THE CIVIL EX POST FACTO CLAUSE

EVAN C. ZOLDAN*

Since its first interpretation of the Ex Post Facto Clause in *Calder v. Bull*, the Supreme Court consistently has held that the clause applies only to retroactive criminal, but not civil, laws. The consequences of this distinction are far ranging, permitting, for example, states to keep offenders behind bars after they have served their sentences. The Court's distinction between civil and criminal retroactivity is based wholly on *Calder*'s historical conclusion that the original meaning of the Ex Post Facto Clause included criminal laws only. This article demonstrates that *Calder*'s historical analysis is wrong.

After examining historical evidence that never before has been considered by scholars or judges interpreting the Ex Post Facto Clause, I conclude that the original meaning of the clause encompassed civil as well as criminal laws. This new evidence calls for a reconsideration of *Calder* and raises the intriguing possibility of greater judicial scrutiny of civil retroactivity. I also examine the most common doctrinal, structural, and normative arguments for retaining *Calder* and offer new ways of approaching these arguments.

---

* I am grateful for the assistance of Lawrence B. Solum, Stephen M. Feldman, Sonja B. Starr, Glen Staszewski, William M. Richman, Lee J. Strang, Gregory M. Gilchrist, and all those who participated in workshops of earlier drafts of this paper at the Law & Society Annual Meeting, the University of Toledo College of Law, Michigan State University College of Law, and the Loyola University Chicago School of Law. Thanks to Samantha Meiers for her research assistance. Thanks also to the University of Toledo College of Law for its support for this project.

INTRODUCTION

A statute is retroactive when it changes the legal consequences of conduct that occurred before the statute was enacted. Retroactive legislation has long been, and continues to be, among the most reviled of all legislative creations. The early Supreme Court denounced retroactive laws as "oppressive, unjust, and tyrannical" and therefore "condemned by the universal sentence of civilized man."[1] Modern scholars and judges reaffirm this historical aversion to retroactive laws.[2] For example, legal philosopher Lon Fuller has called them "truly a monstrosity,"[3] and it is easy to see why. Imagine the following: an oil company drills off the coast of the United States. Through gross negligence, oil company employees cause an explosion that kills workers, decimates wildlife, and pollutes the shores of the United States, causing billions of dollars in damages. Members of Congress sympathetic to the oil industry push through a bill, *effective the day*

1. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827).

2. Retroactive laws have been called, *inter alia*, "a violation of fundamental principles, inconsistent with the nature of republican and free governments, . . . repugnant to the common principles of justice and civil liberty, absolute injustice, a violation of natural right, against the great principle of Eternal Justice, inconsistent with the principles of general jurisprudence, and monstrous." Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 237 (1927) (internal quotation marks omitted).

3. LON L. FULLER, THE MORALITY OF LAW 53 (rev. ed. 1969).

before the explosion, which caps liability for oil spills at a fraction of their true cost.[4]

This hypothetical statute is retroactive legislation because it changes the legal consequences of the employees' past gross negligence; and it exemplifies why retroactive laws have been roundly and universally condemned. Because a legislature can know exactly who will benefit or suffer from the change in law, retroactive laws permit the legislature to single out known individuals for special treatment. By changing the legal effect of past conduct, retroactive legislation prevents citizens from knowing what conduct will subject them to liability. Because retroactive laws upset settled expectations, they discourage investment and contractual arrangements and, more fundamentally, undermine respect for the rule of law.[5]

For these reasons, among others, the United States Constitution restrains retroactive legislation through the Ex Post Facto Clauses.[6] It is beyond dispute that these clauses spring from a deeply held aversion to retroactivity;[7] however, because the phrase "ex post facto" is unfamiliar—indeed, it is not even in English—the interpretation of the clauses has been the subject of dispute since the republic's first days.[8] In at least one respect, the debate is as well-defined as it is unresolved. Scholars and jurists advancing the "narrow" interpretation of the Ex

---

4. This hypothetical is based on the Deepwater Horizon explosion off the coast of Louisiana in the Gulf of Mexico. In the wake of the explosion, members of Congress introduced a number of laws that would have had retroactive effect on the civil liability of BP, to which the Deepwater Horizon was chartered. *E.g.*, Deepwater Horizon Survivors' Fairness Act, S. 183, 112th Cong. (2012); *see also Deepwater Horizon Liability: Hearing on S. 3305 and S. 3346 Before the S. Comm. on Energy & Natural Res.*, 111th Cong. (2010) (discussing retroactive application of liability provisions).

5. *See* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693, 715, 723 (1960); Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 641, 646, 654 (2014).

6. U.S. CONST. art. I, §§ 9, 10.

7. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827) (holding that ex post facto laws are "oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man"); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 2, at 46 (William S. Hein & Co. 1992) (1765); THE FEDERALIST NO. 44, at 287 (James Madison) (Isaac Kramnick ed., Penguin 1987) ("*ex post facto laws* . . . are contrary to the first principles of the social compact, and to every principle of sound legislation"); THE FEDERALIST NO. 84, *supra*, at 473–75 (Alexander Hamilton) (the "prohibition of *ex post facto* laws" is among the greatest "securities to liberty and republicanism" contained in the proposed Constitution); FULLER, *supra* note 3, at 53.

8. 1 WILLIAM WINSLOW CROSSKEY, *The True Meaning of the Prohibition of the Ex-Post-Facto Clauses*, *in* POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324, 338–39 (1953) (recounting debate in the First Congress over the meaning of the Ex Post Facto Clause).

Post Facto Clauses conclude that the clauses originally were understood to restrict retroactive criminal laws only.[9] On the opposite side of the divide, scholars and jurists advancing the "broad" interpretation conclude that the Ex Post Facto Clauses originally were understood to restrict retroactive civil laws along with criminal laws.[10]

In *Calder v. Bull*,[11] the first Supreme Court case to address the Ex Post Facto Clauses, the Court adopted the narrow interpretation; under *Calder*, which controls current law, the hypothetical example of the oil spill legislation would not violate the Ex Post Facto Clauses. Indeed, because the Supreme Court will not invalidate a non-punitive[12] civil statute because of its retroactive effect,[13] both Congress and state legislatures routinely enact laws that alter the legal consequences of previously committed conduct without constitutional consequence. For example, the Court has upheld "civil commitment" schemes by which states refuse to release convicted sex offenders from prison after they have served their sentences.[14] The Court holds that civil commitment is not criminal punishment even though it results in continued incarceration; as a result, the Ex Post Facto Clauses' protections simply are not implicated.[15] Based on the narrow interpretation of the Ex Post Facto Clauses, courts also have upheld the constitutionality of laws that

---

9. *E.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 531 n.29 (1987); Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 521, 523 (2003); Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42 U. TOL. L. REV. 395, 417 (2011).

10. *E.g.*, *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 app. at 683-84 (1829) (Johnson, J., concurring); 1 CROSSKEY, *supra* note 8, at 330; Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315, 321 (1922); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143 (1996); Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 326 (1992); Michael S. Rafford, Note, *The Private Securities Litigation Reform Act of 1995: Retroactive Application of the RICO Amendment*, 23 J. LEGIS. 283 (1997).

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

12. As has been noted, courts construe the term "punitive" narrowly, allowing great leeway for state legislatures and Congress to enact retroactive civil laws that impose significant penalties. Aiken, *supra* note 10, at 326.

13. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). The "presumption against retroactivity," as the Court's clear statement rule is sometimes called, is strongly stated but not strongly enforced. Krent, *supra* note 10, at 2149 ("[T]he Court has generally sustained any retroactive enactment in the economic sphere that is supported by a plausible public purpose.").

14. *Kansas v. Hendricks*, 521 U.S. 346, 369-70 (1997).

15. *Id.* at 370-71.

retroactively impose monetary liabilities, provide disability benefits,[16] strip judges of the discretion to prevent deportations,[17] and impose penalties on foreign companies.[18]

If the Court were ever to reject *Calder*, the constitutionality of countless statutory schemes that rely on civil retroactivity would be cast into doubt. So far, the Court has not yet questioned *Calder*'s fundamental historical conclusion that the original meaning of the Ex Post Facto Clauses included criminal laws only. But, the time may soon come when the Court reconsiders *Calder*. Indeed, both scholars[19] and judges, including justices of the Supreme Court itself,[20] have signaled an increasing interest in grounding their constitutional interpretations in historical meaning. As a result, the importance of historical evidence about the original meaning of the Ex Post Facto Clauses hardly can be overstated. Historical evidence has the potential either to support *Calder*'s fundamental distinction between civil and criminal retroactivity, putting to rest a centuries-old debate, or to undermine its very foundation.

Scholars and judges have reviewed reams of historical evidence, including notes from the Philadelphia and state constitutional conventions, English treatises, and public letters, in order to evaluate *Calder*'s historical conclusions. However, despite their heavy reliance on historical evidence, they have failed to reach consensus on the original meaning of the clauses. Furthermore, despite the breadth of historical material they evaluate, so far they have failed even to consider a vital source of information about the original meaning of the Ex Post Facto Clauses. Decisive evidence of the original meaning of the clauses can be found by examining the "professional" meaning of the phrase ex post facto—that is, how the phrase "ex post facto" was

---

16. Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1054 (2006).

17. *United States v. Bodre*, 948 F.2d 28, 30–31 (1st Cir. 1991) (upholding the retroactive stripping of judges' discretion to prevent a deportation based on a criminal conviction because "[d]eportation proceedings have been consistently classified as purely civil in nature").

18. *GPX Int'l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1309–11 (Ct. Int'l Trade 2013) (upholding law imposing monetary penalties retroactively on foreign companies because courts "have consistently upheld the trade remedy laws as remedial and not punitive in nature").

19. *E.g.*, JACK M. BALKIN, LIVING ORIGINALISM 198–99 (2011); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

20. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702–03 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 592–93 (2008); *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) ("In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.").

used by the professional community of American judges and lawyers in the course of their work in the years leading up to the ratification of the Constitution.

This article corrects the omission in the literature and Supreme Court doctrine by searching colonial and early state case reports for evidence of the professional meaning of the phrase ex post facto. After examining this historical evidence, two points become clear: the professional meaning of the phrase ex post facto includes both civil and criminal laws; and *Calder*'s historical analysis is fundamentally flawed. By analyzing evidence of the professional meaning of the Ex Post Facto Clauses, this article will finally resolve the centuries-old and ongoing debate over the original meaning of the Ex Post Facto Clauses and provide firm historical evidence for reconsidering *Calder*.

Part I of this article organizes the historical arguments made by proponents of both the broad and narrow interpretations of the Ex Post Facto Clauses. After identifying the historical evidence that places each of these interpretations in its most persuasive light, I look for the points of disagreement—and agreement—to learn whether there is any way to break the deadlock between advocates of the broad and narrow interpretations. This examination reveals that proponents of both interpretations have presented powerful arguments, based on much the same evidence, but have reached opposite conclusions. Moreover, laying out the broad and narrow arguments side-by-side reveals that the narrow interpretation's strongest argument rests on the unproved assumption that the professional meaning of the Ex Post Facto Clauses was limited to criminal laws.

In Part II, I uncover the professional meaning of the Ex Post Facto Clauses by analyzing the body of American cases that used the phrase ex post facto in the decades leading up to the framing of the Constitution. An examination of these cases, for the first time with an eye toward uncovering the original meaning of the Ex Post Facto Clauses, reveals that the phrase ex post facto was well known to the professional class of American judges and lawyers in the years leading up to the framing of the Constitution. The phrase was used not only to describe laws imposing retroactive criminal liability, but also laws retroactively altering contract rights and remedies, manumitting enslaved persons, and modifying property rights. Based on the way the phrase ex post facto was used in these cases, I conclude that the professional meaning of the phrase ex post facto included both retroactive criminal and civil laws. The addition of this evidence to the already existing historical record leads to the further conclusion that the original meaning of the Ex Post Facto Clauses prohibited both civil and criminal retroactivity.

Historical meaning is one of the traditional tools used by scholars[21] and judges[22] when interpreting the text of the Constitution. As a result, the conclusions of this article should be of great interest to anyone, originalist[23] or not, who is interested in the interpretation of the Ex Post Facto Clauses. But, even for courts and scholars who do not believe that history has any place in constitutional interpretation, the discovery of the professional meaning of the phrase ex post facto suggests new, non-historically contingent ways to approach the question of reconsidering *Calder*. In Part III, I examine doctrinal, structural, and normative arguments for retaining *Calder* and offer new ways of approaching these arguments.

I. THE DEBATE OVER THE ORIGINAL MEANING OF THE EX POST FACTO CLAUSES

> *The prohibition, that no state shall pass any* ex post facto *law, necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.*[24]

The original Constitution, that is, the Constitution as drafted and ratified between 1787 and 1788, contains few explicit protections for individual rights. Most of the constitutional provisions Americans today associate with their "constitutional rights," including freedom of speech, freedom from unreasonable searches and seizures, and the right to counsel, are found in the Bill of Rights, which were not added to the Constitution until 1791.[25] But, although they are now overshadowed by

---

21. PHILIP BOBBITT, CONSTITUTION INTERPRETATION 12–13 (1991); Aiken, *supra* note 10, at 325 n.12; Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 TEX. TECH L. REV. 29, 49 (2010); Harlan Grant Cohen, *"Undead" Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957, 1017–18 (2010).

22. *E.g.*, *NLRB v. Canning*, 134 S. Ct. 2550, 2559 (2014).

23. I am not an originalist; I do not subscribe to the view that historical meaning definitively answers interpretative questions. However, historical evidence is one of the traditional tools of interpreting the Constitution, and I join the majority of courts and scholars who recognize the relevance of history to constitutional interpretation.

24. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (internal quotation marks omitted).

25. *E.g.*, U.S. CONST. amend. I (freedom of speech, free exercise of religion, freedom of the press, freedom of assembly, right to petition); U.S. CONST. amend. II (right to bear arms); U.S. CONST. amend. IV (freedom from unreasonable searches and seizures); U.S. CONST. amend. V (freedom from self-incrimination, right to just compensation for taking of property, due process); U.S. CONST. amend. VI (right to a speedy and public trial, right to confront witnesses, right to assistance of counsel); U.S.

their more famous brethren, the rights that were included in the original text of the Constitution, including the Ex Post Facto Clauses, are no less important. Indeed, at the time of the framing of the Constitution, the Ex Post Facto Clauses were described as integral to the creation of a just society. James Madison argued that the clauses prevented abusive laws that were "contrary to the first principles of the social compact, and to every principle of sound legislation."[26] Alexander Hamilton added that the "prohibition of *ex post facto* laws" was among the greatest "securities to liberty and republicanism" contained in the proposed Constitution.[27] The early Supreme Court held that ex post facto laws are "oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man."[28] But perhaps the import of the Ex Post Facto Clauses at the time of the framing of the Constitution is best exemplified by the fact that the Constitution contains not one, but two, Ex Post Facto Clauses: the states and the federal government alike are prohibited, in unqualified terms, from passing any ex post facto law.[29]

It is one thing to condemn and proscribe ex post facto laws in the abstract; it is quite another to reduce the prohibition to a precise, administrable definition. Although there is general agreement that ex post facto roughly means "retroactive" or "retrospective,"[30] the exact parameters of the clauses have been disputed since the early days of the republic. Today, as in the late eighteenth century, the primary disagreement revolves around whether the prohibition of the Ex Post Facto Clauses extends to retroactive civil laws. Referring to materials such as notes from the Philadelphia[31] and state ratifying conventions,[32]

CONST. amend. VII (right to a jury in civil cases); U.S. CONST. amend. VIII (freedom from excessive bail and cruel and unusual punishment).

26. THE FEDERALIST NO. 44, *supra* note 7, at 287 (James Madison).

27. THE FEDERALIST NO. 84, *supra* note 7, at 474 (Alexander Hamilton).

28. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827).

29. U.S. CONST. art. I, §§ 9–10; *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 515 n.1 (1995) (Stevens, J., dissenting) ("That the Framers included two separate clauses in the Constitution prohibiting *ex post facto* legislation highlights the Framers' appraisal of the importance of that prohibition." (internal citations omitted)); 1 CROSSKEY, *supra* note 8, at 324; Aiken, *supra* note 10, at 328.

