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CHANGES, ANTICIPATIONS, AND REPARATIONS

*Saul Levmore**

Conventional views of legal change emphasize the values of certainty and reliance, and are therefore hostile to explicitly retroactive laws. Contemporary scholarship, however, allows that a policy of aggressive legal change, with no compensation for "new losers," can encourage socially useful steps in anticipation of change. Professor Levmore argues that the anticipation-oriented approach logically extends to embrace anticipation by "new winners" and governments as well as new losers. If all parties' anticipatory incentives are considered, familiar rules, ranging from statutes of limitations to retroactivity and to compensatory payments for government takings, seem quite sensible. And if these rules are drawn correctly, few parties should find it worthwhile to stand against progress. Professor Levmore then considers reparations. He argues that these payments by governments are made when the potential anticipation effects normally associated with retroactive compensation are absent. The transfers are then redistributive, and best understood through interest group analysis.

INTRODUCTION

Most of the effort expended in understanding and reforming law is concerned with the content of rules, be they substantive or procedural. My interest here is instead with timing. Law may be good enough, whether it is made in courts or more democratic institutions, but it may be too slow in coming about. Various interests and values may work to impede the rate at which good law emerges. This Article offers an early (but not quite first) step toward thinking about the many ways that law can and should influence its own development. If we allow ourselves to be more modest about our ability to know the content of good law, but less shy about encouraging parties to accept and facilitate changes that various empowered majorities send our way, then the roles played by such diverse things as due process, statutes of limitations, administrative rulemaking, appeals, and government compensation take on new meaning. And from a more positive perspective, we might simply try to understand transition rules, broadly construed, as reflecting law's optimistic assumptions about its own substance. My focus is on incentives to anticipate or arrest legal change.

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The guiding principles on matters relating to transition rules have traditionally been the values associated with certainty and reliance, and indeed we might think of the conventional analysis of legal transitions as "reliance-oriented" and as harboring hostility to explicitly retroactive laws.¹ Contemporary work, however, has drawn attention to the idea that these values might be in conflict with faith in legal change and with encouraging desirable change.² The suggestion is that transition rules be "anticipation-oriented," designed to encourage parties to anticipate new law.³ Compensation or other softeners for those who are disadvantaged by change will diminish the desirable inclination of these parties to anticipate change. Instrumentalist arguments have, of course, advanced the possibility that government compensation in the wake of change might generate better law through some sort of internalization process.⁴ But the present focus is on compensation and other tools as means of affecting the pace of change, rather than as implements for influencing the content of new law. Anticipation can increase the value of changes.

It is often easy to see the sense of this insight. If, for example, regulators ban a chemical that had long been used in a manufacturing process, the affected manufacturers might try to gain compensation, exemption from suit for the past use of this input, delay in the effective date of the ban, or exemption for those who like themselves (might be "grandfathered" as having) relied on the legality of this chemical in the past. Retroactive application will certainly be fought by these "new losers," as I will call them, and so aggressive an introduction of change might indeed seem especially unfair and pointless, for it would generate liability for actions that can no longer be altered and that may indeed have been approved by some regulatory authority. But the new, anticipation-oriented approach to legal transitions emphasizes the possibility that

1. See Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 *Harv. L. Rev.* 692, 692-93 (1960); Stephen R. Munzer, *Retroactive Law*, 6 *J. Legal Stud.* 373, 391 (1977); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 *Minn. L. Rev.* 775, 777 (1936); Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 *Duke L.J.* 1069, 1116-17 (1993). For representative examples of judicial decisions and academic commentary referring to unsettling retroactive laws as monstrous, unjust, and the like, see Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 *Geo. L.J.* 2143, 2144-45 (1996).

2. See, e.g., Daniel Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* (forthcoming Mar. 2000) (manuscript on file with *Columbia Law Review*); Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 *U. Pa. L. Rev.* 47, 47 (1977); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *Harv. L. Rev.* 509, 519 (1986); Saul Levmore, *The Case for Retroactive Taxation*, 22 *J. Legal Stud.* 265, 267 (1993) [hereinafter Levmore, *Retroactive Taxation*].

3. In the tax context, however, often it is best if taxpayers do not anticipate new law so that anticipation does not affect their behavior. See Kaplow, *supra* note 2, at 519.

4. See, e.g., Richard A. Epstein, *Simple Rules for a Complex World* 129 (1995); Kaplow, *supra* note 2, at 567-69.

these manufacturers could have anticipated the ban. They might have been in an excellent position to know the costs and benefits of the inputs they used and in a relatively good position to anticipate new and better law. The obvious way to encourage such anticipation and acceleration of beneficial change is for the law to practice "aggressive change."⁵ Manufacturers who expect no protection from the costs of change will then do well to anticipate it. They might, for example, develop and adopt substitutes for the chemicals that they anticipate will be banned, and good change may come about in this way long before lawmakers know to change the law.⁶ While the old, or conventional, view emphasized reliance interests and occasional cost internalization, the new approach focuses on anticipation.⁷ Aggressive change is thus an anticipation-oriented strategy. It refers to the idea of imposing new law as if we were confident of its quality and disappointed that we did not find it earlier. It encourages relevant parties to anticipate new law by declining to compensate them for the costs they incur as the result of change.

This anticipation-oriented approach has its problems but there is obviously much to be said for it. Aggressive change is more attractive the more new law is in fact good law, the more this good law would have been yet better if enacted or conformed to earlier, the more new losers have informational advantages, and the more likely it is that new losers will facilitate good law rather than work wastefully or successfully to block it. But my aim in this Article is not to dwell on the conditions under which the strategy of aggressive change will be most successful, but rather to extend this strategy and to increase the emphasis on anticipatory behavior. Rules of liability and even retroactivity may well encourage conventional tort defendants and regulated industries to anticipate new law, but they may also encourage plaintiffs, regulators, and governments to do the same. New law comes about through the interaction of all such parties, and perhaps all should be encouraged with appropriate incentives regarding any failures of anticipation.

Part I suggests that this anticipation-oriented strategy offers a surprising insight that may explain a good deal of the law requiring government

5. The example in the text involves technological change, with a private party possessing not only superior information but also the ability to effect change. In such cases, the argument for what I call "aggressive change" is most straightforward.

6. In the extreme, there might be cases where self-regulation would be the norm and a formal ban never comes to pass.

7. On cost internalization, see Hochman, *supra* note 1, at 692, 698. The strategy of aggressive change is fueled by some skepticism about internalization strategies. A government that pays for the costs it imposes does not always enjoy corresponding benefits and does not always have an easy means of encouraging its agents to consider the costs for which it will be responsible. Moreover, as a predictive matter the internalization idea raises more problems than it solves in takings law, where the government pays but occasionally and where these occasions are not correlated with the likelihood of complete internalization. In any event, I will treat a "strategy of aggressive change" and an "anticipation-oriented" approach as virtually synonymous.

payments in some situations. The law that we experience may in fact be more compatible with the strategy of aggressive change than with the old, reliance-oriented approach. In order to encourage anticipatory behavior by multiple parties, the best transition rules may be those that impose change rather mildly—not because of any sense of caution about the content of new law, nor because of sympathy for those who relied on old law, but because these rules offer good incentives for all concerned. At the same time, there may be discrete areas of law where more aggressive change is appropriate. Some readers will come away from this exploration of the logic of an anticipation-oriented approach more convinced than before that it is a mistake to impose change aggressively and that the strategy of aggressive change crumbles under its own weight. My own conclusion is at times agnostic and at times optimistic about both the strategy of aggressive change and conventional legal rules.

Extension of the aggressive-change strategy to include the goals of encouraging anticipation by opposing private parties and by governments draws attention to instances where governments do make compensatory-style payments after serious legal changes. In Part II, I consider a category of rather extreme examples, in which monetary reparations are paid long after injuries are suffered and long after a regretted legal regime has been changed.

A good recent example of reparations following social and legal regret of a very serious sort was the payment of \$20,000 each to some 82,000 Japanese Americans (or their immediate relatives) who had been relocated and interned during World War II.⁸ It goes almost without saying that other transformations have not generated reparations. African Americans who experienced discrimination and government-sponsored segregation, not to mention earlier enslavement, have not received direct reparations, despite intermittent arguments and claims for monetary payments.⁹ At a slightly more mundane level, many government programs, experiments, and military campaigns come to seem misguided and unjustifiable, but only a fraction of these generate reparative payments. There may be something of a parallel positive puzzle with respect to international reparations which sometimes follow wars or regrettable state actions—and with remarkable speed. A theory that makes sense of the pat-

8. I will try to reserve the term “reparations” for payments made by governments to injured parties who have no reasonable expectation of recovery in court. These legislated payments are thus different from settlements. In the case of the payments to Japanese Americans, recipients were required to waive any claims they might have had against the government. I think it fair to say that the expected value of these claims was very low or, at least, that sudden success in the courts would itself have come only with the help of political sentiment and have been at odds with existing law. On the details of the reparations scheme itself, see Civil Liberties Act of 1988, 50 U.S.C. § 1989b-4 (1994).

9. See *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995). See generally Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 597 (1993).

tern of domestic reparations might illuminate the incidence of international payments.

My claim about reparations can be summarized (in nearly circular fashion) through the observation that the reasons for denying compensation with respect to most legal changes are inapplicable in the very situations where reparations are paid. Put differently, reparations involve wealth transfers where the behavioral, or potential anticipation, effects normally associated with compensation related to legal change are absent. The transfers are then redistributive, political moves best understood through interest group analysis. The ability to change law without compensating losers may normally encourage desirable legal change, but it will not do so if the compensation claim comes so long after the original regime that it could scarcely have been anticipated, or if its expected costs are very low.

I. AGGRESSIVE LEGAL CHANGE

A. *Encouraging Anticipation by New Losers*

Most, if not all, of the attention paid recently to legal changes, or transitions, has been devoted to claims by those who stand to lose from change.¹⁰ These new losers regularly point to their reliance on old law and argue not only against retroactive application of new law¹¹ but also for compensation or protection to the extent that there are burdens associated with change that is nominally prospective. If, for example, courts or other regulators begin to find that products once declared safe are now thought to be defective, there are questions about who should bear the cost of changing a manufacturing process as well as the costs associated with injuries imposed, or yet to be caused, by these old products. Comparable questions arise with many legislative pronouncements. One favorite in the literature is losses imposed by a repeal of the federal income tax exemption for interest on municipal bonds; the exemption has long been abhorred by tax law theorists and its repeal can be fantasized in various forms with different degrees of retroactivity.¹²

Recent, interesting literature suggests that, whatever the doctrinal context, normative views about protection for new losers follow from assumptions or intuitions about the likelihood that legislative and judicial

10. See Graetz, *supra* note 2, at 49–51; Kaplow, *supra* note 2, at 522; Levmore, *Retroactive Taxation*, *supra* note 2, at 266–67.

11. See, e.g., *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971).

12. See, e.g., Graetz, *supra* note 2, at 53–56. This example is not among the strongest for aggressive change because taxpayers (and even municipalities) are unlikely to have an informational advantage about the case for change. On the other hand, although this Article emphasizes the role that information advantages can play in the argument for a strategy of aggressive change, informational advantage is not a focus of the extant literature.

innovations offer improvements. If new law is good law, then there is normally much to be said for encouraging both new law and the behavior it means to animate. Such encouragement is the goal of a policy of aggressive change; protection for new losers will only weaken their motivation to anticipate change. Moreover, the heroic assumption that new law is more often than not good law, not to mention the implicit assumption that encouraging a different pace of change will not adversely affect its content,¹³ may be optimistic but it is not capricious. It is plausible, for example, that although selfish interest groups and legislators get their way with respect to novel issues, the longer a matter is in the public eye, the more likely some combination of good judgment, majoritarian politics, and market-like bargains will prevail.¹⁴ With market-style bargaining always in the shadows, most legal rules might well come to be sensible or even efficient. It almost follows that most change is for the better. Alternatively, there may be a kind of competitive theory that can ground optimism about the evolution of judicial and legislative interventions. Better governments may help their industries and citizens win various inter-jurisdictional battles against inferior and less responsive governments. In short, although there is an endless stream of pessimistic arguments about the likely character of laws, there may be a comparable—less familiar but perhaps superior—set of optimistic arguments supporting the idea that most new law is good law.¹⁵

An alternative entry point to thinking about the pace of change and anticipatory behavior, as opposed to the content of new law, is to begin with the question of how to encourage parties to anticipate and facilitate good law. Parties who find the content of proposed laws disadvantageous are at present likely to oppose and delay change. One possibility is to inquire constantly whether any party was negligent or worse in its attempts to change law or forestall changes. The difficulties associated with this sort of approach lead to the objective strategy of taking the evolution of the content of law as a given. The idea is to assume that law as it develops is the best law, having survived a kind of evolutionary competition. There is then no need to make subjective judgments about good and bad law, except perhaps in rare cases where law responds to new circumstances that individual actors could not or even should not try to

13. Note that the interaction between pace and content is unlikely to present much of a problem. Rushing things along might sometimes lead to errors, but these mistakes will in turn be discouraged by knowledge that corrections will eventually be imposed aggressively under the rules associated with an anticipation-oriented regime.

