ON STRADDLE CRIMES AND THE EX POST FACTO CLAUSES

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INTRODUCTION

Suppose that Congress, concerned with the sexual exploitation of children by adults and also with the growing problem of international sex tourism, enacts a criminal statute that makes it a crime to travel in interstate or foreign commerce and knowingly engage in illicit sexual conduct with a child.[1] The statute employs two distinct elements: (1) a jurisdictional element (e.g., "whoever travels in interstate or foreign commerce"); and (2) an element that establishes the remainder of the criminal act, as modified by the inclusion of a mens rea element (e.g., "knowingly engages in illicit sexual conduct with a child").[2] Congress defines the phrase "illicit sexual conduct with a child." Moreover, the legislative history reveals numerous statements—in the Committee report, during markup, and during floor debate—on the part of the legislation's drafters that they wanted the term "travels" to apply to present *and past* travel in interstate or foreign commerce, so as to prevent a reviewing court from applying the term only prospectively. Defendant Ron traveled to Thailand in March 2008. The legislation is effective on June 1, 2010. In August 2010, Ron engages in conduct that constitutes "illicit sexual conduct with a child" under the new law. Does the Constitution forbid application of the new statute against Ron?

Now suppose that Congress enacts a law on June 1, 2010 that makes it a crime punishable by up to ten years in prison for any convicted sex

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1 The hypothetical legislation I describe here is modeled upon 18 U.S.C. § 2423(c) (2006), part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28 and 42 U.S.C.), though I have made some modifications in my version.

2 Although the PROTECT Act provision described above does not employ a mens rea element, this Article has done so with this hypothetical legislation to dispense with any questions about whether the crime is one of strict liability. Although Congress did not include a mens rea element in § 2423(c), the seriousness of the offense and the relatively harsh punishment imposed (i.e., up to 30 years in prison) suggest that courts should not treat it as a strict-liability offense. *See* Staples v. United States, 511 U.S. 600, 618-19 (1994).

offender—federal or state—to travel in interstate commerce and subsequently fail to register as a sex offender.[3] Suppose that, as in the first hypothetical, Congress specifically inserts into the legislative history explicit language that indicates that the term "travels" is meant to apply retrospectively. Defendant Frank is convicted of a sex offense in Michigan in January of 2007. After serving his sentence in Michigan, he travels in interstate commerce—moving from Michigan to Ohio—in September of 2009. As of June 1, 2010, he still has not registered in Ohio. Can the Government apply the new federal statute against Frank and prosecute him for failing to register?

Now further suppose that on June 1, 2010, Congress enacts a law that makes it a crime both to engage in a pattern of racketeering activity and to conspire to engage in a pattern of racketeering activity.[4] Under this law, the Government must allege two or more racketeering acts to establish a "pattern," and at least one of those acts must be committed after the effective date of the new law (i.e., June 1, 2010).[5] Congress further requires, for conspiracy liability, the commission of an overt act in furtherance of the conspiracy. Defendant Chazz, who lives in Michigan, is a member of a criminal street gang that fits the definitions of a criminal enterprise under the new racketeering law. Chazz is charged with two predicate acts of racketeering that the Government says constitute a pattern of racketeering activity: (1) he committed extortion in Detroit on March 1, 2008, in violation of Michigan state law; and (2) he then began dealing cocaine in Detroit on July 1, 2010. Can the Government apply the new racketeering legislation to Chazz?

The preceding hypotheticals describe "straddling offenses": those offenses for which the defendant satisfies one or more elements of the crime before the date of enactment, and yet the crime is not fully completed—that is, all of the elements are not satisfied—until after the date of enactment. The first scenario contains two distinct elements, yet they are not committed contemporaneously and one pre-dates the relevant law. The second scenario contains three distinct elements, two of which certainly involve pre-enactment events: the prior conviction and the travel in interstate commerce. The third scenario involves one law that allows the use of pre-enactment conduct to satisfy an element that also must include post-enactment conduct, as well as another law that reaches a crime—conspiracy—that, once begun, has no temporal limit until the conspirators complete the object of the conspiracy or withdraw from it. The question in each scenario is whether, assuming no issue of statutory interpretation

3 The criminal provisions of the federal Sex Offender Registration and Notification Act ("SORNA") impose this type of liability. *See* 18 U.S.C. § 2250(a) (2006).

4 The federal Racketeer Influenced and Corrupt Organizations ("RICO") statute imposes this type of criminal liability. *See* 18 U.S.C. § 1962 (2006).

5 *See id.* §§ 1961(5), 1962.

regarding application of the statute to pre-enactment conduct, the Ex Post Facto Clause bars application of the law to the defendant.

The Constitution contains two ex post facto prohibitions: one directed at federal criminal legislation and the other directed at state criminal legislation.[6] The Clauses simply state that neither Congress nor the States shall pass any "ex post facto [l]aw."[7] The text is unilluminating, however, as to the precise scope of that prohibition. The law governing the application of the Clauses, then, is drawn not chiefly from the text or its drafting history at the Constitutional Convention, but from the Supreme Court's early interpretation of it. In *Calder v. Bull*,[8] Justice Chase offered the following now-familiar formulation of what constitutes an "ex post facto law":

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[9]

Moreover, the Court has identified three primary interests that the ex post facto prohibition protects. First, it assures that citizens are on notice of criminal statutes so that they can conform their conduct to the requirements of existing laws, on which they should be able to rely.[10] As Blackstone described the problem, "it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust."[11]

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[6] U.S. CONST. art. I, §§ 9-10. There is some debate in the literature about whether the Ex Post Facto Clauses apply to civil legislation. *Compare* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 324-51 (1953), *and* William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947), *with* Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 522 (2003); *cf.* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2160 (1996) (acknowledging liberty interests that criminal retroactive laws threaten, but also concluding that civil retroactive laws implicate more serious notice concerns). The Supreme Court has held that the Clauses apply only to criminal laws, *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.), but Justice Thomas has expressed the view that the Court should revisit this question in an appropriate case. *See* E. Enters. v. Apfel, 524 U.S. 498, 539 (1998) (Thomas, J., concurring).

[7] U.S. CONST. art. I, §§ 9-10.

[8] 3 U.S. (3 Dall.) 386 (1798).

[9] *Id.* at 390 (emphases omitted).

[10] Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

[11] 1 WILLIAM BLACKSTONE, COMMENTARIES *46; *see also* THE FEDERALIST NO. 84, at 472 (Alexander Hamilton) (George Stade ed., 2006) ("The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done,

Second, it protects citizens against arbitrary and vindictive legislation.[12] And third, it safeguards the separation of powers.[13] As the Supreme Court has explained it, the ex post facto bar "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."[14] In addition, the ex post facto prohibition is a constitutional component of the principle of legality—*nullum crimen sine lege, nulla poena sine lege* (no crime or punishment without law)—which Herbert Packer described as the first principle of American criminal law.[15] Legality expresses the view that persons may be subject to criminal punishment only when their conduct offends pre-existing law. The legality principle also operates to restrain courts from expanding the scope of the criminal law.[16] And although the ex post facto bar is a limit upon legislative power, the Due Process Clauses forbid courts from doing anything that the Ex Post Facto Clauses would forbid the Congress or the State legislatures from doing.[17]

This last point requires an important terminological caveat as one proceeds to grapple with the straddle crimes problem in the ex post facto context. The Ex Post Facto Clauses apply only to legislation, not to judicial action.[18] In *United States v. Marcus*,[19] the Supreme Court recently said that a defendant actually raises a due process, rather than an ex post facto, claim if he asserts that an erroneous jury instruction led to his conviction for a crime based exclusively on non-criminal, pre-enactment conduct.[20] Although this portion of Justice Breyer's opinion for the Court in *Marcus* later uses equivocal language suggesting that the Court may not have been formally ruling on how to label such a claim,[21] this Article interprets *Marcus* to mean that where the claim is one involving instructional error—which is a *judicial* act, and which was the error alleged in *Marcus*—it is properly characterized as a due process claim. And an unforeseeable judicial enlargement of a criminal statute that would make it apply to

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were breaches of no law . . . [is among the] favorite and most formidable instruments of tyranny."). *Cf.* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275-77 (1998) (explaining the origins of the ex post facto bar and the universal contempt for ex post facto laws among delegates to the Constitutional Convention).

12 *Weaver*, 450 U.S. at 29.

13 *Id.* at 29 n.10.

14 *Id.*

15 *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968).

16 Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 341-45 (2005); *see also* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190-95 (1985) (discussing attributes of legality).

17 *See* Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

18 Marks v. United States, 430 U.S. 188, 191 (1977).

19 130 S. Ct. 2159 (2010).

20 *Id.* at 2165.

21 *Id.*

previously non-criminal conduct is also properly understood as a due process violation.[22] But if the claim is that the executive branch cannot legally enforce—and a grand jury cannot indict under—penal legislation as it is written against a defendant who committed an element of the crime prior to its effective date but who completed the crime after its effective date, then the claim is properly labeled as an ex post facto claim.[23]

Of course, assuming that one of the Ex Post Facto Clauses is implicated, the ex post facto bar is far easier to apply in two paradigmatic situations. In the first, the legislature enacts a criminal law that is used to prosecute a person who has committed all of the relevant acts prior to the effective date of the law (which would amount to an ex post facto law). In the second, the legislature enacts a criminal law that is used to prosecute a person who committed some, but not all, of the relevant acts before the effective date of the law (i.e., no violation). Permitting criminal legislation to apply against a person who commits an act that is not an element of a crime when he does it, but who subsequently commits a separate and distinct act that *is* an element of a newly created crime, implicates the specific concerns of the Ex Post Facto Clauses and of a constitutional scheme that is cautious about the scope of legislative power in general. Courts have usually ruled that the prosecution of "straddle crimes" does not violate the Ex Post Facto Clauses,[24] although the Supreme Court has not specifically addressed the question. The opportunity arose most recently in *Carr v. United States*,[25] which, like the second scenario above, raised the question of whether the Ex Post Facto Clause barred prosecution under the Sex Offender Registration and Notification Act ("SORNA"), where the defendant's travel in interstate commerce occurred prior to SORNA's effective date.[26] Yet in *Carr*, unlike the hypothetical described here, the Court held that Congress did not mean for "travels" to apply retrospectively, only prospectively, and thus avoided the ex post facto problem.[27] In many

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22 *See Bouie*, 378 U.S. at 353-54.

23 This conclusion makes sense especially when we consider the range of other claims that challenge the constitutionality of legislation as applied to a particular defendant. For example, let us say a defendant challenges his indictment by claiming that the federal statute is inapplicable to him because his conduct did not substantially affect interstate commerce. Even though it is the executive branch that is enforcing the statute against him, as well as the judicial branch that issues the indictment (through the grand jury), his underlying claim is directed at the legislature's action in the sense that it is challenging Congress's Commerce Clause authority to reach his conduct.

24 *See infra* Part I.

25 130 S. Ct. 2229 (2010).

26 *Id.* at 2232-33.

27 *Id.* at 2233. Professor Corey Rayburn Yung has thoughtfully identified many of the constitutional problems that SORNA created, including the ex post facto problem. *See* Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 371 (2009). Professor Yung was also one of the authors of the Law Professors Brief in *Carr*, which argued that Carr's conviction created

instances, though, courts have found the straddle crimes at issue to be "continuing offenses"—crimes that by their very nature, or by statutory definition, involve acts that are not temporally limited but that continue over time until they end naturally or until the person committing the act withdraws from or ceases the criminal endeavor.[28] As in the third hypothetical above, conspiracy is commonly cited as an example of a continuing offense.[29]

Yet not all straddle crimes need be continuing crimes as that concept is understood in the criminal law, and the treatment of such non-continuing straddle crimes raises unique problems relating to the ex post facto bar. The first hypothetical above creates this kind of problem: the law requires the commission of two acts that need not be—in fact, usually are not—committed contemporaneously. The second hypothetical creates a potentially similar problem, although there is some dispute in the cases as to whether the failure to register as a sex offender constitutes a "continuing offense."[30] If the failure to register is not a continuing offense and is complete on the date after the grace period for registering expires, then it occurs pre-enactment and there is no straddling: the Ex Post Facto Clause is clearly offended because there is no post-enactment conduct at all. So in the latter type of prosecutions, it is fair to ask whether the logic of the "continuing-offense" approach to the ex post facto prohibition applies equally where the crime is not a continuing offense and yet still involves some elemental conduct that occurred pre-enactment. And as the first and second hypotheticals demonstrate, the problem has the potential to arise where Congress employs a jurisdictional element under the Commerce Clause to reach back in time and capture conduct that was innocent when done or that otherwise would be beyond the reach of federal authority. This, in fact, creates an especially acute ex post facto issue because it implicates the ability of the Ex Post Facto Clause of Article I, Section 9 to operate as an independent limit on the commerce power.[31]

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an ex post facto problem. *See* Brief of Law Professors as *Amici Curiae* in Support of Petitioner at 30, Carr v. United States, 130 S. Ct 2229 (2010) (No. 08-1301).

