be that moment at which legal relations had become so settled or courses of conduct had progressed so far that cost-spreading could no longer be practicably achieved.

In *Ettor v. City of Tacoma*[38] the irrelevance of method-retroactivity to determining the validity of a law governing matters not influenced by

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[36] In Galvan v. Press, *supra* note 35, for instance, the alien had been in the United States since 1918. His deportation was based solely on Communist-Party membership from 1944 to 1946, and his contention that he at no time considered his action disloyal was not denied. An administrative procedure so crude and based on such flimsy grounds is surely not necessary to the effective accomplishment of the object of removing Communist influence from American society.

[37] Both intentional and non-intentional torts are included here: without "choice," how could the defendant be "at fault?"

[38] 228 U.S. 148 (1913).

choice was ignored. The City of Tacoma repealed its ordinance which gave a right of action to abutting property owners for consequential damages inflicted by the city's street-grading operations. The Supreme Court prevented the repeal from being effective as to those whose property had been damaged prior to repeal, even though the property owners in question failed to show or even assert[39] any course of action they would have taken to avoid or lessen the damage they suffered had they been warned of the repeal of the ordinance prior to the street-grading operations. When, as was apparently true in this case, conduct cannot or does not take account of a law, there is no reason why a retroactive repeal is any less desirable than a prospective one.[40] Since it seems clear that a polity ought to be permitted to change its mind on such matters as the cost-distribution of street improvements, a retroactive repeal ought to have been allowed.

2. Reliance

Writers in this field often discuss choice in terms of reliance, surprise, or expectation.[41] To say that one has relied on a law is to say that, at some previous moment or moments, one made choices on the basis of that law. However, "reliance" and similar terms are not used, as was "choice," in the simple sense of asking whether or not contemplated conduct will result in civil or criminal liability. Rather, it connotes the assessment of all the advantages and disadvantages which are expected to occur throughout a future period of indefinite duration. As was shown,[42] any kind of newly enacted law may, if the circumstances are right, impair the expected advantages of such planned conduct. The extent to which reliance is relevant is further complicated by the fact that much civil legislation, unlike that which imposes criminal sanctions, is supportable on grounds other than its effect on the kind of conduct being contemplated.

Nothing in the Constitution explicitly guarantees that an individual's reliance on the civil law will be protected. And yet nothing seems more basic to the existence of a legal order than the ability to rely upon the actions of others, including the government, with some assurance. As Professor Fuller has pointed out, social order inherently requires reliance; even a slave must be able to rely on a correlation between his own good behavior and his master's response, for without this correlation there is no incentive to obey

[39] No such assertion was made in the briefs.

[40] It might seem that the repeal was a denial of the equal protection of the law, since its effect was to discriminate solely on the basis of the accidental factor of a claim's having been adjudicated. But is a prospective appeal, whose discrimination would turn on the time of the occurrence of damage, any the less arbitrary? There seems to be very little difference between the two.

[41] See, *e.g.*, Smith, *Retroactive Laws and Vested Rights*, 6 TEXAS L. REV. 409, 418–19 (1928); Stimson, *supra* note 3, at 37–38.

[42] See text at notes 9–10 *supra*.

the master's commands.[43] Almost as obvious, however, is the fact that reliance can never be absolute, since the legal order must constantly change to fit new factual conditions or new conceptions of the common good. Reliance on existing rules, therefore, must be sacrificed to some extent to the need for change. It is this basic and simple conflict that is often overlooked in writing on retroactivity. Stimson, for example, seems to assert that the conclusive distinction between valid and invalid retroactive law is the element of "surprise"—whether it serves to give effect to or defeat the bona fide and reasonable expectations of the persons it affects.[44] Such a test is far too rigorous, since it would rule out all but the most inconsequential legislative change.

Change in the law impairs the ability to rely on the conduct of others in the time dimension. In order to obtain judicial relief against change in the law, however, an individual must have incurred a measurable loss. Moreover, the Supreme Court decisions also strongly indicate that a litigant has little chance of success unless he can show reliance in the form of showing that his lost property represented the product of planned investment of labor or value. Windfalls, even when substantial, are given little protection.[45] For example, the Court has upheld laws that validated contracts previously invalid because contrary to some public policy,[46] such as a policy against usurious interest[47] or against foreign corporations owning land in the State.[48] Reinstatement of the duty of the obligor is justified by saying that he is getting only that to which he freely assented in the first place, but this rationale fails to take into account the adverse effect such a decision may have on parties who had nothing to do with assenting to the original contract. A more precise rationale would seem to be that the party who was put in a less advantageous position by the retroactive validation of the contract is not being deprived of anything for which he bargained or in the expectation of which he otherwise made substantial commitments. This rationale would explain why retroactive validation is equally effective against third parties, such as second mortgagees or general creditors in a

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[43] *Cf.* FULLER, PROBLEMS OF JURISPRUDENCE 701–03 (temp. ed. 1949).

[44] Stimson, *supra* note 3, at 37–38. See also Smith, *supra* note 41, at 427.

[45] *But see* Ettor v. City of Tacoma, 228 U.S. 148 (1913).

[46] Hale, *supra* note 25, at 514–16, treats without distinction all laws that enlarge the obligation of existing contracts, whether the law serves to ratify the manifested intent of the parties or goes beyond it. His conclusion seems to be that all "strengthening" of contractual obligations is as evil as "weakening." It is submitted that his failure to take into account the intent of the parties renders his conclusion invalid. The Supreme Court, in McNair v. Knott, 302 U.S. 369 (1937), upheld a legislative validation of existing pledge agreements between national banks and local governments. See text at notes 49–50 *infra*. See also, *e.g.*, Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[47] Ewell v. Daggs, 108 U.S. 143 (1883).

[48] Gross v. United States Mortgage Co., 108 U.S. 477 (1883).

bankruptcy proceeding, who had nothing to do with assenting to the original contract.

In *McNair v. Knott*,[49] the receiver of a national bank which had failed sold securities that had been pledged by the bank to secure a deposit of funds belonging to a county government. The Comptrollers of the Currency had assumed, at the time the deposit was secured, that national banks were empowered to secure public deposits in this manner; the assumption subsequently proved erroneous, but Congress passed validating legislation after the bank failed but before its affairs were settled. Clearly the persons deprived by the validating legislation were the general depositors whose claims on the security were made junior to those of the county, not the defunct bank, and thus the Court's justification—that the parties to the contract were getting only what they originally intended—was not applicable to the primarily interested parties.[50] Section 9 of the Agricultural Adjustment Act[51] imposed a processing tax on, among others, cotton processors. The amount of the tax was proportional to the amount of cotton used by the mill and, like most excise taxes, the largest portion of its cost was added to the price of the finished product. The section was soon declared unconstitutional,[52] leaving a situation in which some processors had paid the tax, some had collected prices based on the expectation of payment but had not yet paid, and others had neither paid the tax nor sold their cotton at the raised price. Congress moved to rectify the situation in 1936 by a law[53] which put each processor in substantially the same position he would have been had the AAA been upheld or never been enacted. In particular, those who sold at the high prices and paid the tax were denied refunds to which the unconstitutionality of the AAA would otherwise have entitled them. The Court upheld the 1936 act, saying that the claimant could show no "actual injury" because his refund would have been a windfall.[54]

This same rationale was among the many used by the federal appellate courts[55] in denying recovery on statutory overtime claims under section 7a of the Fair Labor Standards Act, 1938,[56] after Congress in the Portal-to-

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[49] 302 U.S. 369 (1937).

[50] See also Gross v. United States Mortgage Co., 108 U.S. 477 (1883). The party who there urged that the mortgage contract should remain unenforceable was a junior mortgagee to the one in dispute, and the general creditors of the bankrupt mortgagor, though not parties to the litigation, were bound to share the burden of the Court's decision to uphold the senior mortgagee.

[51] 48 Stat. 35 (1933), as amended, 7 U.S.C. § 609 (1958) [hereinafter, the AAA].

[52] United States v. Butler, 297 U.S. 1 (1936).

[53] Revenue Act of 1936, §§ 901–17, 49 Stat. 1747, as amended, 7 U.S.C. §§ 644–59 (1958).

[54] Anniston Mfg. Co. v. Davis, 301 U.S. 337, 348 (1937).

[55] See, *e.g.*, Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

[56] 52 Stat. 1063, as amended, 63 Stat. 912 (1949), 29 U.S.C. § 207a (1958) [hereinafter, FLSA].

