Lessons Unlearned: The Effects of Statutory Ambiguity and The Interpretative Uncertainty It Injects in The Courts

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LESSES UNLEARNED:
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Carolyn Singh*

INTRODUCTION

For centuries, courts have dealt with the challenge of imposing penalties for crimes when governing law changes. Applying the new provisions can be a straightforward exercise for courts, but when legislatures are ambiguous with regard to which law applies—for example, to pending cases—the courts are forced to interpret what legislatures intended. For some judges, the answer is easily found in the plain meaning of the text. For others, legislative intent can become the deciding factor. Throughout United States history, this has been a manageable yet controversial task, but aside from interpretive differences among judges, creating laws with uncertainty is a dangerous policy that legislatures should end.

Because some cases with the most adverse effects involve federal criminal statutes, this paper argues that in light of the high stakes involved for criminal defendants, clear statutory language is required for the efficient administration of justice. It does so by first examining consequences of statutory ambiguity and the Fair Sentencing Act of 2010 (FSA), which was enacted after almost twenty-four years of an unfair law taking effect. Tens of thousands of individuals were convicted under the old law, which remained in effect despite its disparate treatment of certain drug offenders. But even when the

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United States Congress corrected the disparity by enacting the FSA, it left ambiguity in the legislation regarding retroactivity and the FSA’s application to pending cases, which would qualify defendants for reduced sentences or elimination of their convictions altogether. Most individuals sentenced under existing law would have already completed their prison sentences if the FSA were applied retroactively.

Second, by examining the FSA, a comparison is made with federal and state gun control legislation, general principles of statutory interpretation, and the need for legislatures to clearly communicate with the courts. Because judges may apply varying interpretive philosophies, legislatures must be explicit when they write laws in order to maintain the integrity of the criminal justice system. Otherwise, the role of a judge may arguably extend into effectively legislating from the bench.

I. THE PRESUMPTION AGAINST RETROACTIVITY

When Congress enacts or amends a statute, it may indicate the effect to be either prospective or retroactive, or remain silent on the issue. A prospective statute operates from the effective date noted in the statute. A retroactive statute is backward-looking in the sense that it upsets vested rights or changes the legal consequence attached to conduct and transactions that have already occurred. An intermediate, quasi-retroactive analysis is needed for cases that are pending when a statute changes. When Congress is silent on the issue of retroactivity, courts must evaluate whether applying the statute would have an undesirable retroactive effect.

A. General Principles of Statutory Interpretation

When determining statutory context and purpose, courts must begin by looking to the text of the statute itself. Courts first follow this “plain meaning” rule, and if the language of the statute is clear, there is

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2 Am. Steel Foundries v. Tri-City Central Trades Council, 42 S. Ct. 72, 75 (1921).
3 When determining the constitutionality of retrospective statutes, such legislation may not abrogate vested rights, which are rights vested when it has been so far perfected that it cannot be taken away by statute. Bryant Smith, Retroactive Laws and Vested Rights, 5 Texas L. Rev. 231, 245–48 (1927).
4 Id.
6 Landgraf v. USI Film Products, 511 U.S. 244 (1994).
no need to look beyond the statute to its legislative history in order to
determine its meaning.\footnote{7} In general, a statute should be read as a whole, with its parts being interpreted within their broader statutory context and in a manner that furthers its statutory purposes, rather than undercuts them.\footnote{8}

Courts also look to “words at issue, to surrounding text, to the statute’s history, to legal traditions, to precedent, to the statute’s purposes, and to its consequences evaluated in light of those purposes.”\footnote{9} When a statute is ambiguous, judges commonly use two approaches: textualism, which looks to the plain meaning of the statute, and a purpose-driven approach, which relies on congressional intent.\footnote{10} These two approaches dominate views of justices and have been debated for decades. Notably, Supreme Court justices have commented with different views on the balance of statutory interpretation. Justice Stephen Breyer supports a purpose-driven interpretation based on congressional intent, whereas Justice Antonin Scalia maintains that statutory interpretation should be focused on the plain meaning of the legislative text without extrinsic influence.\footnote{11}

1. Purpose-Driven Approach

To support his purpose-driven view, Justice Breyer believes that the Court should read language “as the revelation of the great purposes which are intended to be achieved,”\footnote{12} and should “reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise from their decision.”\footnote{13} Because law is connected to life, it requires judges to apply a text in light of its purpose to achieve its overall public policy objectives.\footnote{14} Justice Breyer believes that contemporary conditions and

\footnotetext{7}{\textsc{Stephen Breyer}, \textit{Making Our Democracy Work: A Judge’s View} 88–102 (Vintage 2010).} \footnotetext{8}{Id.} \footnotetext{9}{Id.} \footnotetext{10}{\textsc{Stephen Breyer}, \textit{Active Liberty: Interpreting Our Democratic Constitution} 85–88 (Vintage 2005) [hereinafter \textit{Active Liberty}].} \footnotetext{11}{\textsc{Antonin Scalia} \& \textsc{Bryan A. Garner}, \textit{Reading Law: The Interpretation of Legal Texts} xxvii (West 2012) [hereinafter \textit{Reading Law}].} \footnotetext{12}{\textit{Active Liberty}, \textit{supra} note 10, at 17–18.} \footnotetext{13}{Id. at 18 (quoting Learned Hand, \textit{The Contribution of an Independent Judiciary to Civilization}, in \textit{Jurisprudence in Action} 228 (1953).} \footnotetext{14}{Id. at 17–18 (citing \textsc{The Words of Justice Brandeis} 61, 115 (Solomon Goldman ed., 1953); Int’l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918); Lochner v. New York, 198 U.S. 45, 75 (1905); \textsc{Learned Hand}, \textit{The Spirit Of}
social, industrial, and political consequences to be affected in a community are important: “nothing that is logically relevant should be excluded.” Justice Breyer has said the following regarding instances where statutory language is unclear:

[There is a] danger that lurks where judges rely too heavily upon just text and textual aids when interpreting a statute . . . when difficult statutory questions are at issue, courts do better to focus foremost upon statutory purpose, ruling out neither legislative history nor any other form of help in order to locate the role that Congress intended the statutory words in question to play.17

2. Textual Approach

Justice Scalia, on the other hand, supports a text-oriented approach to statutory interpretation, focusing on a “fair reading” of legislative text, history, tradition, and precedent, which is aimed at the decision-making void of an individual judge’s policy preferences, and strictly adheres to the textual language provided by the legislature.18 This textual approach is based on the constitutional mandate that “legislators enact; judges interpret.”19 Adhering to strict textual


15 ACTIVE LIBERTY, supra note 10, at 18.
16 Id. at 85.
17 Id. at 98.
18 READING LAW, supra note 11, at xxvii.
19 Id. at xxx (citing U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . ”)). See also U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one
interpretation and fair implications of the text ensures that the power of the judiciary does not prevail over the will of the legislature.20

Furthermore, proponents of this approach believe that substituting purpose for text is dangerous; for example, looking to non-textual material, such as legislative history, manipulates statutory construction and therefore enables justices to legislate from the bench.21

Perhaps a holistic medium between the purpose-driven and textual approaches would best serve legislative intent. As Chief Justice Taney explained: “In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”22 However, in instances where legislation is ambiguous or silent with regard to an element of statutory text, courts are forced to go beyond that level of analysis. Keeping in mind that Congress is aware of the rules of statutory construction, Congress’s silence, in some instances, could signify that nothing more is needed to be said to effectuate a statute. In other instances, Congress may not have considered the issue,23 or is enacting emergency legislation to take effect “as soon as practicable.”24

B. Retroactive Statutes

In recent years, courts have increasingly dealt with an additional wrinkle when it comes to ambiguous statutes: retroactivity. Examples of retroactive statutes include those remedying unexpected judicial

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20 READING LAW, supra at note 11, at xxix (citing Osborn v. Bank of the U.S., 22 U.S. 738, 866 (1824)). See also LACKLAND H. BLOOM JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION (Oxford Univ. Press 2009) (stating “for Marshall the underlying rationale for judicial review itself was dependent on an understandable and legally applicable text.”).

21 READING LAW, supra note 11, at 18 (citing Harris v. Commissioner, 178 F.2d 861, 864 (2nd Cir. 1949) (“It is always a dangerous business to fill in the text of a statute from its purposes.”)). See also Petties v. Butler, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting) (“[T]he recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application.”).


23 Id.

decisions in order to effectuate the intentions of parties, and legislative changes that may be more responsive to the needs of a particular situation. Retroactive statutes can take the form of an *ex post facto* law, or an ameliorative statutory change in the form of a new, amended, or repealed statute.\(^{25}\)

1. *Ex Post Facto* Laws

An *ex post facto* law applies retroactively to negatively affect or impair a person’s rights. The United States Constitution prohibits federal and state governments from enacting *ex post facto* laws.\(^{26}\) For the Founding Fathers, this prohibition was rooted in principles favoring personal security and private rights in order to avoid fluctuating policy and to give a regular course to the business of society.\(^{27}\) The contrary policy was characterized by the violence and injustice that resulted from the Parliament of Great Britain declaring acts to be treason that were not treason when committed.\(^{28}\) Thus, the framers of the Constitution sought to secure citizens from injury or punishment in consequence of such laws.

In addition, *ex post facto* laws are generally prohibited because the enacting of any law after the fact could greatly restrict the power of federal and state legislatures.\(^{29}\) Examples of prohibitions against *ex post facto* laws are increasing punishment, removing a defense that was previously available, and applying rules of evidence or procedure

\(^{25}\) *BLACK’S LAW DICTIONARY* 1432 (9th ed. 2009) defines retroactive law as: “A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. A retroactive law is not unconstitutional unless it (1) is in the nature of an ex post facto law or bill of attainder, (2) impairs the obligation of contracts, (3) divests vested rights, or (4) is constitutionally forbidden.”

\(^{26}\) U.S. CONST. art. I, §§ 8–9. The *ex post facto* clause applies only to criminal statutes and not to judicial decisions that have retroactive effect. Frank v. Magnum, 237 U.S. 309 (1915). In addition, a U.S. Supreme Court decision creating a new constitutional right or rejecting a previous position is fully retroactive to all pending cases. Such cases are examined under the due process framework, not as an *ex post facto* prohibition. Rogers v. Tennessee, 532 U.S. 451, 455 (2001). In the criminal context, a completed case or conviction may be abated if the crime is decriminalized or if the punishment is unfair in light of the new rule. Teague v. Lane, 489 U.S. 288 (1989).