28 *See* Toussie v. United States, 397 U.S. 112, 115 (1970), *superseded by statute*, Military Selective Service Act, Pub. L. No. 92-129, Title I, § 101(a)(31), 85 Stat. 348, 352-53 (1971).

29 *See infra* Part I.B.

30 *Compare* United States v. George, 625 F.3d 1124, 1131 (9th Cir. 2010) (holding that a failure to register under SORNA is a continuing offense), *with* United States v. Gillette, 553 F. Supp. 2d 524, 533 (D.V.I. 2008) (holding that a SORNA crime is complete upon initial failure to register and is not a continuing offense).

31 This Article does not mean to argue that the Ex Post Facto Clause was intended as a structural check specifically upon the Commerce Clause. Rather, the argument is simply that the Ex Post Facto Clause is a structural check on legislative power more broadly and that, in this particular context, it can have the effect of limiting Congress's commerce power to the extent that the commerce power is used to support a law that reaches backward in time as a predicate for criminal punishment. *Cf.* Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL RTS. J. 439, 507 (2004) (referencing the "constraining structural force" of the Ex Post Facto Clause).

The question, then, is whether *Calder*'s reference to an "action done,"[32] which cannot be made the object of criminal prosecution without running afoul of the ex post facto bar, refers merely to a completed course of conduct resulting in a particular kind of evil, or whether it refers to any affirmative act on the part of the defendant that pre-dates a new law that makes that act an element of a crime. If Justice Chase means to say that it is only a fully completed course of conduct that causes harm that must be done before the passing of the law—and that is then punished—then it seems clear that so long as any element of the crime occurs after the effective date of the law, there is no ex post facto bar. This Article refers to this as the "completion approach." Yet, if the first *Calder* category refers to any affirmative action on the part of the defendant that is done and later made the element of a crime—and then punished as part of that criminal law—then it seems that the ex post facto bar is plainly implicated by straddle offenses, especially those that are not properly understood as "continuing offenses." This Article refers to this as the "elemental approach."

The problem here is one that arises with some frequency in American criminal law, yet has escaped scholarly attention. This Article fills that void in the literature by considering straddle offenses in the particular context of the potential ex post facto problem that arises when these situations occur. This Article examines the cases that address this problem and places those cases into three distinct categories of treatment: (1) those that employ the completion approach; (2) those that employ the continuing-offense doctrine; and (3) those that avoid the ex post facto claim by interpreting the statute to apply only prospectively. These cases have not fully grappled with the interpretive problem under the Ex Post Facto Clauses that straddle crimes present. And because the latter two approaches negate the straddling problem, this Article ultimately focuses on the completion approach and demonstrates that there is much strength in, and substantial appeal to, this approach. Notwithstanding that strength and appeal, there is also good reason to question the soundness of the completion approach in the context of applying criminal legislation to a crime that truly straddles the effective date of the legislation, at least where the offense contains temporally distinct elements and is not of a continuing nature. In this situation, courts should give meaningful attention (which they have not yet done) to an alternative, elemental approach that would consider the temporal limits of the Ex Post Facto Clauses with respect to each element of the crime that requires a voluntary act (thus excluding mens rea elements and those involving prior convictions). The elemental approach also forbids the government from applying a newly created crime against a defendant who had committed some elements of the crime pre-enactment, where that crime was not otherwise of a continuing nature. This approach would serve not

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[32] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.).

only the functions of the ex post facto prohibition and the criminal law, but would serve the constitutional interest in a robust ex post facto limit on legislative power and also function as a useful auxiliary limit on Congress's commerce power.

I. JUDICIAL APPROACHES TO STRADDLE CRIMES AND THE EX POST FACTO CLAUSES

Although courts have not adopted any universally-accepted approach to the precise problem explored in this Article, that problem and the range of potential approaches to it are at least implicated by a variety of court decisions in which the government attempted to apply legislation to crimes that involved pre-enactment conduct. So it is useful to examine the ways in which lower courts have approached the straddle offense problem in the ex post facto context, and this Article has taken care to categorize only those straddle crimes cases that are most relevant to resolving the *Calder* Category One problem identified here.[33] To this end, among others, this Article excludes mens rea and prior conviction elements from its examination. The case law deals exclusively with physical conduct elements. Perhaps this is because no cases have arisen in which the mental element occurred post-enactment while the act requirement was satisfied pre-enactment, or perhaps this is because it is not clear that mens rea elements involve "actions" as that word is used in *Calder* and the ex post facto cases.[34] Prior convictions raise a similar problem. Some criminal offenses require a prior conviction as an element of the crime (such as felon-in-possession crimes) or increase or enhance penalties where the defendant has a prior conviction. The penalty-enhancement problem is a Category Two and Category Three problem under *Calder*, rather than a Category One problem, and thus falls outside the scope of this inquiry. But where the substantive offense requires proof of a prior conviction, obtained pre-enactment, this would ordinarily implicate the concerns identified in this Article. Again, though, it could be argued that prior convictions relate only to status and are not affirmative acts on the part of the defendant that occur as a course of actions that straddle the date of enactment and thus fall outside of the scope of the precise problem examined here. Moreover, and

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[33] The list of cases here is not meant to be a complete one, but merely representative of the various approaches.

[34] There does not appear to be any cases in which the mental element alone was satisfied before enactment and the physical act occurred afterward. One can conceive of at least one scenario in which a mental element *could* arise after the physical act occurs—such as where, for larceny purposes, a person takes and carries away the personal property of another without the intent to steal, only to later form the intent to steal once he dispossessed the victim of the property—but that scenario obviously raises distinct questions (and some courts hold that this is a larceny by continuing trespass, essentially treating the crime as a continuing one). *See, e.g.*, State v. Langford, 483 So. 2d 979, 985 (La. 1986).

perhaps more importantly, the cases overwhelmingly hold that no ex post facto problem exists when a legislature makes a conviction obtained before the date of enactment an element of the crime.[35]

Finally, it is noteworthy that almost all of the cases included here were decided prior to *Marcus*, and so some may use ex post facto language when the claim is better understood as a due process claim. And it is equally noteworthy that the problem explored in this Article is one that involves the crafting of criminal legislation that prosecuting authorities could later apply (or that the legislature intends to apply) to a defendant who committed an element of the crime prior to its effective date, a practice understood to implicate the Ex Post Facto Clauses, although many of the same constitutional arguments made herein could apply with equal force under the Due Process Clauses.

A. *Cases Focusing upon the Post-Enactment Completion of the Crime*

The first category of straddle crimes cases involves those in which courts have concluded that the straddle crime at issue did not offend the ex post facto prohibition because the crime was not fully complete until after the date of enactment—cases where courts have applied what this Article refers to as the completion approach.

"[A] statute is not rendered unconstitutional as an ex post facto law merely because some of the facts upon which it operates occurred before the adoption of the statute,"[36] said the Colorado Court of Appeals in *People v. Dalton*,[37] a case involving the application of a state direct filing statute to a defendant who committed part of his crime (pattern sexual abuse) before

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[35] *See* United States v. Springfield, 337 F.3d 1175, 1178-79 (10th Cir. 2003). This is consistent with other areas of constitutional law that give special treatment to prior convictions. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 240-41 (1998) (stating that even where a prior conviction would increase defendant's sentencing exposure, the right to a jury trial does not require that the prior conviction be proven to a jury beyond a reasonable doubt). There is also a substantial body of case law concerning straddle crimes in the context of applying sentencing guidelines or where guidelines are amended after commission of the offense. *See, e.g.*, United States v. Zimmer, 299 F.3d 710, 717-18 (8th Cir. 2002) ("[An ex post facto violation] occurs where the operative Guidelines at sentencing 'produce a sentence harsher than one permitted under the Guidelines in effect at the time the crime is committed[]' . . . [but] where a defendant's offense conduct straddles an enactment, the enactment can be applied to the defendant without violating the Ex Post Facto Clause even when the enactment would result in a harsher sentence." (quoting United States v. Reetz, 18 F.3d 595, 598 (8th Cir. 1994))); United States v. Vivit, 214 F.3d 908, 917 (7th Cir. 2000) ("[W]hen a defendant commits crimes that straddle the date of promulgation of new guidelines provisions, the defendant can be punished under a guideline effective after the beginning of the straddle period."). Again, those cases, while useful, address a different problem than the one confronted here.

[36] People v. Dalton, 70 P.3d 517, 521 (Colo. App. 2002).

[37] 70 P.3d 517 (Colo. App. 2002).

the filing statute went into effect.[38] "Where some of the elements of an offense are committed before the effective date of a new statute, but the crime is not completed until after the new statute's effective date, application of the new statute does not violate the Ex Post Facto Clause."[39] This, forthrightly stated, is the essence of the completion approach.

Although the Supreme Court has not decided how *Calder's* Category One applies in the context of straddle offenses, some of the language from its ex post facto case law is arguably consistent with (or at least not inconsistent with) the completion approach as applied in cases like *Dalton*. In *Weaver v. Graham*,[40] which concerned a change of Florida law with respect to good-time credits for a prisoner who had committed his offense before the change, the Court explained, in the context of a challenge under *Calder*'s Category Two, "[t]he critical question is whether the law changes the legal consequences of *acts completed* before its effective date."[41] Justice Marshall's opinion for the Court also stated in a footnote that ex post facto analysis "is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred."[42] On its face, the phrase "acts completed" suggests that the ex post facto inquiry focuses upon the date of the completion of the offense, and thus is consistent with the completion approach. But it is not clear that *Weaver*'s language reaches that far or that it was ever intended to capture straddling situations. First of all, *Weaver* dealt with *Calder*'s Category Three, which asks whether a law makes the punishment more onerous than it was when the crime was committed.[43] In both Category Two and Three cases, there will always be a completed criminal offense because the question is whether the new law makes the punishment worse or aggravates the crime, which implies that a criminal offense already exists. So it is not clear that *Weaver*'s statement can extend to Category One cases where the question is focused upon crime creation ab initio. Second, "acts completed" does not necessarily mean a fully completed crime. Rather, it could refer to the completion or fulfillment of any part of the actus reus of a crime or any element of the crime that requires an affirmative act on the part of the defendant. This reading is especially sensible in the context of crimes that require acts that are separated in space and time. *Weaver* merely uses the same language as *Calder*, and its failure to explain what it means by "acts" or "acts completed" thus reinforces the problem that *Calder*'s language raises, thus necessitating further scholarly investigation. At best, *Weaver* is inconclusive on the question.

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38 *Id.* at 519.

39 *Id.* at 521.

40 450 U.S. 24 (1981).

41 *Id.* at 31 (emphasis added).

42 *Id.* at 29 n.13.

43 *Cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.).

Yet it has long been the Justice Department's position,[44] as well as that of the Congress[45] and the position reflected in language from several lower federal courts, that so long as any element of the crime occurs after the date of enactment, no ex post facto problem exists. *United States v. Campanale*[46] provides a useful example. There, the defendants were members of a local Teamsters union in California and employees of the Pronto Loading and Unloading Company. The Government charged them with conspiracy under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), arising from a scheme in which they would coerce meat packers to contract for Pronto's business and extort money from Pronto's competitors.[47] The conspiracy lasted from 1968 to 1972.[48] During that period, on October 15, 1970, RICO became law.[49] The defendants argued that their prosecution would violate the Ex Post Facto Clause because the Government could rely upon predicate racketeering acts in furtherance of the conspiracy that occurred prior to October 15, 1970.[50] The Court of Appeals for the Ninth Circuit, however, rejected the challenge, citing with approval the Government's position that the defendants were being prosecuted only upon proof that they committed at least one racketeering act after October 15, 1970, as required by Congress's definition of a pattern of racketeering activity.[51] The court further cited with approval the conclusions contained in the Senate Judiciary Committee's report on the RICO legislation, in which the Committee determined that no ex post facto problem arose as long as at least one act in the pattern of racketeering activity occurred after the law's effective date.[52]

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44 This was the Department's stated position in, for example, *Carr*. *See* Brief for the United States at 32-33, Carr v. United States, 130 S. Ct. 2229 (2010) (No. 08-1301); *see also* United States v. Jackson, 480 F.3d 1014, 1017 (9th Cir. 2007); United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (per curiam).