Portal Act of 1947[57] retroactively prohibited such recovery. The claims were based on the Supreme Court decision in *Anderson v. Mt. Clemens Pottery Co.*[58] construing "workweek" for the purpose of section 7a of the FLSA to include the time spent by each worker in donning work clothes and walking from the shop entrance to the work site. This construction, which was wholly unexpected by the overwhelming majority of both the unions and the employees,[59] suddenly opened the door to billions of dollars of back-pay claims against employers who had not included this time in computing the number of hours worked by their employees.[60] The Supreme Court denied certiorari on all the circuit court decisions upholding the retroactive elimination of the claims.

A more difficult case, and one that may be read to indicate that absence of reliance is a very powerful factor indeed in judging the constitutionality of depriving a person of his propery, is *Addison v. Huron Stevedoring Co.*[61] A collective-bargaining agreement negotiated by a longshoremen's union and an employer group provided that all time worked outside of the daylight weekday hours was to be paid at a time-and-a-half "overtime" rate.[62] The purpose and substantial effect of the arrangement was to coerce the employers to shift all possible work into "regular" hours. After the agreement had been in effect for a few years, the Supreme Court held in *Bay Ridge Operating Co. v. Aaron*[63] that section 7a of the FLSA[64] which decreed that "one and one-half times the regular rate" be paid for working time in excess of 40 hours per week, required that "regular rate" be construed as "average rate for the first forty hours." This permitted the longshoremen to include the contract "overtime" in the base rate to which the statutory overtime would be added, thus giving them "overtime on overtime." Congress, in the "Overtime-on-Overtime" Act,[65] redefined the disputed words to include the meaning embodied in the collective-bargaining agreement and made this redefinition retroactive as to all employers who had believed "in good faith" that the provisions of their collective-bargaining contract did not violate the FLSA.

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[57] 61 Stat. 84, 29 U.S.C. §§ 251–62 (1958).

[58] 328 U.S. 680 (1946).

[59] See H.R. REP. No. 71, 80th Cong., 1st Sess. 3–5 (1947); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 685 (1946) (decision admitted to be contrary to established custom in the industry).

[60] See H.R. REP. No. 71, *supra* note 59, at 3–5.

[61] 204 F.2d 88 (2d Cir), *cert. denied*, 346 U.S. 877 (1953).

[62] For example, a worker whose shift extended from 2 to 10 p.m. would receive 4 hours of "overtime" because work after 6 p.m. was outside the regular daylight hours.

[63] 334 U.S. 446 (1948).

[64] 52 Stat. 1063 (1938), as amended, 63 Stat. 912 (1949), 29 U.S.C. § 207a (1958).

[65] Act of July 20, 1949, ch. 352, 63 Stat. 446 (repealed by 63 Stat. 920 (1949)), amending FLSA § 7, 52 Stat. 1063 (1938), as amended, 63 Stat. 913, 920 (1949), 29 U.S.C. §§ 207(d), 216b (1958).

The *Addison* litigation was commenced prior to the legislative redefinition but did not reach final judgment until after Congress had acted. A good share of the employees' work was done at a time when administrative rulings on the proper interpretation of the overtime provisions of the FLSA were in conflict, and the employers were therefore aware that whether their contracts were consistent with FLSA standards was open to some doubt.[66] Nevertheless, the trial court had ruled that the employers believed in good faith that their contracts complied with this act.[67]

The trial court's judgment was affirmed on appeal: The employers could resort to a congressionally provided defense of good faith compliance to effect a retroactive elimination of the employees' "overtime on overtime" claims. But Judge Hand, who cast the deciding vote to affirm, found the defense to stem from the provisions of the Portal-to-Portal Act of 1947,[68] not from those of the "Overtime-on-Overtime" Act. This enabled him to justify the removal of the employees' claims by giving weight to a legislative finding of a national emergency. Such a finding accompanied the Portal-to-Portal Act,[69] but not the "Overtime-on-Overtime" Act.

Although the power of Congress to bar claims retroactively had been upheld previously under the Portal-to-Portal Act,[70] the claims barred were based on the definition of "workweek" rather than "overtime." Therefore, since a different term was involved, the declaration of a national emergency did not necessarily apply to the subject matter of the present litigation. Thus, the application of the Portal-to-Portal Act defense to the facts in *Addison* meant that the act was being applied in respect of a situation not itself a "national emergency," even though the drastic retroactive effect of that defense was to be justified on the ground that such an emergency existed.

The question was posed whether Congress could retroactively remove *all* rights of action to which an employer could plead the defense of good-faith compliance with what he believed to be the law, in order to meet a national emergency created solely by rights of action based on the definition of "work week." The question was made even more difficult by the fact that the employers in the present case could not claim that the *Bay Ridge* interpretation of "regular rate" was totally unexpected. However—and this seems to be the key to the situation—the employees did not argue that they had in any way changed their conduct in reliance on the *Bay Ridge* interpretation. In this respect, therefore, the situation is indistinguishable

[66] Addison v. Huron Stevedoring Co., 204 F.2d 88, 98, 99–102 (2d Cir. 1953).

[67] Addison v. Huron Stevedoring Co., 96 F. Supp. 142 (S.D.N.Y. 1950).

[68] 61 Stat. 84, 29 U.S.C. §§ 251–62 (1958).

[69] Section 1, 61 Stat. 84 (1947), 29 U.S.C. § 251 (1958).

[70] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948). See text at notes 55–60 *supra*.

from that involved in the "work week" claims and from the situations in which the Supreme Court has upheld retroactive validation of contracts invalid when made. The Supreme Court denied certiorari, and thus the question never received a forthright answer.

Irrespective of confusion and misfiring of issues, the denial of the employees' claims may well have been the correct result. The situation certainly raises grave doubt as to the wisdom of a statute that permitted a few employers knowingly to skirt the edges of the law and then retrieve their judicial losses through legislation. But the blame for this can probably be placed on the Supreme Court. The genuine emergency created by the decision in *Anderson v. Mt. Clemens Pottery Co.*[71] forced Congress to enact the Portal-to-Portal Act in haste and under an aura of crisis.[72] The overly broad scope of the act is therefore understandable. However, when we consider the later litigation about the Overtime-on-Overtime Act, the questionable character of the emergency as applied to overtime claims and the knowledge of the employers that they were on dangerous ground do not change the fact that the rights of action would have been unbargained-for and unrelied-upon windfalls to the employees. This does not seem to be the kind of gain whose protection justifies judicial interference with a legislative judgment.[73]

Absence of reliance entered into the Court's determination in a slightly different manner in *Fleming v. Rhodes*.[74] In the 25-day interim in 1946 between termination of the Emergency Price Control Act of 1942[75] and enactment of the Price Control Extension Act of 1946[76] a landlord obtained eviction judgments against several of his tenants. The federal administrator, pursuant to the latter act, sued to enjoin the execution of the judgments and a decision in his favor was upheld by the Supreme Court. The 25-day interim was as much of a windfall to this landlord as were the effects of the Supreme Court rulings in the previously discussed cases, and the Court had no trouble in denying him the possession of this rented property.

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[71] 328 U.S. 680 (1946).

[72] See Note, 71 HARV. L. REV. 1324 (1958).

[73] Judge Frank, however, took sharp issue with the majority's reliance on the fact that the employees were being deprived only of a windfall. He questioned whether this meant that Congress could with impunity retroactively remove unexpected stock-market gains or bequests from unknown relatives. Addison v. Huron Stevedoring Co., 204 F.2d 83, 103 (2d Cir. 1953). Yet, these hypothetical examples can probably be distinguished from the case in question. Stock-market transactions are entered into precisely in order to achieve such "unexpected" gain; and the donor has relied on the validity of his bequest, if the donee has not.

[74] 331 U.S. 100 (1947).

[75] Ch. 26, § 2, 56 Stat. 24, as amended (expiration date of June 30, 1946, postponed 1 year pursuant to § 1 of the Price Control Extension Act 1946, ch. 671, 60 Stat. 664—see note 76 *infra*).

[76] Ch. 671, § 3, 60 Stat. 664, amending Emergency Price Control Act of 1942, tit. 1, 56 Stat. 23, as amended (enacted July 25, 1946—see note 75 *supra*).

(a) "Don't Rely" Statutes and the Federal Tax.—Once the relevance of reliance to a due-process determination has been established, the question arises whether this factor might be subject to legislative or judicial control through some sort of warning procedure. The question can be answered in the affirmative, since this device is already in use by some States and it seems also to have made an appearance on the federal scene.

