

## Going Retro: Abolition For All

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*The opening of the twenty-first century has seen a flurry of death penalty repeals. This development is encouraging, but only partly so. Amidst the cheers for abolition, there is an unfairness of the highest order: the maintenance of the death penalty for some, but not others, for no other reason than the date of their crimes. State legislatures are repealing the death penalty prospectively only, and these states' executive branches are leaving their prisoners on death row. In New Mexico and Connecticut, a total of thirteen prisoners remain on death row after those states abolished the death penalty.*

*Some states, however, are “going retro.” In 2012, California's Proposition 34 would have applied retroactively, reducing over 700 death row prisoners' sentences to life without parole (“LWOP”). More states should attempt to pass retroactive death penalty repeals, but they are not doing so, for two reasons. The first is political: legislators are not pursuing retroactive legislation because they do not have the votes. The second reason is legal: legislators are not pursuing retroactive legislation because they believe that the separation of powers and state constitutional prohibitions on retroactive laws forbid it. These arguments are reasonable ones, and they reach far beyond the death penalty sphere—to retroactive crack sentencing laws and retroactive juvenile LWOP sentencing laws, among others.*

*This Article argues that neither the separation of powers nor state constitutional prohibitions on retroactive laws prohibits states from retroactively repealing their death penalties. While politics may*

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*prevent legislatures from pursuing retroactive repeal of the death penalty, the law should not. As California’s 2012 repeal bill makes clear, “fairness, equality, and uniformity” demand retroactivity. They demand abolition for all.*

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## INTRODUCTION

The death penalty is in rapid decline. Over the past eight years, five states have repealed the death penalty.<sup>1</sup> Never before in history have such a large number of states abolished the death penalty in so short a time.<sup>2</sup> From coast to coast, abolition shows no signs of abating. In 2012, California, the largest state in the union and a death penalty bellwether, narrowly missed repealing its death penalty by a 53%–47% vote of the electorate.<sup>3</sup> In 2014, New Hampshire, the only retentionist

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1. The states that legislatively repealed the death penalty are: New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013). See *infra* notes 7–10 and accompanying text. New York abolished its death penalty in 2007 by court decision and legislative inaction. See *People v. Taylor*, 878 N.E.2d 969, 978 (N.Y. 2007) (vacating sentence of only remaining death row prisoner and stating that “[*People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004)] made perfectly clear that the death penalty sentencing statute crafted by the Legislature was unconstitutional”).

2. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 29 (1986) (illustrating abolition of death penalty in United States from 1840–1980).

3. In 1972, in the watershed case of *Furman v. Georgia*, in which the U.S. Supreme Court ruled the death penalty unconstitutional as applied, Justice Blackmun mused that the Court was

state in New England, missed repealing the death penalty by one vote in the state senate.<sup>4</sup> And more states await a vote as momentum builds in Delaware, Kansas, Colorado, Washington, and elsewhere.<sup>5</sup>

What is perhaps most interesting about death penalty abolition in the twenty-first century is not the sheer number of states that are repealing the death penalty, but the way in which they are doing it. Every state with the death penalty has prisoners on death row,<sup>6</sup> which creates a conundrum for legislators: What to do about them? A legislature might repeal the death penalty prospectively *and* retroactively, thereby abolishing the death penalty for everyone, including those currently on death row. Alternatively, a legislature might repeal the death penalty prospectively only, thereby limiting repeal to future crimes and retaining death row intact.

Over the past eight years, nearly all state legislatures considering repeal have responded to this conundrum by seeking to abolish the death penalty prospectively only. New Mexico repealed prospectively only in 2009, leaving two prisoners on death row.<sup>7</sup> Illinois abolished prospectively only in 2011, but its governor immediately commuted the sentences of those remaining on death row.<sup>8</sup> Connecticut followed suit in 2012 and now has eleven prisoners on death row, including one man, Richard Rozkowski, who committed his crime before repeal but was not sentenced to death until after repeal.<sup>9</sup> Maryland repealed prospectively

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“somewhat propelled toward its result by the interim decision of the California Supreme Court, with one justice dissenting, that the death penalty is violative of that State’s constitution.” *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting) (citing *People v. Anderson*, 493 P.2d 880 (Cal. 1972)).

4. *New Hampshire Retains Death Penalty on Tie Vote*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5749> (last visited Mar. 30, 2015).

5. See *infra* notes 12–17 and accompanying text (discussing death penalty repeal legislation).

6. *Compare States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 30, 2015), with *Death Row Inmates by State*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188> (last visited Mar. 30, 2015).

7. *New Mexico*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-mexico-1> (last visited Mar. 30, 2015).

8. *Illinois*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/illinois-1> (last visited Mar. 30, 2015).

9. *Connecticut*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/connecticut-1> (last visited Mar. 30, 2015); Daniel Tepfer, *Rozkowski Sentenced to Death*, CT POST, <http://www.ctpost.com/local/article/Rozkowski-sentenced-to-death-5498444.php> (last updated May 22, 2014, 10:41 PM) (discussing sentencing of Rozkowski to death on May 22, 2014 for 2006 triple murder). In 2012, the Connecticut Supreme Court overturned the death sentence of Eduardo Santiago on grounds that the trial court had improperly failed to disclose privileged records regarding abuse and neglect of Mr. Santiago’s siblings. *State v. Santiago*, 49 A.3d 566, 653–54 (Conn. 2012). Following remand to the trial court for a new penalty phase hearing, Mr.

only in 2013, leaving five prisoners on death row.<sup>10</sup> On January 20, 2015, one day before leaving office, Governor Martin O'Malley commuted the sentences of Maryland's four remaining death row inmates.<sup>11</sup> And prospective-only legislation awaits in other states, including Kansas,<sup>12</sup> Colorado,<sup>13</sup> and Washington,<sup>14</sup> as well as in New Hampshire<sup>15</sup> and Delaware,<sup>16</sup> both of which have expressly rejected provisions that would have applied their repeals retroactively.<sup>17</sup>

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Santiago argued that Connecticut's prospective-only repeal prohibits the State from seeking the death penalty against him. Supplemental Reply Brief of the Def. at 1–3, *State v. Santiago*, 49 A.3d 566 (Conn. 2012) (No. 17413). Mr. Santiago's case is once again pending before the Connecticut Supreme Court. Because Mr. Santiago is no longer on death row at the time of this writing, this Article does not include him within Connecticut's death row population as a statistical matter.

10. *Maryland*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/maryland-1> (last visited Mar. 30, 2015).

11. *Outgoing Gov. Martin O'Malley Officially Commutes Death Sentences*, WBAL TV (Jan. 20, 2015), <http://www.wbalv.com/news/outgoing-gov-martin-omalley-officially-commutes-death-sentences/30822092>. John Booth-El, a fifth man on death row at the time Maryland abolished the death penalty, died in prison in April 2014. Jeff Barker & Jonathan Pitts, *Demise of Death Row Inmate Rekindles Debate Over Capital Punishment*, BALTIMORE SUN (Apr. 28, 2014, 9:11 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-death-row-man-dies-20140428-story.html#page=1>.

12. See S.B. 126, 58th Leg., Reg. Sess. (Kan. 2013), available at [http://www.kslegislature.org/li/b2013\\_14/measures/documents/sb126\\_00\\_0000.pdf](http://www.kslegislature.org/li/b2013_14/measures/documents/sb126_00_0000.pdf) (proposing to repeal death penalty in Kansas prospectively).

13. See H.B. 13-1264, 69th Leg., Reg. Sess. (Colo. 2014), available at <http://legiscan.com/CO/text/HB1264/id/947306/Colorado-2014-HB1264-Introduced.pdf> (proposing to repeal death penalty in Colorado prospectively).

14. See H.B. 1739, 64th Leg., 2d Reg. Sess. (Wash. 2015), available at <http://lawfilesexet.leg.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/5639.pdf> (proposing to repeal death penalty in Washington prospectively).

15. See H.B. 1170-FN, 147th Legis. (N.H. 2014), available at <http://www.gencourt.state.nh.us/legislation/2014/HB1170.pdf> (proposing to repeal death penalty in New Hampshire prospectively).

16. See S. 19, 147th Legis. (Del. 2013) available at <http://votesmart.org/static/billtext/43299.pdf> (proposing to repeal death penalty in Delaware prospectively).

17. See *Death Penalty Repeal Passes Delaware Senate; Defeated in Colorado*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/recent-legislation-death-penalty-repeal-passes-delaware-senate-defeated-colorado> (last visited Mar. 30, 2015) (discussing passage of amendment striking language that would have applied repeal retroactively to eighteen prisoners on Delaware's death row). Compare H.B. 1170-FN, 147th Legis. (N.H. 2014), available at <http://gencourt.state.nh.us/legislation/2014/HB1170.pdf>, Floor Amendment to H.B. 1170-FN, 2014-0916h, available at <http://www.gencourt.state.nh.us/legislation/amendments/2014-0916H.html> (proposing to retroactively apply repeal to "[a]ny person sentenced to death . . . for an offense committed prior to the effective date of the [a]ct"), and *New Hampshire Retains Death Penalty on Tie Vote*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5749> (last visited Mar. 30, 2015) (discussing rejection of amendment that would have applied repeal retroactively to New Hampshire's one death row prisoner), with S. 19, 147th Legis. (Del. 2013), available at <http://votesmart.org/static/billtext/43299.pdf>, and Sen. Amendment No. 1 to Sen. Bill. No. 19, An Act to Amend Title 11 of the Delaware Code Relating to the Death Penalty, 147th Legis. (Del.

Death penalty abolition in the twenty-first century is “gradual” abolition. In states like New Mexico, Connecticut, and many more to come, the death penalty will end when the last remaining death row prisoner in each of these states dies or is freed from death row.<sup>18</sup>

The primary reason why states are repealing prospectively only is, not surprisingly, political. While not all family members of murder victims support the death penalty, many do,<sup>19</sup> and they can make passage of repeal difficult as a political matter. Take, for example, Mark and Kathleen Bonistall, the parents of slain University of Delaware student, Lindsey Bonistall, who encouraged legislators to “do the right thing” by opposing repeal.<sup>20</sup> “[D]on’t let the judicial process, our tragedy, trauma and pain to be in vain,” they wrote in a letter to legislators.<sup>21</sup> Consider also the testimony of Sharon Ward Blickenstaff, whose elderly father was murdered in his home.<sup>22</sup> In testimony opposing Maryland’s repeal, she told legislators that “the murder[er]’s victims are put into a situation where their cries of pain and pleas for mercy fall on uncaring ears. Who stands for the true victims? Who gives them a voice? Who cares for the families of survivors?”<sup>23</sup> Or the testimony of Dr. William Petit, whose two children and spouse were murdered during a home invasion, and who encouraged Connecticut legislators to vote against repeal because “some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it . . . .”<sup>24</sup> In this climate, it may be impossible for

2013) (amending Senate Bill 19 by striking retroactive language stating that “[a]ny person who has been sentenced to death prior to the effective date of this act shall instead be punished by imprisonment for the remainder of the person’s natural life without benefit of probation or parole or any other reduction.”).

18. Kevin Barry, *From Wolves, Lambs (Part II): The Fourteenth Amendment Case for Gradual Abolition of the Death Penalty*, 35 CARDOZO L. REV. 1829, 1831–32 (2014) [hereinafter Barry, *Part II*].

19. See *infra* notes 20–24 and accompanying text (discussing murder victims’ family members who support death penalty).

20. Kara Nuzback, *Senate Approves Death Penalty Repeal*, CAPE GAZETTE OF LEWES, DEL., Mar. 29, 2013, <http://www.smalltownnews.com/article.php?catname=Crime&pub=Cape%20Gazette&aid=136665>.

21. *Id.*

22. Testimony of Sharon Ward Blickenstaff, Md. Comm’n on Capital Punishment 3–4 (Aug. 27 2008), available at <http://www.goccp.maryland.gov/capital-punishment/documents/blickenstaff-testimony.pdf>.

23. *Id.* at 4.

24. See Press Release, State of Conn. Exec. Chambers, Governor Rell Vetoes HB 6578, An Act Concerning the Penalty for a Capital Felony (June 5, 2009), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=441204> (reciting Dr. Petit’s quotation of Lord Justice Denning, Master of the Rolls of the Court of Appeals in the United Kingdom); see also Barry, *Part II*, *supra* note 18 (“Kansas legislature introduced prospective-only repeal bill at urging of

legislatures to pass a retroactive bill. Faced with the option of repealing prospectively only or not at all, legislatures are choosing the former out of political necessity.

As indicated by the number of states that have recently repealed the death penalty or are on the cusp of repeal, prospective-only repeal is sound strategy. It is also good law. Indeed, every court to have addressed the question has upheld the validity of prospective-only death penalty repeal. In 1908, the Supreme Court of Kansas held that prospective-only repeal of the death penalty did not apply retroactively to a defendant who committed his offense three months before repeal.<sup>25</sup> And in 1917, the Supreme Court of Missouri likewise held that prospective-only repeal did not apply retroactively to a defendant who was sentenced to death three months before passage of the repeal.<sup>26</sup> “Undoubtedly the Legislature in 1917 had the power to abolish capital punishment as to all offenses, whether committed before or after the enactment of the new law,” the court stated, “but it did not do so.”<sup>27</sup>

More recently, in 2010, a New Mexico trial court similarly held that New Mexico’s 2009 prospective-only repeal did not apply retroactively to a defendant who committed his crime three years before passage of the repeal.<sup>28</sup> “I don’t find anything about [prospective-only repeal] unconstitutional,” concluded Judge Neil Candelaria.<sup>29</sup> “It’s the Legislature’s prerogative to make a law prospective or retroactive.”<sup>30</sup> And on October 18, 2013, Maryland trial court judge Thomas G. Ross found that Maryland’s prospective-only repeal did not invalidate the death sentence of Jody Lee Miles, who was convicted and sentenced before the passage of Maryland’s repeal.<sup>31</sup> On November 25, 2013, Maryland’s high court, the Court of Appeals, declined to address the validity of Maryland’s prospective-only repeal.<sup>32</sup> However, the court

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legislators who refused to vote for bill that would clear death row, largely in response to brothers Reginald and Jonathan Carr’s murder, assault, rape, and robbery of five people.”)

25. *In re Schneck*, 96 P. 43, 44 (Kan. 1908).

26. *State v. Lewis*, 201 S.W. 80, 85–86 (Mo. 1918) (per curium); *accord* *State v. Hill*, 201 S.W. 58, 61 (Mo. 1918) (holding that statute abolishing death penalty, which became operative on June 18, 1917, did not apply where “trial and conviction was had in May, 1917”).

27. *Lewis*, 201 S.W. at 85.

28. Scott Sandlin, *Astorga Death Penalty Trial Can Proceed*, ALBUQUERQUE J., Dec. 3, 2010, <http://www.abqjournal.com/news/metro/032332537958newsmetro12-03-10.htm>.

29. *Id.* (quoting District Judge Neil Candelaria).

30. *Id.* (quoting District Judge Neil Candelaria). Because a jury subsequently sentenced the defendant to life imprisonment without parole (as opposed to death), the Supreme Court of New Mexico did not have occasion to directly address this issue.

31. See Brief of Appellee at 6, *Miles v. State* (Md. Nov. 6, 2012) (No. 2155), available at [http://www.oag.state.md.us/Press/11\\_6\\_14\\_Miles\\_COSA\\_Appeals\\_Brief.pdf](http://www.oag.state.md.us/Press/11_6_14_Miles_COSA_Appeals_Brief.pdf).

32. See *Miles v. State*, 80 A.3d 242, 266 (2013).

strongly signaled its validity, noting that the repeal did not reduce Miles's death sentence as Miles's attorneys argued.<sup>33</sup> As these cases demonstrate, it is perfectly constitutional for state legislatures to make eligibility for death turn on the date of one's crime.<sup>34</sup>

Although politics is the primary reason why states are repealing prospectively only, it is not the only reason. Some state legislatures are pursuing prospective-only bills because they believe that repealing the death penalty *retroactively* may be unconstitutional. They believe that the reduction of existing death sentences—whether final or pending further appeal—may violate constitutional principles. Specifically, these legislators have expressed concern that retroactive bills are prohibited by the separation of powers between the legislature and the judiciary, the separation of powers between the legislature and the executive, and state constitutional prohibitions on retroactive laws.<sup>35</sup>

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33. See *id.* (“[W]e do not reach Miles’s supplementally briefed argument that the legislative repeal of the death penalty demonstrates that the death penalty is not necessary for the safety of the State.”); *id.* at 244 n.2 (stating that Maryland’s prospective-only repeal “does not moot this appeal” and that the repeal “authorize[s] the Governor to ‘change a sentence of death into a sentence of life without the possibility of parole,’ but, as of this writing, that provision has not been invoked”). In November 2014, in a case before Maryland’s Court of Special Appeals, Maryland Attorney General Douglas F. Gansler stipulated that executing Miles post-repeal would violate due process based on the fact that Maryland’s death row protocols were invalidated in 2006. Justin Fenton, *Gansler Argues that State Must Vacate Sentences of Death Row Inmates*, BALTIMORE SUN (Nov. 6, 2014, 8:55 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-death-row-appeal-20141106-story.html#page=1> (discussing appeal of death row inmate Jody Lee Miles, pending before Maryland’s Court of Special Appeals). Importantly, the State of Maryland did not argue that prospective-only repeal was unconstitutional. According to the State, it was Maryland’s lack of protocols—not prospective-only repeal, in and of itself—that raised due process concerns. See Brief of Appellee at 6, 24–28, *supra* note 31 (“Miles’s sentence is not illegal—either when it was handed down in 1998 or now—and his claims in support of his motion to correct an illegal sentence have no merit.”).

34. On September 12, 2012, in the case of *State v. Santiago*, the Connecticut Supreme Court became the first high court in nearly a century to take up this issue. See *State v. Santiago*, SC 17413, <http://appellateinquiry.jud.ct.gov/CaseDetail.aspx?CRN=11507&Type=CaseName>. At the time of this writing, nearly two years after oral argument on April 23, 2013, the Connecticut Supreme Court has not issued an opinion. *Id.* An identical legal challenge is pending before New Mexico’s high court. Barry Massey, *New Mexico High Court to Hear Death-Row Appeals*, SANTA FE NEW MEXICAN (Sept. 3, 2014, 3:00 PM), [http://www.santafenewmexican.com/news/local\\_news/new-mexico-high-court-to-hear-death-row-appeals/article\\_1464a27d-f25d-5fea-8155-25e9a5347dca.html](http://www.santafenewmexican.com/news/local_news/new-mexico-high-court-to-hear-death-row-appeals/article_1464a27d-f25d-5fea-8155-25e9a5347dca.html) (discussing appeals of death-row inmates Timothy Allen and Robert Fry, pending before New Mexico Supreme Court). Odds are good that both high courts will likewise uphold prospective-only death penalty repeal. See generally Kevin Barry, *From Wolves, Lambs (Part I): The Eighth Amendment Case for Gradual Abolition of the Death Penalty*, 66 FLA. L. REV. 313 (2014) [hereinafter Barry, *Part I*] (arguing that prospective-only death penalty repeal does not violate Eighth Amendment); Barry, *Part II*, *supra* note 18 (arguing that prospective-only death penalty repeal does not violate Fourteenth Amendment’s Equal Protection and Due Process Clauses).

35. According to New Mexico State Representative Gail Chasey, the New Mexico

These concerns are reasonable. None, however, should prevent state legislatures from repealing the death penalty retroactively. None should prevent the legislature from eliminating an unfairness of the highest order: the execution of one but not another for no other reason than the date of the crime.<sup>36</sup> With proper drafting, retroactive repeal, like prospective-only repeal, is almost certainly valid as a matter of constitutional law.<sup>37</sup> If retroactive repeal proves politically impossible

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legislature's decision not to pursue a retroactive bill was based on, among other things, New Mexico's constitutional savings clause, which prohibits a new law from extinguishing penalties, rights, and liabilities under a prior law. N.M. CONST. art. IV, §§ 33–34. Likewise, the Maryland legislators' decision not to pursue a retroactive bill "was a combination of constitutional concerns [that the bill] . . . would constitute a violation of the separation of powers and throw the whole bill into doubt . . . and political concerns (the issue would be all about the particular cases)." Email from Jamie Raskin, Maryland Senate, to Kevin Barry, Prof., Quinn. Univ. Sch. Law (June 9, 2014) (notes on file with author). And advocates in Illinois similarly stated that Illinois decided not to pursue a retroactive bill in 2011, in part, because "we concluded that a retrospective abolition bill would be unconstitutional. We didn't think the legislature had any authority to vacate an already court-imposed sentence, under the separation of powers provision of our state constitution." E-mail from Confidential Source, Ill., to Kevin Barry, Prof., Quinn. Univ. Sch. Law (July 18, 2013) (on file with author). Connecticut legislators did not share these concerns. See Barry, *Part II*, *supra* note 18, at 1836–37 (stating that motivation for prospective-only bill was purely political).

36. For purposes of this article, the normative value of eliminating sentencing disparities created by prospective-only repeal of the death penalty is assumed. For more on this issue, see Barry, *Part II*, *supra* note 18 (discussing disproportionality of imposing death penalty on those who committed crime before repeal and not those who committed identical crimes after repeal). For thoughtful discussions of this issue in the non-capital context, see Dorean M. Koenig, *Advocating Consistent Sentencing of Prisoners: Deconstructing the Michigan Myth That Retroactive Application of Lesser Penalties for Crimes Violates the Governor's Power of Commutation*, 16 T.M. COOLEY L. REV. 61, 64 (1999) ("The preeminent value of consistent sentencing lies in its sense of justice and proportionality. Teaching the fair application of the laws, by making certain that prison sentences are fairly and evenly applied, is held to be important for generating respect for the law and the rule of law. It makes no sense to have one prisoner sentenced to a mandatory forty-years imprisonment being bunked two years later with a very similar prisoner who is serving a twenty-year mandatory term for the same exact offense."); Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. MICH. J.L. REFORM 53, 64 (2013) ("These three related fundamental concerns—honoring reliance interests, imposing rule of law constraints on legislatures, and valuing certainty—largely are absent when Congress ameliorates the severity of prior penalties or decriminalizes conduct altogether."); S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 12 (2009) ("Withholding a lesser punishment from a pre- or post-final judgment defendant is contrary to consequentialist and retributivist justifications for punishment because the ameliorative legislative change reflects the legislature's assessment that the prior penalty is no longer an adequate deterrence or an appropriate penalty."). See generally Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 120, 148 (1972), cited in *Bradley v. United States*, 410 U.S. 605 (1973), and *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974) (discussing "the seemingly arbitrary decisions reached by the courts" in cases involving "an individual who commits a criminal act prior to a mitigatory change which precedes his apprehension, trial, or completion of sentence").

37. See *infra* Part VI (discussing model retroactivity language).

in a given state, the legislature should follow the current trend of abolishing prospectively only. Repeal for some is better than repeal for none. If, however, a state legislature has the votes to repeal the death penalty prospectively *and* retroactively, it should do so. California is a case in point.

In 2012, California narrowly missed becoming not only the largest state in the union to abolish the death penalty, but also the first state in nearly fifty years to do so retroactively.<sup>38</sup> In order to “achieve fairness, equality and uniformity in sentencing,” California’s Proposition 34 would have reduced the death sentences of over 700 death row prisoners to life without parole (“LWOP”).<sup>39</sup> That Proposition failed by just three percent of the electorate.<sup>40</sup> California’s retroactivity provision underscores the importance of retroactive repeal to this century’s abolition effort.<sup>41</sup> Every remaining state with the death penalty has

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38. *California Retains Death Penalty by Narrow Margin*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/california-retains-death-penalty-narrow-margin> (last visited Mar. 30, 2015). Nebraska’s pending death penalty repeal bill is also retroactive. See L. 543, § 21, 103d Leg., 1st Sess. (Neb. 2013), available at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB543.pdf> (“In any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, it is the intent of the Legislature that such penalty shall be changed to life imprisonment without possibility of parole.”).

39. The SAFE California Act § 10(a)–(b), in California General Election Tuesday, November 6, 2012: Official Voter Information Guide 95, 96 (2012), available at <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop34> (“In any case where a defendant or inmate was sentenced to death prior to the effective date of this act, the sentence shall automatically be converted to imprisonment in the state prison for life without the possibility of parole . . .”). For more information on Proposition 34, see generally Judge Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 46 LOY. L.A. L. REV. 221 (2012); Hadar Aviram & Ryan Newby, *Death Row Economics the Rise of Fiscally Prudent Anti-Death Penalty Activism*, 28 CRIM. JUST. 33, 39–40 (2013).

40. *California Retains Death Penalty by Narrow Margin*, *supra* note 38.

41. Although California and Nebraska’s legislation represents the most recent attempts to abolish the death penalty retroactively, see *supra* note 38 and accompanying text, they are not the first. New Jersey’s 2007 repeal law contained a retroactivity provision that required courts to reduce the sentences of death row prisoners to LWOP on the condition that such prisoners waived any further appeals. See Act of Dec. 17, 2007, ch. 204, § 2, 2007 N.J. Laws 1427, 1429–30, available at [http://www.njleg.state.nj.us/2006/Bills/PL07/204\\_PDF](http://www.njleg.state.nj.us/2006/Bills/PL07/204_PDF) (“An inmate sentenced to death prior to the date of the enactment of this act, upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole. Such sentence shall be served in a maximum security prison. Any such motion to the sentencing court shall be made within 60 days of the enactment of this act. If the motion is not made within 60 days the inmate shall remain under the sentence of death previously imposed by the sentencing court.”). Because New Jersey’s governor commuted all existing death sentences immediately prior to the effective date of the law (apparently, in response to the due process concerns of death row prisoners who refused to waive further appeals on grounds that they were innocent of any crime), the law’s retroactivity provision became moot. North Dakota and West Virginia appear to be the only two

prisoners on death row; state legislatures should carefully consider California's example before writing those prisoners out of repeal legislation.<sup>42</sup>

Significantly, the constitutionality of retroactive repeal has implications beyond the death penalty context. In 2014, Congress introduced the Smarter Sentencing Act of 2014, which would reduce the final sentences of tens of thousands of crack cocaine offenders.<sup>43</sup> And a number of state laws passed in the wake of the Supreme Court's recent decision in *Miller v. Alabama* permit courts to reduce the final sentences of prisoners who were mandatorily sentenced to LWOP for crimes committed as juveniles.<sup>44</sup> This important legislation raises the very same constitutional questions as retroactive death penalty repeal.