45 *See, e.g.*, S. REP. NO. 91-617, at 158 (1969) (finding that even where federal racketeering law would impose criminal liability for racketeering acts committed prior to the effective date of the law, no ex post facto problem exists so long as liability is contingent upon the commission of at least one racketeering act after the effective date of the law).

46 518 F.2d 352 (9th Cir. 1975) (per curiam).

47 *Id.* at 355 (describing the charges against the co-defendants, including conspiracy under the RICO statute, 18 U.S.C. § 1962(d) (2006)).

48 *Id.*

49 Racketeer Influenced and Corrupt Organizations (RICO) Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2006)).

50 *Campanale*, 518 F.2d at 363.

51 *Id.* at 365.

52 *Id.* at 364 (citing S. REP. NO. 91-617, at 158 (1969)); *see also* United States v. Brown, 555 F.2d 407, 416-17 (5th Cir. 1977) (holding same and citing *Campanale*); United States v. Philip Morris USA, 310 F. Supp. 2d 58, 65 (D.D.C. 2004) (holding that RICO does not violate the ex post facto bar as long as racketeering acts occurred after effective date); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977) (holding same and saying that where the law is applied to one who does not complete the crime until after the effective date of the law, "[t]his is all that the *ex post facto* clause requires"), *aff'd*, 578

United States v. Alkins[53] offers another example. There, the defendants were clerks at a local branch of the New York Department of Motor Vehicles who processed various applications (e.g., driver's licenses, vehicle registrations, state identifications) in exchange for cash payments.[54] The clerks would often process these applications for illegal immigrants to help conceal the immigrants' identities or for persons who wished to register stolen vehicles.[55] The defendants were charged with, among other things, mail fraud arising from the use of the mail to further a scheme to defraud (i.e., mailing the fraudulent registrations).[56] They claimed, however, that with regard to six counts in the indictment, they processed the fraudulent applications prior to November 1988, which was the effective date of the honest services fraud statute.[57] Therefore, they argued, their convictions on these counts violated the ex post facto prohibition, even though the mailings occurred *after* the statute's effective date.[58]

The Court of Appeals for the Second Circuit rejected the claim. Noting that a mail fraud crime is not complete until the act of mailing, the court did not credit the Government's contention that the crime continued after the fraudulent activity began.[59] This was because the clerks did not place the fraudulent registrations in the mail themselves.[60] Rather, those registrations were mailed to the customers in the ordinary course of business.[61] The clerks, however, knew this to be the case, so it was sufficient to satisfy the mailing requirement for mail fraud.[62] The court cautioned that "if Congress

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F.2d 1371 (2d Cir. 1978). *United States v. Garfinkle*, also provides a useful example. 842 F. Supp. 1284, 1293-95 (D. Nev. 1993), *aff'd sub nom.* United States v. Bracy, 67 F.3d 1421 (9th Cir. 1995). In *Garfinkle*, the defendant was charged with committing violent crime in aid of racketeering ("VICAR") under 18 U.S.C. § 1959 (2006), which relies upon 18 U.S.C. § 1961 (part of RICO) for the definition of an applicable "racketeering act." *Garfinkle*, 842 F. Supp. at 1294. Congress amended § 1961 in November 1986 to expand the kinds of acts that could constitute racketeering acts. *Id.* The defendant said that prior to this time period, the enterprise with which he was associated had committed acts that were not yet defined as racketeering acts. *Id.* The court said that he could not prevail on his ex post facto claim because he had committed two racketeering acts that were already defined under § 1961—before it was amended—and that this was sufficient for his conviction on the VICAR counts. *Id.* at 1295. Had the Government relied solely upon conduct that was not defined as "racketeering" at the time the act was committed, however, Garfinkle's ex post facto claim would have been stronger.

53 925 F.2d 541 (2d Cir. 1991).

54 *Id.* at 545-47.

55 *Id.* at 546-47.

56 *Id.* at 545. The Government brought this prosecution under the honest-services fraud theory embodied in 18 U.S.C. § 1346. *Id.* at 548. The Supreme Court recently narrowed the scope of that statutory scheme. *See* Skilling v. United States, 130 S. Ct. 2896, 2933 (2010) (holding that the honest services statute can apply only to bribery and kickback schemes).

57 *Alkins*, 925 F.2d at 548.

58 *Id.*

59 *Id.* at 549.

60 *Id.*

61 *Id.*

62 *Id.*

were able to criminalize conduct after it has occurred simply by making criminality turn on a jurisdictional fact that is bound to occur after enactment and is the unpreventable consequence of conduct by the defendant before enactment," the ex post facto bar would be implicated.[63] Here, the mailings were preventable, yet the clerks acquiesced. Because the fraudulent conduct that resulted in the mailings occurred before the honest services fraud statute was enacted, the clerks could have avoided criminal responsibility if they had simply taken steps to prevent the mailings, which did not happen until after the effective date of the statute. "Since appellants permitted the final element of the crime to occur after the effective date of the statute," the court held, "their mail fraud convictions did not violate the ex post facto clause."[64] The Second Circuit thus adopted a somewhat modified version of the completion approach: if the crime becomes complete after the effective date of the statute, where the defendant could have prevented the post-enactment element from being satisfied, then no ex post facto problem exists.[65]

The Court of Appeals for the Fifth Circuit applied the same approach in *United States v. Manges*.[66] There, the defendants were convicted of mail fraud and conspiracy to commit mail fraud, arising from a scheme in which they submitted false documents to state regulators and paid off state officials to retain the oil and gas rights to a parcel of property in Corpus Christi, Texas.[67] The court, like the Second Circuit in *Alkins*, noted that mail fraud is not a continuing offense; it is complete once the offending mailing occurs.[68] Here, although the scheme to defraud existed before the honest services fraud statute went into effect in November 1988, the relevant mailing did not occur until September 1989.[69] Therefore, because the crime was not completed until after the effective date of the honest services statute that provided the theoretical predicate for the mail fraud prosecution, that prosecution did not offend the ex post facto prohibition.[70]

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63 *Alkins*, 925 F.2d at 549 (emphasis omitted).

64 *Id.*

65 *See id.* Compare this to Judge Posner's holding for the Seventh Circuit in *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008), *rev'd on other grounds sub nom.* Carr v. United States, 130 S. Ct. 2229 (2010), the lower court case that went to the Supreme Court as *Carr* (*Carr* and *Dixon* were consolidated in the Seventh Circuit). There, in rejecting Dixon's ex post facto argument, Judge Posner stated:

> [A]s long as at least one of the acts took place later [post-enactment], the clause does not apply. For in that case the defendant cannot be punished without a judicial determination that he committed an act after the statute under which he is being prosecuted was passed, and by not committing that act (provided of course that it is a voluntary act and so can be avoided by an exercise of volition) he would have avoided violating the new law.

Id. at 585 (citations omitted).

66 110 F.3d 1162 (5th Cir. 1997).

67 *Id.* at 1166-67.

68 *Id.* at 1172.

69 *Id.* at 1171-72.

70 *Id.* at 1172.

One variation on this theme comes from the Second Circuit's regular approach to straddle crimes. According to that court, there is no ex post facto violation where the crime did not become complete until after the date of enactment.[71] But if there is any possibility that the jury could have convicted solely on pre-enactment conduct, the conviction violates the Ex Post Facto Clause.[72] This is a sensible approach, but one that shows just how elusive the "straddle crime" concept can be. For if all of the conduct that could supply the basis for a conviction occurred pre-enactment, there is actually no straddling at all: the entire crime pre-dated the relevant law and the ex post facto problem becomes obvious. So, although the Second Circuit's approach is consistent with ex post facto principles, it tells us little about why the court's approach is the correct one where there really is straddling conduct, particularly when the elements of the crime are temporally separate.

B. *Cases That Focus upon the Offense as Continuing*

The second category of relevant straddle crimes cases involves those in which courts have found no ex post facto problem because the straddle offense was deemed a continuing offense.

A crime is deemed a continuing offense, the Supreme Court explained in *Toussie v. United States*,[73] where Congress explicitly makes it so or when "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."[74] As courts have consistently found, "[i]t is well-settled that when a statute is concerned with a continuing offense, 'the Ex Post Facto Clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of [the statute].'"[75] Conspiracy is the most prominent of the examples in these cases.[76]

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71 United States v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991).

72 *See* United States v. Monaco, 194 F.3d 381, 386 (2d Cir. 1999).

73 397 U.S. 112 (1970), *superseded by statute*, Military Selective Service Act, Pub. L. No. 92-129, Title I, § 101(a)(31), 85 Stat. 348, 352-53 (1971).

74 *Id.* at 115. In *Toussie*, the offense of failing to register for the draft was deemed not to be a continuing offense. *Id.* at 116-17. It is also notable that the *Toussie* Court considered the continuing-offense doctrine in the statute of limitations context. *Id.* at 114-15. Although courts have not typically made this distinction, there is some authority for the notion that an offense may be continuing for statute of limitations purposes and yet not so for ex post facto purposes. *See* United States v. Gillette, 553 F. Supp. 2d 524, 532-33 (D.V.I. 2008).

75 United States v. Harris, 79 F.3d 223, 229 (2d Cir. 1996) (second alteration in original) (quoting United States v. Torres, 901 F.2d 205, 226 (2d Cir. 1990)).

76 A recent Congressional Research Service report enumerated the crimes that have been described as continuing offenses for statute of limitations purposes: escape from federal custody, flight to avoid prosecution, failure to report for sentencing, possession of the skin and skull of an endangered species, possession of counterfeit currency, kidnapping, failure to register under the Foreign Agents

For example, in *United States v. Couch*[77] the Court of Appeals for the Seventh Circuit rejected an ex post facto claim brought by a defendant convicted of conspiracy to manufacture, possess, and intentionally distribute methcathinone, a drug that was made a Schedule I controlled substance as of May 1, 1992.[78] The conspiracy began prior to this date but continued at least until January 1993, when police arrested one of Couch's co-conspirators, who helped Couch make the methcathinone.[79] The court explained that the ex post facto bar does not apply to offenses that begin before the statute's effective date and continue thereafter.[80] So, "a statutory change that takes place during the existence of an ongoing conspiracy will subject members of that conspiracy to the provisions of the later enactment."[81] Similarly, in *United States v. Monaco*,[82] the Second Circuit used the same type of language in rejecting an ex post facto challenge brought by a married couple charged with conspiracy to commit money laundering, rather than substantive money laundering, arising from a scheme in which various family members stored assets and acted as nominee property owners on behalf of a Florida drug trafficker and pirate, Jimmy Monaco.[83] The couple—Linda and Michael DeMaio, Monaco's sister and brother-in-law—bought a house in Miramar, Florida, that was managed by Monaco's father.[84] When they sold the house in 1989, the DeMaios cross-endorsed the proceeds check to Monaco's father, who placed it into an account for Monaco.[85] The relevant money laundering statute, 18 U.S.C. § 1956,[86] was enacted in October 1986.[87] The DeMaios argued that they took the deed to the Miramar home and used Monaco's funds for home construction prior to the effective date of the money laundering statute.[88] But the Second Circuit said that this was irrelevant to their conviction for conspiracy because their conviction "rests securely on their continuing stewardship of these properties—on [Monaco's] behalf—after enactment of the money laundering

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Registration Act, failure to register under the Selective Service Act, being found in the United States after reentry following deportation, certain embezzlement crimes, and conspiracy. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL 31253, STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW 12-14 (2007).

77 28 F.3d 711 (7th Cir. 1994).

78 *Id.* at 713.

79 *Id.* at 712-13.

80 *Id.* at 715.