30. The terms "retroactive" and "retrospective" are generally used interchangeably. Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 84 n.158 (2014). *E.g.*, *Ogden*, 25 U.S. (12 Wheat.) at 262; *cf.* DANIEL E. TROY, RETROACTIVE LEGISLATION 6–9 (1998).

31. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798); Natelson, *supra* note 9, at 517–18; Ostler, *supra* note 9, at 413–14.

32. *Calder*, 3 U.S. (3 Dall.) at 391; Natelson, *supra* note 9, at 521–23.

English treatises,[33] and public letters,[34] scholars and jurists advancing the "narrow," or "criminal-only," interpretation of the Ex Post Facto Clauses conclude that the clauses originally were understood to restrict retroactive laws in the criminal context only.[35] By contrast, scholars and jurists advancing the "broad" or "criminal-and-civil" interpretation, rely largely on these same materials to conclude that the Ex Post Facto Clauses originally were understood to cover all retroactive laws, whether civil or criminal.[36]

Part I collects and organizes historical evidence supporting both the broad and narrow interpretations of the Ex Post Facto Clauses.[37] Focusing on this history reveals the points of historical agreement and disagreement that have separated the two lines of scholarship. Evaluating these points of agreement and disagreement allows me to identify a way to break the deadlock that has developed between advocates of the broad and narrow interpretations.[38]

A. The Criminal-Only or Narrow Interpretation

Scholars who advance the criminal-only, or narrow, interpretation of the Ex Post Facto Clauses argue that the framing generation, and the framers of the Constitution in particular, originally understood the Ex Post Facto Clauses to reach criminal laws only.[39] Under this interpretation, the Ex Post Facto Clauses would prevent, for example,

---

33. *Calder*, 3 U.S. (3 Dall.) at 391; Natelson, *supra* note 9, at 503, 517.

34. Natelson, *supra* note 9, at 520.

35. *Calder*, 3 U.S. (3 Dall.) at 387–89; Kmiec & McGinnis, *supra* note 9, at 531 n.29; Natelson, *supra* note 9, at 521, 523; Ostler, *supra* note 9, at 417.

36. *E.g.*, Field, *supra* note 10, at 321 (Philadelphia Convention); Aiken, *supra* note 10, at 327 (Philadelphia Convention); Rafford, *supra* note 10, at 287 (Philadelphia Convention); 1 CROSSKEY, *supra* note 8, at 332–37 (state constitutional conventions); *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 app. at 683–84 (1829) (Johnson, J., concurring) (British sources); 1 CROSSKEY, *supra* note 8, at 330–31 (British sources); *id.* at 327–30 (public articles and letters); Krent, *supra* note 10, at 2153–54 (public articles and letters); Rafford, *supra* note 10, at 287 (public articles and letters).

37. I will describe the meaning of the Ex Post Facto Clauses at the time of the framing of the Constitution as the "original meaning" of the clauses; however, the historical evidence I consider includes evidence that could be used by those who focus on original intent and original understanding as well.

38. Moreover, setting out the historical record in full highlights the ambiguities in the historical record that are sometimes obscured in discussions of historical evidence. Revealing the ambiguities inherent in the historical record creates a vantage point from which we may view the merits of using history to determine constitutional meaning. Although it is beyond the scope of this current piece, in future work I plan to address the conceptual and practical problems associated with this use of history that are revealed by the story of the Ex Post Facto Clauses.

39. *E.g.*, Natelson, *supra* note 9, at 521–23; Ostler, *supra* note 9, at 417.

Congress from retroactively imposing a prison term for criminal fraud; however, Congress would not be prohibited from retroactively imposing compensatory damages for the tort of civil fraud. The narrow interpretation finds support in the way the phrase ex post facto was used by British jurists,[40] the drafters of the Constitution,[41] the Constitution's state ratifiers,[42] and in public letters, private correspondence,[43] and post-ratification discussions.[44]

1. BRITISH PRIMARY SOURCES

The phrase ex post facto did not originate during the debate in Philadelphia over the text of the Constitution. This Latin phrase was known to English jurists who, in turn, learned the concept from classical literature.[45] William Blackstone, whose seminal work, *Commentaries on the Laws of England*, was widely read by educated members of the revolutionary generation,[46] described that a resolution may not properly be called a "law" unless it is publicized in advance to the people who are bound by it.[47] After describing the injustice of Caligula, who was said to have ensnared his subjects by posting laws where they could not be seen by the public, Blackstone described what he called an even "more unreasonable method than this, which is called making of laws *ex post facto*."[48] A law is made ex post facto when

> *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from

40. Natelson, *supra* note 9, at 503, 517–18.

41. *Id.* at 517; Ostler, *supra* note 9, at 413–14, 417; Rafford, *supra* note 10, at 286–87.

42. Natelson, *supra* note 9, at 518–22; Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 579–81 (2003).

43. Natelson, *supra* note 9, at 520.

44. 1 CROSSKEY, *supra* note 8, at 339; Nelson, *supra* note 42, at 581–82; Rafford, *supra* note 10, at 287.

45. 1 BLACKSTONE, *supra* note 7, § 2, at 46 (citing Cicero and Dio Cassius).

46. ZECHARIAH CHAFEE JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 95 (1956); EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 53 (1948).

47. 1 BLACKSTONE, *supra* note 7, § 2, at 45.

48. *Id.* § 2, at 46.

> it; and all punishment for not abstaining must of consequence be cruel and unjust.[49]

Similarly, in *A Systematical View of the Laws of England*, Richard Wooddeson, Blackstone's successor at Oxford,[50] referred to "penal statutes passed *ex post facto*."[51] What is clear from these passages is the uncontroversial proposition that Blackstone and Wooddeson considered a criminal law applied to past conduct an ex post facto law. Scholars and jurists who advance the narrow reading of the Ex Post Facto Clauses read these passages not just as an example, but as a definition, of the phrase ex post facto, concluding that the phrase is limited to criminal retroactivity only.[52]

2. THE PHILADELPHIA CONVENTION

The draft of the Constitution produced in Philadelphia in 1787 contained two Ex Post Facto Clauses, one prohibiting the states, and one prohibiting the federal government, from passing any ex post facto law. These clauses reflect the substantial debate that took place during the Philadelphia convention over whether to include the ex post facto language in the Constitution, and, equally importantly, what precisely that language would mean. When the debate began, James Wilson and Oliver Ellsworth objected to the inclusion of this language at all. Ellsworth, a future justice of the Supreme Court, argued that "ex post facto laws were void of themselves. It cannot then be necessary to prohibit them."[53] Wilson, perhaps the most learned member of the Convention, agreed, arguing that they were so obviously invalid that it would "bring reflexions on the Constitution — and proclaim that we are ignorant of the first principles of Legislation" to prohibit ex post facto laws specifically.[54] Because "civil retroactivity was a fact of life in several states" during the Confederation period, scholars advancing the narrow interpretation read Wilson and Ellsworth's comments as

---

49. *Id.*

50. 1 JAMES WILSON, *Of Municipal Law*, *in* LECTURES ON LAW, *in* THE WORKS OF THE HONOURABLE JAMES WILSON 179 (Bird Wilson ed., 1804); *see also* 1 CROSSKEY, *supra* note 8, at 331.

51. 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 641 (1792). Although Wooddeson's *A Systematical View of the Laws of England* was published after the ratification of the Constitution, this work represents a collection of lectures delivered in the 1770s and 1780s.

52. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798); Natelson, *supra* note 9, at 503, 51.

53. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1911).

54. *Id.*; *see also* Field, *supra* note 10, at 318.

references to criminal laws only.[55] It would have made little sense, they argue, for Wilson and Ellsworth to so lightly dismiss as a contradiction in terms statutes that their own states routinely enacted.

Concurring in the impropriety of ex post facto laws, Hugh Williamson of North Carolina advocated inserting ex post facto language in the federal Constitution to achieve the benefits of a similar clause in his own state's constitution.[56] The ex post facto clause in North Carolina's Constitution referred explicitly to criminal laws, providing that "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made."[57] By arguing that the Federal Constitution's ex post facto prohibition would achieve the same benefits as North Carolina's, Williamson appears to have believed that he and his fellow delegates were debating whether to include a prohibition on retroactive criminal laws only.

But, not everyone agreed that the phrase ex post facto was limited to criminal laws only. After Madison used the phrase to refer to a law that would shorten the statute of limitations for certain civil actions, the debate intensified.[58] John Dickinson, having consulted his copy of Blackstone's *Commentaries*, informed the Convention that the term "ex post facto related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases. . . ."[59] George Mason was unconvinced by the reference to Blackstone; he believed that retroactive civil laws sometimes should be permitted and was concerned that the proposed language would prohibit even salutary retroactive civil laws.[60] He moved to strike the clause as overbroad, which Elbridge Gerry seconded; Gerry, however, made clear that his aim was to substitute language that would have explicitly extended the prohibition to retroactive civil laws.[61] The motion was voted down unanimously by the states.[62]

---

55. Natelson, *supra* note 9, at 517.

56. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 376.

57. N.C. CONST. of 1776, A Declaration of Rights, art. XXIV.

58. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 440, 448.

59. *Id.* at 448–49 (internal quotation marks omitted); *see also* Rafford, *supra* note 10, at 287.

60. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 617.

61. *Id.*

62. *Id.*

Scholars advocating the narrow definition suggest that Dickinson's invocation of the much-admired Blackstone[63] "probably settled the matter for most delegates,"[64] who were unwilling to reopen discussion either to eliminate the prohibition altogether, as Mason intended, or to expand it to include a prohibition on civil laws, as Gerry intended.[65] These scholars conclude, as a result, that at the time of the signing of the Constitution, most delegates had accepted Dickinson's representation and understood the Ex Post Facto Clauses to prohibit retroactive criminal laws only.[66]

3. STATE RATIFYING CONVENTIONS

The debate continued in the state conventions that considered and ultimately ratified the Constitution. In the Virginia Convention, Mason, this time joined by Patrick Henry, again raised his concern that the clauses would prohibit useful retroactive civil statutes.[67] Mason was particularly concerned that the Ex Post Facto Clauses would prevent Congress from enacting scaling laws to reduce the value of national debt—ultimately chargeable to the states—that was held by speculators.[68] Edmund Randolph, future Attorney General under George Washington, argued that Mason's concern was unfounded because the phrase "ex post facto" was a term of art that referred only to criminal laws.[69] If taken "technically," argued Randolph, the phrase relates "solely to criminal cases."[70] It was the technical meaning of the phrase that was adopted in the Philadelphia Convention, claimed Randolph,[71] and it is this technical meaning that would be employed by judges.[72] Randolph added that, because of the Ex Post Facto Clause's

63. Indeed, Blackstone and his *Commentaries* are referred to in the *Federalist Papers*, THE FEDERALIST NOS. 69, 84, *supra* note 7, at 398–99, 474–75 (Alexander Hamilton), during the Philadelphia Convention, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 472, and 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 448–49, and throughout James Wilson's influential *Lectures on Law*, *see* 1 JAMES WILSON, LECTURES ON LAW, *in* THE WORKS OF THE HONOURABLE JAMES WILSON, *supra* note 50, at 3.

64. Natelson, *supra* note 9, at 518; Ostler, *supra* note 9, at 413–14.

65. Natelson, *supra* note 9, at 518; Ostler, *supra* note 9, at 413–14.

66. Natelson, *supra* note 9, at 518, 520; Ostler, *supra* note 9, at 413–14, 417.

67. Convention of Virginia, *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 471–74 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES].

68. *Id.* at 472–73.

69. *Id.* at 477–79.

70. *Id.* at 477, 481.

71. *Id.* at 477.

72. *Id.* at 481.

proximity to the Bill of Attainder Clause, the common canon of construction *noscitur a sociis* suggested that these clauses should be read together; because the Bill of Attainder Clause relates to crimes only, so too must the Ex Post Facto Clause.[73] Mason retorted that he would not dispute the phrase's "technical" meaning; however, he was concerned not with the meaning "at the bar, or in a professional line"[74] but rather with the common meaning of the phrase. "Whatever may be the *professional* meaning," Mason argued, the "*general* meaning of *ex post facto*" included all laws having retroactive effect.[75]

While perhaps not alone, Mason and Henry were in the minority, argue proponents of the narrow reading of the Ex Post Facto Clauses.[76] Members of the other state conventions that addressed the ex post facto issue agreed with Randolph. New York's ratification of the Constitution was accompanied by a declaration that set out that state's interpretation of the document, including the caveat that "the prohibition contained in the said Constitution against *ex post facto* laws, extends only to laws concerning crimes."[77] Similarly, statements made during Pennsylvania's ratifying convention declare that the Ex Post Facto Clauses prevent only the imposition of criminal liability.[78] Although proponents of the Constitution in North Carolina's ratifying convention, including future Supreme Court Justice James Iredell, argued that the Ex Post Facto Clauses would prevent Congress from diminishing the value of that state's paper currency, North Carolina's convention initially rejected the Constitution. As a result, argue proponents of the narrow interpretation, the broad interpretation of the clauses was not the basis for that state's—or any state's—ratification of the Constitution.[79]

---

73. *Id.* at 477-78; *cf. Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 329 (1827) (holding that the maxim *noscitur a sociis* suggests that the collocation of the clauses in U.S. CONST. art. I, § 10 strongly suggests that these clauses should be interpreted in light of one another).

74. Convention of Virginia, *in* 3 ELLIOT'S DEBATES, *supra* note 67, at 479.

75. *Id.* (emphasis added).

76. Natelson, *supra* note 9, at 520.

77. Convention of New York, *in* 1 ELLIOT'S DEBATES, *supra* note 67, at 328; Nelson, *supra* note 42, at 581. This declaration was, perhaps, a second-best alternative to the failed amendment to the Constitution moved by a member of New York's convention that would have defined the Ex Post Facto Clauses to include criminal laws only.

78. Natelson, *supra* note 9, at 521-22.

79. *Id.*

4. PUBLIC DEBATE

In public letters, influential Federalists implied that the clauses encompassed criminal laws only.[80] For example, Hamilton explained that the prohibition of ex post facto laws was necessary because the "creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law" is among the "most formidable instruments of tyranny."[81] Advocates of the narrow interpretation conclude that these representations informed the public debate over the decision to ratify the Constitution.[82] Moreover, in addition to North Carolina's Constitution, noted above, Maryland's Constitution also used the phrase ex post facto to include criminal laws only. Specifically, Maryland's Constitution provided that "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made."[83] By contrast, New Hampshire's Constitution prohibited the more general category of "Retrospective laws," defining them to include both laws affecting "civil causes" and "the punishment of offences."[84] The usage of the phrases in these state constitutions suggests that the terms ex post facto and retrospective were not synonymous: while "retrospective" included civil and criminal laws, as indicated by its use in New Hampshire, "ex post facto" was a term of art including only criminal laws, as it was used in Maryland.

5. POST-RATIFICATION EVIDENCE

Although post-ratification history is not the most reliable evidence of meaning at the time of the Constitution's ratification,[85] scholars and the Supreme Court alike accord substantial interpretative significance to the conduct of the first Congress[86] and the early Supreme Court when

---

80. *Id.* at 520.

81. THE FEDERALIST NO. 84, *supra* note 7, at 474 (Alexander Hamilton).

82. Kmiec & McGinnis, *supra* note 9, at 531 n.29; Natelson, *supra* note 9, at 521–23; Ostler, *supra* note 9, at 413–14.

83. MD. CONST. of 1776, A Declaration of Rights, art. XV.

84. N.H. CONST. of 1784, art. I, § XXIII.

85. Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court's Use of History*, 94 CALIF. L. REV. 1745, 1746 & n.13 (2006) ("The Court has sporadically trotted out this First Congress canon of constitutional interpretation in more than thirty decisions over the last 200 years.").