This Article considers each of the constitutional arguments against retroactive death penalty repeal and concludes that none should prevent legislators from retroactively repealing the death penalty. In sum, the law permits retroactive repeal of the death penalty and, as California's Proposition 34 makes clear, "fairness, equality, and uniformity" demand it. Hopefully, more states will follow California's lead: Abolition for all.

This Article proceeds as follows: Parts I and II introduce the concepts of retroactive legislation and the separation of powers, respectively. At the heart of this Article are Parts III, IV, and V, which turn to each of the three primary constitutional arguments against retroactive death

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states that actually abolished their death penalties retroactively. See Act of Mar. 9, 1915, ch. 63, § 1, 1915 N.D. Laws 76, 76 ("Every person who has been or may be hereafter convicted of murder in the first degree shall be punished by confinement at hard labor in the State Penitentiary for life."); Act of Mar. 12, 1965, ch. 40, 1965 W. Va. Acts 203, 207 ("[N]o person . . . shall be executed, irrespective of whether the crime was committed, the conviction had, or the sentence imposed, before or after the enactment of this section."). Because these laws were apparently never challenged in court (in fact, it is unclear whether there were prisoners on death row to challenge them), these laws provide little guidance in analyzing the constitutionality of retroactive repeal—other than demonstrating legislatures' willingness to pass such repeals. See *supra* notes 15–17 and accompanying text (discussing retroactive death penalty-repeal efforts in New Hampshire and Delaware); see also Barry, *Part I, supra* note 34 (discussing statutes in Mississippi, Idaho, and New Mexico, which retroactively altered death penalty procedures or repealed death penalty for certain crimes).

42. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188> (last visited Mar. 30, 2015).

43. See Smarter Sentencing Act of 2014, S. 1410, 113th Cong. § 3(b) (2014), available at <https://www.govtrack.us/congress/bills/113/s1410/text>.

44. See JOSHUA ROVNER, THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 3 (2014) ("Of the 13 states that have passed legislation, only four – Delaware, North Carolina, Washington, and Wyoming – allow for resentencing among the current JLWOP population.").

penalty repeal. Specifically, Part III argues that the reduction of final death sentences does not offend the separation of powers by interfering with the final judgments of courts, and it distinguishes cases holding to the contrary. Even if the separation of powers prohibits the legislature from *requiring* courts to reopen final judgments, Part III argues, it does not prohibit the legislature from merely authorizing such legislation.

Part IV argues that the reduction of final sentences does not offend the separation of powers by interfering with the executive's commutation authority. Although a majority of jurisdictions have held that sentence reduction is the same as commutation and therefore violates the separation of powers, the better argument is the minority view, which holds that sentence reduction is different from commutation in both purpose and effect, and is therefore constitutional. Part V argues that retroactive death penalty repeal does not offend state constitutional savings clauses and retroactivity clauses. To the extent that these clauses facially apply to ameliorative criminal laws, they have not prevented legislatures from passing legislation that retroactively reduced penalties, nor have they prevented courts from upholding such legislation.

Having canvassed the various constitutional concerns with retroactive death penalty repeal, Part VI provides four model statutory provisions for state legislatures to consider in abolishing the death penalty retroactively. Drawn from federal and state capital and non-capital legislation, these provisions can help avoid the constitutional infirmities endemic to retroactive legislation. Part VII offers some concluding remarks.

### I. RETROACTIVE LEGISLATION, GENERALLY

Retroactive legislation refers to legislation “that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred.”<sup>45</sup> Although determining when legislation operates retroactively “is not always a simple or mechanical task,”<sup>46</sup>

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45. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995); *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (stating that legislation operates retroactively when “the new provision attaches new legal consequences to events completed before its enactment”); *cf. Weaver v. Graham*, 450 U.S. 24, 29, 31 (1981) (stating that, in order for a more onerous criminal law to be considered *ex post facto*, “it must be retrospective, that is, it must apply to events occurring before its enactment. . . . The critical question is whether the law changes the legal consequences of acts completed before its effective date.”); *id.* (stating that “it is the effect, not the form, of the law” that determines whether it is retrospective and therefore *ex post facto*).

46. *Landgraf*, 511 U.S. at 270 (“Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.”); *see id.* at 294 (Scalia, J., concurring) (“I do not maintain that it will

some straightforward examples from the civil and criminal contexts will suffice. In the civil context, consider an amendment to the Bankruptcy Act that gives priority to certain personal injury claims “*now or hereafter pending in any court in the United States.*”<sup>47</sup> If the new law is retroactive, a person whose pending personal injury claim had no priority under the old law could claim priority under the new.<sup>48</sup> In the criminal context, a new law might reduce the sentence for certain criminal acts, or it might decriminalize such acts altogether.<sup>49</sup> If the new law were retroactive, a person who committed a crime under the old law would be entitled to the benefit of the new law—a reduced sentence or no conviction at all.<sup>50</sup>

Given “[t]he Legislature’s unmatched powers . . . to sweep away settled expectations suddenly and without individualized consideration,” retroactive legislation “raise[s] particular concerns.”<sup>51</sup> As the Supreme Court has stated, “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to

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always be easy to determine, from the statute’s purpose, the relevant event for assessing its retroactivity.”); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990) (Scalia, J., concurring) (“It will remain difficult, in many cases, to decide . . . whether a particular application [of new legislation] is retroactive.”).

47. *See, e.g.,* *Carpenter v. Wabash R. Co.*, 309 U.S. 23, 26 (1940).

48. *See id.* at 27 (holding that retroactive amendment to statute applied to case pending on appeal, regardless of whether lower court’s ruling was correct when it applied prior version of statute); *see also* *Freeborn v. Smith*, 69 U.S. 160, 162 (1864) (upholding new jurisdictional statute that explicitly applied to all cases “pending” on appeal from the territory of Nevada at the time Nevada achieved statehood); *id.* at 174–75 (“It is well settled that where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.”); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801) (applying new treaty to case pending on appeal where treaty unambiguously applied to pending cases).

49. *See* Comment, *supra* note 36, at 131–41 (discussing retroactive application of ameliorative criminal statutes that reduce sentences or decriminalize previously criminal conduct).

50. *See, e.g.,* *State v. Payne*, 199 P.3d 123, 154 (Idaho 2008) (giving retroactive effect in pending case to statute requiring new procedures for “any capital sentencing proceeding occurring after the effective date of this act, including those cases where the murder for which sentence is to be imposed occurred before the effective date of this act and including those cases where a first-degree murder conviction or death sentence occurring before the effective date of this act has been set aside and the case is before the court for retrial or resentencing”); *Watts v. State*, 733 So. 2d 214, 237 (Miss. 1999) (giving retroactive effect in pending case to statute requiring jury to consider life imprisonment without the possibility of parole as sentencing option in “any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994,” and stating that the fact that defendant’s crime occurred several months before effective date of statute was “immaterial”); *State v. Pace*, 456 P.2d 197, 205 (N.M. 1969) (per curiam) (supplemental opinion) (giving retroactive effect in pending case to statute “provid[ing] for revocation of death penalties already imposed and substitution of a sentence of life imprisonment”).

51. *Landgraf*, 511 U.S. at 266.

conform their conduct accordingly; settled expectations should not be lightly disrupted.”<sup>52</sup> For this reason, “a presumption against retroactive legislation” (with some exceptions<sup>53</sup>) has long prevailed in the civil context.<sup>54</sup>

In the criminal context, courts’ treatment of retroactive legislation is more nuanced. To begin with, retroactive criminal legislation that is more burdensome than prior law is not simply presumptively prohibited; it is *constitutionally barred* by the Ex Post Facto Clause.<sup>55</sup> By contrast, retroactive criminal legislation that is ameliorative—for example, legislation that reduces sentences for various crimes—was favored at common law.<sup>56</sup> Under the common-law doctrine of “abatment,” there was a presumption *in favor* of the retroactivity of

52. *Id.* at 265; *see id.* at 270 (“The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.”); *see also* Comment, *supra* note 36, at 120 (“[J]udicial and legislative concern that retroactive laws are characterized by lack of notice, inadequate consideration of past conditions, and disruption of the security attaching to the finalization of past transactions.”).

53. According to the Supreme Court, the presumption against retroactivity does not apply when the legislation: (1) explicitly authorizes retroactive application, *Landgraf*, 511 U.S. at 273; *see, e.g., infra* notes 69–71 and accompanying text (discussing explicitly retroactive statutes); (2) “authorizes or affects the propriety of prospective relief,” *Eco Mfg. LLC v. Honeywell Int’l, Inc.*, 357 F.3d 649, 652 (7th Cir. 2003) (“Changing the rules governing future behavior . . . is a prospective application. This is why, ‘[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.’” (citing *Landgraf*, 511 U.S. at 273)); (3) confers or ousts jurisdiction, “whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed[.]” *Landgraf*, 511 U.S. at 274 (“Present law normally governs in such situations because jurisdictional statutes ‘speak to the power of the court rather than to the rights or obligations of the parties.’” (citation omitted)); or (4) changes procedural rules; *see id.* at 275 (“Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.” (citation omitted)).

54. *Landgraf*, 511 U.S. at 265 (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. . . . [T]he ‘principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.’” (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring))).

55. U.S. CONST. art. I, § 9, cl. 3.

56. *Holiday v. United States*, 683 A.2d 61, 66 (D.C. App. 1996) (“Although nonpenal statutes traditionally operate prospectively, unless there is evidence of legislative intent to the contrary, an opposite presumption applies to repeals of criminal statutes.”); *see Landgraf*, 511 U.S. at 270–71 (“[A]t common law a contrary rule [favoring retroactivity] applied to statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal.”); *Kaiser*, 494 U.S. at 841 n.1, 853 (Scalia, J., concurring) (distinguishing “presumption that statutes are not retroactive” in the civil context from “contrary presumption (*i.e.*, a presumption of retroactivity)” in “the repeal of punishments”).

ameliorative criminal laws.<sup>57</sup> Absent some expression of legislative intent to the contrary, the repeal or amendment of a criminal statute resulted in the termination of all prosecutions that had not yet resulted in a final sentence.<sup>58</sup> According to the Supreme Court,

By the repeal of [a criminal statute], without any reservation of its penalties, all criminal proceedings taken under it fall. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed.<sup>59</sup>

But this common-law presumption in favor of retroactivity had unintended consequences. Laws reducing criminal sentences for particular crimes had the effect of abating all pending prosecutions of those crimes, thereby allowing such crimes to go completely unpunished.<sup>60</sup> “To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause”—a so-called “savings clause”—

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57. See *Holiday*, 683 A.2d at 66 (“Although nonpenal statutes traditionally operate prospectively . . . an opposite presumption applies to repeals of criminal statutes.”); see also *supra* note 56 and accompanying text (discussing *Landgraf* and *Kaiser*). The common-law doctrine of abatement was not, technically, the same as a presumption in favor of retroactivity. Abatement did not retroactively apply reduced sentences to pending cases—it terminated pending cases altogether.

58. *Bradley v. United States*, 410 U.S. 605, 607 (1973) (“At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them.”); see *Holiday*, 683 A.2d at 66 (“At common law, such repealing legislation applied retroactively, abating every prosecution which had not yet resulted in final conviction (including appeal to the highest reviewing court)—unless a special provision had been enacted to save prosecutions under the repealed statute.”). Common-law abatements were not limited to cases involving ameliorative legislative changes. Abatements also took place where legislative changes retroactively *increased* penalties; such changes would have likely violated the Ex Post Facto Clause had they not resulted in abatement. See *Warden v. Marrero*, 417 U.S. 653, 660 (1974) (“Common-law abatements resulted . . . from repeals and re-enactments with different penalties, whether the re-enacted legislation *increased* or decreased the penalties.” (emphasis added)); see also *Holiday*, 683 A.2d at 66 (discussing Ex Post Facto Clause’s preclusion of prosecution under harsher statute); Mitchell, *supra* note 36, at 25 (discussing “technical abatements” of pending cases in light of more onerous legislative changes).

59. *United States v. Tynen*, 78 U.S. 88, 95 (1870); see *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809) (“[I]t has been long settled, on general principles, that 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.”).

60. See *Holiday*, 683 A.2d at 66; accord. *State v. Carpentino*, 85 A.3d 906, 910 (N.H. 2014) (“[T]he theory of abatement carries an obvious potential for injustice: the prospect that crimes committed before the effective date of a statutory amendment would go entirely unpunished even though (as evidenced by the terms of the new legislation applicable prospectively) the legislature quite obviously had no intention of removing the conduct at issue from the ambit of the criminal law.”); see also Comment, *supra* note 36, at 125–26 (discussing abatement cases).

”stating that prosecutions of offenses under the repealed statute were not to be abated.”<sup>61</sup> Nevertheless, through legislative inadvertence, savings clauses were sometimes left out of legislation, and so prosecutions continued to abate.<sup>62</sup>

Beginning in the latter half of the nineteenth century, Congress and state legislatures responded to this problem by passing general savings statutes that preserved or “saved” pending prosecutions under statutes that had been amended or repealed.<sup>63</sup> The federal general savings statute, for example, states that:

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.<sup>64</sup>

Nearly all states have passed similar general savings statutes.<sup>65</sup>

61. *Bradley*, 410 U.S. at 608.

62. *See Marrero*, 417 U.S. at 660; *see also* Comment, *supra* note 36, at 126 (discussing legislative oversight that resulted in abatement).

63. *See Marrero*, 417 U.S. at 660; *United States v. Chambers*, 291 U.S. 217, 224 (1934) (stating that, by enacting federal general savings statute, Congress exercised “its undoubted authority to qualify its repeal and thus to keep in force its own enactments”). “The majority of [general savings] statutes,” including the federal general savings statute, “apply in both civil and criminal actions.” Comment, *supra* note 36, at 128; *see Hertz v. Woodman*, 218 U.S. 205, 217–18 (1910) (stating that federal general savings statute “is not alone applicable to penalties and forfeitures under penal statutes. It extends as well to ‘liabilities,’ and a liability or obligation to pay a tax imposed under a repealed statute is not only within the letter, but the spirit and purpose, of the provision.”), *cited favorably in Korshin v. Comm’r*, 91 F.3d 670, 673–74 (4th Cir. 1996).

64. 1 U.S.C. § 109 (2012). “Case law makes clear that the word ‘repeal’ applies when a new statute simply diminishes the penalties that the older statute set forth.” *Dorsey v. United States*, 132 S. Ct. 2321, 2330–31 (2012). “[P]enalties are ‘incurred’ under the older statute when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable.” *Id.* at 2331.

65. *See Mitchell*, *supra* note 36, at 47–51 (compiling state savings statutes, but excluding Delaware and Minnesota); *see also* Del. Code Ann. tit. 11, § 211 (Delaware savings statute); Minn. Stat. Ann. § 645.35 (1945) (Minnesota savings statute). Ten states have passed ameliorative exceptions to their general savings statutes, which give retroactive effect to ameliorative legislative changes in pending cases. *See, e.g.*, VT. STAT. ANN. tit. 1, § 214(c) (1969) (“If the penalty or punishment for any offense is reduced by the amendment of an act or statutory provision, the same shall be imposed in accordance with the act or provision as amended unless imposed prior to the date of the amendment.”); *see also Mitchell*, *supra* note 36, at 47–51 (compiling ameliorative exceptions). Four states have savings clauses embodied in their constitutions—not in their statutes. *Id.* (compiling constitutional savings clauses); *see infra* Part V (discussing state constitutional savings clauses). Unlike federal courts, several state high courts have disregarded their general savings statutes and give retroactive effect to ameliorative legislative changes in pending cases. *See Holiday v. United States*, 683 A.2d. 61, 74 (D.C. App. 1996) (stating that some state supreme courts “have held a general savings statute inapplicable because it is ambiguous, or expressly is limited to preserving sentences already imposed, or is an

These general savings statutes, in effect, shift the legislative presumption regarding ameliorative criminal laws from one of retroactivity (through abatement) to one of non-retroactivity in the absence of contrary legislative direction.<sup>66</sup> Therefore, absent explicit language to the contrary or some other “indicia of congressional intent,”<sup>67</sup> ameliorative criminal legislation does not apply to those who commit their crimes prior to the effective date of the statute—even if they are tried, convicted, or sentenced, or if the sentence becomes final, after the effective date of the statute.<sup>68</sup>

Importantly, the presumption against retroactivity in the civil and criminal contexts, as codified in general saving statutes, is a presumption only; it can be overcome by clear legislative intent to the contrary.<sup>69</sup> If a statute explicitly states that it is retroactive—for

optional canon of statutory construction, or must be construed by reference to legislative intent in other criminal statutes, or is relevant only to ‘technical abatements’ of an entire criminal offense” (internal citations omitted)).

66. *Holiday*, 683 A.2d at 66–67 (“[Savings] statutes shift[] ‘the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction.’” (quoting Comment, *supra* note 36, at 127)). *But see infra* Part V (discussing constitutional savings clauses, which technically prohibit *all* retroactive legislation regardless of legislative intent).

67. *Dorsey*, 132 S. Ct. at 2332; *id.* at 2331–32 (stating that, although the general savings statute “set[s] forth an important background principle of interpretation,” Congress remains free to disregard it “either expressly or by implication as it chooses”); *see id.* at 2340 (Scalia, J., dissenting) (stating that where repeal is not explicit, “the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals”).

68. *See Marrero*, 417 U.S. at 661 (“[T]he saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force *at the time of the commission of an offense.*” (emphasis added)); *see also* *United States v. Blewett*, 746 F.3d 647, 655 (6th Cir. 2013) (stating that, “by default under the [federal] savings statute,” ameliorative statutory change “would not have applied to people who offended before the statute’s effective date, even those sentenced after the effective date”); *Holiday*, 683 A.2d at 72–74 (rejecting argument that federal general savings statute “is limited to preserving sentences already imposed”); *cf.* *United States v. Baum*, 74 F. 43, 46 (D. Utah 1896) (“The crime is complete as of the date of the criminal act, and, unless there be a remission, by the repeal of the only law which authorizes its punishment, or by direct pardon, such punishment may be inflicted. This is shown by the admittedly valid statutes of the United States, and of most of the states, to the effect that such a repeal in criminal cases should not affect causes of prosecution already accrued. Rev. St. U.S. Sec. 13. Wherever there is such general saving [statute] . . . the authority to punish is still preserved, and the intent, otherwise inferable, that the repeal should operate as a remission of past offenses, is negated [sic].”). *But cf. Dorsey*, 132 S. Ct. at 2335 (stating that, in non-capital cases involving application of federal sentencing guidelines, “the ordinary practice is to apply new penalties to defendants *not yet sentenced*, while withholding that change from defendants already sentenced” (emphasis added)).

69. *E.g., Dorsey*, 132 S. Ct. at 2326, 2332 (stating that federal general savings statute “set[s] forth an important background principle of interpretation” by which the Court “must assume that Congress did *not* intend [newly reduced] penalties to apply [to pre-Act conduct] unless it clearly indicated to the contrary. . . . But we find that clear indication here.”); *Landgraf v. USI Film*

example, an ameliorative criminal statute that is to be applied “irrespective of whether the crime was committed, the conviction had, or the sentence imposed, before or after” a date certain<sup>70</sup>—or if some other indicia of congressional intent suggests as much, then, as a matter of statutory construction, courts are duty-bound to give the statute retroactive effect.<sup>71</sup>

This obligation to give retroactive effect to retroactive laws, however, is subject to an obvious and important limitation. Courts will not give retroactive effect to retroactive laws if doing so would violate constitutional principles<sup>72</sup>—a qualification to which this Article now turns.

## II. RETROACTIVE LEGISLATION AND THE SEPARATION OF POWERS

Although the legislature has the power to pass retroactive laws, its power is constrained by the separation-of-powers doctrine.<sup>73</sup> To understand this constitutional limit on retroactive legislation, some brief background is instructive.

The federal constitution does not explicitly mention the separation-of-powers doctrine.<sup>74</sup> The doctrine arises not from Article III or any

Prods., 511 U.S. 244, 280 (1994) (“If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.”); *Holiday*, 683 A.2d at 79 (“[A]bsent an express provision specifying the class or classes to which the new sentencing scheme applies, we cannot conclude that, ‘obviously’ and inevitably, the legislature must have intended a retroactive, rather than a prospective, approach.”).

70. Act of Mar. 12, 1965, ch. 40, 1965 W. Va. Acts 202, 207; *see supra* notes 41 and 49 (discussing capital and non-capital ameliorative retroactive legislation); *cf.* OHIO REV. CODE ANN. § 2929.06(E) (West, Westlaw through 2013 File 47 of the 130th Gen. Assemb.) (stating that *non-ameliorative* statute making capital offenders eligible for a death sentence on resentencing “shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced”); *State v. White*, 972 N.E.2d 534, 543 (Ohio 2012) (“By enacting [§ 2929.06(E)], the General Assembly has clearly expressed its intent that [the statute making capital offenders eligible for a death sentence on resentencing] apply retroactively.”).

71. Rules of statutory construction require that courts give effect to the plain language of a statute, provided that it does not lead to absurd results. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (“[W]here, as here, the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

72. *Caminetti*, 242 U.S. at 485 (stating that court’s function is to enforce plain meaning of statute “if the law is within the constitutional authority of the lawmaking body which passed it”).

73. *See Krent, supra* note 36, at 66 (discussing separation of powers in context of retroactive legislation reducing drug sentences).

74. 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW, GOVERNMENT STRUCTURE § 37:1, at 386 (3d ed. 2011).

other single provision of the Constitution, but rather from the organization of the Constitution, which sets forth three separate branches of government.<sup>75</sup> In the words of Chief Justice John Marshall, “the legislature makes, the executive executes, and the judiciary construes the law.”<sup>76</sup> Of course, the separation contemplated by the Constitution is not a rigid one, as exemplified by an elaborate system of checks and balances that “mak[e] the three branches of government to some extent interdependent.”<sup>77</sup> As James Madison wrote, the separation of powers does “not mean that these departments ought to have *no* partial agency in, or *no* control over the acts of each other.”<sup>78</sup>

There is widespread agreement that one of the basic principles behind the separation-of-powers doctrine is the protection of individual liberty and the “deterrence of arbitrary or tyrannical rule.”<sup>79</sup> In *The Federalist No. 47*, James Madison called the separation of powers an “essential precaution in favor of liberty,” and stated that “the accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>80</sup> Consistent with this animating principle, “[t]he Supreme Court Justices have repeatedly acknowledged that the separation of powers doctrine protects the liberty of the citizen from a dangerous accumulation of power in the trustees of

75. *Id.*

76. *Id.* at 387–88 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825)).

77. DONALD L. DOERNBERG & C. KEITH WINGATE, *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS* 12 (2d ed. 2000). Among these checks and balances are “bicameralism, presidential veto, impeachment, the Senate’s power to approve treaties, its ‘advise and consent’ power generally, the House of Representative’s special role as the originator of all revenue bills, and judicial review.” *Id.* at 8.

78. *Id.* at 9 (quoting *THE FEDERALIST NO. 47* at 323–26) (emphasis added)). It is only “where the whole power of one department is exercised by the same hands which possess the whole power of another department [that] the fundamental principles of a free constitution[] are subverted.” *Id.* (quoting *THE FEDERALIST NO. 47* at 323–26); see *Loving v. United States*, 517 U.S. 748, 773 (1996) (“Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.”).

79. See, e.g., *Loving*, 517 U.S. at 757; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (Breyer, J., concurring); see also RICH, *supra* note 74, at 386 (discussing principal purposes behind Framers’ adoption of separation-of-powers doctrine).

80. DOERNBERG & WINGATE, *supra* note 77, at 8 (quoting *THE FEDERALIST NO. 47* at 323–26); see *Separation of Powers—Congressional Authority to Reopen Final Judgments*, 109 HARV. L. REV. 229, 235 (1995) [hereinafter *Final Judgments*] (“Since the middle of the seventeenth century, numerous commentators have warned of the dangers arising from consolidated powers. . . . Whereas the concentration of powers threatened to expose ‘the life and liberty of the subject . . . to arbitrary control,’ the separation of powers served to ‘save the people from autocracy.’” (quoting 1 CHARLES MONTESQUIEU, *THE SPIRIT OF THE LAWS* 174 (Thomas Nugent trans., 1949) (1748); *Myers v. United States*, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting))).

governance.”<sup>81</sup>

Despite agreement over the separation of powers’ liberty-protecting objectives, there is much debate over the analytical approaches used by courts to protect liberty: broadly speaking, formalism v. functionalism.<sup>82</sup> Formalists argue that individual liberty is best protected through a categorical, rule-bound approach.<sup>83</sup> Under a formalist approach to retroactivity, for example, the finality of judicial decisions and the exclusivity of the executive’s pardon power serve as proxies for the preservation of liberty.<sup>84</sup> Legislation that disrupts the finality of judicial decisions or resembles a pardon necessarily threatens liberty and therefore violates the separation of powers.<sup>85</sup> For functionalists, by contrast, individual liberty is best protected by a more searching inquiry, one that balances the need for social change with the risk of harm to a specific liberty concern.<sup>86</sup> Under a functionalist approach to retroactivity, legislation that reopens final judgments or resembles a pardon does not threaten liberty per se; a case-specific analysis of the legislation’s burden on individual liberty is required.<sup>87</sup>

Importantly, the federal constitution “does not impose the doctrine of separation of powers upon the states.”<sup>88</sup> Nevertheless, all fifty states divide power between the judicial, legislative, and executive branches,<sup>89</sup>

81. RICH, *supra* note 74, at 387; *see, e.g., Plaut*, 514 U.S. at 241 (Breyer, J., concurring) (stating that “protect[ion of] individual liberty” is a “basic ‘separation-of-powers’ principle”); *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting) (“The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.”).