81 *Id.* (quoting United States v. Gibbs, 813 F.2d 596, 602 (3d Cir. 1987)) (internal quotation marks omitted).

82 194 F.3d 381 (2d Cir. 1999).

83 *Id.* at 384-86.

84 *Id.* at 384-85.

85 *Id.* at 385.

86 *Id.* at 383.

87 *See* 18 U.S.C. § 1956(a)(1) (2006) (prohibiting certain transactions involving the "proceeds" of unlawful activity); *Monaco*, 194 F.3d at 385.

88 *Monaco*, 194 F.3d at 386.

statute."[89] This included, among other things, selling the Miramar property in 1989 and remitting the money for Monaco's benefit.[90]

A variation on the approach to conspiracies that straddle the date of enactment relates to the overt act requirement. Although common law conspiracy did not require an overt act, just as many modern conspiracy statutes do not, some jurisdictions now require an overt act in furtherance of the conspiracy. Thus, an ex post facto issue may arise with regard to the timing of the overt act when it is required by statute or where an overt act is used as evidence to prove the perpetuation or execution of the conspiracy.

In *United States v. Hersh*,[91] the Court of Appeals for the Eleventh Circuit reviewed an ex post facto claim brought by a defendant who was charged with conspiracy to travel in interstate commerce with the intent to engage in sexual contact with a minor.[92] The court reiterated the well-established rule that there is no ex post facto violation "when a defendant is charged with a conspiracy that continues after the effective date of [a new criminal law]."[93] This, the court explained, can be demonstrated by evidence that an overt act occurred after the law's effective date, which, in this case, was December 23, 1995.[94] Although Hersh's conspiracy began well before December 1995, and although the overwhelming majority of his overt acts (including travel between Florida and Honduras) occurred prior to that time, the Government's proof showed that Hersh traveled twice in furtherance of the conspiracy between December 23, 1995, and January 1, 1996.[95] This, the court said, was sufficient to prove the continuation of the conspiracy beyond the effective date of the law, and thus to dispose of the ex post facto claim in favor of the Government.[96] *Hersh* is an example of how the continuing-offense doctrine can sometimes merge with the completion approach.

Courts have also found bank fraud to constitute a continuing offense. One example is *United States v. Harris*,[97] involving a defendant who was president and chief executive officer of two related companies—one that traded in petroleum and petroleum products and one that operated a petro-chemical refinery—and who was convicted under the Continuing Financial Crimes Enterprise statute, which was enacted in November 1990.[98]

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89 *Id.*

90 *Id.* at 387.

91 297 F.3d 1233 (11th Cir. 2002).

92 *Id.* at 1236. Hersh was prosecuted under 18 U.S.C. § 2423(b), part of the federal Sex Crimes Against Children Prevention Act of 1995. *Id.*; *see also* Pub. L. No. 104-71, 109 Stat. 774 (1995).

93 *Hersh*, 297 F.3d at 1244.

94 *Id.* at 1244-45.

95 *Id.* at 1245.

96 *Id.* ("It is undisputed that Count 10 is constitutionally valid, as far as the *ex post facto* analysis is concerned, if the government proves that one overt act occurred *after* the amendment of the statute.").

97 79 F.3d 223 (2d Cir. 1996).

98 18 U.S.C. § 225 (2006); *Harris*, 79 F.3d at 225-26, 228.

According to the court, even though some of Harris's conduct occurred prior to November 1990, Harris could not prevail on his ex post facto challenge to his conviction under this statute because the relevant predicate crimes—bank fraud and wire fraud—are continuing offenses.[99] The statute requires that the defendant have committed a series of violations, and the court concluded that the jury could only have convicted Harris if it found at least two of those violations to have occurred post-enactment.[100]

On occasion, courts have even been willing to find omissions to constitute continuing offenses. For example, in *United States v. Russell*,[101] the Court of Appeals for the Eighth Circuit rejected an ex post facto claim brought by a man from one state whose child resided in a different state and who failed to pay more than $10,000 in child support.[102] He was convicted for violating the federal Deadbeat Parents Punishment Act of 1998 ("DPPA")[103] but claimed that his accumulation of the debt began prior to the date of the DPPA's enactment in 1998 and that he did not accrue more than $10,000 in unpaid debt after that date.[104] The court held that the statute did not make it a federal crime to accrue the child support obligations; it only made the willful failure to pay the obligation a federal crime.[105] Moreover, the court said in a footnote that even if the accrual of the child support obligation was an element of the crime, the failure to pay child support is a continuing offense and thus does not offend the Ex Post Facto Clause.[106]

There is a limitation on the continuing-offense approach, however, and it applies with special force to conspiracies. If the conspiracy ends prior to the effective date of the new law, or if the defendant withdraws from the conspiracy before the new law, the defendant can avoid liability under ex post facto principles because his conduct under those circumstances is no longer said to be continuing beyond the effective date of the new law.[107] In such a situation, no straddling occurs at all, and we can apply a pure ex post facto bar. A similar situation arose in *United States v. Brown*.[108] There, the Government obtained a RICO indictment against the defendants, including

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[99] *Harris*, 79 F.3d at 229-30.

[100] *Id.* at 229. *But cf.* United States v. De La Mata, 266 F.3d 1275, 1278-79, 1288-89 (11th Cir. 2001) (finding ex post facto violation in bank fraud prosecution where bank fraud did not continue, and was not complete, after enactment).

[101] 186 F.3d 883 (8th Cir. 1999).

[102] *Id.* at 884.

[103] Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228 (2006).

[104] *Russell*, 186 F.3d at 885.

[105] *Id.* at 885-86.

[106] *Id.* at 886 n.4.

[107] *See* United States v. Salmonese, 352 F.3d 608, 615 (2d Cir. 2003). But note that the Supreme Court has held that a conspiracy does not end merely because the government has frustrated or defeated its objectives. *See* United States v. Jimenez Recio, 537 U.S. 270, 275 (2003).

[108] 555 F.2d 407 (5th Cir. 1977).

a count charging conspiracy under RICO (Count II of the indictment).[109] The problem there was that many of the racketeering acts that were the object of the conspiratorial agreement on which Count II was based were committed prior to October 15, 1970—RICO's effective date.[110] The trial court failed to instruct the jury about the significance of that date, thus creating the risk that the jury would convict on the basis of conduct that occurred wholly before the statute went into effect.[111] The United States Court of Appeals for the Fifth Circuit said that this prosecution was "constitutionally defective,"[112] applying ex post facto principles (although the court thought the claim properly arose out of the Due Process Clause and not the Ex Post Facto Clause, it acknowledged that ex post facto principles are "encompassed in the concept of due process").[113] The court lacked confidence that the conspiracy convictions were based on conspiratorial agreements that existed after October 15, 1970.[114] Compare this to, for example, *Manges*, where the Fifth Circuit concluded that there was "substantial evidence" that the defendants participated in the conspiracy after the honest services fraud statute went into effect and thus rejected an ex post facto challenge that was based on the fact that the conspiracy began prior to the statute's effective date.[115] Another useful comparison is *United States v. Boffa*,[116] where the Court of Appeals for the Third Circuit found that the jury was properly instructed that it could not convict for RICO conspiracy unless it found that the defendants had participated in the conspiracy after July 14, 1975 (the indictment was filed on July 14, 1980, so the court's instruction to the jury accounted for the applicable five-year statute of

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109 *Id.* at 411-12.

110 *Id.* at 412 nn.4-5, 418.

111 *Id.* at 419.

112 *Id.*

113 *Id.* Here, the Fifth Circuit may have overstated its labeling argument. As explained at the beginning of Part II, it now seems as though a defective jury instruction that results in a conviction for pre-enactment conduct would constitute judicial action that would take the claim out of the Ex Post Facto Clause and render it a due process claim. *See* United States v. Marcus, 130 S. Ct. 2159, 2165 (2010). Defense counsel and prosecutors litigating such claims should therefore take care to couch it in the rubric of due process, even though the issue would properly be before the court if the defendant asserted that ex post facto principles inform the meaning of due process, as the *Brown* court explained. In this sense, *Brown*'s labeling may be correct. Somewhat more concerning is the *Brown* court's assertions relating to the label that attaches to the indictment. The indictment is, strictly speaking, a judicial act in the sense that it is the act of the grand jury. But the court conflates the indictment with the Government's application of the newly created legislation to the defendant in the first instance. Here, there is a better case for labeling a claim as one under the Ex Post Facto Clause in the sense that the challenge is to the Congress's enactment of legislation that could be applied (and Congress contemplated that it could apply) to a defendant for pre-enactment conduct.

114 *Brown*, 555 F.2d at 421.

115 United States v. Manges, 110 F.3d 1162, 1172 (5th Cir. 1997) (internal quotation marks omitted).

116 688 F.2d 919 (3d Cir. 1982).

limitations under RICO).[117] In this sense, these continuing-offense cases demonstrate concerns that mirror those of the Second Circuit's approach highlighted earlier: the reviewing court must have confidence that the jury could not have convicted only on pre-enactment conduct.[118] And it further shows that this principle extends to continuing offenses. It is not enough to merely label the offense as continuing. Rather, what is important is that the conduct *actually continues* beyond the effective date, thus creating a straddle situation and allowing for application of the continuing-offense approach to avoid the ex post facto bar.

So the continuing-offense formulation is sensible as far as it goes. If we view the pre-enactment conduct as continuing, it is fair to conclude that each day thereafter, it is as if the conduct begins afresh. The continuing-offense doctrine essentially turns a straddle offense into one that does not straddle; all of the relevant conduct can now be said to occur post-enactment, even if, in reality, it began beforehand. But these cases also raise multiple problems in the ex post facto context. For example, should it not matter which element of the crime continues? Conspiracy represents the easier case because the criminal agreement—the actus reus of conspiracy—is deemed to continue over time until the object is achieved or the conspiracy is abandoned. But consider the situation where an element that occurred pre-enactment does not continue, such as where a person who is required to register as a sex offender under SORNA travels in interstate commerce before SORNA is enacted, and then fails to register as required by 18 U.S.C. § 2250(a).[119] If, as some courts have held, failure to register as a sex offender under SORNA is a continuing offense,[120] then should it matter that even if the failure to register continues, the travel in interstate commerce might not?[121] This situation, like the one in *Russell*, also raises the problem associated with saying that a crime of omission (e.g., failure to pay, failure to register) continues.[122] The Supreme Court's decision in *Toussie* reflects the difficulty of this conclusion, for it is far from clear that a failure to perform some act, by its very nature, continues over time.

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117 *Id.* at 937.

118 *See supra* Part I.A.

119 Sex Offender Registration and Notification Act, 18 U.S.C. § 2250(a) (2006).

120 *See* United States v. George, 625 F.3d 1124, 1131 (9th Cir. 2010); United States v. Dixon, 551 F.3d 578, 582 (7th Cir. 2008), *rev'd on other grounds sub nom.* Carr v. United States, 130 S. Ct. 2229 (2010). *But see* United States v. Gillette, 553 F. Supp. 2d 524, 533 (D.V.I. 2008) (holding that a SORNA crime is complete upon initial failure to register and is not a continuing offense); United States v. Smith, 481 F. Supp. 2d 846, 852 (E.D. Mich. 2007) (same); United States v. Stinson, 507 F. Supp. 2d 560, 569-70 (S.D.W. Va. 2007) (same).

121 *See* United States v. Hinckley, 550 F.3d 926, 936 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009) (finding a SORNA violation to be a continuing offense where defendant, before and after SORNA's effective date, traveled back and forth between Oklahoma and Arkansas for work).

122 Some crimes of omission have been categorized as continuing offense for statute of limitations purposes. *See* DOYLE, *supra* note 76, at 12-14.

This leads to a final problem with the continuing-offense cases, which is that—even granting that the continuing-offense cases make good analytical sense and are correct in their approach to the ex post facto claim—these cases reach only conduct that forms a part of a continuing offense. That is, even if it is "well established" (and this appears to be a fair characterization of the law) that no ex post facto bar applies where the offense is a continuing one, this rule does not account for non-continuing-offense statutes that apply to a course of conduct that began prior to the effective date of a new law. For, as this Article demonstrates, it is hardly "well settled" that the Ex Post Facto Clauses do not apply in this latter scenario.