86. *Id.* at 1746–47.

interpreting provisions of the Constitution.[87] Soon after the first Congress convened, the issue of the scope of the Ex Post Facto Clauses resurfaced. Madison precipitated the dispute by proposing a bill in the House of Representatives that would allow the debts of the United States to be paid below face value.[88] A number of members of the House objected that a law diminishing the value of the debt of the United States would be prohibited as an ex post facto law.[89] Contradicting his statement at the Philadelphia Convention, Madison responded that laws reducing the value of debt do not run afoul of the Constitution because "*ex post facto* laws relate to criminal not civil cases."[90]

Madison's assertion was articulated more fully a few years later in the seminal Supreme Court case, *Calder v. Bull*. *Calder* involved a challenge to the Connecticut General Court's decision to vacate a lower court judgment and grant a new trial to the losing party in a civil dispute.[91] Much like the English House of Lords, Connecticut's General Court sat both as a court of appeal and also as the state's legislative body.[92] As a result, the Supreme Court was called on to decide whether the General Court's resolution to vacate the lower court judgment fell within the Constitution's proscription on ex post facto laws. Justice Chase opined that granting a new trial does not fall within the Constitution's prohibition because the phrase "ex post facto laws" refers to criminal laws only.[93] Indeed, the phrase was a term of art, noted Chase, that had a "technical" meaning acquired through use by "Legislators, Lawyers, and Authors."[94] Justice Paterson, assuming *arguendo* that the resolution of the General Court was a legislative act, also was of the opinion that the General Court's order did not fall within the ambit of the Ex Post Facto Clause. Like Chase, Paterson noted that the words "ex post facto, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties."[95] Paterson noted that he, as a delegate to the Philadelphia convention, "had an ardent desire to have extended the

87. For example, thousands of cases and articles have referenced *Calder* and tens of thousands have referenced *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

88. 1 CROSSKEY, *supra* note 8, at 338.

89. *Id.*

90. 5 JAMES MADISON, THE WRITINGS OF JAMES MADISON 446, 453 (Gaillard Hunt ed., 1904) (1790); see also 1 CROSSKEY, *supra* note 8, at 339; *cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 440.

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

92. *Id.* at 395.

93. *Id.* at 391.

94. *Id.*

95. *Id.* at 396.

provision in the Constitution to retrospective laws in general" but was unable to prevail on his fellow delegates.[96] Whatever the "literal sense" of the phrase ex post facto, said Paterson, the "technical" meaning refers to criminal laws only.[97] Justice Iredell agreed that, assuming the resolution of the Connecticut General Court was a legislative act, the Ex Post Facto Clauses did not reach this resolution because they applied to criminal statutes only.[98]

B. The Criminal-and-Civil or Broad Interpretation

Like the scholars advancing the narrow interpretation, scholars and jurists advancing the broad reading of the Ex Post Facto Clauses rely on evidence derived from British primary sources,[99] the Philadelphia and state constitutional conventions,[100] newspaper articles and open letters,[101] and post-ratification evidence.[102] Although they rely on nearly identical historical sources, they draw the opposite conclusion: that the original meaning of the Ex Post Facto Clauses included both civil and criminal retroactive laws.

1. BRITISH PRIMARY SOURCES

Much like scholars advancing the narrow interpretation, scholars and jurists advancing the broad interpretation emphasize that neither the phrase ex post facto nor the concept of retroactive legislation originated

---

96. *Id.* at 397; Rafford, *supra* note 10, at 287.

97. *Calder*, 3 U.S. (3 Dall.) at 397.

98. *Id.* at 400. Justice Cushing did not opine that the Ex Post Facto Clauses refer to criminal laws only; rather, he rested on the alternative arguments that either the resolution was a judicial act or, even if legislative, it was "justified by the ancient and uniform practice of the state of Connecticut." *Id.* at 400–01.

99. *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 app. at 683–84 (1829) (Johnson, J., concurring); 1 CROSSKEY, *supra* note 8, at 330–32; Aiken, *supra* note 10, at 335.

100. 1 CROSSKEY, *supra* note 8, at 332–37; Field, *supra* note 10, at 318–25; Krent, *supra* note 10, at 2153; Aiken, *supra* note 10, at 327–28, 331–32; Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 444–45; Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 302–06 (1996); Rafford, *supra* note 10, at 287.

101. 1 CROSSKEY, *supra* note 8, at 327–330; Aiken, *supra* note 10, at 332 n.40; Krent, *supra* note 10, at 2153; Rafford, *supra* note 10, at 287.

102. *Satterlee,* 27 U.S. (2 Pet.) at 416 app. at 685–86 (Johnson, J., concurring); 1 CROSSKEY, *supra* note 8, at 327, 340–41; Aiken, *supra* note 10, at 334–35; Krent, *supra* note 10, at 2153.

in Philadelphia.[103] In the decades leading up to the American Revolution, the phrase ex post facto was used in British cases, treatises, and reference materials to include both criminal and civil retroactive laws. In his mid-eighteenth century law dictionary, Giles Jacobs used the phrase ex post facto to include civil laws; indeed, the examples he gave to illustrate the phrase were examples of its civil rather than criminal application.[104] Similarly, Sheppard's *Touchstone of Common Assurances*, Bacon's *Maxims*, and Godolphin's *View of the Admiralty* all used the phrase ex post facto to mean civil laws.[105]

Before the ratification of the Constitution, British court cases used the term ex post facto to include civil statutes. In *Wilkinson v. Meyer*,[106] the court referred to a statute that retroactively impaired contract rights as an ex post facto act. Proponents of the broad interpretation take *Wilkinson* as evidence that the "practical or technical construction" of the phrase that included criminal laws only had not yet developed by the middle of the eighteenth century.[107]

Scholars and jurists advancing the broad interpretation take particular exception to the use of Blackstone and Wooddeson as support for the narrow interpretation. Blackstone and Wooddeson, they argue, use criminal laws as examples of perhaps the worst, but not only, types of ex post facto laws.[108] Indeed, by using the phrase "*penal statutes*, passed *ex post facto*," Wooddeson implied that only some, but not all, statutes passed ex post facto are penal.[109] At most, Blackstone and Wooddeson are neutral; they provide evidence of one use of the phrase ex post facto but do not provide evidence that the phrase ex post facto was limited to that use.

2. THE PHILADELPHIA CONVENTION

To proponents of the broad definition, the debates in the Philadelphia Convention support the conclusion that the Ex Post Facto Clauses were understood to encompass both criminal and civil

---

103. *Satterlee*, 27 U.S. (2 Pet.) at 416 app. at 684–85 (Johnson, J., concurring); 1 CROSSKEY, *supra* note 8, at 330; Krent, *supra* note 10, at 2153.

104. 1 CROSSKEY, *supra* note 8, at 330.

105. *Satterlee*, 27 U.S. (2 Pet.) at 416 app. at 686 (Johnson, J., concurring); 1 CROSSKEY, *supra* note 8, at 331.

106. *Wilkinson v. Meyer*, 2 Ld. Raym. 1350, 1352 (1724).

107. *Satterlee*, 27 U.S. (2 Pet.) at 416 app. at 684 (Johnson, J., concurring).

108. *Id.*; 1 CROSSKEY, *supra* note 8, at 331–32; Ricciardi & Sinclair, *supra* note 100, at 306.

109. *Satterlee*, 27 U.S. (2 Pet.) at 416 app. at 684 (Johnson, J., concurring).

retroactive laws.[110] After Rufus King moved to add language prohibiting the interference with private contracts, George Mason objected that unforeseeable situations may necessitate state laws interfering with contract rights.[111] For example, Mason argued, a state should be permitted to shorten a statute of limitations period for bringing an action on an open account.[112] Madison answered Mason's objections by asking, perhaps rhetorically, "Is not that already done by the prohibition of ex post facto laws, which will oblige the Judges to declare such interferences null & void[?]"[113] At the end of this discussion, the convention approved a motion to insert a prohibition on "retrospective laws."[114] The Committee on Style changed this phrase to its present form, "ex post facto."

Proponents of the broad interpretation draw a number of conclusions from this exchange. First, it appears that Madison, a key drafter of the Constitution, believed that the previous prohibition on ex post facto laws covered civil laws. Alternatively, if Madison's question was not rhetorical, and he genuinely was inquiring into the scope of the clause, it does not appear that anyone at the Convention informed him that the ex post facto prohibition did not cover civil laws.[115] Second, the Convention actually agreed to prohibit "retrospective" laws, a term which has never been construed as limited to criminal laws only. Third, there is no evidence that anyone objected to the Committee on Style's rendering of "retrospective" as "ex post facto." This indicates that the Convention understood the two terms to be synonymous.

Moreover, Dickinson's representations about Blackstone's use of the phrase ex post facto are both inaccurate and irrelevant to the decision to include language prohibiting ex post facto laws in the Constitution.[116] The Convention voted to adopt the language that became the Ex Post Facto Clauses on August 28. It was not until August 29 that Dickinson informed the Convention of Blackstone's technical limitation on the meaning of the phrase. Because the vote on

---

110. Field, *supra* note 10, at 317–22; Ricciardi & Sinclair, *supra* note 100, at 302–06; Rafford, *supra* note 10, at 286–87.

111. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 439–40.

112. *Id.* at 440. An "open account" involves a series of related transactions between a buyer and seller in which, "in expectation of future dealings," the parties have not settled the charges. 1 C.J.S. *Action on Account* § 1 (2005). An action on an open account seeks payment on the unsettled amount of the series of transactions. *Id.*

113. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 53, at 440.

114. *Id.*

115. Field, *supra* note 10, at 319; Rafford, *supra* note 10, at 287.

116. Field, *supra* note 10, at 320.

the clauses predated Dickinson's explanation, proponents of the broad interpretation argue that Dickinson's representations are meaningless to interpret the intent of the framers at the time of their vote.[117] Indeed, they argue, the fact that Dickinson felt the need to raise Blackstone's usage after the delegates voted the previous day suggests that Dickinson believed he was correcting the delegates' (erroneous) view that they had voted on the more expansive meaning.[118]

3. STATE RATIFYING CONVENTIONS

As noted above, proponents of the narrow interpretation emphasize the discussion about the clauses in the Virginia Convention and downplay the North Carolina Convention. Predictably, then, proponents of the broad definition reverse this emphasis; that is, they focus on the North Carolina Convention while minimizing the Virginia Convention. Virginia's ratification of the Constitution postdated the ratification of the Constitution by nine other states; as a result, the Constitution already had come into force when Randolph made his argument that the "technical" meaning of the phrase ex post facto included criminal laws only. Proponents of the broad definition conclude that, therefore, the discussions in Virginia teach us nothing about the intentions of the ratifiers of the Constitution at the time it became effective.[119] Moreover, proponents of the broad definition emphasize that, in Virginia, Randolph stood alone; in addition to Henry and Mason, George Nicholas also referred to laws interfering with debt or contracts as ex post facto.[120] Adding to these three Madison, who had suggested the broad interpretation in Philadelphia, it appears that all but one—or four out of five—of the Virginians who spoke out about the Ex Post Facto Clauses believed that they included civil laws.[121] Therefore, the disagreement between Randolph on the one hand, and Henry, Mason, Nicholas, and Madison on the other, indicates only that there was a dispute over whether the professional, or technical, meaning of the phrase would prevail over the lay meaning; it does not imply that the other delegates acquiesced in Randolph's understanding.[122]

---

117. *Id.*

118. *Id.* at 320–21.

119. 1 CROSSKEY, *supra* note 8, at 332.

120. Convention of Virginia, *in* 3 ELLIOT'S DEBATES, *supra* note 67, at 476; Field, *supra* note 10, at 325.

121. Field, *supra* note 10, at 325; Ricciardi & Sinclair, *supra* note 100, at 310.

122. 1 CROSSKEY, *supra* note 8, at 332–35.

Although the first set of debates in North Carolina resulted in a rejection of the Constitution, the discussion in that state's ratifying convention indicates the generally accepted understanding that the Ex Post Facto Clauses prohibited the abolition of already-printed paper money. Stephen Cabarrus argued that the state's paper money would be secure because any law that purported to eliminate it "would clearly be *ex post facto*, and repugnant to the express provision of the Constitution."[123] Iredell concurred, arguing that there "is an express clause" in the Constitution providing "that there shall be no *ex post facto* law"; and therefore, no law can be passed to retroactively diminish the value of paper money already issued.[124] Proponents of the broad interpretation argue that, at least in North Carolina, it was well understood that the Ex Post Facto Clauses encompassed civil laws.[125]

4. PUBLIC DEBATE

It may well be doubted whether, at the time of the adoption of the Constitution, the public at large was familiar with the arguments articulated above. Certainly they were not familiar with the notes of the Philadelphia Convention, which were secret when taken and not published until 1840.[126] It is also questionable whether the public at large would have had access to British treatises and reference materials, let alone have been competent to parse them. However, details of the proposed Constitution, including the scope of the Ex Post Facto Clauses, also were discussed publicly and in more accessible language. In New Jersey, a pair of newspaper articles referred to laws modifying actions on debt as ex post facto.[127] Newspaper articles appearing during the ratification debates supported ratification on the ground that the Constitution would protect against ex post facto laws that interfered with property rights.[128] An article appearing in a South Carolina newspaper argued that the proposed Constitution's clause prohibiting ex post facto laws would prevent the states from diminishing the value of debt.[129] No doubt hoping that their authority as members of the Philadelphia Convention would help settle the issue, Ellsworth and

123. Convention of North Carolina, *in* 4 ELLIOT'S DEBATES, *supra* note 67, at 1, 184.

124. *Id.* at 185.

125. 1 CROSSKEY, *supra* note 8, at 336–37; Field, *supra* note 10, at 326; Ricciardi & Sinclair, *supra* note 100, at 311–12.

126. William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 204 (2012).

127. 1 CROSSKEY, *supra* note 8, at 327; Krent, *supra* note 10, at 2153.

128. 1 CROSSKEY, *supra* note 8, at 328–29; Krent, *supra* note 10, at 2153.

129. 1 CROSSKEY, *supra* note 8, at 329; Krent, *supra* note 10, at 2153.

Roger Sherman wrote an open letter during the ratification debates in which they argued that the prohibition of ex post facto laws would prevent the retroactive impairment of contract rights.[130] In South Carolina, state legislators referred to a proposed law that would grant pensions retroactively as ex post facto.[131] Taken together, proponents of the broad interpretation argue, these statements paint a picture of the public understanding of the ex post facto clauses at the time of ratification that includes both civil and criminal laws.[132]

The authors of the *Federalist Papers*, perhaps the most widely circulated explanation of the Federalists' interpretation of the Constitution, wrote extensively of the import of the Ex Post Facto Clauses and the protections they would afford. Madison wrote that "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation."[133] These clauses stand as a "constitutional bulwark in favor of personal security and private rights" by preventing the worst kinds of abusive legislation.[134] In particular, Madison pointed out that these clauses were intended to forestall legislative interferences "in cases affecting personal rights" that "become jobs in the hands of enterprising and influential speculators."[135]

Scholars have argued that the breadth of the defense of these provisions suggests that the Ex Post Facto Clauses were intended to apply both to criminal and civil matters.[136] By referring to "private rights," Madison suggests that these provisions were meant to protect not only the interest of liberty, but of property as well. Similarly, by referring to legislative abuses that affect personal rights and become jobs in the hands of speculators, Madison suggests that the clauses protected property rights.[137]

In a related vein, Madison's discussion highlights the fact that the Bill of Attainder, Ex Post Facto, and Contract Clauses appear in the same clause of the Constitution.[138] The proximity of these clauses reveals the flaw in Randolph's argument, made in the Virginia

130. 1 CROSSKEY, *supra* note 8, at 329-30.

131. *Id.* at 327-28.

132. *Id.* at 330; Krent, *supra* note 10, at 2153; Rafford, *supra* note 10, at 287.

133. THE FEDERALIST NO. 44, *supra* note 7, at 287 (James Madison).

134. *Id.* at 288.

135. *Id.*

136. 1 CROSSKEY, *supra* note 8, at 329.

