The Rule against Retroactive Legislation: A Basic Principle of Jurisprudence

Elmer E. Smead
THE RULE AGAINST RETROACTIVE LEGISLATION: A BASIC PRINCIPLE OF JURISPRUDENCE

By Elmer E. Smead*

The bias against retroactive laws is an ancient one. That the Greeks were influenced by it is shown by the case of Timokrates and the Athenian Ambassadors. There the Ambassadors had withheld money owed to the city-state, and were condemned to repay twice the amount. Timokrates succeeded in securing the enactment of a law to relieve the Ambassadors of this penalty, but, as a consequence of the efforts of Demosthenes, the law was held to be invalid because it was retroactive. From this case Sir Paul Vinogradoff has drawn the conclusion that the Greeks recognized the principle expressing opposition to retroactive laws which is a very important element in American law today.

It is clear, furthermore, that the Roman Law included the same principle, as shown in several prohibitions laid down by the Corpus Juris Civilis. The Digest gives as a rule that the law-giver could not change his course of action to the injury of another person. "Nemo potest mutare consilium suum in alterius injuriam." The principle, however, was more clearly stated by the Code, which declared that laws and customs should be given an operation on future transactions and that they cannot be recalled to past facts unless it is stated expressly that they apply either to past time or to pending transactions.

"Leges et consuetitiones futuris certum est dare formam negotii, non ad facta praeterita revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sex."*

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*Instructor in Political Science, Dartmouth College, Hanover, N. H.

1 Vinogradoff, Outlines of Historical Jurisprudence 139, 140. It is interesting to note here that the author uses the term ex post facto legislation in the general sense rather than in the limited meaning of criminal retroactive laws given to it in the United States constitution. See footnote 51. His statement that the principle is "clearly stated in the constitution of the United States of America that no law should be retroactive, that no person ought to be affected by a law which was not in force when his case was decided" is inaccurate, as will be shown.

2 It is worthy of note that the statute here was to the advantage of the defendants, whereas the principle as applied in Anglo-American law was united with the concept of justice—which restricted the application of the principle to those cases where the retroactive application of the Act worked disadvantageously to a party to a case.

3 Corpus Juris Civilis, Digest, 50, 17, 75. The "nemo" here refers to the lawgiver.

4 Corpus Juris Civilis, Code, 1, 14, 7.
This was the rule which the English common law courts later declared applicable as a guide to the construction of statutes. In so far as the principle found its way into the law of the United States, it took the same form as a rule for construction of statutes, but when united with the doctrine of vested rights it was identified with the natural law and found its way into the system of constitutional limitations on governmental power. It is primarily this latter development which this paper purports to trace and analyze.

This principle of the Roman Law found its way into the English common law through the medium of Bracton. As is well known, he served to carry over into the common law a considerable number of the principles of the civil law in his De Legibus et Consuetudinibus Angliae—a work which was well known to English students of the common law in the Sixteenth and Seventeenth centuries. One of these principles was that expressed in the condemnation of retroactive legislation. Thus, in 1250 Bracton declared:

"Item tempus spectandum erit, cum omnis nova constitutio futuris formam imponere debet et non praeteritis." 5

The similarity, both as to language and principle, to be found in the statements of the Roman Law and of Bracton gives support to the conclusion that to him must be given the credit for providing this principle with its start in the common law of England.

It was Coke, however, who gave the principle currency and acceptability. He did this in the same way in which he had established for posterity other principles of the common law—by the creation of a legal maxim which, under the prevailing philosophy of the period, placed upon that principle for which a maxim was coined the stamp of authority and irrefutability. The principle under discussion seemed to Coke to be a rule so obviously just as to be beyond criticism. 6 In making it a maxim of the common law he established it for all time, and its development as a part of present day jurisprudence begins with his writings. A profound student of the law, he knew Bracton's work well and found therein the principle already stated. Consequently, it can be said that Coke lifted the principle from Bracton and applied it to the interpretation of the statute of Gloucester, saying that that Act ap-

5 Bracton, De Legibus et Consuetudinibus Angliae b. 4, c. 38, f. 228: edition by Sir Travers Twiss, III, 530. The translation by Twiss (p. 531) is: "Likewise time is to be taken into account, since every new constitution ought to impose a form upon future matters, and not upon things past."

applied only prospectively "for it is a rule and law of Parliament, that Regularly Nova constitutio futuris formam imponere debet non praeteritis." Coke usually is cited as the authority for this principle as represented by this maxim of the common law, and the courts seem to have become acquainted with it primarily through his works.

Once the principle was thus established it was adopted by the English courts and commentators. It indicated the attitude which the courts would take toward any statute. That attitude was one of opposition to construing a statute so as to make it apply to cases arising prior to the enactment of the statute or to acts from a time anterior to passage. The principle expressing this opposition was united with the concept of justice in such a way that it became a basic part of that concept, and a violation of the principle was thought to work an injustice. This is particularly evidenced by the fact that the principle was, in practice, invoked only in those cases where the retroactive operation of a statute re-

resulted disadvantageously to a party. Thus Coke declared that no Act of Parliament should be construed in such a way as to do a man any damage when he was free from wrong. Also, he maintained that one was punished or injured if he were affected disadvantageously by the retroactive application of a law.

Furthermore, this concept of justice, of which the maxim was thought to be an element, was united with the theory of the nature of law. An essential character of laws was held to be applicability only in the future. Thus, in the thought of that period on the nature of justice and the characteristics of law, these were combined and interwoven with a resulting strengthening of the fundamental nature of the principle itself. This is illustrated very well by Blackstone. He pointed out that all laws should be made to operate in futuro because it is reasonable that they be prescribed or promulgated and there can be no promulgation where they commence at a time anterior to enactment. In support of his view of the necessity and reasonableness of promulgation, he declared that as a matter of justice laws should not be enforced before the subjects have an opportunity to become acquainted with them.