C. *Cases That Interpret the Relevant Statute to Apply Only Prospectively*

The third category of relevant straddle-crimes cases involves those in which the defendant has asserted an ex post facto bar, but the courts have avoided the ex post facto problem by interpreting the relevant legislation to apply only prospectively, not retrospectively. This approach has been favored where the temporally separate conduct element is jurisdictional.

Some of the SORNA cases, culminating in *Carr*, fall into this category. Carr was a registered sex offender in Alabama who committed his underlying offense—first-degree sexual abuse—in May 2004.[123] He was released on probation in July 2004.[124] Before SORNA was enacted, Carr moved to Indiana.[125] Yet he failed to comply with Indiana's registration requirements.[126] After his involvement in a fight, it came to the attention of local authorities that he was an unregistered (for Indiana purposes) sex offender.[127] A federal grand jury indicted him in August 2007 under 18 U.S.C. § 2250(a),[128] making it a federal crime for a person who is required to register to travel in interstate or foreign commerce and then fail to register.[129] Carr claimed that SORNA's application to him was unlawful, first, because the jurisdictional element was prospective and not retrospective, and second, if the element can be applied retrospectively, then SORNA's application to him violated the Ex Post Facto Clause because his conduct occurred before SORNA's enactment.[130]

The Court sided with Carr on statutory-interpretation grounds, holding that when Congress said "travels in interstate or foreign commerce" in § 2250(a), it meant that language to apply only to present or future travel,

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123 Carr v. United States, 130 S. Ct. 2229, 2233 (2010).

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Carr*, 130 S. Ct. at 2232.

130 *Id.* at 2235.

not to travel that pre-dated the law's enactment.[131] Justice Sotomayor's opinion for the Court first noted that Congress meant to condition criminal liability only where the person is subject to SORNA's registration requirements and that this element can occur only after the statute's effective date.[132] Congress then used the present tense of "travel," instead of the past tense or present perfect, which further reinforces the temporal limit on the statute.[133] This interpretation is also consistent with the rule of construction under the Dictionary Act, which states: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present."[134] The Court said there was nothing about the context of "travels" in § 2250(a) that altered this construction.[135] The subsection that includes "travels" also includes a series of other present tense verbs, and the other elements of a § 2250(a) offense appear in the present tense.[136] If Congress wanted the interstate travel element to pre-date enactment while ensuring that the registration requirement post-date enactment, it could have achieved this by using different verb tenses in the various elements.[137] The Court then rejected the Government's effort to overcome the tense-based interpretation by focusing on the broader statutory purposes underlying § 2250(a): Congress did not seek a broad sweep for the law with respect to federal and state offenders equally, nor did § 2250(a) evince the kind of broader statutory purposes that are contained in other provisions of SORNA.[138] Finally, Justice Sotomayor concluded with the observation that because § 2250(a) does not extend to Carr's pre-enactment travel, "we need not consider whether such a construction would present difficulties under the Constitution's Ex Post Facto Clause."[139]

So although *Carr* is ultimately unhelpful in determining whether the Ex Post Facto Clause limits Congress's ability to retrospectively apply a jurisdictional element of a federal crime, two observations in *Carr* are notable. In footnote six, Justice Sotomayor responds to the dissent's contention about the significance of other provisions in SORNA that could apply

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131 *Id.* at 2235-36; *see also* United States v. Husted, 545 F.3d 1240, 1242 (10th Cir. 2008) (holding that SORNA does not reach pre-enactment travel); United States v. Smith, 481 F. Supp. 2d 846, 850-51 (E.D. Mich. 2007) (same).

132 *Carr*, 130 S. Ct. at 2236.

133 *Id.*

134 1 U.S.C. § 1 (2006).

135 *Carr*, 130 S. Ct. at 2237.

136 *Id.*

137 *Id.*

138 *Id.* at 2238.

139 *Id.* at 2242 (emphasis omitted). The Law Professors' Brief in *Carr* offers an excellent discussion of the ex post facto problem that SORNA created. *See* Brief of Law Professors as *Amici Curiae* in Support of Petitioner, *supra* note 27, at 6-21.

to pre-enactment conduct.[140] She concludes that the language in those provisions does not tell us much about the conduct to which § 2250(a) specifically applies.[141] The note ends by saying that "[g]iven the well-established presumption against retroactivity and, in the criminal context, the constitutional bar on *ex post facto* laws, it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment."[142] The logic here suggests that if the statutory language *were* to apply to pre-enactment conduct by default, it would create ex post facto concerns. Justice Sotomayor does not elaborate, nor does she explain what is meant by "acts completed," language that merely repeats that employed by the Court in cases like *Calder* and *Weaver*, but which does not specifically address the problem created by straddle offenses. But because the statutory problem at issue involves a single element (indeed, a single word) in a crime with multiple elements, it is reasonable to conclude that Justice Sotomayor's language could refer to the completion of any act that forms a part of the crime, not the fully completed offense itself.

And then there is *United States v. Jackson*,[143] a decision of the Court of Appeals for the Ninth Circuit,[144] upon which the first scenario of this Article is based. In *Jackson*, the defendant and his domestic partner moved to Cambodia in November 2001.[145] They obtained both a home and employment in Cambodia.[146] In June 2003 in Cambodia, Jackson performed oral sex on three boys between the ages of ten and fifteen, and gave the boys $21.[147] Although he was charged in Cambodia with debauchery, he was flown back to the United States once the federal government decided to pursue the case.[148] Eventually, a federal grand jury in Washington indicted Jackson under 18 U.S.C. § 2423(c),[149] which was enacted on April 30, 2003, as part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act")[150] and which makes it a federal crime to travel in foreign commerce and engage in illicit sexual conduct (here, sex with a person under age eighteen and a commercial sex

140 *Carr*, 130 S. Ct. at 2237 n.6.
141 *Id.*
142 *Id.*
143 480 F.3d 1014 (9th Cir. 2007).
144 *Id.* at 1014.
145 *Id.* at 1015.
146 *Id.*
147 *Id.* at 1016.
148 *Id.*
149 *Jackson*, 480 F.3d at 1016.
150 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, §§ 103, 105, 117 Stat. 650, 652-54 (codified as amended in scattered sections of 18 U.S.C.).

act with a person under age eighteen).[151] Jackson challenged the prosecution under the Ex Post Facto Clause because his travel pre-dated the statute's enactment.

The Ninth Circuit did not reach the ex post facto claim because it found, as did the Supreme Court in *Carr*, that Congress did not intend the statute to apply retrospectively. The court concluded that Congress's use of the present tense indicated that the statute reached only present and future travel but not travel in the past.[152] Moreover, the travel was not of an infinitely continuing nature, contrary to the Government's position.[153] Jackson had settled in Cambodia with no apparent plans to return to the United States.[154] So although "travel" is susceptible to two alternative interpretations—one that understands "travel" to end only when a person resettles in a foreign land, and one that understands "travel" to end when the person arrives in the foreign country—the court did not need to decide which applied because, under either interpretation, Jackson was no longer traveling.[155] Consequently, the court was able to avoid the ex post facto problem that it would have had to face if it found that the statute applied retrospectively.

This category of cases demonstrates that even without a strong constitutional ex post facto bar, there remains a method for limiting congressional power to enact criminal legislation that would apply partially retrospectively: the judiciary's powers of statutory interpretation. As demonstrated in the next part of this Article, however, this limit could prove illusory if Congress is sufficiently interested in partial retrospectivity and reaching the broadest possible universe of offenders.

II. EVALUATING THE COMPETING APPROACHES

The taxonomy of cases discussed above demonstrates the existing range of possible outcomes in cases that involve straddle crime problems under Category One of *Calder*'s ex post facto laws. But only the first group—those in which courts have determined that there is no ex post facto bar where the crime is completed after enactment—constitutes a distinct theory of the Ex Post Facto Clauses that could apply to any straddle crime, especially those with temporally distinct elements that do not continue over time. The other two approaches apply only in a limited universe of cases involving what are, on their faces, straddle crimes. But the continuing-offense doctrine is a sensible approach for that universe of cases because it

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151 18 U.S.C. §2423(c) (2006); *Jackson*, 480 F.3d at 1016.
152 *Jackson*, 480 F.3d at 1018-21.
153 *Id.* at 1022.
154 *Id.* at 1015-16.
155 *Id.* at 1022-24.

essentially transforms a straddle crime into a non-straddle crime and thus avoids the constitutional problem, much like the statutory interpretation approach we see in a narrow category of cases like *Carr* and *Jackson*. This Part therefore evaluates the strength of the completion approach as avoiding the ex post facto bar where true straddle crimes are at issue, with a focus on the distinct problems that accompany straddle offenses that are not also continuing offenses and that proscribe acts that form the elements of the crime but that are not performed contemporaneously.

A. *On the Completion Approach*

An approach that holds that there is no ex post facto problem so long as any element of the crime is committed after the date of enactment—the completion approach—is undeniably persuasive. As this Article has shown, it has long traditionally been the federal government's position and that of many federal courts that have rejected ex post facto challenges to straddle crime prosecutions. Yet, as seen from the preceding Section, neither the Government nor the courts have been clear as to why this approach is the correct one. This Article views the primary justifications for this approach in the context of the purposes of the ex post facto prohibition as relating to *Calder*'s understanding of an "action done," to the object and purposes of punishment, and to the provision of notice to the defendant.

First, it is sensible to argue that the Ex Post Facto Clauses only bar the criminalization, or aggravated punishment, of acts that were completed before the effective date of the law. That is, the Clauses bar only legislation applied after the date of the offense, and the date of offense will always be the date on which the final element is satisfied. So, to the extent that any part of the crime was not yet complete when the relevant law became effective, the government is not forbidden from reaching that post-enactment conduct, even if this means combining that conduct with pre-enactment conduct, because what matters is the date of the offense.[156] *Calder*, after all, refers to "acts done," which one might reasonably understand to mean a completed course of conduct, and the Court has used similar language in subsequent cases saying that the focus of the ex post facto bar is upon conduct that was "consummated" or "acts completed."[157]

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[156] Professor Wayne LaFave's excellent treatise does not take a position on the precise straddle crime issue posed here, but he nonetheless offers a valuable analysis of the date-of-offense problem. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 2.4(b), at 121 (5th ed. 2010).

[157] *See* Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 505 (1995) (using the phrase "already consummated" (quoting Lindsey v. Washington, 301 U.S. 397, 401 (1937)) (internal quotation marks omitted)); Weaver v. Graham, 450 U.S. 24, 31 (1981) (using the word "completed"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) (using the phrase "acts done").

Moreover, *Calder* requires that the "acts done" be *punished*.[158] The Supreme Court's ex post facto cases have devoted substantial effort to explaining whether certain consequences are properly understood as punishment.[159] But those cases do not explain precisely *what* gets punished for ex post facto purposes. Punishment, for purposes of the completion approach, can be best understood this way: when the government punishes, it punishes the ultimate harm or evil, not an innocent act that forms only a part of the course of criminal conduct. So, for example, if Congress makes travel in interstate or foreign commerce a jurisdictional element of the crime of having illicit sex with a child, it is the illicit sex that Congress is seeking to punish, not the travel, which is itself not a morally condemnable act. So, because the state can only punish a completed course of conduct, or one in which the ultimate harm or evil to be prevented has occurred, the "action done" for purposes of *Calder*'s Category One must necessarily refer to a completed course of criminal conduct that results in a particular harm that is the target of the new legislation.

Perhaps most compellingly, the completion approach also makes sense if notice is a concern. One could reasonably argue that once the law becomes effective, the person, having not yet completed all of the acts that would subject him to the criminal sanction, is on notice that his prior conduct—say, acts X and Y—could subject him to criminal liability if he does act Z. It is fully within his control to refrain from committing act Z after the effective date of the law, knowing that it, combined with his pre-enactment conduct, will render him criminally liable. The *Campanale* case captures this notion. There, according to the court, Congress rightly concluded that even if a defendant commits a predicate act prior to the law's effective date, he is on notice once the law goes into effect that if he engages in any additional racketeering acts, those acts can be combined with his prior conduct to form a pattern of racketeering activity.[160]

The Second Circuit's *Alkins* opinion also demonstrates how this notice argument works. Although the DMV clerks there processed the fraudulent applications before the effective date of the law, once the law went into effect, they fully controlled their ability to prevent, or to take steps to prevent, the mailings of the fraudulent registrations.[161] Thus, because the law went into effect before their crime (i.e., mail fraud) was complete, they were on notice that if the fraudulent registrations were mailed, they could

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158 *See Calder*, 3 U.S. (3 Dall.) at 390 (opinion of Chase, J.).