\(^{27}\) *THE FEDERALIST* No. 44 (James Madison).

\(^{28}\) Calder v. Bull, 3 U.S. 386, 389 (1798) (citing the Case of the Earl of Strafford (1641)).

\(^{29}\) *Id.* at 394.
that would make it easier to obtain a conviction. In the criminal context, *ex post facto* laws are impermissible, whereas in the civil context, they are permitted.\(^{30}\)

2. Ameliorative Statutory Changes

An ameliorative statutory change, by contrast, seeks to decrease the consequence or penalty associated with a statutory violation.\(^{31}\) The Fair Sentencing Act of 2010 is an example of an ameliorative statute in that it seeks to remedy an unfair sentencing disparity between offenders based on the quantity of crack versus cocaine possession.\(^{32}\)

One of the earliest Supreme Court cases to address *ex post facto* laws and the presumption against retroactivity is *Calder v. Bull*.\(^{33}\) The case involved a bequest in a will made on August 21, 1779, for property to Caleb Bull and his wife. On May 2, 1795, the Connecticut legislature changed the applicable law that was originally enacted on March 21, 1793, which resulted in a refusal to record the will that allowed Calder and his wife to claim the property.\(^{34}\) Writing for the Court, Justice Chase noted the distinction between retrospective and *ex post facto* law:

> Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust; and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do

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\(^{30}\) ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 496–502 (4th ed. 2011) (The *ex post facto* clause does not apply to deportation proceedings because they are characterized as civil.).

\(^{31}\) People v. Oliver, 134 N.E.2d 197 (N.Y. 1956).

\(^{32}\) Fair Sentencing Act § 8.

\(^{33}\) *Calder*, 3 U.S. at 386.

\(^{34}\) *Id.*
not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease [sic] the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an UNLAWFUL act LAWFUL; and the making an innocent action criminal, and punishing it as a CRIME.35

Another general principle is that courts apply the law in effect at the time their decisions are rendered.36 Although conduct that triggers criminal prosecution predates amendment, such amendments apply to ongoing rather than completed proceedings, which would otherwise have the disfavored retroactive effect of an ex post facto law.37

3. Abatement versus Repeal

In addition, when a statute is abated by repeal, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force unless some provision is made.38 The general saving statute39 gives the government authority to continue ongoing prosecutions, whereas pending prosecutions would be “technically abated” when the statute subject of the prosecution is amended. This concept of technical abatement is a common law rule that prevents prosecution of offenses committed prior to a statutory amendment.40

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35 *Id.* at 391.
36 *Landgraf*, 511 U.S. at 263–64.
37 *Id.*
38 *Yeaton v. United States*, 9 U.S. 281 (1809) (After the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute).
40 An example of technical abatement is the case of *The King. v. M’Kenzie*, 168 Eng. Rep. 881 (Cr. Cas. 1820). The defendants were convicted of “feloniously
Statutory abatement, following the enactment of the general saving statute, applies to pending criminal proceedings to preserve the government’s ability to continue prosecution and thereby prevent technical abatement while simplifying the enactment process for future legislators:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.\(^{41}\)

In instances when Congress creates a statute lacking a saving clause, portions with \textit{ex post facto} effect may be applicable to pending cases.\(^{42}\)

By contrast, when a statutory provision becomes deprived of force, abatement is proper. For example, with the repeal of the Eighteenth Amendment by the Twenty-first Amendment of the United States Constitution, prohibition ended.\(^{43}\)

C. \textit{When Congress is Silent on Retroactivity}

In the absence of a congressional mandate for prospective or retroactive interpretation of a statute, application of a new statute to cases arising before its enactment is unquestionably proper in many

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\(^{41}\) 1 U.S.C. § 109 (emphasis added).

\(^{42}\) Weaver v. Graham, 450 U.S. 24, 37–38 (1981) (Rehnquist, J., concurring) ("[O]nly the \textit{ex post facto} portion of the new law is void as to petitioner, and therefore any severable portions which are not \textit{ex post facto} may still be applied to him.").

\(^{43}\) U.S. \textit{Const.} amend. XVIII, § 2 (repealed 1933) ("[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."). \textit{See also} United States v. Chambers, 291 U.S. 217 (1934).
situations. And, as a guiding principle against retroactivity, courts read laws as prospective unless Congress unambiguously instructs retroactivity. The general rule is that courts must apply the law in effect at the time it renders a decision, and in Landgraf, the Supreme Court addressed the presumption against retroactivity, noting that when a statute would impair rights that a party possessed when he or she acted, increase liability for past conduct, or impose new duties with respect to transactions already completed, the statute would have an unfavorable retroactive effect.

In Landgraf, the Court examined whether applying a new provision under Title VII of the Civil Rights Act of 1991 would give Landgraf the right to recover compensatory and punitive damages and provide for trial by jury if such damages were claimed while her case was pending on appeal. The lower court dismissed her case, holding that although she had been sexually harassed, the harassment did not justify her resignation; therefore, the termination of her employment was not in violation of Title VII and she was unable to obtain equitable relief. She appealed. While her case was pending on appeal, the Civil Rights Act of 1991 became law, and it contained a provision that created the right to recover compensatory and punitive damages for intentional Title VII discrimination, among other things. The new provision did not include a prohibition against retroactivity, nor did Congress indicate whether it was precluded from application to pending cases.