Although it was true that the common law accepted this maxim

72 Inst. 292. See also Littl., sec. 685; Co. Littl. 360a.
91 Blackstone, Comm. 46.
as the statement of a principle of justice which was irrefutable and beyond criticism, yet it was not applied as a rule of limitation on the power of the legislature. The courts and commentators viewed it as a rule to guide the courts, but that Parliament, if it desired, could pass a statute to apply to a past time was always clear. The Digest showed that the Prince could make a law operate retrospectively if he made it expressly clear that such was his will, and the common law followed this interpretation of the rule. Thus, this principle in the English common law meant that the courts, in the exercise of their function of interpreting the law in the cases which came before them, viewed themselves as bound by the rule of construction that no law should be given an operation from a time prior to its enactment unless Parliament had expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to this past time. Because a retroactive law was unjust the judges insisted that they would not assume that Parliament meant a statute in general terms to be applied retrospectively.

As a rule of construction some of the outstanding applications of the maxim by the English courts have been to the Statute of Frauds and Perjuries, the Statute of Mortmain, and to bankruptcy laws. Also, in criminal laws it was thought to be unjust

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See also I Blackstone, Comm. 46; Bacon, Abridgment, Statute (c) 4, 6; Herbert Broom, Legal Maxims 14, 15.


14. See Young v. Rishworth, (1838) 8 Ad. & El. 470 where the court said that the Act operated retrospectively. This was denied later by Lord Denman, C. J., who held in Benjamin v. Belcher, (1840) 11 Ad. & El.
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to punish a man for an act which had not been a crime at the
time it had been committed\textsuperscript{16} and one of Sir Francis Bacon's
Maxims\textsuperscript{16} was designed largely to indicate this.

In the determination of the question of when a statute com-
mences, however, there was at one time an actual denial of the
concept of justice with which the principle was identified in theory.
This is to be found in the doctrine of relation, whereby it was
held that an Act of Parliament did not take effect from the time of
passage or of Royal approval, but from the beginning of the
session in which it had been enacted. Where the act itself set
forth the date upon which it was to take effect, the practice of
relation back to the first day of the session was not followed.\textsuperscript{17}
Thus, by applying a fiction, the courts permitted that injustice
which they declared the principle against retroactive laws was
designed to prevent, because where an Act was passed during
the latter days of a session it could not have been known by
the public to be law during the early days of the same session.
Such a law was in fact applied to past acts from a time anterior
to enactment. An illustration of the violation of the precept of
justice upon which the principle was based and of the retroactive
effect of the application of the doctrine of relation is the case of
King v. Thurston\textsuperscript{18} in which a criminal law was held to have com-
menced on the first day of the session in which it had been en-
acted, with the result that the defendant was convicted of the crime
of murder where his act had not been murder at the time it had
been committed.

It appears, however, that the evils of the rule attracted the
attention of the Parliament, with the result that in 1793 a stat-
350, 3 Per. & Dav. 317, 9 L. J. Q. B. 153, that the facts in the former case
show that the Act in that case was applied prospectively, and that the choice
of words by the court in that case was “unfortunate.” See also Edmonds
536; Waugh v. Middleton, (1853) 8 Exch. 352, 22 L. J. Ex. 109, 20
L. T. O. S. 262.

\textsuperscript{16}See text at footnote 9. See also Co. Litt., 360a; Couch, qui tam v.
 Jeffries, (1769) 4 Burr. 2460, 2462.

\textsuperscript{17}Sir Francis Bacon, The Elements of the Common Lawes of England :
“Regula 8: Aestimatio praeteriti delicti ex post facto nunquam crescit.”

\textsuperscript{18}Partridge v. Strange, (1553) 1 Plowd. 78, 79; Whitten, qui tam v.
 Marine, (1554) Dyer 95a; Inglefield’s Case, (1591) 1 And. 294; Sydowme
 v. Holme, (1636) Cro. Car. 422, 424; King v. Thurston, (1674) 1 Lev. 91;
Henley v. Jones, (1678) 1 Sid. 310; Rex. v. Call, (1698) Comb. 413, 1 Ld.
Raym. 370; Panter v. Attorney General, (1772) 6 Bro. P. C. 486; Latless v.
Holmes, (1792) 4 T. R. 660. See also 4 Inst. 23; Conyn, Digest, Parliament
(R) 1; Viner, Abridgement, Statutes (B).

\textsuperscript{18}King v. Thurston, (1674) 1 Lev. 91.
ute of George III provided that an Act should take effect on the day it received the Royal assent unless some other time was stated in the Act. The preamble to the statute declared that the older rule was likely to produce a great injustice. By this action of Parliament the principle was strengthened and its fundamental nature emphasized. The Parliament itself recognized the element of justice which was thought to be inherent in the principle and determined that it should constitute a guide in the enactment of statutes. As shown above, Coke was probably the principal authority to view the principle as a natural law. He made of it a legal maxim and called this maxim "a rule and law of Parliament." Thus the change in grammar from the debeat of Bracton to the debet of Coke is significant. Also, as shown above, only so far as the English judges and commentators following Coke identified this principle with the concept of justice, which in turn was viewed as an element of the natural law, do we find any evidence that the principle itself might have been viewed as possessing the characteristics of the "higher law." The English common law definitely recognized the principle as one of its fundamental rules, but the doctrine of legislative sovereignty was dominant throughout.

American law borrowed this principle and it soon became recognized as a rule of construction which our courts would follow in interpreting statutes. In this respect, the principle remained as it had been in England prior to its transplantation to these shores. American commentators and courts also viewed it as based on the same concepts of justice and jurisprudence of which the English common law held it to be an expression. Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future. The United States Supreme Court has stated expressly that retrospective legislation would not be favored, that such laws were contrary to American jurisprudence, and that the court, in the absence of an express command or "necessary implication" to the contrary,
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will presume that a law is designed to act prospectively.\textsuperscript{22} American law never followed the common law practice of relation. The rule always has been that a statute commences on the day of its enactment when no other time is expressed.\textsuperscript{23}

But this does not exhaust the usefulness to which the principle was put by the American courts. They brought it to the defense of vested rights by expanding its meaning and by incorporating it into the system of limitations on legislative action, while at the same time continuing to employ it as a rule of construction. That the contribution should be one made, on the whole, by the American courts is quite to be expected because of the absence of the rule of legislative sovereignty and the presence of the institution of judicial review. These were essential to the development.