82. DONALD E. LIVELY ET AL., *CONSTITUTIONAL LAW* 299 (1996); *see* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359, 363 (2000) (discussing formalism and functionalism in separation-of-powers context).

83. *See* Vermeule, *supra* note 82, at 360, 362.

84. *See, e.g., Plaut*, 514 U.S. at 239 (characterizing separation between legislature’s power to make law and judiciary’s power to render final judgments as “a prophylactic device, establishing high walls and clear distinctions”); *see also Final Judgments*, *supra* note 80, at 236 (“A fundamental premise of rule-based approaches is the notion that application of the rule generally effects the rationale behind it and thus dispenses with the need to apply the background rationale directly.”).

85. *Cf. Final Judgments*, *supra* note 80, at 235–36 (arguing that, by failing to take into account the individual liberty concerns underlying the separation of powers, the separation of powers becomes an end in itself).

86. *See* Vermeule, *supra* note 82, at 360, 363; *Final Judgments*, *supra* note 80, at 238.

87. *See, e.g., Plaut*, 514 U.S. at 246 (Breyer, J., concurring) (balancing “risks of the very sort that our Constitution’s ‘separation-of-powers’ prohibition seeks to avoid” against “offsetting legislative safeguards that . . . offer assurances that minimize those risks”); *see also* Vermeule, *supra* note 82, at 360 (discussing functionalism’s case-specific balancing).

88. RICH, *supra* note 74, at 389.

89. Norman R. Williams II, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. Rev. 963, 1013 n.108 (1994).

with most state constitutions containing specific separation-of-powers provisions.<sup>90</sup> The Framers of the federal constitution “actually borrowed the separation of powers doctrine from the states” and, not surprisingly, “[f]ederal separation-of-powers doctrine often influences state jurisprudence.”<sup>91</sup>

Retroactive criminal legislation—particularly, legislation that reduces final sentences—raises two important separation-of-powers questions. The first involves the relationship between the legislature and the judiciary: Does the reduction of final sentences violate the separation of powers by interfering with the final judgments of courts? The second involves the relationship between the legislature and the executive: Does retroactive repeal legislation violate the separation of powers by infringing the executive’s pardon power?<sup>92</sup> Part III turns to the first question; Part IV takes up the second.

### III. THE REDUCTION OF FINAL DEATH SENTENCES DOES NOT VIOLATE THE SEPARATION OF POWERS BY INTERFERING WITH THE FINAL JUDGMENTS OF COURTS

As discussed in Part I, the law is well settled that a legislature can enact laws that retroactively apply to pending cases so long as its intent is clear.<sup>93</sup> In the criminal context, this means that a legislature can reduce punishment for anyone who has not exhausted his direct appeals—i.e., one who committed a crime before the effective date of the ameliorative statute, but who has not been arrested, tried, convicted, or sentenced, or whose sentence has not been affirmed by the highest court on direct appeal, until after the effective date of the statute.<sup>94</sup>

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90. RICH, *supra* note 74, at 389.

91. *Id.*; Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in Era of Positive Government*, 24 RUTGERS L.J. 1057, 1067 (1993); *see also* Evans v. State, 872 A.2d 539, 546 (2005) (stating that “the proposed federal Constitution’s formulation for separating the powers of government was modeled after many existing state constitutions”).

92. As discussed more fully in Part III, this Article uses the word “pardon” generally to refer to the governor’s authority to pardon or commute sentences.

93. *See supra* Part I and note 50 (discussing retroactive legislation and cases upholding retroactive legislation in pending cases); *see also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (“It is true . . . that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.”).

94. *See Plaut*, 514 U.S. at 226; *cf.* *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (“By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.”); *Bradley v. United States*, 410 U.S. 605, 609 (1973) (“Final judgment in a

But can a legislature go whole-hog, reducing punishment for those under a final sentence as well? One might reasonably argue that, although the legislature has the power to repeal the death penalty retroactively in pending cases, the separation of powers between the judiciary and legislature prohibits the legislature from reducing *final* death sentences. While this argument is a reasonable one and is supported by strong authority,<sup>95</sup> the better argument, supported by stronger authority, is that the reduction of final death sentences raises no separation-of-powers problem. As Professor Adrian Vermeule has written, courts' rejection of such retroactive legislation on separation-of-powers grounds can best be described as "paranoid . . . display[ing] a prickly sensitivity to any slighting of judicial prerogatives, a dismissive impatience toward legislative aims, and a general, brooding suspicion of legislative bad faith."<sup>96</sup> An analysis of the issue begins with the watershed case of *Plaut v. Spendthrift Farm, Inc.*<sup>97</sup>

#### A. *Plaut v. Spendthrift Farm, Inc.'s Prohibition on Re-Opening Final Judgments*

In 1996, in *Plaut*, the Supreme Court addressed the limits on Congress' power to pass retroactive laws.<sup>98</sup> The Court held that Congress cannot make retroactive laws that require courts to reopen final judgments; the separation-of-powers doctrine prohibits it.<sup>99</sup> Although *Plaut* is not binding on states, it is strong persuasive authority for courts interpreting state constitutions.<sup>100</sup> It is therefore instructive to examine this case in some detail.

In 1987, plaintiff shareholders in *Plaut* brought suit against the defendant company, alleging fraud and deceit in the sale of stock under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.<sup>101</sup> On June 20, 1991, with

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criminal case means sentence. The sentence is the judgment.").

95. See *infra* Part III (discussing cases prohibiting reduction of final sentences).

96. Vermeule, *supra* note 82, at 360; see Krent, *supra* note 36, at 57 (arguing that "there are no sound policy reasons or constitutional grounds to presume that congressional leniency should apply prospectively only. Congress should be accorded the discretion to determine where to draw the line in determining the proper amount of retribution for those who committed offenses prior to the decriminalization or diminution in punishment."); Mitchell, *supra* note 36, at 39 ("Whereas a retroactive increase in punishment is constitutionally barred, a decrease is not. Denying the retroactive application of an ameliorative legislative change . . . ignores the fundamentally important concept that the standards of justice should and do evolve.").

97. 514 U.S. 211 (1995).

98. *Id.* at 218–19.

99. *Id.*

100. See RICH, *supra* note 74, at 389; Feldman, *supra* note 91, at 1067.

101. *Plaut*, 514 U.S. at 213.

lengthy pretrial proceedings in *Plaut* still underway, the Supreme Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.<sup>102</sup> *Lampf* replaced various state statutes of limitations governing shareholder actions under section 10(b) and Rule 10b-5 with a uniform federal limitations rule,<sup>103</sup> and in so doing, rendered the *Plaut* plaintiff shareholders' action untimely under the new *Lampf* rule.<sup>104</sup> The district court, applying *Lampf*, dismissed the shareholders' claims with prejudice on August 13, 1991, and the judgment became final thirty days later.<sup>105</sup>

Finding flaw with the Court's failure to exempt pending cases from operation of the new uniform federal limitations rule, Congress enacted § 27A of the Securities Exchange Act on December 19, 1991.<sup>106</sup> Section 27A(b) of the law required the "reinstate[ment] on motion by the plaintiff" of all shareholder actions that were pending at the time *Lampf* was decided and were subsequently dismissed as untimely under *Lampf*.<sup>107</sup> Pursuant to § 27A(b), the shareholders filed a timely motion for reinstatement in the district court.<sup>108</sup> The district court denied the motion on the ground that § 27A(b) was unconstitutional, and the Sixth Circuit affirmed.<sup>109</sup>

In a 7-2 decision, the Supreme Court affirmed, holding that § 27A(b)

102. *Id.*

103. Under the Court's uniform federal limitations rule, "[I]tigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* (quoting *Lampf, Pleva, Limpkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991)) (internal quotations omitted).

104. On the day it decided *Plaut*, the Court also decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991):

[I]n which a majority of the Court held, albeit in different opinions, that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to *all cases pending on direct review*. The joint effect of *Lampf* and *Beam* was to mandate application of the [uniform federal] . . . limitations period to petitioners' suit [in *Plaut*].

*Plaut*, 514 U.S. at 214 (emphasis added) (internal citation omitted).

105. *Id.*

106. *Id.* at 246 (Stevens, J., dissenting).

107. *Id.* at 214-15. Section 27A(b) of the Securities Exchange Act provides:

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—(1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, *shall* be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

15 U.S.C. § 78aa-1 (2012) (emphasis added).

108. *Plaut*, 514 U.S. at 215.

109. *Id.*

violated the separation of powers because it required courts to reopen final judgments.<sup>110</sup> In restricting the temporal reach of retroactive legislation, the Court acknowledged that there is no constitutional impediment to the passage of retroactive laws impacting *pending* cases.<sup>111</sup> “When a new law makes clear that it is retroactive,” the Court stated, “an appellate court must apply that law in reviewing judgments *still on appeal* that were rendered before the law was enacted, and must alter the outcome accordingly.”<sup>112</sup> By extension, a trial court must likewise apply a retroactive law in deciding a case that involves conduct predating the law.<sup>113</sup>

But laws that retroactively command courts to reopen final judgments are different. Article III of the Constitution, the Court explained, empowers the judiciary “not merely to rule on cases, but to *decide* them,” that is, to render a dispositive judgment that “conclusively resolves the case.”<sup>114</sup> By enacting legislation that reopens final judgments, Congress exercises the “power to render final judgments”—a power that belongs to the judiciary alone.<sup>115</sup> “When retroactive legislation requires its own application in a case already *finally* adjudicated,” the Court stated:

[I]t does no more and no less than “reverse a determination once made, in a particular case.” . . . Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very* case was something other than what the courts said it was.<sup>116</sup>

According to the Court, the laudable purposes of legislation reopening final judgments was beside the point:

Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislature’s genuine conviction (supported by all the law professors in the land) that the judgment was

110. *Id.* at 240.

111. *Id.* at 226.

112. *Id.* (emphasis added); *see id.* at 227 (“It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress’s latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must ‘decide according to existing laws.’” (internal citations omitted))

113. *See id.* at 226–27.

114. *Id.* at 218–19.

115. *Id.* at 231.

116. *Id.* at 227–28.

wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.<sup>117</sup>

In support of its holding, the Court first looked to the Framers' intent. According to the Court, a "sense of a sharp necessity to separate the legislative from the judicial power . . . triumphed among the Framers," who "lived among the ruins of a system of intermingled legislative and judicial powers."<sup>118</sup> Long before and well after the Revolution, the Court noted, legislatures functioned "as courts of equity of last resort" or nullified judicial decisions through the passage of legislation.<sup>119</sup>

The Court next turned to federal and state court decisions in the years immediately following ratification of the Constitution, which confirmed that the separation-of-powers doctrine "forbade interference with the *final* judgments of courts."<sup>120</sup> Judicial decisions and commentary from the mid-nineteenth century, the Court noted, further clarified that the line between permissible retroactive lawmaking and the unconstitutional usurpation of judicial authority is *finality*.<sup>121</sup> Lastly, the Court emphasized the complete absence of precedent for retroactive legislation mandating the reopening of final judgments. "That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."<sup>122</sup>

### B. Limiting Plaut

*Plaut*'s holding is well settled: Congress violates the separation of powers when it passes legislation reopening final judgments.<sup>123</sup> At first

117. *Id.* at 228.

118. *Id.* at 219–21.

119. *Id.* at 219–20.

120. *Id.* at 224 ("The power to annul a final judgment . . . was 'an assumption of Judicial power' and therefore forbidden." (quoting *Bates v. Kimball*, 2 Chipman 77 (Vt. 1824))).

121. *Id.* at 224–25; *see id.* at 226 ("[J]udgments of Article III courts are 'final and conclusive upon the rights of the parties.'" (quoting *Gordon v. United States*, 117 U.S. App'x. 697, 700–704 (1864) (opinion of Taney, C.J.))); *see also id.* at 225 ("If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry." (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 94–95 (1868))).

122. *Id.* at 230.

123. *Id.* at 219. One might argue that, for purposes of retroactivity in the criminal context, and especially in the death penalty context, "final judgment" should not mean the same thing that it means in the habeas context—i.e., the imposition of a sentence and the exhaustion of direct appeals. Instead, the argument goes, "final judgment" should refer to the *completion* of the sentence—i.e., time served or, in the death penalty context, execution of the prisoner. After all, one might argue, in the criminal context,

[T]he broad scope of available collateral remedies raises the question of whether, as a

blush, *Plaut* appears to foreclose legislation that reduces final death sentences. But a closer look at *Plaut* reveals three important limiting principles that provide support for such legislation. A discussion of these three limiting principles follows.

### 1. Principle One: *Plaut* Does not Prohibit the Legislature from Reopening Final Judgments in Criminal Cases

The first limiting principle drawn from *Plaut* narrows the Supreme Court's holding to its facts: a legislature may pass legislation reopening final judgments in criminal—but not civil—cases.<sup>124</sup> Authority for this limiting principle comes from *Plaut* itself, which was silent as to the reduction of final sentences, as well as from federal case law after *Plaut* that supports the reduction of final sentences.

#### a. *Plaut*'s Silence Regarding the Reduction of Final Sentences

*Plaut* was a civil case holding that Congress violated the separation of powers in passing a law that “retroactively command[ed] the federal courts to reopen final judgments” for money damages.<sup>125</sup> There was

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practical matter, a conviction [or sentence] is ever “certain” prior to completion of sentence or complete exhaustion of collateral remedies. Additionally, there is so much uncertainty due to the possibility of retroactive application of constitutional decisions and the availability of relief on that basis, that adding the possibility of retroactive application of legislative changes does not significantly increase the amount of uncertainty.

Comment, *supra* note 36, at 145–46 (footnotes omitted). Construing “final judgment” in this way would permit the legislature to reduce any sentence, including a death sentence, at any time. While this argument is attractive, it is contrary to the Supreme Court's determination that the imposition of a sentence “is the judgment” for purposes of retroactivity in the criminal context. *Bradley v. United States*, 410 U.S. 605, 609 (1973) (emphasis added); *accord*. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987). It also misunderstands the finality concern articulated by the Court in *Plaut*. According to *Plaut*, retroactive changes to final judgments violate the separation of powers *not* because they undermine certainty but rather because they undermine the judiciary's “duty . . . to say what the law is.” *Plaut*, 514 U.S. at 218–19. Finality in this context is therefore not a concern with certainty but rather a concern with power; the imposition of a sentence and the exhaustion of direct appeals marks the line that separates the judicial and legislative powers. As discussed below, this Article argues that the separation of powers nevertheless permits the legislature to reopen these concededly “final judgments.” For other thoughtful arguments regarding why the legislative reduction of final sentences does not undermine final judgments, see Krent, *supra* note 36, at 74 (arguing that reduction of final sentences “does not disturb the finality of a judgment but rather modifies the prior ruling's continuing impact”); Mitchell, *supra* note 36, at 39 (arguing that reduction of final sentences does not undermine final judgments because it “does not disturb finalized convictions”).

124. *Commonwealth v. Sutley*, 378 A.2d 780, 798 (Pa. 1977) (Manderino, J., dissenting) (arguing that reopening of final criminal judgments does not violate the separation of powers and distinguishing cases prohibiting reopening of final *civil* judgments).

125. *Plaut*, 514 U.S. at 219; see *Miller v. French*, 530 U.S. 327, 344 (2000) (“[T]he situation before the Court in [*Plaut* involved] legislation that attempted to reopen the dismissal of a suit

simply no discussion of the reopening of final judgments in the criminal context. This distinction between the civil and criminal contexts is significant. For example, one of the reasons relied upon by the Court to prohibit the reopening of final judgments was the intent of the Framers, who felt a “sharp sense of necessity” to separate powers.<sup>126</sup> But the Framers did not make this separation absolute; in the criminal context, the federal constitution, like its state counterparts, permits the executive to pardon offenses.<sup>127</sup> As the Court stated in *Plaut*, a final judicial decision in the civil context “conclusively resolves the case because a judicial Power is one to render dispositive judgments.”<sup>128</sup> In the criminal context, however, a final judicial decision is not conclusive because it remains subject to the pardon power.<sup>129</sup> *Plaut* never discussed the pardon power, nor why the Framers would permit the executive to reduce final sentences but not the legislature.

Similarly, *Plaut* did not address how a blanket prohibition on the reopening of final judgments in the criminal context would render the Ex Post Facto Clause largely superfluous. According to the Supreme Court, “two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.”<sup>130</sup> By contrast, *Plaut*’s separation-of-powers prohibition requires only the first element.<sup>131</sup> Therefore, if *Plaut*’s holding were extended to the criminal context, the separation of powers would largely subsume the Ex Post Facto Clause; it would prohibit a legislature from enacting any retroactive legislation—whether ameliorative or more onerous—that reopened final judgments.<sup>132</sup>

By this logic, the Ex Post Facto Clause would have no application except in cases that had not resulted in final judgment. Importantly, the Supreme Court has not construed the Ex Post Facto Clause so narrowly.

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seeking money damages . . . .”); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 80 (D.D.C. 2009) (“Absent further guidance . . . it is not up to this Court to expand upon the basic holding in *Plaut*—that a statute is unconstitutional as a violation of the separations of power to the extent that it requires the reopening of a final judgment for money damages.”).

126. See *Plaut*, 514 U.S. at 221.

127. U.S. CONST. art. II, § 2, cl. 1.

128. *Plaut*, 514 U.S. at 219 (internal quotations omitted).

129. See U.S. CONST. art. II, § 2, cl. 1; *State v. Morris*, 378 N.E.2d 708, 715 (Ohio 1978) (“[E]xercise of the pardoning power has never been held to constitute an infringement of the judicial power.”); *Sutley*, 378 A.2d at 798 (Manderino, J., dissenting) (“A ‘final judgment’ in a criminal case . . . has never been held to be free from the power of pardon.”).

130. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

131. See *Plaut*, 514 U.S. at 219.

132. See *id.*

In *Weaver v. Graham*, the Court invalidated under the Ex Post Facto Clause a statute that reduced good time credit for a defendant whose sentence was final.<sup>133</sup> The Court never mentioned the statute's reopening of final judgments, much less that such reopening violated the separation of powers.<sup>134</sup> Indeed, the Court's only mention of the separation of powers appeared in a footnote, in which the Court stated that "[t]he *ex post facto* prohibition . . . upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law."<sup>135</sup> Justice Rehnquist's concurring opinion went further, explicitly acknowledging the Florida legislature's power to enact retroactive criminal legislation *benefitting* those under a final sentence.<sup>136</sup> The question of whether to "provide prisoners in petitioner's position with the benefits" of a new law was not one of separation of powers, but one of statutory intent, and was therefore, "of course, one for Florida to resolve."<sup>137</sup>

*Weaver's* majority and concurring opinions suggest that separation-of-powers concerns over retroactive criminal legislation begin and end with the Ex Post Facto Clause.<sup>138</sup> In other words, if retroactive criminal legislation is not *ex post facto*, it does not violate the separation of powers.<sup>139</sup> Because *Plaut* was not a criminal case, the Court never addressed this interaction between the Ex Post Facto Clause and broader separation-of-powers concerns.<sup>140</sup>

Two other reasons cited by the *Plaut* Court in support of its holding were the reluctance of federal and state courts to uphold legislation reopening final judgments in the civil context, and the reluctance of

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133. *Weaver*, 450 U.S. at 25–27, 36.

134. *See id.*

135. *Id.* at 29 n.10.

136. *Id.* at 38–39 (Rehnquist, J., concurring).

137. *Id.* at 39.

138. *See id.* at 33–39.

139. *See id.* at 29 n.10, 36.

140. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 213 (1995); *cf. Commonwealth v. Sutley*, 378 A.2d 780, 794 (Pa. 1977) (Roberts, J., dissenting) ("Where . . . none of the *specific* prohibitions of the Pennsylvania Constitution have been violated, the Legislature has the power to enact legislation which mitigates the consequences of a final judgment." (emphasis added)); Vermeule, *supra* note 82, at 361, 398 (proposing that state judges declare nonjusticiable "any claim that legislation intrudes upon the freestanding grant of the 'judicial power' vested in state courts under a separation-of-powers scheme," while retaining power to "adjudicate claims that legislation either violates *specific constitutional provisions* governing judicial authority, such as a clause protecting judicial salaries from reduction, or violates *independent constitutional rules*, such as the right of jury trial." (emphasis added)).

Congress to pass such legislation.<sup>141</sup> In the criminal context, especially at the state level, these arguments are far less persuasive. Simply put, legislatures have passed, and courts have upheld, legislation reducing final sentences.<sup>142</sup>

Subsequent Supreme Court cases provide no further clarity regarding *Plaut*'s applicability in the criminal context. In *Loving v. United States*, a federal death row inmate challenged Congress' delegation of authority to the President to prescribe aggravating factors permitting imposition of the death penalty.<sup>143</sup> Although the Court cited *Plaut* for the general proposition "that one branch of the Government may not intrude upon the central prerogatives of another,"<sup>144</sup> the similarities between *Plaut* and *Loving* end there. The issue in *Loving* was not whether Congress could reopen a final judgment, but rather whether Congress could confer power upon the President to establish factors narrowing the class of death-eligible defendants.<sup>145</sup> The Court concluded that Congress' delegation of such power to the President "was in all respects consistent" with the separation of powers.<sup>146</sup>

More recently, in *Miller v. French*, the Court applied *Plaut* in the context of the Prison Litigation Reform Act ("PLRA"), which provided for, among other things, the termination of ongoing injunctive relief in civil actions challenging prison conditions.<sup>147</sup> Citing *Plaut*, the Court held that ongoing injunctive relief was not a final judgment and so a law terminating such relief did not violate the separation of powers.<sup>148</sup> Although *Miller* directly addressed whether Congress could reopen a final judgment, it did so in the civil context (i.e., legislation terminating civil relief), not the criminal context (i.e., legislation modifying a final conviction or sentence).<sup>149</sup> *Miller* therefore reinforced *Plaut*'s holding, but did not extend it to the criminal context.

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141. See *Plaut*, 514 U.S. at 223, 230.

142. See *supra* notes 41 and accompanying text (discussing legislation reducing final sentences), 43 (discussing federal Smarter Sentencing Act of 2014); see also *infra* Part III.C (discussing state cases upholding legislation that reduced final sentences).

143. 517 U.S. 748, 751–52 (1996).

144. *Id.* at 757 (citing *Plaut*, 514 U.S. at 225–26) ("Congress may not revise judicial determinations by retroactive legislation reopening judgments").

145. *Id.* at 759.

146. *Id.* at 774; see *id.* at 769 ("There is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief.").

147. 530 U.S. 327, 330–34 (2000).

148. *Id.* at 344–45, 350.

149. See *id.* at 344–45.

b. *Chambers'* Implied Prohibition on the  
Reduction of Final Sentences

Notwithstanding *Plaut's* silence as to whether the Constitution prohibits the reopening of final judgments in criminal cases, the Supreme Court's decision more than sixty years earlier in *United States v. Chambers* strongly implies that retroactive reduction of final criminal sentences is prohibited.<sup>150</sup> *Chambers* therefore presents an obstacle to the reduction of final sentences.

In 1934, the Court in *Chambers* explicitly declined to address whether a change in the law (in that case, the passage of the Twenty-First Amendment, which decriminalized the transportation, importation, and possession of alcohol by repealing the Eighteenth Amendment) could be applied retroactively to final judgments.<sup>151</sup> While giving retroactive effect to the Twenty-First Amendment in cases *pending* at the time of its ratification, the Court stated that it was "not dealing with a case where final judgment was rendered prior to that ratification. Such a case would present a distinct question which is not before us."<sup>152</sup> In a *per curiam* opinion issued one month later in *Massey v. United States*, the Court clarified that the Twenty-First Amendment's application to pending cases included cases on direct appeal at the time of ratification.<sup>153</sup> Again, the Court avoided squarely addressing the question of whether an ameliorative change in criminal law could be applied retroactively to undo a final judgment.

Many lower federal courts subsequently addressed the question left open in *Chambers*. All held that the Twenty-First Amendment did not apply retroactively to final judgments, and all cited in support the Court's qualifying statement in *Chambers*.<sup>154</sup> For example, according to the Third Circuit,

[T]he Supreme Court expressly excluded from the scope of [*Chambers*] persons who were serving sentences upon final judgments. . . . The law seems to be well settled that a repeal, after

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150. See *United States v. Chambers*, 291 U.S. 217, 226 (1934).

151. *Id.* at 222–23, 226.

152. *Id.* at 226.

153. *Massey v. United States*, 291 U.S. 608, 610 (1934) ("[I]t appears from the record that no final judgment was rendered herein against the petitioner prior to the ratification of the Twenty-First Amendment. The judgment of the Circuit Court of Appeals, as entered in the cause of this petitioner, is accordingly reversed . . .").

