

HAVE COURTS BECOME TOO DEFERENTIAL?: THE CONSTITUTIONALITY OF RETROACTIVE ECONOMIC REGULATION

*Kirby Black**

I. INTRODUCTION

The Framers of the Constitution sought to protect citizens against ex post facto laws because they believed such laws to be the hallmarks of tyranny.¹ As such, the Constitution's Ex Post Facto Clause has traditionally been applied in the criminal context as a prohibition on the retrospective application of penal legislation.² By contrast, non-penal (civil) retroactive legislation has a more convoluted history, which prompts an examination into how courts have treated such laws in the absence of any solid constitutional mooring.³ This Note will focus on the way in which modern, post-*Lochner* era judicial deference toward legislative choices in regulating the economy affects individuals' ability to challenge non-penal retroactive legislation.⁴ Ultimately, the issue is whether courts have become too deferential and effectively abdicated their role in protecting economic liberties.⁵

Part II of this Note examines the historical development of judicial precedent on statutory retroactivity and identifies the difference between "primary" and "secondary" retroactive legislation. Part II also discusses the Supreme Court's decision in *Landgraf v. USI Film Products*, which has become landmark precedent for modern questions concerning the constitutionality of retroactive laws.⁶ Part III analyzes the viability of retroactive economic legislation and compares how courts in Kentucky, Ohio, New York, and California have determined the constitutionality of retroactive economic legislation after *Landgraf*. Part IV offers an alternative, more meaningful standard for courts to use in analyzing retroactive

* J.D. Candidate, May 2020, University of Louisville Louis D. Brandeis School of Law; B.A. in International Studies, Centre College, May 2017. I would like to thank my family, friends, and mentors for supporting me throughout my academic career. I would especially like to thank my parents, Chris and Nancy Black, for their constant love, support, and unwavering enthusiasm.

¹ Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 324 (1992).

² *See id.*

³ Julian Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 12 AM. B. FOUND. RES. J. 379, 427–28 (1987).

⁴ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 656–57 (5th ed. 2015).

⁵ *Id.* at 656.

⁶ *See generally* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

legislation.

II. BACKGROUND

A. The End of Laissez-Faire Jurisprudence: A Future without Lochner

The height of protections afforded to economic rights under the Due Process and Contracts Clauses of the Constitution are linked to *Lochner v. New York*.⁷ During the *Lochner* era, from approximately 1897 to 1937, the Supreme Court consistently applied the Contracts Clause to invalidate state and local laws that attempted to regulate economic life.⁸ Yet modern critics of *Lochner* often depict substantive due process in the *Lochner* era as the “unrestrained protection of economic rights that permitted the judiciary to import illegitimately laissez-faire, pro-business policy preferences into its explication of the constitutional text.”⁹ Essentially, freedom of contract protected those already in possession of economic power at the expense of the masses and prevented the government from intervening to regulate or redistribute economic power.¹⁰ As such, by the mid-1930s, societal and political pressures were mounting for the Court to abandon the laissez-faire philosophy of the *Lochner* era.¹¹ The economic hardships of the Great Depression created the perception that governmental economic regulations were essential, and, thus, should not be continually upset by an overemphasis on contract and property rights.¹² As a result, the Court declared that it would no longer protect freedom to contract as an absolute right, allowing the government to regulate in the service of reasonable economic objectives.¹³

Since 1937, the “[Supreme] Court has made it clear that economic regulations—laws regulating business and employment practices—will be upheld when challenged under the due process clause so long as they are rationally related to serve a legitimate governmental purpose.”¹⁴ The extent of this judicial deference is reflected in the Supreme Court’s 1976 ruling in *Usery v. Turner Elkhorn Mining Co.*, which demonstrated that the Court would uphold non-penal retroactive laws so long as they satisfy this test of

⁷ Matthew A. Schwartz, *A Critical Analysis of Retroactive Economic Legislation: A Proposal for Due Process Revitalization in the Economic Arena*, 9 SETON HALL CONST. L.J. 935, 944 (1999); see generally *Lochner v. New York*, 198 U.S. 45 (1905).

⁸ See CHEMERINSKY, *supra* note 4, at 658.

⁹ James L. Kainen, *The Historical Framework for Reviving Constitutional Protections for Property and Contract Rights*, 79 CORNELL L. REV. 87, 91 (1993).

¹⁰ *Id.* at 92.

¹¹ CHEMERINSKY, *supra* note 4, at 649.

¹² *Id.*

¹³ *Id.* at 652.

¹⁴ *Id.* at 653.

rationality.¹⁵ In other words, retroactive legislation will violate the Due Process Clause only if the Court determines the law to be “arbitrary and irrational.”¹⁶ Under this lenient standard of rationality, the “existence of facts supporting the legislative judgment is to be presumed.”¹⁷ Thus, the lenient judicial scrutiny afforded to retroactive economic legislation has its foundations in this post-*Lochner* era abandonment of substantive economic due process review.¹⁸

B. What Makes A Law Retroactive? Variations of Retroactivity

Historically, retroactive legislation has been a point of contention within our legal system because it runs contrary to traditional ideas of how legislation should affect behavior.¹⁹ Legislative enactments usually operate prospectively; that is, they attach new legal consequences to events occurring after the date of enactment.²⁰ Sometimes, however, statutes act retroactively, meaning they reach back to attach new legal rights and duties to past actions.²¹

There are two types of retroactivity: primary and secondary. Statutes operating with primary retroactivity reach back to alter the past legal consequences of events that were completed prior to their enactment²² and are usually invalid.²³ These laws alter rights and duties “in the past.” Alternatively, statutes with secondary retroactivity impose a post-enactment effect on prior events whose legal status has yet to be determined at the time the new law is enacted.²⁴ These laws alter legal rights and duties “in the future.” The terms “primary” and “secondary” retroactivity will be used throughout this Note to clearly distinguish the two variations of retrospective

¹⁵ *Id.* at 655; see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). *Turner Elkhorn* involved a due process challenge to the retroactive provision of the Federal Coal Mine Health and Safety Act, which provided compensation to former coal miners who suffered from “black lung disease” even if their work was terminated before the Act was passed. *Id.* The Court upheld the retroactive application of liability because it was a “rational measure” to spread the costs of the employees’ disabilities to those who benefitted from their labor. *Id.*

¹⁶ Schwartz, *supra* note 7, at 946–47.