In determining whether applying the new provision would have the disfavored retroactive effect, the Court noted that punitive and compensatory damages were new legal consequences attached to pre-enactment conduct, and would therefore have the disfavored retroactive effect if applied to her case: “Elementary considerations of fairness dictate that individuals should have an opportunity to know

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45 Landgraf, 511 U.S. at 263.

46 Id.

47 Id. at 245.


49 Landgraf, 511 U.S. at 247.

50 Id.
what the law is and to conform their conduct accordingly; settled
expectations should not be lightly disrupted.” 51

More recently, in the context of immigration, the Supreme Court
held a consistent view 52 with regard to immigration requirements for
deporation prior to the Illegal Immigration Reform and Immigrant
Responsibility Act of 1996 (IIRIRA). 53 Under the IIRIRA, Congress
expressly stated that the statute would not apply retroactively. 54 Prior
to the IIRIRA, U.S. immigration law provided deportation hearings for
excludable aliens who had already entered the United States, and
exclusion hearings for excludable aliens seeking entry into the United
States. 55 The IIRIRA permitted automatic exclusion, for example, as a
result of a prior felony conviction. In Vartelas, Pagakis Vartelas was a
lawful permanent resident alien, a native and citizen of Greece, whose
petition for review of removal proceedings was denied. 56 In 1994,
Vartelas plead guilty to a felony and served a four-month prison
sentence. In 1996, the IIRIRA became law and was applied
retroactively, denying Vartelas’s 2003 re-entry to the United States.
Vartelas appealed, and in 2012 the Supreme Court denied the
government’s retroactive application of the IIRIRA because it created
a new disability contrary to congressional intent. 57

Writing for the dissent, Justice Scalia distinguished his
interpretation of the triggering activity for determining retroactivity as
Vartelas’s 1996 return trip, not the crime for which he plead guilty in

51 Id. at 265 (citing General Motors Corp. v. Romein, 503 U.S. 181, 191(1992)
(“Retroactive legislation presents problems of unfairness that are more serious than
those posed by prospective legislation, because it can deprive citizens of legitimate
expectations and upset settled transactions”)).

52 Vartelas v. Holder, 132 S. Ct. 1479 (2012) (In this 6–3 decision, Justice
Ginsburg delivered the opinion of the Court, and Chief Justice Roberts and Justices
Kennedy, Breyer, Sotomayor, and Kagan joined. Justice Scalia filed a dissenting
opinion, in which Justices Thomas and Alito joined).


54 Id.

55 Vartelas, 132 S. Ct. at 1479.

56 Id.

57 Id. at 1481–82 (citing Landgraf, 511 U.S. at 265 (The presumption against
retroactive legislation “embodies a legal doctrine centuries older than our
Republic.”)). Numerous decisions of this Court have invoked Justice Story’s
formulation for determining when a law’s retrospective application would collide
with the doctrine, namely, as relevant here, when such application “attaches a new
disability, in respect to transactions or considerations already past . . . .” Soc’y for
Cyr, 533 U.S. 289, 321; Hughes Aircraft Co. v. United States ex rel. Schumer, 520
U.S. 939, 947; Landgraf, 511 U.S. at 283.
1994, which would trigger exclusion under the not yet effective IIRIRA.\textsuperscript{58}

\section*{II. \textit{Dorsey v. United States} and \textit{Hill v. United States}}

On June 21, 2012, about three months after the Supreme Court released its opinion in \textit{Vartelas}, the Court addressed the same issue of statutory interpretation in \textit{Dorsey} and \textit{Hill} when it examined the FSA’s repeal of the Anti-Drug Abuse Act of 1986 (ADAA).\textsuperscript{59}

\subsection*{A. The Anti-Drug Abuse Act of 1986}

Under the Anti-Drug Abuse Act of 1986 (ADAA), federal offenses involving certain quantities of drugs were subject to mandatory minimum sentences.\textsuperscript{60} It created a disparity between sentences associated with crack and powder forms of cocaine by treating every gram of crack cocaine as the equivalent of 100 grams of powder cocaine.\textsuperscript{61} The ADAA was drafted and enacted within a four month period in response to a notable rise in cocaine-related deaths, notably the deaths of Len Bias of the University of Maryland and Don Rogers of the Cleveland Browns.\textsuperscript{62} Congress was urged to act swiftly, and they did with the intention of assigning greater punishment to offenders with crack cocaine in their possession. There was no research or scientific evidence that supported the 100:1 ratio, but the

\footnotesize{\textsuperscript{58} \textit{Vartelas}, 132 S. Ct. at 1496 (stating “This case raises a plain-vanilla question of statutory interpretation, not broader questions about frustrated expectations or fairness. Our approach to answering that question should be similarly straightforward: We should determine what relevant activity the statute regulates (here, reentry); absent a clear statement otherwise, only such relevant activity which occurs after the statute’s effective date should be covered (here, post-1996 re-entries). If, as so construed, the statute is unfair or irrational enough to violate the Constitution, that is another matter entirely, and one not presented here. Our interpretive presumption against retroactivity, however, is just that—a tool to ascertain what the statute means, not a license to rewrite the statute in a way the Court considers more desirable.”).}


\textsuperscript{60} \textit{Id.}


\textsuperscript{62} \textit{Id.}
ADAA was nevertheless enacted to target major drug traffickers and combat the perceived levels of violence and social harms, and because crack was thought to be more addictive and lethal.63