The identification of the principle with vested rights was made by expanding the principle to make it include a prohibition


\textsuperscript{23}The Brig Ann, (1812) 1 Gall C. C. 62, 66; Matthews v. Zane, (1822) 7 Wheat. (U.S.) 164, 1211, 5 L. Ed. 425. See also, 1 Kent Comm. 454.
against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws. Prior to this development, as indicated above, the principle had been invoked against retroactive laws which operated only on acts from a time before the passage of those laws or on cases arising during this past time. Also, it was against past negotiis that the Code and the common law had directed their prohibitions. This older interpretation had not included those laws which divested rights vested antecedently to enactment in applying to cases arising prospectively.24

It was Mr. Justice Story who was the first to point out the difference between these two meanings of "retroactive laws."25 This he did in 1814 in the case of Society for the Propagation of the Gospel in Foreign Parts v. Wheeler,26 decided while he was on circuit. In construing the term "retrospective law" he said:

"Is it confined to statutes, which are enacted to take effect from a time anterior to their passage, or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions?"

He answered this query by declaring:

"It would be a construction utterly subversive of all the objects of the provision, to adhere to the former definition. . . . Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective, . . . ."

Story cited with approval and relied upon the opinion of Chief Justice Kent in the case of Dash v. Van Kleeck,28 decided only a few years before. In that case a defense was given to the sheriff in actions for escapes by a statute passed after the escape had

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24 See Corwin, The Twilight of the Supreme Court, A History of Our Constitutional Theory 199, note 16, "The true sense of the term retroactive or retrospective legislation would appear to be legislation which operated on past acts from a time anterior to its passage."

25 That there is no distinction between these two kinds of retroactive laws and that they were both objectionable had previously been advanced by Parsons, C. J., of Massachusetts. In Bacon v. Callender, (1810) 6 Mass. 303, 309 he said: "The demandant has not contested the constitutionality of this statute, so far as may affect actions sued after its passage; but denies it as affecting actions pending at that time.—We see no ground for this distinction; and if it were competent for the legislature to make these provisions, to affect actions after to be commenced; the same provisions might apply with equal authority to actions then pending."

26 (1814) 2 Gall. C. C. 105.

27 (1814) 2 Gall. C. C. 105, 139.

occurred and the suit had commenced upon it. The law at the time of the escape did not provide the sheriff with the defense given by the Act, which would have defeated the plaintiff's suit if it had been applied in this particular case. The Act was construed, under the authority of our maxim, not to apply to this case but only to actions for escapes occurring after the enactment of the statute. The Chief Justice declared: "The construction here contended for on the part of the defendant, would make the statute operate unjustly. It would make it defeat a suit already commenced upon a right already vested. This would be punishing an innocent party with costs, as well as devesting him of a right previously acquired under the existing law." He also cited the provision of the Roman Law and declared that the principle "relates not merely to future suits, but to future as contradistinguished from past contracts and vested rights." Story, in relying upon the authority of this case, said: "in a fit case, depending upon elementary principles, I would be disposed to go a great way with the learned argument of Chief Justice Kent."

It is interesting to note here that Kent's opinion went considerably beyond the facts of the Van Kleeck Case. In order to render his decision he need not have gone as far as he did in his opinion. The law was retroactive in the common law meaning of that term —i.e. it applied to an act from a time anterior to the enactment of the law. The law was not retroactive in the sense of destroying a right vested prior to the enactment of the law by its application to cases arising subsequently. Consequently, it was not necessary for him to state that the principle "relates not merely to future suits, but to future as contradistinguished from past contracts and vested rights." Furthermore, he declared that the civil law principle had held to the same construction, thus giving his expanded interpretation the support of authority. He failed to recognize the distinction between the two types of retroactive laws which Story was later frank to admit. In this way the vested rights of property received the protection of a principle which had been recognized as fundamental for centuries. Thus, by definition, any law which destroyed a right vested before the law was passed became retroactive, regardless of whether it commenced upon enactment or anterior to that time.

While it was Kent and Story who had, by definition, established in American law this union of our principle with the doctrine of vested rights, nevertheless that the trend of judicial action had already been that way seems clear. A few English judges had already brought our principle, as a rule of construction, to the defense of proprietarian rights. As early as 1769 Lord Mansfield in *Couch, qui tam v. Jeffries* refused to construe an Act of Parliament to discharge the defendant from a penalty for which the plaintiff had already recovered a verdict.

"Here is a right vested; and it is not to be imagined that the legislature could by general words mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting. . . . It can never be the true construction of this act; to take away this vested right, and punish the innocent pursuers of it with costs." In 1790 Lord Kenyon in *Williams v. Pritchard* refused to construe the words of a general statute to remove immunity from taxation which had been given by a prior Act of Parliament. The English courts, however, had not gone as far as the Kentian and Storian definition of retroactive laws.

In so far as the principle was applied by the courts as a rule of construction, the union with the doctrine of vested rights is made clear. Here, the Kentian and Storian interpretation and definition were widely accepted. Thus the rule of interpretation came in many cases to be not so much a prohibition against construing all laws retrospectively in the sense of applying them to a past time, but more often an inhibition against a construction which would give such a retrospective operation to a statute which, because of this very interpretation, would violate vested rights.