¹⁷ *Id.* at 947; see also *Turner Elkhorn*, 428 U.S. at 15–16.

¹⁸ Andrew C. Weiler, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1079 (1993).

¹⁹ See generally Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81 (1997); see also John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CAL. L. REV. 12, 58 (1967).

²⁰ McNulty, *supra* note 19.

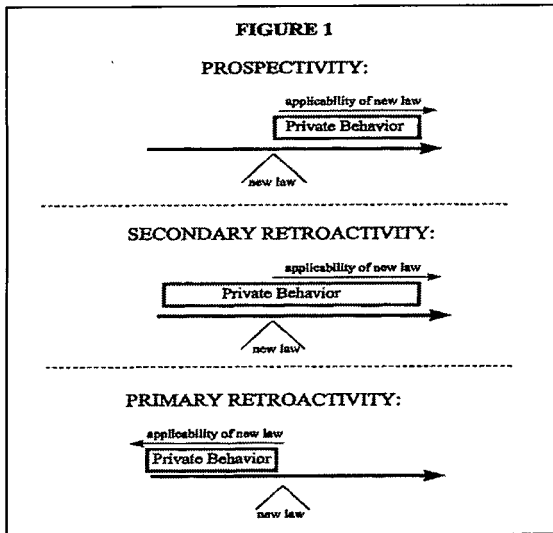
²¹ *Id.*

²² See Laitos, *supra* note 19; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

²³ Laitos, *supra* note 19, at 85.

²⁴ See *id.* at 91; see also McNulty, *supra* note 19, at 58–60.

laws.²⁵ The aforementioned types of legislation are diagrammed below²⁶:



C. Developments in Judicial Precedent on Retroactivity

Traditionally, the judiciary has disfavored retroactive legislation.²⁷ The presumption against retroactive legislation is deeply rooted in American jurisprudence because it upsets foundational principles of fairness and settled expectations; it impacts a party's ability to identify the applicable law and conform her conduct accordingly.²⁸ This ideology is reflected in a nineteenth century case, *Society for the Propagation of the Gospel v. Wheeler*, where the Circuit Court for the District of New Hampshire broadened the ban on retrospective legislation to encompass all statutes, which, "though operating only from [their] passage, affect [past] rights and transactions."²⁹ At that particular point in history, statutes could be voided for applying primary or secondary retroactivity, effectively rejecting the prior view that only laws

²⁵ This Note follows the standard practice of using the terms "retrospective" and "retroactive" interchangeably. See Kainen, *supra* note 9, at 102 (citing NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.01, at 337 (5th ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably.")).

²⁶ This diagram appears in Laitos, *supra* note 19, at 88.

²⁷ *Id.* at 109.

²⁸ *Landgraf*, 511 U.S. at 265.

²⁹ Laitos, *supra* note 19, at 137 (citing *Society for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (D. N.H. 1814) (describing a statute that operates with secondary retroactivity because it "operates only from [its] passage" moving forward, affecting post-enactment conduct)); *Landgraf*, 511 U.S. at 268-69.

with primary retroactivity were invalid.³⁰ The strict rule from *Wheeler* labels every statute as retrospective when it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.”³¹ Despite the seemingly wide breadth of the concept of retroactivity, this rule was limited by the doctrine of vested rights.³² Non-vested interests could still be extinguished by subsequent retrospective legislation.³³

The *Wheeler* rule meant that retroactive legislation affecting vested rights could not be saved by the mere existence of express legislative intent to affect private conduct post-enactment.³⁴ “Thus, the prevailing notion of retrospectivity focused on whether a statute operated to alter a pre-existing legal interest rather than on whether the law itself purported to take effect before its enactment.”³⁵ During the early nineteenth century, vested rights retroactivity served as the central organizing principle for the protection of economic rights.³⁶ Consequently, jurists placed the “retrospective” label on legislation that was only nominally prospective (becoming effective only after its passage) because of the legislation’s effect on previously established contract and property rights.³⁷ This principle of legislative non-retroactivity garnered support from the substantive due process and contracts rights enforced by the Court prior to the end of the *Lochner* era.³⁸

The subsequent erosion of *Lochner*-era substantive due process, however, derailed any judicial inclination to subject retroactive economic legislation to heightened scrutiny.³⁹ Beginning in the 1930s through the 1980s, there was a shift in the way courts exercised their power of judicial review.⁴⁰ Courts now believed that the judicial standards previously used to invalidate statutes affecting economic rights were an excessive exercise of

³⁰ See Laitos, *supra* note 19, at 109–10; *Wheeler*, 22 F.Cas at 767.

³¹ Laitos, *supra* note 19, at 110.

³² Kainen, *supra* note 9, at 105.

³³ *Id.* at 105–06.

³⁴ Laitos, *supra* note 19, at 111. It is important to note that during the *Wheeler* era, a person’s vested rights included many contract and property rights, and during this time, the court’s power of judicial review was much more expansive than it is now. Courts had the power to review the wisdom of secondary retroactive legislation specifically intended to affect these interests, and to subsequently overturn any legislation they believed “impaired” these rights. See *id.*

³⁵ *Id.* at 104.

³⁶ Kainen, *supra* note 9, at 111.

³⁷ *Id.* at 105.

³⁸ Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063–64 (1997).

³⁹ *Id.* at 1064.