Several States have statutory or constitutional provisions warning that all laws pertaining to corporations are subject to amendment or repeal.[77] The clauses were probably inserted to avoid having a corporate charter construed as a contract, and thus unmodifiable.[78] Their application, however, has gone substantially beyond that of rebutting the inference of a contract between the corporation and the State; the primary use of the clauses now seems to be to decrease the efficacy of the plea of "vested rights" against changes in the corporation codes. This use seems to serve two worthwhile purposes:

(1) Corporation codes commonly contain provisions subject to change by private agreement. The conditions under which dividends can be issued,[79] or the plurality necessary to take certain types of corporate action,[80] are examples. A legislature might well intend such provisions to serve only as sensible corporate rules in those instances in which the corporation promoters overlooked the particular contingencies, rather than as consciously relied-upon substitutes for explicit charter draftsmanship. The "don't rely" provision thus performs a role analogous to that performed by a statute of frauds or parole-evidence rule: individuals are encouraged to make explicit their intent, and the courts are saved the necessity of deciding questions of fact on the basis of unreliable and inconclusive evidence. It is especially desirable that corporate charters and bylaws not be permitted to impliedly incorporate laws existing at some previous date, since investors, lenders, and others not intimately familiar with the history of a corporation may rely on these instruments.

(2) The other function such provisions may serve is to give notice of an intended "common law" development. That is, the legislature is saying that its general purpose in the code is to provide a set of laws adequately

[77] *E.g.*, CAL. CONST. art. 12, § 1; MICH. CONST. art. 12, §1; N.D. CONST. § 131; OHIO CONST. art. 13, § 2; W. VA. REV. STAT. ch. 31, art. 1, § 3020 (1955).

[78] See Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). For the effectiveness of these provisions in avoiding such a result, see, *e.g.*, Wilson v. Cherokee Drift Mining Co., 14 Cal. 2d 56, 92 P.2d 802 (1939); Wayne County Prosecuting Attorney v. Grosse Ile Bridge Co., 318 Mich. 266, 28 N.W.2d 123 (1947); Ashury Hosp. v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943); Harbine v. Dayton Malleable Iron Co., 61 Ohio App. 1, 22 N.E.2d 281 (1939); Marshall County Bank v. Wheeling Dollar Sav. & Trust Co., 119 W. Va. 383, 193 S.E. 915 (1937), *cert. denied sub nom.* Marshall County Bank v. Crowther, 303 U.S. 652 (1938).

[79] *E.g.*, COLO. REV. STAT. § 31-31-10 (Supp. 1959).

[80] *E.g.*, COLO. REV. STAT. § 31-31-12(2) (Supp. 1959) (sale of suhstantially all assets).

protecting the complex array of conflicting interests represented in corporate affairs, and that subject to being within the spirit of this purpose (as more precisely defined by the current code itself) the detailed rules are open to change. So interpreted, "don't rely" statutes would strike a reasonable balance between the advantages of being able to keep a code responsive to current business and government needs and the difficulties of private accommodation to changing rules.

The only Supreme Court decision dealing with this type of statute, *Coombes v. Getz*,[81] made no attempt to ascertain the purpose of the provision and applied the theory of implied incorporation of existing law into contracts to a situation that certainly did not warrant it. A California constitutional provision made corporate directors liable to creditors and shareholders for all moneys embezzled by corporate officers during the directors' terms of office.[82] Another constitutional provision made all laws concerning corporations subject to repeal,[83] and prior California decisions had left no substantial doubt that the scope of the latter provision was broad enough to cover changes in the former.[84] The Court nevertheless held that the contracts of the corporation's creditors, made before the first provision was repealed, impliedly incorporated the provision and therefore were unaffected by repeal of the directors' liability provisions. The decision seems far too rigid in its conception of permissible legislative change and would almost certainly not be followed today.

The Supreme Court has accomplished for federal tax law what the "don't rely" provisions accomplished for corporation codes, and the result has without doubt been beneficial. Congress and the tax bar have been given notice that existing property may be taxed at different rates and by varying methods, so long as the legislative and administrative alterations develop along certain broad and generally accepted lines of operation.[85] If legisla-

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[81] 285 U.S. 434 (1932).

[82] CAL. CONST. art. XII, § 3 (1879).

[83] CAL. CONST. art. XII, § 1.

[84] See, *e.g.*, Moss v. Smith, 171 Cal. 777, 155 Pac. 90 (1916).

[85] The Supreme Court has twice struck down estate and gift taxes on grounds of "retroactivity." Untermyer v. Anderson, 276 U.S. 440 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927). However, the Supreme Court subsequently upheld the assessment of an estate tax at current rates on a gift in contemplation of death made at a time when the applicable rates were lower. Milliken v. United States, 283 U.S. 15 (1931). There, the doctrine was laid down that the existence of an estate tax at some rate was fair warning that the rates might be changed. A year after the *Milliken* decision, an estate tax was upheld on property acquired before any federal estate tax existed because, the Court reasoned, the decedent could have divested himself of the property before death. Gwinn v. Commissioner, 287 U.S. 224 (1931). But the reasoning relied on is questionable, since the decedent's estate would not have been decreased by a sale of the property and the gift tax would be a barrier to a transfer for less than full consideration. However, doubts as to the state of the law were removed a short time later when the Court upheld an estate tax on inalienable property (tenancy by the entirety) acquired before

tive modifications could only be applied so as to affect property acquired or transactions entered subsequent to enactment, tax computation would become an incredibly complicated procedure. Different parcels of income and property would have different "tax years," which would in addition be subject to change each time the tax unit changed hands in certain ways, if these parcels were acquired in a manner that gave them a "vested right" to certain tax consequences. Furthermore, the rates and methods of federal taxation reflect rather closely the economic and social demands of the nation, and a scheme of taxation that permitted a few taxpayers indefinitely to "freeze" their tax liability at some low level despite the growing needs of the nation would be unfair to the remaining taxpayers who would have to bear the additional burden. Unfortunately, although experience shows that the Supreme Court would almost certainly uphold reasonable changes applicable to existing interests, Congress, except when enacting very minor variations such as rate changes, has been responsive to arguments that it would be unfair.[86]

(b) Reliance Manifested in Contracts.—A generalization with some validity may be that laws impairing the obligation of contracts are more likely to be harmful than other forms of legislation that are vested-rights retroactive. Contracts are formal legal relations, entered with explicit regard to their legal consequences. Their very purpose is to create rather precisely articulated duties and rights to guide future conduct. More than other kinds of legally significant action, therefore, contracting is likely to be done with knowledge of, and specific reliance on, the law. This fact plus the very apparent favoritism inherent in relieving one party to a contract of his duties at the expense of the other may justify the special attention given contract-impairment legislation.[87] The extreme reluctance displayed in those decisions that uphold laws impairing contracts,[88] therefore, seems at least in part to be further evidence of the importance attributed to the element of reliance by the Court.

3. Equal Protection of the Law

Substantive due process requires that liberty and property be not impaired unless, allowing a wide play to legislative discretion, the impairment

any estate tax existed. Third Nat'l Bank & Trust Co. v. White, 287 U.S. 577 (1932) (per curiam). One writer, considering these cases and the unchallenged habit of Congress to pass income-tax laws retroactive to the beginning of the calendar year in which they were enacted, has been moved to call the issue of retroactivity in federal tax litigation "as dead as wager of law." Ballard, *Retroactive Federal Taxation*, 48 HARV. L. REV. 592 (1935).

[86] See INT. REV. CODE OF 1954, §§ 2036, 2038(a), 2041; H.R. REP. No. 2319, 81st Cong., 2d Sess. 96–99 (1950).

[87] The reason, as distinguished from the justification, for the special attention includes the history of colonial legislation discriminatory towards creditors. See Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 512–13 (1944).

[88] See, *e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Perry v. United States, 294 U.S. 330 (1935); Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935).

is reasonably necessary to achieve a legitimate social goal.[89] It seems clear that, to some degree, the basis for selecting who will bear the burden or be denied the benefit of government action must be tested against the reasonableness of this burden or nonbenefit on the particular individual. For example, the quantum of detriment necessarily borne by a single person or class of persons in order to achieve a social objective is closely related to the number of persons chosen to share the burden. The discussion in this paper will therefore assume that equal protection of the law is relevant in judging federal acts as well as those of the States.[90] Whether the Supreme Court will or should hold the federal government as strictly accountable in this respect will not be considered.