14. Indeed, it is something of a puzzle that commentators who have the most faith in private bargains (even in the face of transaction costs) tend to be those with the least faith in private parties' abilities to bargain successfully for efficient outcomes in the political arena. See, e.g., Richard A. Posner, *Economic Analysis of Law* § 3.1, at 37–38, § 19.3, at 572–73 (5th ed. 1998).

15. There is something attractive about avoiding the question of asking some institution to identify good law versus bad law.

anticipate.¹⁶ There is obviously much more that could be said about this notion, but my strategy here is to focus on timing and to assume a good deal about content.

In any event, if one is willing to assume that new law is more often than not good law, or at least to see where this sort of leaping lands us, then there is much to be said for the proposition, associated with Louis Kaplow, Dan Shaviro, and others, that there should be no protection for those who lose because of substantive change.¹⁷ What is said to be at stake is not simply a question of wealth distribution but rather the incentive to predict change and to exploit informational advantages in ways that promote the social interest. Imagine, again, that new legislation bars the use of some chemical inputs or that new administrative regulations hold users responsible for injuries caused by these ingredients. The more aggressive the expected application of these new rules, the more it seems likely that well-informed firms will choose to substitute other, less harmful inputs even before the government (through courts, regulators, or legislatures) devises the new controls. The idea, once more, is that it will pay for firms to anticipate government regulation in order to avoid liability or wasted investments. Moreover, there is reason to think that these regulated firms know or could know more than the government about likely subjects of regulatory concern and, therefore, might be in the best position to forecast the coming, good law. In contrast, if the law is such that these firms know that they will be compensated for the cost of legal change, then they have little incentive to anticipate new law. The case for aggressive change is much weaker where the parties that might anticipate new law have no special informational advantage, if only because it is much more likely that they will waste resources in their attempts to acquire information in the hands of others.¹⁸

There is, to be sure, the possibility that the law might encourage useful anticipation by asking *ex post*, and on a case-by-case basis, when various actors should have anticipated what the lawmakers eventually discovered. The idea is that even if we assume the desirability of new law, we may be willing to inquire in each case whether anticipation was feasible, whether various parties enjoyed superior information, and even whether

16. It is possible that anticipation should sometimes be discouraged in order to economize on duplicative information gathering.

17. Or at least because of substantive or policy changes. See Shaviro, *supra* note 2 (manuscript at 8) (striving to distinguish policy-relevant attributes from those that are "accounting" conventions); Kaplow, *supra* note 2, at 513.

18. The case does not evaporate when there is no informational advantage because these parties may still usefully adapt to coming law. And the problem of duplicative searches for information is common in many markets. Consumers and investors, for example, regularly face collective action problems that suggest the presence of something other than the optimal amount of comparison shopping and other searching, but it is unlikely that there is much of a case to be made for law's intervening in all such markets.

there was antisocial obstruction of good change.¹⁹ Such a scheme might call for payments for the period in which there was negligent or intentional non-anticipatory behavior. We might simply think of the case for fairly aggressive legal change as a kind of argument for strict liability for non-anticipation, where a negligence rule is expensive to administer. In any event, the choice between negligence and strict liability can be revisited if the strategy of aggressive legal change ever becomes conventional.

An intermediate strategy would allow room for categories of changes, and in particular would attempt to identify changes in law that arise because of new circumstances that make early anticipation unlikely or even undesirable. Thus, when a speed limit is reduced on a highway, it is likely that anticipatory precautions may be inefficient, because in a much earlier period there was insufficient congestion to warrant the lower speed, or even dangerous, because of a collective action problem that is solved rather uniquely by a posted speed limit.²⁰ New law may be good law, but only in its time.²¹ In contrast, airbags might have been usefully anticipated long before their actual introduction. There is, therefore, something to be said for case-by-case determinations as to whether change would have been appropriate earlier. On the other hand, there is the possibility of useful generalization. One possibility is to generalize based on regulatory subject.²² Another is to treat decisions by

19. Further refinements might include the question of whether a reasonable party might have thought that others were investing in information. That problem becomes similar to that encountered in rescue law. See Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 *Va. L. Rev.* 879, 934 (1986).

20. There can be danger in driving as if the speed limit were lower than posted when others do not do the same. In any event, I do not put too much weight on the collective action point because I doubt that much changes if we use an example where the speed limit changes on a railroad line used by one or two carriers. Finally, note that anticipation could also be encouraged with subsidies or penalties targeted at behavior that is a substitute for that which the law eventually chooses. If congestion leads to lower speed limits, some of those who usefully anticipated the legal change will drive a bit slower but some will switch to other routes or modes of transportation. We might penalize those who do not (or reward those who do) anticipate and perform these useful acts. The problem is that it can be difficult to specify all those things that are substitutes for the behavior eventually legislated.

21. We might imagine transition rules that vary according to the underlying substantive rule. Thus, new speed limits might be retroactively imposed for a six-month period to take account of the lag between new density and traffic conditions and the passage of new speed limits by legislation or administrative rulemaking. The public choice implications are fairly clear and not necessarily upsetting. Old speeders—as defined by new law—will not normally be known except for those who were involved in accidents during the six-month period. These parties will have a keen interest in opposing the new legislation, while their victims will have an interest in supporting lower speed limits in order to facilitate victories in tort suits. And it is possible that these interested and comparably situated parties are well-suited adversaries in the political arena.

22. Thus, new traffic and new zoning laws might be presumed to be based on new circumstances while product safety rules might be presumed to reflect technological advances or data collection that might have been usefully anticipated. But even these

legislators or administrative agencies as more likely than those of courts to result from recently changed contexts, if only because the former can move more quickly.

Even with a convenient assumption about the quality of the content of new law, the argument for aggressive legal change is open to important objections and qualifications. It must assume that negatively affected parties can be discouraged from delaying good law, or that they are unable to succeed in such obstruction. After all, if new losers simply go uncompensated for the burdens new law imposes on them, then they can be expected to work to delay the implementation of proposed changes. One way to combat this delay and to promote the anticipation-oriented strategy is to insist that legal change *should* be accompanied by retroactive liability where necessary, in order to ensure that new losers will not waste resources seeking to promote destructive delay. In some settings law encourages anticipation and discourages intentional delay by awarding pre-judgment interest as well as by imposing retroactive liability,²³ and the same strategy can be followed even where new losers were proclaimed to be winners under old law. The problem is more difficult when new law affects things that are not easily monetized. In any event, the strategy of aggressive change requires not only the very optimistic assumption that most changes are good but also the sanguine conjecture that we need not be concerned about the social costs associated with delays in change brought about through the influence of those who will lose from it. Indeed, a vulnerability of the anticipation-oriented approach discussed thus far is that it gives new losers a new (and unfortunate) incentive to block change entirely.

The preceding analysis is, however, unnecessarily wooden. In fact, a legal system guided by the value of anticipatory behavior need not precommit either to the noncompensation norm or to a rule requiring compensation (or other protection) for those who relied on old law. Courts may react to new law and subsequent claims by new losers by allowing change, and even nominally retroactive change, with no protection for new losers—but nothing stops legislatures from providing compensation where none is legally required. Legislatures, more than courts, can engage in the strategic and selective protection of new losers. A plausible, but admittedly blissful, view is that where losers have sufficient power to delay or block desirable change, winners (including the polity as

examples might be trivialized with the claim that virtually everything can be usefully anticipated. Thus, property owners might usefully anticipate zoning changes—but then again perhaps we have no reason to expect them to anticipate where governments choose to put new industrial parks or military bases.

23. See *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194 (1995) (discussing prejudgment interest in the context of admiralty law); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654 (1983) (discussing prejudgment interest in the context of patent infringement); *United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co.*, 986 F.2d 1110, 1120 (7th Cir. 1993) (discussing prejudgment interest in the context of breach of contract).

a whole) find it worthwhile to compensate losers in order to go forward with good new law. Good law is to be expected under this view, but it will sometimes come with a political cost in the form of compensation for losers, or for a potent subset of losers. It goes almost without saying that such political deals must (at least sometimes) be enforceable for them to have any value. If aggressive change is applied everywhere, even to undo previous compensation payments to new losers, then political bargains to facilitate change will depend on the development of a norm against this sort of aggressive undoing of earlier deals. If this norm does not develop, if compensation were somehow impermissible in the first place, or if it were required to be disbursed with some principled consistency, then it is quite plausible that there would be less good change and good law than there would be in a world where selective protection was permissible or even in one where reliance interests were always protected.²⁴

There is, of course, ample room for the pessimistic view that begins with the intuition that new law is often bad law. Political agents may be selfish and uncontrollable. Bargains may be missed because of transaction costs, because potential winners and losers cannot easily convert their rights to money or other tradable goods, because the potential for payments may lead to extortion, inefficient posturing, and so forth. Such pessimism leads to a taste for less government flexibility in order to avoid political bargains for further changes. But the pessimistic view tends to conflate problems of timing and content, and my aim is to focus on the former even if it means (unrealistically) holding the latter constant or assuming the best about it. To put the entire matter differently, the best argument for mandating government compensation for all those who lose from change—which is to treat most regulations as compensable takings—may not be that compensation will encourage better governmental decisionmaking but rather that the permissible and flexible character of compensation in the absence of a mandatory rule leads to wasteful rent-seeking by those who now seek to ward off uncompensated regulation.²⁵

Our legal system, and surely most others, reflects an intuition that the promise of compensation for new losers would do more harm than

24. This flexibility advances the optimistic case alluded to above. See *supra* note 13 and accompanying text. If endowments (and even legal rules) do not matter much in private law because trades will occur where they are profitable, then the same might be true even where voting rights, interest groups, and other political arrangements create the need for an extra layer of costly transactions. The flexibility of law, in the form of the power to compensate or not, often creates more bargaining room.

25. Note that if we focus on timing or the process of change, and concern ourselves entirely with such things as rent-seeking, there is a strong case to be made for mandatory compensation to new losers. The idea is that if there is no compensation, then prospective losers will fight change. And if compensation is discretionary, then they will fight change or work to gain compensation. The only way to avoid rent-seeking entirely is to guarantee compensatory payments (but no more) in the event of change. This is, of course, neither the position taken here nor one already associated with the strategy of aggressive change. See *infra* Part II.C (discussing other flawed strategies for reducing rent-seeking).

good except under special circumstances, such as the singling out of a particular individual or group. New legislation is normally associated with new winners and new losers; the former group has often been instrumental in encouraging the legislative change, and the latter group generally receives no compensation. The system operates through political power rather than unanimity or a Paretian ideal.

The discussion thus far has emphasized legal change through legislation, but the case for encouraging anticipation by new losers is much the same whether changes come about in legislatures or in courts.²⁶ The winners and losers in court cases are not unlike those found in the wake of new legislation. When a court surprises us by finding liability where none was known before, we expect the moving party to be one of the winners, and it is rewarded by a judgment against its opponent, a new (and perhaps lone) loser. The loser is hardly compensated even though there is a sense in which the government (through the courts) has taken from it. There is again the question of useful anticipation. Continuing with the example of potential tortfeasors who should rush to take precautions that future courts will eventually find to be desirable, one can imagine a system in which past litigants, who failed to collect when they had their day in court, collect on the basis of new law in order to encourage anticipation by the new losers. But prior to exploring this possibility, I turn to more explicit consideration of the role of new winners.

B. *Encouraging Anticipation (Even) by New Winners*

The anticipation-oriented approach to new losers, which is to say the idea of fully burdening them with the costs of change, is most attractive where these players, who are often conventional defendants, have both an informational advantage in anticipating changes (in law and technology) and the ability to take concrete, socially useful steps. However, new losers are not the only parties whose anticipation or advance behavior might be usefully encouraged. This is easier to see if we characterize the strategy of aggressive change as aimed not simply at anticipation but, more generally, at facilitation of new rules and associated behavior. Anticipation (and new law itself) is simply a means to the desirable end of new and better behavior.²⁷

We might, therefore, stand the discussion thus far (and the recent literature on legal transitions) on its head by encouraging new *winners* to

26. This is recognized by Kaplow, *supra* note 2, at 614–15. Note, however, that the entire discussion of prejudgment interest, see *supra* note 23 and accompanying text, provides an example of judge-made law exhibiting remarkable awareness of the problem of delay by those who expect to be new losers.