⁴⁰ See Laitos, *supra* note 19, at 111.

judicial power and infringed on state police powers.⁴¹ Thus, although early decisions fostered an era of rigorous due process review under which retroactive legislation was particularly problematic, the post-*Lochner* abandonment of economic substantive due process undermined the premise of those decisions.⁴²

Moreover, the modern constitutional analysis of economic rights stands as a rejection of the vested rights retroactivity logic that dominated the nineteenth century.⁴³ This rejection emphasizes the lack of a logical framework for determining whether rights are vested.⁴⁴ Consequently, for most of the twentieth century, retroactive legislation was not tested against the *Wheeler* rule.⁴⁵ Instead, the Supreme Court employed a rights and remedies analysis to inquire into “the extent, consequences, and justification for a statute’s unavoidable alteration of pre-enactment interests.”⁴⁶ Under the modern analysis, courts consider the “rationality, reasonableness, or arbitrariness of legislation,”⁴⁷ and determine the validity of retroactive statutes based on whether or not the statutes violate the property clauses in the Constitution—the Due Process Clause, Contracts Clause, and Takings Clause.⁴⁸ Pursuant to these clauses, the Court invoked an extremely deferential standard of review, and retroactive provisions of a law would meet the test of due process as long as they were a rational means of furthering some legitimate legislative purpose.⁴⁹ During this time, if the retrospective application of a new law was found to be rational, it could safely “readjust existing rights, and upset otherwise settled expectations.”⁵⁰

By the latter part of the twentieth century, the Supreme Court had largely done away with the Contracts Clause as a weapon to use against retroactive legislation.⁵¹ As a result, litigants turned to the Takings Clause as the constitutional provision that might offer protection for existing property interests that had been adversely affected by retroactive legislation.⁵² This change is linked to the Supreme Court decision in *Penn Central Transportation Co. v. New York City* in which the Court stated that one factor that should be taken into account when determining if a regulation was an

⁴¹ *Id.*

⁴² Fisch, *supra* note 38, at 1074.

⁴³ Kainen, *supra* note 9, at 112.

⁴⁴ *Id.*

⁴⁵ Fisch, *supra* note 38, at 1074.

⁴⁶ Kainen, *supra* note 9, at 113.

⁴⁷ *Id.* at 114.

⁴⁸ Laitos, *supra* note 19, at 111.

⁴⁹ *Id.* at 112.

⁵⁰ *See id.*; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–18 (1976).

⁵¹ *See* Laitos, *supra* note 19, at 113.

⁵² *Id.*

unconstitutional taking was whether the regulation had “interfered with distinct investment-backed expectations.”⁵³ The protection of “investment-backed expectations” seemed to “parallel the *Wheeler* admonition against retroactive laws which either impaired rights acquired under existing laws, or imposed new duties on past transactions.”⁵⁴ However, the Court soon narrowed the scope of protected property interests under *Penn Central*⁵⁵ by exempting from the regulatory takings analysis situations in which “a private property owner (1) had long been subject to similar laws, or (2) had somehow been put on notice that a change in the law was possible.”⁵⁶

Now, the Court has not only shifted away from *Wheeler*, but has also imposed substantial doctrinal limitations on the reach of the property clauses of the Constitution, rendering them essentially useless as a tool to challenge retroactive laws. The abandonment of the *Wheeler* rule, along with the Court’s reluctance to use the Constitution’s property clauses to invalidate retroactive legislation, meant that throughout much of the twentieth century courts routinely upheld statutes operating with secondary retroactivity.⁵⁷ Indeed, in *Plaut v. Spendthrift Farm*, the Supreme Court held that Congress may direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.⁵⁸

After the abandonment of *Wheeler*, Supreme Court precedent was unclear on whether courts should allow statutes to be applied retroactively when there was no guiding legislative intent.⁵⁹ This confusion stemmed from two lines of contradictory Supreme Court cases. In the first line of cases—*United States v. Schooner Peggy*,⁶⁰ *Thorpe v. Housing Authority of Durham*,⁶¹ and *Bradley v. School Board of Richmond*⁶²—the Court

⁵³ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); see also Laitos, *supra* note 19, at 113–14. The “investment-backed expectations” approach seemed to permit recovery under the Takings Clause for owners who could demonstrate that they had purchased their property or made decisions about their property in reliance on an expectation that did not include the new regulation at issue. See *id.*

⁵⁴ Laitos, *supra* note 19, at 114.

⁵⁵ *Id.*; see generally *Penn Central*, 438 U.S. 104; see also *United States v. Locke*, 471 U.S. 84, 86 (1985).

⁵⁶ Laitos, *supra* note 19, at 114.

⁵⁷ *Id.* at 115.

⁵⁸ *Id.*; see also *Plaut v. Spendthrift Farm*, 514 U.S. 211, 226 (1995) (“When a new law makes clear that it is retroactive, an appellate court must apply it in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.”).

⁵⁹ Laitos, *supra* note 19, at 122.

⁶⁰ *United States v. Schooner Peggy*, 5 U.S. 103 (1801).

⁶¹ *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969) (holding that retroactive application was appropriate because the change imposed by the law was merely a procedural change and did not alter any substantive rights.)

⁶² *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974) (articulating the principle that a court is “to apply the law in effect at the time of the decision”); see also Laitos, *supra* note 19, at 122 (comparing *Bradley* with *Thorpe* and *Schooner-Peggy*).

established a general presumption favoring retroactive legislation.⁶³ In these cases, the Court held that a court is to apply the statutory law in effect at the time it renders its decision, “unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.”⁶⁴ In *Bradley*, the Court articulated an analytic framework that gave it discretion to impose its views on the fairness of retroactive legislation and the extent to which retroactivity would serve the legislative objective.⁶⁵

Alternatively, in the second line of cases, represented by *Bowen v. Georgetown University Hospital*, the Court retreated from its discretionary approach and returned to a traditional presumption against retroactive application.⁶⁶ In *Bowen*, the Court stated plainly that “retroactivity is not favored in the law.”⁶⁷ The Court’s use of the traditional presumption in *Bowen* muddied the waters; it was not until the *Landgraf* decision in 1994 that the Supreme Court was able to resolve this “apparent tension” between the two lines of cases by clearly indicating a presumption of prospectivity for new legislation.⁶⁸

In *Landgraf*, the Court returned to a broader definition of retroactivity that encompassed both primary and secondary retroactivity, holding that statutes altering substantive rights should be presumed to operate prospectively absent express legislative intent to the contrary.⁶⁹ The *Landgraf* Court returned to a “vested rights” analysis and readopted the *Wheeler* definition of secondary retroactivity, in which “a new statute is truly retroactive if it takes away or impairs vested rights acquired under existing laws, creates a new obligation or imposes a new duty, or attaches liability for past conduct.”⁷⁰

⁶³ Laitos, *supra* note 19, at 122.