154. See *infra* notes 156–57 and accompanying text (considering application of Twenty-First Amendment to sentences that became final prior to ratification).

final judgment, will neither vacate the judgment nor arrest the execution of a sentence partly executed under that judgment.<sup>155</sup>

The Second, Fifth, and Sixth Circuits held likewise.<sup>156</sup> As the District Court for the Southern District of Illinois stated,

Whatever doubt there may be as to what the [C]ourt intended in its opinion in the *Chambers* Case . . . is to my mind eliminated by the last few lines of the opinion. . . . It was entirely unnecessary, of course, for the Supreme Court to make this statement [limiting its holding to pending cases] with reference to a question not before it, and different minds may differ as to the purpose the court had in mind in making such a plain and unequivocal statement. To my mind, however, . . . it is a plain warning that the rule announced in its opinion is to have no application to cases where a final judgment was rendered prior to the adoption of the Twenty-First Amendment.<sup>157</sup>

The Supreme Court's qualifying statement in *Chambers*, together with lower federal courts' uniform interpretation of that statement, strongly supports a constitutional prohibition on the retroactive

155. United States *ex rel.* Nerbonne v. Hill, 70 F.2d 1006, 1006–07 (3d Cir. 1934) (per curiam); see United States v. Voorhees, 72 F.2d 826, 826 (3d Cir. 1934) (per curiam) (refusing to give retroactive effect to Twenty-First Amendment where “[f]inal judgment and sentence were entered prior to . . . ratification,” and noting that the Supreme Court’s holding in *Chambers* “did not apply if such was the fact”).

156. See United States *ex rel.* Randall v. U.S. Marshal for E.D.N.Y., 143 F.2d 830, 831 (2d Cir. 1944) (per curiam) (“When the defendant was sentenced and the judgment against him was affirmed and no application for a writ of certiorari was made within the period allowed by statute[,] judicial action became final and the repeal of the prohibition amendment did not under the following authorities affect the rights of the parties.”); Odekirk v. Ryan, 85 F.2d 313, 314 (6th Cir. 1936) (“[W]hile it is settled that the repeal of the Eighteenth Amendment had the effect of terminating pending prosecutions, including those on appeal, for violation of the National Prohibition Act . . . , it is also settled that where an offense was committed against that act and a sentence passed on the offender prior to its repeal, the sentence is valid and must be legally executed.”). In *Hosier v. Aderhold*, the Fifth Circuit held:

The Twenty-First Amendment . . . cannot in our opinion be made to apply retroactively to a case like this where the prosecution [has] been completed and a valid judgment entered before its adoption. That judgment, valid when rendered, remains valid, without the necessity of being constantly renewed, until satisfied by execution. . . . The decisions on the subject, though there have not been many reported, without exception hold that the repeal of a criminal statute after final judgment does not arrest or interfere with execution of the sentence.

71 F.2d 422, 422 (5th Cir. 1934) (internal citations omitted); accord. United States v. Ing, 8 F. Supp. 471, 471–72 (E.D.N.Y. 1934).

157. United States *ex rel.* Behen v. Ruppel, 6 F. Supp. 346, 348 (S.D. Ill. 1934) (“[T]he ratification of the Twenty-First Amendment to the Constitution thereby repealing the Eighteenth Amendment and laws enacted thereunder, has no effect upon a person serving a sentence in prison as a result of a final judgment entered prior to such adoption and such repeal.”); *id.* (distinguishing *Chambers*, in which the Supreme Court “was considering solely the question as to the effect which the repeal of a statute would have on pending prosecutions and not cases where the matter in controversy had been reduced to a final judgment”).

reduction of final sentences.<sup>158</sup> In short, *Chambers* and its progeny support the extension of *Plaut* to the criminal context.

One might argue, however, that *Chambers* should not be read so broadly. While *Chambers* may prohibit the reversal of a final conviction for conduct no longer deemed criminal,<sup>159</sup> the argument goes, it does not prohibit the reduction of final sentences. This distinction is unconvincing. *Chambers*, as uniformly interpreted by the lower courts, supports the proposition that Congress cannot enact criminal laws that retroactively modify “final judgments.”<sup>160</sup> As the Supreme Court has repeatedly stated, “[f]inal judgment in a criminal case means sentence. The sentence is the judgment.”<sup>161</sup> Therefore, once there is a final judgment—i.e., the person is sentenced and all appeals have been taken—Congress cannot retroactively reduce a sentence any more than it can retroactively reverse a conviction for conduct no longer deemed criminal. Both actions undo a final judgment and therefore, as *Chambers* appears to say, are prohibited.<sup>162</sup>

Additionally, the fact that *Chambers* involved a repeal by constitutional amendment, not by statute, does not diminish *Chambers*’ authority for the proposition that Congress cannot enact laws that retroactively modify final judgments in the criminal context.<sup>163</sup> In fact, this distinction would seem to support—not undermine—a prohibition on such laws. After all, if the Supreme Court was unwilling to undo a final judgment as the result of an amendment to the Constitution—the supreme law of the land—it seems even less likely that it would be willing to undo a final judgment as the result of a new statute.<sup>164</sup>

### c. *Dorsey*’s Support for the Reduction of Final Sentences

Although *Chambers* and its interpretation by lower courts point toward a constitutional bar on the retroactive reduction of final sentences, the Court’s recent decision in *Dorsey* suggests otherwise.<sup>165</sup> In 2012, in *Dorsey v. United States*, the Court addressed whether the Fair Sentencing Act of 2010, which, among other things, reduced the

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158. See *United States v. Chambers*, 291 U.S. 217, 226 (1934); see also *supra* notes 150–57 (discussing cases interpreting *Chambers*).

159. See *Chambers*, 291 U.S. at 226 (affirming dismissal of indictment).

160. *Id.*

161. *Bradley v. United States*, 410 U.S. 605, 610 (1973) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)).

162. See *Chambers*, 291 U.S. at 226.

163. *Id.* at 222.

164. See *id.* at 226.

165. See *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012).

penalty for crack-cocaine trafficking offenses, applied retroactively to those who committed their crimes before the Act's effective date but were not sentenced until after that date.<sup>166</sup> The Court began by acknowledging the presumption of non-retroactivity created by the federal general savings statute, and explained that this presumption could be overcome either "expressly or by implication."<sup>167</sup> Although the Court found no express congressional intent to apply the Fair Sentencing Act's reduced penalties retroactively, the Court concluded that retroactive application was implied based on various "indicia of congressional intent."<sup>168</sup> Significantly, the Court's holding extended only to those who, like the plaintiffs in *Dorsey*, were sentenced *after* the Act's passage.<sup>169</sup> It did not extend to the tens or even hundreds of thousands of crack offenders whose sentences became final before the effective date of the Act, or those whose sentences were pending on appeal at the time of the Act's passage.<sup>170</sup>

At first glance, *Dorsey* appears to provide strong support for *Plaut*'s application in the criminal context. After all, not only did the *Dorsey* Court refuse to undo the final sentences of crack offenders, but it also refused to undo the sentences of crack offenders whose sentences had not yet become final and were pending on appeal at the time of passage of the Fair Sentencing Act.<sup>171</sup> Even *Plaut* did not go that far, holding that Congress can retroactively modify judgments in cases "still on appeal that were rendered before the law was enacted."<sup>172</sup>

But a careful reading of *Dorsey* points to a different conclusion—that Congress may retroactively undo final sentences in certain circumstances, so long as it is clear that it is doing so.<sup>173</sup> Although neither the Fair Sentencing Act's plain language nor other indicia of congressional intent revealed an intent by Congress to re-open final sentences, the Court implicitly acknowledged that Congress had the

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166. *Id.* at 2326.

167. *Id.* at 2331; *see supra* note 64 and accompanying text (discussing federal general savings statute).

168. *See Dorsey*, 132 S. Ct. at 2331 ("Six considerations, taken together, convince us that Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date.").

169. *Id.* at 2326.

170. *Id.*; *see Krent*, *supra* note 36, at 54.

171. *See Dorsey*, 132 S. Ct. at 2326 ("The question here is whether the Act's more lenient penalty provisions apply to offenders who committed a crack cocaine crime before August 3, 2010, but *were not sentenced* until after August 3." (emphasis added)).

172. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995).

173. *See Dorsey*, 132 S. Ct. at 2335.

power to do so.<sup>174</sup> In its discussion of the disparities created by treating those sentenced before enactment of the Fair Sentencing Act differently from those sentenced after the Act, the Court stated that “those disparities will exist whenever Congress enacts a new law changing sentences (*unless Congress intends re-opening sentencing proceedings concluded prior to a new law’s effective date*).”<sup>175</sup> This sentence may stand for the unremarkable proposition that Congress has the power to undo sentences pending on direct review, but the Court’s use of the terms “re-open[]” and “concluded” appears to indicate finality.<sup>176</sup> To paraphrase Justice Scalia in *Plaut*, there is no need to “re-open” actions that are still pending on appeal.<sup>177</sup> While it is “perhaps arguable” that this language “does *not* include suits that are not yet *finally* dismissed, *i.e.*, suits still pending on appeal . . . there is *no* basis for the contention that it includes *only* those.”<sup>178</sup> Significantly, in his dissenting opinion in *Dorsey*, Justice Scalia, joined by then-Chief Justice Roberts, Justice Thomas, and Justice Alito, did not take issue with the majority’s reference to Congress’ ability to re-open final sentencing proceedings.<sup>179</sup>

Additional language in *Dorsey* supports the proposition that the Court’s reluctance to extend the Fair Sentencing Act to those finally sentenced prior to the Act’s passage was driven by rules of statutory interpretation, not constitutional concerns. “[I]n federal sentencing,” the Court stated, “the *ordinary practice* is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.”<sup>180</sup> Importantly, the Court did not state that withholding new penalties from defendants already sentenced was constitutionally prohibited; the Court merely stated that such was not the “ordinary practice.”<sup>181</sup> Stated another way, the *Dorsey* Court refused to extend the Fair Sentencing Act to those sentenced prior to the

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174. *See id.*

175. *Id.* (emphasis added).

176. *Id.*

177. *Plaut*, 514 U.S. at 217 (“There is no need to ‘reinstate’ actions that are still pending; [the new law] could and would be applied by the courts of appeals.”).

178. *Id.*

179. *See Dorsey*, 132 S. Ct. at 2339–44 (Scalia, J., dissenting).

180. *Id.* at 2335; *see id.* at 2332 (“[T]he Sentencing Reform Act sets forth a special and different background principle [than the federal general savings statute]. Th[e Sentencing Reform Act] . . . says that when ‘determining the particular sentence to be imposed’ in an initial sentencing, the sentencing court ‘shall consider,’ among other things, the ‘sentencing range’ established by the Guidelines that are ‘*in effect on the date the defendant is sentenced.*’” (internal citation omitted)).

181. *Id.* at 2335.

Act's passage not because the Constitution's separation of powers prohibited it, but rather because Congress did not intend it.<sup>182</sup>

Because *Dorsey* rested on statutory, not constitutional, grounds, the Court's refusal to extend the Fair Sentencing Act to those finally sentenced does not mean that Congress lacks the power to reduce final sentences through passage of retroactive criminal statutes.<sup>183</sup> Indeed, had the Court decided that Congress could not, under any circumstances, retroactively reduce final sentences without violating the separation-of-powers doctrine, the Court would have invoked this doctrine and relied on *Plaut* or *Chambers* in support. Significantly, the Court did neither of these things.<sup>184</sup>

Lower federal courts have universally held that the Fair Sentencing Act does not apply to those finally sentenced before the Act took effect.<sup>185</sup> Like *Dorsey*, however, these lower court decisions were premised on rules of statutory construction, not on the separation-of-powers-doctrine.<sup>186</sup> None held that Congress lacked the power to undo final sentences; in fact, the opposite is true. In *United States v. Blewett*, for example, the Sixth Circuit joined “[e]very other federal court of appeals” in holding that the Fair Sentencing Act “does not retroactively undo final sentences,” but strongly implied that Congress could have made the Act retroactive to offenders already sentenced if it had wanted to.<sup>187</sup> According to the Sixth Circuit, a different result might have been achieved had Congress included in the Fair Sentencing Act language “provid[ing] that [the Act] covers offenders sentenced before it became effective” or otherwise “clear[ly] . . . show[ing] a desire to apply the new law to offenders already sentenced.”<sup>188</sup> Given the Act's inapplicability to final sentences, the Sixth Circuit encouraged Congress to “think seriously about making the new minimums retroactive,” and encouraged the plaintiff to address his request for a sentence reduction “to a different forum altogether (the Congress and the President).”<sup>189</sup>

*Blewett*'s five dissenting opinions also assumed Congress' authority

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182. *See id.*

183. *See id.*

184. *See id.*

185. *United States v. Blewett*, 746 F.3d 647, 652 (6th Cir. 2013) (“Every other federal court of appeals—except the Federal Circuit, which does not hear criminal cases—has [refused to apply Fair Sentencing Act to individuals sentenced before its effect date.]”).

186. *See, e.g., id.* at 651 (“Congress . . . intended to follow the ‘ordinary practice [of] apply[ing] new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.” (quoting *Dorsey*, 132 S Ct. at 2335)).

187. *See Blewett*, 746 F.3d at 649, 659.

188. *Id.* at 650.

189. *Id.* at 660.

to apply the Fair Sentencing Act retroactively to final sentences. According to Judge White,

[T]he scheme set up by Congress contemplates not only that finality is not sacrosanct, but that consideration whether a change should be available for application to offenders *already under sentence* should be a part of the very process of making changes, and the determination left to the Commission's sound discretion.<sup>190</sup>

#### d. Summary of Federal Courts' Treatment of the Reduction of Final Sentences

*Plaut* did not address whether Congress has the power to reopen final judgments in the criminal context, and United States Supreme Court and lower federal court precedent is, at best, unclear on this point.<sup>191</sup> Although *Chambers* and its progeny suggest that Congress cannot reduce final sentences, *Dorsey* and its progeny suggest that Congress can, so long as it makes its intent clear.<sup>192</sup> Because *Dorsey*—decided over forty years after *Chambers* and over fifteen years after *Plaut*—is the more recent statement of the Court, the better argument is that *Plaut* does not prohibit legislatures from reopening final judgments in the criminal context, including reducing final death sentences.<sup>193</sup>

### 2. Principle Two: The Separation of Powers Permits the Legislature to Reduce Final Sentences to Further Liberty

Limiting *Plaut* to the civil context removes a precedential obstacle to the reduction of final sentences, but it does not provide an affirmative argument for why the reduction of final sentences is constitutional.<sup>194</sup> A court willing to acknowledge that *Plaut* does not control in the criminal context may still believe that, at least *sometimes*, the separation of powers prohibits legislatures from reopening final judgments in criminal cases.<sup>195</sup> Therefore, a second limiting principle, derived from

190. *Id.* at 692 (White, J., dissenting) (emphasis added); *see id.* at 688 (Rogers, J., dissenting) (“It may be that the Supreme Court Justices and litigants in *Dorsey* assumed that the 18–1 minimums could not be applied whenever sentencing occurred prior to the Fair Sentencing Act’s passage. But assumptions are not law.”).

191. *See supra* Part III.B.1.a–c (discussing *Plaut*, *Chambers*, and *Dorsey*).

192. *See supra* Part III.B.1.b–c (discussing *Chambers* and *Dorsey*).

193. *See id.*

194. *See supra* Part III.B.1 (arguing that *Plaut*’s holding should be limited to civil context).

195. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240–41 (1995) (Breyer, J., concurring) (“[T]he separation of powers inherent in our Constitution means that at least *sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment.”).

Justice Breyer's concurrence in *Plaut*, is instructive: the separation of powers permits the legislature to pass laws reopening final judgments in criminal cases so long as such laws contain liberty-protecting assurances.<sup>196</sup> Although Justice Breyer found no such liberty-protecting assurances in the retroactive law at issue in *Plaut*, his analysis points to the opposite conclusion with respect to legislation that reduces final sentences, and therefore offers state courts another means of distinguishing *Plaut*.

The *Plaut* majority's central premise—that Congress has no authority to reopen final judgments—was sharply contested.<sup>197</sup> In his dissenting opinion, joined by Justice Ginsburg, Justice Stevens argued that Congress has always had the power to reopen final judgments.<sup>198</sup> “Throughout our history, Congress has passed laws that allow courts to reopen final judgments,” and “the Court has *never* invalidated such a law on separation of powers grounds until today.”<sup>199</sup>

Justice Breyer's concurrence traced a more moderate path. Resisting the majority's “absolute, always determinative” rule declaring unconstitutional all legislation that requires the reopening of final judgments, Justice Breyer stated that “important separation-of-powers decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree.”<sup>200</sup> According to Justice Breyer, it was not clear that “the separation of powers is violated *whenever* an individual final judgment is legislatively rescinded.”<sup>201</sup> Although “*sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment,” this determination comes only after an examination of whether the law threatens individual liberty.<sup>202</sup>

For example, according to Justice Breyer, a retroactive law that reopens final judgments, applies only retroactively, and applies only to a limited number of individuals violates the separation of powers.<sup>203</sup> It risks “singling out” individuals for “oppressive treatment” in violation of the separation of powers’ “liberty-protecting objectives.”<sup>204</sup> By

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196. *See id.* at 243–44.

197. *See id.* at 219 (majority opinion).

198. *Id.* at 247 (Stevens, J., dissenting).

199. *Id.* at 247–48 (emphasis added).

200. *Id.* at 245 (Breyer, J., concurring).

201. *Id.* at 241.

202. *Id.* at 240–41; *see id.* at 242 (“[T]he Constitution’s ‘separation-of-powers’ principles reflect, in part, the Framers’ ‘concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.’” (citation omitted)).

203. *See id.* at 243.

204. *Id.* at 243–44.

contrast, a retroactive law that reopens final judgments while “providing some of the [liberty-protecting] assurances against ‘singling out’ that ordinary legislative activity normally provides—say, prospectivity and general applicability”—might pass constitutional muster.<sup>205</sup> Its evenhanded application and lack of a “substantial deprivation on one person” may support the reopening of final judgments.<sup>206</sup>

Rejecting Justice Breyer’s balancing test (and the dissent’s broad support for retroactive reopening provisions) in favor of a formalistic, bright-line rule, the majority stated that:

[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one), it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.<sup>207</sup>

*Plaut*’s majority and concurring opinions pit formalism against functionalism. For the majority, Congress violates the separation of powers when it reopens final judgments—full stop.<sup>208</sup> For Justice Breyer, however, Congress violates the separation of powers when it reopens final judgments without providing some “liberty-protecting” assurances—such as prospectivity and general applicability—against the “singling out” of individuals for adverse treatment.<sup>209</sup> If the reopening of final judgments can be accomplished while protecting individual liberty, then, according to Justice Breyer, there is no separation-of-powers problem.<sup>210</sup>

Justice Breyer’s focus on individual liberty, “a basic separation-of-powers principle,” lends support to the reopening of final judgments in the criminal context.<sup>211</sup> Individual liberty, one might reasonably argue, is not furthered by depriving criminal defendants of the benefits of a

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205. *Id.* at 243.

206. *See id.* at 241–42 (discussing Framers’ intent that “even an unfair law at least will be applied evenhandedly according to its terms” and their “concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person”).

207. *Compare id.* at 239, *with id.* at 244–45 (Breyer, J., concurring) (“[W]e need not, and we should not . . . make of the reopening itself, an absolute, always determinative distinction, a ‘prophylactic device,’ or a foundation for the building of a new ‘high wal[l]’ between the branches.”).

208. *See id.* at 239–40.

209. *Id.* at 243–44 (Breyer, J., concurring).

210. *See id.* at 243–44 (“[I]f Congress enacted legislation that reopened an otherwise closed judgment but in a way that mitigated some of the here relevant ‘separation-of-powers’ concerns . . . we might have a different case.”).

211. *Id.* at 241.

subsequent ameliorative law.<sup>212</sup> In fact, retroactive application of such a law *further*s individual liberties by preventing what one commentator has referred to as a “stark instance of governmental arbitrariness”: the imposition of a punishment that the people have rejected.<sup>213</sup> This is especially true in the death penalty context, where not just liberty but *life* is at stake.

Justice Breyer was particularly concerned with the “singling out of a few individuals for adverse treatment” through retroactive legislation—for example, the singling out of defendant businesses in *Plaut*, who relied on the finality of favorable judgments.<sup>214</sup> Unlike in the civil context, no party is disadvantaged or “oppressed” by the reopening of final judgments in the criminal context.<sup>215</sup> The criminal defendant receives an obvious benefit (a reduced sentence), and there is no disadvantage to the State, whose legislature passed the retroactive law reopening final judgments in the first place.<sup>216</sup>

The case of *United States v. Sioux Nation* is instructive.<sup>217</sup> In that case, the Court gave retroactive effect to a law that permitted the reopening of final judgments in cases brought by the Sioux Nation

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212. *See id.* at 241.

213. *Final Judgments*, *supra* note 80, at 239; *see* *Loving v. United States*, 517 U.S. 748, 757 (1996) (discussing “deterrence of arbitrary or tyrannical rule” as one reason for separation of powers).

214. *Plaut*, 514 U.S. at 246 (Breyer, J., concurring); *see id.* 243–44 (noting that singling out of defendants for *adverse* treatment was more relevant to separation of powers inquiry than singling out of plaintiffs for *favorable* treatment).

215. *See id.* at 243–44 (expressing concern over targeting of particular defendants for adverse treatment); *see also* Krent, *supra* note 36, at 64 (“The concern for retroactivity in [the context of ameliorative legislation] is not that the Legislature is singling out individuals for disadvantageous treatment but rather to confer a benefit.”). One might argue that the reduction of final sentences *does* disadvantage certain individuals, namely, victims. While it is true that the legislature’s reduction of final sentences may disturb victims’ expectations of punishment for the convicted prisoner, these expectations are far more attenuated than the liberty interests that concerned Justice Breyer. Indeed, the State is not obligated to honor victims’ expectations when prosecuting a case, *see* MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2013) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); the executive is not prevented from upsetting these expectations in pardoning a crime or commuting a sentence; and the judiciary remains free to disturb these expectations on collateral review. Therefore, while the legislature’s dashing of victims’ expectations may strike some as unfair, it does not threaten liberty.

216. *See, e.g.*, *State v. Morris*, 378 N.E.2d 708, 715 (Ohio 1978) (“It does not hinder the state from divesting itself of any right of claim of its own. The only party who could object is the prisoner, and he can not, where it is clearly for his benefit.”); *Commonwealth v. Sutley*, 378 A.2d 795, 795 (Pa. 1977) (Roberts, J., dissenting) (“Because only public rights are involved, and the Legislature has decided that the harsh penalties formerly applicable no longer serve the public interest, the Legislature’s decision to provide for resentencing should be respected.”).

217. 448 U.S. 371 (1980).

seeking just compensation from the federal government.<sup>218</sup> There, the party disadvantaged by the reopening of final judgments—the federal government—was the very body that passed the retroactive law reopening final judgments.<sup>219</sup> Acknowledging that “Congress may recognize its obligation to pay a moral debt” by waiving legal defenses, the Court held that the retroactive law did not violate the separation of powers because “Congress has the power to waive the *res judicata* effect of a prior judgment entered in the Government’s favor on a claim against the United States.”<sup>220</sup> Applying Justice Breyer’s balancing scheme to *Sioux Nation*, there simply was no disadvantage to the U.S. government in allowing the reopening of final judgments because Congress waived its reliance on finality through passage of the retroactive law.<sup>221</sup> As in *Sioux Nation*, the reduction of final death sentences does not disadvantage the State, whose legislature has waived reliance on finality by passing the law reducing such sentences.<sup>222</sup>

Furthermore, ameliorative criminal legislation contains the liberty-protecting assurances outlined by Justice Breyer—namely prospectivity and generality.<sup>223</sup> Death penalty-repeal legislation like California’s, for example, does not seek only the elimination of the death penalty for those on death row—it seeks abolition of the death penalty *in toto*.<sup>224</sup> And such legislation does not apply to a small number of individuals, but rather applies generally to all those who have committed or will commit otherwise death-eligible crimes.<sup>225</sup>

Justice Breyer’s elevation of functionalism over formalism thus

218. *Id.* at 407.

219. *Id.* at 390–91.

220. *Id.* at 397.

221. *See id.*

222. *See id.*; *see also* Vermeule, *supra* note 82, at 382 (“[C]riminal sentences are, of all judicial judgments, the most susceptible to revision by the political branches, so long as the revision operates in the prisoner’s favor. As the winning party to the previous judgment, the state should be able to waive the benefit of its judgment the way other parties may.”); *cf.* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1058 (2006) (proposing “lenient scrutiny for retroactive legislation affecting traditional *public* rights,” such as criminal penalties, but “strict scrutiny for retroactive legislation imposing on private rights” (emphasis added)).

223. *See* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 243–44 (Breyer, J., concurring). Commentators have suggested still other factors that might be included in the balance. *See, e.g.*, *Final Judgments*, *supra* note 80, at 238 (avoidance of arbitrariness and partiality).

224. *See supra* notes 38–39 and accompanying text (discussing the SAFE California Act).