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32(1769) 4 Burr. 2460.
34(1790) 4 D. & E. 2. Compare with *New Jersey v. Wilson*, (1812) 7 Cr. (U.S.) 164, 3 L. Ed. 303.
35Many courts brought the prohibition against retroactive legislation, whether in the form of a rule of construction or of a principle of natural law or of a constitutional denial of power to enact such laws, directly to service as a protection of vested rights. Within the scope of this prohibition are included laws which are retroactive in both the narrower and broader meanings of the term. See *Merrill v. Sherburne*, (1818) 1 N. H. 199, 213, 214,
Also, Story's broader definition that a retrospective law is one which "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past," was frequently accepted by the courts as giving the true meaning of the principle. Thus, some courts refused to follow the original principle that all retroactive laws which worked to the disadvantage of parties were undesirable or to be discouraged. In fact, they occasionally declared that some retroactive laws, even though they impaired established interests, were necessary and desirable.

8 Am. Dec. 52; Lewis v. Brackenridge, (1822) 1 Blackf. (Ind) 220, 12 Am. Dec. 228; Kennebec Purchase v. Laboree, (1823) 2 Greenl. (Me.) 275, 11 Am. Dec. 79; Bell v. Perkins, (1823) Peck (Tenn.) 261, 14 Am. Dec. 745; People ex rel. Fleming v. Livingston, (1831) 6 Wend. (N.Y.) 526, 531: "But it cannot be denied that the legislature possesses the power to take away what was given by statute, except vested rights."

Sayer v. Wisner, (1832) 8 Wend. (N.Y.) 661; Addridge v. Tuscumbia, C. & D. R. R., (1832) 2 Stew. & P. ( Ala.) 199, 23 Am. Dec. 307, 312: "I therefore conclude that if a retrospective law, when applied to civil cases, takes away no vested right to property, it would not be unconstitutional."


See, for example, Goshen v. Stonington, (1822) 4 Conn. 209, 10 Am. Dec. 121, 126; "On the other hand, laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principles and highly beneficial to the general public, have often been passed and as often approved. . . . I very much question whether there is an existing government in which laws of a retroactive nature and effect, impairing vested rights, but promotive of justice and the general good, have not been passed." Boston v. Cummins, (1854) 16 Ga. 102, 60 Am. Dec. 717, 720: "I hold that there are numerous cases where retrospective laws operate for the benefit of the community. To repudiate them altogether would be to obliterate a large portion of the statute law of this state."
and the frequent dictum of the United States Supreme Court that all retrospective laws per se were not contrary to the Constitution implies this. Furthermore, those cases in which the courts expressed the older idea, which condemned in general terms all retroactive laws, were frequently cases in which the court thought that the statutes had impaired vested rights. It is clear from an analysis of all of these cases that the laws which were to be discouraged or prohibited were those which injured or destroyed

The position taken in these cases marks the pre-Civil War origins of the concept of the Police Power, which, under its great post war development, was restrictive of vested rights in that the state could regulate proprietarial interests in the protection of public health, safety, morals, and the general welfare. See also, Calder v. Bull, (1798) 3 Dall. (U.S.) 386, 391, 1 L. Ed. 648.

It must be noted here that there is one type of law which has not been forbidden by our principle. That is the curative law, which validates past acts that would have been otherwise void. It is the law which ratifies and gives approval to an act already performed, but defective and thus either void or voidable. This kind of law was viewed as desirable and necessary. See, for example, Bell v. Perkins, (1823) Peck. (Tenn.) 261, 14 Am. Dec. 745; Baugher v. Nelson, (1850) 9 Md. (Gill.) 299, 52 Am. Dec. 694; People, ex rel. Fells v. Supervisors, (1875) 65 N. Y. 300; Bullock v. Town of Durham, (1892) 64 Hun 360, 19 N. Y. S. 635, 46 N. Y. St. Rep. 459. Compare the common law maxim Omnis ratihabitio retrotrahitur et mandato priori aequiparatur, which gave approval to such laws. Grim v. Weisenberg School Dist., (1868) 57 Pa. St. 433, 98 Am. Dec. 237, 241; Cassell v. Carroll, (1826) 11 Wheat. (U.S.) 134, 6 L. Ed. 438; White Water Valley Canal Co. v. Vallette, (1858) 21 How. (U.S.) 414, 16 L. Ed. 154; Prize Cases, (1862) 2 Bl. (U.S.) 635, 17 L. Ed. 459; Mechanics' & Traders' Bank v. Union Bank, (1874) 22 Wall. (U.S.) 276, 22 L. Ed. 871; Jefferson City Gas-Light Co. v. Clark, (1877) 95 U. S. 64, 24 L. Ed. 521; Atoe County v. Baldwin, (1884), 111 U. S. 1, 4 Sup. Ct. 265, 28 L. Ed. 331; Mitchell v. Clark, (1884) 110 U. S. 633, 4 Sup. Ct. 312; 28 L. Ed. 279; Anderson v. Santa Anna, (1886) 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; Bolles v. Brimfield, (1887), 120 U. S. 759; 7 Sup. Ct. 736, 30 L. Ed. 786; Comanche County v. Lewis, (1890) 133 U. S. 198, 10 Sup. Ct. 286, 33 L. Ed. 604; Street v. United States, (1890) 133 U. S. 299, 10 Sup. Ct. 309, 33 L. Ed. 631; DeLima v. Bidwell, (1901) 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; Turpin v. Lemon, (1902) 187 U. S. 51, 57, 23 Sup. Ct. 47, 51 Ed. 22; McFaddin v. Evans-Snider-Buel Co., (1902) 185 U. S. 505, 513, 22 Sup. Ct. 758, 46 L. Ed. 1012; United States v. Heinszen, (1907) 206 U. S. 70, 27 Sup. Ct. 742, 51 L. Ed. 1998; Tiaco v. Forbes, (1913) 228 U. S. 459, 33 Sup. Ct. 585, 57 L. Ed. 900; Forbes Pioneer Boat Line v. Everglades Drainage District, (1922) 258 U. S. 338, 42 Sup. Ct. 325, 66 L. Ed. 647. But some curative laws, by impairing vested rights or otherwise working an injury to parties, were condemned by our principle. The distinction between the approved and disapproved curative laws has been stated by Judge T. M. Cooley, The Limits to Legislative Power in the Passage of Curative Laws, (1881) 12 Cent. L. Jr. 3, 4, "If one curative law may be held good, and another not good, the result is that the validity of legislation in this class of cases must depend upon the view the court may take of its justice. If, in the opinion of the court, it operates unjustly, it must be held void; but if not, it may be upheld." The American doctrine, like the English, applied our principle only to those laws which the courts thought were injurious, either because they destroyed vested rights or were unjust for other reasons. See Welch v. Wadsworth, (1861) 30 Conn. 149, 79 Am. Dec. 236; Conway v. Cable, (1865) 37 Ill. 82, 87 Am. Dec. 240.
previously acquired proprietarian interests. Consequently, the principle under discussion here came more and more to be limited to apply to retrospective laws which impaired vested rights in both the older common law and the broader Kentian and Storian meanings.