⁶⁴ Fisch, *supra* note 38, at 1064.

⁶⁵ *Id.*; *Bradley*, 416 U.S. at 717. The analytic framework consisted of applying the following factors: (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Id.*

⁶⁶ Fisch, *supra* note 38, at 1064; *see generally* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

⁶⁷ Laitos, *supra* note 19, at 122; *see Bowen*, 488 U.S. at 208. The presumption of prospectivity in *Bowen* was eventually adopted by the Court in *Landgraf*. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

⁶⁸ Laitos, *supra* note 19, at 124–25. In *Landgraf*, the Court held that Petitioner was not entitled to a jury trial under the Civil Rights Act of 1991 because the Act was not retrospectively applicable to a Title VII case that was pending on appeal. *Landgraf*, 511 U.S. at 247, 260. The Act became effective during appeal; however, after reviewing congressional intent on whether the Act was retrospective, the Court determined that no express or implied intent was given. *Id.* at 250, 286. The question before the court was whether the compensatory and punitive damage provisions of the Act should apply, post-enactment, to conduct that occurred before the effect date of the 1991 Act. *See id.* at 250.

⁶⁹ Laitos, *supra* note 19, at 81, 85; *See Landgraf*, 511 U.S. at 265–73.

⁷⁰ Laitos, *supra* note 19, at 131.

The Court explained in *Landgraf* that absent a violation of one of the economic clauses of the Constitution, “when a new law makes clear that it is retroactive, the arguable unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give that law its intended scope.”⁷¹ Moreover, the Court will abstain from questioning the wisdom of Congressional economic regulations in an effort to stay within its power of judicial review.⁷² Nonetheless, the Court’s effort to avoid becoming a “super-legislature” does not mean that Congress has the unfettered right to enact retroactive economic legislation, unrestricted by any reasonable temporal limitation.⁷³ The Court has suggested that retroactive economic legislation that exceeds a reasonable temporal reach could potentially run afoul of the Due Process Clause.⁷⁴ Yet, this apparent limitation has not been consistently applied, seeing as the Court has upheld retroactive economic legislation of varying temporal lengths.⁷⁵

Despite a lack of any definitive temporal standard, the *Landgraf* decision established an important limitation on retroactive legislation—a presumption of prospectivity. After *Landgraf*, the presumption of prospectivity has been applied to legislation that exhibits “true retroactivity” by attaching a new legal consequence to pre-enactment conduct or events.⁷⁶ This presumption operates as a checkpoint that a law must pass through before a court makes a determination on whether the law would be constitutional if applied retroactively. If the law does not make it past this procedural checkpoint, the presumption is not rebutted, and the law will not be given retroactive effect. The presumption is not rebutted without express legislative intent indicating its retrospective application.⁷⁷

In order for a statute to be considered “truly retroactive,” two criteria must be met. First, the statute must satisfy the *Wheeler-Landgraf* definition of secondary retroactivity—i.e. the statute takes away or impairs vested rights

⁷¹ *Landgraf*, 511 U.S. at 266–67. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation and prohibits states from passing laws impairing the obligation of contracts, and the Fifth Amendment’s Takings Clause prevents the legislature from depriving private persons of vested property rights except for a public use and upon payment of just compensation. U.S. CONST. art. I § 10; amend. V. The Due Process Clause protects the interests in fair notice and repose that may be compromised by retroactive legislation. U.S. CONST. amend. V.

⁷² See Schwartz, *supra* note 7, at 950.

⁷³ *Id.*

⁷⁴ See, e.g., *United States v. Carlton*, 512 U.S. 26, 32 (1994) (upholding a retroactive tax law and reasoning that “Congress acted promptly and established only a modest period of retroactivity”).

⁷⁵ Schwartz, *supra* note 7, at 951 (comparing *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) (upholding a state law with a six-year period of retroactivity) with *Carlton*, 512 U.S. 26 (1994) (applying a tax law retroactively over a period of over one year) and *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) (upholding retroactive legislation with a five month time span)).

⁷⁶ Laitos, *supra* note 19, at 127, 131.

⁷⁷ *Id.*

acquired under existing laws, creates or imposes a new duty, or attaches or increases liability for past conduct; *and* second, the legislative intent as to the statute's temporal reach must be unclear.⁷⁸ Alternatively, if the statute is not "truly retroactive," and the presumption of prospectivity is rebutted (because of express language indicating the legislature's intent for the statute to apply retroactively), the final step is to ask whether the retroactive provisions are permissible.⁷⁹

At this point, the court determines whether the pre-enactment conduct or private interest has protected legal status with respect to the new statute. If it does not, and legislative intent is clear, then the statute may alter the future, post-enactment legal consequences of past actions.⁸⁰ If the conduct or interest does have protected legal status, then the secondary retroactive provisions of the statute will be invalidated, regardless of express legislative intent.⁸¹ Under *Landgraf*, the elements of protected legal status are:

- (1) the new law must be intended to alter future legal consequences of past private action (intentionally secondarily retroactive); (2) the past private action must have some legal status—it must have resulted in the creation of a property interest, contract, or some other vested right; and (3) that legal status must also be protected by some anti-retroactivity principle, found either in the Constitution or in equity.⁸²

The reality is that most retroactive legislation does not survive the presumption of prospectivity and is therefore only applied prospectively, which means that reviewing courts need not address whether the law would be constitutional if it were to be applied retroactively. Even though this presumption prevents most legislation from being applied retroactively, this does not mean that an individuals' economic liberties are adequately protected, because once the presumption is rebutted, only superficial obstacles remain.

III. ANALYSIS

The analysis that follows looks at how state courts in Kentucky, Ohio, New York, and California have interpreted retroactive legislation post-*Landgraf* in the context of workers' compensation law and compares the way

⁷⁸ *Id.* at 136–37.

⁷⁹ *Id.* at 137.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Laitos, *supra* note 19, at 90–91; *see also* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

these state's constitution and laws address economic retroactivity.