27. I put the point in purely instrumentalist terms in order to avoid repetition. Much of what is said in the text could also be attached to claims about other goals of law. If, for example, one prefers to think of the role of law in seeking to promote communal values or an attractive distribution of resources, then private anticipation and facilitation might still be usefully encouraged exactly as discussed in the text.

anticipate change or, more accurately, the potential for change, and to facilitate and argue effectively for improvements in both courts and legislative hallways. There will be contexts where new winners might do well to take concrete steps that are quite similar to those now expected of new losers. Accident reduction might, for instance, call for a new loser to invest in some precaution, but it might also require apparent winners (who will collect for old losses) to take some precautionary steps that are costly because of their own earlier reliance on old law. But the easiest and most common case to think of is where “real” change is in the hands of the new losers and the role of new winners is to litigate or lobby. The obvious, or parallel, way to encourage this facilitation by new winners is to penalize its absence. Much as new losers were encouraged (at least by the logic of the strategy of aggressive change) with retroactive liability and the like, new winners can in turn be encouraged by the law’s *withholding* of the normal rewards that change bestows on new winners. Put differently, an anticipation-oriented approach applied only to the disadvantage of new losers would increase the rewards to new winners; this may be unwise and inconsistent with the strategy of aggressive change. Those who do not bring claims, or do not argue effectively for change, might lose through the simple expedient of putting a limit on our retroactive impulses with respect to their adversaries.²⁸

The first blossoming of the anticipation-oriented strategy was too limited in its focus on new losers. The strategy, as a matter of both logic and practice, should be applied in a way that reflects the fact that legal change often results from the work of multiple actors. Much as anticipation by new losers might be encouraged through the aggressive imposition of new rules, with no compensation, some retroactive liability, and so forth, so too new winners might be encouraged to bring these changes about through limits on their victories. Ideally, the errors associated with old law might be divided between new winners and losers in a manner designed to encourage optimal efforts on both sides in anticipating and bringing about new, improved law. There will surely be situations where new winners are as important or even more important than new losers in facilitating change. The idea of aggressive change applies as much to plaintiffs and analogous legislative supplicants as to defendants and other new losers. New winners can also be asked to anticipate new law and to come forward with their claims earlier rather than later. There is no reason to expect everything of new losers. And the easy way to encourage anticipatory, early claims against the status quo is to limit the retroactive

28. There are also other ways of encouraging new winners. The law might allow winners to collect from new losers but might pay rewards to new winners as a kind of incentive to facilitate legal change. Similar subsidies might be used to encourage new losers. But my aim here is not to explore the various strategies for joint optimization. And my argument sticks with the conventional practice of using liability for damages as a convenient tool and suggests that this liability might be divided among all those parties whose anticipation is sought.

impulses suggested by the first wave of thinking about an anticipation-oriented approach to legal change.

C. *Litigation and Legislation (and Rules of Civil Procedure)*

An anticipation-oriented approach is consistent with rules long associated with change through litigation. These familiar rules encourage new losers by holding them liable for some past losses that could have been avoided with better anticipation. At the same time, statutes of limitations confine this liability and thereby encourage new theories and anticipation by new winners.²⁹

Imagine, for instance, that A sues X and loses but that B is successful later on when she brings a similar (but non-precluded) suit against Y, with parallel facts but with an improved theory or new safety technology at B's disposal.³⁰ An anticipation-oriented view of litigation is that aggressive retroactivity is appropriate; Y should pay for past behavior even though judges in the past thought that X's comparable behavior did not call for the imposition of liability. Y might have been in the best position to know whether it was reasonable to rely on the judgment in favor of X. The anticipation goal might also suggest reopening the case between A and X, although we may want to abide by some version of preclusion doctrine if there is some benefit to case-by-case signaling along the way. We might, for example, only go so far as to allow claimants other than A to recover against X for X's past actions. X's early success is at least partially undone because X itself is in a good position to know how strongly it should rely on its first victory over A. This victory might be treated as permanent in order to give parties some incentive to litigate their case to the best of their abilities, if only to provide some information to other parties about the current state of the law. If the case meant nothing, the parties would not invest in its litigation and it would, in turn, provide little in the way of useful signals to others. On the other hand, first movers like A are disadvantaged and discouraged by a rule that constrains no one but the first mover in the event of an unsuccessful suit, but then allows everyone else to free-ride should the first mover succeed.

One can barely imagine a rule so driven by the value of useful anticipation as to undo even a victory by A, even though such a rule would require the regular extraction of recoveries from past winners. This sort

29. Anticipation-oriented approaches have a good deal to say about the details of statutes of limitations and related common law doctrines, which now play the interesting role of allocating encouragement to new winners and losers. A rule that begins the statutory period from the moment plaintiff could or did learn about defendant's behavior might or might not be extended to plaintiff's knowledge of new law or scientific evidence.

30. Of course, the secret to B's success might simply be turnover in the judiciary, but no theory can hope to distinguish such causes perfectly.

of perpetually open-ended system is especially hard to imagine in a world with appeals and conflicts among courts.³¹

It is thus possible to describe existing law, at least with respect to change brought about through litigation, as already reflecting the value of anticipation. A is encouraged to bring claims, and to design them carefully, by rules allowing for some retroactive liability attached to X. Statutes of limitations and other evidentiary or procedural rules limit A's recovery, and while these rules diminish X's incentive to anticipate, they also encourage A to bring better and earlier claims.³²

In contrast, once the dispute between A and X is (however temporarily) resolved, the strategy of aggressive change emphasizes the need to think about B's and Y's incentives for anticipation, as well as whether A and X should think more about the likelihood that new information will lead to a rethinking of the resolution of their original dispute. Every judicial decision is a mere bit of information along the way; every judgment is temporary, although some are much less likely to be undone than others.³³ Once this anticipation-oriented strategy is applied not only to conventional defendants but also to plaintiffs, there is so much up for grabs that it is difficult to identify the strategy's normative implications—but there is also room to imagine that prevailing rules are consistent with the anticipation-oriented approach. This approach might, for instance, displace the conventional language used to explain finality of judgments and rules of preclusion. Claims about fairness for those who have not had their day in court (or not been well represented by similarly situated parties before them), along with arguments about certainty, might usefully give way to reasoning about anticipation and facilitation by all concerned.

31. I do not mean to ridicule the strategy of aggressive change by suggesting that there is no stopping point to its logic and no reason to regard any legal decision as meaningful in a world that applies new law aggressively. Our inability to elicit the optimal amount of anticipation by the various parties involved in the process of legal change does not mean that we should completely ignore the value of elevating anticipation and deprecating reliance. X should, after all, be encouraged to anticipate new and presumably improved law whether it comes through legislation or litigation. At the same time, however well X or Y is positioned to anticipate new law, there is often a need for a private party, such as A or B, to bring claims (in court) or to exert political pressure (on the legislature or administrative apparatus) in order to bring about new law. The more the strategy of aggressive change focuses on X's and Y's behavior, the less it leaves law with which to encourage A and B. Still, one committed to an anticipation-oriented approach might argue that the public-good quality of litigation can be supplanted by the constant incentive to anticipate law, even if actual litigation is never necessary.

32. Secondary rules and contractual arrangements deal with the incentive problems between A and A's attorneys.

33. The differences may track familiar lines, such as that between constitutional and other law, but discussion of the inclination of judges to abide by precedents is beyond the scope of this Article.

Recent tobacco litigation offers something of an example of this shift in perspective.³⁴ The conventional wisdom emphasizes the advantages and disadvantages of asymmetrical preclusion of a sort, such that tobacco companies found themselves threatened by lawsuits even after winning a string of such suits over many years.³⁵ New plaintiffs could relitigate, and the conventional emphasis on reliance suggested that this was less unfair the more new information developed and, especially perhaps, the more defendants could be shown to have withheld information.³⁶ If they withheld information, then their reliance was unreasonable in the extreme; if it was simply a matter of new information, then reliance on old science was unreasonable and unwise. An anticipation-oriented approach emphasizes, instead, the likelihood that tobacco companies had an informational advantage (regarding scientific and even political changes), and that their anticipation of legal change is therefore to be encouraged. If early litigation were indeed final, at least as to liability for past injuries, then incentives for such anticipation would be greatly reduced.

Once again, changes in the legislative climate are not unlike changes in litigation results. In the case of tobacco, legislatures can of course enact taxes, advertising restrictions, and a variety of other means to undo subsidies and policies of the past. In the long run, such aggressive change encourages anticipation—but mostly on one side. Plaintiffs' attorneys are obviously rewarded for developing strategies that eventually succeed in court or in legislatures, but there is no apparent "penalty" for failing to facilitate legal change earlier. On the other hand, plaintiffs are penalized to the extent that they bear opportunity costs. The history of tobacco litigation and its politics can be understood as one in which plaintiffs bring repeated and various claims until political (or legal) success strikes. Plaintiffs' attorneys have incentives to facilitate change successfully because those who fail cannot count on being included when victory and rewards finally arrive.

It goes almost without saying that this anticipation-oriented view of litigation and legislation is in serious tension with the old (and often debunked) saw about legislatures looking forward and courts looking back-

34. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420 (Tex. 1997); Daniel Givelber, *Cigarette Law*, 73 Ind. L.J. 867 (1998); Sandra Torry, *Cigarette Firms Lose Huge Suit: Sick Smokers Win Fla. Class Action*, Wash. Post, July 8, 1999, at A1.

35. See *Rogers*, 557 N.E.2d at 1054; *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1254 (N.J. 1990).

36. See *Gilboy v. American Tobacco Co.*, 582 So. 2d 1263, 1265 (La. 1991); *Grinnell*, 951 S.W.2d at 431; Karen E. Meade, Comment, *Breaking Through the Tobacco Industry's Smoke Screen: State Lawsuits for Reimbursement of Medical Expenses*, 17 J. Legal Med. 113, 132-34, 138-39 (1996) (arguing that efforts by the tobacco industry to withhold evidence of the addictive potential of nicotine support conspiracy and concert-of-action theories, and may overcome the presumption that additional studies by the tobacco industry would not have influenced smokers to stop smoking).

ward.³⁷ The argument for encouraging useful anticipation does not depend on whether new law comes about through legislatures or courts. There may be important reasons to prefer courts or legislatures for some matters, but both are vehicles of change capable of encouraging useful anticipation. There is no reason to expect the division of responsibility between legislature and court to track the dividing line between instances where aggressive change is and is not appropriate. Moreover, if courts and legislatures are often substitutes and there is some reason to prefer one or the other venue for various regulatory matters, then comparable rules avoid creating incentives for players inefficiently to prefer one to the other.³⁸

The litigation-legislation comparison might also be put in terms of expectations about the adversarial nature of the two systems. The anticipation-oriented approach developed here emphasizes the bilateral nature of change accomplished through litigation. The explicit adversarial nature of litigation encourages the search for dual incentives for anticipation and facilitation. Legislative change is often more multidimensional. Earlier anticipation-oriented work may have ignored the role of new winners because it focused on legislation rather than litigation, and because legislation is not conventionally conceived of as the product of opposing forces. But the more we think of interest groups battling for legislation, the more appropriate it is to think of incentives for both new losers and winners.³⁹

In the end, I think it unlikely that the case for aggressive change is systematically stronger or weaker depending on whether a change comes

37. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31 (1991) (comparing interest group problems found in litigation and judicial intervention with those found in legislative decisionmaking); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331 (1991) (examining the interaction of legislature and judiciary in the legislative process); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 *Harv. L. Rev.* 1055, 1059-66 (1997) (reviewing Supreme Court decisions on adjudicative and legislative retroactivity).

38. This observation refers obliquely to some of the literature on takings law. See Saul Levmore, *Takings, Torts, and Special Interests*, 77 *Va. L. Rev.* 1333, 1342 (1991) [hereinafter Levmore, *Takings, Torts, and Special Interests*] (advancing theory of takings cases that encourages neutrality between public and private sector).

I do not make too much of this argument about allocation between these branches because for most disputes our legislatures can effectively overrule courts, and undo the courts' transition rules as well. Therefore, in order to say something definitive about transition rules in legislation versus litigation, we need first some predictive or normative theory as to the allocation of decisionmaking between courts and legislatures. In the absence of such a theory, there is probably not much to be gained by a further comparison of anticipation incentives in the two arenas; a complete theory of the allocation of decisionmaking is well beyond the scope of this Article.

39. It bears mentioning that transition losses cannot be made to disappear. The law creates these burdens and can also allocate them. Note also that the reliance-oriented approach to legal change, like the first wave of anticipation-oriented scholarship, reflects a unilateral view of legal rulemaking.

about through courts or legislatures. Indeed, there is a case to be made for some diversification, with courts reviewing legislation and regulation and deciding how aggressively to apply change based on their confidence in the wisdom of the change, the extent to which early anticipation is desirable, and their assessment of unhealthy interest group influences.⁴⁰

D. *Encouraging Governments*

1. *New Winners, New Losers, and Governments.* — Once the strategy of aggressive change encompasses dual anticipation, encouraging new winners as well as new losers, there arises the further question of encouraging governments and regulatory authorities. A conventional law-and-economics analysis suggests that governments be encouraged to think about the costs they impose by internalizing these costs with rules requiring payments to new losers.⁴¹ A public choice version of this analysis is that the prospect of new taxes, which will be required in order to pay for the new burdens the government imposes, will arouse political opposition on the part of those who expect to be taxed—and with able groups on all sides, good political decisions are more likely to emerge. In contrast, a strategy driven by the value of anticipation might suggest that governments pay new winners but not new losers. New losers need to be encouraged to anticipate government lawmaking and, at least where these new losers might have anticipated change, compensating them might be counterproductive. But government will be less inclined to delay desirable legal change if it must pay new winners some of the damages they suffered because the new law was not yet in force. To the extent that political feedback is insufficient to encourage optimal anticipation by the government itself, the strategy of aggressive change suggests that the government pay new winners—so long as the prospect of these payments does not itself discourage good legal change.⁴²

The argument is strongest where there is reason to think that a dispersed majority will eventually compel the government to change law for the better. Imagine, for example, that despite intense lobbying by organ-

40. This last feature animates the anticipation-oriented work done by Fischel and Sykes on the law of government (breaches of) contracts. See Daniel R. Fischel & Alan O. Sykes, *Government Liability for Breach of Contract*, 1 *Am. L. & Econ. Rev.* (forthcoming Dec. 1999) (suggesting that courts can review original bargains and regulatory schemes and decide cases of government breach accordingly). There are, of course, benefits and costs to case-by-case judgments.