137. Rafford, *supra* note 10, at 287.

138. That is, as applied against the states. U.S. CONST. art. I, § 10, cl. 1. The Contract Clause does not apply against the federal government and so does not appear in Article I, Section 9 of the U.S. Constitution.

Constitutional Convention, that the collocation of the Ex Post Facto and Bill of Attainder Clauses suggests criminal application only. To the contrary, the Ex Post Facto Clause is located precisely between the Bill of Attainder Clause, admittedly related to crimes only, and the Contract Clause, which relates to civil matters only. As a result, little relevant to the present interpretative discussion can be gleaned from the proximity of the Bill of Attainder and Ex Post Facto Clauses.

5. POST-RATIFICATION EVIDENCE

In the 1790s, state cases from Maryland, Virginia, and New Jersey suggested that the phrase ex post facto included both civil and criminal laws.[139] This trend, however, was halted by *Calder*, which provides proponents of the broad reading of the Ex Post Facto Clauses with their greatest challenge. As noted above, Chase and Paterson explained that the Ex Post Facto Clause was a term of art that, in the "technical" or "professional" sense, referred to criminal laws only.[140] As a result, Justices Chase, Iredell, and Paterson opined that the Connecticut General Court did not run afoul of the Constitution by granting a new trial in a civil case.[141] Proponents of the broad reading of the clauses respond that this proposition, although the one for which *Calder* is most well-known, is mere dictum. Indeed, all of the Justices writing in *Calder* opined that the General Court's grant of a new trial was not a legislative act at all and, as a result, would not fall within the prohibition of the Ex Post Facto Clauses.[142] Only in the alternative did three Justices opine that the General Court's resolution was outside the scope of the Ex Post Facto Clause because it was civil in nature.[143] Therefore, *Calder*'s only binding rule is that when a body sits as a Court of Appeal, like the English House of Lords (or Connecticut's General Court), its resolutions are judicial acts outside the bounds of the clauses' restrictions.[144]

---

139. 1 CROSSKEY, *supra* note 8, at 327, 340–41; *see also* Krent, *supra* note 10, at 2153.

140. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 396 (1798).

141. *Id.* at 392.

142. *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 app. at 681–83 (1829) (Johnson, J., concurring).

143. *Id.* at 416 app. at 685–86 (Johnson, J., concurring).

144. *Id.* (Johnson, J., concurring). Justice Johnson's concurrence continues by explaining the reasons why the portions of the opinions of Chase, Paterson, and Iredell that suggest that the clauses historically related to crimes only were historically inaccurate. All of these reasons have been explored elsewhere in Part I.B and will not be repeated here.

C. Breaking the Deadlock Between Proponents of the Narrow and Broad Interpretations

Proponents of both the narrow and broad interpretations of the Ex Post Facto Clauses make forceful arguments, bringing to bear a weight of historical evidence to support their respective conclusions. The use of historical evidence reflects not only the value of this evidence to define an unfamiliar term, but also the high esteem in which scholars and courts hold the opinions of the generation of the framing of the Constitution and the historical context that informed their views. The preceding review of their arguments reveals forceful points on both sides of the debate. Nevertheless, the debate continues. But, reviewing this historical evidence has not been in vain—it allows us to draw three conclusions that enable us to break the deadlock that has developed between proponents of the narrow and broad interpretations.

First, both the narrow and broad interpretations rely on strikingly similar historical sources, including British primary sources, notes from the Philadelphia and state conventions, state legislative materials, newspaper articles, and post-ratification history. The two camps agree that these types of sources are relevant to determining the original meaning of Ex Post Facto Clauses. They differ, that is, not in the categories of evidence they consider, but rather in the inferences they draw from this evidence.

Second, if we look at the arguments made by these two camps, and the evidence on which they rely, we see that both camps have accepted the assumption that there is a distinction between the "professional" or "technical" meaning of the phrase ex post facto on one hand and, on the other, its general or lay meaning. As summarized below, this distinction was used by the framers of the Constitution and has been used by courts and scholars since the Constitution's ratification.

Introducing the distinction between the technical definition and the general definition in the Philadelphia Convention, Dickinson asserted that the phrase ex post facto was a term of art that, according to Blackstone, related to criminal laws only. Likewise, in Virginia's constitutional convention, Randolph insisted that the "technical" definition of the phrase applies to criminal laws only.[145] Mason did not quibble with Randolph's distinction between the technical and lay meaning of the term, but demurred that the layman understood "*ex post facto*" to be synonymous with "retrospective."[146]

---

145. Convention of Virginia, *in* 3 ELLIOT'S DEBATES, *supra* note 67, at 477, 481.

146. *Id.* at 479.

Judicial opinions considering the scope of the clauses adopt and emphasize this distinction between the lay meaning and the technical or professional meaning of the clauses. In *Calder*, Justices Chase and Paterson rely on this distinction. Chase noted that his interpretation of the phrase ex post facto rested on the fact that the phrase had a "technical" meaning acquired through use by legal experts.[147] So, too, did Paterson explain that the phrase's technical meaning included criminal laws only. Paterson distinguished this technical meaning from the "literal sense" of the word that, to the layperson rather than the lawyer, might denote retroactive laws generally.[148] Justice Johnson's later broadside attack on *Calder*'s historical analysis turned also on the distinction between the technical or professional meaning of the clauses and the layman's meaning; he accepted that the technical meaning of the clauses refers to criminal laws only but argued that the technical meaning was not settled before *Calder*.[149] *Calder* is, of course, vital to the modern interpretation of the Ex Post Facto Clauses; countless cases rely explicitly on *Calder* for the proposition that the clauses do not extend to civil laws.[150] And these modern cases, adopting *Calder*'s distinction between the professional and lay meanings, emphasize that the phrase ex post facto incorporated "a term of art with an established meaning at the time of the framing of the Constitution."[151]

Scholars also emphasize this distinction. In his foundational *General Principles of Constitutional Law*, Thomas Cooley distinguished between the ordinary and technical meanings of the phrase: he wrote that although the phrase ex post facto encompasses "all retrospective laws" in its "natural and ordinary sense," the Constitution's use of the phrase is "more restricted, and is limited exclusively to laws of a criminal nature."[152] Professor William Crosskey, whose historical review of the phrase ex post facto set the tone for the modern debate over the Ex Post Facto Clauses,[153] concluded that the debate in the

147. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798).

148. *Id.* at 396–97.

149. *Satterlee*, 27 U.S. (2 Pet.) at 416 app. at 682–87 (Johnson, J., concurring).

150. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

151. *Id.* at 41.

152. THOMAS M. COOLEY, *Protections to Persons Accused of Crime*, *in* THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 283, 285 (1880).

153. Crosskey's analysis has been subject to a good deal of criticism, and his work continues to be controversial. *See, e.g.*, Abe Krash, *The Legacy of William Crosskey*, 93 YALE L.J. 959 (1984) (reviewing WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, VOLUME III: THE POLITICAL BACKGROUND OF THE FEDERAL CONVENTION (1980)). Nevertheless, the sources he collected, and his more basic

Virginia Constitutional Convention ended with the understanding that the general, rather than the professional or technical, meaning had been adopted.[154] Similarly, Professor Oliver Field, on whose early critique of *Calder* modern scholars still heavily rely, accepted the premise that there was a distinction between the technical and lay meanings of the term, although Field concluded that "the framers of the Constitution did not give evidence of using the term *ex post facto* in a technical sense."[155] More recently, Professor Caleb Nelson, in the context of arguing that an indeterminate meaning may become "fixed" over time,[156] concluded that early interpretations of the Ex Post Facto Clauses "helped establish the legitimacy of reading at least some provisions of the Constitution in a technical rather than lay sense."[157]

Third, although proponents of the two competing interpretations pour over all manner of historical evidence to determine the original meaning of the phrase, and although this determination appears to turn to a large degree on the distinction between the phrase's professional or technical meaning, as opposed to its lay meaning, no one has yet determined precisely the contours of the "professional" or "technical" meaning of the phrase ex post facto at the time of the framing of the Constitution. That is, although courts, scholars, and indeed some of the framers themselves assumed that the technical or professional meaning of the phrase ex post facto included criminal laws only, there has not yet been an investigation into the way the phrase was used in its technical sense by the professional class of judges and lawyers in America in the decades leading up to the framing of the Constitution. The failure to consider how American judges and lawyers used this phrase during this period is surprising because scholars and jurists have considered both English cases and post-ratification American cases. The failure to consider the use of the phrase ex post facto in American cases before ratification appears, therefore, to be an oversight rather than a

---

conclusions, have been adopted by many legal scholars writing on the subject of the original meaning of the Ex Post Facto Clauses. *E.g.*, Rafford, *supra* note 10, at 286–87.

154. 1 CROSSKEY, *supra* note 8, at 336.

155. Field, *supra* note 10, at 321; *see also* Ricciardi & Sinclair, *supra* note 100, at 305; Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REV. 269, 271 (1927). Professor McAllister explained Justice Chase's well-known dictum in *Calder*, which set out the four categories of laws within the scope of the Ex Post Facto Clauses, by asserting that the phrase ex post facto cannot be understood in its ordinary sense. The term "is a technical one, to be filled by the court with an esoteric meaning." *Id.*

156. Nelson, *supra* note 42, at 583.

157. *Id.*

deliberate omission.[158] Indeed, because American judges and lawyers in the years leading up to the framing of the Constitution are the very professionals to whom scholars, jurists, modern cases, and the framers themselves refer, an investigation into their usage of the phrase is in order.

Fortunately, records of the use of the phrase ex post facto survive in state and colonial cases decided in the decades leading up to the ratification of the Constitution. Examining these cases, for the first time with an eye toward uncovering the original meaning of the Ex Post Facto Clauses, reveals that the phrase was well known to the legal profession in the years before the framing of the Constitution. Part II, below, analyzes these cases in order to determine what precisely was the "professional" meaning of the phrase ex post facto; that is, how the phrase was used by the professional class of American judges and lawyers in the years leading up to the framing of the Constitution. After reviewing these cases, I conclude that, contrary to the accepted understanding that drives the modern debate over the Ex Post Facto Clauses, the "professional" meaning of the phrase ex post facto included both civil and criminal laws.

II. THE PROFESSIONAL MEANING OF THE EX POST FACTO CLAUSES

Examining evidence of the professional meaning of the phrase ex post facto will add to the body of knowledge that is used to determine the original meaning of the Ex Post Facto Clauses. Moreover, because the narrow interpretation rests so heavily on the distinction between the professional meaning and lay meaning of the phrase ex post facto, uncovering the professional meaning allows us finally to resolve the two hundred-year-old dispute over the original meaning of the Ex Post Facto Clauses.

What, then, is the "technical" or "professional" meaning of the phrase ex post facto? Put another way, how did American judges and lawyers use the phrase "ex post facto" in the course of their legal work in the decades leading up to the drafting of the Constitution? The answer to this question can be found by examining state and colonial court opinions from the years leading up to the drafting of the Constitution. After examining these cases, I conclude that state court

158. Crosskey suggests that there is a case that used the phrase "ex post facto" in the decade leading up to the framing of the Constitution. However, he neither names the case, quotes the relevant language, describes this case, nor mentions the numerous other cases that use the phrase "ex post facto" described in this paper. *See* 1 CROSSKEY, *supra* note 8, at 326–27. Crosskey's reference seems to have been lost on subsequent scholars writing about the original meaning of the Ex Post Facto Clauses, many of whom relied heavily on his work.

judges and practitioners used the phrase ex post facto to refer not only to criminal laws, but also to laws enacted in a variety of civil contexts, including laws involving actions on debt, manumission, and property disputes.[159]

A. Criminal Laws

Proponents of both the narrow and broad interpretations of the Ex Post Facto Clauses agree, at the very least, that they apply to retroactive criminal laws. This should come as no surprise; retroactive criminal laws—which punish an individual for conduct that was not yet a crime—have always been regarded with the greatest opprobrium.[160] Recall that Blackstone's example of an abusive ex post facto law, which he regarded as even more unreasonable than Caligula's trap to ensnare the unwary, is a retroactive criminal law.[161] But whatever legislative abuses Blackstone had in mind, they were surely matched, if not exceeded, by the litany of abusive retroactive criminal laws enacted by the newly independent American state legislatures during the period between independence and the ratification of the Constitution. The most well-known of these laws are the countless bills of attainder[162] that

159. A note on methodology: Before the professionalization of case reporting in the late eighteenth century, there were a number of methods by which colonial and early republican court cases were recorded. Some were recorded by private attorneys who kept notes of decisions for their own use and later published them as collections of decisions. Other decisions were published individually in the form of pamphlets. The regularity and comprehensiveness of these reports varied greatly by jurisdiction and many of these early records have been lost. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 50–55 (1981). Because of this variation, the list of cases I have been able to locate, which I examine in Part II, most likely does not represent every decision in which the phrase "ex post facto" was used in the years before the framing of the Constitution. Nevertheless, the cases that I have been able to locate span the five decades leading up to the framing of the Constitution and represent the states of Pennsylvania, Connecticut, Maryland, and Virginia. Altogether, I was able to locate ten cases from the relevant time period. I located these cases using electronic searches on HeinOnline, Westlaw, and Lexis. Although I surely would have welcomed the opportunity to locate more cases from this period and from other states, I have a high degree of confidence in the historical conclusions that can be drawn from the cases I did find for three reasons. First, of these ten cases, nine use the phrase "ex post facto" to include civil laws. Second, none of the cases I found from the relevant time period, including the case that uses ex post facto to mean a criminal law, suggest a criminal-only interpretation. Third, none of the cases I found from this time period suggest that the narrow-broad debate even existed. These conclusions, and the support underlying them, are the subject of Part II.

160. *See* FULLER, *supra* note 3, at 53.

161. 1 BLACKSTONE, *supra* note 7, § 2, at 46.

162. Bills of attainder are often, but not always, ex post facto. Ostler, *supra* note 9, at 416–17.

singled out and sentenced to death or banishment suspected Tories[163] or other social undesirables[164] without judicial process.[165] The reckless populism of the newly independent American states, exemplified by these bills of attainder, coexisted uneasily with the same period's patient creation of a new nation steeped in the science of government[166] and the rights of man.[167] Like Dickens's description of England and France,[168] America's confederation period could well be characterized as the "the best of times" and "the worst of times," an "age of wisdom" and an "age of foolishness," the "spring of hope" and "the winter of despair."[169] It was in these heady days of freedom immediately following independence from Great Britain that the state of Pennsylvania enacted the pair of treason laws at issue in *Respublica v. Chapman*.[170]

As described in *Chapman*, Pennsylvania declared independence from Great Britain in May 1776. In December 1776, Chapman, a resident of Pennsylvania, emigrated from the newly independent state to fight for England. Sometime after Chapman's departure, Pennsylvania enacted the first of two treason statutes, declaring that any subject of Pennsylvania who joins the army of the enemy is guilty of high treason.[171] Chapman was indicted for treason; under a plain reading of this law, the court opined, Chapman would be guilty because he was subject to the laws of the new commonwealth as soon as Pennsylvania declared independence.[172] Chapman's guilt, however, was complicated by the fact that the Pennsylvania Assembly subsequently enacted a

---

163. An Act for disposing of certain Estates, and banishing certain persons, therein mentioned, No. 1153, 1782 S.C. Stat.; *Respublica v. Gordon*, 1 U.S. (1 Dall.) 233 (Pa. 1788); CHAFEE, *supra* note 46, at 97; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 71 (1999).

164. An Act to attaint Josiah Philips and others, unless they render themselves to justice within a certain time, ch. XII, 1778 Va. Stat.; W.P. Trent, *The Case of Josiah Philips*, 1 AM. HIST. REV. 444, 454 (1896).

165. *See* CHAFEE, *supra* note 46, at 93; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 279 (1969).

166. DAVID HUME, *That Politics May Be Reduced to a Science*, *in* POLITICAL ESSAYS 4 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1742).

167. C. Bradley Thompson, *On Declaring the Laws and Rights of Nature*, *in* NATURAL RIGHTS INDIVIDUALISM AND PROGRESSIVISM IN AMERICAN POLITICAL PHILOSOPHY 104, 117-20 (Ellen Frankel Paul et al. eds., 2012).