A. Constitutionality of Retroactive Legislation in Various Jurisdictions

1. Kentucky

In Kentucky, retroactive application of legislation is governed by KRS 446.080(1), which states in relevant part that “[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . . ,” and KRS 446.080(3), which states that “[n]o statute shall be construed to be retroactive, unless expressly so declared.”⁸³ Pursuant to the provisions in KRS 446.080, the court in *Rogers v. Commonwealth* held that substantive civil statutes are not to be applied retroactively unless the General Assembly declares otherwise, although procedural and remedial statutes are to be so applied, even without express legislative intent.⁸⁴

The distinction between substantive legislation and remedial or procedural legislation is an important one. For purposes of Kentucky's general rule that substantive legislation is presumed to be prospective and remedial legislation is not, “substantive legislation” refers to any law that “changes and redefines out-of-court rights, obligations, and duties of persons in their transactions with others.”⁸⁵ Those “amendments which apply to the in-court procedures and remedies which are used in handling pending litigation, even if the litigation results from events which occurred prior to the effective date of the amendment, do not come within the rule prohibiting retroactive application.”⁸⁶

The rationale surrounding the retroactive effect of remedial and procedural legislation is explained in *Kentucky Insurance Guaranty Association v. Jeffers*, where the court held that if an amendment is remedial, it may be applied retrospectively.⁸⁷ The court in *Jeffers* explained that “[r]emedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes.”⁸⁸ There is no issue presented

⁸³ KY. REV. STAT. ANN. § 446.080 (Lexis through Ch.128 of the 2020 Reg. Sess.).

⁸⁴ *Rogers v. Commonwealth*, 285 S.W.3d 740, 751 (Ky. 2009).

⁸⁵ *Am. Exp. Travel Related Servs. Co., Inc. v. Kentucky*, 730 F.3d 628, 633 (6th Cir. 2013) (quoting *Commonwealth Dept. of Agric. v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000)).

⁸⁶ *Vinson*, 30 S.W.3d at 169.

⁸⁷ *Kentucky Ins. Guar. Ass'n v. Jeffers*, 13 S.W.3d 606, 611 (Ky. 2000).

⁸⁸ *Id.* at 607.

by applying remedial statutes retroactively because remedial statutes do not affect substantive rights. They merely expand an existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.⁸⁹ Legislation that is remedial or procedural in nature has been applied to causes of action that arose before the statute's effective date, despite the absence of an express declaration that the provision is to be so applied.⁹⁰ Therefore, this type of legislation operates as an exception to KRS 446.080(3)'s provision that no statute shall be construed to be retroactive unless expressly so declared.⁹¹

KRS 446.080(3) clearly reflects the reasoning from *Landgraf*, which requires that in order for retroactive legislation to be valid, the legislature must have unambiguously expressed its intent for the law to be applied retroactively.⁹² In addition, Kentucky court precedent mirrors the definition of retroactivity articulated in *Landgraf* in stating "a statute cannot be characterized as retroactive if it does not take away or impair vested rights acquired under existing laws already passed."⁹³ As stated by the Kentucky Supreme Court, the General Assembly may not arbitrarily, or without due process, retroactively terminate or impair someone's vested rights.⁹⁴ "In order for a right to be vested, there 'must be more than a mere expectation of future benefits or an interest founded upon an anticipated continuance of existing general laws.'"⁹⁵ Once a statute is determined to be truly retroactive and not procedural or remedial, then courts will look to the language of the statute to determine whether legislative intent is sufficiently clear.

Even though the language in the Kentucky statute does not articulate a clear standard for determining when legislative intent is adequately expressed to permit a statute to apply retroactively, the Kentucky Supreme Court has noted that this statutory rule should be "strictly construed."⁹⁶ Due to the lack of statutory specificity, legislators, practitioners, and scholars must continue to look to court precedent to discern the standard for the accepted interpretation and application of retroactive legislation. However, as discussed previously in this Note, judicial ideology on certain matters, like

⁸⁹ *Moore v. Stills*, 307 S.W.3d 71, 80–81 (Ky. 2010). Remedial legislation implies an intention to reform or extend existing rights with the purpose of promoting justice and the advancement of public welfare and important and beneficial public objects. *See id.*

⁹⁰ *See, e.g., Spurlin v. Adkins*, 940 S.W.2d 900, 901 (Ky. 1997).

⁹¹ *See id.*

⁹² *See Laitos, supra* note 19, at 90.

⁹³ *Cassidy v. Adams*, 872 F.2d 729, 733 (6th Cir. 1989); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 268–69 (1994).

⁹⁴ *Jarvis v. National City*, 410 S.W.3d 148, 156 (Ky. 2013).

⁹⁵ *Id.*

⁹⁶ *Am. Exp. Travel Related Servs. Co., Inc. v. Kentucky*, 730 F.3d 628, 632 (6th Cir. 2013) (citing *Hamilton v. Desparado Fuels, Inc.*, 868 S.W.2d 95, 97 (Ky. 1993)).

retroactivity, continues to develop and change, which can result in inconsistent decisions among lower courts.

Repercussions of this statutory ambiguity are exemplified in a recent Kentucky Supreme Court decision, *Holcim v. Swinford*.⁹⁷ In that case, the lower appellate court had ruled that KRS §342.730(4)—a recently amended statute that determined the expiration of workers' compensation benefits—did not apply retroactively because the language in the bill that would have made it retroactive was not codified in the official version of the statute; thus, the lower court reasoned, the requisite legislative intent did not exist, leaving the law in effect on the date of the injury to control.⁹⁸ However, the retroactive language did appear in a Legislative Research Commission note appended to the amended statute, which states that the relevant amendments

shall apply prospectively and retroactively to all claims: (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and (b) That have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act.⁹⁹

The Kentucky Supreme Court reversed this decision and held that the appellate court erred by not giving this statute its intended retroactive effect.¹⁰⁰ The state high court determined that the Legislative Research Commission note references the Act from which the statute was enacted and is exempt from the codification requirements.¹⁰¹ Thus, the court held, the newly enacted amendment applies retroactively.¹⁰²

Even though the Kentucky Supreme Court determined that KRS 342.730(4) does apply retroactively, it did not address the constitutionality of the statute's retroactive nature. The question remains whether it would survive a constitutional challenge.