41. See, e.g., Epstein, *supra* note 4, at 129–31; Kaplow, *supra* note 2, at 567.

42. The introduction of an additional actor in need of influence raises the sometimes subtle issue of whether to use negative or positive inducements. In this context, “sticks” are often thought inappropriate because government agents do not normally enjoy corresponding benefits when they do well. There are modest attempts to offer prizes to innovative government employees, although there is the danger of encouraging volatility (because it is difficult to make them pay for corresponding errors). In any event, the strategy of aggressive change, and the particular rules explored here, concentrate on “sticks.” In some settings, “carrots” may indeed be appropriate.

ized industries, the government, compelled by an informed citizenry, bans the use of some pesticides. Aggressive change applied against the pesticide makers and users is by now familiar. Some degree of retroactive liability might have encouraged efficient anticipation and discouraged wasteful and dangerous political activity aimed at diluting change. Similarly, there may be good reason not to compensate new winners, which is to say ex-losers such as consumers or farmers, who incurred losses because of the once-legal pesticide. These parties may now be new winners, but they might well have facilitated an earlier ban if encouraged by transition rules reflecting the strategy of aggressive change.

New winners are in this way also a target of the anticipation-oriented approach. And there is no reason to leave out a third target: The government might also have been slow to see the need for regulation or slow to design and pass new rules.⁴³ A three-way division that includes the government might cause the government, or other interest groups that can influence it, to anticipate the legal rules that will be in place once a well-informed electorate is aware of the best scientific evidence.⁴⁴

Taken to an extreme, the anticipation-oriented approach in this way suggests government liability for things ranging from new food and drug regulation to judicial decisions reversed on appeal, overruled by statute, or otherwise altered by future decisionmakers. After all, if legislators and regulators can be encouraged with liability rules to anticipate better law, then why not judges themselves? Most legislation and litigation might generate payments not to compensate those who are newly burdened (for they should have anticipated change), but rather to compensate those who are now vindicated, in a sense, and who should have been declared winners in an earlier session or court case—unless such payments will in turn discourage their own work in advancing the cause of good law. And where governmental liability is a good idea but for the fact that it interferes with the scheme for encouraging new winners, there is the possibility of liability that is paid into some fund that does not redound to the benefit of any of the parties that might have facilitated change.

43. I leave aside the question of allocating responsibility among different units or levels of government. Governments might sometimes qualify as new winners who fall into the second group, entitled now to collect for such things as health care and cleanup costs they once incurred. It is as an imperfect regulator that the government might be liable under the third prong of the anticipation-oriented scheme discussed here.

44. This sort of description suggests an optimistic version of interest group behavior that is sometimes thought of as dangerously anti-competitive. A firm that anticipates safety developments and chooses not to use an input then prefers for its competitors to do the same (in order not to leave them with a cost advantage). The innovator cannot simply bank on its low-cost, less-safe competitors' losing ground because of liability, because this liability need not change these competitors' prices in the future. An innovative firm might therefore encourage a regulatory ban in order to force its competitors to face costs similar to its own. The dark side of this story is that the "innovator" seeks to exploit a cost advantage it enjoys, or hopes to encourage conformity in production and then in pricing. There is no reason to think that these problems depend on whether the law follows an anticipation-oriented approach.

There is, no doubt, some limit to logical extensions of provocative insights, and this may be a good point at which to make more manageable claims for the anticipation-oriented strategy. As a positive matter we do not require payments from governments whenever they might have changed laws more rapidly. And the normative argument for rampant liability is unlikely to attract many adherents. Pockets of governmental liability do of course exist; some might be traced to an insurance function (as in the cases of payments for wrongful arrest or some police misbehavior) and some might be associated with categories where anticipation by private parties seems vastly inferior to anticipation by the government.⁴⁵

There are, I think, at least two kinds of reasons for limiting the strategy of aggressive change when it comes to government's role. One is pragmatic and the other is speculative; one has more to do with judicial interventions and the other with legislatively sponsored change. The pragmatic explanation for declining to encourage better—or a better pace of—judging and regulation through liability payments by judges and regulators to new winners is that it may help to have an arbiter outside the system, not itself subject to the rules of aggressive change. If judges, for instance, were required to make payments when they were reversed on appeal, lower court judges might be biased in their decisions (because exposure may not be symmetrical), and appeals court judges might be chilled from reversing their colleagues below.⁴⁶ We might well expect inferior rather than superior legal change in terms of both content and pace. Moreover, if a judge breaks with longstanding precedent and is upheld on appeal, where should liability lie?

And what of courts that decline to decide certain matters and judges who dissent? Many of these problems have counterparts where there are private parties who are encouraged to anticipate legal change, so I hesitate to pronounce these problems intractable. Perhaps the safest thing to say is that where private parties are concerned, the strategy of aggressive change simply suggests that we modify the rules of liability already in existence, and in some cases justify or explain those rules, by adding to our earlier conceptions of liability the idea that parties be encouraged to anticipate legal change. In the case of governments, and certainly judges, the system has already decided to regard most of their decisions as immune from liability claims, and an anticipation-oriented approach does not necessarily change that calculation.

45. A distinction emphasized presently *infra* Part I.D.2 (contrasting most regulatory takings with physical takings).

46. There is also the more obvious chilling problem of judges' avoiding their responsibilities or of talented persons declining to become judges because of the threat of liability. Judges whose compensation is protected by constitutional rule might also object that liability of the sort fantasized here defeats their job security. But these problems and others are not insurmountable. Base pay might rise in order to encourage judges. Innovative, prescient judges might receive bonuses. Judges might also be publicly indemnified or privately insured, in which case the behavioral effects of the liability rule would be even more difficult to predict.

Concerns over strategic behavior offer additional reasons to hesitate to encourage government officials to anticipate change. If nothing is final and the rules of aggressive change apply, then it is possible that interest groups and other investors will not devote resources to influencing decisionmakers because there is no point in acquiring something that can be undone at a later date. If, on the other hand, this logic fails of its own paradoxical weight,⁴⁷ then it is possible that rules of aggressive change will generate more rent-seeking behavior because there is so much at stake. Alternatively, the fact that there is more at stake might make interest groups less potent because the salience of the large decision may bring out the best in democratic (or judicial) decisionmaking.⁴⁸

If a government must also pay for its own failure to anticipate (its own) decisionmaking, then there will normally be more at stake in any given decision. Not only might an industry lose if the government bans its product, but there will also be payments by the government to new winners. Potential new winners may work harder because there is more at stake. On the other hand, there is again the possibility that interest groups (including new winners) will perceive that there is really very little at stake, because they can always change the rules in the future and then recover for the intermediate decision, which will then be treated as a failure to anticipate. There is no clear answer to these puzzles, and I certainly do not intend to settle on one here. But I think it plausible that our legal system tends not to try to encourage anticipation by government actors because of a fear that putting more at stake (and often in asymmetric fashion) will exacerbate interest-group problems.

Note that I do not advance a third view, that governments are assumed to be in no need of encouragement to anticipate the future. Such a view might seem mandated by the very premise of a strategy of aggressive change, that new law is (on average) presumed to be better law so that its anticipation is usefully encouraged. A perfectly benign government, or set of agents, facing no ambiguities about what is good for its

47. Because if no one will ever invest, then it does pay to invest and get one's way, for no one will invest in undoing it—and so forth.

48. Under conventional rules, if the government bans a pesticide then there is limited or no liability for past injuries and some private loss because of reliance on the old law. The ban imposes X costs on an industry and some consumers and it confers, we might imagine, $2X$ benefits on other consumers, citizens, and perhaps some other industries who profit from the first industry's setback. But if very aggressive rules of change apply, then we might imagine that there is a cost of $2X$ to the industry and perhaps overall benefits of $3X$. In which of these situations will organized interest groups wield more power and engage in more wasteful rent-seeking? On the one hand, they might compete away all the gains and losses at stake, so that we should prefer rules that put less rather than more at stake. On the other hand, when there is more at stake, otherwise dispersed interests may finally organize either on their own or through political entrepreneurs. Thus, interest groups will introduce less bias and deadweight loss (relative to the size of the decision) when a country is deciding whether to engage in a major war than when it is deciding on a crop subsidy. Perhaps the simplest form of this argument is that when there is a great deal at stake, attention is drawn to the matter and inefficient rent-seeking is less likely.

people and interested in satisfying them or gaining their approval, would not need to compensate for the losses it imposed either because of past errors or because of changes in regulatory or other law. But the presumption that new law is usefully anticipated is not based on faith in the motives of government agents. New law may be good law because, despite the best efforts of selfish agents and overachieving interest groups, good bargains or democratic politics often yield good results. Alternatively, good law may often yield good results and eventually win out because of bargains and votes in favor of wealth-increasing and majority-enhancing pressures. This is the optimistic view of interest groups; organized groups may succeed in bringing evidence of intensity of preferences to political decisionmaking.⁴⁹

To be sure, it is possible that good law wins out but that before it does, government agents systematically misanticipate legal change or even work to delay new, improved law. It is also possible that with better incentives these agents would facilitate better law. But my aim here is not to insist that our rules best facilitate good legal change. I do, however, claim that it is useful to extend the anticipation-oriented approach to include new winners and sometimes even governments—and that the rules we experience can be described as doing just that. I make no claim as to whether we have the best possible rules.

2. *Aggressive Change and the Law of Takings.* — I have suggested that our legal system encourages anticipation by new winners and new losers, but that it often declines to use available incentives to encourage anticipation by governments themselves. It would be a mistake, however, to write off the anticipation-oriented approach as having no application to government agents. The most exciting application is in the area of government interventions litigated under the Fifth Amendment, where there is the potential for nothing less than a revolutionary theory of takings law. Consider the familiar contrast between regulatory interventions, which are generally uncompensated, and physical takings of private property by the government, which usually trigger the just compensation requirement of the Fifth Amendment.⁵⁰ If the government regulates a factory so that its value is reduced, there is generally no compensation even if the reduction in value is fairly severe; but if the government takes a piece of the factory or even appropriates some output of that factory, compensation is required. An anticipation-oriented perspective offers an elegant theory regarding this distinction. And it is a theory with both positive and normative features.

A fair amount of regulation might be usefully anticipated. If a factory owner knew that a production method would be deemed unsafe or

49. See Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. Legal Stud. 259, 259 (1999) [hereinafter Levmore, *Voting Paradoxes*].

50. See generally Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal. L. Rev. 569 (1984); Levmore, *Takings, Torts, and Special Interests*, *supra* note 38.

that inputs would be banned—and that such interventions will be uncompensable—then the factory owner would often choose a different method of production in order to avoid unnecessary losses. But if the government pays for losses suffered as a result of regulation, then the factory owner has no incentive to anticipate these regulations and to facilitate the move to better and safer methods. In contrast, while an individual factory owner might well have an informational advantage about safe production methods, for example, it is unlikely that a given property owner has a comparable advantage with respect to where the government is likely to build a road or where the government is likely to turn for its inputs. In the latter case, in any event, we would normally not want a property owner to anticipate uncompensated takings—because then the owner would choose not to produce (or perhaps would choose to conceal) things that the government needed. And in the prototypical case of taking land to build a road, even if people can anticipate new roadbuilding, perhaps because they observe increased population density, there is no reason to think that private parties have an informational advantage over the government as to where such roads will run. Moreover, no single individual is likely to affect the need for roads enough to make us wish that anticipation would translate into a different location decision. The same analysis holds where the government takes a firm's output in wartime. Anticipation by the firm is difficult and rarely useful, and where anticipation is possible, we would like the firm to expect compensation rather than to shift away from goods needed by the government.

As with so many theories of takings, the theory is an imperfect tool for prediction. There are, after all, regulations and other government activities that generate losses that go uncompensated under our legal rules (as well as those of all other jurisdictions), but where new losers are unlikely to have an informational advantage that might have been exploited in the interest of efficient facilitation. If, for example, the government builds or expands an airport in a way that reduces nearby property values because of increased noise, compensation is unusual. But it is hard to see how property owners might have facilitated change, and difficult, therefore, to see how noncompensation might encourage useful anticipation. If the rule were one of partial recovery, then we might say that property owners were meant to anticipate change at least insofar as they should not improve their properties (so as to reduce the loss imposed by airport expansion). But the rule normally offers no compensation, and, in any event, the government is likely to be the better facilitator or cost avoider.⁵¹

There are also cases where the law provides for compensation but where payments probably interfere with efficient facilitation. A property owner who does not want a road to be built through her property might

51. I leave for another day the interesting question of why partial recoveries are here (and elsewhere) unusual.

rush to improve land in the hope that the government will be discouraged from taking it and will instead take other land and even bestow a windfall on the improver. In such a case, the anticipation-oriented approach (not to mention common sense) suggests the advantage of a rule permitting an uncompensated taking.