225. *See id.*; *see also* *Commonwealth v. Sutley*, 378 A.2d 780, 795 (Pa. 1977) (Roberts, J., dissenting) (“[T]he separation of powers principle is in no way offended when the Legislature provides, pursuant to a statute of general application, that persons convicted under prior laws should be resentenced by the courts in accordance with the lesser penalties provided for by the statute currently in force.” (emphasis added)).

supports the reduction of final sentences, especially death sentences.<sup>226</sup> Because laws reducing death sentences further the liberty (and life) interests of prisoners, do not disadvantage others, and contain other liberty-protecting assurances, one may reasonably argue that they do not violate the separation-of-powers doctrine.<sup>227</sup>

### 3. Principle Three: The Separation of Powers Permits the Legislature to Reduce Final Sentences if Courts Retain Discretion

Even if a court finds that *Plaut*'s holding applies to retroactive criminal legislation or that such legislation "singles out" individuals in violation of Justice Breyer's balancing test, a third limiting principle drawn from *Plaut* strongly supports the reduction of final sentences. This limiting principle seizes on the importance of judicial discretion: the separation of powers permits the legislature to pass laws "authorizing" but not "mandating" the reopening of final judgments.<sup>228</sup> Significantly, *Plaut* involved "retroactive legislation requiring an Article III court to set aside a final judgment."<sup>229</sup> If the retroactive legislation had required a court to review the judgment but had given the court discretion to set it aside, *Plaut* might have gone the other way.<sup>230</sup> Justice Stevens' dissent in *Plaut* and the majority's response make this clear.<sup>231</sup>

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226. See *Plaut*, at 244–45 (Breyer, J., concurring).

227. See *id.* This focus on individual liberty in the context of statutory retroactivity finds some support in Supreme Court jurisprudence regarding the retroactivity of judicial decisions. Although an in-depth discussion of decisional retroactivity is beyond the scope of this Article, some introductory thoughts are instructive. See generally Barry, *Part I, supra* note 34, at 336 n.97 (distinguishing statutory retroactivity from judicial (decisional) retroactivity). In *Teague v. Lane*, a plurality of the Court held that, when a case announces a "watershed" rule that requires the observance of procedures "implicit in the concept of ordered liberty," that rule should be applied retroactively to cases that have become final. 489 U.S. 288, 307 (1989) (plurality). Although the Supreme Court has applied this exception in very few cases, see, e.g., *Brown v. Louisiana*, 447 U.S. 323, 328 (1980) (holding that decision announcing right to unanimous six-person jury was retroactive to final cases), the Court's consideration of "ordered liberty" in deciding whether to give retroactive effect to its decisions supports a functionalist approach to statutory retroactivity. For example, one might argue that by retroactively reducing final sentences, the legislature is, in a sense, decreeing that the original sentencing law was inconsistent with the concept of ordered liberty and, therefore, should be given retroactive effect by the courts. Cf. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (discussing second circumstance in which Supreme Court gives retroactive effect to its decisions, namely, when a decision announces a new rule that "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.").

228. See *Plaut*, 514 U.S. at 233–34.

229. *Id.* at 240 (emphasis added).

230. See *id.*

231. See *infra* notes 232–41 and accompanying text (discussing majority's and Justice

Justice Stevens began with the familiar refrain that the Constitution does not “require[] that the three branches of Government ‘operate with absolute independence.’ Rather, our jurisprudence reflects ‘Madison’s flexible approach to separation of powers.’”<sup>232</sup> Accordingly, statutory provisions “that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment” do not violate the separation of powers.<sup>233</sup> The statute at issue in *Plaut*, Justice Stevens argued, did “not *decide* the merits of any issue in any litigation”—a quintessentially judicial function.<sup>234</sup> It “neither command[ed] the reinstatement of any particular case nor direct[ed] any result on the merits.”<sup>235</sup> Instead, it merely “remove[d] an unanticipated and unjust impediment to adjudication of a large class of claims on their merits” by “enact[ing] a law that applied a substantive rule to a class of litigants, specif[ying] a procedure for invoking the rule, and le[aving] particular outcomes to individualized judicial determinations—a classic exercise of legislative power.”<sup>236</sup>

In this way, Justice Stevens argued, the statute at issue in *Plaut* was like Federal Rule of Civil Procedure 60(b), which authorizes courts to retroactively relieve parties from a final judgment for excusable neglect, newly discovered evidence, fraud, and other reasons.<sup>237</sup> Accordingly, Justice Stevens concluded, the statute at issue in *Plaut*, like Rule 60(b), posed “no danger of ‘aggrandizement or encroachment’” and therefore did not violate the separation of powers.<sup>238</sup>

In response, the majority distinguished Rule 60(b) from the statute at issue in *Plaut*, noting that Rule 60(b) was not, in fact, mandatory.<sup>239</sup> Rule 60(b) “authorizes *discretionary* judicial revision of judgments in the listed situations and in other ‘extraordinary circumstances’”; it does not, like the statute in *Plaut*, “impose any legislative *mandate* to reopen upon the courts, but merely reflects and confirms the courts’ own inherent and discretionary power . . . to set aside a judgment whose

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Stevens’ differing opinions regarding resemblance of statute at issue in *Plaut* to Rule 60(b)).

232. *Plaut*, 514 U.S. at 260 (Stevens, J., dissenting) (citations omitted).

233. *Id.*

234. *Id.* (emphasis added).

235. *Id.* at 266.

236. *Id.* at 264; *see id.* at 260–61 (“§ 27A(b) specifies both a substantive rule to govern the reopening of a class of judgments—the pre-*Lampf* limitations rule—and a procedure for the courts to apply in determining whether a particular motion to reopen should be granted. These characteristics are quintessentially legislative.”).

237. *Id.* at 256 (citations omitted).

238. *Id.* at 264.

239. *Id.* at 233.

enforcement would work inequity.”<sup>240</sup> A retroactive legislative change, “subject to the control of the courts themselves,” the majority noted elsewhere in its opinion, “would obviously raise no issue of separation of powers.”<sup>241</sup>

As the majority and dissent’s exchange makes clear, the Constitution permits a legislature to “authorize”—but not “mandate”—the reopening of final judgments.<sup>242</sup> Although the line between the two is not always clear, Rule 60(b) and the statute at issue in *Plaut* serve as useful guideposts. A law reducing final death sentences will most likely survive a separation-of-powers challenge if, like Rule 60(b), the law provides that a court “may” reopen the final judgment when it makes certain findings.<sup>243</sup> The Smarter Sentencing Act, now pending in Congress, provides a useful example.<sup>244</sup> That legislation would allow certain inmates finally sentenced before the effective date of the Fair Sentencing Act to petition for sentence reductions consistent with the Fair Sentencing Act, and would give courts the *discretion* to impose a reduced sentence.<sup>245</sup>

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240. *Id.* (emphasis added); *see id.* at 261 (Stevens, J., dissenting) (“The Court, therefore, must mean to hold that Congress may not *unconditionally* require an Article III court to set aside a final judgment.”). The Court also distinguished various other laws that provided for the reopening of final judgments, including laws that disturbed the final judgments of non-Article III courts and administrative agencies, or altered the prospective effect of an injunction entered by an Article III court. *Id.* at 232.

241. *Id.* at 231–32.

242. *See supra* notes 232–41 and accompanying text (discussing majority’s and Justice Stevens’ differing opinions regarding resemblance of statute at issue in *Plaut* to Rule 60(b)). The mandatory feature of retroactive legislation reducing final judgments also troubled the Pennsylvania Supreme Court. *See Commonwealth v. Sutley*, 378 A.2d 780, 782 (Pa. 1977) (“A plain reading of the enactment reveals that it is couched in *mandatory* language; it unquestionably directs that a defendant ‘shall be resentenced under this act upon his petition if the penalties hereunder are less than those under prior law . . .’ The amendment is, in operation and effect, a legislative command to the courts to open a judgment previously made final, and to substitute for that judgment a disposition of the matter in accordance with the subsequently expressed legislative will. The vesting in the legislature of the power to alter final judgments would be repugnant to our concept of the separation of the three branches of government.” (emphasis added)); *see also* *People v. Bunn*, 37 P.3d 380, 394 n.14 (Cal. 2002) (rejecting retroactive application of statute *requiring*—as opposed to merely permitting—reopening of final judgment).

243. *See Plaut*, 514 U.S. at 233 (discussing Rule 60(b)); *see also* FED. R. CIV. P. 60(b) (stating that “[o]n motion and just terms, the court *may* relieve a party or its legal representative from a final judgment, order, or proceeding” for six reasons, including “any other reason that justifies relief” (emphasis added)).

244. *See* Smarter Sentencing Act of 2014, *supra* note 43.

245. *Id.* (“A court that imposed a sentence for a covered offense, *may*, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” (emphasis added) (citation omitted)); *see* Press Release, U.S. Senate, Durbin and Lee Introduce Smarter Sentencing Act, (Aug. 1, 2013),

By contrast, a law reducing final death sentences may violate the separation of powers if, like the statute in *Plaut*, it provides that a court “shall” reopen a final judgment when certain purely administrative requirements are met.<sup>246</sup> California’s Proposition 34 is a case in point. That proposition stated that the repeal “shall be applied retroactively,” and that any sentence of death entered prior to the effective date of the act “shall automatically be converted to imprisonment in the state prison for life without the possibility of parole under the terms and conditions of this act.”<sup>247</sup> *Plaut* did not address the gap between these two poles, that is, whether the separation of powers permits a law that *requires* a court to reopen a final judgment when it makes certain substantive findings.<sup>248</sup>

### C. State Courts’ Conflicting Treatment of the Reduction of Final Sentences

Although many state courts have concluded that ameliorative criminal legislation does not apply retroactively to final judgments, they have done so with remarkably little reasoning and with no constitutional analysis whatsoever.<sup>249</sup> Pennsylvania, Ohio, and California appear to

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available at <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736> (discussing introduction of Smarter Sentencing Act “to modernize drug sentencing policies by giving federal judges more discretion in sentencing those convicted of non-violent offenses”).

246. See *Plaut*, 514 U.S. at 214–15 (“Any private civil action . . . that was commenced on or before June 19, 1991—(1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.” (emphasis added) (citation omitted)).

247. The SAFE California Act § 10(a)–(b), *supra* note 39. The drafters of the SAFE California Act were keenly aware of the likelihood that the retroactive provision may violate the separation of powers; the act included a severability clause providing for the constitutionality of the rest of the act should the retroactivity provision fail. *Id.* § 12. Importantly, the fact that California’s death penalty repeal statute was proposed by voters through the ballot initiative process—not by legislators—does not impact the separation-of-power analysis. See *Legislature v. Deukmejian*, 669 P.2d 17, 26–27 (Cal. 1983) (“[T]he power of the people through the statutory initiative is coextensive with the power of the Legislature. . . . Although the initiative power must be construed liberally to promote the democratic process . . . when utilized to enact statutes, those statutes are subject to the same constitutional limitations and rules of construction as are other statutes.”).

248. Justice Stevens suggested that the separation of powers would permit such legislation. See *Plaut*, 514 U.S. at 261 (Stevens, J., dissenting) (arguing that “Congress surely could add to Rule 60(b) certain instances in which courts *must* grant relief from final judgments if they make particular findings—for example, a finding that a member of the jury accepted a bribe from the prevailing party”).

249. Several state supreme courts have refused to apply ameliorative statutes retroactively to reduce final sentences. *E.g.*, *Davenport v. McGinnis*, 522 P.2d 1140, 1142 (Alaska 1974); *Davis*

be the only states to have squarely addressed whether the separation of powers permits a legislature to reopen final judgments in the criminal context.<sup>250</sup> Pennsylvania courts prohibit the reduction of final sentences, Ohio courts allow it, and California courts are split.

### 1. Pennsylvania

In 1977, in *Commonwealth v. Sutley*, the Supreme Court of Pennsylvania held that a statute mandating the reduction of final sentences for those convicted of marijuana possession violated the separation of powers.<sup>251</sup> Foreshadowing the Supreme Court's decision in *Plaut* nearly two decades later, the majority opinion in *Sutley* was premised on a formalistic conception of the separation of powers—one that embraced a clear line of demarcation between the legislature and judiciary.<sup>252</sup> “[E]ven though the legislature possesses the power to promulgate the substantive law,” the court reasoned, “judicial judgments and decrees entered pursuant to those laws may not be affected by subsequent legislative changes after those judgments and decrees have become final.”<sup>253</sup> To hold otherwise, the court concluded, would undermine “the inviolability of final judgments of the judiciary” by permitting the legislature to substitute its will for the final judgments of the courts.<sup>254</sup> It would also “distort the exercise of judicial discretion” by further reducing the sentences of prisoners who may have received the benefit of judicial discretion at their original sentencing.<sup>255</sup>

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v. State, 446 N.E.2d 1317, 1322 (Ind. 1983); *Duff v. Clarke*, 526 N.W.2d 664, 667 (Neb. 1995); *People v. Utsey*, 855 N.E.2d 791, 794 (N.Y. 2006); *Pollard v. State*, 521 P.2d 400, 402 (Okla. Crim. Ct. 1974); *accord. Owens v. Commonwealth*, No. 2006-CA-002600-MR, 2009 WL 2568899, at \*2 (Ky. Ct. App. Aug. 21, 2009). Still more state supreme courts have applied ameliorative statutes retroactively to reduce sentences in *pending* cases, while reasoning that such statutes would not apply to final sentences. *E.g.*, *People v. Thomas*, 525 P.2d 1136, 1138 (Colo. 1974); *State v. Von Geldern*, 638 P.2d 319, 323–24 (Haw. 1981); *State v. Wiese*, 201 N.W.2d 734, 737 (Iowa 1972); *State v. Coolidge*, 282 N.W.2d 511, 514–15 (Minn. 1979); *State v. Wilson*, 926 P.2d 712, 716 (Mont. 1996); *State v. Pardon*, 157 S.E.2d 698, 702 (N.C. 1967); *State v. Cummings*, 386 N.W.2d 468, 472 n.2 (N.D. 1986); *State v. Macarelli*, 375 A.2d 944, 947 (R.I. 1977); *Belt v. Turner*, 483 P.2d 425, 426 (Utah 1971); *State v. Zornes*, 475 P.2d 109, 112 (Wash. 1970), *overruled on other grounds*, *United States v. Batchelder*, 442 U.S. 114 (1979); *cf. Gibbons v. Gibbons*, 432 A.2d 80, 85 (N.J. 1981) (holding that statute amending divorce law applied retroactively to cases “presently on direct appeal or in which a final judgment has not been entered”).

250. See *infra* notes Part III.C.1–3 and accompanying text (discussing conflicting treatment of reduction of final sentences in Pennsylvania, Ohio, and California).

251. *Commonwealth v. Sutley*, 378 A.2d 780, 782 (Pa. 1977).

252. See *id.*

253. *Id.* at 784.

254. *Id.*

255. *Id.* at 787.

In a concurring opinion, Justice Pomeroy underscored the importance of the majority's categorical approach:

The concept of the finality of judgments and the integrity of the judicial process would, I fear, be seriously jeopardized were the understandable effort of the legislature in this situation to be validated. Courts may sentence only for acts made criminal by the legislature and may do so only within limits set by the legislature. When, however, those steps are taken, they are judicial acts, and in my view may not be undone by the legislature because it has come to believe that its prior treatment of the offense was mistaken.<sup>256</sup>

In a strongly worded dissent, Justice Roberts rejected the majority's formalistic conception of the separation of powers, opting instead for a more flexible approach akin to Justice Breyer's balancing test.<sup>257</sup> According to Justice Roberts, when the reduction of final sentences is considered in light of the principles *underlying* the separation of powers—namely the defense against tyranny and protection of the rights of the individual—there is no separation-of-powers problem, for two primary reasons.<sup>258</sup>

First, statutes of general application that reduce final sentences do not infringe on the province of the judiciary; they do not, for example, empower the legislature to make or review findings in particular cases or to decide that a trial court's choice of sentence in a particular case was an abuse of discretion.<sup>259</sup> Instead, these statutes merely affirm the legislature's power to define criminal offenses and determine the range of punishments, which necessarily includes “[t]he power to determine what classes of offenders should benefit by the reduced penalties. . . . Simply because final judgments may be affected,” Justice Roberts argued, “does not mean that the Legislature has infringed on the province of the judiciary.”<sup>260</sup>

Second, statutes reducing final sentences do not burden the private rights of individuals.<sup>261</sup> On the contrary, such statutes *benefit* the private rights of individuals—namely, defendants—by reducing their punishment.<sup>262</sup> The public, of course, has an interest in the enforcement

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256. *Id.* at 789 (Pomeroy, J., concurring).

257. *Id.* at 791 (Roberts, J., dissenting).

258. *Id.*

259. *Id.* at 792 (stating that such statutes “leave[] to the judiciary the power to impose sentences on the individuals to whom [the statutes] appl[y]. . . . Rather than impairing or usurping the power of the judiciary, enactment of [such] legislation . . . is peculiarly within the province of the Legislature”).

260. *Id.* at 796.

261. *See id.* at 794–95.

262. *Id.*

of sentences “to vindicate the public’s interest in obedience to the law, and to protect the public against future violations,” but this interest finds expression through the will of the legislature.<sup>263</sup> As Justice Roberts stated, “[b]ecause only public rights are involved, and the Legislature has decided that the harsh penalties formerly applicable no longer serve the public interest, the Legislature’s decision to provide for resentencing should be respected.”<sup>264</sup>

## 2. Ohio

Less than one year later, in *State v. Morris*, the Supreme Court of Ohio considered the constitutionality of legislation that required the reduction of final sentences for those convicted of certain drug offenses.<sup>265</sup> Citing Justice Roberts’ dissenting opinion in *Sutley*, the *Morris* court held that such legislation did not violate the separation-of-powers doctrine.<sup>266</sup> The legislature’s plenary power to prescribe crimes and fix penalties, the court reasoned, necessarily included the power to “require th[e] trial courts [to] abrogate or reduce the prior convictions and sentences of those convicted and sentenced under the old drug enforcement law.”<sup>267</sup> Legislation reducing final drug sentences therefore did not “infringe on the judicial powers, since at all times it is the power of the General Assembly to establish crimes and penalties.”<sup>268</sup>

Furthermore, such legislation did not deprive individuals of any private rights.<sup>269</sup> According to the court, “[t]he only party who could object is the prisoner, and he can not [sic], where [the retroactive legislation] is clearly for his benefit.”<sup>270</sup> Although the state “has a protected interest in the continuing punishment of convicted criminals,” the court reasoned, “it is unquestionable that the state may waive its

263. *Id.* at 795.

264. *Id.*; see *Friends of Pa. Leadership Charter Sch. v. Chester Cnty. Bd. of Assessment Appeals*, 101 A.3d 66, 76 (Pa. 2014) (Saylor, J., concurring) (“I would refrain from expanding application of *Sutley*’s broad-brush approach to proscribing retrospective legislative social-policy adjustments merely because they may in some way be said to impact upon final judgments . . . .” (citing Justice Robert’s dissent in *Sutley*)).

265. *State v. Morris*, 378 N.E.2d 708, 715–16 (Ohio 1978).

266. *Id.* at 716.

267. *Id.* at 715.

268. *Id.* at 715 (“[T]he General Assembly has not attempted to review the findings of guilt as determined by the trial court. Nor has the General Assembly in effect found that the court has abused its discretion in rendering sentences. Rather, the General Assembly has made its own determination that the proscribed conduct in the area of drug abuse should be redefined and the corresponding sentences revised.”).

269. See *id.* at 715–16.

270. *Id.* at 715 (citation omitted).

vested rights obtained through prior judgments” by passing retroactive legislation reducing final sentences.<sup>271</sup>

### 3. California

California’s case law points in opposite directions, both for and against the retroactive reduction of final sentences.<sup>272</sup> In 1965, in *In re Estrada*, the California Supreme Court gave retroactive effect to a statutory amendment reducing the penalty for escape from prison.<sup>273</sup> However, the court limited retroactive application to judgments that were not final on the effective date of the amendment.<sup>274</sup> According to the court, “the key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective *prior to the date the judgment of conviction becomes final* then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.”<sup>275</sup> This limitation on the retroactive application of ameliorative statutes, the court suggested, was constitutionally mandated by the separation of powers:

When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage *provided the judgment convicting the defendant of the act is not final*.<sup>276</sup>

Nearly forty years later, in *People v. Bunn*, the California Supreme Court gave retroactive effect to a (non-ameliorative) criminal statute that permitted the refiling of charges against suspected child sex offenders in previously dismissed cases.<sup>277</sup> Explicitly adopting *Plaut*’s constitutional framework, the court concluded that retroactive application of the statute was limited to cases that had *not* resulted in

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271. *Id.* at 715–16.

272. *See infra* notes 273–90 and accompanying text (discussing California cases).

273. *In re Estrada*, 408 P.2d 948, 954 (Cal. 1965) (en banc).

274. *See id.* at 951.

275. *Id.* (emphasis added).

276. *Id.* (emphasis added); *see* *People v. Brown*, 278 P.3d 1182, 1188 (Cal. 2012) (“*Estrada* is today properly understood . . . [as] articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all *nonfinal* judgments.” (emphasis added)).

277. *People v. Bunn*, 37 P.3d 380, 382 (Cal. 2002).

final judgment at the time the new statute took effect.<sup>278</sup> “Separation of powers principles do not preclude the Legislature from amending a statute and applying the change to both pending and future cases,” the court reasoned, “though any such law cannot readjudicat[e] or otherwise disregard judgments that are already final.”<sup>279</sup> Relying on *Plaut*, the court concluded that the dismissal of charges against the defendant did not become final until *after* the statute permitting the refiling of charges took effect.<sup>280</sup> Therefore, the refiling of charges against the defendant did not violate the separation of powers.<sup>281</sup>

And in *People v. Davis*, the California Court of Appeals refused to give retroactive effect to a statute that would have reduced the defendant’s sentence because “the [defendant’s] judgment of conviction was final before the amendments became effective, and the retroactive application of the amendments to the final judgment would violate the separation of powers doctrine.”<sup>282</sup> Citing *Estrada*, the court reasoned that “retroactively apply[ing] legislatively mitigated punishment to judgments finalized by the courts would be tantamount to readjudicating litigated controversies in violation of the separation of powers doctrine.”<sup>283</sup>

Although numerous (unpublished) California Court of Appeals decisions have similarly refused to give retroactive effect to ameliorative criminal statutes,<sup>284</sup> a separate line of cases holds

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278. *See id.* (finding *Plaut* “both consistent with California law and persuasive for state separation of powers purposes.”); *see also id.* at 394 (“*Plaut* properly preserves and balances the respective ‘core functions’ of the two branches.”).

279. *Id.* at 390 (internal quotations omitted); *see id.* at 395–96 (“[A] refiling provision . . . cannot be retroactively applied to subvert judgments that became final before the provision took effect . . . even where lawmakers have acted for the very best of reasons. . . . To the extent [that new statutes allowing for refiling were not] . . . in effect when a prior judgment of dismissal . . . became final within the meaning of *Plaut*, the state separation of powers doctrine bars reliance on [it].” (internal quotations omitted)).

280. *See id.* at 397 (stating that dismissal of criminal charges did not become final until 1997, one year after the statute permitting refiling took effect).

281. *Id.*; *see id.* at 396 (“[A] judgment is not final for separation of powers purposes, and reopening of the case can occur, under the specific terms of refiling legislation *already in effect* when the judicial branch completed its review and ultimately decided the case. Such nonretroactive limitations . . . are constitutionally allowed.” (emphasis added)).

282. *People v. Davis*, No. D058659, 2011 WL 5039882, at \*1 (Cal. Ct. App. Oct. 24, 2011).

283. *Id.* at \*2.

284. *See, e.g., People v. Colaizzi*, No. H036415, 2011 WL 2565390, at \*3–4 (Cal. Ct. App. June 29, 2011) (refusing to give retroactive effect to statutory reduction in sentence); *People v. Romo*, No. H035905, 2011 WL 2084567, at \*4 (Cal. App. Ct. May 26, 2011) (holding that separation-of-powers doctrine prohibited giving retroactive effect to statutory reduction in sentence because judgment in defendant’s case became final before statute’s effective date); *accord. Bennett v. Procnier*, 262 Cal. App. 2d 799, 801 (1968) (denying defendant benefit of statutory amendment reducing sentence for time spent in custody because “the judgment was final

otherwise. For example, in 2004, in *In re Chavez*, the California Court of Appeals gave retroactive effect to an amendment that reduced the defendants' sentences for tax fraud, even though the defendants' sentences became final before the amendment went into effect.<sup>285</sup> In stark contrast to *Davis*, which relied on *Estrada* in refusing to reduce a final sentence, the *Chavez* court reasoned that “[t]here is nothing in *Estrada* that prohibits the application of revised sentencing provisions to persons whose sentences have become final if that is what the Legislature intended or what the Constitution requires.”<sup>286</sup> The *Chavez* court relied on *Way v. Superior Court*, a 1978 California Court of Appeals decision cited with approval by the California Supreme Court, which recognized a narrow exception to the “final judgment rule” for reductions in sentences “as an incident of a major and comprehensive reform of an entire penal system.”<sup>287</sup> According to the *Chavez* court, this exception was satisfied because the legislative motivation for reducing the penalty for tax fraud was “to achieve equality and uniformity in felony sentencing.”<sup>288</sup>

In a concurring opinion in *Way*, Justice Friedman “defended in even stronger terms the Legislature’s power to retroactively apply legislation reducing punishment for crime.”<sup>289</sup> Dismissing the finality rule set forth in *Estrada* as “semantic smoke” and “archaic dictum” that “accords too much sanctity to the rule insulating final criminal judgments from the collective impact of penal law revisions,” he argued

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before the amendment, and the petitioner is bound by law as it existed at that time”); *see also* *Perez v. Roe*, 52 Cal. Rptr. 3d 762, 775 (Cal. Ct. App. 2006) (holding that the separation-of-powers doctrine prohibits giving retroactive effect to a statute reviving childhood sex abuse actions in cases that had become final); *id.* at 776 (“[I]f the Legislature has the power to undo the class of judgments covered by [the new statute], then it would also be free to revive any cause of action, no matter how old, that had been dismissed under a previously existing statute of limitations. The constitution does not permit such an extension of legislative power.”).