159 *See* Smith v. Doe, 538 U.S. 84, 89 (2003); Kansas v. Hendricks, 521 U.S. 346, 361, 370-71 (1997); Hudson v. United States, 522 U.S. 93, 98 (1997); *see also* Logan, *supra* note 11, at 1280-95 (describing the Court's ex post facto cases on "punishment" (internal quotation marks omitted)).

160 United States v. Campanale, 518 F.2d 352, 364-65 (9th Cir. 1975) (per curiam); *see also* S. REP. NO. 91-617, at 158 (1969) (concluding that a person whose predicate acts straddle the law's effective date is on notice "that only one further act may trigger the increased penalties and new remedies" under RICO).

161 *See* United States v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991).

be held criminally responsible. And we see the same sort of reasoning in the SORNA case of *Dixon*: so long as the defendant can avoid committing the post-enactment conduct, there is no ex post facto notice problem.[162]

A final argument in favor of the completion approach derives from the underlying purposes of criminal punishment. According to this argument, a contrary approach would preclude the government from prosecuting dangerous, highly culpable offenders merely because they committed some act before the enactment of the statute, even though they committed the ultimate and most harmful act after enactment. The completion approach safeguards the government's ability to reach these harms and thus serves the functions of the criminal law in the following ways: it ensures that highly culpable actors—indeed, actors whose most culpable acts are committed post-enactment—can be punished, thus serving retributive interests; and it serves utilitarian interests in deterrence by personally deterring actors from socially harmful conduct and by providing an example to would-be actors that they may still be subject to punishment even if only a part of their conduct occurs post-enactment.

Without the completion approach, a person who knows that the government cannot reach him because of an ex post facto bar has no disincentive to complete his crime. He can commit the act that causes the harmful result, even after enactment of a law that targets his harmful act, without fear of prosecution merely because some distinct part of the crime occurred pre-enactment. This is especially true when the crime involves patterns of culpable conduct, such as a pattern of child abuse[163] or a pattern of racketeering activity.[164] Without the completion approach, a person who engages in a long train of abuses that extends over a significant period of time—and has done significant harm to a victim or perhaps even multiple victims—would escape liability under a new law that targets the pattern, no matter how brutal his acts or how great the personal and social harm he has caused, merely because he committed some of the acts before the legislature passed the new law.

So, the argument goes, the completion approach assures that a wider universe of culpable actors will be captured and punished and that the government can make an example of a defendant who engages in socially harmful conduct that occurs over a period of time and is completed after the new law goes into effect.

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162 *See* United States v. Dixon, 551 F.3d 578, 585 (7th Cir. 2008), *rev'd on other grounds sub nom.* Carr v. United States, 130 S. Ct. 2229 (2010).

163 *See, e.g.*, 18 U.S.C. § 1111 (2006) (including, as part of federal murder statute, death resulting from pattern of child abuse).

164 *See, e.g.*, *id.* § 1962 (making it a federal crime to engage or conspire to engage in pattern of racketeering activity).

B. *On a New (Elemental) Approach*

There are reasons, though, to question whether the completion approach is the only, or best, interpretation of the Ex Post Facto Clauses where straddle crimes are involved, particularly where those crimes involve temporally separate elements and are not continuing offenses. The cases give no meaningful attention to an alternative approach. Consequently, defendants wishing to persuade a court to adopt a different approach have precious little authority on their side. This Article's purpose is to explore the possibilities for a new approach to which courts could give meaningful consideration.

1. Ex Post Facto Purposes as Support for the Elemental Approach

The closest that reviewing courts have come to articulating something like the elemental approach comes from the Ninth Circuit's holding in *Russell v. Gregoire*,[165] which involved the question of whether state sex offender registration and notification requirements for persons with prior convictions for sex offenses were punitive for purposes of applying the Ex Post Facto Clause.[166] More generally, though, Judge O'Scannlain said for that court that "[i]t is hornbook law that no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, *as long as the other relevant conduct took place after the law was passed*."[167] On its face, this would appear to contradict the completion approach. And yet, despite Judge O'Scannlain's confident description of this principle as "hornbook law," it is not, as we have seen, the approach that courts typically take in straddling cases. But it is a useful starting point for litigants seeking authority.

Moreover, the Supreme Court's own ex post facto precedents call the completion approach into question. The Court has said that retrospectivity means that the law applies to events occurring before its effective date and disadvantages the offender affected by it.[168] The Court has explained that retrospectivity turns on whether a law changes the legal consequences of acts completed before the law's effective date.[169] If this is true, then when a person commits an act prior to the law's enactment, that act is not the element of a crime, and he has no reason to believe that it is or will be. Yet, if the newly enacted law subsequently makes that prior act an element, it has then changed the legal consequences of that action—it has now made

165 124 F.3d 1079 (9th Cir. 1997).

166 *Id.* at 1083-84.

167 *Id.* at 1088-89 (emphasis omitted and added).

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

169 *Id.* at 31.

the action an element of a new crime, whereas it was not the element of that crime when done, and the person may now be subjected to punishment for that act when it is combined with some subsequent act.

The Court has not offered a more comprehensive understanding of retrospectivity in the criminal context, and this is perhaps one of the crucial deficiencies in existing ex post facto jurisprudence. It is true that in the civil context, the Court has offered a more lengthy explanation of retrospectivity and has stated that a statute is not retrospective "*merely* because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law."[170] But the Court was careful to further explain, consistent with *Weaver* in the criminal context, that what is important is whether the new law "attaches new legal consequences to events completed before its enactment."[171] The Court also cited with approval Justice Scalia's assertion that "the 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,"[172] as well as Justice Stevens's observation that "[l]egislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens."[173]

Taking the above description of retrospectivity at face value, then, as well as the Court's recognition of a robust anti-retroactivity principle both in criminal and civil legislation, this suggests that a new criminal law *is* retrospective for ex post facto purposes if the government applies it to a person whose pre-enactment conduct is made the element of that new crime, as this would constitute a new legal consequence of the acts that pre-date the statute.

Although the notice and object of punishment arguments are among the real strengths of the completion approach, they remain imperfect justifications for that approach, for many of the same reasons already discussed. Notice is a critical component of the criminal law and the constitutional regulation of it,[174] including the ex post facto bar.[175] Notice safeguards the

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170 Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994) (emphasis added) (citation omitted); *cf.* United States v. Philip Morris USA, 310 F. Supp. 2d 58, 65 (D.D.C. 2004) (citing *Landgraf* in upholding RICO conviction against ex post facto challenge).

171 *Landgraf*, 511 U.S. at 270.

172 *Id.* at 265 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)) (internal quotation marks omitted).

173 *Id.* at 267 n.20 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment)).

174 *See, e.g.*, City of Chi. v. Morales, 527 U.S. 41, 58 (1999) (discussing the importance of notice in the context of due process principles). Indeed, due process vagueness jurisprudence is another area in which the Court conducts a kind of elemental analysis. The analogy to the ex post facto context is not perfect, of course, but it is useful.

citizenry, not only by informing them of the evils that the government is attempting to punish, but also by creating reliance on existing legal structures.[176] That is, it ensures that citizens can conform their conduct to the mandates of the criminal law. When the state defines the criminal law, it criminalizes not only the ultimate evil, but also any attending conduct that forms the elements of the crime. Without proof beyond a reasonable doubt of all of those elements, there is no crime, no matter how socially undesirable or harmful the defendant's behavior.

So, in the completion approach described above, the actor is on notice only of the criminal consequences of any conduct that takes place *after* the law is enacted. He is not, however, on notice that any of his pre-enactment conduct could be combined with other later conduct to subject him to liability. That is, when he engages in the pre-enactment conduct, he has no idea that he is committing acts that could later subject him to a criminal law, whether those acts are morally innocent or not.

It may, of course, be argued that with regard to many criminal laws—even those that are applied to post-enactment conduct alone—those laws reach conduct that may otherwise be innocent but only becomes criminal when it is combined with some subsequent conduct that represents an evil that the state seeks to forbid. The difference, though, is that in such an instance, the actor is on notice that *any* of his acts that form the elements of a crime could be used to prosecute him for that crime. So, when the state defines the criminal law by employing multiple conduct elements, it is the entire combination of those elements that constitutes the crime that it punished, not merely the ultimate harmful act. After all, the state would be unable to punish at all if it did not prove all of the elements—even those involving morally innocent pre-enactment conduct—beyond a reasonable doubt.

Of course, it is important not to overstate the notice and reliance interests here. The ex post facto bar is not implicated every time a person relies on settled law only to have his plans unsettled by some legal change. As Professor Lon Fuller put it, "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."[177] It is one thing to have one's pre-existing expectations frustrated—or plans burdened—because of a change in the law. It is quite another when one's prior actions are actually used against him as a predicate for criminal

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175 *See* Weaver v. Graham, 450 U.S. 24, 28-29; (1981); Dobbert v. Florida, 432 U.S. 282, 298 (1977); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (discussing notice concerns that animate the prohibition on ex post facto laws); Robinson, *supra* note 16, at 348-53 (same).

176 *See* Jeffries, *supra* note 16, at 205-12 (explaining that although the concept of notice can be "shallow and unreal," its core bears on fairness to individuals and should be taken seriously).

177 LON L. FULLER, THE MORALITY OF LAW 60 (rev. ed. 1969). The Supreme Court's civil retroactivity cases have recognized this reality. *See, e.g.*, *Landgraf*, 511 U.S. at 269 n.24.

punishment or for moral condemnation by the political community, and it is that kind of alteration in the legal consequences of one's actions that implicates the concerns of the ex post facto prohibition.

So, in the first scenario set forth in Part I, when Defendant Ron traveled to Thailand, even if he did so for the purpose of having sex with a child, he was not on notice that such conduct could subject him to federal criminal law. Had the law been in effect before his travel, he would have had the opportunity to decide whether to engage in the travel at all in light of the criminality of his plan. And even if, in the case of the straddle situation, Ron was still on notice that his sex with a child could subject him to federal criminal prosecution under the new law, so that he could at that point refrain from the prohibited sexual conduct and avoid prosecution in spite of his travel in foreign commerce, the Government is not applying a law that criminalizes only his illicit sex; it is applying a law that criminalizes the entire course of conduct, including the travel in foreign commerce, for which there was no notice when it was done.

In other words, Congress was not merely punishing illicit sex; it was punishing illicit sex by someone who traveled in foreign commerce, and the defendant had no notice of this when he traveled. The evil that Congress sought to forbid and punish had to do not just with a particular form of socially harmful sexual conduct, but also with the fact that that particular sexual conduct occurred as a result of foreign travel.

The same problem—perhaps even more troubling—occurs when we examine the substantive criminal RICO problem from the third scenario of Part I (not including the continuing offense of RICO conspiracy), where pre-enactment conduct, when committed, was not punishable as a critical part of a federal racketeering crime, but is made so even if the defendant commits only a single predicate act after the date of enactment. In that case, it can plausibly be argued that the defendant had no notice that his pre-enactment conduct could be used to subject him to *federal* punishment for racketeering, even if some of his pre-enactment racketeering conduct is illegal under *state* law (as RICO permits).[178] And when he is punished under the statute, the federal government is punishing him, not simply for his single post-enactment racketeering conduct, but for his pre-enactment conduct as well, which he had no reason to know was punishable, at least not by the United States.

Indeed, the Government would lack the power to reach this defendant but for the pre-enactment conduct. So even if it can be argued, as in the first scenario, that Congress was not punishing the morally innocent pre-enactment conduct that occurs there (i.e., travel in foreign commerce), the RICO scenario is more problematic because the pre-enactment conduct was not morally innocent or neutral—the pattern of racketeering activity

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[178] *See* 18 U.S.C. § 1961 (2006).

includes both enumerated pre-existing state offenses or pre-existing federal offenses that become predicate acts for racketeering purposes. When Congress sought to punish under this provision of RICO, it was punishing not merely the ultimate or post-enactment racketeering activity, but a pattern of racketeering activity that began before the law existed.[179]

Of course, where the crime is one in which the elements are committed contemporaneously, this problem does not tend to arise. But at least with respect to those crimes that contain temporally separated elements or predicate acts and the potential for Congress to create more of these kinds of offenses through the use of its commerce power, the notice and object of punishment critiques have significant force as justifications for an elemental approach.