These flaws in the descriptive power of a theory of takings law based on the idea of encouraging useful anticipations do not, of course, destroy the suggested theory. A more perfect and precise rule system might be expensive to administer. To be sure, the theory advanced here would be quite stunning if compensation were awarded where regulatory intervention was relatively hard to anticipate, and if it were not awarded where physical takings could have been anticipated and facilitated by property owners. But we are accustomed to overinclusive rules, and I think the link between anticipation (and informational advantages) and regulation—as opposed to most physical takings—quite remarkable. There are more details to be explained, but a full re-examination of takings law through the lens of the anticipation-oriented approach requires a separate effort.

3. *From Property to Other Rights.* — The strategy of aggressive change applies to the government in contexts other than takings law. Consider, for example, a criminal procedure case where a court undoes earlier precedents or reinterprets the Constitution to the benefit of a criminal defendant by finding that a practice followed by the police is unacceptable. In some of these cases courts feel compelled, having now “found the law,” to apply it retroactively. This inclination may have something to do with the need to reward litigants (in which case the earlier discussion about influencing both winners and losers is relevant) and the perceived need to be consistent across like cases.⁵² In other cases, courts may find a way to impose new constraints on police without benefitting past defendants. The anticipation-oriented approach—if applied to government—suggests that this balance, if it can be called that, should be shifted further in favor of retroactive application in order to encourage desirable anticipatory behavior on the part of the police and prosecutors. This is because the government can sometimes be enlisted to anticipate in a useful manner, while it is unlikely that criminal defendants have comparable informational (and behavioral) advantages. If the government suspects that a court decision might be applied aggressively, so as to free persons already incarcerated (or even simply to require new trials), then law enforcement officials might well be encouraged to anticipate future court decisions, even if this means offering advantages to those they investigate and arrest. Here, there is not much that an arrested person could have done, and perhaps very little possibility that most potential defendants will know anything about legal trends; but there is a great deal that the

52. See Krent, *supra* note 1, at 2167 (suggesting that retroactivity in criminal law is especially suspect because the new losers are especially powerless).

government might have done by anticipating new rules of criminal procedure.

An obvious reaction is that the government is not really in a better position to anticipate change. A manufacturer might know a good deal about chemicals it uses, but the police have no special information about the "Constitution's" attitude toward searches. Of course, the more one thinks of constitutional questions as involving neither absolute rights nor the politics of those who happen to be appointed to the Court, but rather cost-benefit calculations, the more the government does indeed resemble a manufacturer. For example, police might well develop better information about the costs and benefits of anti-loitering statutes or stop-and-search strategies, anticipating the possibility that the courts will declare new and "better" law on these matters.⁵³ Retroactive liability for governmental new losers—in this case the police—would encourage such anticipation.

There is of course the danger of excessive precautions, which is to say costly misanticipations. This problem is exacerbated by the fact that government agents are unlikely to be penalized as much for overanticipating on behalf of criminal defendants as for underanticipating, because it is harder for victims to gain standing and to show measurable damages. But the more one is optimistic about legal change the less one is troubled by these costs. Comparable dangers apply where private parties are concerned, although they internalize costs and benefits rather differently from public agents who may enjoy greater informational advantages than their private counterparts.⁵⁴

In sum, it is easier to extend the logic of the anticipation-oriented approach to new winners than it is to government decisionmakers, and the inclusion of new winners—but not government decisionmakers—succeeds in placing much of prevailing law in a favorable light. In some contexts, there is little likelihood of useful anticipation by the government and grave danger of discouraging desirable change by holding governments accountable in the way that private parties might be. In a world of overinclusive rules, there is surely something to be said for a presumption of retroactivity in tort law, to take one example, but not in public law. But in other settings, the extension to anticipation by governments seems sensible. I have suggested that it might form a new basis for understanding takings law as well.

53. See, e.g., *City of Chicago v. Morales*, 119 S. Ct. 1849, 1853 (1999) (striking down Chicago's anti-gang loitering ordinance as too vague); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 95 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991); *Welch v. Cadre Capital*, 946 F.2d 185, 186 (2d Cir. 1991).

54. There are agency problems in the private sector as well, but it appears to be much easier to have private agents share in the gains they generate. It is therefore easier, and less distorting, to ask them to share in the costs.

E. Interest Groups and Government Compensation Once More

I have already emphasized that while aggressive change might encourage socially useful anticipation of legal changes, it might also encourage wasteful investments that aim to prevent or slow change, especially if the compensation rules are imperfect. On the other hand, proponents of good change might offer to compensate new losers in order to facilitate legal change. It is noteworthy that this line of reasoning becomes faint in most public-law contexts. Prosecutors might, for instance, over-litigate in opposition to change because they do not want to free those already incarcerated—but it is difficult to compensate prosecutors and their principals when they are new “losers,” and when neither the new winners nor new losers are particularly organized.⁵⁵

A related but fairly distinct approach focuses on the role of interest groups. Overachieving, well-organized interest groups might benefit from their ability to “acquire” regulations that benefit them at the expense of efficiency or of the majority, even though they recognize that these benefits are short-term. Thus, an interest group might obtain “safety” regulations that serve to promote ill health or to keep out new competitors, although over time a strong, informed majority develops against these policies. Against this backdrop, there is again a fairly good argument for (some) compensation for new winners. Once good law prevails, we might go back and pay those who suffered from the bad laws and, in turn, the system might then be less inclined to do the bidding of selfish and inefficient interests in the first place. Put differently, a focus on optimal timing may improve content. The argument is thus a version of the conventional law-and-economics case for compensable regulatory takings: A government that one day must pay for what it does might be much less inclined to regulate inefficiently. Overachieving interest groups will get their way less often if the policies they propose are seen to require explicit outlays.⁵⁶

The interest group perspective raises the question of how to design transition rules so as to minimize the deadweight loss attributable to rent-seeking. Some of the effort expended in attempting to influence the political process is likely to inform legislators and the public, but it seems

55. Much the same conclusion can be drawn from a perspective that focuses on the medium, or decisionmaker, rather than on the winners and losers. Since most change in private law originates with, or can be reviewed by, the legislature, legislatures can ease change by choosing to compensate new losers. However, the courts entrusted with constitutional change lack comparable ability to compensate. The biggest difference between the private and public contexts, however, returns us to thinking about potential losers and their constituents. The social costs associated with potential losers' attempts to stall change are surely much greater in the private sphere than in most of public law. Over-litigating seems a less serious cost than most other rent-seeking. Although it is hard to take account of all of these costs, the anticipation-oriented approach still has some value. Yet, once we agree to take anticipation seriously, there is no reason to ignore the roles of new winners and governments.

56. Put this way, the argument neglects the difficulty of internalizing benefits.

safe to abide by the conventional wisdom that the power of politics to create and redistribute wealth generates efforts to capture this power that in turn may be inefficient because they are duplicative (which is to say part of a zero-sum game) or corrupt (aimed at exacerbating principal-agent problems).⁵⁷ As a first cut, it seems that an anticipation-oriented approach might encourage more rent-seeking because each proposed change would involve greater stakes.⁵⁸ One might, therefore, argue against aggressive change on grounds that even if most new law is good law, there will be more deadweight loss associated with each instance of new law, and perhaps a larger fraction of new law will be bad law because of the impact of rent-seeking endeavors.

The flaw in this argument is that aggressive change does not necessarily raise the stakes (and therefore the rent-seeking) associated with new law because the practice of aggressive change will also be anticipated for future changes. Rules enacted today are then weaker because they may be undone by future changes which will again bring on compensation for new losers. Today's winners can be tomorrow's losers. Today's rent-seekers have a great deal to gain or lose in nominal terms because today's results, applied aggressively, bring on compensation claims regarding the past. Still, those who face these liabilities can sit on the sidelines and then undo all that transpires by investing in the next round of politics.

The argument also applies when the government compensates new winners for their past losses. If new winners can (in the absence of changed circumstances) point to new law and bring claims for the failure of lawmakers to facilitate or anticipate new law, then new law will be associated with governmental payments for delay in its passage. In turn, agents and interest groups might find new law too costly and might work to block rather than to anticipate it. The argument is surely stronger if there are errors in determining when there are changed circumstances, and thus no reason to impose liability for a failure to anticipate new law. But even where there is no error of this kind, once there is any delay in passing good law, then the requirement that new winners be compensated can discourage rather than encourage quicker passage of good law.

If there is a kink in this argument it is that lawmakers must worry that their opposition to change will eventually fail and that all they will have done is to delay new law. If delay is to remain a fruitful strategy, it is because as the magnitude of projected payments triggered by change increases, the likelihood of change probably diminishes. It seems possible, therefore, to encourage better lawmaking by associating change with payments for delay. The argument can be understood as borrowing from

57. See Robert D. Tollison, *Public Choice and Legislation*, 74 *Va. L. Rev.* 339, 343 (1988).

58. Assuming, for the sake of avoiding repetition, that greater stakes generate more political activity. See *supra* note 48.

the libertarian, or "property rights," approach to takings law, but then following its logic somewhat further and turning it on its head.

While some would have government pay new losers, arguing that interest groups will do less damage if the government must pay for the costs it imposes, by the same logic the government should pay for the burdens it imposes by delaying good law. Past losers should be compensated just as new losers are. Imagine for example that an environmental group succeeds in blocking a developer's plan to extend the footprint of a building. The familiar argument is that the government should pay the developer at least the amount of the fall in value of this property. But if the environmental group in fact gets its way (with or without court-ordered compensation for the developer), why not take the occasion to imply a change in baselines such that the government should now pay the environmental group for any losses imposed by the developer's earlier construction?

A very different perspective on these questions begins with sovereign immunity and those areas in which governments do not traditionally pay for harms they generate. Rather than looking to ancient times for some baseline, we might simply begin in the present with the observation that although the government is required to pay for some takings, and although it agrees to pay for a variety of torts and contract breaches, it does not pay for those that can be traced to its "discretionary function."⁵⁹ There are a number of explanations for these rules and distinctions, ranging from historical to structural (i.e., separation of powers) to allocative.⁶⁰ The allocative notion is that the more governmental actions are substitutes for private activity, the more governmental liability succeeds in encouraging a healthy (undistorted) allocation between the private and public sectors. But this theory says something only about those cases where there is the possibility of moving activities from the private to the public sector or back again. It says nothing about those cases where the likelihood of substitution is very low. It is not as if the ability of the government to make war free of ex post negligence suits is what encourages war to be made through the public rather than the private sector. On the other hand, we need some other theory as to why there is no liability for negligently declared or managed wars. Again, there are a number of explanations available. For present purposes we might simply say that there are ample political checks on such important or "discretionary" acts of government.

In the case of "negligent" lawmaking there is again no ready substitution between the private and public sectors. Lawmaking is in this sense (and others as well) the quintessential discretionary function of government. This is so whether we view lawmaking idealistically, as an effort to

59. See Levmore, *Takings, Torts, and Special Interests*, *supra* note 38, at 1350-52.

60. See Krent, *supra* note 1, at 2152-67.

advance the public good, or cynically, as the product of competition among private firms and interest groups.

There is, I think, an important difference between anticipation in the public and private sectors. It is a difference that returns us to the idea that the majority can choose to compensate. Imagine, for instance, that a new majority passes a new law, presumed here to be a good law but also one that benefits the majority. The same majority, if it is secure, could pass the law and simultaneously compensate itself for losses suffered as a result of the fact that this new law was not passed earlier. Thus, if the majority passes a rule banning the sale of tobacco to minors, it could also pass a rule taxing manufacturers or growers or retailers for the harm imposed by past sales to minors.⁶¹ The majority might choose to use these new revenues to pay the health costs associated with teenage smoking. Similarly, almost any new law can be accompanied by a legislative plan that provides compensation for new winners. Presumably, new law is often unaccompanied by such compensatory legislation because the coalition that supports the new law would not support more aggressive change of this sort. Perhaps compensation would motivate new losers to organize more vigorously to block change. In short, new winners sometimes offer to compensate new losers in order to facilitate the adoption of the new law, but new winners can also elect to hold the new losers liable for old losses suffered by the new winners. New winners would not gain much from a legal rule mandating these payments, and there are of course many times when they would lose because the all-or-nothing character of legal change would make change itself less likely.

If we imagine a world in which flexibility is somehow not permitted, so that all changes must either be accompanied by compensation for new winners or, at the opposite extreme, all changes must be as prospective as possible, then reasonable people might disagree as to which rule was more likely to promote good law. The former rule mightily promotes anticipation, but it is also likely to encourage political opposition to change. If such opposition is often successful, an aggressive rule may generate less rather than more good law. It is not surprising that ours is a more flexible world, where aggressive change is neither forbidden nor mandatory. Good law is sometimes encouraged by unaggressive change. Modest retroactivity (as promoted by statutes of limitations and the like) might promote some anticipation by new losers but non-excessive political opposition.