The basis of selection of method retroactive legislation—events that have occurred in the past—may be especially susceptible to the charge of being unreasonable. Prima facie at least, there seems to be an anomaly in changing the present legal relations of an individual because of acts he performed in the past. Tax legislation presents the policy of equal protection in especially sharp focus, because the usual due-process justification for imposing a burden—that it is a reasonably necessary means to the object of the legislation—is of little help. Since the purpose of a tax is to obtain revenue[91] it is clear that money must be taken from someone; the question is only *who* should bear what is conceded to be a necessary burden. Tax burdens are apportioned on many bases. Ability to pay (income taxes), benefit received (fees, tolls), a combination of ability to pay and benefit received (property taxes), and the ability to achieve, by private ordering, a distribution of the burden related to one of the above cases (excise taxes) are familiar examples. Federal income taxes are almost always set during the year in which they take effect,[92] and are thus retroactive for the portion of the year prior to enactment. It seems clear that correlation to ability to pay has not been lost through the passage of a few month's time, especially in light of the fact that taxpayers generally know to a rough estimate what their tax will be and plan accordingly.

A longer period of time can destroy such correlation, however. The income tax in force in Wisconsin in 1933 permitted deductions for such itemized expenditures as taxes, interest, and business expenses, and contained an exemption for income received from the stock of corporations whose "principal business" was "attributable to Wisconsin." In 1935 in

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[89] Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 161–63 (1919) (Brandeis, J.).

[90] The Supreme Court has held that to some extent equal protection is included within the due process provisions of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

[91] But some taxes are levied primarily as a means of control. United States v. Sanchez, 340 U.S. 42 (1950) (tax on marijuana).

[92] Ballard, *supra* note 85, at 597–98.

order to meet a legislatively declared emergency to obtain revenue for unemployment-relief purposes, the state legislature enacted a tax on 1933 income which had previously been exempted under the home-business provision. The new tax set a rate different from that imposed on 1933 general income and allowed a single $750 deduction. The Supreme Court viewed the tax as though it were levied on 1935 income and held that taxing this special category differently than other sources of income was not a denial of equal protection of law.[93] The retroactive element was dismissed with the statement that if the basis for treating this category separately in 1933 was proper, then it must have been proper in 1935 too. Somewhat inconsistently, the Court added the further justification that the exemption for this income in 1933 was probably thought, on hindsight, to have been inequitable. The Court's first rationale is obviously wrong, and its decision seems incorrect as well. In the economically turbulent 1930's a presumption that ability to pay in 1936 bore a reasonable relation to having been granted an exemption in 1933 seems untenable. And whatever the equities of the legislative compromise that resulted in the 1933 home-business exemption, this is clearly not the kind of unexpected "windfall," such as occurred in connection with the FLSA and AAA legislation. The 1933 government of Wisconsin intended the exemption and, therefore, implicitly intended also that taxpayers order their affairs accordingly.

III

THE SUPREME COURT'S APPROACH TO RETROACTIVE LEGISLATION

A. The Language of the Opinions

In view of the fact that almost all significant legislation operates to some extent to affect legal relations entered into prior to its enactment, it is not surprising that persons whose interests have been adversely affected by new legislation frequently petition the Supreme Court to strike down the legislation because it is "retroactive." Such appeals have seldom been effective, however, and examination of the decisions gives one the strong impression that the Court's instinct, if not its reasoning, has in most instances been correct. The langnage of the opinions, with a few exceptions, has been confused and unenlightening to those who must use it as a guide in discerning the constitutional law of retroactive legislation. The Court's confused articulations may well have been a principal reason for the frequency with which the plea of retroactivity was raised, for, in some areas, almost the sole indication of the way the Court would rule in a particular case was the statistical fact that it had seldom before upheld the defense.

Several common judicial rationales for upholding retroactive legislation

[93] Welch v. Henry, 305 U.S. 134 (1938).

have no analytic validity. Some decisions, for example, state that the exercise of the commerce power[94] can alter the rights and duties of contracts because, if this were not so, private contracts could render commerce-clause legislation ineffective.[95] But of course such legislation is and should be ineffective at least as to particular persons if the Court finds that the constitutional guarantees asserted by the petitioner have been violated.

The Court on occasion has upheld legislative removal of powers or rights of action because the legal relations in question were purely statutory.[96] No one has attempted to demonstrate why statutory law should always be subject to retroactive repeal, and it is doubtful that such an attempt would succeed. The rationale is probably a hangover from a period when the intrusion of statutory upon decisional law was still a rarity. No recent Supreme Court decision has been found that is based on this ground.

Parties to contracts have been denied judicial relief on the theory that all contracts contain an "implied term" that their obligations are subject to changes in the law.[97] The decisions on this ground offer no evidence that such a term was in fact intended by the parties, and "implying" such a term irrespective of intent is merely stating the conclusion that this particular contract can be impaired by the legislation in question.

Parties who have contracted with a State have been denied relief against repudiation because their contracts have been said to have a "congenital infirmity."[98] One author has stated that this is an attribute of those contracts that purport to authorize what would otherwise by a common-law nuisance.[99] This rationale is merely another expression of the "implied term" rationale, and subject to the same objections.

The Supreme Court not too long ago asserted, in upholding Congress' repeal of a previous waiver of state-tax immunity on particular classes of government property, effective as to pending state-tax claims, that the retroactive repeal was justified because a privilege can be withdrawn at any time.[100] The grounds are not very helpful because the question has merely been shifted to determining what is a privilege. The holding of the case made it clear that tax immunities on property held by the Reconstruction Finance Corporation were "privileges" for the purpose of retroactive repeal, but this much could have been communicated by a memorandum decision without opinion.

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[94] U.S. CONST. art. 1, § 8, cl. 3.

[95] See, *e.g.*, Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911).

[96] *E.g.*, Flanigan v. Sierra County, 196 U.S. 553, 560 (1905).

[97] *E.g.*, Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).

[98] *E.g.*, Stone v. Mississippi, 101 U.S. 814 (1879); Norman v. Baltimore & O.R.R., 294 U.S. 240, 308 (1935) (dictum).

[99] Collier, *Constitutionality of Statutory Renegotiation*, 10 LAW & CONTEMP. PROB. 353, 371 (1943).

[100] Maricopa County v. Valley Nat'l Bank, 318 U.S. 357 (1943).

One other rationale sometimes used by the Supreme Court when dealing with retroactive legislation, the so-called ability of a legislature to "ratify" the acts of its official agents, will be discussed along with curative legislation in the next subsection.

In contrast to the issue-hiding language of so many cases are some of the opinions of Justices Hughes[101] and Jackson.[102] Both men avoided easy semantic substitutions for analysis and spoke directly of the interests involved. Their opinions will be discussed later under the sections appropriate to their subject matter. Two opinions by Justice Douglas evidence a regrettable inclination to return to the previous methods of easy rationalizations. In *Fleming v. Rhodes*[103] a landlord had obtained eviction judgments against several tenants in the 25-day interim in 1946 between expiration of the Emergency Price Control Act of 1942[104] and the enactment of the Price Control Extension Act of 1946.[105] The administrator sued pursuant to the latter act to enjoin the execution of the judgments, and a decision in his favor was upheld by the Court. The decision seems proper,[106] since the landlord suffered no more (except litigation costs) than thousands of other landlords throughout the nation who were being forced to retain their tenants at government-set rentals. The only answer given to the landlord's due-process objection, however, was that, "federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution."[107]

It is unlikely that Douglas meant only that regulation is not per se prohibited, for this is obvious and, moreover, not an answer to this defendant's assertion that in his case the regulation should be prohibited. However, the other possible interpretation, that any law that only regulates future action is not unconstitutional as a deprivation of property without due process, at least if the person being regulated is doing business in a regulated field, is also unsatisfactory. The difference between a law that only regulates future conduct and one that removes previously acquired rights is only a difference of phrasing, and the former can be quite as injurious to the individuals affected as the latter.

That the second interpretation was the one intended seems to be proved by the subsequently decided case of *FHA v. The Darlington, Inc.*,[108] in which Mr. Justice Douglas again spoke for the Court. The subject of the

[101] W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[102] Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945).

[103] 331 U.S. 100 (1947).

[104] See note 15 *supra*.

[105] See note 76 *supra*.

[106] See text at notes 72–74 *supra*.