In this phase of the development the courts were exercising what has been recognized as a type of judicial review. That is, the courts were not necessarily declaring statutes invalid but they were restricting their operation very drastically to narrow limits by the route of construction. As indicated above, the power of judicial review, in its narrower and more usual sense, was a very important instrument of American courts in completing the steps through which we are tracing the development of our principle of jurisprudence. This occurs at the time the courts held that laws which were retroactive in both senses of the term and which impaired vested rights were void, first, because they were in violation of the rules of the natural law, and, subsequently, because they were contrary to various provisions of the United States and state constitutions.

At the same time and in the same case that Kent brought about the union of the principle with the doctrine of vested rights, he established the transmutation of the former into a transcendental limitation. The significance of these two developments in this principle is that it ceased to be solely a rule of construction. It now became a limitation placed by the higher law on the power of the legislature, and the courts made it effective. This principle, nevertheless, remained as a rule of construction. Consequently, where the courts could protect vested rights by interpretation they would do so, but where this was impossible the statute would be held invalid. In general, it might be said that the principle was frequently a rule of construction where the law was retroactive in the older sense of the term, but that it was always a rule of the higher law where the law was retroactive in the newer sense. This was true by definition. It was by the broader definition, as shown above, that the principle was united with the doctrine of vested rights, and no statute was invalid within this definition unless it did divest such rights.

This transmutation undoubtedly preserved the principle and established it permanently in American law, but the change was made by the courts more because of the fundamental nature of the doctrine of vested rights than because of the significance of the
principle. This is true even though many of the judges approached
the matter from the point of view of the ancient prejudice against
retroactive laws, and emphasized the importance of the principle
expressing that prejudice. It was property rights, however, which
the courts wanted to protect. Our principle was the instrument,
and it became more effective at the time it was given a transcen-
dental nature.

Accordingly, it was Chancellor Kent who established this trans-
mutation in Dash v. Van Kleeck,\textsuperscript{37} and his opinion in that case has
been cited frequently by other American courts. At that time, of
course, Kent did not hold the statute void. He was justifying the
authority of the common law maxim nova constitutio futuris for-
mam imponere debet, et non praeteritis as a rule of construction,
but in his opinion he brought this maxim and our principle within
the scope of the natural law limitations on the legislature.

"This construction is agreeable to those settled rules which the
wisdom of the common law has established for the interpretation
of statutes, as it is not inconvenient, nor against reason, and in-
jures no person. A statute is never to be construed as against
the plain and obvious dictates of reason. The common law, says
Lord Coke, (8 Co. 118.a) adjudgeth a statute so far void; \ldots
The very essence of a new law is a rule for future cases."\textsuperscript{38}
This maxim is "a principle which has become venerable for
the antiquity and the universality of its sanctions, and is acknowledged
as an element of jurisprudence."\textsuperscript{39}

Professor Corwin has already conclusively shown the signifi-
cance of the natural law in the development of American legal
history and its use in defending vested rights from infringement
by legislative action. He has also shown the very important part
which Kent has played in establishing these limitations.\textsuperscript{40} It is

\textsuperscript{37}(1811) 7 Johns. (N.Y.) 477, 5 Am. Dec. 291.
\textsuperscript{38}(1811) 7 Johns. (N.Y.) 477, 502, 5 Am. Dec. 291.
\textsuperscript{39}(1811) 7 Johns. (N.Y.) 477, 503, 5 Am. Dec. 291. The "train of
authority declaratory of the common sense and reason of the most civilized
states, ancient and modern, on the point before us, is sufficient, as I
apprehend, to put it at rest; and to cause not only the judicial, but even the
legislative authority to bow with reverence to such a sanction" at p. 508. See
also 1 Kent, Comm. 455, 456; "A retrospective statute affecting and changing
vested rights, is very generally considered, in this country, as founded on
unconstitutional principles, and consequently inoperative and void."

\textsuperscript{40}See Corwin, The Doctrine of Due Process of Law Before the Civil
War, (1911) 24 Harv. L. Rev. 366, 460; The Basic Doctrine of American
Constitutional Law, (1914) 12 Mich. L. Rev. 247; The "Higher Law"
Background of American Constitutional Law, (1928-1929) 42 Harv. L. Rev.
149, 365. See also Haines, The Law of Nature in State and Federal Judicial
Decisions, (1916) 25 Yale L. J. 617 and The Revival of Natural Law
Concepts; Wright, American Interpretations of Natural Law.
important to remember, therefore, that Kent was a strong believer in transcendent limitations on government and that he frequently identified the common law with the natural law. As already shown, the principle came into American law by way of the common law and had even been coined into a legal maxim. The common law viewed its maxims as its fundamental principles.

Kent, then, made two important changes in our principle in the Van Kleeck Case, as shown above. In the first place, he provided Story with the idea of two definitions of retroactive laws. In the second place, Kent established the transmutation of the principle, in its broader sense, into a transcendent limitation on legislative power.41 Both of these changes were made by Kent in a case where the law was really retroactive in its older and narrower sense of applying to a case which had already begun, and where he was actually using the principle in its older form as a rule of construction and not as a limitation on legislative power. The result of this development is that where a general law impairs rights vested prior to enactment, either by applying to cases arising previously or subsequently, it will be void as a violation of the higher law, if the court cannot construe it to render it innocuous.