168. CHARLES DICKENS, A TALE OF TWO CITIES 1 (Bantam Dell 2003) (1859).

169. *Id.*

170. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53 (Pa. 1781).

171. *Id.* at 59. Under this treason law, a person would be declared guilty of high treason if he was designated a traitor by Pennsylvania's Supreme Council and failed to turn himself in in order to stand trial.

172. *Id.*

second treason law.[173] This second law declared that only current and future inhabitants of Pennsylvania owe allegiance to the commonwealth; therefore, former inhabitants could not be guilty of treason for joining the enemy.[174] Chapman's attorney argued that the application of the first treason statute would punish conduct—Chapman's departure to fight for England—that took place before the statute was enacted; therefore, he argued "it is evidently an ex post facto law, and as such, contrary to the words, and spirit of the Constitution."[175]

The court adopted, in part, Chapman's reasoning. Because there were two treason laws, one that was prospective only, which would not cover Chapman, and one that would apply to Chapman if given retroactive effect, the court held that it would err on the "side of mercy" rather than "strict justice"; accordingly, the court applied the second statute and found Chapman not guilty.[176]

Despite the outcome, the court did not wholly adopt Chapman's reasoning. Rejecting an absolute bar on ex post facto laws, the court opined: "Generally speaking, ex post facto laws are unjust and improper; but there may certainly be occasions, when they become necessary for the safety and preservation of the Commonwealth."[177] As a result, if the legislature was "impressed with the necessity of the case, [it] had incontrovertibly a right to declare any person a traytor, who had [g]one over to the enemy, and still adhered to them."[178]

Chapman represents the paradigmatic use of the phrase ex post facto. Both Chapman's attorney and the court use it in the context of a law that imposes the criminal sentence of treason and the punishment that accompanies this sentence. Other courts used the phrase in a similar sense. The court in *Place v. Lyon*[179] declared that it is a fundamental principle of jurisprudence that "*ex post facto* laws, declaring criminal what was not so when the facts were done . . . are inoperative; which principle a court of justice is not at liberty to depart

173. *Id.* at 58–59.

174. *Id.*

175. *Id.* at 54. Perhaps the most interesting aspect of this argument is the fact that, at the time it was made, the federal Constitution had not yet been drafted. Moreover, neither the Pennsylvania Constitution of 1776, nor the Articles of Confederation, contained a prohibition on ex post facto laws. This suggests that Chapman's usage of the word "constitution" is in line with the British conception of "constitution" rather than the American conception of a "constitution" as a written document.

176. *Id.* at 60.

177. *Id.* at 59.

178. *Id.*

179. *Place v. Lyon*, 1 Kirby 404 (Conn. 1788).

from . . . ."[180] Together, these cases exemplify the uncontroversial principle that the phrase ex post facto was used in the years before the framing of the Constitution to describe laws that imposed criminal punishment retroactively.

B. Debt Disputes

The palpable tension between debtors and creditors was felt throughout America in the decades leading up to the framing of the Constitution.[181] In order to alleviate poor, often rural, debtors from debilitating financial obligations, colonial and state legislatures enacted all manner of laws that had the effect of diminishing the value of debt held by their creditors. These laws included tender laws, which permitted debtors to repay debts with worthless paper money or other commodities,[182] scaling laws, which allowed debtors to repay debt at market rather than face value,[183] and suspension laws, which suspended payment obligations.[184] These debtor relief statutes led not only to social unrest but also to litigation over the enforceability of these laws.[185] In cases considering these debtor relief laws, judges and attorneys routinely described statutes retroactively altering contract rights and remedies as ex post facto laws.

1. TENDER LAWS

A number of cases that evaluated the retroactive application of debtor relief laws arose from the paper money problem that followed independence. Once independent from Great Britain, the new states began to issue paper money backed by nothing but their own credit.[186] As the war dragged on, inflation nearly wiped out the value of the

180. *Id.* at 406.

181. Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1140.

182. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1353–54, at 221–25 (1833); Bruchey, *supra* note 181, at 1137–38; Krent, *supra* note 10, at 2153. Tender laws permitted debtors to repay debts in quickly depreciating paper money or worthless commodities.

183. 3 STORY, *supra* note 182, § 1354, at 223–25. Scaling laws provided that debt could be redeemed at market value, far below the face value of the debt, reducing the real obligation owed by debtors. Ricciardi & Sinclair, *supra* note 100, at 309.

184. 3 STORY, *supra* note 182, § 1365, at 236–37. Suspension laws placed moratoria on the repayment obligations, essentially extending the repayment period without penalty for debtors. *Cf. Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 415–16 (1934).

185. *E.g.*, *Place v. Lyon*, 1 Kirby 404, 406 (Conn. 1788).

186. 3 STORY, *supra* note 182, §§ 1352–53, at 220–23.

paper money.[187] In order to protect their assets, therefore, lenders began to insist that the money they lent be repaid in hard currency, typically Spanish silver.[188] A borrower obligated to repay money in hard currency, while earning his living in quickly depreciating paper money,[189] would be hard-pressed to meet his repayment obligations. In order to ease the burden on debtors, state legislatures enacted tender laws providing that paper money was legal tender for the repayment of debt notwithstanding the contract terms under which the money was borrowed.[190] It was in this economic environment that the confederation-era cases of *Place v. Lyon*[191] and *Mumford v. Wright*[192] were decided.

In *Place*, the defendant contracted to borrow money from the plaintiff.[193] The parties stipulated that the defendant would repay the plaintiff in Spanish silver dollars.[194] After the contracting parties entered into this agreement, the state of Rhode Island enacted a tender law declaring that all contracts for debt could be discharged with paper money.[195] Rhode Island's statute provided that its paper money "shall be a good and lawful tender, for the complete payment and final discharge of all debts now due and contracted, and that may hereafter become due and be contracted."[196] The statute also made the attempted repayment in paper money, over the objection of a lender, an affirmative defense to a lender's action on debt against a borrower.[197] As permitted by Rhode Island's tender law, the defendant in *Place* attempted to repay the plaintiff with worthless paper money; the plaintiff refused to accept the paper money offered in lieu of the contracted-for Spanish silver.[198]

In the action on debt that followed, the court held that the effect of Rhode Island's debtor relief law on the contract at issue was unequivocal: by providing that paper was legal tender for "discharge of all debts now due"[199] the law was intended to alter, retroactively, the terms of the contract previously executed between the plaintiff and the

187. Bruchey, *supra* note 181, at 1137.
188. *E.g.*, *Place*, 1 Kirby at 404.
189. 3 STORY, *supra* note 182, § 1353, at 221-23.
190. Bruchey, *supra* note 181, at 1140.
191. *Place,* 1 Kirby 404.
192. *Mumford v. Wright*, 1 Kirby 297 (Conn. 1787).
193. *Place*, 1 Kirby at 406.
194. *Id.*
195. *Id.* at 404-05.
196. *Id.* at 405.
197. *Id.* at 405-06.
198. *Id.*
199. *Id.* at 405.

defendant. By providing that a defendant could plead the attempted payment in paper money as a defense, the tender law created a defense to breach of contract that did not exist at the time the parties made their agreement. The court held that "*ex post facto* laws, declaring criminal what was not so when the facts were done, or impeaching contracts lawfully made, are inoperative; which principle a court of justice is not at liberty to depart from . . . ."[200] The court concluded that Rhode Island's statute violated this "fundamental principle of jurisprudence" by declaring, after the fact, that a contract for debt made in silver could be discharged in paper. The statute was an ex post facto law and, accordingly, void.[201]

In *Mumford*, a nearly identical case, the court was more hesitant to declare the Rhode Island paper money statute void because of its retroactive effect. The court, instead, declined to enforce the statute on the ground that it was intended to protect only Rhode Island residents; because the parties were not Rhode Island residents at the time the defendant attempted to repay the debt in paper, the tender law did not apply to the transaction.[202] Although the court did not reach the merits of the case, it did use the phrase ex post facto when describing the tender law at issue. The court held that it did not have to decide "How far an ex post facto law can operate, to impair contracts."[203]

Both *Place* and *Mumford* help define the phrase ex post facto. Although the court in *Mumford* did not hold explicitly that an ex post facto law is void, it left no doubt that it considered Rhode Island's statute, which retroactively altered contract rights and remedies, an ex post facto law. *Place* not only explicitly held that Rhode Island's statute was an ex post facto law, but also invalidated the statute because of its ex post facto effect. Together they describe a definition of the phrase ex post facto that includes statutes that retroactively alter contract rights and remedies.

2. INTEREST RATE LAWS

In addition to tender laws, the colonies and early state legislatures enacted statutes fixing interest rates. In *Anderson v. Winston*,[204] the defendant borrowed money from the plaintiff with an obligation to

200. *Id.* at 406.

201. *Id.* This case provides additional, and as yet unexplored, evidence of a pre-*Marbury* court refusing to enforce the clear will of the legislature. *Cf.* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 497 (2005).

202. *Mumford v. Wright*, 1 Kirby 297, 297-98 (Conn. 1787).

203. *Id.* at 298.

204. *Anderson v. Winston*, 2 Va. Colonial Dec. B201 (1735).

repay the debt at an interest rate of fifteen percent.[205] Soon afterwards, the colonial legislature enacted a usury law that voided any contract for debt with an interest rate above six percent.[206] The court found that the plain language of the usury law could be read either prospectively or retrospectively. That is, the usury statute could be read retroactively to prevent repayment of debt above six percent even for contracts entered into before the usury law came into force; alternatively, it could be read only to prevent the repayment of debt above a rate of six percent for debt contracts made after the usury law was passed. In order to avoid the consequences of the retroactive application of the law, the court held that the statute applied only in futuro.[207] Central to the court's decision was its opinion that the alternative, retroactive interpretation of the usury statute would render it void as an ex post facto law.[208] Invoking the law of nature, the court noted that it is against "natural Justice to punish any Man for an Action innocent in itself with respect to human Laws . . . made *ex post facto* Which kind of Laws have been always condemned as unjust . . . ."[209] Put otherwise, the court read the usury law to have future effect only in order to avoid having to consider it an inoperative ex post facto law.

In *Kissam v. Burrall*,[210] the court confronted a similar issue as the *Anderson* court: specifically, whether a change in the manner of calculating interest applies to a debt when repayment is already in progress. Sometime before 1784, the defendant borrowed money from the plaintiff with an obligation to repay the debt at an interest rate set by the court.[211] In 1784, the court changed the way that it calculated interest on outstanding debts. Sometime after the 1784 change, the defendant ceased making payments, arguing that he had discharged his obligation to the plaintiff using the pre-1784 interest calculation method. The plaintiff, by contrast, argued that the post-1784 interest calculation was the appropriate one.[212] The defendant's attorney argued that the parties contracted with the understanding that the pre-1784 interest calculation would be used. If the court were to "subject them to a subsequent rule, . . . [it] would make their contract different from the original intention of the contracting parties. By the law, as it then stood

205. *Id.* at B203-04.
206. *Id.* at B204.
207. *Id.*
208. *Id.* at B204.
209. *Id.*
210. *Kissam v. Burrall*, 1 Kirby 326 (Conn. 1787).
211. *Id.* at 328-29.
212. *Id.*

[i.e., before 1784], the contract was fully performed; but by an *ex post facto* law, it is again opened, and left unfulfilled."[213]

In other words, the defendant's attorney argued that the alteration in the method of calculating interest is an ex post facto law as applied to a contract formed before the alteration because the interest rate is a basic condition underlying the parties' agreement. The court held that the defendant already had discharged his obligation toward the plaintiff, implicitly adopting the defendant's argument that the plaintiff's interpretation of the interest rate calculation would have an impermissible ex post facto effect.

Both the *Anderson* and *Kissam* courts avoided squarely deciding whether a law retroactively affecting interest rate calculations was void. Nevertheless, by using the phrase ex post facto to describe retroactive laws altering interest rate repayment obligations, these cases help to confirm that the phrase includes retroactive laws that affect repayment obligations.

3. SPECIAL EXEMPTIONS FROM GENERALLY APPLICABLE LAWS

During the confederation period, states passed all manner of special laws that exempted named individuals from generally applicable laws. Many of these special laws provided retrospective benefits, like immunity from civil liability, or imposed retrospective burdens, like the confiscation of property.[214] In the case of *Mortimer v. Caldwell*,[215] the defendants were two brothers, George and Charles Caldwell, who had been partners of a recently bankrupt business. After the bankruptcy, George, but not Charles, procured from the state legislature a special law that exempted him from liability for his inability to pay his debts. Mortimer, a creditor of the bankrupt business, sued the Caldwell brothers to recover money owed by the defunct partnership.[216] The court held that George was immune from suit because of the special law protecting him. By contrast, the court held that Mortimer's suit could proceed against Charles, who was not protected by any special-benefit law.[217] The dissent opined that the suit against George should proceed despite the special law because, as an ex post facto law, it was unjust. With reasoning reminiscent of *Kissam*, the dissent explained that the special law was ex post facto because, at the time of the agreement between the Caldwells and Mortimer, the parties expected that George

213. *Id.* at 333.
214. *See* Zoldan, *supra* note 5, at 632–40.
215. *Mortimer v. Caldwell*, 1 Kirby 53 (Conn. 1786).
216. *Id.* at 57 (Dyer, J. dissenting).
217. *Id.* at 55–56.

would be responsible for liabilities of the partnership.[218] By retroactively altering an assumption underlying the agreement between Mortimer and the Caldwells, the special law, would "operate to destroy or render void the original contract."[219] It would be "unjust, and not consonant to reason or equity"[220] for the court to give effect to this ex post facto law.[221]

Mortimer, unlike *Place* and *Anderson*, does not hold that a law with retroactive effect is necessarily void. And unlike *Kissam* and *Mumford*, the court in *Mortimer* was not able to avoid the retroactivity issue by reading the statute to have *in futuro* effect only. Indeed, faced squarely with the issue of the retroactive application of a debtor relief law, the majority permitted the law despite its retroactive effect. Nevertheless, *Mortimer* provides confirmation of the definition, described in *Place*, *Anderson*, *Kissam*, and *Mumford*, that a law that provides immunity from already existing debts is considered an ex post facto law. Although these cases do not consistently hold that laws are invalid or unenforceable simply because they are ex post facto, there is little doubt that, when read together, they describe a consistent definition of the phrase ex post facto that includes retroactive alterations of contract rights and remedies.

C. Manumission Cases

Before the framing of the Constitution, American judges and lawyers used the phrase ex post facto to describe statutes that, when applied retroactively, resulted in the manumission of enslaved individuals.[222] Early colonial statutes provided that a child born of the union between an enslaved person and a free person would be enslaved.[223] Although these statutes were intended to discourage free people from marrying enslaved people,[224] slave owners frustrated the

---

218. *Id.* at 56–57 (Dyer, J., dissenting).

219. *Id.* at 56 (Dyer, J., dissenting).

220. *Id.* at 59 (Dyer, J., dissenting).

221. *Id.* at 56 (Dyer, J., dissenting).

222. *See, e.g.*, *Butler v. Craig*, 2 H. & McH. 214, 221 (Md. 1787); *Butler v. Boarman*, 1 H. & McH. 371, 375, 382 (Md. 1770).

223. *Boarman*, 1 H. & McH. at 371; Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 577 (2004); *see* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1756 (1996) (noting that in some colonies, the condition of slavery followed the father, in others it followed the mother, and in still others descendants of slaves, regardless of gender, were slaves).