Moreover, the arguments from the purposes of the criminal law cut both ways. It may be argued that the retributive rationale is *not* served by the completion approach because a person who commits a part of the subsequently created crime before his action was an element thereof is not fully culpable—certainly not as culpable as one who commits all of the prescribed conduct post-enactment when he was on notice that each act, when combined with one another, could subject him to criminal prosecution. And even for those actors who commit the ultimate harmful act post-enactment, the law does not punish those acts in isolation, but rather the combination of acts that form the whole crime.[180]

Finally, as for the argument that persons who commit certain kinds of crime (such as pattern crimes) could escape liability under the elemental approach, it should first be noted that in many instances, these could constitute continuing offenses. But even if the continuing-offense approach would not apply, it remains worth observing that we pay some price for a constitutional system that limits the legislature's ability to expand the universe of actors that the criminal law may seek to capture. The cost of having a

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[179] But what about federal crimes that proscribe possession or receipt of a firearm that has been shipped in interstate commerce, where the interstate movement occurred before the effective date of the statute? *See id.* § 922. First, the continuing-offense doctrine might apply. Second, continuation aside, this language does not punish an act in which the defendant affirmatively engages. *Calder* and the ex post facto history are concerned with *actions done* by the defendant. The receipt or possession may be said to be an act of the defendant (at least for purposes of satisfying the actus reus component of the crime), but the fact that the firearm has otherwise moved in commerce is not an act attributable to the defendant. Even if such interstate movement can be made an element of the crime, it is not en element that would implicate ex post facto concerns. "Travels," though, as it is used in statutes like the PROTECT Act, proscribes affirmative, voluntary conduct on the part of the defendant. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 105, 117 Stat. 650, 653-54 (codified as amended at 18 U.S.C. § 2423).

[180] The deterrence argument is also problematic because one cannot be deterred from committing a crime if he does not know ahead of time that his conduct will form a part of a later-enacted crime. This would be subject to the persuasive counterargument, however, that the real deterrence benefit of the completion approach is to deter actors who have already committed elements of the crime (before it was enacted) from completing the crime. *See* discussion *supra* Part II.A.

system of limited and enumerated powers in which the principle of legality is taken seriously is that some actors, even highly culpable ones, will avoid criminal punishment.[181] Indeed, merely having the Ex Post Facto Clauses means that some culpable actors will escape prosecution because their culpable acts occurred before the legislature could identify those acts as deserving of criminal punishment. And the government is in no worse position if the protections of the ex post facto bar extend to actors who engage in certain conduct before it can be made part of a new criminal law, even if they satisfy other parts of the law after it is enacted.

2. The History of the Ex Post Facto Clauses as Support for the Elemental Approach

Although there was some discussion of the Ex Post Facto Clauses during the Constitutional Convention, those discussions offer little aid in grappling with the straddle crimes problem. There was general agreement among the delegates that ex post facto laws were void,[182] yet some of the delegates did not wish to include a provision barring ex post facto laws because it was obvious that they were unenforceable and including a provision would create the risk of what James Wilson described as "reflexions on the Constitution—and proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."[183] Daniel Carroll responded that regardless of how it is understood among the citizens, some States have passed ex post facto laws that had taken effect.[184] And Hugh Williamson noted that such a provision applied under the North Carolina Constitution and had done some good because "the Judges can take hold of it."[185]

The delegates also questioned the scope of the prohibition and whether it extended to civil as well as criminal legislation.[186] Yet John Dickinson of

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[181] *See* Robinson, *supra* note 16, at 364 ("The concern of the legality principle is procedural fairness, not blamelessness.").

[182] *See generally* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 268-72 (1985); Logan, *supra* note 11, at 1275-77; Natelson, *supra* note 6, at 517-22.

[183] James Madison, Notes on the Constitutional Convention (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 366, 376 (Max Farrand ed., 1911) [hereinafter FARRAND].

[184] *Id.*

[185] *Id.*

[186] James Madison, Notes on the Constitutional Convention (Aug. 29, 1787), *in* FARRAND, *supra* note 183, at 447, 448-49. Both Forrest McDonald and Professor Robert Natelson note the confusion surrounding Madison's apparent conclusion that ex post facto laws could also be civil. *See* MCDONALD, *supra* note 182, at 271 n.18; Natelson, *supra* note 6, at 517. This occurred during debate on August 28, 1787. McDonald writes that Madison had improperly recorded a motion by John Rutledge as restricting "retrospective laws," whereas the Convention Journal recorded it as prohibiting ex post facto laws. MCDONALD, *supra* note 182, at 271 n.18 (internal quotation marks omitted).

Delaware reminded the group that Blackstone had limited the ex post facto bar to criminal laws.[187]

During ratification, again, there was little controversy over the prohibition itself. Madison thus echoed in *The Federalist No. 44* the sentiments of the Convention that ex post facto laws were contrary to "every principle of sound legislation."[188] And Hamilton, in his response to the criticism that the Constitution contained no bill of rights, adds in *The Federalist No. 84*, "the subjecting of men to punishment for things which, when they were done, were breaches of no law" is among the "favorite and most formidable instruments of tyranny."[189]

What emerges from the Convention debate and from Publius's defense of the Constitution, then, is not a conclusion about the precise operation of the ex post facto ban (of the type we see in *Calder*), but rather a general agreement that the ex post facto prohibition should be robust, as it reflects an important and historically sanctioned limit on legislative power and, as such, safeguards liberty and thwarts tyranny.

Yet, if we look to Blackstone and to the ex post facto prohibitions of the early state constitutions, we see some reason to believe that the ex post facto bar ought to extend to any criminal law that operates other than purely prospectively. This evidence, though hardly conclusive on the question, could well serve as evidence of what the Convention delegates believed they were prohibiting when they included the Ex Post Facto Clauses in the Constitution.

In his discussion of the nature of the laws and the necessity of notifying the public of new laws by "some external sign," Blackstone ventures briefly into an explanation of the perniciousness of ex post facto laws.[190] He describes how Caligula wrote the laws in very small characters and then posted them on high pillars, thus making it difficult for people to see and understand them, "the more effectually to ensnare the people."[191] But Blackstone calls ex post facto laws an even "more unreasonable method" than Caligula's.[192] The first part of Blackstone's description of ex post facto laws arguably offers support for the completion approach: he says that "when after an action . . . is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it."[193]

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187 MCDONALD, *supra* note 182, at 271-72.

188 THE FEDERALIST NO. 44, at 249 (James Madison) (George Stade ed., 2006).

189 THE FEDERALIST NO. 84, at 472 (Alexander Hamilton) (George Stade ed., 2006).

190 1 WILLIAM BLACKSTONE, COMMENTARIES *45. The Supreme Court has recognized that Blackstone was an authoritative source for the early writings on the meaning of the Ex Post Facto Clauses. *See* Collins v. Youngblood, 497 U.S. 37, 44 (1990).

191 1 WILLIAM BLACKSTONE, COMMENTARIES *46.

192 *Id.*

193 *Id.* at *45-46.

Blackstone's use of the language "action . . . committed" suggests that the entire course of criminal conduct has been complete and is the object of punishment, not unlike the kind of description we see from the Supreme Court in *Calder* and *Weaver*. Yet Blackstone goes on to describe the notice problem, explaining that the actor had no reason to abstain from the act, so punishing him for not abstaining is "cruel and unjust."[194] Now it would seem arguable that if the criminal punishment is predicated upon any act that was innocent when done and *then* made a part of a criminal prohibition, it is ex post facto because the actor is punished for not abstaining from an act from which he had no cause to abstain. This conclusion is further supported by Blackstone's next observation: "All laws should be therefore made to commence *in futuro*, and be notified before their commencement."[195]

One can therefore plausibly read Blackstone to forbid any criminal legislation that reaches backward in time, before its enactment, in order to punish. And this is precisely what legislation does when it permits prosecution of a straddle crime, particularly where the crime is not continuing: it reaches backward in time for conduct that it can combine with post-enactment conduct, and that prior conduct forms a basis for the new criminal punishment. Indeed, the government could not impose the punishment without the pre-enactment conduct.

Similarly, some of the early state constitutions that address the ex post facto problem use more descriptive language than does the federal Constitution, and those constitutions informed *Calder*'s interpretation of the Ex Post Facto Clauses.[196] Article XV of Maryland's Declaration of Rights provided "[t]hat retrospective laws, punishing *facts committed* before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made."[197] Article XXIV of North Carolina's Declaration of Rights employed precisely the same language as Maryland's.[198] New Hampshire's Constitution does not similarly refer to "facts" or to "ex post facto laws," but it does forbid "[r]etrospective laws."[199] And Article XXIV of the Massachusetts Constitution of 1780, Part the First, stated that "[l]aws made

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194 *Id.* at *45.

195 *Id.*

196 *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 391-92 (1798) (opinion of Chase, J.); *see also* Collins v. Youngblood, 497 U.S. 37, 43 (1990) (noting the influence of the State Constitutions on the Framers' understanding of the Ex Post Facto Clauses).

197 MD. CONST. of 1776, Declaration of Rights, art. XV (emphasis omitted and added).

198 N.C. CONST. of 1776, Declaration of Rights, art. XXIV. The Maryland and North Carolina language is also somewhat confusing because both constitutions first forbid "retrospective laws" and then forbid ex post facto laws, presumably because all ex post facto laws are retrospective. But Justice Chase demonstrates that retrospective laws and ex post facto laws are not the same. *Calder*, 3 U.S. (3 Dall.) at 391 (opinion of Chase, J.).

199 N.H. CONST. of 1783, pt. I, art. XXIII.

to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."[200] The Massachusetts language thus tracks more closely *Calder*'s explanation, as well as Blackstone's, than does Maryland's or North Carolina's. But the question is twofold: (1) whether "action" means the same thing as "facts," and *Calder* implies that it does; and (2) whether both terms contemplate completed crimes, in which case we could simply substitute "actions" or "facts" with "offenses" or "crimes."

By comparison, Delaware's early constitution stated that "retrospective Laws, punishing Offences committed before the Existence of such Laws, are oppressive and unjust, and ought not to be made."[201] So Delaware is clearer than the other states in saying that its prohibition extends to "offenses committed" before enactment, which implies that the entirety of the crime must have come to completion for the ban to operate (otherwise, until it is complete, it is not an "offence"). But Justice Chase explained that Delaware's language was inaccurate precisely because it referred to "offences" instead of to "actions" or "facts" (which Chase understands as active conduct, "some fact to be done by a Citizen, or Subject").[202] Justice Chase thought Delaware *intended* the same definition provided by Massachusetts, Maryland, and North Carolina, but described the definition wrongly.[203]

Presumably, the inaccuracy arises from describing innocent conduct as an "offence," rather than as an "action" or a "fact." That is, the person's pre-enactment conduct cannot be accurately described as an "offense" if there was no law in existence to make it such. So using the words "action" or "fact" could still refer to a completed course of conduct. But if, as Justice Chase's opinion suggests, there is a critical difference between "offenses," which mean a completed crime, and "acts" or "facts,"[204] which can also refer to the component parts of a criminal offense rather than the offense as fully completed, then it becomes more realistic to say that the understanding of the Ex Post Facto Clauses at the time of the framing was broad enough to contemplate a ban on legislation that would apply to any strictly pre-enactment conduct (i.e., non-continuing) that forms a part of a crime that is made punishable by the legislation, even if other parts of the crime occur afterward. What is important is that the government would be reaching backward in time to take innocent acts and combine them with

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200 MASS. CONST. of 1780, pt. I, art. XXIV.

201 DEL. CONST. of 1776, Declaration of Rights, art. XI.

202 *Calder*, 3 U.S. (3 Dall.) at 392 (opinion of Chase, J.).

203 *Id.* at 392-93.

204 *Id.* at 390-92. Justice Chase says that the ex post facto prohibition forbids the legislatures from passing laws "after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it." *Id.* at 390.

future acts that have been made criminal, and then punishing the entire transaction.