[107] Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

[108] 358 U.S. 84 (1958).

dispute was the contractual provisions of a mortgage held by a government agency. The mortgagor argued that the mortgage left him free to lease to transients, at least as to space which good faith efforts had failed to fill with permanent lessees. Justice Douglas, giving "weight" to subsequent legislation, interpreted the mortgage to prohibit transient rentals altogether, and, alternatively, gave effect to the subsequent legislation because it applied prospectively only. The act, because it controlled only the defendant's future conduct, was not retroactive and therefore there was "no possible due proces issue on that score."[109] Perhaps a clue to why Douglas chose to ignore the landlord's reliance on the terms of the mortgage may be found in his attitude toward the judicial process—"the Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning"—and his attitude towards the rights of the regulated—"those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."[110]

B. The Holdings

In discussing what the Supreme Court has done, as opposed to what it has said, only a few generalizations can be made. Some progress, however, will result from the segregation of certain types of legislative activity which have been accorded special treatment by the Court. The special attitude of the Court to retroactive federal tax statutes has already been discussed.[111] Three other types of legislation also warrant discussion: (1) curative legislation; (2) remedial legislation; and (3) legislation altering the obligation of government contracts.

1. "Curative" Legislation

Long-continued and substantial administrative and private conduct pursuant to what is believed, at least by the administrative officials, to be the law is on occasion undercut by a tardy discovery that the law is invalid in some respect. The Court has almost always upheld "curative" legislation designed to restore what was believed to have been the status quo. The situation usually arises when government officials assert that some duty must be performed, *e.g.*, to pay a tax, toll, or tariff, and their authority is later found invalid.[112] It can be seen that these cases are included among those

[109] FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958).

[110] *Ibid.*

[111] See text following note 85 *supra*.

[112] *E.g.*, Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937) (AAA § 9 having been held unconstitutional, statute that, in effect, collected taxes that would have been collected had AAA previously been in force upheld); Graham & Foster v. Goodcell, 282 U.S. 409 (1931) (statute of limitations having been held to be shorter than Treasury Department had believed, statute reopening barred claims against delinquent taxpayers upheld); Charlotte Harbor & N. Ry. v.

in which the Court has given weight to reliance or its absence; curative legislation forms an even stronger case, however, for it does not merely deny that which was not expected, but restores a situation that was affirmatively anticipated and provided for.

Probably the leading example of curative legislation is found in *United States v. Heinszen & Co.*[113] An importer paid duties on his merchandise pursuant to the invalid orders of an executive agency governing the Philippine Islands. These orders in turn had been issued pursuant to a Presidential order apparently authorized by statutes that a reasonable judgment could well have concluded did so authorize.[114] Legislation later retroactively validated the agency's authority, and the importer's claim for refund was denied. The facts showed that he had priced so as to pass on the tariff burden.[115]

It seems clear that the principle of curative legislation could, if carried too far, encourage irresponsible official conduct. This consideration seems to have motivated the Court's refusal to uphold the attempted retroactive validation of toll assessments in *Forbes Pioneer Boat Lines, Inc. v. Board of Comm'rs.*[116] A canal boat operator paid under protest a series of tolls which the highest state court agreed were illegally levied,[117] but on the same day on which the decision of the court was handed down the legislature enacted a statute purporting to validate the levies.[118] The board of commissioners, whose job it was to construct and maintain irrigation works, justified its exactions on the vague, proprietary theory that, since the irrigation locks were within its control, it could deny or conditionally permit their use for navigation. The statutes giving the board its authority contained no express or even reasonably implied power to collect tolls.[119] That the factor of official irresponsibility was decisive in *Forbes* is further evidenced by statements in the later case of *Graham & Foster v. Goodcell*[120] which distinguished *Forbes* as being an effort to "create a liability," as opposed to one "curing a defect in the administration of the law."

Welles, 260 U.S. 8 (1922) (invalidly constituted road and bridge district having collected property taxes, statute ratifying its authority upheld); United States v. Heinszen & Co., 206 U.S. 370 (1907) (statute imposing tariff duties having been held invalid after duties collected, ratifying statute denying refunds upheld).

[113] 206 U.S. 370 (1907).

[114] See *id.* at 377–82.

[115] See Brief for Appellant [United States], p. 66, United States v. Heinszen, 206 U.S. 370 (1907): "[The duties] . . . it is proper to assume, under the well-recognized laws of trade, were recouped from the Philippine people by the importers . . . ." The appellee's brief did not deny the assertion.

[116] 258 U.S. 338 (1922).

[117] Forbes Pioneer Boat Line, Inc. v. Board of Comm'rs, 77 Fla. 742, 82 So. 346 (1919).

[118] See Board of Comm'rs v. Forbes Pioneer Boat Line, Inc., 80 Fla. 252, 86 So. 199 (1920).

[119] The applicable statutes are set out in the opinion in Forbes Pioneer Boat Line, Inc. v. Board of Comm'rs, 77 Fla. 742, 82 So. 346 (1919).

[120] 282 U.S. 409, 426–30 (1931).

A rationale sometimes invoked to support curative legislation is that the lawmaking body can "ratify" the acts of its agent if the agent purported to act for his principal, the government; if the acts when performed could have been authorized by appropriate legislation; and if the acts, were they performed at the time the ratifying legislation was enacted, would be legal.[121] All these criteria exactly parallel the common-law requisites for ratification of the agency relation,[122] and this relation obviously forms the analogy for the so-called legislative ratification. The analogy is false, however, and has only served to confuse.

The common-law doctrine is used to uphold contracts, and it is apparent that it operates to give effect to what a party voluntarily intended. As used by the Supreme Court, however, the doctrine gives effect to something that had nothing to do with a voluntarily expressed assent to the assumption of rights and duties.

The inference of assent carried by the common-law nomenclature has led one writer to infer that if the person contesting the retroactive authorization also "protested" when the power was originally asserted, he could not be forced to accede to the retroactive legislation.[123] The grain of truth in this distinction is that the existence or nonexistence of widespread "protest" may be evidence of whether the government officials imposing a duty are doing so under colorable authority and in good faith. The "protest" is only evidence however; making it conclusive of the ultimate fact creates an unnecessary margin for error. Furthermore, if the distinction were to be applied on an individual basis, as that writer seems to contemplate, a technicality almost totally unrelated to the merits of the issue would be introduced. Applied without the "protest" limitation, the ratification theory is even more dangerous, for it fails to take into account the policy against encouraging irresponsible official conduct. The legislature in *Forbes* could just as validly "ratify" as could Congress in the *Heinszen* situation.

A more complex example of curative rule-making, and one in which the Court itself ordered an agency to promulgate a retroactive regulation, is *Addison v. Holly Hill Fruit Prods., Inc.*[124] Congress had exempted from the operation of the FLSA certain agricultural occupations within an "area of production" to be defined by the Administrator. The regulation defining "area of production" included a rule that no employer who employed more than seven employees was to receive the benefit of the exemption. Six years after promulgation, the Supreme Court held that this aspect of the regula-

[121] See cases cited note 112 *supra*. Graham & Foster v. Goodcell, *supra* note 120, reiterated the principle but did not specifically apply it.

[122] See MECHEM, AGENCY §§ 200, 201, 203 (1952).

[123] Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisdiction*, 20 MINN. L. REV. 775, 795–96 (1936).

[124] 322 U.S. 607 (1944).

tion was improper because Congress' intent was that the limitation on the exemption be defined solely in geographical terms. If the Court were to invalidate the whole regulation, then Congress' intent that not all employers whose employees were in the enumerated agricultural occupations should be exempted would be contravened. Upholding the regulation without its seven-employee limitation would likewise exclude many employers Congress meant to include in the act. Invalidating the whole statutory exemption because it was not properly limited would retroactively include many employers Congress had not meant to be covered. The Court therefore remanded with instructions that the Administrator draw up a new regulation solely in geographical terms. Although the Court did not discuss the point, presumably the new regulation would be applied retroactively only to employers also included within the old regulation. A more traditional disposition of the case might have been to invalidate the regulation and determine the scope of what should have been the agricultural-workers exemption on a judicial *ad hoc* basis, but the administrative and judicial burden this would have necessitated is obvious. The Court's disposition of the case seems imaginative and proper, and has been commended by an expert in the FLSA area.[125]

In the only clear misuse of the curative doctrine the Court in *Paramino Lumber Co. v. Marshall*[126] upheld on the ground that it was merely "corrective" a private act directing that one John T. Clark be accorded another hearing on his claim for compensation for injuries under the Longshoremen's and Harbor Workers' Compensation Act.[127] An administrative hearing which was not appealed had previously set the amount to which Clark was entitled, and his employer had paid the award. The "legislative finding" was that the award was based on a mistaken finding of fact as to the extent of Clark's injuries. The Court justified the act as corrective of a defect in administration, and dealt with the equal-protection issue by saying that, even assuming the fifth amendment included equal protection, private acts of Congress had always been accepted.[128] The equal-protection issue was certainly dismissed too glibly. Private acts have not traditionally operated to take *A*'s property and give it to *B*. If the policy of res judicata is to be relaxed as against Clark's employer it is difficult to see what reasonable justification exists for not imposing a like burden on other employers whose employees had injuries that proved to be worse than anticipated. If the act had been general it would almost certainly have imposed a sizeable burden

125 Dodd, *The Supreme Court and Fair Labor Standards, 1941–1945*, 59 HARV. L. REV. 321, 339–41 (1946).

126 309 U.S. 370 (1940).