My intuition is that, on the margin, change is and should be more aggressively imposed when it comes at the hands of judges rather than legislators. Court cases, like legislation, are products of investments by

61. The charge might be an exact one. Thus, tax rates could rise for all firms but then credits could be offered on a sliding scale, with larger credits for firms that sold fewer cigarettes to minors. More likely, an inexact tax would do the job; prospective taxes on retailers or other parties in the distribution chain would fall fairly squarely on those who sold to minors in the past.

opposing interests; a rule of aggressive change might therefore stimulate enough litigation by those seeking to block change as to more than offset the gains from encouraging anticipation.⁶² Still, if judges are somewhat more independent than legislators, then aggressive change is less likely to block good change in courts than in legislatures. Indeed, this is more or less what we find; most changes wrought by courts are accompanied by some retrospective liability, while many more changes enacted by legislators not only spare new losers from paying the new winners but also protect new losers against their transition losses.

Retrospective validity is much less usual where the litigation is against the government itself. In these cases we see new losers protected in the interest of encouraging good law. Classic cases involve "structural injunctions" regarding such things as prison conditions and school desegregation.⁶³ In the prison case, for example, imagine that a claim is brought that prisoners' rights are violated by the overcrowded conditions in local jails. Where relief is granted, it is common for the legal change to be unaggressive, awarding no damages to those who suffered from the crowded conditions even though the law now declares these conditions to have been wrongful.⁶⁴ It is almost conventional wisdom to observe that if prospective relief (for example, in reforming prisons) needed to be accompanied by retrospective damages, change would come about less quickly and even less frequently. Judges are more likely to grant relief, and to impose serious costs on taxpayers for an unpopular cause, if they need not also award monetary damages to an unpopular, politically weak group like prisoners.

Implicit in this observation about judge-made change is the idea that judges fear or at least identify with taxpayers and legislators.⁶⁵ Alternatively, there is the possibility that judges will call for aggressive change on the government's part but that the legislature will then partly overrule the courts through budgetary or other maneuvers. If judges call for damages to be paid to prisoners who live in crowded conditions, then legislatures (even if they feel forced to produce the funds called for by courts) might either reduce other expenditures which benefit these prisoners or spend less on other prisons. This could force courts to micro-manage prisons in a way beyond their competence or ambition. In short, the very sentiment or conception of rights that causes a court to demand less crowded prisons is likely to make the court eager to impose costs on the non-prison population that are low rather than high. The need to build

62. For the provocative idea that interest groups may affect judicial decisionmaking as much as legislation, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31, 80-81 (1991).

63. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

64. See *Hutto*, 437 U.S. at 683-84.

65. Private firms, as losing defendants, are less often accommodated with decisions that strive to be prospective only. On the other hand, private firms are often in battle with other private firms.

more prisons or free some prisoners might on its own serve as enough of an incentive for the legislature to anticipate these judicial decisions.

II. REPARATIONS

A. *An Anticipation-Oriented Approach to Reparations*

Consider finally those cases where a government voluntarily compensates very old losers. I have identified these cases as involving both regret and accompanying payments, where the payments were not required by courts or by earlier agreements and where they are not mere settlements in the shadow of litigation or legislation.⁶⁶ An anticipation-oriented approach suggests that reparations or other payments to new winners are sound as a matter of transition policy. Such payments for past wrongs might encourage the government to change more quickly away from policies it will come to regret.⁶⁷ Constituent groups that benefit from (potentially) regrettable laws will have less of an incentive to hang on to the old ways if they see that delayed change will be more expensive than quick change. Nor is it likely that these parties will remain passive because change is unpredictable and might occur in any direction. Reparative payments tend to apply to a subset of those cases where an identifiable group received inferior treatment. Members of the majority coalition might be unsure whether they will ever need to pay current losers, but if they move to laws that provide equal treatment then they can be fairly sure that no future legal regime will hold them responsible for past equality. Experience suggests that law sometimes permits unequal treatment but often evolves in the direction of mandating equal treatment.

But the simple internalization policy sketched above is unhelpful as a positive matter both because so many past wrongs in fact go unrepaired (despite the possibility that a regimen which included reparations would encourage facilitation by the government and by beneficiaries under old, bad law) and because the same logic suggests that most regulation and especially deregulation will generate reparative payments to old losers as they are created. Related intuitions suggest that a normative approach will be no more fruitful. Aggressive change is more easily applied to pri-

66. See *supra* note 8 and accompanying text. Regret and the passage of time might of course lead courts to order payments by the government. We might think of these as reparative, especially when the government does not strongly fight the claim. In fact, however, recent notable payments have been legislative in origin. Moreover, unless we revisit the idea that interest groups work through courts as they do through legislatures, a public choice explanation of reparations might be best limited to legislated payments.

67. In interest group terms, there may be actors or groups who will work to avoid the future tax bill associated with past wrongs. Virtually any calculation attributed to the government can in this manner be ascribed to groups that affect what the government does. Note, however, that it may be rational to encourage the government to change a policy, such as one that discriminates against a group; but once this policy changes, those who worked for change may have every incentive to delay the legislation of reparative payments. One kind of interest group story describes the change in government policy, while quite another explains the reparations themselves.

vate parties than to governments—and indeed governments may facilitate change more successfully if they are immune from the rules associated with aggressive change.

A different use of the anticipation-oriented approach is much more interesting. Starting with the idea that good change might be impeded by a rule requiring governments (and even judges) to pay for their failure to facilitate, we should look for required compensation by the government when there is little chance that the expectation of such payments will block change and when the potential for compensation is unlikely to interfere with new winners' efforts to bring about change. Viewed in this manner, the striking thing about familiar reparations, as for example those legislated recently for once-interned Japanese Americans,⁶⁸ is that payments came so long after the misdeeds and subsequent change occurred.⁶⁹ For better or worse, it is unlikely that these reparations, and any precedents they may set, would have any influence on government policies during a future war. It is also unlikely that they would have any effect on potential losers seeking to avoid or bring an end to internment or other unequal treatment. In short, if we seek to understand reparative payments in functional terms, then we should look not to the obvious internalization or deterrence idea that governments pay so that they will consider the costs they impose, but rather, and to the contrary, to the fact that such payments are sufficiently unpredictable and slow in coming that they do not influence the likelihood of substantive change. If the payments could be expected to come quickly after a decision to end an internment policy, then such a decision might be delayed because the inclination of a government or interest group to avoid making payments might well dominate the added incentive of the poorly treated group to argue yet more strongly for change.

The connection between this argument and the nearly conventional wisdom regarding such things as injunctions aimed at prison conditions is fairly clear. Just as the very parties who most want less crowded prisons might favor a rule that associated (or at least permitted) structural relief with the absence of monetary payments for past crowding,⁷⁰ some groups that are seriously aggrieved might waive their rights to compensation in order to end the policies they find so painful. Long after the government's policy has changed, when regret is the dominant emotion, there is no harm in reopening the case for compensation. I will suggest presently

68. See Restitution for World War II Internment of Japanese-Americans and Aleuts, 50 U.S.C. § 1989 (1994).

69. See *id.* § 1989a(a); see also Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 363-68 (1987) (discussing the internment of Japanese Americans).

70. The idea is that structural relief is more likely to be obtained if judges (and obviously legislators) can improve conditions without also requiring payments to those who have been incarcerated. See Douglas Laycock, Injunctions and the Irreparable Injury Rule, 57 Tex. L. Rev. 1065, 1068 (1979) (reviewing Owen M. Fiss, *The Civil Rights Injunction* (1978)); *supra* notes 63-64 and accompanying text.

that such compensation, long after the original wrongdoing, is largely a political matter. Thus, even after fifty years' time, I would not expect compensation for prisoners who come to be regarded as having justly served time but as having been unjustly made to serve that time in horrible conditions. Compensation would have no real effect on the rate of change one way or the other, so reparative payments would not interfere with the path of change as understood through the anticipation-oriented approach—but prisoners are simply apt to remain an unpopular cause. If all we cared about was facilitating optimal change, we would say that these old losers could be compensated but that there is no need to compensate them; their weak political status then explains the absence of reparations.

Monetary reparations have of course not been paid to African Americans for slavery, subjugation, and government-sanctioned discrimination. The theory advanced here can make some sense of this apparent paradox or contrast with the Japanese American case.⁷¹ Even with no new theory, there is no shortage of modest explanations for the contrasting remedies offered to Japanese Americans and African Americans. African American claims may simply be too numerous and overwhelming to be granted. The Japanese American claims were sufficiently small that no strong interest group was likely to arise in opposition to these payments.⁷² Japanese American internees were concentrated in a few western states,⁷³ and public choice theory suggests that a small organized minority will often fare better than a dispersed one of equal size—or even of much greater size.⁷⁴ It did not hurt that the President who signed the necessary legislation had been the Governor of California and thus was likely to have been familiar with and sympathetic to some of the claimants.⁷⁵

A very different (but reasonable) reaction to the apparent puzzle of reparative treatment is to insist that there is little difference in the groups' treatments and, therefore, not much to explain. Affirmative action or other programs might be understood as substitutes for monetary reparations. Alternatively, African American reparations may yet be legis-

71. See Boris I. Bittker, *The Case for Black Reparations* 8 (1973); Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 *Va. L. Rev.* 863, 868 (1993); Verdun, *supra* note 9, at 612.

72. It is tempting to add that a much bigger group might not (setting aside the history of African Americans) have been interned at all, so that reparations end up being paid to small groups because it is such groups that are subject to certain kinds of discrimination in the first place.

73. See *Hirabayashi v. United States*, 320 U.S. 81, 87 (1943).

74. The classic citation is to Mancur Olson, *The Logic of Collective Action* (1971) (arguing that collective action problems are greatest in large groups; such problems are therefore likely to remain latent due to greater anonymity, lower probability that individual effort makes a useful contribution, and greater enforcement problems).

75. See Larry Liebert, *Reagan Signs War Camps Redress Bill*, *S.F. Chron.*, August 11, 1988, at A1.

lated, in which case the present perception of an apparent puzzle will come to be seen as a matter of impatience.⁷⁶

Public choice theory helps to explain the payment of reparations, and all these explanations, if they can be called that, are useful in constructing a more general theory of when reparations are made. The Japanese American case may simply be a straightforward example of political success by a discrete minority, with a number of other factors playing supporting roles. Nevertheless, the anticipation-oriented approach supports a more interesting and perhaps better understanding. We have seen that requiring governments to pay new winners injured by the slow pace of change might impede desirable change. Limiting payments from new losers to new winners is more plausible when the new loser is the government than when new losers are private parties. Reparations are an exception to the extent that reparative payments occur where legal change is so dramatic and so far in the past that there is little fear that the prospect of these payments will slow change.

If these observations are useful in understanding the absence of African American reparations, it is because the law's reaction to its own history with respect to that group remains uncompleted. A hint of this can be found in the common reaction that reparative payments to African Americans might be unwise because such payments would mark a close to a period of introspection, apology, lawsuits, and affirmative action.⁷⁷ It is interesting and perhaps mysterious that this might be so with regard to reparations and not, say, affirmative action. It is rarely claimed that affirmative action is a bad idea (or a good one) because it suggests finality, yet monetary reparations are often associated with the idea (good or bad, depending on the observer) of a fresh start for race relations and the law. This association of reparations with finality may in fact reflect a deeper inclination to avoid collective payments where legal and cultural change is still very much underway.⁷⁸

In the case of reparations to African Americans, it is indeed quite plausible that payments would interfere with "good" change, or at least changes that a majority of African Americans might favor. Affirmative action and other programs often command narrow majorities. Indeed, a version of minimum winning coalition theory suggests that we should expect proponents to advance programs up to the point where only a slim

76. See, e.g., Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. Pa. L. Rev. 677, 703 (1999); Irma Jacqueline Ozer, *Reparations for African Americans*, 41 How. L.J. 479 (1998).

77. See Magee, *supra* note 71, at 880–81. The concern about reparations and a sense of finality is, of course, not limited to this setting. See Martha Minow, *Between Vengeance and Forgiveness* 93, 105 (1998) (post-apartheid South Africa and Japanese offer of privately funded reparations to "comfort women").

78. Note the implicit claim that affirmative action connotes an ongoing process while monetary payments connote finality to the remedial process.

majority of the legislature (or population) is supportive.⁷⁹ If new law then required payments to new winners, it is easy to see that support would drop and that the new settling point would reflect a much less ambitious program. The intuition behind this claim is most straightforward when the new law at issue is legislative, as most of the proposed payments to Japanese Americans and African Americans have been.⁸⁰ Here the intuition is that if new law comes with liability for those who failed to provide good law in the past, as well as with payments to those who lost from the absence of this good law, potentially liable parties will decline to pass the new law. A majority might well pass some programs that are costly to its members, if only because it has deep regret, but programs can be expected sometimes, if not often, to be less ambitious than they might have been if they must be accompanied by payments for the past.