285. *In re Chavez*, 8 Cal. Rptr. 3d 395, 405 (Cal. Ct. App. 2004).

286. *Compare id.* at 404, with *Davis*, 2011 WL 5039882, at \*1–2.

287. *Chavez*, 8 Cal. Rptr. 3d at 404–05 (citing *Way v. Superior Court*, 74 Cal. App. 3d 165, 180 (1977), cited with approval in *Younger v. Super. Ct. of Sacramento Cnty.*, 577 P.2d 1014, 1024 (Cal. 1978) (en banc)).

288. *Chavez*, 8 Cal. Rptr. 3d at 405; *see* *People v. Cmty. Release Bd.*, 96 Cal. App. 3d 792, 800 (1979) (“We therefore take it as settled that legislation reducing punishment for crime [from life without possibility of parole to life with possibility of parole] may constitutionally be applied to prisoners whose judgments have become final.”); *cf. In re Kemp*, 122 Cal. Rptr. 3d 354, 363 (Cal. Ct. App. Jan. 27, 2011) (“[W]e conclude that extending the benefits of the January 25 amendment to those whose judgments were final prior to the amendment’s effective date would not violate separation of powers.”), *transferred with instructions to vacate, In re Kemp*, 301 P.3d 1175 (Cal. 2013).

289. *Cmty. Release Bd.*, 96 Cal. App. 3d at 800 (citing Judge Friedman’s concurrence in *Way*).

that:

There is nothing sacred about a final judgment of imprisonment which immunizes it from the Legislature's power to achieve equality among past and new offenders. In short, the Legislature may grant or withhold retroactive amelioration of existing criminal judgments in response to some legitimate public purpose. Parity is the not least of those purposes.<sup>290</sup>

#### 4. Summary of State Courts' Treatment of the Reduction of Final Sentences

State courts are inconsistent in their treatment of legislation that reduces final sentences.<sup>291</sup> On the one hand are the Pennsylvania Supreme Court's decision in *Sutley*, the California Supreme Court's decisions in *Estrada* and *Bunn*, and California appeals court decisions like *Davis* that categorically prohibit the reopening of final judgments in the criminal context—in effect, following the *Chambers* line of precedent by extending *Plaut* to the criminal context.<sup>292</sup> On the other hand are the Ohio Supreme Court's decision in *Morris*, California appeals court decisions like *Chavez* and *Way* (the latter of which was cited favorably by the California Supreme Court), and Justice Roberts' dissent in *Sutley*, all of which conclude that the reduction of final sentences is constitutionally permissible—in effect confirming what *Dorsey* implied.<sup>293</sup>

It is significant that in the three states that have looked closely at the reduction of final sentences, two (Ohio and California) have decisions strongly supporting the reduction of final sentences, and the third (Pennsylvania) has a strong dissenting opinion saying as much.<sup>294</sup> The better argument is the one adopted in *Morris*, *Chavez*, *Way*, and Justice Roberts' *Sutley* dissent—all of which acknowledge that the reopening of final judgments in the criminal context is different from the reopening of final judgments in the civil context.<sup>295</sup> The former does not offend

290. *Way*, 74 Cal. App. 3d at 181–82 (Friedman, J., concurring) (internal quotation marks omitted).

291. See *infra* Part III.C (discussing conflicting treatment of reduction of final sentences in Pennsylvania, Ohio, and California).

292. See *supra* Part III.C (discussing *Sutley*, *Estrada*, *Bunn*, and *Davis*).

293. See *id.* (discussing *Morris*, *Chavez*, *Way*, and *Sutley* dissent).

294. See *id.* (discussing *Morris*, *Chavez*, *Way*, and *Sutley* dissent). Although California's case law is mixed, one might reasonably argue that the California Supreme Court is more likely to uphold the constitutionality of a statute reducing final death sentences because: (i) *Bunn* is distinguishable (i.e., the statute at issue in that case did not *reduce* sentences); and (ii) California Court of Appeals decisions striking down the reduction of final sentences are not published, in contrast to *Chavez*, which is. See *supra* notes 272–90 and accompanying text.

295. See *id.* (discussing *Morris*, *Chavez*, *Way*, and *Sutley* dissent).

the separation-of-powers doctrine because it is consistent with the legislature's plenary power to prescribe crimes and fix penalties, and it also benefits—not burdens—the private rights of individuals (*Morris* and *Sutley* dissent).<sup>296</sup> Furthermore, the reopening of final judgments in the criminal context is incidental to the purpose of achieving equality and uniformity in sentencing among past and new offenders—something the judiciary cannot do (*Chavez* and *Way*).<sup>297</sup> And in the death penalty context, there simply is no counterargument that retroactive reduction of death sentences would “distort the exercise of judicial discretion” by further reducing the sentences of prisoners who already received the benefit of judicial discretion at their original sentencing.<sup>298</sup> Those sentenced to death, almost by definition, have received no such benefit.

Strong as all of these arguments may be, the reduction of final sentences remains the exception, not the rule, among states.

*D. Conclusion: The Reduction of Final Death Sentences  
Does not Violate the Separation of Powers by Interfering  
with the Final Judgments of Courts*

In conclusion, one may reasonably argue that the legislature's reduction of final death sentences does not interfere with the final judgments of courts in violation of the separation of powers, for several reasons. First, the U.S. Supreme Court's decision in *Plaut*, which held that the separation of powers prohibits Congress from reopening final judgments in civil cases, did not address the power to reopen final judgments in the *criminal* context.<sup>299</sup> U.S. Supreme Court and lower federal court decisions before and after *Plaut* are, at best, unclear on this point.<sup>300</sup> Although the Supreme Court's 1934 decision in *Chambers*

296. See *supra* Part III.C (discussing *Morris* and *Sutley* dissent).

297. See *id.* (discussing *Chavez* and *Way*); see also *Friends of Pa. Leadership Charter Sch. v. Chester Cnty. Bd. of Assessment Appeals*, 101 A.3d 66, 76 n.1 (Pa. 2014) (Saylor, J., concurring) (“This Court frequently recognizes that the Legislature possesses superior tools and resources in making social policy judgments, including comprehensive investigations and policy hearings. . . . The upshot of *Sutley*, however, is that, so long as some final judgment in the judicial system is involved, and irrespective of the absence of any harm to vested individual entitlements, the General Assembly simply cannot bring such resources to bear to advance beneficial social policy aims. I have strong reservations concerning such an inflexible approach to separation of powers.” (citations omitted)); Koenig, *supra* note 36, at 70 (“[T]here is no other governmental body which has the authority to regulate sentences for those who have been sentenced under the authority of a now dead legislature.”).

298. *Commonwealth v. Sutley*, 378 A.2d 780, 787 (Pa. 1977).

299. See *supra* Part III.B.1.a (discussing *Plaut*'s silence regarding reduction of final sentences).

300. See *supra* Part III.B.1.b–c (discussing *Chambers*' implied prohibition on reduction of

and the lower court decisions interpreting it suggest that the legislature cannot reopen final judgments in criminal cases, the Court's recent decision in *Dorsey*, together with the decisions of several lower federal courts and state courts, suggest the opposite is true.<sup>301</sup> Given the recency of *Dorsey* and its progeny, the better argument is that *Plaut* is a narrow decision that does not prohibit the legislature from reducing final sentences.<sup>302</sup>

Limiting *Plaut*'s holding to the civil context suggests why the reduction of final sentences *may* be constitutional, but it does not provide an affirmative argument for why such reduction *is* constitutional. For this, a second limiting principle, drawn from Justice Breyer's concurrence in *Plaut*, is instructive: the separation of powers permits a legislature to reduce final sentences where doing so would further liberty, "a basic separation-of-powers principle."<sup>303</sup> Because legislation that reduces final sentences necessarily furthers the liberty (and life) interests of prisoners, does not disadvantage others, and contains other liberty-protecting assurances suggested by Justice Breyer's balancing test in *Plaut*, such legislation does not violate the separation of powers.<sup>304</sup>

Third, the separation of powers permits a legislature to reopen final judgments in criminal cases if courts retain the discretion to reopen.<sup>305</sup> As *Plaut*'s majority and dissenting opinions make clear, the Constitution clearly permits a legislature to "authorize"—but not necessarily "mandate"—the reopening of final judgments.<sup>306</sup> Death penalty repeal legislation that leaves to the discretion of the courts the decision of whether to reduce a final death sentence does not violate the separation of powers.<sup>307</sup>

Finally, state court decisions, on balance, support the constitutionality

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final sentences and *Dorsey*'s support for reduction of final sentences).

301. See *id.* (discussing *Chambers*' implied prohibition on reduction of final sentences and *Dorsey*'s support for the reduction of final sentences).

302. See *supra* Part III.B.1.d (discussing *Plaut* and *Dorsey*).

303. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241 (1995) (Breyer, J., concurring); see *supra* Part III.B.2 (arguing that separation of powers permits legislature to reduce final sentences to further liberty).

304. See *Plaut*, 514 U.S. at 241–43 (arguing that separation of powers permits legislature to reduce final sentences to further liberty).

305. See *supra* Part III.B.3 (arguing that separation of powers permits legislature to reduce final sentences so long as courts retain discretion).

306. See *id.* Compare *Plaut*, 514 U.S. at 233–34 (distinguishing statute at issue in *Plaut* from Rule 60(b)), with *id.* at 258–60 (Stevens, J., dissenting) (comparing statute at issue in *Plaut* to Rule 60(b)).

307. See *supra* Part III.B.3.

of legislation that reduces final sentences. These decisions, consistent with Justice Breyer's balancing test, take a functionalist approach toward the separation of powers, upholding the reduction of final sentences where the legislation benefits—not burdens—the private rights of individuals and encourages equality and uniformity in sentencing.<sup>308</sup>

#### IV. THE REDUCTION OF FINAL SENTENCES DOES NOT VIOLATE THE SEPARATION OF POWERS BY INTERFERING WITH THE EXECUTIVE'S COMMUTATION POWER

Even if legislation reducing final sentences does not interfere with the final judgments of courts, such legislation gives rise to a second separation-of-powers concern: the legislature's usurpation of the executive's commutation power.<sup>309</sup> The commutation power refers to the power to reduce sentences, and it is vested in the executive.<sup>310</sup> At least eight state constitutions allow legislative participation in the commutation process.<sup>311</sup> In these states, therefore, the legislature's reduction of final sentences most likely does not interfere with the executive's commutation power.<sup>312</sup>

In the remaining states, by contrast, the legislature's reduction of final sentences implicates the separation of powers.<sup>313</sup> A review of state case law reveals two lines of cases: a minority rule holding that the legislature's retroactive reduction of final sentences does not violate the executive's commutation authority, and a majority rule holding that it does.

308. See *supra* Part III.C (discussing state courts' conflicting treatment of reduction of final sentences).

309. See, e.g., Comment, *supra* note 36, at 146 (arguing that executive's pardon power does not prohibit legislative reduction of final sentences); Krent, *supra* note 36, at 66–73 (same).

310. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 250–51 (2d ed. 2008). Pardons, by contrast, do not merely reduce sentences—they absolve the defendant of the conviction and sentence. *Id.* at 250. Because “[t]he power of commutation is an adjunct of the pardoning power,” the pardon power is often used to refer to both the power to pardon as well as to commute. *Commonwealth v. Sutley*, 378 A.3d 780, 789 n.12 (Pa. 1977).

311. See *McLaughlin v. Bronson*, 537 A.2d 1004, 1006–07 (Conn. 1988) (“In Connecticut, the pardoning power is vested in the legislature.” (citing *Palka v. Walker*, 195 A. 265 (Conn. 1938))); Comment, *supra* note 36, at 146 n.168 (citing ALA. CONST. amend. 38; ARIZ. CONST. art. V, § 5; IOWA CONST. art. IV, § 16; KAN. CONST. art. I, § 7; N.M. CONST. art. V, § 6; OR. CONST. art. V, § 14; WASH. CONST. art. III, § 9).

312. Comment, *supra* note 36, at 146.

313. See *id.* (discussing “judicial adherence” to the “theory that the legislature constitutionally lacks the power to grant pardons or clemency and that any legislative reduction or extinguishment of penalty would be in the nature of a pardon or clemency”).

A. *The Minority Rule: The Reduction of Final Sentences Does not Violate the Executive's Commutation Power*

In *Way v. Superior Court*, the California Court of Appeals addressed whether a retroactive law that reduced final sentences violated the separation of powers by infringing the executive's power to commute sentences.<sup>314</sup> While acknowledging that the legislature did not have the power to commute prison sentences, and that its legislative reduction of final sentences "ha[d] the effect" of commutation, the court held that such legislation nevertheless did not constitute "such an invasion of the executive power as to make the Act's retroactivity unconstitutional."<sup>315</sup> The legislature's objective, the court noted, was "admittedly one within its power"—to "restructure punishments for criminal conduct and to make them uniform to the extent reasonably possible."<sup>316</sup> The court contrasted this objective with the objective of executive commutations, which is to show "mercy, grace or forgiveness toward past offenders."<sup>317</sup>

Because the objective of the legislation was within the legislature's power, the court concluded that the infringement on the executive's commutation power was merely "incidental" and therefore permissible.<sup>318</sup> Although sentence reduction "may be traditionally associated" with the executive, this does not mean that it "cannot incidentally be used by" the legislature.<sup>319</sup> According to the Court,

There can be no rigid line over which one department cannot traverse. . . . Each branch must in some degree exercise some of the functions of others; it is only when one branch exercises the *complete* power constitutionally delegated to another that the action violates the constitutional distribution of powers.<sup>320</sup>

In *Younger v. Superior Court of Sacramento County*, the Supreme Court of California followed the reasoning of *Way* in upholding legislation that authorized destruction of conviction records relating to the possession of marijuana.<sup>321</sup> Such legislation, the court held, did not violate the separation of powers between the legislature and the

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314. *Way v. Superior Court*, 74 Cal. App. 3d 165, 180 (1977), cited with approval in *Younger v. Super. Ct. of Sacramento Cnty.*, 577 P.2d 1014, 1024 (Cal. 1978) (en banc).

315. *Id.* at 177.

316. *Id.*

317. *Id.*

318. *Id.* at 177–78.

319. *Id.* at 178.

320. *Id.*

321. *Younger v. Super. Ct. of Sacramento Cnty.*, 577 P.2d 1014, 1024 (Cal. 1978).

executive.<sup>322</sup> “Any infringement on the power of executive clemency is thus purely incidental to the main purpose of the statute,” i.e., reducing the adverse social and personal effects of a conviction that might linger long after the prescribed punishment has been completed, “which is well within the province of the Legislature.”<sup>323</sup>

California appeals courts have likewise followed *Way*'s purpose test in rejecting separation-of-powers challenges alleging legislative infringement of the pardon power.<sup>324</sup> In *Chavez*, the California Court of Appeals relied on *Way* in holding that the retroactive reduction of final sentences “did not infringe the governor’s pardon power because the motivation for the law was not to pardon, but to restructure punishment. The lessening of petitioners’ sentences here is incidental to the legitimate motivation of correcting an anomaly in the law . . . .”<sup>325</sup>

In 1986, in *Kent County Prosecutor v. Kent County Sheriff*, the Michigan Supreme Court was equally divided on the question of whether a statute providing for the early release of prisoners infringed on the executive’s pardon power.<sup>326</sup> Judge Boyle stated that the act violated the separation-of-powers doctrine because the Governor’s power of commutation was exclusive and the legislature’s reduction of sentences was “a commutation in every sense of the word.”<sup>327</sup> Judge Levin disagreed.<sup>328</sup> “Any general mercy arising from the exercise of the power conferred by the act,” Judge Levin stated, “is simply incidental to the primary goal of relieving county jail overcrowding, a goal clearly within the plenary power of the Legislature.”<sup>329</sup>

After rehearing, the Michigan Supreme Court in *Kent County Prosecutor v. Kent County Sheriff* unanimously held that the early-release statute did not infringe the executive’s pardon power.<sup>330</sup> Like in

322. *Id.*

323. *Id.*

324. *See Way v. Superior Court*, 74 Cal. App. 3d 165, 177–78 (1977) (holding that “shortening of existing prison terms” was “purely incidental to the main legislative purpose” of uniformity in sentencing).

325. *In re Chavez*, 8 Cal. Rptr. 3d 395, 405 (Cal. Ct. App. 2004).

326. *Kent Cnty. Prosecutor v. Kent Cnty. Sheriff (Kent Cnty. I)*, 391 N.W. 2d 341 (Mich. 1986), *rev’d on reh’g*, *Kent Cnty. Prosecutor v. Kent Cnty. Sheriff (Kent Cnty. II)*, 409 N.W.2d 202 (Mich. 1987).

327. *Kent Cnty. I*, 391 N.W.2d at 344.

328. *Id.* at 350 (Levin, J., dissenting).

329. *Id.*

330. *Kent Cnty. II*, 409 N.W.2d at 206–07. *Compare id.* at 208 (Boyle, J., concurring) (“I concur in the result of the majority because, upon consideration of the new arguments presented since this Court’s original determination in this case, I am now convinced that the grant of power to the Legislature permitting indeterminate sentences allows the reductions called for in the jail overcrowding act.”), *with Kent Cnty. I*, 391 N.W. 2d at 344 (Boyle, J.) (holding that legislature’s

Way, the court began by examining the purpose of the statute, which was to “to reduce or eliminate the evils fostered by overcrowded jails.”<sup>331</sup> This purpose, the court noted, implicated the public health and welfare and was therefore well within the Legislature’s plenary power.<sup>332</sup>

The court next turned to the governmental action contemplated by the act—the reduction of sentences.<sup>333</sup> “If the effect of the jail overcrowding act [i.e., sentence reduction] is to violate a constitutional command,” the court stated, “then no laudable legislative purpose can save the enactment.”<sup>334</sup> The court concluded that, although the statute reduced sentences, it did not permit “commutations” in violation of the state constitution, for two reasons.<sup>335</sup> First, the commutation process did not resemble the process mandated by the early-release statute.<sup>336</sup> Executive commutations, the court reasoned:

[A]re acts of individualized clemency, typically motivated by the prisoner’s personal characteristics and behavior in jail or prison. In contrast, the sentence reductions under the act are prompted by generalized conditions of the jail or jails within the county, not by the unique characteristics of the affected prisoners.<sup>337</sup>

Second, the beneficiaries of commutation differed from those benefitted by the early-release statute.<sup>338</sup> “Commutations are directly aimed at benefiting the released prisoner, and no others. . . . Reduction in sentences due to jail overcrowding,” by contrast, “are directly aimed at alleviating that emergency situation.”<sup>339</sup> As a result, “released prisoners are not the only ones affected by sentence reductions”—

reduction of sentences violated executive’s pardon power).

331. *Kent Cnty. II*, 409 N.W.2d at 204 (“In assessing the validity of a statute against a constitutional challenge, an appropriate starting point is the legislative purpose in enacting the statute.”).

332. *Id.* at 205.

333. *See id.* at 205–06.

334. *Id.* at 205.

335. *Compare id.* at 206–07 (adopting Judge Levin’s analysis in *Kent County I*, which found no infringement of the Governor’s commutation power), with *Kent County I*, 391 N.W.2d at 344 (Boyle, J.) (“[T]he sentences of the prisoners who benefit from an application of the county jail overcrowding act are reduced from the time specified by the sentencing judge. This, in my estimation, is a commutation in every sense of the word.”).

336. *See Kent Cnty. II*, 409 N.W.2d at 206; *see also Kent Cnty. I*, 391 N.W.3d at 348 n.20 (Levin, J., dissenting) (contrasting character of sentencing proceeding, “which emphasized that the sentence should be tailored to the particular circumstances of the case and offender,” with “the massive, generally nonindividualized reduction of sentences pursuant to [the early-release statute]”).

337. *Kent Cnty. II*, 409 N.W.2d at 206.

338. *See id.*

339. *Id.*

prisoners still confined (and prison officials) enjoy less crowded conditions.<sup>340</sup> “The incidental benefit that accrues to the prisoners released under the act,” the court concluded, “does not amount to an unconstitutional invasion of the powers of the executive branch.”<sup>341</sup>

In 2001, in *People v. Matelic*, the Michigan Court of Appeals similarly held that a statute providing parole eligibility for drug offenders previously sentenced to mandatory terms of LWOP did not violate the governor’s commutation power.<sup>342</sup> According to the court, the Legislature enacted the statutes “to create uniformity” in the law “by bringing preamendment sentences into line with the terms of punishment to be imposed under the amended [law],” “to alleviate to some degree the persistent problem of prison overcrowding,” “to save taxpayers the cost of lifetime incarcerations,” and “to reduce the likelihood that other felons who were violent might obtain early release on parole because of prison overcrowding.”<sup>343</sup> Finding that “the primary purposes of [the parole eligibility law] all serve the public good,” the court concluded that the Legislature acted properly to the extent that “it *incidentally* reduced the prison terms of prisoners previously convicted of drug offenses that carried life sentences without the possibility of parole.”<sup>344</sup>

In 1964, in *People v. Pate*, the Supreme Court of Illinois similarly held that retroactive application of a statute allowing resentenced prisoners to receive credit for time served on an erroneous sentence did not amount “to a pardon or commutation of a valid sentence. . . . The legislature has not attempted to change the duration of the sentence, but merely to recognize the gross inequity in the legal reasoning that would ignore penitentiary time served for the same offense.”<sup>345</sup> To hold otherwise, the court reasoned:

340. *Id.* at 206; *see id.* at 207 (“[C]onditions arising from jail and prison overcrowding can lead to suits against jail and prison officials . . .”).

341. *Id.* at 204; *see Kent Cnty. I*, 391 N.W.2d at 350–52 (Levin, J., dissenting) (citing *Way*, and stating that “[a]ny general mercy arising from the exercise of the power conferred by the act is simply incidental to the primary goal of relieving county jail overcrowding, a goal clearly within the plenary power of the Legislature.”). Several years before *Kent County I*, the Michigan Supreme Court held that a law providing for reduction of final *indeterminate* sentences in order to reduce prison overcrowding did not infringe the executive’s pardon power, based on a constitutional provision explicitly empowering the legislature to provide “for the detention and release of persons imprisoned or detained on [indeterminate] sentences.” *Oakland Cnty. Pros. Att’y v. Mich. Dep’t of Corr.*, 305 N.W.2d 515, 519 (Mich. 1981).

342. *People v. Matelic*, 641 N.W.2d 252, 265 (Mich. Ct. App. 2001), *overruled on other grounds*, *People v. Stewart*, 698 N.W.2d 340, 343 (Mich. 2005).

343. *Id.*

344. *Id.* (emphasis added)

345. *People ex rel. Gregory v. Pate*, 203 N.E.2d 425, 428 (Ill. 1964).

[W]ould perpetuate a situation that the legislature clearly sought to eliminate, and would ignore the express intention that the remedial provisions of the Code be applied retroactively. No rational purpose would be served in treating persons resentenced prior to January 1, 1964, in a completely different way than those resentenced after that date.<sup>346</sup>

The Supreme Court of Ohio took a different tack in rejecting a separation-of-powers challenge to a retroactive ameliorative law.<sup>347</sup> In *State v. Morris*, the court held that a law reducing final sentences did not infringe the executive's pardon power because the authority to commute sentences was not exclusive to the Governor but rather was shared with the legislature.<sup>348</sup> Under the Ohio Constitution, the court explained, "the Governor's powers are those that are specifically granted," whereas the legislature's powers are those not specifically *limited* by the state constitution.<sup>349</sup> Although the Ohio Constitution explicitly authorized the Governor to commute sentences, it did not—either explicitly or implicitly—prohibit the legislature from doing likewise.<sup>350</sup> Because Ohio's Constitution did not prohibit the legislature from exercising the pardon power, the court reasoned, that power was vested in the legislative branch.<sup>351</sup> The explicit grant of the pardon power to the Governor was not, therefore, a limitation on the power of the legislative branch, but rather a special grant of authority to the executive to grant pardons in certain instances.<sup>352</sup> In short, the Ohio Constitution did not take away the legislature's pardon power; it merely

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346. *Id.* at 427; see *Commonwealth v. Sutley*, 378 A.2d 780, 794 (Pa. 1977) (Roberts, J., dissenting) ("While the Pennsylvania Constitution does not require that those sentenced before the adoption of ameliorative legislation receive the benefits of that legislation, it should not be interpreted to prohibit the Legislature from equalizing the treatment of such offenders when it considers such treatment to serve the public interest. The power to determine what classes of offenders should benefit by the reduced penalties provided for in the Controlled Substance Act is a necessary incident to the Legislature's power to enact legislation, such as the Controlled Substance Act, which changes the penalties for certain crimes."). Notably, in 1918, the Supreme Court of Illinois held otherwise—invalidating legislation reducing final sentences on separation of powers grounds. See *People ex rel. Brundage v. La Buy*, 120 N.E. 537, 538 (1918) ("The power to grant reprieves, commutations, and pardons, after conviction, 'for all offenses,' is vested in the Governor and cannot be vested in another officer or body, directly or indirectly, by act of the Legislature, which the amendment [reducing final sentences] attempted to do.").

347. See *State v. Morris*, 378 N.E.2d 708, 713–14 (Ohio 1978).

348. *Id.*

349. *Id.* at 714 ("[T]he state Constitution does not grant power to the General Assembly, but only provides limitations to that power.").