127 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–50 (1958), as amended, 33 U.S.C.A. § 933 (Supp. 1959).

128 Paramino Lumber Co. v. Marshall, 309 U.S. 370, 380 (1940).

on the employers and insurers affected; and the necessity of facing the implications of such a general burden before inflicting it on a single person is one of the duties the equal-protection guarantee is designed to enforce.

2. "Remedial" Legislation

The Supreme Court has never prevented the application to existing rights of action of statutes that vary the methods by which or the time in which rights of action can be enforced, so long as the potential plaintiff's ability to enforce his right is left substantially unimpaired. The basis of the decisions is the traditional difference in emphasis between a duty and the means by which it is enforced, which accords stability to the former and subjects the latter to reasonable considerations of administrative expediency and avoidance of undue harshness towards the obligor.[129] The most litigated questions concern statute-of-limitations legislation, and the permissible limits of variation of such statutes are by now well settled. Time periods generally can be lengthened or shortened as the legislature desires, even to the extent of reviving claims previously barred.[130] However, statutes of limitations that are enacted as part of the right of action to which they refer,[131] or, if not so enacted, were "directed to the newly created liability so specifically as to warrant saying that it qualified the right,"[132] cannot be lengthened so as to revive barred claims. This distinction arises from the conceptual feeling that such a limitation is more a part of the right that it qualifies than is a general limitation statute.[133] It is also employed in the field of the conflict of laws.[134] There it is justifiable by the reasonable assumption that, by enacting a statute of limitations with specific reference to a particular, relatively narrowly defined right of action, the legislature manifests its belief that the cause should be totally extinguished when the limitation has run. Such an assumption has no relevance to the propriety of a legislature's later changing its mind on this matter. Since the distinction seems to have no generally valid bearing on the extent of the obligor's probable reliance, there is no reason to rely on it here. The other restriction on alteration of time periods is that a shortening be accomplished in such a

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129 See HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 151–53 (tent. ed. 1958).

130 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311–12 (1945).

131 William Danzer & Co., Inc. v. Gulf & Ship Island R.R., 268 U.S. 633 (1925) (alternative holding).

132 Davis v. Mills, 194 U.S. 451, 454 (1904) (*semble*). This holding is not completely clear, but it has been interpreted so as to uphold the proposition for which it is cited. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 312 n.8.

133 See William Danzer & Co. v. Gulf & Ship Island R.R., 268 U.S. 633, 636–37.

134 See Bournias v. Atlantic Maritime Co., 220 F.2d 152 (1955).

manner as to leave a reasonable time for outstanding claims to be filed before being barred.[135]

3. Government Contracts

Perhaps the most generally difficult class of cases involving retroactive legislation is that in which the Government seeks relief from its own contractual obligations. The Government, as a contracting party, has expressly and directly invited reliance, and its subsequent refusal to perform as promised produces a readily measurable harm which falls on a comparatively small segment of the population. The Court was first presented with the problem in 1933 when, as an economy measure, Congress repealed all laws granting or pertaining to life insurance issued to members of the armed forces in World War I. The repeal was held unenforceable against a beneficiary of a policy taken out by a veteran who had been totally disabled.[136] The Government's contention that the great need for economy justified the repeal was rejected. Two years later Congress enacted legislation ordering payment in paper currency, whose gold equivalent had been reduced 40 percent, of "gold bonds" payable "in United States gold coin of the present standard of value." The Government's dishonor of its obligation was held to be unconstitutional, but the refusal to pay otherwise than in current paper currency was upheld because the bondholder could show no damage.[137] Had the bonds been paid in gold, the Court said, the Government could have exercised its acknowledged power over the currency to force the bondholder to exchange his gold for current legal tender.

The holding that the Government cannot repudiate its own obligations has since been implicitly overruled,[138] and the *Perry* case can more easily be justified on the grounds that, when the need is sufficiently great and the means nondiscriminatory and otherwise reasonable, the Government's own obligations can be altered or repudiated like any other contract. All these conditions were satisfied in the instant case. It was not unreasonably believed that lowering the gold equivalent of the dollar would be of great benefit in alleviating the depression,[139] and this could be accomplished without dislocating the financial structure of the national economy only if the estimated 75 billion dollars in gold bonds currently outstanding[140] were

[135] Terry v. Anderson, 95 U.S. 628 (1877) (dictum); *cf.* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930). In the latter case, judicial overruling of previous law as to appropriate remedy left plaintiff without remedy because he had let the statute of limitations run on what now was declared the sole remedy; the Supreme Court ordered the State to give him a hearing on the merits of his case.

[136] Lynch v. United States, 292 U.S. 571 (1933).

[137] Perry v. United States, 294 U.S. 330 (1935).

[138] Lichter v. United States, 334 U.S. 742 (1948).

[139] See Norman v. Baltimore & O.R.R., 294 U.S. 240, 295–97, 312–16 (1935).

[140] See *id.* at 313.

made payable in depreciated currency. A good share of these gold bonds must have been government obligations, and Congress treated them the same as it treated the private debts; it apparently saw no reason to treat obligees of the Government as a favored class. The Court upheld alteration of the private debts in *Norman v. Baltimore & O.R.R.*,[141] decided the same day as the case on the government bonds.

In 1942 the Court ordered the Government to pay in full a contract claim of Bethlehem Steel Corporation dating from World War I.[142] The Government had pleaded to be discharged by a lesser sum because the terms of the contract were set under the economic duress of wartime and Bethlehem had exacted an unconscionable advantage. The Court denied the defense, saying that the contracting agency at the time was authorized to pay the current profit margins. However, 6 years later the Court in *Lichter v. United States*[143] upheld, as a necessary and proper exercise of the war power, application of the Renegotiation Act to defense contracts let by the Government prior to the act's enactment. The opinion cited the strong moral and psychological necessity that the war effort, which required great sacrifices on the part of so many, not be permitted to be a source of excessive profit to a few, and drew a persuasive analogy between the armed services' conscription of men and the Renegotiation Act's "conscription" of excessive industrial profits.[144]

The scope of the Government's power to repudiate its own obligations, therefore, seems to have been defined so as to be consistent with its power to use or impair property of any other sort. The principle of equal protection operates to prevent repudiation from being used to single out a particular person or a small class of persons who will bear an inordinately great share of the revenue burden of the State; the Court made this clear in the *Bethlehem Steel* case and the war-risk-insurance case.[145] On the other hand, when the extent of the repudiation is only that which is reasonably necessary to effectuate a valid objective, it is permitted; *Lichter* and *Perry*[146] demonstrated this.

IV

INTERACTION BETWEEN LEGISLATIVE AND JUDICIAL RETROACTIVE LAWMAKING

It is sometimes stated that courts commonly make law retroactively.[147] In the sense that the rules and principles announced by courts are as appli-

141 295 U.S. 240 (1935).

142 United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942).

143 334 U.S. 742 (1948).

144 *Id.* at 756.

145 Lynch v. United States, 292 U.S. 571 (1933).

146 Perry v. United States, 294 U.S. 330 (1935).

147 Smith, *Retroactive Laws and Vested Rights*, 6 TEXAS L. REV. 409, 414 (1928).

cable to events occurring prior to the announcement as they are to events occurring subsequently, the statement is no doubt true. In its general usage, however, "retroactivity" implies more than universality of application; it carries a pejorative connotation of surprise and disappointed expectations —of "affecting vested rights." The connotation is seldom justified in a judicial setting. When presented with a set of facts the legal effect of which is disputed, a court has no choice but to give a decision. Saying that it acts retroactively, as opposed to prospectively, is therefore misleading, since its decision sets out for the facts presented a rule that had not previously been known. The status quo from which a deviation can operate either prospectively or retrospectively does not exist for the judge as it does for the legislator.