Accordingly, then, we find the courts holding that retroactive laws which impaired vested rights were contrary to justice, violations of the social compact or of the very principles upon which our government was based, or were not properly an exercise of the legislative power at all.42 Such laws were held to be forbidden

41 In some earlier American cases the validity of retroactive laws which impaired vested rights had already been called into question. Wales v. Stetson, (1806) 2 Mass. 143, 3 Am. Dec. 39, and Bacon v. Callender, (1810) 6 Mass. 303. In other earlier cases the "law of the land" clauses of state constitutions had already been invoked in order to invalidate such laws: University v. Foy, (1805) 3 N. C. 310, 374, 3 Am. Dec. 672, 5 N. C. 58; and Little v. Frost, (1807) 3 Mass. 106.

42 As in the English common law, American courts also united our principle with ideas of the nature of laws. Operation in the future was viewed as a vital characteristic of a law. Consequently, it was but a step for American courts to bring the doctrine of separation of powers to the support of our principle. The legislative function, which alone was given to the legislature, was that of enacting laws. A retroactive statute not being law, its enactment was beyond the power of the legislature. See Merrill v. Sherburne, (1818) 1 N. H. 199, 212, 213, 8 Am. Dec. 52; Grim v. Weisenberg School District, (1868) 57 Pa. St. 433, 98 Am. Dec. 237, 240; See also Ogden v. Blackledge, (1804) 2 Cranch (U.S.) 272, 2 L. Ed. 276; Dupuy v. Wickwire, (1814) 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729; Somerset v. Dighton, (1815) 12 Mass. 383.

The doctrine of separation of powers was not greatly relied upon, however. It was open to many objections because it could be used conveniently only where the law was retroactive in the older sense. Consequently, the natural law and constitutional provisions of due process provided the only
by or in violation of first principles, reason, justice, or the nature of our government.43

The United States Supreme Court also used the transcendental nature of the principle as authority for invalidating laws. In some cases, as will be shown below, it was combined with a specific provision of the United States constitution44 but in others it stood alone as the sole authority.45 The power of the court to hold void the acts of the legislature on the ground that they violated the principles of the higher law, however, was challenged very early in American constitutional history in the case of Calder v. Bull,46 and protection to vested rights from the broader type of retroactive laws in the Kentian and Storian sense.

43See Goshen v. Stonington, (1822) 4 Conn. 209, 10 Am. Dec. 121; Lewis v. Brackenridge, (1822) 1 Blackf. (2nd) 220, 12 Am. Dec. 228; Kennebec Purchase v. Laboree, (1823) 2 Greenl. (Me.) 275, 11 Am. Dec. 79; Woart v. Wimnick, (1826), 3 N. H. 473, 14 Am. Dec. 384; Wynne's Lessee v. Wynne, (1852) 2 Swan (Tenn.) 405, 58 Am. Dec. 66; Welch v. Wadsworth, (1861) 30 Conn. 149, 79 Am. Dec. 236; Conway v. Cable, (1865) 37 Ill. 82, 87 Am. Dec. 240, 241; "But few principles are better settled than that the legislature is powerless to divest, by enactment, an individual of a vested legal right. . . . Such legislation, under our form of government, has always been supposed to be unwarrantable, as being opposed to the principles of natural justice, and depriving persons of their property contrary to due course of law." Williams v. Johnson, (1869) 30 Md. 500; 96 Am. Dec. 613; People ex rel. Pells v. Supervisors, (1875) 65 N. Y. 300. See also I Kent, Comm. 455. See footnote 21.

44Calder v. Bull, (1798) 3 Dall. (U.S.) 386, 1 L. Ed. 648; Fletcher v. Peck, (1810), 6 Cranch (U.S.) 87, 3 L. Ed. 162.

45Story, J., in Terrett v. Taylor, (1815) 9 Cranch (U.S.) 43, 3 L. Ed. 650. See also his opinion in Green v. Biddle, (1823), 8 Wheat. (U.S.) 1, 12, 5 L. Ed. 547. But compare Watson v. Mercer, (1834) 8 Pet. (U.S.) 88, 110, 8 L. Ed. 876; "... it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it devests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally, but only ex post facto laws." See opinion of Johnson, J., in Fletcher v. Peck, (1810) 6 Cranch (U.S.) 87, at p. 143, 3 L. Ed. 162. See also Society etc. v. New Haven, (1823) 8 Wheat. (U.S.) 464, 493, 494, 5 L. Ed. 632; Ogden v. Blackledge, (1804) 2 Cranch (U.S.) 272, 2 L. Ed. 276.

46(1798) 3 Dall. (U.S.) 386, 1 L. Ed. 648. Chase, J. thought that the legislature was limited by the natural law: (at p. 387, 388). "I cannot subscribe to the omnipotence of a state legislature or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state. . . . The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it; the nature, and ends of legislative power will limit the exercise of it. . . . There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; and to authorize manifest injustice by positive law, to take away that security for personal liberty, or private property, for the protection whereof the government was established."

Iredell, J., on the other hand, (at p. 398) declared that if no limitations
as a matter of fact, the principle was applied by the United States Supreme Court as a limitation placed by the natural law on legislative power in only a few cases. Instead, it found its way into the United States constitution by the process of interpretation. Thus, the judicial prejudice against retroactive laws, in both senses of the term, applied by the courts in the form of a rule of construction and of the natural law, was translated into the system of constitutional limitations on the power of the legislature. The result is that the courts will construe a statute, where possible, to eliminate the objections against it as expressed by the broadened principle, but where this is impossible the Act will be held to be unconstitutional as a violation of the ex post facto, contract, or due process clauses of the United States constitution. It is submitted here that the conclusion of this development is to leave the principle in the same position it was in with the Storian interpretation and the Kentian identification of it as one of the principles of the higher law, which existed prior to the state and which limited the legislative power of the government.