After the ADAA’s enactment, the U.S. Sentencing Commission issued several reports urging Congress to reassess the 100:1 ratio because it was not justified.64 Of note, the penalty did not achieve the goal of prosecuting major cocaine traffickers. The opposite resulted: street dealers of crack were punished more frequently and severely than the major dealers of powdered forms of cocaine. Moreover, subsequent studies showed that there was no increase in violence as initially thought, and that crack was not 100 times more harmful than powder cocaine. The psychological effects were similar, the risks of dependence were similar, and using crack turned out to be more addictive than snorting cocaine.65

After the ADAA was enacted, an amendment in 2007 retroactively lowered the base offense level applicable for crack offenses. With that amendment, 16,000 of the 25,000 requested sentence reductions were granted.66 Perhaps one of the more alarming consequences is the social impact associated with the ADAA, which resulted in a disproportionate rate of incarceration of African Americans. Statistics from the U.S. Sentencing Commission estimate that 1,056,855 individuals were sentenced under the ADAA between 1992 and 2009.67 Data from 2009 alone shows that 79% of the 5,669 sentenced crack offenders were black, whereas 10% were white and 10% were Hispanic.68 The figures for powder cocaine offenders showed a different distribution: 17% were white, 28% were black, and 53% were Hispanic. In addition, average prison terms for crack convictions were 115 months, whereas powder cocaine convictions were 87 months.69

63 Id.
64 Id.
65 Id.
67 Id. at 11–17. The manual also estimates that with the enactment of the Fair Sentencing Act (FSA), 29,455 offenders would be eligible for reduced prison sentences. In addition, the top ten states with offenders eligible for reduced sentences under the FSA are: Virginia, Florida, South Carolina, Texas, Illinois, Pennsylvania, New York, Alabama, Missouri, and Maryland.
68 Id.
B. The Fair Sentencing Act of 2010

In 2010, over two decades after it was passed, Congress repealed the ADAA\(^{70}\) by enacting the Fair Sentencing Act of 2010 (FSA), which reduced the crack-powder ratio from 100:1 to 18:1 to apply to all sentences after its enactment.\(^{71}\) The FSA was signed into law August 3, 2010, because Congress realized that there was an unfair disparity in the conviction rates for individuals found guilty of possessing crack cocaine as opposed to cocaine powder. Congress intended the changes to apply as soon as possible. Congress also directed the Sentencing Commission to update its guidelines no later than November 1, 2010. Although the FSA reduced the disparity between crack and powder forms to 18:1, and eliminated the mandatory minimum sentencing for simple possession, among other things, thousands of individuals were convicted under a statute that has since been deprived of force.

When Congress enacted the FSA, it was silent on whether the FSA applied prospectively or retroactively, but mandated its immediate application without an explicit answer about whether the new penalties would apply to ongoing prosecutions.\(^{72}\)

The Congressional Budget Office has estimated that because the FSA was passed, the prison population will decrease by 1,550 persons per year over the 2011–2015 period.\(^{73}\) In addition, the federal prison system’s spending is estimated to be reduced by $42 million over the 2011–2015 time frame, which correlates to savings of about $27,000 per year for each person who avoided incarceration time as a result of the FSA.\(^{74}\)

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\(^{70}\) Prior to the FSA’s enactment, under the Anti-Drug Abuse Act of 1986, certain U.S. federal criminal penalties could result from possessing a crack-to-powder weight ratio of 100:1 because crack cocaine was believed to be more potent than cocaine powder. Convictions could result in a 5-year mandatory minimum sentence for simple possession of crack cocaine. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

\(^{71}\) Fair Sentencing Act of 2010.

\(^{72}\) Based on the reasoning in *Landgraf*, when Congress is silent, a prospective application is required. *Landgraf*, 511 U.S. at 263.


\(^{74}\) *Id.*

291
C. Dorsey and Hill

In Dorsey and Hill, the Supreme Court held that more lenient penalties of the FSA, which reduced the crack-to-powder cocaine disparity, applied to those offenders whose crimes preceded the effective date of the Act and were sentenced after the statute’s effective date, abrogating United States v. Sidney, and United States v. Tickles. The Court also held that the more lenient penalties applied to those offenders who committed an offense prior to the FSA’s effective date and were sentenced after such date, but before the new sentencing guidelines concerning the disparity took effect. The Court’s decision in Dorsey also vacated and remanded forty-three cases in circuit courts of appeal.

1. Fisher & Dorsey Consolidated in the Seventh Circuit—The Bell Standard

Fisher was a consolidation of two cases against Anthony Fisher from Wisconsin and Edward Dorsey from Illinois before the Seventh Circuit. Fisher was decided based on the Seventh Circuit precedent set in Bell, which declined the retroactive application of the FSA because Congress did not expressly mandate retroactivity.