224. *Craig*, 2 H. & McH. at 221; Wiecek, *supra* note 223, at 1762 (quoting the Maryland statute that provided "'divers freeborne English women forgettfull of

purpose of these statutes by encouraging the disfavored unions in order to claim the offspring as their property.[225] In order to combat this problem, colonial legislatures subsequently repealed the enslavement statutes, prohibited the unions, and freed people who were held in violation of the new restrictions. Such was the background of *Butler v. Boarman*.[226]

In *Boarman*, the court considered a 1663 Maryland statute that declared the child of the union between an enslaved man and a white woman to be a slave. The legislature repealed the 1663 act in 1681. The petitioners, the Butlers, were the enslaved children of the union between a slave and an indentured servant. The Butlers' parents were married after the 1663 act was passed; however, the Butlers were not born until after the 1681 law repealed the 1663 act.[227] As a result, the court had to determine whether the 1681 statute had retroactive effect. If the 1681 law did have retroactive effect, it would vitiate the effect of the 1663 act altogether and the Butlers would be free; if it applied only prospectively, the Butlers would remain enslaved.[228]

The attorney for Boarman, the respondent slaveholder, argued against the retroactive application of the 1681 law. Specifically, Boarman's attorney argued that "Laws ought to have a commencement *in futuro*, and ought not to have an *ex post facto* exposition given to them."[229] The court agreed, reasoning that the legislature intended the 1681 statute to repeal the 1663 law only prospectively. As a result, the 1681 law repealed only the effect of the 1663 statute going forward; by contrast, marriages entered into between 1663 and 1681 were still governed by the 1663 statute. The Butlers, as children of a pre-1681 union between a slave and servant, were still slaves.

The court rested its decision on the potential retroactive effect of the 1681 law. The court reasoned that if the repealing law "is to have such a construction as will manumit the issue who were made slaves by the act of 1663, the consequence will be, that it will have the effects of an *ex post facto law*."[230]

Although the court refused to read the statute to have retroactive effect, it stopped short of adopting Boarman's argument that a law may never operate ex post facto. Instead, the court held, "*Ex post facto* acts

---

their free Condicion' who marry slaves 'to the disgrace of our Nation' were to serve their husband's master for the rest of their lives, and their children were to be 'slaves as their fathers were'").

225. *Craig*, 2 H. & McH. at 217; Gillmer, *supra* note 223, at 577.

226. *Boarman*, 1 H. & McH. at 371–73.

227. *Id.*

228. *Id.* at 374.

229. *Id.* at 375.

230. *Id.* at 382.

are to be construed as much as possible in favour of precedent rights."[231] However, despite its discomfort with retroactive laws, the court left open the possibility that the legislature would be permitted to do so under limited circumstances. The court noted that a "law which has an *ex post facto* effect ought to be very clear and explicit in the terms of it, otherwise the Court will not give it such a construction as will defeat rights formerly acquired and well settled."[232]

A generation later, *Butler v. Craig*[233] revisited the situation of Mary Butler, one of the petitioners in *Boarman*, who again sued for her freedom. This time the respondent, Craig, was a subsequent purchaser of Mary Butler. Unlike in *Boarman*, the trial court in *Craig* held that Butler could not be held as a slave. The court reasoned that her slavery was predicated on the "conviction" of her ancestor, Irish Nell, of having unlawfully married a slave. Because there was no record of Irish Nell's conviction of the predicate offense, the court held that it could not conclude that the marriage actually took place.[234] The attorney for the slaveholder argued, as in *Boarman*, that reading the statute to free Butler would be an impermissible ex post facto application of the manumission law.[235] Specifically, he argued that it would be unjust for the legislature "to have made an *ex post facto* law, which might have affected innocent purchasers."[236] The court of appeals rejected the petition and upheld the trial court's decision to free Butler.

The *Boarman* and *Craig* courts came to different substantive conclusions about the effect of a statute that repeals a previous statute. Either decision—or both—may reflect the sensitive nature of the "peculiar institution"[237] of slavery rather than a run-of-the-mill exercise in statutory interpretation;[238] nevertheless, we can learn much about our present inquiry, into the professional meaning of the phrase ex post facto, from these decisions. The court in *Boarman*, and attorneys in both cases, used the phrase ex post facto when describing the retroactive application of a law freeing enslaved individuals.[239] Although the *Boarman* court left open the possibility that ex post facto

231. *Id.* at 383.

232. *Id.* at 382.

233. *Butler v. Craig*, 2 H. & McH. 214 (Md. 1787).

234. *Id.* at 215-16.

235. *Id.* at 221.

236. *Id.*

237. John C. Calhoun, On the Reception of Abolition Petitions, Address Before the United States Senate (Feb. 6, 1837), *in* 3 ROBERT C. BYRD, THE SENATE 1789-1989, at 171, 175 (Wendy Wolff ed., 1994).

238. Gillmer, *supra* note 223, at 565-66.

239. *Craig*, 2 H. & McH. at 221; *Butler v. Boarman*, 1 H. & McH. 371, 375, 382 (Md. 1770).

laws would be permissible at times, these cases support the conclusion that the phrase ex post facto encompasses statutes that alter the legal status of slaves retroactively. Although it seems odd today to characterize a statute dealing with slavery as either civil or criminal, in the context of a slave-owning society, such a statute was considered civil in nature. State statutes permitted enslaved individuals to bring private suits for freedom against slaveholders.[240] These suits sounded in tort,[241] were conducted between private parties, and did not include the state as a litigant.[242] In both *Boarman* and *Craig*, for example, the petitions for freedom were brought by the enslaved individuals, the Butlers, against the slave owners.[243] As a result, the use of the phrase ex post facto in *Boarman* and *Craig*, like in the debt relief cases, is evidence that the phrase was used to refer to civil laws with retroactive effect.

D. Property Disputes

Judges and lawyers in the colonial and early republican period used the phrase ex post facto not only in cases involving the politically sensitive issues of slavery and debt relief, but also in more routine cases involving real property. In *Helms's Lessee v. Howard*,[244] the court used the phrase in the context of a retroactive law that affected property rights conveyed by deed. In 1699, the state legislature set a rebuttable presumption for measuring property conveyed in a deed. The particular problem addressed in *Helms's Lessee* arises when a deed conveys property that runs a certain distance alongside a flowing body of water: for example, suppose that a deed reads "A conveys to B the portion of Blackacre that lies west of the Huron River, beginning at the northern border of Blackacre and running south along the River for two miles." Without more specificity, the deed is ambiguous as to whether the two miles should be measured in a straight line from the border of Blackacre or along the curved contours of the river. Of course, a measurement running along the curve of the river would convey less land than a measurement running in a straight line next to the curved river. In order to minimize disputes arising from this ambiguity, the

240. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1234–35 (1993).

241. Gillmer, *supra* note 223, at 567–68.

242. Higginbotham & Higginbotham, *supra* note 240, at 1235 ("The Freedom Suit Act required a petitioner to present himself at the county court or to a magistrate, who would then summon the apparent owner to answer the complaint.").

243. *Craig*, 2 H. & McH. at 215; *Boarman*, 1 H. & McH. at 371, 374.

244. *Helms's Lessee v. Howard*, 2 H. & McH. 57 (Md. 1784).

1699 law provided that, unless the grantor made his intention to do so otherwise clear, the court must presume that a length given in the deed is measured in a straight line rather than curved to follow the contours of a flowing body of water.[245] In 1704, the statutory presumption was repealed and the 1699 Act setting the straight-line presumption was declared "null and void."[246] Surely reflecting concern over the potential retroactive effect of the law, the 1704 Act provided a "savings clause" providing that, despite the repeal of the 1699 Act, any rights acquired under it were preserved.[247] The plaintiff in *Helms's Lessee* claimed title to property that was acquired under the 1699 Act and argued that, despite the repeal of the act, the 1704 Act's savings clause ensured that the new law did not operate retroactively to defeat his previously acquired rights.[248]

The court held that, normally, the savings clause of the 1704 Act would have the effect advanced by the plaintiff, that is, to ensure only prospective application of the new law and preserve the rights acquired under the previous act.[249] Nevertheless, the court held, an interpretation giving any effect to the 1699 Act would defeat the portion of the 1704 Act that declared the previous act "null and void."[250] Rejecting the plaintiff's argument that the 1704 Act's savings clause permitted rights acquired under the 1699 Act to stand, the court asked, rhetorically, "What right had the legislature to make *ex post facto* rules to take [the plaintiff's] land from him? How could the legislature pass an act for perpetuating bounds, if they had any idea the act of 1699 was in force?"[251] The court answered: because the legislature did not merely repeal the 1699 Act, but also declared it "null and void," the legislature intended to give ex post facto effect to the 1704 Act.[252]

In *Timson v. Scarburg*,[253] the court considered whether a matter occurring after the execution of a will retroactively validates the will if it was void at the time of its creation. The testator possessed a fee tail that he devised to someone other than his son, who was alive at the

245. *Id.* at 92. Specifically, the statute provided that "[i]f a certain number of perches be prescribed to run by a creek, river or branch side, and no . . . certain course expressed, the number of perches shall not be spent away by the several windings of the river, creek or cove, but brought to a straight line of that length." *Id.* (quoting An Act ascertaining the Bounds of Land, ch. XVIII, 1699 Md. Laws).

246. *Id.* at 98.

247. *Id.* at 93.

248. *Id.* at 91–92.

249. *Id.* at 99.

250. *Id.* at 98–99.

251. *Id.* at 96.

252. *Id.* at 98–99.

253. *Timson v. Scarburg*, 2 Va. Colonial Dec. B140 (1741).

time the testator died. By statute, the testator was not permitted to devise property he possessed in fee tail to someone other than his son; as a result, his devise would have been void had his son survived him. However, by the time the testator's will was probated, his son had died, raising the question whether the subsequent death of his son could retroactively validate his will, which was void at the time of its creation. The court reasoned that a "Devise void in its creation cannot be made good by matter *ex post facto*."[254]

In *Helms's Lessee* and *Timson* the courts used the phrase ex post facto to describe whether the effect of events taking place after property rights are fixed can be altered retroactively. In *Helms's Lessee*, the court held that a statute could retroactively diminish previously acquired property rights if the legislature made clear its intention to do so.[255] In *Timson*, the court held that an event after the fact could not alter the effect of previously fixed property rights.[256] Although they address retroactivity in different contexts, they use the phrase ex post facto in a similar fashion; in both cases, the phrase ex post facto is used to describe the effect of a subsequent event on previously fixed property rights.

Timson and *Helms's Lessee* are instructive as to the meaning of the phrase ex post facto for another reason as well. Unlike cases involving manumission of slaves or cases involving the emergency situation created by the economic dislocations of the confederation period, *Timson* and *Helms's Lessee* involve ordinary property disputes. As a result, these cases confirm that the use of the phrase ex post facto in the context of retroactive interferences with property rights is not limited to the perhaps *sui generis* situations of slavery or confederation-era debtor relief. Read together, all of the cases discussed in Part II describe a coherent definition of ex post facto that includes not only criminal laws,[257] but also a wide variety of civil laws, including laws that retroactively alter contract rights and remedies,[258] manumit slaves,[259] and affect previously fixed property rights.[260]

---

254. *Id.* at B147.

255. *Helms's Lessee v. Howard*, 2 H. & McH. 57, 98–99 (Md. 1784).

256. *Timson*, 2 Va. Colonial Dec. at B146–47.

257. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 59 (Pa. 1781).

258. *Place v. Lyon*, 1 Kirby 404, 406 (Conn. 1788); *Kissam v. Burrall*, 1 Kirby 326, 328–39 (Conn. 1787); *Mumford v. Wright*, 1 Kirby 297, 298 (Conn. 1787); *Mortimer v. Caldwell*, 1 Kirby 53, 53–54 (Conn. 1786); *Anderson v. Winston*, 2 Va. Colonial Dec. B201, B202 (1735).

259. *Butler v. Craig*, 2 H. & McH. 214, 216–17 (Md. 1787); *Butler v. Boarman*, 1 H. & McH. 371, 371–72 (Md. 1770).

260. *Helms's Lessee*, 2 H. & McH. at 99–100. *Timson*, 2 Va. Colonial Dec. at B146–47.

E. The Original Meaning of the Ex Post Facto Clauses

When a long-standing historical dispute turns on inferences drawn from well-known evidence, the discovery of a new body of evidence presents scholars with a unique opportunity to reframe the debate. Such is the case here. The evidence traditionally used to support both the broad and narrow interpretations of the Ex Post Facto Clauses is essentially the same. Scholars and courts advocating both readings rely on British primary sources, notes from the Philadelphia and state constitutional conventions, state legislative materials, newspaper articles, and post-ratification history. Using these sources, proponents of the broad interpretation infer that the original meaning of the clauses encompassed both criminal and civil retroactive laws. Relying on, essentially, these same sources, proponents of the narrow interpretation infer that the original meaning of the clauses included only retroactive criminal laws. Because no one, however, previously has analyzed the debate in light of the professional meaning of the phrase ex post facto, the body of evidence relied on by proponents of both readings is incomplete. The above-described cases, which used the phrase ex post facto in the decades leading up to ratification of the Constitution, help to complete the picture; and the analysis of these cases offers insight into the ongoing debate over the original meaning of the Ex Post Facto Clauses. An analysis of this new evidence leads to a number of historical conclusions: there was a professional or technical meaning of the phrase ex post facto; this phrase referred both to civil and criminal laws; and the original meaning of the Ex Post Facto Clauses included both civil and criminal retroactive laws.

First, the phrase ex post facto had a professional or technical meaning. As reflected in colonial and state cases, this phrase was used by the professional class of American judges and lawyers in the course of their work. This phrase was used for decades leading up to the framing of the Constitution. It was used in a consistent manner by these professionals throughout the colonies and, later, the newly independent states.

Second, the technical or professional meaning of the phrase ex post facto referred both to civil and criminal laws. It was, not surprisingly, used to describe retroactive criminal laws.[261] But more interestingly, it also was used to refer to statutes that retroactively modified contract rights,[262] statutes that freed enslaved individuals,[263]

261. *Chapman*, 1 U.S. (1 Dall.) at 59.

262. *Place*, 1 Kirby at 406; *Kissam*, 1 Kirby at 328-29; *Mumford*, 1 Kirby at 298; *Mortimer*, 1 Kirby at 53-54; *Anderson*, 2 Va. Colonial Dec. at B202.

263. *Craig*, 2 H. & McH. at 216-17; *Boarman*, 1 H. & McH. at 371-72.

and events that altered previously fixed property rights.[264] In light of these cases, it is safe to conclude that the professional meaning of the phrase ex post facto included, at the very least, retroactive laws that touch on these substantive subject matters.

Moreover, these cases strongly suggest that the phrase ex post facto extended beyond particular substantive subject matters to include the broader category of all civil laws. The cases that describe the professional meaning of the phrase ex post facto concerned a wide variety of common law subject matters, like contracts, torts, and property.[265] Moreover, none of these cases suggested any logical or practical limitation on the use of the phrase ex post facto to these specific civil subject matters. As a result, the best reading of these cases suggests that the professional meaning of the phrase ex post facto included, along with criminal laws, all retroactive civil laws, irrespective of substantive subject matter.

Third, the discovery of the professional meaning of the phrase ex post facto provides crucial evidence that helps us resolve the ongoing debate over the original meaning of the Ex Post Facto Clauses. The fact that the professional meaning of the phrase ex post facto included civil as well as criminal laws weighs in favor of the broad interpretation of the Ex Post Facto Clauses. When added to the evidence that already exists supporting the broad interpretation of the Ex Post Facto Clauses, including evidence from British sources, constitutional debates, and public documents, evidence of the professional meaning tips the scales of the debate in favor of the broad interpretation.

Importantly, however, evidence of the professional meaning of the phrase ex post facto does more than simply add to a debate that already is overflowing with historical support. Rather, because courts and scholars rely so heavily on the distinction between the professional and lay meanings of the phrase ex post facto, evidence of its professional meaning helps resolve, once and for all, the debate over the original meaning of the Ex Post Facto Clauses. As noted, from its earliest introduction, the distinction between the professional meaning and the general meaning of the phrase ex post facto has provided proponents of the narrow interpretation with their strongest arguments. Dickinson asked his colleagues in Philadelphia to defer to the technical meaning of the phrase as (he believed) it was used by Blackstone. Randolph asked his colleagues in Virginia to defer to the technical meaning as well, asserting that the phrase "*ex post facto*," if taken "technically," relates

264. *Helms's Lessee*, 2 H. & McH. at 99–100; *Timson*, 2 Va. Colonial Dec. at B146–47.