⁹⁷ *Holcim v. Swinford*, 581 S.W.3d 37, 41–43 (Ky. 2019).

⁹⁸ *Id.*

⁹⁹ *Id.* at 43.

¹⁰⁰ *Id.* at 41.

¹⁰¹ *Id.* at 44. The Legislative Research Commission “may omit all laws of a private, local, or temporary nature.” KY. REV. STAT. ANN. § 7.131(3) (LEXIS through Ch.128 of the 2020 Reg. Sess., with the exception of Acts 79 and 80).

¹⁰² *Holcim*, 581 S.W.3d at 44. “For any new injuries and claims, the retroactivity of the Act will not be an issue. The language is only relevant to a particular time frame and once cases arising during that time frame are fully adjudicated, it will be unnecessary. Therefore, due to the temporary nature of the language regarding retroactivity in the Act, codification was not required.” *Id.*

2. Ohio

In Ohio, retroactive laws are governed by Ohio Constitution II Section 28, which states that

[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this state.¹⁰³

Ohio courts employ a two-step test when analyzing whether a statute is unconstitutionally retroactive. First, as a threshold matter, a court must review the language of the statute and determine whether the legislature expressly stated that retroactive application was intended.¹⁰⁴ Second, if the wording of the General Assembly is sufficiently explicit to show a retroactive intent, the statute will then be reviewed to determine whether the statute is substantive in nature or merely remedial.¹⁰⁵ Similar to Kentucky, Ohio courts strictly construe the requirement for express legislative intent, declaring that the court cannot infer retroactivity from suggestive language or legislative history; rather, legislative intent must be enumerated. As for the second prong, Ohio follows the general definition of a “substantive” statute.¹⁰⁶

Ohio’s constitution broadly prohibits substantive retroactive legislation that affects vested rights. A “vested right” can be “created by common law or statute and is generally understood to be the power to lawfully do certain actions or possess certain things; in essence, it is a property right.”¹⁰⁷ A vested right is a right that “so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.”¹⁰⁸ Under Ohio law, even if a statute is prospective in its operation, it may nonetheless implicate the retroactivity clause of the Ohio Constitution if it divests a party of substantive rights, particularly property rights, that vested prior to the

¹⁰³ OHIO CONST. art. II, § 28.

¹⁰⁴ *State v. Hudson*, 986 N.E.2d 1128, 1132–33 (Ohio App. 2013).

¹⁰⁵ *Id.*

¹⁰⁶ *See Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 18 N.E.3d 505, 515 (Ohio App. 2014) (“A statute is ‘substantive’ for purposes of retroactivity analysis, when it impairs or takes away vested rights; affects an accrued substantive right; imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction; creates a new right out of an act that gave no right and imposed no obligation when it occurred; creates a new right; or, gives rise to or takes away the right to sue or defend actions at law.”).

¹⁰⁷ *State ex rel. Jordan v. Indus. Comm.*, 900 N.E.2d 150, 152 (Ohio 2008).

¹⁰⁸ *Id.*

enactment of the statute.¹⁰⁹

In the realm of workers' compensation law, the rights of injured employees to receive compensation are purely statutory.¹¹⁰ Such rights are limited to those conferred by statute, and therefore no injured employee has a vested interest in compensation for injuries arising outside the bounds of workers' compensation statutes. Additionally, for a right to be characterized as "vested" so as to support a finding that a statute is unconstitutionally retroactive, it must constitute more than a mere expectation or interest based on an anticipated continuance of existing law.¹¹¹ In *State ex rel. Richard v. Board of Trustees of the Police & Firemen's Disability & Pension Fund*, the plaintiff challenged the retroactive application of the new law, specifically as it applied to him, claiming that this retroactivity would deprive him of a vested interest in a permanent disability award.¹¹² "The court disagreed, noting that a subsequent enactment will not burden a past transaction or consideration in the constitutional sense, unless the past transaction or consideration created, if not a vested right, at least a reasonable expectation of finality."¹¹³ Furthermore, the court went on to quote that "[m]aximum partial disability recipients have no reasonable expectation that their right to apply for different benefits would never be terminated by subsequent changes in the applicable law."¹¹⁴

The court in *Richard* reasoned that were it to hold otherwise, the General Assembly would never be able to limit some benefits in order to retain the solvency of financially strapped disability or retirement funds.¹¹⁵ Thus, although a majority of Ohio case law states that no substantive retroactive law will be upheld, this strict notion has exceptions when the individual's rights are not sufficiently vested or they possessed unreasonable expectations by assuming that current law would not change. Another important exception to this seemingly harsh blanket rule is that retroactive application of laws regulating economic matters will be upheld as long as they pass the test for rationality and are not arbitrary or capricious. For the purpose of a substantive due process claim, a retroactive economic law is arbitrary and capricious only if its retroactive feature is not rationally related to a legitimate governmental interest.¹¹⁶ Ohio's rationality standard is consistent with both Kentucky's

¹⁰⁹ 16B AM. JUR. 2D *Constitutional Law* § 741.

¹¹⁰ 94 OHIO JUR. 3D *Workers' Compensation* § 3.

¹¹¹ *State ex rel. Jordan*, 900 N.E.2d at 152.

¹¹² *Kahles v. City of Cincinnati*, No. 1:13-cv-560, 2015 U.S. Dist. LEXIS 112504, *35 (S.D. Ohio Aug. 25, 2015) (examining *State ex rel. Richard v. Bd. of Trs. of the Police & Firemen's Disability & Pension Fund*, 632 N.E.2d 1292 (Ohio 1994)).

¹¹³ *Id.* at *35–*36.

¹¹⁴ *Id.* at *36.

¹¹⁵ *Id.*

¹¹⁶ *M&F Supermarket v. Owens*, 997 F. Supp 908, 913 (S.D. Ohio 1997).

precedent and U.S. Supreme Court precedent. However, overall, Ohio has more substantial and consistent court precedent on the question of retroactive civil legislation than Kentucky. Ideally, this clarity should help to prevent the Ohio General Assembly from passing unconstitutional retroactive legislation because the courts' interpretation of the statutory requirements has been unambiguous.