Anthony Fisher plead guilty in February 2010 to one count of conspiracy to distribute crack cocaine. He disputed the amount of crack in question, but was sentenced on June 2, 2010, without the quantity dispute being resolved, to the 120 month mandatory minimum based on the quantity Fisher claimed: 50 to 150 grams. For the Bell

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75 United States v. Sidney, 648 F.3d 904 (8th Cir. 2011).
76 United States v. Tickles, 661 F.3d 212 (5th Cir. 2011).
77 The Supreme Court in Dorsey held that it applied prospectively with new penalties to apply to ongoing prosecutions.
78 Dorsey v. United States (No. 11-5683) was consolidated with Hill v. United States (No. 11-5721).
81 Id. at 338.
court, the triggering activity was the date the crime was committed.82 Fisher appealed, claiming the FSA should apply because his appeal was pending on August 3, 2010, when the FSA went into effect. Fisher requested that the FSA be applied retroactively to his sentence, noting the Seventh Circuit’s prior holding in Bell.83 Bell was convicted and sentenced, and had an appeal pending when the FSA went into effect. In Bell, the Court applied the savings statute, barring the retroactive FSA application to Bell’s appeal. The Seventh Circuit noted that other circuit courts of appeals declined to apply the FSA retroactively because such an application was barred by the savings statute.

Edward Dorsey pleaded guilty to possessing 5.5 grams of crack cocaine with the intent to distribute on August 6, 2008.84 With Dorsey’s prior conviction, he was subject to the ten-year mandatory minimum sentence. If he were sentenced under the FSA, the ten-year mandatory minimum sentence would be triggered only if he possessed 28 grams or more of crack.85 He was sentenced on September 10, 2010, after the FSA took effect, to the mandatory minimum sentence of 120 months.86 The Court declined to apply the FSA, noting that the crime was committed prior to the FSA’s enactment.

Dorsey argued that even if the saving statute prevents retroactive application of the FSA, the relevant date for determining retroactivity is the date of sentencing, not the date of the commission of the criminal act, and that based on congressional intent and for reasons of fairness, his claim is distinguished from Bell; therefore, the FSA should apply to his conviction.87 In other words, the relief he sought was prospective and therefore consistent with the FSA. In Bell, the Seventh Circuit held that the savings statute prohibits the FSA from applying retroactively because Congress was silent on retroactivity and there was no expression in the statute that it applied retroactively.88 Dorsey argued that when considering the applicability of the saving statute, retroactivity is to be denied unless Congress expressly prohibits it.89 Since Congress was silent on retroactivity in the FSA,
Dorsey argued for prospective application and for the FSA to apply to his case because his case was pending when the FSA became the law.

2. *Hill*—The Seventh Circuit and The *Bell* Standard

Corey Hill was arrested on June 19, 2008, for delivery of 53 grams of cocaine base and sentenced to 120 months imprisonment on December 2, 2010.\(^90\) If the FSA were applied to Hill, he would have faced the mandatory minimum sentence of five years, rather than the ten-year sentence he faced.\(^91\) Based on the *Bell* standard set in the Seventh Circuit, Hill’s motion to reconsider his sentence was denied.\(^92\)

3. *Dorsey* and *Hill* in the Supreme Court

Both Dorsey and Hill\(^93\) petitioned the Supreme Court to hear their cases because the Seventh Circuit’s *Bell* standard was in conflict with the First\(^94\) and Eleventh\(^95\) Circuits, as well as forty-five district courts based on a different statutory interpretation.\(^96\) In addition, the United States government agreed with Dorsey and Hill that the Seventh Circuit’s bar to applying the FSA was unfair. On July 15, 2011, Attorney General Eric Holder issued a memorandum expressing that view:

In light of the differing court decisions—and the serious impact on the criminal justice system of

\(^90\) Petition for Writ of Certiorari at 2–3, 6, Hill v. United States (No.11-5721), 2011 WL 5909899.
\(^91\) Id. at 8–10.
\(^92\) Id. at 6.
\(^93\) Dorsey’s petition was filed on August 1, 2011, and Hill’s was filed on July 1, 2011. See Petition for Writ of Certiorari, Dorsey v. United States (No. 11-5683), 2011 WL 5909896; Petition for Writ of Certiorari, Hill v. United States (No.11-5721), 2011 WL 5909899.
\(^94\) United States v. Douglas, 644 F.3d 39 (1st Cir. 2011) (The First Circuit held that the FSA applies to criminal defendants sentenced after November 1, 2010, regardless of when the criminal act was committed. This was based on the statutory direction for the U.S. Sentencing Commission to promulgate guidelines within 90 days of the FSA’s enactment).
\(^95\) United States v. Rojas, 645 F.3d 1234 (11th Cir. 2011) (The Eleventh Circuit held that the FSA applies to sentencing conducted after the August 3, 2010, date of enactment, regardless of when the crime was committed).
\(^96\) Petition for Writ of Certiorari, Dorsey v. United States (Nos. 11-5683, 11-5721).
continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to “restore fairness in federal cocaine sentencing policy” but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act’s new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles."97

With the government’s support of the Dorsey-Hill petitions for writs of certiorari, the Court appointed amicus curiae in support of the judgments from the Seventh Circuit. The court-appointed amicus curiae brief put forth the argument that petitioners were sentenced in accordance with the law at the time of their offenses, which predated the FSA and therefore the FSA’s mandatory minimum sentences should not apply. To support its argument, it was noted that the “Supreme Court has never held any change in a criminal penalty to be partially retroactive . . . the choice has always been binary: retroactive or prospective.”98 In addition, section 109, “says that only an ‘express’ provision in a later statute can support retroactivity.”99 Taking a textual approach to interpretation, it was argued that the Court does not