350. *Id.* at 713–14.

351. *Id.*

352. *Id.*

shared that power with the executive.<sup>353</sup> Because the power was not exclusive, the court held, there was no separation-of-powers problem.<sup>354</sup>

Together, these cases stand for the proposition that legislation reducing final sentences does not violate the executive's pardon authority in two circumstances. First, the legislature's reduction of final sentences is permissible when the legislature retains the commutation power, as was the case in *Morris*.<sup>355</sup> Second, even if the legislature lacks the power to commute, its reduction of final sentences is nevertheless permissible when the purpose (e.g., uniformity, health and welfare, cost avoidance) and effect (e.g., generalized process benefitting the public and, only incidentally, prisoners) of such legislation differs from the purpose (e.g., mercy or forgiveness) and effect (individualized process benefitting one prisoner) of commutation, as was the case in *Way, Kent County*, and their progeny.<sup>356</sup>

Several other reasons support the wisdom of the minority rule. First, the system of checks and balances already provides the executive with protection against legislation that violates the separation of powers. If a governor believes that his or her commutation authority is threatened by an act of the legislature, a governor can exercise the veto power.<sup>357</sup> This structural safeguard cautions against a restrictive interpretation of

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353. *Id.*

354. *Id.* at 714; *see* *Commonwealth v. Sutley*, 378 A.2d 780, 793 n.9 (Pa. 1977) (Roberts, J., dissenting) ("The constitutional provision granting the executive power to pardon, Pa. Const. art. IV, § 9, is not exclusive by its terms, and there is no reason to construe it as exclusive. . . . Thus, the executive's power to pardon does not impliedly prohibit the Legislature from enacting statutes in the nature of general pardons."); *id.* at 798 (Manderino, J., dissenting) ("The authority of the legislature is unlimited so long as the exercise of that authority does not violate any constitutional limitations. The authority of the executive, on the other hand, extends only so far as is expressly provided in the Constitution." (citations omitted)).

355. *See supra* notes 347–54 and accompanying text (discussing *Morris*, which held that law reducing final sentences did not infringe executive's pardon power because authority to commute sentences was not exclusive to Governor).

356. *See supra* Part IV.A (discussing *Way, Kent County*, and their progeny, which upheld laws reducing final sentences).

357. COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES 2012, ENACTING LEGISLATION: VETO, VETO OVERRIDE AND EFFECTIVE DATE* 156–58 tbl. 3.16 (2012), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/BOSTable3.16.pdf> (compiling veto powers in each state); *see* *Kent Cnty. Prosecutor v. Kent Cnty. Sheriff (Kent Cnty. II)*, 409 N.W.2d 202, 206 n.8 (Mich. 1987) ("It is significant to note that when the jail overcrowding act was passed, Governor Milliken signed it without any indication of qualms that it would invade his executive powers of clemency. Also, although the present litigation has been pending for some years, Governor Blanchard has not sought to intervene to protect his powers. . . . [W]e can presume that each Governor recognized the need for legislation dealing with overcrowding in county jails and approved the method chosen by the Legislature to deal with this problem." (citations omitted)). *But see* *Bossie v. State*, 488 A.2d 477, 480–81 (Me. 1985) (rejecting argument that "Governor intended that his signature would be a blanket exercise of his commutation power").

the legislature's power to reduce sentences.<sup>358</sup>

A second reason that the reduction of final sentences does not infringe the executive's commutation power is consistency. A governor can commute sentences that are not yet final.<sup>359</sup> Likewise, it is not a violation of the commutation power for a legislature to retroactively reduce sentences that are not yet final.<sup>360</sup>

If the legislature's reduction of sentences does not infringe the executive's commutation power *before* finality, it should not violate the executive's commutation power *after* finality.<sup>361</sup>

A third reason that the reduction of final sentences does not infringe the executive's commutation power relies on federal law. The Constitution explicitly grants pardon authority to the President.<sup>362</sup> Although the Department of Justice has taken the position that this grant of authority to the President implicitly precludes Congress from exercising such authority itself, Congress "has never acknowledged that it lacks the authority to grant at least general amnesties [i.e., pardons extended to whole classes or communities, instead of individuals] if not pardons to specified individuals."<sup>363</sup> Indeed, Congress "has debated bills proposing amnesties on a number of occasions and has asserted its constitutional authority to adopt such legislation."<sup>364</sup> The Supreme Court "has never directly resolved the question of Congress's pardon and amnesty authority," but early cases suggest that Congress retains such authority, at least with respect to general amnesties.<sup>365</sup> As the

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358. See *Kent Cnty. II*, 409 N.W.2d at 206 n.8 (recognizing ability of governors to challenge "inva[sion] . . . [of their] executive powers of clemency").

359. *Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The executive can relieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.").

360. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) ("Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments *still on appeal* that were rendered before the law was enacted, and must alter the outcome accordingly." (emphasis added)).

361. See Krent, *supra* note 36, at 71 ("If congressional action paralleling pardons of individuals before conviction does not violate the President's pardon authority, it is difficult to understand why congressional action after sentencing would be unconstitutional.").

362. U.S. CONST. art. II, § 2, cl. 1.

363. Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1269 (2003); see *id.* ("[A] bill granting clemency to persons already convicted and serving their sentences 'constitutes an obvious usurpation of the pardoning power and renders the bill constitutionally infirm.'" (quoting Letter from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, to the Honorable James D. Eastland (Feb. 25, 1974))).

364. *Id.*

365. *Id.* at 1272-73.

Court stated in *Brown v. Walker*:

Although the Constitution vests in the President “power to grant reprieves and pardons for offences against the United States, except in cases of impeachment,” this power has never been held to take from Congress the power to pass acts of general amnesty, and . . . “extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.”<sup>366</sup>

Fourth, as the California Supreme Court stated in *Way*, the legislative reduction of final sentences is not a *complete* usurpation of the executive’s commutation power.<sup>367</sup> The executive still retains a range of pardon and commutation options. For example, suppose that legislation reduced final death sentences to LWOP. The executive could further reduce those LWOP sentences by commuting the sentence to life in prison *with* the possibility of parole, by commuting the sentence to a term of years, or by pardoning the person altogether.<sup>368</sup> Because the executive retains this power notwithstanding the legislature’s sentence reduction, such a reduction hardly seems to tip the scales toward a constitutional violation.

### *B. The Majority Rule: The Reduction of Final Sentences Violates the Executive’s Commutation Power*

Although court decisions in California, Michigan, Illinois, and Ohio persuasively hold that a legislature’s reduction of final sentences does not violate the executive’s commutation authority, these cases appear to

366. *Brown v. Walker*, 161 U.S. 591, 601 (1896); see *The Laura v. Bridge-Port Steamboat Co.*, 114 U.S. 411 (1885) (“[I]n none of the cases in this court or in the Circuit and District Courts of the United States, involving the operation or effect of such warrants of remission [of fines, penalties, and forfeitures], was it ever suggested or intimated that the legislation was an encroachment upon the President’s power of pardon.”); see also *Commonwealth v. Sutley*, 378 A.2d 780, 788 (Pa. 1977) (“[F]ederal courts have adopted the principle of the English common law which recognized an inherent power of pardon in the legislative branch under that body’s supreme lawmaking power . . .”).

367. See *Way v. Superior Court*, 74 Cal. App. 3d 165, 178 (1977) (“Each branch must in some degree exercise some of the functions of others; it is only when one branch exercises the *complete* power constitutionally delegated to another that the action violates the constitutional distribution of powers.” (emphasis added)).

368. See *Oakland Cnty. Pros. Att’y v. Mich. Dep’t of Corr.*, 305 N.W.2d 515, 521 (Mich. 1981) (“[T]he Legislature has done nothing to directly interfere with the Governor’s function; he remains free to pardon or commute the sentences of individual prisoners as he, in his discretion, feels the circumstances warrant.”); see also Koenig, *supra* note 36, at 69–70 (“Where the Legislature reduces penalties, and makes that retroactive to those in prison, clearly the Legislature is not co-opting the Governor’s power to grant commutations, as the Governor is free to grant any commutation he or she desires. There is no interference with the carrying out of that gubernatorial right.”).

be in the minority.<sup>369</sup> At least eight state high courts have gone the other way, holding that legislation that reduced final sentences violated the executive's commutation power.<sup>370</sup> For example, in *Bossie v. State*, the Supreme Court of Maine held that a statute reducing final sentences by changing the calculation of "good-time" credits violated the separation of powers.<sup>371</sup> Rather than carefully distinguishing between the reduction of sentences and executive commutation, as the courts did in *Way* and *Kent County*, the Maine Supreme Court simply stated that "the separation of powers issues must be dealt with in a formal rather than functional manner."<sup>372</sup> The power to commute sentences, the court reasoned, was "explicitly and exclusively granted to the executive."<sup>373</sup> Therefore, because the statute "shortened (commuted) the lengths of existing sentences," the legislature had "interfere[d] with the executive's explicit and exclusive grant of the commutation power" in violation of the constitution.<sup>374</sup>

In *State ex rel. Smith v. Blackwell*, the Texas Court of Criminal Appeals similarly held that a statute reducing the final sentences of those convicted of marijuana offenses resulted in "commutation" and therefore violated the Texas Constitution, which "plac[ed] the power of clemency in the hands of the Governor, acting upon the recommendation of the Board of Pardons and Paroles."<sup>375</sup> Unlike the court in *Way*, the *Smith* court was not persuaded that the legislature's goal of uniformity in sentencing rendered its reduction of sentences constitutional.<sup>376</sup> According to the court:

The Texas Controlled Substances Act clearly represents a re-thinking, a change in attitude toward marihuana-related offenses and the penalties to be imposed. It was in fact remedial legislation as it related

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369. See *supra* Part IV.A (discussing state court decisions permitting legislative reduction of final sentences).

370. See *infra* notes 371–92 and accompanying text (discussing state court decisions prohibiting legislative reduction of final sentences as violation of executive's commutation authority).

371. *Bossie v. State*, 488 A.2d 477, 479–480 (Me. 1985).

372. *Id.*

373. *Id.*

374. *Id.*; see *Littlefield v. Caton*, 856 F.2d 344, 348 (1st Cir. 1988) (stating that the application of *Bossie* furthered "state's paramount interests in maintaining the integrity of the executive branch of state government and in applying the correct rule of law" (citing *Bossie*, 488 A.2d at 480)); *Austin v. State*, 663 A.2d 62, 64 (Me. 1995) (stating that parole board's "reduction of Austin's life sentence was the equivalent of a commutation, and thus intruded on the power reserved to the Governor by Article V of the Maine Constitution." (citing *Bossie*, 488 A.2d at 479–80)).

375. 500 S.W.2d 97, 103 (Tex. Crim. App. 1973).

376. See *id.* at 104.

to possession of marihuana. And the Legislature was not unaware of the large number of inmates in the Department of Corrections as well as those who have already been released who suffered some of the harsher penalties authorized by the former law which will no longer be imposed for the same type of offense. . . . There can be no question but that the Legislature acted with worthy motives in mind, but today's holding [that the statute violates the executive's commutation power] cannot come as a surprise to the Legislature . . . .<sup>377</sup>

Likewise, in *People v. Herrera*, the Supreme Court of Colorado held that a statute providing for a right of review of final sentences, in light of Colorado's amendment of its criminal code to reduce final sentences for most offenses, violated the executive's commutation authority.<sup>378</sup> The court began by recognizing and agreeing with the "laudable, beneficent purposes motivating the enactment" of the statute—the equalization of existing sentences in light of reductions of sentences for future crimes.<sup>379</sup> "[T]he criminal justice process," the court noted,

[S]ometimes results in imperfect justice which in extreme cases cries out for correction. This is particularly so in the area of imposition of sentences for criminal misconduct. The methods and means by which correction of such inequities and injustices may be attained, however, are circumscribed by constitutional limitations.<sup>380</sup>

According to the court, "the power of commutation is the power to reduce punishment from a greater to a lesser sentence," and this power was exclusive to the governor.<sup>381</sup> "Any attempt, therefore, to exercise such power by the judicial department" by reducing sentences, even though legislatively sanctioned, the court held, "would be a violation of the doctrine of separation of powers under Article III of the Colorado Constitution."<sup>382</sup> Like the court in *Bossie*, the *Herrera* court favored formalism over functionalism, declining to distinguish between the legislative reduction of sentences and executive commutation.<sup>383</sup> Significantly, *Herrera* also went further than *Bossie* and *Smith*, invalidating a statute that made the court's reduction of final sentences

377. *Id.* at 104.

378. 516 P.2d 626, 627 (Colo. 1973).

379. *Id.* at 628.

380. *Id.*

381. *Id.*

382. *Id.* at 629. The court also reasoned that the legislature's conferral of such power on the judiciary was, itself, a violation of the separation of powers. *See id.* at 628 (stating that legislature was "powerless to confer executive powers upon the judiciary").

383. *See id.* at 628–29 ("Implied in this provision [providing for right of review of final sentences] is the authority to reduce a sentence after a final conviction—the power of commutation.").

merely discretionary.<sup>384</sup> Courts in Nebraska,<sup>385</sup> Pennsylvania,<sup>386</sup> Louisiana,<sup>387</sup> Mississippi,<sup>388</sup> and North Dakota<sup>389</sup> have similarly held that legislation reducing final sentences violates the executive's pardon power.<sup>390</sup>

Together, these cases stand for the straightforward proposition that a legislature's reduction of final sentences violates the executive's

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384. *Id.* at 627 (stating that amendment “authorizes postconviction review where it is alleged “[t]hat there has been a significant change in the law, applied to applicant’s conviction or sentence, allowing in the interest of justice retroactive application of the changed legal standard.” (emphasis added)).

385. *Boston v. Black*, 340 N.W.2d 401, 408 (Neb. 1983) (stating that “denying retroactive application of the [statute’s] good time sentence reduction provisions to those serving sentences imposed prior to its effective date” promoted “the preservation of the separation of governmental powers embedded in our state Constitution”); *see State v. Philipps*, 521 N.W.2d 913, 917 (Neb. 1994) (“[T]o interpret a statute such that it would reduce, without the approval of the Board of Pardons, a sentence imposed prior to its enactment would render the statute unconstitutional, for it would permit a legislative invasion of the power of commutation constitutionally consigned to the board.”).

386. *Commonwealth v. Sutley*, 378 A.2d 780, 782, 789 (Pa. 1977) (holding that statute that reduced final sentences for those convicted of marijuana possession violated separation of powers because it “operated as a legislative impairment of existing final legal judgments,” but strongly implying that statute also violated separation of powers because “there is no power of pardon or commutation in the legislature and . . . the power is specifically and singularly granted to the executive branch”).

387. *State v. Dick*, 951 So. 2d 124, 133 (La. 2007) (“[A]llowing the courts to reduce the offenders’ final sentences would, in effect, commute a valid sentence, a power the legislature knows to be constitutionally reserved to the executive branch.”).

388. *Whittington v. Stevens*, 73 So. 2d 137, 140 (Miss. 1954) (holding that, although “the legislature was prompted by the highest humanitarian motives,” statute providing for reduction of sentence based on incapacity of prisoners violated commutation power vested in governor); *id.* (“Where the power to commute sentences is expressly or impliedly vested in the governor or a board, that authority alone can grant a commutation; and no other person, official, or body can be empowered to grant a commutation.”), *cited with favor in Corley v. State*, 584 So. 2d 769, 775 (Miss. 1991).

389. *State v. Cummings*, 386 N.W.2d 468, 472 n.2 (N.D. 1986) (“Legislation lessening punishment may not be applied to final convictions because this would constitute an invalid exercise by the Legislature of the executive pardoning power.” (citing *Ex parte Chambers*, 285 N.W. 862 (N.D. 1939))).

390. Decisions from the Supreme Courts of Idaho and Missouri suggest that these courts would also hold that legislation reducing final sentences violates the executive's pardon power. *Cf. Bates v. Murphy*, 796 P.2d 116, 119 (Idaho 1990) (citing *Bossie*, and stating that discharges by Commission of Pardons and Parole “are in fact commutations because they shorten the term of the sentences imposed by the court. Since the discharges granted to the petitioners in the present case did not comply with the procedures set forth in Article IV, § 7, of the Idaho Constitution, they are void”); *State v. Grant*, 79 Mo. 113, 124 (1883) (holding that statute that retroactively removed restriction prohibiting ex-offenders from testifying as witnesses violated governor's pardon power because “the only method of relief from the disabilities annexed to such judgment is by a full pardon of the offense”), *distinguished on other grounds by State ex rel. Oliver v. Hunt*, 247 S.W.2d 969, 972 (Mo. 1952)).

commutation authority.<sup>391</sup> According to the *Herrera* court, this remains true even if courts are given the discretion to reopen, because the legislature is “powerless to confer executive powers upon the judiciary.”<sup>392</sup> Importantly, the majority rule does not appear to prohibit a legislature from authorizing (or perhaps even mandating) *the executive* to review the sentences of those finally sentenced under an old law and, in its discretion, to commute those sentences consistent with the new law.<sup>393</sup>

*C. Conclusion: The Reduction of Final Death Sentences  
Does not Violate the Separation of Powers by Interfering  
with the Executive’s Commutation Power*

In conclusion, it is highly unclear whether the reduction of final death sentences interferes with the Executive’s commutation power because case law argues in both directions. Under the minority rule, retroactive death penalty repeal would almost certainly not violate the executive’s commutation power for one of two reasons.<sup>394</sup> First, the commutation power may not be exclusive to the executive; it may instead be shared with the legislature, thereby eliminating any separation-of-powers problem.<sup>395</sup>

Second, even if the commutation power were exclusive to the executive, the reduction of final death sentences would most likely not

391. See *supra* notes 371–90 and accompanying text (discussing state court decisions prohibiting legislative reduction of final sentences as violation of executive’s commutation authority).

392. See *People v. Herrera*, 516 P.2d 626, 628 (Colo. 1973) (holding that Colorado statute providing for right of review of final sentences violated executive’s commutation authority).

393. See Comment, *supra* note 36, at 146 (discussing Washington law by which legislature “circumvent[ed]” separation of powers challenge by directing board of prison terms parole to review sentences of prisoners sentenced under old law and giving it discretion to reduce such sentences in accordance with new law); see also *Dugger v. Williams*, 593 So. 2d 180, 183 (Fla. 1991) (per curiam) (“On its face, the statute does no more than direct DOC to *recommend* [to the Governor and Cabinet] a commutation of sentence. . . . The executive still retains full discretion, subject only to its own Rules of Executive Clemency and the state Constitution, to accept or reject the recommendation. There thus is no usurpation of executive authority here.” (emphasis added)). Such legislation would likely give rise to yet another separation of powers concern—this time, between the executive and the judiciary. See, e.g., *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (holding that Congress cannot vest review of the decisions of Article III courts in executive officials). Because such legislation would not vest in the executive any authority that it does not already have (i.e., the power to commute sentences), such legislation most likely would not violate the separation of powers. See generally Peterson, *supra* note 363, at 1250–60 (discussing congressional imposition of procedures on the Presidential pardon process).

394. See *supra* notes 355–56 and accompanying text (discussing minority rule holding that legislative reduction of sentences does not violate executive’s commutation authority).

395. See *supra* notes 347–54 and accompanying text (discussing *Morris*).

offend the separation of powers because it is not the same as commutation in either purpose or effect.<sup>396</sup> Like the statute at issue in *Way*, the purpose of retroactive death penalty repeal is not mercy or forgiveness—it is uniformity.<sup>397</sup> Furthermore, like the statute at issue in *Kent County*, the reduction of sentences through retroactive death penalty repeal differs markedly from commutation in both process and intended beneficiaries.<sup>398</sup> Commutation is a highly individualized process involving consideration of a prisoner’s “personal characteristics and behavior”; retroactive death penalty repeal turns on a single, general factor that has absolutely nothing to do with a prisoner’s personal characteristics or behavior: the date of the crime.<sup>399</sup> And while commutation benefits some individual offenders but not others, retroactive death penalty repeal benefits literally everyone who committed a death-eligible crime before the passage of the statute.<sup>400</sup> This includes those known (i.e., prisoners awaiting trial or sentencing and those finally sentenced to death row) and unknown (i.e., those who committed crimes in “cold cases” and have not yet been arrested).<sup>401</sup> Importantly, retroactive death penalty repeal also benefits the public, more generally, which is spared the expense of maintaining the death penalty through the payment of taxes.<sup>402</sup>

Under the majority rule, by contrast, the legislature’s reduction of final death sentences would most likely violate the executive’s commutation power unless the authority to reduce sentences was given to the executive and made discretionary.<sup>403</sup>

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396. See *supra* notes 314–46 and accompanying text (discussing, among others, *Way* and *Kent County*).

397. See *Way v. Superior Court*, 74 Cal. App. 3d 165, 177–78 (1977); see also *supra* notes 314–20 and accompanying text (discussing *Way*).

398. See *Kent Cnty. Prosecutor v. Kent Cnty. Sheriff (Kent Cnty. II)*, 409 N.W.2d 202, 206 (Mich. 1987); see also *supra* notes 330–41 and accompanying text (discussing *Kent County II*).

399. See *Kent Cnty. II*, 409 N.W.2d at 206.

400. See, e.g., The SAFE California Act § 10, *supra* note 39 (retroactively reducing all death sentences).

401. See *id.*

402. See *People v. Matelic*, 641 N.W.2d 252, 265 (Mich. Ct. App. 2001) (upholding law that reduced final sentences, in part, to “save taxpayers the cost of lifetime incarcerations”); see also The SAFE California Act § 2(10), *supra* note 39 (“Retroactive application of this act will end a costly and ineffective practice.”); *supra* notes 342–44 and accompanying text (discussing *Matic*).

403. See *supra* notes 371–94 and accompanying text (discussing majority rule holding that legislative reduction of sentences violates executive’s commutation authority).

## V. THE REDUCTION OF FINAL SENTENCES DOES NOT VIOLATE CONSTITUTIONAL SAVINGS AND RETROACTIVITY CLAUSES

In addition to separation-of-powers concerns, two constitutional impediments to retroactive death penalty-repeal legislation remain: constitutional savings clauses, which are extremely rare, and constitutional retroactivity clauses, which are only slightly less so.<sup>404</sup>

### A. Constitutional Savings Clauses

As discussed in Part I, the majority of states have enacted general savings statutes that create a presumption against retroactive laws.<sup>405</sup> That presumption can be overcome by explicit language or other clear indicia of legislative intent indicating that a new law is intended to be retroactive.<sup>406</sup> Three states—Florida, New Mexico, and Oklahoma—however, have saving clauses in their constitutions.<sup>407</sup> These constitutional savings clauses create not a statutory presumption but instead a *rule* against retroactivity that cannot be overcome by a new law.<sup>408</sup> In theory, at least, these state legislatures are “powerless to lessen penalties for past transgressions; to do so would require constitutional revision.”<sup>409</sup> In practice, however, constitutional savings clauses have not stopped legislatures in these states from passing legislation that retroactively reduces penalties, nor have they stopped

404. See *infra* Part IV.A–B and accompanying text (discussing constitutional savings clauses and constitutional retroactivity clauses). Unlike separation-of-powers concerns, which arise only when legislation reduces *final* sentences, constitutional savings clauses and retroactivity clauses implicate all retroactive legislation, regardless of whether it disturbs final sentences or pending cases. State constitutional *contract* clauses, which prohibit the retroactive impairment of contracts, are no impediment to retroactive death penalty repeal legislation because they apply only to civil legislation. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (distinguishing the federal “*Ex Post Facto* Clause,” which “flatly prohibits retroactive application of penal legislation,” from the federal Contracts Clause, which “prohibits States from passing another type of retroactive legislation, laws ‘impairing the Obligation of Contracts’”); see also L. Harold Levinson, *The Legitimate Expectation That Public Officials Will Act Consistently*, 46 AM. J. COMP. L. 549, 561 (1998) (stating that the federal Contracts Clause governs retroactivity of non-penal statutes).

405. See *supra* note 65 and accompanying text (discussing state general savings statutes).

406. See *supra* notes 69–71 and accompanying text (discussing presumption against retroactivity).

407. FLA. CONST. art. X, § 9; N.M. CONST. art. IV, §§ 33–34; OKLA. CONST. art. V, § 54. The Arizona Constitution has a savings clause, but it only applies to actions pending when Arizona became a state. ARIZ. CONST. art. XXII, §§ 1–2. Because such legislation is not at issue in the context of retroactive death penalty repeal, Arizona’s constitutional savings clause is not discussed here.

408. See Comment, *supra* note 36, at 129 (discussing constitutional savings clauses).

409. *Id.*

courts in these states from upholding such legislation.<sup>410</sup> As a result, it is far from certain that constitutional savings clauses necessarily prohibit the retroactive reduction of death sentences. And even if they do, they are only applicable to three states.<sup>411</sup>

### B. Constitutional Retroactivity Clauses

In addition to the separation-of-powers doctrine and state constitutional savings clauses, state constitutional provisions prohibiting “retroactive” (or “retrospective”) laws present another possible constraint on the legislature’s power to enact retroactive laws.<sup>412</sup> Importantly, constitutional retroactivity clauses are the exception, not the rule; only eleven state constitutions contain such provisions,<sup>413</sup> which generally take one of three forms.