265. *E.g.*, *Place*, 1 Kirby at 406.

"solely to criminal cases."[266] Scholars have long taken these assertions as accurate, concluding that the distinction drawn by Dickinson and Randolph was generally accepted.[267] *Calder*, too, rests on the assumption that there is a distinction between the professional, or technical, and literal meaning of the phrase; and Justices Chase and Paterson defer to their understanding of the technical meaning in their interpretation of the Ex Post Facto Clauses. And of course, subsequent cases, including modern Ex Post Facto Clause cases, defer to *Calder*'s conclusions about the historical meaning of the Ex Post Facto Clauses. Because the professional meaning of the phrase ex post facto actually encompassed both criminal and civil laws, the claims made by Dickinson, Randolph, and Justices Chase and Paterson, whether intentional or not, were false. Proponents of the narrow interpretation, including modern scholars and even the Supreme Court, rest their arguments on the historical assertions made by Dickinson, Randolph, and the *Calder* opinions. As a result, these courts and scholars have built their interpretations on infirm ground.

The conclusion that the original meaning of the term ex post facto referred both to criminal and civil laws, therefore, does not merely provide additional support for the broad interpretation; it undermines the major premise supporting the narrow interpretation. Without this support, there is little to recommend the narrow view of the original meaning of the Ex Post Facto Clauses. In conclusion, the discovery of the professional meaning of the phrase ex post facto strongly suggests

---

266. Convention of Virginia *in* 3 ELLIOT'S DEBATES, *supra* note 67, at 477, 481.

267. *See supra* Part I.C. Interestingly, neither scholars nor jurists trying to divine the original meaning of the Ex Post Facto Clauses have suggested an interpretation that includes both criminal laws and laws that impair contractual obligations. This is odd because a simple reading of the historical evidence supporting the broad interpretation, including most prominently the notes from the constitutional conventions, suggests that the retrospective civil matters on the minds of the framers were those relating to debt obligations. Indeed, as noted above, the social and economic dislocations of the confederation period were driven largely by the quickly depreciating paper money issued by the states and the Continental Congress. It is no surprise, therefore, that the debate over retroactivity contemporaneous with the framing of the Constitution was focused on its potential effect on debt obligations. From this evidence, it would be fair to conclude that the original meaning of the Ex Post Facto Clauses, even in its broadest sense, included only criminal laws and laws impairing obligations of contract. Curiously, this argument has not been advanced. In any event, the professional meaning of the Ex Post Facto Clauses, as described by the cases that define it, dispel that possibility. By referring to retroactive laws related to matters sounding in tort and property as well as contract, the cases defining the phrase ex post facto confirm that the professional meaning of the phrase is not limited solely to criminal and contract matters, but rather includes civil law generally.

that the narrow interpretation of the original meaning of the Ex Post Facto Clauses, as a historical matter, is incorrect.

III. BEYOND THE ORIGINAL MEANING OF THE EX POST FACTO CLAUSES

The historical information analyzed in Part II helps resolve a weighty, ongoing dispute over the original meaning of the Ex Post Facto Clauses. But, although uncovering the professional meaning of the phrase ex post facto answers one question, it raises other, trickier questions about what to do with this information. Most immediately, it forces us to confront the question of the relationship between history and interpretation. Should the Court give any weight to historical evidence? If so, how much weight? The extent to which courts and scholars should accord interpretive significance to historical information is hotly contested. Originalists[268] who would discount or dismiss precedent in light of contrary historical evidence are likely to take this historical information very seriously. To the extent that they regard the original meaning of the Ex Post Facto Clauses as dispositive of their proper interpretation, they would likely conclude that *Calder* was wrongly decided and argue that it should be overruled.[269] However, even non-originalist courts and scholars, who do not consider historical information dispositive, would likely consider the original meaning of the Ex Post Facto Clauses relevant to defining their scope. Indeed, even among non-originalist scholars, historical meaning always has been one of the traditional tools of interpreting the Constitution. Historical meaning is one of the modalities of constitutional argument identified and described by Philip Bobbitt;[270] and it continues to be used routinely

268. Although there are a number of branches of originalism, I refer to them collectively despite their differences because they share the aim of treating "the discoverable meaning of the Constitution at the time of its . . . adoption as authoritative for purposes of constitutional interpretation." Keith Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 599 (2004). The historical evidence presented in Part II should be relevant to originalists who focus on original meaning, original understanding, and original intent.

269. *See, e.g.*, Natelson, *supra* note 9, at 493–94. Modern versions of originalism acknowledge a role for precedent even if it is non-originalist. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 177–78 (2013); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1441–42 (2007).

270. BOBBITT, *supra* note 21, at 12–13.

both by scholars[271] and judges, including justices of the Supreme Court.[272]

Even if one accepts, as most scholars and courts do, the relevance to interpretation of historical conclusions, there remains the question of the weight that should be accorded to history. Most interpreters, including even some modern originalists,[273] will weigh historical conclusions against ahistorical considerations, like precedent, constitutional structure, and normative considerations. These ahistorical considerations often suggest different interpretations than does strictly adhering to the original meaning of the Constitution. For example, *Calder*'s narrow interpretation has been well-established for over two centuries; an interpretation based on newly considered historical evidence would unsettle settled expectations and cast countless regulatory regimes into doubt.[274] Moreover, the broad interpretation of the Ex Post Facto Clauses creates some new interpretative problems. The narrow interpretation of the Ex Post Facto Clauses is often justified as necessary to make room for other clauses of the Constitution, the coverage of which would overlap with the broad interpretation of the Ex Post Facto Clauses.[275] Finally, an expanded reading of the Ex Post Facto Clauses would prevent legislatures from enacting some socially desirable laws.[276]

When the Court considers whether to overrule *Calder*, it will weigh considerations about precedent, constitutional structure, and normative outcomes against evidence about the Ex Post Facto Clauses' historical meaning. Although the scope of this paper precludes finally resolving whether *Calder* should be overruled, this Part will frame the questions that the Court should consider. Moreover, it will offer some preliminary answers to these questions, informed by the newly

---

271. Aiken, *supra* note 10, at 325 n.12; Cloud, *supra* note 21, at 49; Cohen, *supra* note 21, at 1017–20.

272. *E.g.*, *NLRB v. Canning*, 134 S. Ct. 2550, 2559 (2014).

273. MCGINNIS & RAPPAPORT, *supra* note 269, at 177–78; Lash, *supra* note 269, at 1441–42.

274. *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1463–66 (2013).

275. Kmiec & McGinnis, *supra* note 9, at 531 n.29.

276. Bernard W. Bell, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 248 (1999) (reviewing DANIEL E. TROY, RETROACTIVE LEGISLATION (1998)); *see also United States v. Carlton*, 512 U.S. 26, 32 (1994) (upholding a tax law with retroactive effect because "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss").

discovered evidence of the professional meaning of the Ex Post Facto Clauses described in Part II. First, the Court should consider whether *Calder*'s narrow interpretation should be retained, despite the original meaning of the Ex Post Facto Clauses, because of *Calder*'s antiquity. The professional meaning of the Ex Post Facto Clauses suggests that *Calder*'s claim to precedential value is weak because it is based on a faulty premise. Second, the Court should consider whether the broad or narrow interpretation of the Ex Post Facto Clauses fits better with the structure of the rest of the Constitution. The professional meaning suggests that any ambiguity in the structure of the Constitution should be resolved in favor of the broad interpretation of the Ex Post Facto Clauses. Third, the Court should consider whether the broad or narrow interpretation leads to normatively attractive results. The professional meaning of the Ex Post Facto Clauses suggests some ways in which the broad interpretation can advance normatively attractive results.

A. Does Calder*'s Antiquity Suggest the Retention of the Narrow Interpretation?*

Calder's narrow interpretation has endured for more than two hundred years. Indeed, there are few precedents as well established as *Calder*, which courts continue to cite as the lead case in its modern Ex Post Facto opinions.[277] There are, of course, good reasons to continue to enforce such a long-standing rule. Pragmatically, long-standing constitutional precedents create certainty both for individuals and government agencies.[278] Consistency over time, moreover, contributes to the public's perception of the integrity of the legal process.[279] Indeed, the very thing that separates "law" from a patternless set of orders is the consistent application of legal principles over time.[280] Precedent supplies consistency that could not be achieved by de novo application of legal rules in close cases. Finally, numerous well-settled statutory schemes, including civil commitment programs and environmental laws, are predicated on the legality of civil retroactivity. All of these considerations suggest that *Calder*'s narrow interpretation of the Ex

277. The Supreme Court recently reiterated *Calder*'s basic categories of laws that run afoul of the Ex Post Facto Clauses. *Peugh v. United States*, 133 S. Ct. 2072, 2077–78 (2013).

278. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180 (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

279. *Casey*, 505 U.S. at 865–66; Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412–13 (2010).

280. FULLER, *supra* note 3, at 46–48; *Casey*, 505 U.S. at 854.

Post Facto Clauses should be retained notwithstanding their historical meaning.

On the other hand, the Court has recognized circumstances that warrant departing from precedent. The Court considers itself less bound to follow precedent when the prior case becomes unworkable or anachronistic, departing from the rule will not cause instability or frustrate reliance interests, and, finally, when the prior opinion's "premises of fact have so far changed . . . as to render its central holding somehow irrelevant or unjustifiable."[281] It is this last basis for reconsidering precedent, a discovery that the prior opinion rested on "false factual assumptions,"[282] that is implicated by the newly discovered professional meaning of the Ex Post Facto Clauses. As the Court elaborated, when the predicate facts underlying a constitutional decision are "proven to be untrue," the "demonstration of their untruth not only jusitifie[s] but require[s]" a new constitutional rule.[283]

Calder's holding is based on the false factual premise that the professional meaning of the phrase ex post facto pertained to criminal laws only. As noted above, Justices Chase and Paterson interpreted the Ex Post Facto Clauses to include criminal statutes alone because they believed, erroneously, that they were interpreting the clauses in accordance with their professional or technical meaning.[284] Chase argued that the phrase was a term of art with a "technical" meaning, acquired through use by legal professionals,[285] that signified criminal laws only. Paterson noted that the "words, ex post facto, when applied to a law, have a technical meaning"—the narrow definition—that differs from the "literal sense" of the phrase.[286] Paterson even lamented that he personally had an "ardent desire" to extend the Constitution's protections to civil laws but, alas, he could not persuade his more technically minded colleagues.[287]

Of course, both Chase and Paterson were incorrect: the technical or professional meaning of the phrase ex post facto included civil statutes as well as criminal statutes.[288] As a result, Chase and Paterson's conclusion—to give the Ex Post Facto Clauses a narrow interpretation—was based on a faulty historical premise, not on the decision to interpret the clauses consistent with a different, ahistorical

281. *Casey*, 505 U.S. at 855.
282. *Id.* at 861–62.
283. *Id.* at 862.
284. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 397 (1798).
285. *Id.* at 391.
286. *Id.* at 396–97.
287. *Id.* at 397.
288. *See supra* text accompanying note 159.

value. Therefore, *Calder* is wrong not just compared with extrinsic historical evidence, but because it is intrinsically incoherent; that is, its opinions evince a frustrated attempt to interpret the Ex Post Facto Clauses according to their professional meaning. Put another way, although *Calder*'s conclusion was to give the clauses the narrow reading, the reasoning of its opinions leads to the broad interpretation of the clauses. Because *Calder* is based on faulty factual assumptions, its reasoning is inconsistent with its conclusion. As a result, *Calder* does not present a strong case for *stare decisis*. Although the Court should take great care before overruling any long-standing precedent, it should take into account the fact that *Calder* is based on an erroneous factual assumption when considering its precedential value.

B. Does the Structure of the Constitution Support Calder*'s Narrow Interpretation?*

When considering whether to retain *Calder*'s narrow interpretation, the Court should evaluate whether the broad or narrow interpretation of the Ex Post Facto Clauses fits better with the structure of the rest of the Constitution. Although the structural argument supporting the narrow interpretation is well known, the professional meaning of the Ex Post Facto Clauses suggests a structural argument in support of the broad interpretation. Scholars long have noted that a number of clauses of the Constitution constrain various types of retroactivity.[289] Indeed, the Supreme Court has explained that the Takings,[290] Due Process,[291] and Contract[292] Clauses all address civil retroactivity.[293] A broad reading of the Ex Post Facto Clauses, by reaching civil retroactive legislation, will render these other clauses partially, if not wholly, redundant. Consider the following example: The state has a contract with Contractor Y to perform road repair for the next five years. In year two, the state learns that it can obtain a better deal for itself by doing business with Contractor Z instead; it therefore passes a law nullifying its contract with Contractor Y for years three through five and awarding the contract to Contractor Z. Under *Calder*'s narrow interpretation, the state has not violated the Ex Post Facto Clause because the law breaching its contract is civil rather than criminal in nature. However, the state's conduct does not go unredressed; the state has violated the Contract Clause of the

289. TROY, *supra* note 30, at 6–9.
290. U.S. CONST. amend. V.
291. *Id.*
292. U.S. CONST. art. I, § 10.
293. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

Constitution, which prohibits states from breaching obligations of contract.[294] Under a broad interpretation of the Ex Post Facto Clauses, by contrast, the state's conduct would be prohibited by both the Contract Clause and the Ex Post Facto Clause. The potential redundancy between the broad reading of the Ex Post Facto Clauses and other clauses of the Constitution suggests that the narrow interpretation is more appropriate because it creates one and only one constitutional remedy for a breach of contract.

This structural argument is supported by what may be called the "anti-redundancy" canon of constitutional construction that long has been recognized by the Supreme Court. As the Court held in *Marbury v. Madison*,[295] unless the words of the Constitution require it, the Court will not presume that any part of the Constitution was intended to be mere "surplusage."[296] In *Calder* itself, Justice Chase made this very argument, reasoning that the broad interpretation of the Ex Post Facto Clause would render the Contract Clause "unnecessary, and therefore improper."[297] Scholars, too, have noted that if the broad interpretation of the Ex Post Facto Clauses is correct, then the Contract Clause would be rendered partially if not completely superfluous.[298]

On the other hand, many of the Constitution's protections obviously overlap.[299] A few examples will suffice: because bills of attainder almost always impose legislative punishment for past conduct, the Bill of Attainder Clauses overlap significantly with even the narrow reading of the Ex Post Facto Clauses.[300] Relatedly, because bills of attainder often were used to confiscate property, the protections of the Bill of Attainder Clauses overlap with those of the Takings Clause.[301] The right to a jury trial in criminal cases is guaranteed both by

294. U.S. CONST. art. I, § 10.

295. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

296. *Id.* at 174.

297. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

298. Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. CIN. L. REV. 1447, 1467 n.85 (2013); Kmiec & McGinnis, *supra* note 9, at 531 n.29.

299. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 648–50 (1996) ("Even a casual look at the Constitution reveals clauses that are in some sense redundant or superfluous."); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1718 (2012) ("Surely the prohibition on bills of attainder and the requirement of a jury trial, to name just two examples, are comprised within the demand for 'due process.'").

300. Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227, 229 (1998) ("[S]ome statutes violate both ex post facto and bill of attainder guarantees.").

301. Ostler, *supra* note 9, at 417.

Article III and Amendment VI of the Constitution.[302] As these redundancies show, the anti-redundancy canon, whatever its parameters, cannot be read as an absolute bar to interpretations that yield overlapping protections. Indeed, as Professor Balkin has argued, there is an alternative explanation for redundancy: when clauses of the Constitution overlap in coverage, it may be considered evidence of a design to ensure that there is no gap in coverage for important rights. Rather than representing poor drafting, overlap can be considered evidence of deep concern on the part of the framers to protect a particular right.[303] This model can be thought of as a belt-and-suspenders approach, akin to the way statutes and contracts are often drafted, that prefers redundancy to unforeseen lacunae.