99 Holcomb, 657 F.3d at 448.
give “authoritative weight” to “legislative history that is in no way anchored in the text of the statute.”100

In sum, the Seventh Circuit argued that the FSA does not apply retroactively to criminal defendants whose conduct occurred before the FSA’s effective date, regardless of when they were sentenced.101

4. The Supreme Court’s Opinion in Dorsey and Hill

In a 5–4 decision,102 the Court ruled in favor of the petitioners, agreeing with the government’s new position that the new, lower mandatory minimum sentences of FSA applies to post-FSA sentencing of conduct predating the FSA. Justice Breyer, writing for the majority, noted that applying the more lenient penalties to those sentenced after August 3, 2012, made it possible to foresee a reasonably smooth transition.103 Justice Scalia, writing for the dissent, described concerns of unpredictability that it creates for future interpretation of law.104

Congress intended the more lenient penalties of the FSA to apply to offenders whose conduct occurred before August 3, 2010, and were sentenced after. Using the purpose-driven principles of interpretation, the Court concluded that Congress did intend for the FSA’s more lenient penalties to pre-FSA conduct, and would have clearly indicated to the contrary if it did not. This was supported by the reasoning that a contrary holding would undermine the FSA’s objective to achieve uniformity in sentencing.105

On the issue of retroactivity, the Court noted two seemingly conflicting statutes: the general saving statute106 and the Sentencing Reform Act.107 Under the saving statute, a new criminal statute that repeals an older criminal statute shall not change the penalties incurred under that older statute without clear expression in the repealing act.

100 Id. (citing Shannon v. United States, 512 U.S. 573, 583 (1994)).
101 Id. (citing Marcello v. Bonds, 349 U.S. 302, 310 (1955) (because Congress did not provide for retroactivity in the FSA, it should not “lightly . . . be presumed” by the courts)).
102 Justice Breyer delivered the opinion of the Court, and was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. Justice Scalia’s dissent was joined by Justices Roberts, Thomas, and Alito. Dorsey, 132 S. Ct. at 2321.
103 Id. at 2323.
104 Id. at 2344 (In the end, the mischief of the Court’s opinion is not the result in this particular case, but rather the unpredictability it injects into the law for the future.).
105 Id. at 2325.
The FSA did not expressly provide that it applied to pre-enactment conduct. By contrast, under the Sentencing Reform Act, the applicable sentencing guidelines are those in effect on the date the defendant is sentenced, regardless of when the criminal offense occurred.

Justice Breyer outlined six factors that lead the Court to its conclusion. First, the savings statute enables Congress to apply a new statute’s more lenient penalties to pre-dated conduct. Second, the Sentencing Reform Act applies when *ex post facto* application would occur—i.e., it would not have the disfavored retroactive effect of increasing penalties. Third, Congress’s mandate for the Sentencing Commission to change guidelines implies that it intended the Sentencing Reform Act’s background principle to apply. Fourth, applying the former 100:1 ratio to pre-FSA crack offenders sentenced after August 3, 2010, would create the very disparities in sentencing for which the FSA was enacted to prevent. Fifth, not applying the FSA would result in disproportionate sentences, imposing higher sentences for some and not others being sentenced at the same time, under the FSA and ADAA. Sixth, there were no countervailing considerations that would support not applying the FSA retroactively.

The concerns expressed by the dissent highlight the need for Congress to communicate effectively with the Court to avoid unpredictability when courts interpret future law.

The basis for these concerns is rooted in the express language requirement of section 109 which mandates that Congress explicitly state whether section 109 applies to ameliorative amendments to trigger the general saving statute:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for

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108 *Id.*
109 *Dorsey*, 132 S. Ct. at 2330–2336.
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Dorsey*, 132 S. Ct. at 2344.
the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.\footnote{116}

Justice Scalia outlines that section 109 creates a “demanding standard” which courts should not deviate from.\footnote{117} In addition, the dissenting opinion outlines that none of the six factors the majority identified overcame that standard individually; in sum, nor is there any foundation for using a repeal by “implication” approach.\footnote{118} In prior cases before the Court, it has used varying standards of interpretation: fair implication,\footnote{119} clear implication,\footnote{120} expressly or by necessary implication,\footnote{121} and the interpretation “must be clear enough to overcome [a court’s] strong presumption against implied repeals.”\footnote{122}

No legislative mandate prevents a prospective application of the new law to pre-FSA offenders whose cases were pending while the FSA was enacted. Although the FSA was enacted as an ameliorative statute to be effective as soon as practicable, and discrepancies in sentencing and data collection remain,\footnote{123} nothing indicates that the absence of clear legislative intent on the issue or retroactivity was something Congress forgot. Moreover, the dissent defers to Congress’s understanding of its role to be clear when drafting legislation.\footnote{124} In other words, Congress is well aware of its duty to draft legislation that clearly communicates its intent to courts, and without an express