The first step in incorporating the principle into the system of constitutional limitations was taken in Calder v. Bull. There, the ex post facto clauses of the constitution were held to forbid the enactment of criminal laws which worked disadvantageously to the defendant. The decision, however, was restrictive rather than expansive, so far as the principle is concerned, because those clauses of the constitution were limited to criminal laws. Thus, the contention that the constitution forbade the enactment of all retroactive laws was denied. It was on this ground that Mr. Justice Johnson later objected to Chase's opinion in that case, and contended that the term "ex post facto" authentically and properly applied to all retroactive laws because all were unjust and contrary to the proper nature of law.

were imposed on the legislature by the constitution, whatever it "chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any court of Justice would possess power to declare it so."

See footnotes 44 and 45.

The courts have read higher law principles into provisions of the United States constitution by way of construction. See the authorities cited in footnote 40.

Compare the maxim, "The court will look to the substance and not to the form."

(1798) 3 Dall. (U.S.) 386, 1 L. Ed. 648.

See his note, (1829) 2 Pet. 681. It seems impossible, on the basis of authority, to decide this controversy, although Johnson seems to have had the
It is not to be said, however, that Chase and Johnson differed in their position on the evils of retroactive legislation. In fact, they were agreed on that point and both thought that the power to enact them should be denied to the legislature. Chase thought that this power was forbidden by the natural law, and later Johnson freely endorsed this position. They were of the same mind, viz., that property rights, once vested, should be protected from impairment by retroactive laws. But when it came to constitutional limitations, the difference was one of the convenience of the instrument for limiting the legislative power in this respect. Thus, Johnson argued that, it being agreed that all retroactive laws were injurious, they should be prevented by the broader construction of the ex post facto clauses of the constitution. Because of the narrower construction laid down in *Calder v. Bull*, he declared, the court would be required "to toil up hill" to bring within the purview of the constitution that protection of vested

stronger position. In the first place, some of the authorities can be cited for either, both, or neither construction because they are ambiguous. Thus, it can be said that Blackstone (1 Comm. 46) limited ex post facto to criminal laws or that he merely gave a criminal law as an example of what he meant because it showed more glaringly the injustice, which was the reason lying at the basis of the condemnation of retroactive legislation. There is nothing in the Commentaries to show definitely what Blackstone meant. Likewise, the Federalist does not decide the question unless a great deal is read into the words used there. See Number 44, where it is said that the constitutional prohibitions against bills of attainder, ex post facto laws and laws impairing the obligations of contracts are constitutional bulwarks "in favour of personal security and private rights." Chase interpreted this to mean that "personal security" refers to bills of attainder and ex post facto laws and that "private rights" refers to the contract clause. Does ex post facto refer to both "personal security" and "private rights?"

In support of Johnson's construction it must be said that the term had been used repeatedly in the more general sense. Bacon used it both civilly and criminally. (See, footnote 16) Regula 8 refers to criminal cases. Regula 21, on the other hand, applied the term civilly: "Clausula vel dispositio inutilis per praesumptionem vel causam remotam, ex post facto non fulcitur." Coke, likewise, used the term in the civil sense: (Co. Litt. 241a) "... the entrie of the disseisee may be taken away for a time, and by matter ex post facto revived againe." Other English writers and some court decisions also used the term in the civil sense. See John Godolphin, *A View of Admiralty Jurisdiction* 109; 1 Fearne, *Essays on Contingent Remainders*, 5th ed., 420; 1 Sheppard, *The Touchstone of Common Assurances* (Amer. ed. of 1808) 63; Wilkinson v. Meyer, (1723) 2 Ld. Raym. 1350, 1352, 8 Mod. Rep. 173; Hitchcock v. Way, (1837) 6 Ad. & El. 943, 2 New. & P. K. B. 72, 6 L. J. K. B. 215. See also 2 Wooddeson, *Laws of England*, 641.

On the other hand, in support of Chase's construction, contemporary opinion leaned strongly to an interpretation which limited the term to criminal laws, although this was not unanimously so. See 2 Farrand, *The Records of the Federal Convention of 1787*, 448, 449, 617; III, 106, 328. But see Den, ex dem. Low v. Goldtrap, (1795) 1 N. J. L. 315, 319; State v. Parkhurst, (1802) 9 N. J. L. 528, 551. See also Corwin, *The Twilight of the Supreme Court* 198, note 9.
rights from infringement by retroactive laws which our expanded principle required.

And Mr. Justice Johnson was right. The United States Supreme Court soon found that if it was to protect vested rights from retroactive laws under the constitution, the contract clause must be given a broad interpretation. Chase had based his construction of the term ex post facto partially on his interpretation of the contract clause. Thus, he had decided that this clause protected property rights from retroactive laws, and had held that if the broader construction were to be given the ex post facto clause the former clause would become superfluous. This interpretation was later followed on the ground that those contracts made subsequent to the enactment of a law could not be impaired by that law because it became part of the contract. Only those laws which affected previous contracts could impair the obligations of those contracts.52

Also, the word "contract" was construed broadly to include both executed contracts under which property had already vested, and executory contracts.53 Thus, Chief Justice Marshall held in **Fletcher v. Peck** that a law of Georgia repealing former statutes, which had conveyed land, was invalid. "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest these rights."54

As indicated above, the appeal to the higher law was originally a very important step or aid to this construction. Story is con-

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54Fletcher v. Peck, (1810) 6 Cranch (U.S.) 87, at p. 135, 3 L. Ed. 162.
spicuous in his reliance solely on the natural law by his decision in *Terrett v. Taylor* that the doctrine that a legal grant was revocable by another law was "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired." The court, he declared was "standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

Chief Justice Marshall in *Fletcher v. Peck* placed his decision on both the contract clause, with its broad interpretation, and on the natural law, whereas Mr. Justice Johnson, who objected to the limitation of that clause in the constitution to retroactive laws, placed his position solely on the higher law.