Both the anti-redundancy and belt-and-suspenders models of constitutional interpretation are therefore "permissible maxim[s] of commonsensical interpretation, to be applied sensitively and contextually to aid sound construction."[304] The question becomes, then, which model best describes the potential overlap between the Ex Post Facto Clauses and other clauses that disfavor retroactivity. Another way to frame the question is to ask how important is the constitutional norm against retroactivity; is it a "commonsensical interpretation" to read the Constitution to err on the side of redundant protections against retroactivity? The choice between the anti-redundancy and belt-and-suspenders models is particularly stark in the case of retroactivity because, while the broad interpretation of the Ex Post Facto Clauses leads to some redundancy, the narrow interpretation leads to gaps in the Constitution's protections against retroactivity. Even combined with the protections afforded by the Takings, Due Process, and Contract Clauses, the narrow reading of the Ex Post Facto Clauses fails to prevent many types of civil retroactivity. For example, modern retroactive civil laws, including laws that result in deportation,[305] impose tax obligations,[306] and impair property interests,[307] fall through gaps created by a narrow interpretation of the Ex Post Facto Clauses, even combined with the Constitution's other anti-retroactivity

---

302. *Compare* U.S. CONST. art. III, § 2 ("The Trial of all Crimes . . . shall be by Jury."), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

303. BALKIN, *supra* note 19, at 198–99.

304. Amar, *supra* note 299, at 650.

305. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

306. *United States v. Carlton*, 512 U.S. 26, 30 (1994) (reviewing retroactive application of tax laws under Due Process Clause rather than Ex Post Facto Clause).

307. Krent, *supra* note 10, at 2153.

provisions. Similarly, many of the retroactive civil laws called ex post facto in the years leading up to the framing of the Constitution, including laws that modified property rights,[308] would fall outside the scope of the Constitution's anti-retroactivity provisions if the Ex Post Facto Clauses are read narrowly.

Because the narrow interpretation results in coverage gaps, the choice between the anti-redundancy and belt-and-suspenders models of anti-retroactivity is, therefore, a choice between incomplete coverage and redundant coverage, respectively. The historical evidence developed in Part II suggests that, between these two choices, redundant coverage is a more "commonsensical" reading than incomplete coverage. During the decades leading up to the framing of the Constitution, retrospective laws were well-known to the legal community. The legal community's opinion of retrospective laws, as reflected in court cases of that time, leaves no doubt that they were a much reviled legislative creation. Ex post facto laws were called "unjust and improper" by the courts.[309] Judges asserted that enforcement of these laws violated a "fundamental principle of jurisprudence."[310] Ex post facto laws were considered against "natural Justice"[311] and "not consonant to reason or equity."[312] The unmistakable odium directed towards ex post facto laws in the cases described in Part II places it squarely in line with longstanding sentiments about retrospective legislation. Blackstone called ex post facto laws "cruel and unjust."[313] James Madison argued that ex post facto laws were "contrary to the first principles of the social compact and to every principle of sound legislation."[314] The early Supreme Court asserted that ex post facto laws are "oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man."[315] In similar language, North Carolina and Maryland's constitutions called them "oppressive, unjust, and incompatible with liberty."[316] Modern commentators have labeled these laws, among a host of other epithets, "truly a monstrosity."[317]

---

308. *E.g.*, *Helms's Lessee v. Howard*, 2 H. & McH. 57, 99–100 (Md. 1784).

309. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 60 (Pa. 1781).

310. *Place*, 1 Kirby at 406.

311. *Anderson v. Winston*, 2 Va. Colonial Dec. B201, B204 (1735).

312. *Mortimer v. Caldwell*, 1 Kirby 53, 59 (Conn. 1786).

313. 1 BLACKSTONE, *supra* note 7, §2, at 46.

314. THE FEDERALIST NO. 44, *supra* note 7, at 287 (James Madison).

315. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827).

316. N.C. CONST. of 1776, A Declaration of Rights, art. XXIV; MD. CONST. of 1776, A Declaration of Rights, art. XV.

317. FULLER, *supra* note 3, at 53. *See also* Smith, *supra* note 2, at 237.

In light of the overwhelming condemnation of ex post facto laws, the better interpretation of the Ex Post Facto Clauses is the one that errs on side of redundant coverage rather than one that results in coverage gaps. Although the broad reading of the Ex Post Facto Clauses would overlap with other constitutional provisions, it has the merit of providing coherent protection against legislation long considered contrary to the first principles of government. By contrast, although the narrow interpretation of the Ex Post Facto Clauses partially (though far from completely) reduces redundancy with other clauses of the Constitution, it comes at the cost of unraveling coherent and meaningful protection against long-reviled retroactive laws. When the Court considers whether to overrule *Calder*, it will no doubt take into consideration the anti-redundancy approach to constitutional interpretation; it should, however, also take into account the belt-and-suspenders approach suggested by the consistent constitutional norm disfavoring retroactive legislation.

C. Will the Broad Reading of the Ex Post Facto Clauses Lead to Normatively Attractive Results?

When the Court reevaluates *Calder*'s breadth, it undoubtedly will weigh the historical understanding of the Ex Post Facto Clauses against the consequences of expanding their coverage to civil laws. The historical aversion to retrospective laws proceeds from the experience that they are used by legislators to oppress, exact vengeance, and aggregate power.[318] On the other hand, scholars and courts have expressed concern that applying the Ex Post Facto Clauses to civil laws would tie the hands of well-meaning legislatures, who would be prohibited from enacting some socially desirable legislation.[319] As Professor Bernard Bell has argued, among other salutary purposes, retrospective laws can be used to hold actors responsible when they "cause novel and unforeseen harms," to "vindicat[e] reasonable expectations," and to "preserv[e] the status quo" pending legislative developments.[320]

In accord with these competing visions of retrospective legislation, and as current doctrine reflects,[321] restrictions on retrospective laws are sometimes, but not always, desirable; the question, then, is how to determine the circumstances in which retrospective laws should be

318. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798); 1 BLACKSTONE, *supra* note 7, § 2, at 46.

319. Bell, *supra* note 276, at 248.

320. *Id.*

321. *E.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

permitted. Put another way, what retroactivity rules will most precisely prevent harmful retroactive laws without overly hamstringing well-intentioned legislatures? A comprehensive evaluation of the circumstances in which retrospective laws would be most beneficial has been hotly debated and is beyond the scope of this paper. Nevertheless, the historical evidence developed in this article helps frame the questions the Court will face when considering this issue. The cases described in Part II, which define the professional meaning of the phrase ex post facto, suggest how the Court can approach the question of when retrospective laws should be permitted.[322] Reviewing these cases suggests that a general rule against civil retroactivity can coexist with normatively attractive results because it need not be applied in a wooden, unyielding manner and applied to the exclusion of competing values. Rather, the Court can apply a general rule against civil retroactivity while still allowing for exceptions for emergency situations and clear legislative intent to promote retroactivity. As a result, these cases suggest how a general rule against civil retroactivity need not unduly tie the hands of the legislature, but rather can help produce normatively attractive results.

First, cases defining the professional meaning of the phrase ex post facto recognized that, although ex post facto laws were disfavored, sometimes overriding considerations required retroactive application. As the court stated in *Chapman*, "Generally speaking, ex post facto laws are unjust and improper; but there may certainly be occasions, when they become necessary for the safety and preservation of the Commonwealth."[323] As is suggested by *Chapman*, the Ex Post Facto Clauses may be read to provide protection from retroactive civil statutes while still allowing room for legislative judgments about competing values. *Chapman* can be read to suggest that, rather than prohibiting retroactive laws unyieldingly, the Court may weigh the negative effects of retroactivity against other values, such as public safety, to determine whether a particular retroactive law should be permitted.[324]

---

322. Evidence of how courts approached the issue of civil retroactivity before the framing of the Constitution can inform the Supreme Court's approach today even though these cases do not control the Supreme Court's modern decisions as a doctrinal matter. These cases are compelling because they elucidate how, as a matter of statutory interpretation, the common law dealt with the tricky issue of statutory retroactivity; as a result, they serve as examples of how the modern Court fruitfully could address these same issues.

323. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 59 (Pa. 1781).

324. *Id.* Although, on their face, the Ex Post Facto Clauses appear absolute, this should be no bar to weighing their protections against other values. Indeed, the Supreme Court made a similar move to accommodate the protections of the Contract Clause with social reality, holding that an "economic emergency" justifies legislative

Second, the cases defining the professional meaning of the phrase ex post facto suggest a mechanism for ensuring that the legislature may impose civil retroactivity, but that it does not do so thoughtlessly or ambiguously. These cases suggest that a rule against civil retroactivity should give way to the legislature's clear intent to apply a rule retrospectively. As the court stated in *Boarman*, a "law which has an *ex post facto* effect ought to be very clear and explicit in the terms of it, otherwise the Court will not give it such a construction."[325] Similarly, in *Helms's Lessee*, the court held that the legislature intended to give a later statute retroactive effect only because it declared a previous, contrary statute "null and void."[326] Together, *Boarman* and *Helms's Lessee* suggest that, although civil retroactive laws are disfavored, the legislature should be permitted to impose civil retroactivity if it has clearly stated its intention to do so. A clear statement rule allows retroactivity but forces the legislature to be explicit about the imposition of retroactivity. This has a number of benefits. One, it encourages deliberation about the potentially harmful results of proposed legislation. If legislators want to impose retrospective liability, they will be forced explicitly to provide for retroactivity in the statute or risk having their intention unenforced. A requirement of explicitness will encourage legislators to deliberate openly about their intention to impose retroactivity.[327] Two, a clear statement rule encourages political accountability. Because a clear statement rule requires explicit statutory language in order to impose retroactivity, it will be evident to the electorate that their representatives intended to impose retroactive effect. This transparency will allow the electorate to hold legislators who supported retroactivity accountable if they are unhappy with the legislation's retroactive effect.

The clear statement rule suggested above is not totally foreign to the Court's current approach. In *Landgraf*, the Court held that it will not read a civil statute to impose retroactive effect unless Congress made its intention to do so clear.[328] However, the Court's *Landgraf* approach is not a substitute for a meaningful clear statement rule as suggested by *Boarman* and *Helms's Lessee*. As Dean Krent noted, the

---

breaches of contract. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444–45 (1934). Just as the facially absolute language of the Contract Clause has been tempered to take account of emergency situations, so too can the Ex Post Facto Clauses meaningfully protect against civil retroactivity while, at the same time, leave room for legislative judgment.

325. *Butler v. Boarman*, 1 H. & McH. 371, 382 (Md. 1770).

326. *Helms's Lessee v. Howard*, 2 H. & McH. 57, 98 (Md. 1784).

327. *See* Terrence Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977).

328. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994).

Court's current clear statement rule is too weak to restrain civil retroactive legislation because the Court has "sustained any retroactive enactment in the economic sphere that is supported by a plausible public purpose."[329] Moreover, the Court's current clear statement approach is conceptually flawed. Because of *Calder*'s narrow reading of the Ex Post Facto Clauses, the Court cannot rely directly on these clauses as a basis to restrain civil retroactivity. Instead, the Court rests on a precarious inference of anti-retroactivity from some combination of the Ex Post Facto, Takings, Contract, and Due Process Clauses.[330] Because none of these clauses directly addresses the types of civil retroactive laws that would be prohibited by the broad interpretation of the Ex Post Facto Clauses, scholars have rightly criticized the Court's reliance on these clauses for a general anti-retroactivity principle.[331] Reliance on a broad reading of the Ex Post Facto Clause would provide a conceptually cleaner and textually more supportable method of policing civil retroactivity than the Court's *Landgraf* approach.

In sum, when the Court considers whether to extend the Ex Post Facto Clauses to civil laws, it will consider whether such an extension will lead to normatively attractive results. As part of that analysis, the Court can look to the common law for guidance; as the cases defining the professional meaning of the phrase ex post facto indicate, protection against civil retroactivity can coexist with legislative flexibility. A general rule against civil retroactivity can be tempered by an emergency exception and an exception for the clearly stated intentions of the legislature. These exceptions allow for normatively attractive social legislation without completely eviscerating a rule against civil retroactivity or creating collateral interpretative problems.

CONCLUSION

Calder's legacy—the restriction of the Ex Post Facto Clauses to criminal retroactivity—has been criticized as historically unsound and normatively unjustified. Nevertheless, *Calder*'s distinction is firmly established: relying on *Calder*, courts universally uphold retroactive civil laws against Ex Post Facto challenges. Given this license, Congress and state legislatures have not hesitated to enact all manner of retroactive civil laws, including laws that impose monetary penalties retroactively and permit deportations for conduct committed before it was proscribed. While giving wide berth to legislatures enacting

329. Krent, *supra* note 10, at 2149.

330. *Id.* at 2149–50.

331. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 435 (2010).

retroactive civil laws, paradoxically, courts routinely condemn civil retroactivity as unjust.

Scholars long have been intrigued by the disconnect between courts' rhetorical condemnation of retroactive laws and their practical permissiveness toward them. Focused on historical evidence of the original meaning of the Ex Post Facto Clauses, some jurists and scholars have concluded that *Calder* was, as a historical matter, correctly decided; others disagree. The dispute turns on the professional meaning of the term ex post facto, a phrase that was well known to the professional class of American judges and lawyers in the decades leading up to the framing of the Constitution. The phrase, as recorded in colonial and early state court cases, was used by these professionals to describe not only criminal laws, but civil laws as well. This evidence adds significant weight to the historical evidence supporting the broad interpretation of the Ex Post Facto Clauses. More importantly, it also undercuts the claim that the professional meaning of the phrase ex post facto refers only to criminal laws, the major premise underlying the narrow interpretation.

But, uncovering the professional meaning of the phrase ex post facto and, consequently, the original meaning of the Ex Post Facto Clauses, does much more than quell a historical tempest in a teapot. It allows us to see beyond the original meaning of the clauses and helps us analyze the most serious non-historically contingent challenges to reconsidering *Calder*. Despite its age, there are good reasons to refrain from according *Calder* membership in the American constitutional law canon. Structural concerns, normally believed to favor the narrow interpretation of the Ex Post Facto Clauses, in fact can be viewed as favoring the broad interpretation. And although some retroactive legislation is socially desirable, anti-retroactivity in the context of civil laws can be squared with normatively attractive results.

With the discovery of the professional meaning of the Ex Post Facto Clauses, we have achieved closure to a long-running historical debate. We also have found a new way to analyze the major non-historically contingent challenges to reconsidering *Calder*. But perhaps most surprisingly, the story of the discovery of the professional meaning of the Ex Post Facto Clauses gives us a vantage point from which to assess the utility of history as a rule of decision for constitutional interpretation. As *Calder* aptly demonstrates, American judges always have relied on history to resolve questions of constitutional interpretation. But the story of the Ex Post Facto Clauses indicates the danger in relying too heavily on history: a reliance on historical evidence has the tendency to direct our attention away from other, potentially more appropriate, methods of interpretation. Indeed, *Calder* has persisted not because of its logic, or its reading of the text

of the Constitution, or its balancing of competing constitutional values, but because the authors of its opinions rooted their decisions in the revelation of an esoteric historical meaning. Paterson recounts that, despite his "ardent desire," he was unable to prevail on the other delegates at the Convention to adopt the broad interpretation.[332] Chase explains that his interpretation is constrained by the meaning the phrase had acquired through its "use long before the Revolution."[333] In short, *Calder* rests not on reasoning, but on assertions of historical fact. As it happens, these assertions of fact were mistaken.

And the rest, so to speak, is history.

The story of the Ex Post Facto Clauses is not quite a tragedy, but it is a cautionary tale. It cautions against accepting historical conclusions as definitive, of course. But perhaps more importantly, it cautions against relying too heavily on historical conclusions as a basis for formulating legal interpretations. It is easy to accept the assertion of experts about the historical meaning of a phrase. But reliance on history goes too far when it supplants other accepted, traditional methods of constitutional interpretation. As the story of *Calder* and the Ex Post Facto Clauses show, fidelity to an evanescent historical narrative may provide, at the expense of respected constitutional values, only the illusion of consistency through time.

332. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798).

333. *Id.* at 391.