3. New York

In contrast to Kentucky legislation, a New York court held that a workers' compensation award may relate to an injury that occurred prior to the enactment of the statute and such an award would not be deemed retroactive.¹¹⁷ New York seems to be more accepting of retroactive legislation than Kentucky or Ohio. The court expressed this seemingly deferential view when it stated that "[t]he constitutional impediments to retroactive civil legislation are now modest. Absent a violation of a specific constitutional provision, the potential unfairness of retroactive legislation is not a sufficient reason for a court to fail to give a statute its intended scope."¹¹⁸ It is well settled that legislative acts in New York are entitled to a strong presumption of constitutionality.¹¹⁹ The court noted that, in viewing the workers' compensation system broadly, "the allocation of economic benefits and burdens has always been subject to adjustment."¹²⁰ Workers' compensation is a highly regulated field, and participants consistently assume the risk of legislative change.¹²¹

In *Hodes v. Axelrod*, the court held that the vested rights doctrine did not preclude application of the amended statute to the petitioners in that case.¹²² The court also noted that modern cases have reflected a less rigid view of the legislature's right to pass such legislation compared to the traditional aversion to retroactive legislation.¹²³ Overall, most states abide by the default presumption against statutory retroactivity when there is no clear expression

¹¹⁷ *Am. Econ. Ins. Co. v. New York*, 87 N.E.3d 126, 134 (N.Y. 2017). Compare *Am. Econ. Ins. Co.*, 87 N.E.3d at 134, with KY. REV. STAT. ANN. § 342.730(4) (LEXIS through Ch.128 of the 2020 Reg. Sess., with the exception of Acts 79 and 80) (stating that "all determinations of income benefits for disability in Kentucky statutes shall apply prospectively and retroactively to all claims where the date of injury or date of last exposure occurred on or after December 12, 1996; and has not been fully adjudicated, or are in the appellate process").

¹¹⁸ *Am. Econ. Ins. Co.*, 87 N.E.3d at 134 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267, 272 (1994)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 135.

¹²¹ *Id.* at 137.

¹²² *Hodes v. Axelrod*, 515 N.E.2d 612, 615 (N.Y. 1987).

¹²³ *Id.*

of legislative intent sufficient to overcome this presumption.¹²⁴ In *Matter of Nuara*, the court found that the workers' compensation law did not apply retroactively because there was no clear expression of legislative intent sufficient to overcome this strong presumption of prospectivity; there was also nothing in the legislative history to suggest the legislation was remedial.¹²⁵ This case indicates that even though New York courts may find in favor of retroactive application more often than some other states, there is still an aura of skepticism surrounding retroactive legislation.

Consistent with controlling U.S. Supreme Court precedent, New York applies rational basis scrutiny to substantive due process challenges to retroactive legislation.¹²⁶ Even though the justifications that suffice for prospective legislative enactment may not suffice for its retroactive application, the test of due process for retroactive legislation is met simply by showing that the retroactive application of the legislation itself is justified by a rational legislative purpose.¹²⁷ A challenged statute will survive rational basis review as long as it is rationally related to *any* conceivable legitimate state purpose.¹²⁸

New York courts justify this level of judicial deference toward retroactive economic legislation by reasoning that the legislature should have broad discretion to pass laws, especially in areas where heavy regulation is the norm. New York courts do not seem to give as much credence to the *Landgraf* presumption of prospectivity, and there is not an explicitly clear constitutional threshold requiring a finding of express legislative intent that is comparable to the previously discussed states. As a result, individuals must rely more heavily on constitutional provisions to protect their economic liberties from retroactive laws. Yet, the relevant constitutional provisions—Contracts Clause, Takings Clause, and Due Process Clause—are often inadequate sources of protection, especially in the case of workers' compensation regulation.

4. California

Consistent with prevailing precedent, California follows the *Landgraf*

¹²⁴ See, e.g., *Matter of Nuara v. State of N.Y. Workers' Comp. Bd.*, 979 N.Y.S.2d 453, 457 (Sup. Ct. N.Y. 2010).

¹²⁵ *Id.* at 460.

¹²⁶ See, e.g., *Caprio v. N.Y. State Dep't of Taxation & Fin.*, 37 N.E.3d 707, 713 (N.Y. 2015).

¹²⁷ See *FCC v. Beach Comm.*, 508 U.S. 307, 314 (1993) ("On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'").

¹²⁸ See *id.*

presumption of prospectivity. This presumption is based on the rationale that retroactive laws are characterized by a want of notice and a lack of knowledge of past conditions, and they disturb feelings of security in past transactions.¹²⁹ Although statutes are generally presumed to operate prospectively, this presumption is rebuttable by legislative intent clearly indicating that retrospective operation was intended.¹³⁰

However, California courts differ from the aforementioned states in the standard of proof required to show legislative intent for the retrospective application of new legislation. California court precedent declares that when searching for evidence of the legislature's intent, the court may look beyond the statutory language.¹³¹ Legislative intent calling for retroactive operation of a statutory change may be found in such factors as context,¹³² the legislation's objective, the evils to which it is addressed,¹³³ the social history of the times and legislation upon the same subject,¹³⁴ the public policy enunciated or vindicated by the enactment,¹³⁵ and the effect of the particular legislation upon the entire statutory scheme of which it is a part.¹³⁶ However, the existence of a desirable social objective served by a statutory change is insufficient to infer such an intent.¹³⁷ This standard is in stark contrast to the rigidity of Kentucky, Ohio, and New York courts, which have refused to give statutes a retroactive effect absent explicit legislative intent in the language of the statute indicating its temporal reach.

IV. RESOLUTION

Retroactive legislation should be subject to more meaningful judicial review because of the "inherent injustices of retroactive laws."¹³⁸ The rationality standard provides sufficient protection for economic rights affected by prospective legislation because the temporal nature of prospective law does not upset otherwise settled expectations, alter consequences of past actions, or impair existing vested rights. However, this standard provides inadequate protection for economic rights affected by retroactive legislation. Purely prospective legislation, which attaches new

¹²⁹ 58 CAL. JUR. 3D *Statutes* § 30 (citing *In re Marriage of Reuling*, 28 Cal. Rptr. 2d 726 (1st Dist. 1994)).