B. *Toward a More Complete Positive Theory of Reparations*

1. *International Payments.* — Reparations paid across international boundaries are like domestic reparations in name only. For one thing, the label is often attached to involuntary international payments, since reparations is a term of legal art and a damage remedy in international law.⁸¹ An international court or arbitrator might “require” reparative payments, and winners might impose reparations on losers of wars.⁸² Reparations are also offered by countries to citizens of other countries as a kind of settlement after some act that might have generated a formal international dispute. Large-scale examples in these categories include payments by Germany to Holocaust survivors and to the State of Israel after World War II,⁸³ payments by Germany to the Allied countries following World War I,⁸⁴ and payments by the United States to families of victims aboard an Iranian airliner shot down by the U.S.S. *Vincennes* in 1988.⁸⁵ In some of these cases, the continued use of the reparative label

79. See William H. Riker, *The Theory of Political Coalitions* 40, 47–76 (1984) (developing idea of a minimum winning coalition, a group that would lose if one member were subtracted from it).

80. See *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995) (holding that redress for slavery and discrimination is within legislative, but not judicial, power); Commission to Study Reparation Proposals for African Americans Act, H.R. 1684, 102d Cong. (1991).

81. See Ignaz Seidl-Hohenveldern, *Reparations*, in 4 *Encyclopedia of Public International Law* 178, 178 (Rudolf Bernhardt ed., 1982).

82. See *id.* at 178–79.

83. The West German legislature passed a series of acts in the 1950s authorizing payments to Holocaust survivors and Israel known as the *Bundesentschädigungsgesetz* [BEG]. See Nicholas Balabkins, *West German Reparations to Israel 147–50* (1971); Bittker, *supra* note 71, at 179.

84. See F.W. Taussig, *Germany's Reparation Payments*, *Atlantic Monthly*, Mar. 1920, at 398, 398–99 (describing Germany's post-World War I payments); see also Balabkins, *supra* note 83, at 24–25 (same).

85. See *Settlement Agreement on the Case Concerning the Aerial Incident of 3 July 1988 before the International Court of Justice*, Feb. 9, 1996, U.S.-Iran, 35 I.L.M. 553, 572.

requires some retreat from the earlier definition, which identified reparations as payments in the absence of legal obligation. On the other hand, inasmuch as international law lacks an enforcement mechanism, we can think of these international payments as voluntary even though they may be associated with legally cognizable claims.⁸⁶

Still, if we permit some comparison of domestic and international reparations, the anticipation-oriented approach is consistent with both domestic reparations for bad law that was very far in the past and with international reparations for more recent events. In the international context, after all, neither new winners nor responsible governments have much to do with defining what is new and good law when the law is created internationally or in another jurisdiction. If all forms of sovereign immunity were suddenly removed for domestic cases, then we might worry that a government would interfere with good domestic change in order to avoid liability, but the same government has much less control over change in international law than it does over its domestic law.

Moreover, in the international context there will rarely be an interest group that will move to reopen the question of liability to foreigners, so that again the norm of voluntary reparations is unlikely to threaten the course of legal change.⁸⁷ Imagine, for example, a regrettable incident in which the U.S. military injures U.S. citizens and then another similar incident where the losses befall foreigners. If the domestic incident leads to a legal decision immunizing the government, the prospect of voluntary reparations could easily have some impact on regulatory oversight, government operations, or the path of law itself. If reparations connote finality, then payment might head off future litigation or a legislative inquiry which could have brought about changes. If reparations come to be expected, then most of the harms associated with an end to sovereign immunity will arise.⁸⁸ If reparations are paid rarely, then burdened parties will often organize and draw attention to the behavior that harmed them and to the details of the immunity.

However, the distance of wrongdoers from the injured parties in the international case makes it much harder to believe that payments will negatively affect the course of change. Indeed, payments by a government to injured foreigners might draw attention to the source of the claim and lead to reform in the interest of preventing future injuries and liability. This is, of course, hardly much of a normative argument in favor

86. Since this Article defines quickly paid domestic transfers as settlements rather than as voluntary reparations, it is unsurprising that international reparations follow admitted wrongdoing more quickly than do domestic ones.

87. Put differently, foreign interest groups may be as likely to generate backlash as sympathy.

88. On sovereign immunity as a tool to promote the separation of powers, see generally Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 *Vand. L. Rev.* 1529 (1992). Reparations will likely do no harm because it is not the courts that will require this remedy.

of the difference between domestic and international practices. And even as a positive matter it is plausible that once we shed the labels attached to payments, voluntary domestic payments come rather frequently. On the other hand, when domestic payments come quickly after an injury it is difficult to think of them as voluntarily made, because litigation has not run its course. In any event, the set of payments made long after an injury will be dominated by domestic payments. When international payments are made they should look more like tort recoveries and much less like long-sought successes by well-situated interest groups.⁸⁹

2. *Domestic Reparations.* — We have already seen that domestic reparations are likely to come when a much earlier legal regime or determination comes to seem very wrong. Indeed, the regret itself needs to be long-held (and no longer in the process of change) to fit the picture drawn here. Modest misgivings are less likely to generate sufficient political interest. This distinction is like that between modest and serious large-scale natural disasters; the latter are far more likely to attract media coverage and build sympathy for the claim of an organizable group of victims.⁹⁰

I have already referred to the legislation dealing with Japanese Americans who were interned during World War II. Somewhat more modest reparations were subsequently offered to Latin Americans of Japanese ancestry who were brought to the United States during the same wartime period.⁹¹ In retrospect, the substance and procedures associated with these deprivations of liberty and attendant takings of property seem quite extraordinary and shameful. Once we see these payments as liberated by the distance between the deprivations and the compensation, so that effects on change are unlikely, we realize that quicker payments might have been politically difficult because of the resentment in some quarters at the notion of compensating these war-time losers while others who sacrificed life and liberty for their country received little or no compensation.

Another important example that is comfortably categorized as reparative involves payments to Native American tribes beginning with the Indian Claims Act of 1946.⁹² Furthermore, Canada also made payments to its aboriginal peoples and to the Japanese Canadians it interned during World War II.⁹³ This sort of uniformity among legal systems may sug-

89. Political power is unimportant because recovery is sought from a foreign entity, except insofar as it can be used to push one's own government to pressure a foreign payment.

90. See Saul Levmore, *Coalitions and Quakes: Disaster Relief and Its Prevention*, 3 U. Cll. Roundtable 1, 1-3 (1996).

91. See U.S. Will Pay Reparations to Former Latin American Internees, N.Y. Times, June 15, 1998, at A19 (reporting settlement of \$5000 to each of 1200 Latin Americans of Japanese descent who were forcibly brought from thirteen countries to the United States and placed in internment camps during World War II).

92. 25 U.S.C. § 70 (1946) (repealed 1978). At the time of repeal, any remaining claims were transferred to the United States Court of Claims. See *id.* at § 70v.

93. See John F. Burns, *Ottawa Will Pay Compensation to Uprooted Japanese-Canadians*, N.Y. Times, Sept. 23, 1988, at A10 (reporting Canadian decision to pay the

gest the presence of important underlying causes and thus form the basis for a useful positive theory.

Regret regarding the treatment of Native Americans may have generated serious cultural introspection, and this regret is an important condition of reparative payments. Still, it is important to recognize that the reparative legislation was aimed at those who suffered some specific legal, equitable, or treaty-based injury. It accomplished little for the descendants of those who may have been victimized by brutal warfare, ongoing discrimination, or many other things arguably more harmful than particular violations of law or treaty.⁹⁴ There is, in short, something about "legal regret" (by which I mean regret about the operation of the legal system rather than cultural norms more generally) that helps trigger reparations. A positive theory of reparations obviously needs much more than this, however, because there are numerous examples of legal reversals, such as overturned precedents and legislative switches, that do not generate reparations.

The Indian Claims Act offers some useful lessons in public choice. First, sympathy for a group is more likely if there remain live victims, and it seems no accident that by 1946 most of the treaty-breaking horrors contemplated by the Act were sufficiently old that the last of the direct victims would soon pass away. A still more cynical way to make this observation is to note that once old losers pass from the scene, politicians lose valuable opportunities to associate themselves with sympathetic causes. The aging of the victim population was also a feature of the payments to Japanese Americans and of recent payments to Holocaust victims by both governments and non-government entities. Political energy seems to burst forth when the players see that any further delay will result in a reduction in public attention and political opportunities.

The aging of the victim population in so many cases where reparations are paid suggests other, complementary theories as well. Collective action problems among claimants may be overcome as the time to press claims grows short or the number of surviving victims shrinks. The passage of time may also create a situation in which the majority no longer feels direct responsibility for the wrong that was done much earlier, and this self-perception may somehow promote rather than interfere with the inclination to make reparative payments. Most interesting, I think, is the possibility that the majority declines to make payments early because there is no guarantee that the victims will treat the payments as final. Finality is more likely if the victim group will shortly disappear, and the naturally decreasing size of the (disappearing) group does not hurt.⁹⁵

equivalent of \$17,325 to each of approximately 12,000 surviving citizens uprooted and deprived of property during World War II).

94. See 25 U.S.C. § 70a (1976) (repealed 1978).

95. I am indebted to Eric Posner, Jill Hasday, and Bill Landes (respectively) for the ideas in this paragraph. Note that the decreasing size sometimes facilitates payments

A different sort of observation about the Indian Claims Act is that it did not offer payments to individuals but only to tribes or recognized clans.⁹⁶ The stated reason for this constraint was that payments were for wrongfully taken properties and these properties were not “owned” by individuals, under customary tribal law, but rather concerned such things as hunting rights that had traditionally belonged to tribes or to identifiable subsets of tribes.⁹⁷ This reasoning seems too convenient, or even politically correct: Lawyers and politicians have enough imagination to assess damages for an individual’s share of what had once been a collective asset. It seems useful, instead, to note the role of tribal leaders and the Bureau of Indian Affairs in negotiating the political solution represented by the Act, and the interests of these parties in maintaining roles for themselves. The Act transferred resources to the control of these parties for the purpose of allowing them to set up schools and other programs for Native Americans, creating jobs and various opportunities for the very agents who negotiated the Act.⁹⁸

The role of groups in these reparative schemes draws attention to what I regard as the most interesting case related to payments under the Indian Claims Act, *McGhee ex rel. Creek Nation East of the Mississippi v. Creek Nation*.⁹⁹ Under treaties signed in 1814, 1826, and 1832, the United States obtained land in Georgia and Alabama by offering the residents, members of the Creek tribe, a choice between staying on the land as U.S. citizens or moving as a community to Oklahoma where their delegates would be able to choose new land.¹⁰⁰ Some Creeks stayed and some endured a relocation to Oklahoma.¹⁰¹ Subsequent legislation provided that the Oklahoma, or western, branch would be the only successor of the tribal interest and it became known as the Creek Nation.¹⁰² But years

simply because a smaller group is less expensive to pay. But inasmuch as payments sometimes go to surviving victims or their families, I do not make too much of this variable.

96. See 25 U.S.C. § 70a (1976) (repealed 1978).

97. See *McGhee ex rel. Creek Nation East of the Mississippi v. Creek Nation*, 122 Ct. Cl. 380, 392 (1952) (“[A] claim for the taking of tribal lands is a common claim, the ownership of the land being tribal and not individual.”).

98. The same is true for payments made at the state level to tribes and for resolutions regarding the return of lands. See 25 U.S.C. §§ 1701–75 (1994 & Supp. III 1997). Many of these transfers have been made while the tribal claims were very much alive in the courts and they do not, therefore, qualify as reparations under the definition used here. See, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666–67 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376 (1st Cir. 1975). This definition, it will be recalled, looks to payments where no legal obligation is expected and where there is regret for past wrongs (thus excluding voluntary payments in the form of disaster relief, for example).

99. 122 Ct. Cl. 380 (1952).

100. See *id.* at 384.

101. See *id.* at 384–85.

102. See Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 (establishing permanent, closed records of membership in the Creek tribe); Act of Mar. 1, 1901, ch. 675, 31 Stat. 861, 862 (defining the Creek tribe as “the Muskogee [Creek] Nation or Muskogee Tribe of Indians in *Indian Territory*”) (emphasis added); *McGhee*, 122 Ct. Cl. at 385–86.

later, and following the 1946 Act, the Creek Nation brought a claim about the original and coercive acquisition of their southeastern lands.¹⁰³ The Creek Nation (West) and their allies in the federal government argued that any settlement should go to the western tribal entity because (as just discussed) the Act gives standing only to tribes or clans, not to individuals, and by past agreement the western branch is the only successor of tribal interests.¹⁰⁴ The obvious public choice, or simply due process, argument is that the easterners were no less wronged and that they had no voice in selecting the western leadership. The court's decision was to allow the easterners a chance to organize separately and to form a tribal group of their own.¹⁰⁵ Again, the position of the federal bureaucracy may at first be surprising, if only because we would think that defendants would prefer for plaintiffs to face collective action problems, but it is less so once account is taken of the symbiotic relationship between this bureaucracy and that of organized tribes, especially with regard to infusions of cash.