It is true that an individual may be denied, through the operation of stare decisis, an opportunity to argue his case to a court unbiased by a decision rendered subsequent to the occurrence of the litigated events. Even here, however, the judicial system operates to reduce the disadvantages to a point far below that presented by the analogous situation of subsequently enacted retroactive legislation. (1) Judicial decisions are commonly rendered only when the court hears argument from adverse parties; that is, a past decision whose stare decisis effect is adverse to that of a litigant now before the court was not rendered without hearing arguments similar to those he would have presented. (2) An effort is made in adjudication to require that the litigants present a narrow set of facts, and the rule of decision on these facts is to an indeterminate degree limited to them. Therefore even if the rule of decision is adverse to a later litigant, he has the opportunity to show that his facts are in some significant respect different from those upon which the rule was announced; if the difference can be proved to the court, the rule will be altered. (3) Judicial rule-making is the product of reasoning from generally accepted premises, not fiat, and therefore its course may be predicted with some confidence at the time when action must be taken in reliance on legal effects. (4) Judicial rules are created by a disinterested body, thereby diminishing the chance that prejudice or other irrational factors will control the decision.

Judicial rule-making does include a retroactive element analogous to that present in legislation when the effect of a decision is to overrule past decisions or widely accepted lay or administrative interpretations of the law. The overruled interpretations provide a status quo upon which reliance may have been based. The unsettling effect can be quite pronounced in those relatively infrequent cases in which the court's decision is almost totally unexpected. In these situations, retroactive legislation designed to restore the status quo may be appropriate. Four instances in which a Su-

preme Court decision has initiated such a chain of events have been found.[148] Insofar as they are of interest in themselves, the decisions upholding the retroactive legislation have been discussed in other parts of this paper; the only question that will be explored here is the effect of the first decision and the legislation on the second decision.

In those instances in which the undercutting of widespread reliance is caused by a judgment of unconstitutionality,[149] the resulting dislocation seems to be the inherent price of a system that chooses to sacrifice quick certainty in order to gain the assurance that judgments of unconstitutionality will be made only after thorough argument, before several tribunals, and on a set of facts sufficiently specific to permit intelligent decision.[150]

When the undercutting results from a disparity between the Court's interpretation of legislative intent and the interpretation taken and acted upon by most of those affected, however, the consequent dislocation could have been avoided had the Court given greater weight to public reliance. Whether or not decisive weight should be given to this factor clearly cannot be answered in the abstract; but the inevitable dislocation which will ensue if the Court undercuts such reliance should certainly be taken into consideration. When the constitutionality of the retroactive restoration is attacked, the question therefore arises as to what weight should be given the several determinations of the extent of public reliance on what was believed to be the old law, which has purportedly made a retroactive return to this former state at least permissible if not necessary. Presumably the Court in its

148 (1) Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948), was retroactively reversed by the Act of July 20, 1949, ch. 352, 63 Stat. 446 (see note 65 *supra*); the legislation was upheld in Addison v. Huron Stevedoring Co., 204 F.2d 88 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953).

(2) Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), was retroactively reversed by the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251-62 (1958); the legislation was upheld in Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948).

(3) Baltimore Nat'l Bank v. State Tax Comm'n, 297 U.S. 209 (1936), was retroactively reversed by the Act of Mar. 20, 1936, ch. 160, § 1, 49 Stat. 1185 (repealed by 61 Stat. 208 (1947) (now, essentially Reconstruction Finance Corporation Act, § 8 last clause, 47 Stat. 8, as amended, 15 U.S.C. § 607 (1958)); the legislation was upheld in Maricopa County v. Valley Nat'l Bank, 318 U.S. 357 (1943).

(4) Bowers v. New York & Albany Lighterage Co., 273 U.S. 346 (1927), was retroactively reversed by the Revenue Act of 1928, ch. 852, §§ 607, 611, 45 Stat. 874, 875 (§ 607 is similar to INT. REV. CODE OF 1954, § 3760); the legislation was upheld in Graham & Foster v. Goodcell, 282 U.S. 409 (1931). For a general discussion of the first two cases and the legislative reaction to them, see Note, 71 HARV. L. REV. 1324, 1327-29, 1335-37 (1958). See also text at notes 55-73 *supra*. The third decision held that RFC stock was taxable by the States, and the fourth decision involved the tolling of the statute of limitations on actions of distraint to collect taxes in default; see note 112 *supra*.

149 See, *e.g.*, Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937). This decision upheld a special statute to eliminate the windfall profits accruing from the Court's previous holding that the AAA was unconstitutional. See text at notes 51-54 *supra*.

150 Note, 72 HARV. L. REV. 723 (1959).

initial interpretation of the old law made such a determination; the Legislature has certainly made such a determination in enacting the curative legislation; and the Court, if it so desires, now has the opportunity to make a third determination of the same fact. Intertwined with the merits of the question are considerations of tactfulness. Judges in the lower courts and counsel arguing before the Supreme Court are forced into evasive phrasing by their efforts, on the one hand, to justify the retroactivity by describing the totally unexpected character of the Supreme Court's prior ruling and, on the other hand, to avoid calling the Court's decision wrong. The necessity for tact, whether or not it was the primary reason, certainly seems to have been one of the reasons why all the cases found answer the first part of the question posed above in the same way. No weight whatever is given the first judicial determination. Rather, the prior judgment is presumed correct, and the dislocation is blamed on an unfortunate "defect" in the original legislation or, slightly less respectfully, on the "unexpected" character of the previous decision.[151] The approach taken is probably correct irrespective of its face-saving quality. The fact of substantial public reliance on a particular interpretation is a very relevant factor in interpreting the law, but clearly it cannot always be controlling or even almost controlling.[152] For the purpose of upholding a curative statute, the importance of this factor may range from absolutely crucial—for example, if the statute operates to divest certain individuals of valuable rights of action, the only constitutional justification may be that these rights were windfalls—to nearly irrelevant—for example, the curative act may be supportable on grounds other than its curative character, such as being concerned solely with remedies rather than primary conduct.[153] In short, the differences in the importance of the reliance issue in the two proceedings will probably result in the Court and the parties giving it different degrees of attention, and it would be unwise in a case in which the fact is of great importance to give much weight to a previous finding that may have received only collateral consideration at the time it was made.

A further distinction may be helpful. The facts of political life make it very difficult for legislatures to play a corrective role in the process of judicial interpretation. Consequently, the courts must take a large share of responsibility for seeing that the reasonable intent of the legislature, or a reasonable development of the common law, is carried out. This may at times require interpretation contrary to the course of substantial private

151 See, *e.g.*, Battaglia v. General Motors Corp., 169 F.2d 254, 258 (2d Cir. 1958).

152 See, for a discussion of the analogous role of stare decisis and its relation to reliance, Fox v. Snow, 6 N.J. 12, 21–28, 76 A.2d 877, 882–85 (1950) (Vanderbilt, C.J., dissenting).

153 The legislative action following Bowers v. New York & Albany Lighterage Co., 273 U.S. 346 (1927), was upheld largely on this theory. See Graham & Foster v. Goodcell, 282 U.S. 409 (1931).

or administrative reliance patterns, since such conduct, especially when reasoning has been clouded by strong self-interest, may be clearly wrong. Therefore, the emphasis placed on reliance in the initial adjudication should normally vary with the extent that the reliance was reasonable; in the second adjudication the more important fact is simply that the reliance did occur. Consider, for example, *Toolson v. New York Yankees, Inc.*[154] The Supreme Court admitted that a reasonable interpretation of the antitrust laws might well require their application to the baseball business, but the Court refrained from examining the issue because of the substantial property interests built in reliance on exclusion.[155] If the Court had followed what seems the proper course and applied the antitrust acts to baseball, subsequent enactment of legislation retroactively granting immunity would nevertheless almost certainly have been upheld.