It is also important to remember that the crimes that existed at this point in history were relatively few in number (particularly by comparison to modern criminal codes) and typically involved conduct elements that a person would commit contemporaneously.[205] So it is difficult to employ the historical materials to know how exactly the Framers would have approached the precise problem of criminal laws containing elements that could be committed at separate, even distant, moments in time. It is also true that the mere existence of a ban in the state constitutions does not necessarily tell us conclusively about the nature of a ban in the federal Constitution. After all, the New Hampshire Constitution of 1784 applied the ex post facto bar to both criminal and civil legislation, an interpretation that the Framers of the federal Constitution ultimately rejected and that we have never followed in American constitutional law,[206] despite some debate on the subject.[207]

So perhaps the least cumbersome interpretation of these materials—and again, a plausible one—is simply to say that they all contemplate only a ban on criminal legislation that would apply to conduct that represents a fully completed criminal offense before the date of enactment. Still, there is an equally plausible argument that the Framers would have understood the ex post facto ban to apply where there is a conduct element that pre-dates the legislation and is necessary for the imposition of punishment, in light of Blackstone's apparent insistence that criminal legislation not reach backward in time, but operate only prospectively, in light of the State constitutional provisions forbidding retrospective criminal laws as ex post facto, and in light of the understanding of some of these constitutional provisions that the ex post facto ban reaches "facts" that occur before enactment.

3. The Elemental Approach as a Broader Constraint on Legislative Power

The notice problem with the completion approach further highlights another difficulty, namely, the potential for Congress to continue to broaden the reach of the federal criminal law through its Commerce Clause authority in the absence of any additional *constitutional* constraint. As has been well described in the existing literature, the modern commerce power is immense, and its constitutional limits are fairly anemic, even in light of the Court's *Lopez* and *Morrison* decisions, thanks in substantial part to the

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[205] *See* LAFAVE, *supra* note 156, § 2.1, 78-89 (identifying and analyzing common law crimes).

[206] *Compare* N.H. CONST. of 1783, pt. I, art. XXIII, *with Calder*, 3 U.S. (3 Dall.) at 390-91 (opinion of Chase, J.).

[207] *See supra* note 6 and accompanying text.

Court's 2005 decision in *Gonzales v. Raich*.[208] The troublesome scope of the commerce power is no more apparent than in federal criminal law. Substantial literature of relatively recent vintage demonstrates the steady growth of the federal criminal law, a growth that includes not only the sheer number of federal crimes, but also Congress's penchant for adopting new crimes with no mens rea element and for testing the outer reaches of its Commerce Clause authority.[209]

Yet cases like *Carr* and *Jackson* demonstrate how an elemental approach to the Ex Post Facto Clauses could serve to limit the seemingly unbridled use of congressional Commerce Clause authority to create distinctly federal crimes. Suppose, as was set forth at the beginning of this Article, that members of Congress specifically insert language into the legislative history of a law indicating that it was their intention that "travels" apply retrospectively rather than merely prospectively. This is hardly an implausible scenario, particularly where Congress may feel strongly about expanding the reach of a given criminal statute to address a problem of great public and national importance, such as targeting sexually predatory conduct against children. Notwithstanding Justice Scalia's insistence in *Carr* (and elsewhere) that the legislative history and other pre-enactment documents are irrelevant to the judicial inquiry into the meaning

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208 545 U.S. 1 (2005). *See generally* George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 OHIO ST. L.J. 947 (2005); David L. Luck, *Guns, Drugs, and . . . Federalism?—* Gonzales v. Raich *Enfeebles the Rehnquist Court's* Lopez-Morrison *Framework*, 61 U. MIAMI L. REV. 237 (2006); Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006). For specific coverage of the *Lopez-Morrison-Raich* effect on federal racketeering liability, see Thane Rehn, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991 (2008) (discussing overfederalization but focusing on the ways in which RICO's framework would apply under contemporary Commerce Clause doctrine) and Kenton J. Skarin, *Not All Violence Is Commerce: Noneconomic, Violent Criminal Activity, RICO, and Limitations on Congress Under the Post-*Raich *Commerce Clause*, 13 TEX. REV. L. & POL. 187 (2009) (suggesting that the Court not extend *Raich* to non-economic violent crimes).

209 *See generally* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (James A. Strazzella rptr., 1998); Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673 (1999); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 756-78 (2005); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1144-45 (1995); JOHN S. BAKER, JR., HERITAGE FOUND., LEGAL MEMORANDUM NO. 26, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 6-7 (2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; RACHEL BRAND, HERITAGE FOUND., LEGAL MEMORANDUM NO. 30, MAKING IT A FEDERAL CASE: AN INSIDE VIEW OF THE PRESSURES TO FEDERALIZE CRIME 1-4 (2008), *available at* http://www.heritage.org/research/reports/2008/08/making-it-a-federal-case-an-inside-view-of-the-pressures-to-federalize-crime. Other articles explore this problem further. *See, e.g.*, J. Richard Broughton, *Some Reflections on Conservative Politics and the Limits of the Criminal Sanction*, 4 CHARLESTON L. REV. 537 (2010).

of the statutory text,[210] this is not a majority position, and most members of the Court—and lower courts—would likely consider this kind of congressional specificity to foreclose any further questions of statutory interpretation on the scope of the word "travels," at least where its use or purpose is ambiguous.[211] Moreover, Congress could always amend the statute to use the term "traveled" or "has traveled," or include a definition of "travels" that would permit it to apply retrospectively. So although *Carr* and *Jackson* correctly dispose of the statutory construction problems in those cases to avoid the ex post facto claim, Congress could always create the problem again by insisting that those laws apply to pre-enactment travel. And, worse still, there seems to be no principled limit on the time-frame for backward reaching: Congress could capture conduct elements that occurred decades in the past.

Although one may plausibly believe that the problem that this Article addresses is too rare to matter much, or that any potential ex post facto problem would dissipate over time, the potential for mischief is substantial. First, there are numerous federal crimes in which Congress has used travel in interstate or foreign commerce as a predicate for reaching conduct that occurs subsequent to that travel.[212] *Carr* could certainly limit the retrospective reach of those offenses, but as this Article has explained, Congress could always overcome *Carr*. Second, and perhaps more troubling, Congress, over time, rarely misses an opportunity to create at least some mischief in the exercise of its commerce power. Congress has inserted the so-called "jurisdictional hooks" into countless pieces of federal legislation, in part to satisfy the Court's concerns in *Lopez* and *Morrison*,[213] and it is

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[210] Carr v. United States, 130 S. Ct. 2229, 2242 (2010) (Scalia, J., concurring in part and concurring in the judgment).

[211] *See* Jones v. United States, 526 U.S. 227, 237-39 (1999); United States v. Kozminski, 487 U.S. 931, 945 (1988); Scarborough v. United States, 431 U.S. 563, 567 (1977).

[212] *See, e.g.*, 18 U.S.C. § 1952(a) (2006) (providing "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce" and, with requisite intent, "thereafter performs or attempts to perform" certain unlawful acts); *id.* § 1959 (making it a federal crime to travel in interstate or foreign commerce, or to cause another to do so, with the intent to commit a murder for hire); *id.* § 2101 (making it a federal crime to travel in interstate or foreign commerce, with requisite intent regarding rioting, and to thereafter perform or attempt to perform an enumerated overt act regarding rioting).

[213] *See* United States v. Morrison, 529 U.S. 598, 611-12 (2000); United States v. Lopez, 514 U.S. 549, 561-62 (1995). Of course, the mere presence of a jurisdictional element is not sufficient to save the statute from a constitutional challenge. But the Court envisioned a case-by-case inquiry in which reviewing courts could ascertain whether the Government had adequately proven the jurisdictional element so as to ensure that the applicable statute reached only activities that were within Congress's power. *See Lopez*, 514 U.S. at 561-62. For an interesting analysis, see Tara M. Stuckey, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101 (2006). *See also* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203 (2006) (discussing the role of jurisdictional elements in federal criminal law).

this practice that accounts, in significant part at least, for the explosive growth of federal criminal law. Without a robust constitutional bar of the kind that the elemental approach provides, Congress could simply use the interstate or foreign commerce jurisdictional element and continue to insert it into any number of federal criminal statutes that would otherwise qualify as constitutional overreaching, even, perhaps, touching a category of politically unpopular actors (thus implicating the anti-vindictiveness aim of the Ex Post Facto Clauses).[214] So assuming that a reviewing court would be satisfied that the jurisdictional hook properly captures the conduct at issue, Congress could continue to use the Commerce Clause to expand the reach of federal crimes and, in the process of doing so, reach backward in time through an element that is not only jurisdictional, but temporally separated from the conduct causing the primary harm that Congress seeks to punish.

What is needed, then, is a way of *constitutionally* controlling this kind of congressional overreaching, a control that Congress could not evade by manipulating legislative history or through clever terminological definitions. As Professor Wayne Logan has argued—in the particular context of the separation of powers and anti-vindictiveness aims of the Ex Post Facto Clauses—the requirement of prospectivity checks the possibility of legislative overreaching motivated by self-interest, which is often present (or at least especially likely) in *criminal* law making.[215]

With an interpretation of the Ex Post Facto Clauses that forbids applying this kind of new legislation to a person whose offense includes temporally separate pre-enactment conduct, courts can simultaneously make the ex post facto prohibition more robust and narrow the scope of congressional commerce power. In this sense, the elemental approach is consistent not merely with the specific notice and anti-vindictiveness aims of the ex post facto bar, as well as with the Framers' understanding of a robust ex post facto bar, but also with the broader goal of restraining legislative authority.

CONCLUSION

Straddle crimes present the criminal law with a unique ex post facto brainteaser. The legislation that is applied to them does not look like the paradigmatic ex post facto law. After all, the legislation applies to some

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214 *See* Logan, *supra* note 31, at 496-507 (explaining the structural constraining power of the ex post facto bar, particularly as a way of preventing the legislature from reaching unpopular criminals).

215 *Id.* at 495-98. Professor Wayne A. Logan refers in his piece to Professor Adrian Vermeule's work on "veils of ignorance" (drawn from Professor John Rawls) in which Vermeule argues that veil rules suppress self-interest and fortify separation of powers limits on political actors. *Id.* at 496-97; *see* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399-401 (2001). Logan asserts that ex post facto bans can have "re-veiling effects." Logan, *supra* note 31, at 497.

post-enactment conduct. And yet, if we can apply the law to pre-enactment conduct, we see that many of the same concerns that arise in the paradigmatic examples also arise with straddle crimes. Though courts have said little about why the conventional, completion approach to straddle crimes is the correct one, there is much to say on behalf of that approach. Still, a new approach is desirable. Where the crime cannot fairly be described as continuing, the government is using new legislation to reach backward in time for conduct that it can combine with post-enactment conduct, and thus the prior conduct forms a basis for the new criminal punishment. Courts should be reluctant to stamp this practice with their approval, without first considering the substantial merits of a more robust ex post facto prohibition that would extend to such laws.

Of course, courts could limit the legislature's authority to do this without resorting to the ex post facto bar simply by interpreting the legislation to apply only prospectively. But this would not serve as a constitutional restriction, and consequently, the legislature could overcome it. Or we could simply trust the Congress and the State Legislatures to draft legislation that will apply only prospectively or that will respect the structural constitutional limits on legislative power. But experience teaches that this kind of trust is misplaced, especially when the relevant legislative actor is the Congress.

This is not to say that courts should reflexively undermine the considered judgments of the political branches with regard to the definition and enforcement of the criminal law merely as a way of protecting the interests of criminal defendants or of preserving a core-review function for the judiciary in limiting the scope of political power simply because judges do not trust political actors. Nor is it to say that we should interpret the Ex Post Facto Clauses as forbidding some action of the political branches merely because we disapprove normatively of the particular action. Rather, the argument here is that an elemental approach to non-continuing straddle offenses is consistent with the underlying purposes of the ex post facto prohibition and with an understanding of that prohibition that is drawn from its intellectual roots. And those intellectual, theoretical, and historical attributes of the ex post facto bar condemn the practice of using legislation to impose criminal punishment by reaching backward in time. It is, at a minimum, an approach that—even conceding the appeal of the completion approach—courts, legislators, and prosecutors should finally take seriously.