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\footnote{116}{1 U.S.C. § 109.}
\footnote{117}{Dorsey, 132 S. Ct. at 2340.}
\footnote{118}{Id.}
\footnote{120}{Hertz v. Woodman, 218 U.S. 205, 218 (1910).}
\footnote{121}{Great Northern, 208 U.S. at 465.}
\footnote{123}{For example, the majority suggested that the U.S. Sentencing Commission was directed to apply the FSA to “achieve consistency with other guideline provisions and applicable law.” Dorsey, 132 S. Ct. at 2324 (citing Fair Sentencing Act § 8). In addition, the Sentencing Commission, in its history, has no settled practice, so it is unlikely that Congress would rely on the Sentencing Commission to sort out whether the “applicable law” was the pre- or post-FSA.}
\footnote{124}{The dissent also notes that the canons of construction, i.e., the rule of lenity and the canon of constitutional avoidance do not apply because section 109 is unambiguous and there is no constitutional issue that is in doubt. Dorsey, 132 S. Ct. at 2344. See also Richard A. Posner, THE FEDERAL COURTS, CRISIS AND REFORM 276 (Harvard Univ. Press 1st ed. 1985) (noting that there is a canon to support every possible result).}
mandate that provides at least a clear implication of intent, courts may adhere to a strict standard of literal interpretation.

D. Post-Dorsey Problems and the Smarter Sentencing Act

Although Dorsey answered the question of retroactivity, the fundamental issue of fairness to those serving prison sentences who otherwise would not be remains unanswered.

On December 19, 2013, President Obama commuted the sentences of eight long-term federal prisoners who were sentenced for crack cocaine offenses and were serving sentences that Congress repudiated after their sentences when the FSA was passed. The sentences were commuted as “as an important step toward restoring fundamental ideals of justice and fairness,” and the President has since urged Congress to pass legislation that would make the FSA retroactive for non-violent offenders.

By July 2013, an unusual alliance of Senate Democrats and Republicans introduced the Smarter Sentencing Act of 2013 (SSA) that would give judges more flexibility to determine prison sentences in many drug cases.

In 2014, the National Association of Criminal Defense Lawyers (NACDL) launched Clemency Project 2014, which will develop criteria to help the Department of Justice identify prisoners who would have received a substantially lower sentence if sentenced under current laws. The criteria for the initiative have been set by the Obama Administration, and are geared towards prisoners serving federal sentences for non-violent offenses that have served at least ten-year prison sentences, have no significant prior convictions, and have demonstrated good conduct in prison.

130 Id.
While Congress mulls over passing the SSA and the Obama Administration looks to the NACDL for a solution, a similar problem may be brewing over giving retroactive effect to the Supreme Court’s ruling in *Miller v. Alabama*,\(^{131}\) which held that mandatory sentences of life without parole for juvenile offenders is prohibited by the Eighth Amendment.\(^{132}\) State courts have been split over whether *Miller* applies retroactively. If it does, 2,000 inmates serving life sentences could become eligible for parole.\(^{133}\)

### III. Gun Control Legislation

The highly publicized school shooting in Newtown, Connecticut, in 2012 sparked a national gun control debate.\(^{134}\) This, following a shooting in 2011 in Tucson, Arizona, that nearly killed former Representative Gabrielle Giffords—and over a decade after the 1999 shooting at Columbine High School, resulted in lawmakers across the nation introducing more than 500 gun-related bills in 2013.\(^{135}\) Federal legislation has failed to gain support for passage, but some states have already enacted new laws.\(^{136}\)

Even with the lessons from the FSA, for example, some of the proposed and enacted legislation remains unclear about retroactive application of the new laws. Neither of the two prominent federal bills included details of retroactivity. The Safe Communities, Safe Schools Act of 2013\(^{137}\) introduced by Senate Majority Leader Harry Reid, includes effective date language taking effect “180 days after the

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\(^{133}\) *Id.* See also Douglas Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL’Y 151 (2014).
\(^{135}\) *Id.* See also Jack Nicas & Joe Palazzolo, *Pro-Gun Laws Gain Ground*, WALL ST. J., Apr. 4, 2013, http://online.wsj.com/ article/SB100014241278873248836045783983643653264474.html#project%3DGUNSTATES20130404%26articleTabs%3Darticle.
\(^{137}\) S. 649, 113th Cong. (2013).
enactment of this Act." An earlier bill introduced by Senator Diane Feinstein, the Assault Weapons Ban of 2013 also lacked details about retroactivity. The only detail Senator Feinstein’s bill included about timing was that the amendments “shall take effect 90 days after the date of enactment of this Act.”

State legislation strengthening and weakening gun control laws are generally no different. In Alabama where the proposals were to weaken gun control laws, the only provision about enactment was that the Act “shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.” In Maryland, the Firearm Safety Act of 2013 took effect on October 1, 2013, and it includes no provision for retroactivity.

CONCLUSION

With lessons unlearned from past legislative failures, the practical consequences of ambiguous provisions could result in a repeat of what defendants faced under the FSA. Along with uncertainty in the judicial process and varying application of statutes, the administrative burden on courts is certain to increase.

In the end, it is clear that when legislatures fail in their duty to draft laws that comport with statutory requirements, courts are forced to make judgments that could otherwise be avoided. Although the textualist approach that Justice Scalia advocates is proper, when a court is forced to interpret statutory ambiguities, society may be better served when the purpose-driven approach prevails.

One of the next important issues likely to face Congress is immigration reform. If Congress does not handle its legislative duty with care, the detrimental impact could be far-reaching. Hopefully Congress will learn from the lessons of the past. Otherwise, as with the FSA, thousands would be subjected to unintended consequences, and the courts will continue to operate on a slippery slope.

138 Id.
139 S. 150, 113th Cong. (2013).
140 Id.
143 Id.