The first type of constitutional retroactivity clause is one in which the prohibition on “retroactive” (or “retrospective”) laws applies only in the civil context. Colorado’s constitution, for example, provides that “[n]o ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation . . . shall be passed by the general assembly.”<sup>414</sup> According to the Colorado Supreme Court, the “retrospective” clause “pertains to civil statutes and does not provide any independent basis for increased protection from retroactive criminal laws . . . . The retrospective law prohibition is the civil parallel of the

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410. See, e.g., *Bryan v. State*, 753 So. 2d 1244, 1253 (Fla. 2000) (holding that, notwithstanding constitutional savings clause, trial court properly gave retroactive effect to statute providing death row prisoners with choice of death by lethal injection or electrocution); *State v. Pace*, 456 P.2d 197, 205 (N.M. 1969) (per curiam) (supplemental opinion) (holding that constitutional savings clause was not violated by giving effect to statute that repealed death penalty retroactively in pending cases, and stating that “[w]e perceive no reason under the constitution why [the legislature] could not make the law applicable in situations where, as here, the case was pending on appeal”); *Pollard v. State*, 521 P.2d 400, 402 (Okla. Crim. App. 1974) (holding that, notwithstanding constitutional savings clause prohibiting retroactive legislation, “the Legislature may make retroactive a statute lessening the punishment and classification of an offense, but the intent to do so must be affirmatively expressed in said statute”); see also N.M. Stat. Ann. § 12-2A-16(c) (West, Westlaw through 2nd Reg. Sess. of 2014 Legis. Sess.) (“If a criminal penalty for a violation of a statute or rule is reduced by an amendment, the penalty, if not already imposed, must be imposed under the statute or rule as amended.”); *id.* § 12-2A-8 (“A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise . . . .” (emphasis added)).

411. See *supra* note 407 and accompanying text (identifying New Mexico, Oklahoma and Florida as only three states with constitutional savings clauses).

412. See *infra* notes 413–35 and accompanying text (discussing constitutional retroactivity clauses).

413. See *Mitchell*, *supra* note 36, at 47–51 (compiling constitutional retroactivity clauses).

414. COLO. CONST. art. II, § 11 (emphasis added).

ex post facto clause.”<sup>415</sup> Retroactivity clauses such as these present no impediment to retroactive death penalty-repeal legislation, which necessarily involves the reduction of *criminal* sentences.<sup>416</sup>

A second type of constitutional retroactivity clause applies to criminal laws, but only to the extent that such laws impose harsher punishments than prior law. These retroactivity clauses are, in effect, ex post facto clauses, prohibiting more onerous—not ameliorative—criminal laws.<sup>417</sup> Maryland’s constitution, for example, states that “retrospective Laws, punishing acts committed before the existence of

415. *People v. District Court*, 834 P.2d 181, 192 (Colo. 1992). Georgia and Missouri similarly interpret their constitutional retroactivity clauses to prohibit retroactive civil—not criminal—laws. *See, e.g., Evans v. State*, 314 S.E.2d 421, 428 (Ga. 1984) (“[T]he history of our state Constitution shows that the term ‘retroactive law’ applies exclusively to constitutional challenges to civil statutes.”); *State v. Wade*, 421 S.W.3d 429, 432 (Mo. 2013) (en banc) (“[T]he retrospective clause of article I, section 13 does not apply to criminal laws. . . . [T]he ex post facto clause and the clause prohibiting any law retrospective in its operation in article I, section 13 have separate and distinct legal meanings, whereby the ex post facto clause applies to determine the validity of criminal laws and the clause prohibiting any law retrospective in its operation applies to determine the validity of laws affecting civil rights and remedies.”); *see also Mitchell, supra* note 36, at n.21 (“[T]he use of the constitutional retroactive clause to prevent [ameliorative] changes has been applied mostly in the civil law context.”). The Texas Supreme Court “assum[ed] without deciding that [the Texas Constitution’s] proscription against retroactive legislation is applicable to criminal cases.” *Grimes v. State*, 807 S.W.2d 582, 587 (Tex. Crim. App. 1991) (en banc); *see infra* notes 427–29 and accompanying text (discussing Texas’ constitutional retroactivity clause).

416. Idaho and Montana’s constitutions likewise prohibit “retroactive” and “retrospective” laws, respectively, but appear to do so only in the civil context, as demonstrated by the placement of such clauses. *Compare* IDAHO CONST. art. I, § 16 (stating, in “Declaration of Rights” article, that “[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed”), *with* IDAHO CONST. art. XI, § 12 (stating, in “Corporations, Public and Private” section, that “[t]he legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals *retroactive in its operation*” (emphasis added)). The placement of Idaho’s retroactivity clause suggests that it applies to civil laws impacting corporations, not criminal laws impacting individuals. *See* Neil Colman McCabe & Cynthia Ann Bell, *Ex Post Facto Provisions of State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 133, 140 (1991) (stating that Idaho’s retroactivity provision “seem[s] more akin to state constitutional prohibition[s] on special or local legislation than to [a] broad ban[] on retroactive civil laws”). Nevertheless, to the extent that the retroactivity clause applies to retroactive criminal legislation, it most likely does not apply to *ameliorative* criminal legislation because such legislation does not impose “a new liability.” IDAHO CONST. art. X, § 12. Montana’s constitutional retroactivity clause most likely does not apply to ameliorative criminal legislation for similar reasons. *Compare* MONT. CONST. art. II, § 31 (stating, in “Declaration of Rights” article, that “[n]o ex post facto law nor any law impairing the obligation of contracts . . . shall be passed by the legislature”), *with* MONT. CONST. art. XIII, § 1 (stating, in “Non-municipal corporations” section, that “[t]he legislature shall pass *no law retrospective in its operations* which imposes on the people a new liability in respect to transactions or considerations already passed” (emphasis added)).

417. *Cf. Dobbert v. Florida*, 432 U.S. 282, 294 (1977) (“It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law.”).

such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required.”<sup>418</sup> Maryland’s prohibition on “retrospective laws” thus explicitly refers to *ex post facto* laws.<sup>419</sup> As Maryland’s high court has made clear, “[t]he retrospective nature of a law, or its applicability to pre-existing cases does not make it unconstitutional, unless it . . . is ‘*ex post facto* within the meaning of the Constitution of the United States, or of our Declaration of Rights.’”<sup>420</sup>

The New Hampshire Constitution likewise applies to criminal laws, and states that “[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.”<sup>421</sup> In the criminal context, the New Hampshire Supreme Court has made clear that the clause “forbids *ex post facto* penal laws”—not laws that mitigate punishment.<sup>422</sup> According to the court, “[t]he only object of [the *ex post facto*] clause in the bill of rights was to protect individuals against unjust and oppressive punishment. Therefore, while it withholds the power to make retrospective laws for the *punishment of offences*, it leaves to the legislature the power to make such laws, at its discretion, for the *mitigation of punishment*.”<sup>423</sup>

As the Maryland and New Hampshire constitutions make clear, this second type of retroactivity clause does not prohibit retroactive death penalty-repeal legislation because such legislation is not *ex post facto*.<sup>424</sup> Retroactive death penalty-repeal legislation does not “make[]

418. MD. CONST. art. XVII.

419. *Id.*

420. Dep’t of Pub. Safety & Corr. Servs. v. Demby, 890 A.2d 310, 327 (Md. 2006) (internal citations omitted); see John Doe v. Dep’t of Pub. Safety & Corr. Servs., 62 A.3d 123, 137 (Md. 2013) (stating that Maryland’s constitutional retroactivity clause “is not implicated in purely civil matters. . . . [I]n Maryland, the prohibition of *ex post facto* laws applies only to criminal cases”) (internal citations omitted). North Carolina’s constitutional retroactivity clause, contained in a section of its Declaration of Rights entitled, “Ex Post Facto Laws,” parallels that of Maryland and has likewise been interpreted to forbid *ex post facto* laws. N.C. CONST. art. I, § 16; see, e.g., State v. Whitaker, 700 S.E.2d 215, 216–17 (N.C. 2010) (stating that federal Ex Post Facto Clause and North Carolina’s constitutional retroactivity clause “preserve the right of the people to be free from *ex post facto* laws”).

421. N.H. CONST. Pt. I, Art. 23; see State v. Comeau, 697 A.2d 497, 500 (N.H. 1997) (“We have long recognized that this constitutional provision contains two distinct branches—civil and criminal.”).

422. State v. Matthews, 951 A.2d 155, 157 (N.H. 2008).

423. *Id.* at 158 (quoting Woart v. Winneck, 3 N.H. 473, 476 (1826)).

424. See *supra* notes 417–25 and accompanying text (discussing Maryland’s and New Hampshire’s constitutional retroactivity clauses).

more onerous the punishment for crimes committed before its enactment”; quite the opposite, it *reduces* the punishment for such crimes.<sup>425</sup>

A third type of constitutional retroactivity clause extends to criminal laws but sweeps more broadly than *ex post facto* clauses. Only two states appear to have such clauses: Texas and Ohio.<sup>426</sup> The Texas Constitution states that “[n]o bill of attainder, *ex post facto* law, *retroactive law*, or any law impairing the obligation of contracts, shall be made.”<sup>427</sup> In *Grimes v. State*, the Texas Court of Criminal Appeals held that the Texas Constitution’s retroactivity clause did not prohibit retroactive application of a statute that eliminated retrial for wrongly sentenced defendants and instead required reformation of the judgment on appeal.<sup>428</sup> The Court of Criminal Appeals concluded that, although the Texas Constitution “not only prohibits *ex post facto* legislation but also prohibits any ‘retroactive’ legislation,” the clause was not “applicable to statutes merely affecting matters of procedure which do not disturb vested, substantive rights.”<sup>429</sup>

Similarly, the Supreme Court of Ohio has recognized that Ohio’s constitutional prohibition on “retroactive laws” is “a much stronger prohibition” than the prohibition on *ex post facto* laws.<sup>430</sup> As in Texas, Ohio courts have concluded that their constitutional retroactivity clause is not violated unless the new law “reach[es] back in time and create[s] new burdens, deprivations, or impairments of vested rights.”<sup>431</sup> In *State v. Davis*, the Supreme Court of Ohio gave retroactive effect to a law that

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425. *Miller v. Florida*, 482 U.S. 423, 435 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 36 (1981)).

426. See *infra* notes 427–29 and accompanying text (discussing Texas’ and Ohio’s constitutional retroactivity clauses).

427. TEX. CONST. art. I, § 16 (emphasis added).

428. *Grimes v. State*, 807 S.W.2d 582, 587–88 (Tex. Crim. App. 1991).

429. *Id.* at 587; see *Ex parte Abahosh*, 561 S.W.2d 202, 203 (Tex. Crim. App. 1978) (“The Texas Constitution goes further than the United States Constitution for the former is not confined to forbidding *ex post facto* laws, *i.e.*, retroactive penal legislation, but it also lays a ban on any retroactive law. In prohibiting retroactive laws, the Texas Constitution seeks to safeguard rights not guaranteed by other constitutional provisions.” (citing *Mellinger v. City of Houston*, 3 S.W. 249 (1887))).

430. *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 495 n.5 (Ohio 1988), *superseded on other grounds*, R.C. 2745.01 (interpreting OHIO CONST. art. II, § 28).

431. *State v. Davis*, 9 N.E. 3d 1031, 1044 (Ohio 2014) (quoting *Bielat v. Bielat*, 721 N.E.2d 28, 32 (Ohio 2000)); *accord*. *State v. White*, 972 N.E.2d 534, 546 (Ohio 2012) (“[T]he creation of a new right—even a new substantive right—is not, by itself, enough to support a claim of unconstitutional retroactivity. We have held that a claim that a statute is substantive, and hence unconstitutionally retroactive, ‘cannot be based solely upon evidence that a statute retrospectively created a new right, but must also include a showing of some impairment, burden, deprivation, or new obligation accompanying that new right.’” (citation omitted)).

allowed capital offenders whose death sentences had been set aside to be resentenced to death.<sup>432</sup> According to the *Davis* court, the new law did not violate Ohio's retroactivity clause because it did not "increase [the offender's] potential sentence," "impair any vested or accrued rights," violate "a reasonable expectation of finality," or "impose any new burden on [him]."<sup>433</sup>

Because retroactive death penalty repeal legislation safeguards—rather than takes away—death row prisoners' liberty and life interests, it is unlikely that such legislation is prohibited by the constitutional retroactivity clauses contained in the Texas and Ohio constitutions.<sup>434</sup> Indeed, if retroactively permitting a prisoner to be resentenced to death or retroactively depriving a prisoner of a new trial does not offend a retroactivity clause, it seems even less likely that reducing a prisoner's sentence would.<sup>435</sup>

## VI. MODEL RETROACTIVE DEATH PENALTY PROVISIONS

Having canvassed the various constitutional impediments to retroactive death penalty repeal, this Part provides four model statutory provisions that state legislatures should consider when repealing the death penalty retroactively.

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432. *Davis*, 9 N.E. 3d at 1044–45.

433. *Id.*

434. *See supra* notes 427–29 and accompanying text (discussing Texas' and Ohio's constitutional retroactivity clauses).

435. *See id.* (discussing *Grimes* and *Davis*). The Tennessee Constitution contains separate clauses prohibiting "retrospective law[s]," on the one hand, and ex post facto laws, on the other. *Compare* TENN. CONST. art. I, § 11 ("Ex Post Facto Laws"), with TENN. CONST. art. I, § 20 ("Retrospective laws; impairment of contracts"). Although the establishment of these two separate clauses would appear to suggest that Tennessee's constitutional retroactivity clause is more protective than its ex post facto clause, Tennessee courts have not interpreted the clauses this way. Instead, courts have construed Tennessee's constitutional retroactivity clause as creating a presumption against retroactivity that can be overcome by the clear intent of the legislature. *See, e.g., State v. Hayes*, No. M2012–01768–CCA–R3–CD, 2013 WL 3378320, at \*6–8 (Tenn. Crim. App. July 1, 2013) ("Under the Tennessee Constitution, 'no retrospective law . . . shall be made.' Tenn. Const. art. 1, § 20. Therefore, unless the legislature clearly indicates otherwise, statutes are presumed to operate prospectively."). When invalidating retroactive criminal laws, Tennessee courts generally rely on the ex post facto clause—not the retroactivity clause. *See, e.g., State v. Odom*, 137 S.W. 3d 572, 582–83 (Tenn. 2004) (holding that retroactive application of law that allowed admission of facts underlying prior conviction for purposes of establishing aggravating circumstance in death penalty case violated state ex post facto clause, without discussion of state retroactivity clause); *Hayes*, 2013 WL 3378320, at \*7–8 (holding that retroactive application of law that allowed admission of previously inadmissible evidence against defendant violated federal and state ex post facto clauses, but not the state retroactivity clause).

### A. Model Retroactivity Provision in Pending and Final Cases

Generally speaking, neither the separation of powers nor any other constitutional concern prohibits the legislature from repealing the death penalty in *pending* cases—i.e., those in which the person has not received a sentence of death and exhausted all direct appeals.<sup>436</sup> The following provision would provide for mandatory retroactivity in pending cases: “No person shall be executed, irrespective of whether the crime was committed, the conviction had, or the sentence imposed, before or after the effective date of this act.”<sup>437</sup>

Depending on which line of authority a court chooses to rely on, the separation of powers may prohibit the legislature from repealing the death penalty in *final* cases, i.e., reducing final death sentences to life imprisonment without the possibility of parole.<sup>438</sup> The following two provisions, drawn from federal and state capital and non-capital repeal legislation, are the most promising options for reducing final death sentences. The first option, heeding the holding of *Plaut*, authorizes (but does not require) the judiciary to reduce final death sentences:

In any case where a person was sentenced to death prior to the effective date of this act and exhausted all appeals, a court that imposed a death sentence may, on motion of the defendant, the Department of Corrections [or similar executive agency], the attorney for the State, or the court, impose a sentence of imprisonment in the state prison for life without the possibility of parole. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.<sup>439</sup>

In recognition of the majority rule invalidating the reduction of final sentences as a violation of the executive’s commutation power, the second option authorizes (but does not require) the *executive* to reduce final sentences:

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436. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) (stating that legislature can enact laws that retroactively apply to *pending* cases so long as its intent is clear). There is a remote possibility that constitutional savings clauses in Florida, New Mexico, and Oklahoma could be interpreted to prohibit retroactive death penalty repeal in pending cases. See *supra* Part V.A (discussing Florida’s, New Mexico’s, and Oklahoma’s constitutional savings clauses).

437. This provision is based on West Virginia’s death penalty repeal legislation. Act of Mar. 12, 1965, ch. 40, 1965 W. Va. Acts 203, 207.

438. See *supra* Parts III.B.1 (discussing federal authority regarding infringement of final judgments), III.C (discussing state authority regarding infringement of final judgments), and IV (discussing state authority regarding infringement of pardon power) and accompanying text.

439. This provision is adapted from the Smarter Sentencing Act of 2014, *supra* note 43, and SAFE California Act § 10(b), *supra* note 39. For other examples, see *supra* note 41 (compiling retroactive death penalty repeal legislation).

The Board of Pardons and Paroles [or similar executive agency] shall review the sentence of any person who was sentenced to death prior to the effective date of this act and has exhausted all appeals, and, in its discretion, the Board may change a sentence of death into a sentence of life without the possibility of parole. Nothing in this section shall be construed to require the Board of Pardons and Parole [or similar executive agency] to change any sentence pursuant to this section or to otherwise limit its power under the [state] Constitution.<sup>440</sup>

### B. Model Finding

In *Dorsey*, the Supreme Court suggested that, while Congress *could* have made the Fair Sentencing Act retroactive to final drug sentences, it did not intend to do so.<sup>441</sup> To make clear to courts that death penalty repeal is intended to reduce final death sentences, and that the purpose behind such legislation is equality and uniformity in sentencing (as opposed to mercy and forgiveness),<sup>442</sup> state legislatures should consider adding findings like this one from California: “Retroactive application of this act will end a costly and ineffective practice, free up law enforcement resources to increase the rate at which homicide and rape cases are solved, and achieve fairness, equality and uniformity in sentencing.”<sup>443</sup>

### C. Model Provision Making General Savings Statute Inapplicable

As further support for the legislature’s intent to reduce final death sentences, state legislatures should clarify that the state’s general savings statute, which creates a presumption *against* retroactivity, does not apply to the repeal.<sup>444</sup> States can do so by adding a provision stating that, “This act shall be given full force and effect, notwithstanding the provisions of [the state’s general savings statute].”<sup>445</sup>

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440. This provision is adapted from the Smarter Sentencing Act of 2014, *supra* note 43, The SAFE California Act § 10(b), *supra* note 39, and New Jersey’s death penalty repeal law, Act of Dec. 17, 2007, ch. 204, § 2, 2007 N.J. Laws 1427, 1429–30, *available at* [http://www.njleg.state.nj.us/2006/Bills/PL07/204\\_.PDF](http://www.njleg.state.nj.us/2006/Bills/PL07/204_.PDF).

441. *See Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012) (suggesting that Congress could have eliminated crack cocaine sentencing disparities by “re-opening sentencing proceedings concluded prior to [the] new law’s effective date,” but it did not do so).

442. *See supra* notes 314–44 and accompanying text (discussing *Way* and *Kent County* line of cases).

443. This provision is based on the SAFE California Act § 2(10), *supra* note 39.

444. *See supra* Part I (discussing general savings statute’s presumption against retroactivity).

445. By contrast, in order to *avoid* retroactive application of its death penalty repeal statute, the Connecticut legislature added a provision stating that its general savings statute *did* apply to

#### D. Model Severability Clause

If a court were to find retroactive death penalty repeal unconstitutional, it would probably do one of two things. It might “sever” the retroactivity provision, thereby giving effect to the remainder of the repeal (i.e., eliminating the death penalty only for those who commit crimes post-repeal). Alternatively, the court might decide that the provision *cannot* be severed and strike down the entire repeal, effectively reinstating the death penalty.<sup>446</sup>

Given the uncertainty surrounding the constitutionality of retroactive death penalty repeal and the risk that a court will strike down the entire repeal if its retroactive language is declared unconstitutional, it is imperative that the legislature add to the retroactive repeal bill’s text a severability provision that makes clear that the bill’s retroactivity provision is severable. A severability clause is especially important if the legislation mandates the reduction of final sentences (as opposed to making such reduction discretionary). The severability clause in California’s repeal bill provides a useful example:

The provisions of this act are severable. If any provision of this act or its application is held invalid, including but not limited to [the retroactivity provision], that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.<sup>447</sup>

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the repeal. See Connecticut General Statute § 53a–54e (2012) (“The provisions of subsection (t) of section 1-1 and section 54-194 [i.e., Connecticut’s general savings statutes] shall apply and be given full force and effect with respect to a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b in effect prior to April 25, 2012.”).

446. This latter argument has been advanced by the State of Connecticut in a case challenging the constitutionality of Connecticut’s prospective-only repeal. State’s Resp. to Supp’l Brief of Def. at 41, *State v. Santiago* (Conn. Jan. 14, 2012) (S.C. 17413) (“[I]f this Court strikes [the death penalty repeal statute] in its entirety, [the prior statute] would be revived, thereby restoring capital punishment as it existed before passage of the [repeal statute].”; see State’s Response to Petition for Writ of Superintending Control at 2, *Astorga v. State* (N.M. Jan. 27, 2011) (No. 32,744) (arguing that if court were to declare prospective-only language unconstitutional, “the only remedy available to th[e] Court is to strike down the entire statute, which would have the effect of reinstating the [death penalty].”).

447. This provision is based on the SAFE California Act § 12, *supra* note 39. By contrast, in 2012, the Connecticut legislature considered (and ultimately rejected) an amendment that would have added a *non*-severability provision. In contrast to California’s severability provision, the failed Connecticut amendment would have rendered Connecticut’s repeal “inoperative” and of “no effect” if “any sentence imposed . . . is reduced or invalidated on the basis of the [prospective-only repeal].” Sen. Amendment LCO 3058 to Senate Bill 280, An Act Revising the Penalty for Capital Felonies (Conn. Feb. Sess. 2012), available at <http://www.cga.ct.gov/2012/amd/S/2012SB-00280-R00SD-AMD.htm>.

## CONCLUSION

The opening of the twenty-first century has witnessed a flurry of death penalty repeals. This development is encouraging, but only partly so. Amidst the cheers for abolition, there is an unfairness of the highest order: the maintenance of the death penalty for some but not others for no other reason than the date of their crimes. State legislatures are repealing the death penalty prospectively only, and the executive is leaving those prisoners on death row. In New Mexico and Connecticut, a total of thirteen prisoners remain on death row after those states abolished the death penalty. One of those prisoners is Richard Rozkowski, who was sentenced to death on May 22, 2014—over two years after Connecticut abolished its death penalty in 2012. His lawyers argued that this was unfair, and they were right. But it was not unconstitutional. States can constitutionally repeal the death penalty prospectively only.

Some states, however, are “going retro.” In New Hampshire and Delaware, legislators have attempted without success to make their repeal bills retroactive. In California, a retroactive bill that would have reduced the sentences of over 700 death row prisoners narrowly missed passage on a 53%–47% vote of the electorate.

More states should attempt to pass retroactive death penalty repeals, but they are not doing so. There are two reasons for this. The first is political—legislators are not pursuing retroactive legislation because they do not have the votes. The opposition of victims’ family members has proven too strong to permit some legislators to reduce existing death sentences. The second reason is legal. Legislators are not pursuing retroactive legislation—not because they do not have the votes, but because they do not believe that their state constitutions permit it. Separation of powers concerns and constitutional prohibitions on retroactive legislation, they argue, prevent them from extending repeal to those who committed their crimes before repeal. These arguments are reasonable ones, and they extend far beyond the death penalty sphere—to retroactive crack sentencing laws and retroactive juvenile LWOP sentencing laws, among others.

This Article analyzed three primary constitutional concerns and demonstrated why none should prevent legislators from retroactively repealing the death penalty. First, the reduction of final death sentences does not offend the separation of powers by interfering with the final judgments of courts. Supreme Court authority prohibiting Congress from reopening final civil judgments is distinguishable, and recent cases from the Supreme Court and lower federal courts support the reopening of final judgments in criminal cases. In addition, the reopening of final

criminal judgments furthers liberty interests at the very heart of the separation-of-powers doctrine. And, even if the separation of powers prohibits the legislature from *requiring* courts to reopen final judgments, it does not prohibit them from merely authorizing it. Lastly, state court decisions, on balance, support the constitutionality of legislation that reduces final sentences. In the three states that have looked closely at the issue, two have decisions upholding such legislation where it benefits—not burdens—the private rights of individuals and encourages equality and uniformity in sentencing. Second, the reduction of final sentences does not offend the separation of powers by interfering with the executive’s commutation authority. Although a majority of jurisdictions has held that sentence reduction is the same as commutation and therefore violates the separation of powers, a strong minority of jurisdictions has persuasively held otherwise. In contrast to the formalism of the majority view, courts in the minority have concluded that sentence reduction is different from commutation in both purpose and effect, and is therefore constitutional. This less-restrictive interpretation of the separation of powers is the better one for still more reasons, including the existence of constitutional safeguards such as the governor’s veto power, the furtherance of consistency between pending and final cases, and favorable authority at the federal level.

And third, retroactive death penalty repeal does not offend savings and retroactivity clauses in the small number of state constitutions containing them. To the extent that these clauses facially apply to ameliorative criminal laws, they have not prevented legislatures from passing legislation that retroactively reduced penalties, nor have they prevented courts from upholding such legislation.

In sum, while politics may prevent legislatures from pursuing retroactive repeal of the death penalty, the law should not. The law permits retroactive repeal of the death penalty and, as California’s 2012 repeal bill makes clear, “fairness, equality, and uniformity” demand it. The next decade will undoubtedly see more states boarding the abolition train. Hopefully, they will take their death rows with them. Abolition for all.