"I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity."

Even this development does not mark the limit to which the principle, as interpreted by Kent and Story, has been incorporated into the constitution. The doctrine of vested rights is too vital to American law to have permitted so restricted a development of the judicial prejudice against retroactive laws. The next step was to incorporate the principles into those "catch-all" provisions of the constitution—the due process of law clauses of the fifth and fourteenth amendments. Those cases in which the United States Supreme Court has said that retroactive laws are not unconstitutional unless they are ex post facto or impair the obligations of contracts have been cases in which there were no infringements of property rights which the court was desirous of preventing.

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56*(1815) 9 Cranch (U.S.) 43, 3 L. Ed. 650. See also the other cases cited.
57*Terrett v. Taylor, (1815) 9 Cranch (U.S.) 43, 50, 51, 3 L. Ed. 650.
58*Fletcher v. Peck, (1810) 6 Cranch (U.S.) 87, 143, 3 L. Ed. 162.
The due process clauses are not particular renditions of our principle nor have they been interpreted to forbid retroactive laws per se. Nevertheless, although a law is not a violation of due process merely because it is retroactive, it is a violation of this constitutional requirement where it destroys property rights arbitrarily or does not give notice and opportunity for a hearing. And it may be an unreasonable law or it may deny a hearing solely because it is retroactive. The case of Ochoa v. Hernandez y Morales shows this well. Here there was an order of the military governor of Porto Rico in 1899 which reduced from twenty years to six years the period during which possession must continue in order to convert an entry of possession into a record of ownership, and the order specifically provided that it should be retroactive. Plaintiffs claimed ownership of the land, and defendant, who was in possession, claimed title by virtue of the order. At the time the order was made the six-year period had already run against the plaintiffs without giving them an opportunity to assert their rights. It was held that this order was invalid as a violation of due process of law because it enabled the defendant, who had no title to the land but only a claim by possession, to procure title immediately without notice to the owners. It was like an order taking the land from the plaintiff and giving it to the defendant. That the order in this case was a violation of the due process clause because it was retroactive, is made clear when Mr. Justice Pitney declared that this unconstitutionality resulted from the retroactive feature of the order and that the order should be limited to cases where the owner still had a reasonable opportunity to contest the claims of the possessor.


Baltimore and Susquehanna R. Co. v. Nesbit, (1850) 10 How. (U.S.) 395, 13 L. Ed. 469, Brewer, J., speaking of this case in League v. Texas, (1902) 184 U. S. 156, 161, 22 Sup. Ct. 475, 46 L. Ed. 478: "This decision, it is true, was before the fourteenth amendment, and the restrictions placed by the amendment upon state action apply to retrospective, as well as to prospective, legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the federal constitution."

Sohn v. Waterson (1873) 17 Wall. (U.S.) 596, 21 L. Ed. 737; Terry v. Anderson, (1877) 95 U. S. 628, 24 L. Ed. 365; Mitchell v.
Where such statutes are retroactive to the extent that the period of limitations, within which the case must be brought, has run prior to the enactment of the Acts, they are equivalent to a destruction of the property right involved. Consequently, such statutes must either begin to run on actions from the time they are enacted, or leave a reasonable proportion of the period of limitation unexpired at the date of their enactment. If one of these two conditions is not observed, the statute of limitations, by destroying the remedy, destroys the rights back of the remedy without giving a notice or opportunity for a hearing. They are consequently void as denying due process of law, of which they are guilty solely because they are retroactive.

Another type of retroactive law which has been held invalid as destroying vested rights previously vested without due process of law, and which would not deny due process if it were not retroactive is one which approves and validates duties paid under protest as excessive at the time they were paid. Also, while it is true that retroactive tax laws are not prohibited by the constitution, yet it has been held that an estate tax imposed upon gifts, made and completely vested beyond recall before the passage of the tax and not made in contemplation of death, is arbitrary and amounts to the confiscation of property in violation of due process of law. These are also laws which are unreasonable and deny


These are laws which are unreasonable and deny

notice and hearing solely because they are retroactive. They also destroy proprietarian interests.

Such has been the development of this principle of Anglo-American jurisprudence. The objection to retroactive laws, based on the nature of justice and of law, found its way into the English common law through Coke who took it from Bracton and gave it currency and authenticity by creating for it a legal maxim. Bracton, in turn, had taken it from the Corpus Juris where he had found it stated as a rule of the Roman Law.

The principle in England took the form of a rule of construction. Believing that retroactive laws which affected past acts disadvantageously were unjust the common law courts declared that they would not give such a statute in general words a retrospective operation. Parliament, however, could make a statute specifically retroactive. Thus, the principle illustrates the well-known conflict between the Cokian doctrine of natural law and the Blackstonian doctrine of legislative sovereignty.

After the principle had been adopted by American law it went through a very important development. Although remaining as a rule of construction, it was expanded in meaning in order to give a maximum of protection to vested rights, it was metamorphosed into a rule of the higher law which the courts applied in the limitation of legislative power, and it was finally incorporated into the constitution of the United States by the construction given to the ex post facto, contract, and due process of law clauses. By the doctrines of judicial review and separation of powers American law provided the institutionalism necessary to transpose this principle, which had always been considered as fundamental, into an effective transcendental limitation on legislative power.

In giving to proprietarian interests a maximum of protection the courts expanded the meaning of retroactive laws. The original common law definition was a law which operated on past acts from a time prior to passage or on past or pending cases. The development of the principle leaves the term meaning any law which operates on past acts from a time either anterior or subsequent to enactment. Inasmuch as the meaning was expanded in bringing the principle to the defense of vested rights and its use in that capacity has received the greater emphasis, today any law which divests property rights is retroactive and, unless justified by the court as being reasonable, is invalid.