The question still remains as to what weight should be given in testing retroactive legislation to the legislative finding of substantial reliance. In only two of the four instances of retroactive overruling by Congress did the legislation reach the Supreme Court, and in both cases the retroactivity was supported primarily on grounds other than its being restorative of what was widely believed to have been the status quo.[156] The Court therefore found it unnecessary to go into this question at any great length. To the extent that it did, the legislative findings were apparently accepted without argument.[157] In the other two instances, the question was posed to the courts of appeal and they invariably gave great weight to Congress' findings.[158]

Because legislative inertia ordinarily operates to prevent any reaction at all to judicial decisions unless the need is widespread and obvious, the question of the weight to be given the legislature's judgment of reliance is largely academic. The social disruption is usually too obvious to be seriously disputed. In treating vested-rights retroactive legislation in general, however, the Supreme Court has commonly accorded the legislative judgment of social need the same high degree of credence that is characteristic of all substantive due-process adjudications, and there seems no reason why

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[154] 346 U.S. 356 (1953).

[155] Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), had held that baseball as then constituted was not a business for the purpose of the antitrust laws. The proprietary interests affected, in what seems to be an outstanding example of how legal reasoning can be shaped by wishful thinking and self-interest, apparently construed this holding as a blanket immunity effective for all time.

[156] In Maricopa County v. Valley Nat'l Bank, 318 U.S. 357 (1943) the legislation was upheld because tax immunities are a "privilege" and therefore can be withdrawn at any time; in Graham & Foster v. Goodcell, 282 U.S. 409 (1931), the legislation was upheld primarily because it affected the remedy, and not the right.

[157] See Graham & Foster v. Goodcell, *supra* note 156, at 426.

[158] See Moss v. Hawaiian Dredging Co., 187 F.2d 442, 446–47 (9th Cir. 1951); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948). See also text at note 68 *supra*.

the situation should be changed by the fact that the need arises from the Court's own prior decision.

So far as I can discover, the Court and Congress have never given separate consideration to the effect of retroactive legislation on conduct occurring after the first judicial interpretation but before the "overruling" legislation was enacted. Prima facie, this would seem to form a distinct problem, since such conduct would apparently be patterned after the first judicial interpretation and therefore unjustly undercut by the legislation, but in practice the problem seems of small importance.

It is hard to conceive, for example, of any substantial reliance being quickly built on an ability to tax stock of the Reconstruction Finance Corporation, as the Court unexpectedly held could be done in *Baltimore Nat'l Bank v. State Tax Comm'n.*[159] Fortunately, the same factors that call forth the retroactive legislation—large losses to some persons and large windfalls to others—operate to bring it forth quickly,[160] so the shortness of the interim period combined with social inertia have made the problem unimportant. Should a particular individual prove he had in fact relied on the interim state of the law to his detriment, however, it seems clear that he should be entitled to relief. The Supreme Court has given such relief in an analogous situation caused by a judicial overruling in a state court.[161]

V

LEGISLATIVE ALTERATION OF ACCRUED RIGHTS OF ACTION AND RIGHTS OF ACTION REDUCED TO JUDGMENT

Despite some holdings to the contrary,[162] there seems to be little doubt at the present time that legislation can impair or remove accrued rights of action to the same extent that it can impair or destroy other property rights. The Portal-to-Portal and "Overtime-on-Overtime" Acts did precisely this.[163] Furthermore, it is well settled that contractual duties can be impaired or eliminated, and there seems no reason why a claim for money or other relief which arises from violation of a duty should be more jealously protected than the power to enforce a primary duty voluntarily assumed; in both cases the legislation occasions a loss.

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[159] 297 U.S. 209 (1936).

[160] Legislation following upon Baltimore Nat'l Bank v. State Tax Comm'n, 297 U.S. 209 (1936), was enacted within 2 months after the decision; that following upon Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), within 11 months; and that following upon Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948), within 13 months. See note 148 *supra.*

[161] See Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930).

[162] Coombes v. Getz, 285 U.S. 434, 442 (1932); Ettor v. City of Tacoma, 228 U.S. 148, 156 (1913).

[163] See text at notes 55–73 *supra.*

A less easily answered question is the ability of Congress to remove a right of action which has taken the form of a judgment. Since the early case of *Massingill v. Downes*[164] the federal courts have spoken as though this would not be proper,[165] but the immunity of adjudicated rights to legislative repeal may be more a matter of semantics than reality. In *Hy-Yu-Tse-Mil-Kin v. Smith*[166] an Indian's claim for an allotment of federal land which had been refused in an administrative proceeding was upheld under a statute, subsequently enacted, which gave to all Indians who claimed to be entitled to land under any act of Congress a right of action in a federal court. It is not surprising that the Court had no trouble in upholding the statute, since its only effect was to confer a benefit; but the objection of administrative res judicata was raised and rejected.

In *Paramino Lumber Co. v. Marshall*,[167] the Court, although careful to point out that it did "not set aside a judgment,"[168] upheld legislation reopening a particular workmen's compensation proceeding after the time for judicial appeal had elapsed. Moreover, *Fleming v. Rhodes*,[169] decided in 1947, has significantly limited if not overruled the supposed ban on setting aside judgments. In the interim between expiration of one rent-control act and enactment of another, the defendant landlord secured eviction judgments against several tenants, but his efforts to execute the judgments after the new statute was enacted were enjoined by the Price Administrator. The Court upheld the injunction, dismissing the constitutional objections with the statement that the act applied only to future conduct.

Private legislation similar to that involved in *Paramino Lumber Co. v. Marshall* would be at least as objectionable if directed to a court as it was directed to an agency. It seems a clear violation of the policy of equal protection of the law. However, curative legislation that permitted already-litigated actions to be retried on the issue with which the retroactive legislation was concerned, and that also removed similar unaccrued rights of action, ought to be constitutional. Prior to the Portal-to-Portal Act an estimated 5 billion dollars in claims had been filed against employers. If for some reason—*e.g.*, if it had been an election year and Congress had adjourned early without being able to deal with the problem—a significant

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164 48 U.S. (7 How.) 760 (1849) (alternative holding).

165 See, *e.g.*, Battaglia v. General Motors Corp., 169 F.2d 254, 261-62 (2d Cir. 1948).

166 194 U.S. 401 (1904).

167 309 U.S. 370 (1940). See text at notes 126-28 *supra*.

168 *Id.* at 378.

169 331 U.S. 100 (1947). This decision might be distinguished because (1) the eviction had been brought by the plaintiff-landlord in anticipation of the legislation; (2) the type of interference required no affirmative judicial action, and (3) the relief granted—eviction of the tenants—is perhaps sufficiently similar to specific performance to justify application of the equitable doctrine that the decree may be changed on showing of new material facts or change in the law. *Cf.* Note, *Finality of Equity Decrees*, 59 HARV. L. REV. 957, 963-66 (1946).

portion of these claims had matured to judgment, would Congress have been constitutionally unable to give relief? Clearly, Congress should have the power; the legislature should not be forced to race with the court dockets.

It might be objected that permitting the fruits of victory in court to be removed by legislation would unduly discourage litigants from contesting issues of wide public interest, but the probability that Congress will react to any given judicial decision, even when it has widespread effect, is so slight that few litigants would be deterred by the prospect. So long as the policy of equal protection forces the legislature to confine its actions to a whole class of litigants and potential litigants, the policy of res judicata seems adequately protected. It might even be argued that the principle of equal protection should require that, when accrued rights of action are legislatively removed, adjudicated rights of the same class also must be reversed. This is a factor that ought to be considered by the legislature, but it seems clear that, if this body chooses to make a distinction on the basis of res judicata, a court could not call this so unreasonable as to be unconstitutional.

CONCLUSION

This Article has attempted to clarify the theoretical considerations involved in the notion of retroactivity and to present a more direct method of analysis relating to it. The bars to retroactive legislation are those associated with substantive due process: (1) protection from undue loss of property, especially when it represents an investment of labor or other value; (2) protection from the demands of government officials acting irresponsibly; and (3) protection from being punished and condemned for choices made without knowledge of their wrongful character. That a law is method-retroactive is relevant only to the determination of whether or not an opportunity for choice existed. In considering a law in the light of the other factors mentioned above, the presence or absence of method retroactivity is largely irrelevant. To ask whether a law is vested-rights-retroactive, on the other hand, is only to restate the question of its sufficiency in light of substantive due process. Vested-rights retroactivity is a superfluous category.

The conclusions drawn as to the extent to which vested rights may be sacrificed to social expediency are not of primary importance to this Article. However, it is submitted that correct conclusions on this question can only be found by dealing with this fundamental balancing. Attempts to create separate categories for retroactivity have only caused confusion.