It is unsurprising, I think, that many other reparations programs contain similar elements. Reparations immediately following World War II were paid not only to individual survivors of the Holocaust but also to Israel.¹⁰⁶ Recent international bargains with Swiss banks and German insurers have also provided for payments to groups whose leaders were involved in the bargaining itself. These payments can be thought of as reparative because it is unlikely that courts would have found liability. In the case of assets entrusted to Swiss banks before and during World War II, for example, serious negotiations some fifty years earlier had culminated in an accord under which further claims of this sort were said to have been waived.¹⁰⁷ Here, as with most claims and settlements, there has been room to argue that the parties were misinformed or deliberately misled in the earlier negotiations. However, these imperfections do not seem to rise to the level normally required for a claim of duress or for otherwise reopening what was once closed.¹⁰⁸ On the other hand, the payments followed substantial political and economic pressure exerted by U.S. groups and jurisdictions with some leverage over the parties who eventually agreed to make payments.¹⁰⁹

My point here is not to pass normative judgments on these old claims, on those brought against German insurers for life insurance bene-

103. See *McGhee*, 122 Ct. Cl. at 382.

104. See *id.* at 390.

105. See *id.* at 394-95.

106. See Balabkins, *supra* note 83, at 143; see also Bittker, *supra* note 71, at 179-80 (discussing German legislation regarding reparations to individuals).

107. Cf. Detlev F. Vagts, *Restitution for Historic Wrongs, the American Courts and International Law*, 92 *Am. J. Int'l L.* 232, 234-35 (1998) (comparing merits of American and European rules regarding recovery of property stolen during wartime).

108. Cf. *id.* at 233 (noting difficulty of raising claims generally).

109. See John M. Goshko, 3 *Swiss Banks Agree to Negotiate Settlement of Holocaust Claims*, *Wash. Post*, Mar. 27, 1998, at A18.

fits never paid for lack of official death certificates (or because of “acts of war”), or on those brought against German firms for their willing and even aggressive use of slave labor during World War II.¹¹⁰ All these claims deserve more discussion than is appropriate here. Still, the timing of these claims, the continuing role played by mediating groups, and the long-settled quality of the behavior and legal change at issue is noteworthy.

An interesting example of reparations that seems quite different from others noted here is the practice in some states of compensating “wrongfully” incarcerated persons. Thus, Virginia has the practice of paying \$50,000 per year for misimprisonment, although there is no legal requirement that such reparations be made. A legislative committee generally follows this pattern in making recommendations which are then approved by legislative vote without much ado: If the error appears to have been caused not by overzealous police and prosecutors but rather by a dishonest or mistaken private witness, then the state can decline to pay.¹¹¹ The practice of payments for mistaken or wrongful incarceration is known in other legal systems as well.¹¹² These payments to individual citizens are different in that they involve recently uncovered events and are paid neither to organized groups nor in a way that benefits group leaders who negotiate the payments. But I would describe these payments as more on the order of a sensible waiver of sovereign immunity (accompanied by a monetary settlement) than as a classic example of reparations. Regret is felt for something in the recent past, but the payment is to a new winner who already has a great incentive to avoid incarceration in the first place, and, once incarcerated, to work for a change in the law. Indeed, if this is wrong it is because *ex post* payments might offer lawyers a potential source of remuneration, so that wrongfully incarcerated persons will have better access to legal services. But for the most part, the original wrong and the subsequent change are unilaterally in

110. See generally Benjamin B. Ferencz, *Less than Slaves* (1979), for a discussion of earlier failures to recover. Note also the inability of firms even long after the original acts to make payments, or settlements, without bringing forth new claimants. There is, for instance, no shortage of survivors who could bring claims against German wartime manufacturers. A fuller exploration of current claims and recoveries against German firms must await a separate effort.

111. The state has waffled on this practice in the past. See Mike Allen, *Virginia Pardons Itself for Jailing an Innocent Man*, Wash. Post, Feb. 18, 1997, at A1; Mike Allen & Spencer Hsu, *Virginia Senate Votes to Pay Wronged Man*, Wash. Post, Feb. 20, 1997, at D1; Mike Allen, *Virginia Senate Forced to Backtrack on Paying Wronged Man*, Wash. Post, Feb. 21, 1997, at D3.

112. See Paul G. Cassell, *Criminal Law: Protecting the Innocent from False Confessions and Lost Confessions—and from *Miranda**, 88 J. Crim. L. & Criminology 497, 522 n.128 (1998) (“[I]n Britain an average of seven persons a year receive compensation for wrongful imprisonment.”); Hans Gameltoft-Hansen, *Compensation for Unjustified Imprisonment in Danish Law*, 18 Scandinavian Stud. in L. 27–70 (1974). Note, however, that payments are rarely made for regretted arrests or negligent shootings of innocents by police officers where there is no singling out of victims.

the hands of the government and it is possible that the expectation of liability (and associated public attention) serves to rein in prosecutors and police who are too enthusiastic in their pursuit of defendants. In short, the simple internalization argument fits here, and the anticipation-oriented approach argues for rather than against payments. The payments have more to do with content than with timing, but the timing issues support the convention of payments.

Other notable examples of payments to groups reflect the themes developed here, including regret, long-settled change, some striking political advantage of the beneficiary group, and the focal point provided by the aging of the victim group. In 1993, Florida paid a few million dollars to survivors of a group of citizens who were driven from the town of Rosewood in 1923, after eight black citizens were murdered and all black residents' homes were burned by marauding whites from neighboring towns.¹¹³ Law enforcement officials stood by and did nothing during and after what became known as the Rosewood Massacre.¹¹⁴ The payments were labeled as compensation for takings and were paid to nine survivors.¹¹⁵ A fund was set up to compensate later claimants who could prove they had lost property, and a separate scholarship fund offered priority to Rosewood descendants.¹¹⁶ The timing of these reparations caused observers to suggest that the Governor's support for these payments was motivated in part by a desire to obtain reciprocal support for a health care bill.¹¹⁷

Similar claims might be made regarding payments offered by the U.S. government under the Radiation Exposure Compensation Act of 1990 to residents of three western states who had developed any of thirteen listed cancers and who were present during secret (and perhaps careless) testing of atom bombs between 1951 and 1958, or for a short period in 1962.¹¹⁸ The Act offered \$50,000 to each eligible person.¹¹⁹ It also paid \$100,000 to any uranium miner who had developed certain diseases and who had specified exposures between 1947 and 1971 in any of four western states.¹²⁰ The United States had avoided liability in litigation over nondisclosure and over using "downwinders" as "guinea pigs"

113. See Michael D'Orso, *Like Judgment Day* 1-11, 206-20 (1996) (describing Rosewood Massacre and reparation efforts); Florida Will Pay Black Survivors of White-Moh Rampage in Town, *L.A. Times*, Apr. 9, 1994, at A21 (reporting final settlement).

114. See C. Jeanne Bassett, Comment, House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury, 22 *Fla. St. U. L. Rev.* 503, 506-07 (1994).

115. See *id.* at 517.

116. See *id.* at 517-18.

117. See *id.* at 512; Bill Moss, *Tempers Flare in Meeting About the Rosewood Bill*, *St. Petersburg Times*, Apr. 1, 1994, at 1B.

118. 42 U.S.C. § 2210 note (1994) (Radiation Exposure Compensation).

119. See *id.*

120. See *id.*

because testing programs and related decisions fit within its discretionary function.¹²¹

There are obviously many other comparable cases of regret where there was official wrongdoing, as judged by later moral or legal standards, that escapes liability because of sovereign immunity, statutes of limitations, and other defensive devices that are available even when public opinion becomes sympathetic to the victims of the earlier wrongdoing. As with so many other things that are associated with interest groups, it is difficult to say why some groups organize and others do not, and also difficult to know when organized groups will succeed.¹²² The theory advanced here may not be testable. I might continue to advance examples of payments where time had gone by and further change was unlikely, but there is, of course, an enormous number of cases where governments pay for recent wrongs, and it is difficult to distinguish settlements from voluntary payments. I prefer, therefore, to emphasize the implications of the anticipation-oriented approach and to suggest as an afterthought that we might, if we like, understand some reparative payments as not inconsistent with this view and as predictable, if at all, with tools associated with public choice.

C. *Reparations and Rent-Seeking*

I have described reparations as a kind of exception to the pattern of transition rules. To the extent that reparations are made long after some event or use of law, the old law is regretted for a long period of time, new law on the matter is well-settled, and recovery then hinges on the political position of those aggrieved under old law (whose present position was hard to forecast long ago). It seems unlikely that reparations thus defined could have much influence on legal change. I have suggested that public choice considerations might explain when this matter, now beyond influence, leads to payments, but a better use of public choice tools might be to suggest that if reparations do not sort out according to some functional or moral theory, then perhaps it would be better that they not be paid.¹²³ The idea is that the possibility of reparative payments will bring forth rent-seeking by groups interested in obtaining payments, and that these lobbying, litigating, and fundraising efforts can be thought of as wasteful. This idea is obviously normative; as a positive matter we do find instances of reparative payments.

There are two reasons to be skeptical of this approach. The first is that reparations and legal regret have expressive or educational value

121. William A. Fletcher, *Atomic Bomb Testing and the Warner Amendment: A Violation of the Separation of Powers*, 65 Wash. L. Rev. 285, 298-303 & n.81 (1990). Compare the difficulties of the geographically dispersed miners with the cases of the geographically concentrated groups discussed *supra* notes 72-74 and accompanying text.

122. See Levmore, *Voting Paradoxes*, *supra* note 49, at 272.

123. We would not make payments mandatory for fear that good law would face unnecessary obstacles. See *supra* notes 61-62 and accompanying text.

that is difficult to assess. A society that revisits, apologizes, and pays for past wrongs—even if it ignores some of its most serious past wrongs—teaches its members something about law and shared values. Some amount of hunting for reparations might therefore provide a social good.¹²⁴

The second reason is more practical. There are a number of loosely related difficulties with an attempt to precommit *not* to make compensatory or reparative payments. First, it would take some time to build up a sufficient norm that could keep an eager government from making a payment that was politically useful. Moreover, there is no easy way to distinguish such payments from others the government might make. Reparations can be framed as incentives, especially where past victims are now geographically, professionally, or otherwise concentrated. Similarly, the hurdle to setting forth a testable theory of reparations reappears. Politicians can insist that reparations are not voluntary transfers at all, but rather sensible payments in the form of a settlement of a claim that might well prove more costly to the government in court or keep the legislature unnecessarily distracted.

CONCLUSION

Timely lawmaking, of both the judicial and legislative kind, is the product of at least three groups of actors. These include governments (however conceived), interest groups that favor change, and interest groups that were winners under the previous legal regime and can be thought of as opposing change. There is no shortage of other citizens and interest groups, but it is enough to focus for the present on these three kinds of players. I have suggested that as a positive as well as a normative matter we might think of transition rules as attempting to encourage all three of these groups to facilitate change that will come to be seen as good law.

The more one thinks that the last of these three groups, those who profit from the status quo, is the key to good change or the appropriate least cost avoider, then the more one is inclined toward a policy of aggressive change. Protecting these new losers in the event of change ruins their incentive to anticipate good change. But the more we expand the perspective offered by the anticipation-oriented approach to include a role for new winners who develop evidence, invest in the political arena, or litigate for change, the more we may wish to spread the available incentives among both new losers and new winners. Once we take this step—and once we adopt any of a number of plausible and time-honored reasons for limiting the role of monetary incentives as a means of influencing legislatures, courts, and regulators—conventional legal rules appear remarkably sensible. The strategy of aggressive change, and its focus

124. Some of the tensions arising out of this sort of view are developed in compelling fashion in Minow, *supra* note 77, at 91–117.

on anticipatory behavior, begins as a radical approach but can end up supporting the very rules we know and associate with fairness and reliance.

The expanded anticipation-oriented approach can also illuminate specific areas of law. I have suggested that much of takings law might be understood as reflecting concern with anticipation. The government is asked to pay when condemnees are in an especially poor position to facilitate new law. In contrast, most regulated parties go uncompensated where compensation would discourage anticipation and earlier adjustment to new, good law.

A second application involves payments that can loosely be organized under the label of reparations but that also include (apparent) decisions against offering such payments. In most settings, government payments might well interfere with the prospect of good legal change, but when change has come long ago and the law (and sense of regret) is fairly stable, reparations can be paid with little fear of influencing change. There may be value in this form of social expression and there may simply be political gain from reparations. Considerations normally associated with public choice do seem to explain some striking examples of reparative payments.

The anticipation-oriented approach to transition rules, at least as analyzed here, points not to one but to several players, all of whom influence the substance and rate of change. The government is one of these players, and although it could be encouraged with much the same rules as the others, it is perhaps sensible that often it is not. Compensable takings and reparations then emerge as two foils to the general pattern of regulating change. These exceptions may well prove the rule, in which case we have yet another example of a positive, descriptive theory of law, somewhat mysterious in development, that is at the same time normatively tenable.