¹³⁰ *Id.* (citing *In re Daniel H.*, 121 Cal. Rptr. 2d 475 (4th Dist. 2002)).

¹³¹ *Id.* (citing *In re Marriage of Bouquet*, 546 P.2d 1371 (Cal. 1976)).

¹³² *City of Monte Sereno v. Padgett*, 58 Cal. Rptr. 3d 218, 223 (6th Dist. 2007).

¹³³ *Bullard v. California State Automobile Ass'n*, 28 Cal. Rptr. 3d 225, 228 (3d Dist. 2005).

¹³⁴ *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.*, 149 Cal. Rptr. 880, 881 (2d Dist. 1978).

¹³⁵ *Bullard*, 28 Cal. Rptr. 3d at 229.

¹³⁶ *Industrial Indemnity Co.*, 149 Cal. Rptr. at 881.

¹³⁷ *Id.*

¹³⁸ *Laitos*, *supra* note 19, at 84 (citing *Weiler*, *supra* note 18, at 1071-75).

legal consequences to events occurring after the date of enactment,¹³⁹ aligns with traditional ideas of how legislation should affect behavior. Retroactive legislation runs counter to this idea, and the mere fact that a retroactive law is economic in nature is an insufficient justification for courts to afford it the same deference as prospective economic legislation.

The only consistent obstacle to the enactment of retroactive economic legislation is the absence of express legislative intent indicating a statute's intended temporal reach. This means that so long as the legislature includes in the language of the statute its intent for the legislation to apply retroactively, then the presumption of prospectivity will be rebutted and the new legislation will be given its intended retroactive scope. Though one may look to the Due Process Clause of the Constitution for protection, their efforts will be futile because there is no substantial constitutional obstacle to the enactment of retroactive economic legislation. Indeed, no due process challenge to economic legislation—retroactive or otherwise—has been successful since the end of the *Lochner* era in 1937.¹⁴⁰ Accordingly, retroactive legislation should be reviewed under a more exacting standard than its prospective counterpart.

A. Proposal: A Strengthened Standard of Review

A strengthened rationality test would take into account the importance of legislative autonomy in making policy decisions but limit the legislature's ability to unanimously upset settled expectations without any meaningful judicial scrutiny. This balancing test should examine: (1) the existence or absence of notice; (2) an affected party's reliance interest on the reasonably foreseeable outcome of current legislation; (3) the equity and reasonableness of the government's interest compared to the actions and interests of the private party; and (4) the statutory provisions that limit and moderate the impact of the burdens.¹⁴¹

B. The Balancing Inquiry

1. Notice

Courts should find adequate notice only if the law operates with secondary retroactivity and goes into effect only after the public has been

¹³⁹ See McNulty, *supra* note 19.

¹⁴⁰ See CHEMERINSKY, *supra* note 4, at 653.

¹⁴¹ Weiler, *supra* note 18, at 1075, 1130.

introduced to the new law.¹⁴² A law will be considered to have been introduced to the public after a bill has been introduced to the General Assembly or Congress and it states when its effective date will be (either from introduction or enactment).¹⁴³ Thus, a bill only provides notice from the time it is stated that it will apply retroactively.¹⁴⁴ A requirement that a legislature make its intention clear in this manner will help to ensure that the legislature itself has determined that the benefits of retroactivity outweigh the potential for unfairness.¹⁴⁵

2. Reliance

A reviewing court should examine whether there has been reasonable detrimental reliance by a party. This factor recognizes that a retroactive law is less offensive if a party had no prior reasonable expectations.¹⁴⁶ The reasonableness of a party's reliance depends in part on their awareness of the retroactive law, which turns on the issue of notice in the first part of the analysis.¹⁴⁷ When a party had notice of the retroactive law, this weakens the possibility of reasonable detrimental reliance.¹⁴⁸ In addition, the court must consider any additional burdens the retroactive law imposes on the citizen, "for a small burden might serve as evidence disproving the assertion that the citizen would have acted differently had [they] been aware of the new legislation."¹⁴⁹

3. Equity

An equity analysis requires the court to balance the reasonableness of the government's interests with the actions and interests of the citizen.¹⁵⁰ This analysis allows for more flexibility as courts grapple with the inherent vagueness of the Due Process Clause in relation to economic liberties.¹⁵¹

4. Moderation of Burden

¹⁴² A law operates with secondary retroactivity when it has a post-enactment effect on prior events by altering the future legal consequences of private actions taken pursuant to a previously valid legislative rule. *Id.* at 1128.

¹⁴³ *Id.* at 1129 n.286.

¹⁴⁴ *Id.*

¹⁴⁵ *Landgraf v. USI Films Prods.*, 511 U.S. 244, 268 (1994).

¹⁴⁶ *Weiler*, *supra* note 18, at 1129.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1130.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1131.

The final prong of the rationality test mirrors the language of the modern rational basis standard of review. The government must demonstrate that the length of the retroactivity period is necessary to accomplish a rational government objective.¹⁵² Put differently, the length of the retroactive burden on an individual must be reasonably related to serve a legitimate governmental purpose.

V. CONCLUSION

The development of judicial deference regarding retroactivity “reveals how the Court has chosen to value the economic aspect of retroactive economic laws at the expense of their retroactive feature.”¹⁵³ To be sure, “[s]uch deference undervalues the importance of settled expectations and adequate notice and undermines the citizenry’s right to reasonable reliance on the law.”¹⁵⁴ The proposal put forward in this Note instructs that courts should resist rubberstamping such legislation and instead applying a strengthened rationality test, one that balances the government’s interests in applying the law retroactively with the individual’s interest in fair notice and settled expectations.¹⁵⁵

¹⁵² *Id.*

¹⁵³ *Id.* at 1075–76.

¹⁵⁴ *Id.* at 1076.

¹⁵⁵ *Id.* at 1074.

