

RETROACTIVITY AND RESTRAINT: AN ANGLO-AMERICAN COMPARISON

INTRODUCTION

In American law, the mandatory retroactivity of common law decisionmaking is an unfashionable idea. Under the traditional understanding, said by Justice Oliver Wendell Holmes to have prevailed “for near a thousand years,”¹ a judicial decision must be treated as stating what the law was, as well as what it is. In the modern era, this concept strikes many judges as absurd mythmaking—or, as California Supreme Court Chief Justice Roger Traynor called it, “moonspinning.”² Chief Justice Traynor believed that mandatory retroactivity was an artifact of the now-discredited declaratory theory of the common law: “For all too many generations we justified mechanical retroactivity by the prim lore descended to us through Blackstone that judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed.”³

Chief Justice Traynor was, of course, not wrong to connect the origins of mandatory retroactivity with the Blackstonian theory of law. In the eighteenth century, William Blackstone had famously declared judges to be “the living oracles” of the common law.⁴ In his classical formulation, a judge was “sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one.”⁵ And when former decisions were found wanting? “It is declared, not that such sentence was *bad law*, but that it was *not law*”⁶

1. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

2. Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 535 (1977).

3. *Id.*

4. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

5. *Id.*

6. *Id.* at *70. Although the declaratory theory is most often associated with Blackstone, Matthew Hale actually articulated the idea a century earlier:

[English courts cannot] make a law, properly so called, for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law in this kingdom is,

If the declaratory theory of the common law was ever truly believed in, it is no longer.⁷ In the exercise of their common law powers, judges are recognized to be making the law, not finding it.⁸ After the general dawning of this realization, it was only natural that the mandatory retroactivity of judicial decisionmaking would come into doubt. With the rise of Legal Realism, which questioned the internal coherence of the law more broadly,⁹ jurists began to view common law judging as flatly analogous to the work of a legislature.¹⁰ Legislatures could decide whether new rules would operate retroactively or prospectively, based on pragmatic concerns to be weighed by the lawmakers.¹¹ If judges were going to strip off the old Blackstonian mythology, it followed that they should embrace the set of tools that comported realistically with their position.¹² This tool set came to consist of three techniques: traditional retroactive decisionmaking, purely prospective decisionmaking, and selec-

especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are greater evidence thereof than the opinion of any private persons, as such, whatsoever.

1 MATTHEW HALE, HISTORY OF THE COMMON LAW 141 (5th ed. 1794).

7. Albert W. Alschuler notes that Blackstone's own account of the declaratory process is delivered with a "wink and a nod." Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 37 (1996). Alschuler also points out that St. George Tucker, author of the classic early American edition of Blackstone's *Commentaries*, saw Blackstone's account of the common law as providing a baseline for America that ought to be modified through time. *See id.* at 12–14. This perspective refutes the idea that pre-Realist legal thought was in thrall to the declaratory myth. Justice Scalia made a similar point about the jurisprudential philosophy of the Founders: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment).

8. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1759 (1991) ("It would be only a slight exaggeration to say that there are no more Blackstonians.").

9. *See, e.g.*, JEROME FRANK, LAW & THE MODERN MIND 12 (Peter Smith 1970) (1930).

10. *See, e.g.*, Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling* 109 U. PA. L. REV. 1, 3–4, 16 (1960).

11. *See Mackey v. United States*, 401 U.S. 667, 677 (1969) (Harlan, J., concurring in the judgment).

12. *See Levy, supra* note 10, at 16 ("A judge who has fully liberated himself from the outmoded legal *Waltanschauung* of two centuries ago will have no trouble hailing the device as a sensible and simple way to cut a Gordian knot. Contrariwise, the more courts begin to utilize prospective overruling the more it will become obvious that the judge is in fact inescapably a judicial legislator.").

tively prospective decisionmaking. A purely prospective decision would apply the new rule only to cases arising from events after the decision, and not to the case at hand.¹³ A selectively prospective decision would apply the new rule to the case before the court and future cases, but not to any other cases arising from events before the decision.¹⁴ Prospectivity would make the judicial craft more flexible by allowing judges to overrule old laws that had generated substantial reliance interests, such as in property, contract, and tax cases, without upsetting those expectations.¹⁵

In light of the abandonment of the declaratory theory, these innovations were widely viewed as prudent and realistic.¹⁶ Over time, however, prospective decisionmaking fell into disfavor at the federal level. In the 1993 case of *Harper v. Virginia Department of Taxation*,¹⁷ the Supreme Court prohibited the use of selective prospectivity by courts adjudicating federal law as announced and applied by the Court.¹⁸ The Court found that the prospective application of new rules of law was contrary to the judicial function and inherently inequitable.¹⁹ Yet the decision did not extend to state courts' interpretations of state law,²⁰ and state courts have mostly continued their use of prospective decisionmaking since then.²¹ Because state courts, unlike federal courts, are uniquely charged with developing the common law,²² and because the common law is now universally acknowledged to be judge-made, few state courts in the af-

13. See Eva Steiner, *Judicial Rulings with Prospective Effect—from Comparison to Systematisation*, in *COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS* 1, 6 (Eva Steiner ed., 2015).

14. See *id.* at 7–8.

15. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 146 (1987).

16. See, e.g., Levy, *supra* note 10, at 1 (favorably describing prospective overruling as a “technique[] of judicial lawmaking”).

17. 509 U.S. 86 (1993).

18. See *id.* at 97. The Court expressly prohibited selective prospectivity in civil cases and suggested, though it did not hold, that pure prospectivity might also be forbidden.

19. See *id.*

20. See *id.* at 100.

21. See Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, in *COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS*, *supra* note 13, at 209, 223.

22. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

termath of *Harper* seriously questioned their use of prospectivity.²³ How, for a modern common law court, could it be otherwise?

For our closest common law ancestor, it is otherwise. An English court has never decided a case prospectively.²⁴ This difference is arresting, because the English and American legal systems share deep similarities. English and American courts both decide common law cases. English judges, like their American counterparts, reject the declaratory theory.²⁵ Like American courts, English courts actively, knowingly, and sometimes drastically change the common law.²⁶ Yet English legal culture has resisted the idea that judges can both change the law *and* decide when that change will come into effect.²⁷ In 1999, Lord Goff of the House of Lords stated that prospective overruling “has no place in our legal system,” because it necessarily entails the unequal application of the law.²⁸ In the 2005 case of *In re Spectrum Plus Ltd.*,²⁹ the House of Lords declared for the first time that a new rule could be applied prospectively, but only in “a wholly exceptional case”—which the matter

23. See Kay, *supra* note 21 at, 223.

24. See Niamh Connolly, *The Prospective and Retroactive Effect of Judicial Decisions in Ireland*, in COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS, *supra* note 13, at 27, 48.

25. See, e.g., *In re Spectrum Plus Ltd.* [2005] UKHL 41, [34], [2005] 2 AC 680 (HL) 698 (Lord Nicholls of Birkenhead) (appeal taken from Eng.) (“[In cases where an overruling decision represents a response to social changes], on any view, the declaratory theory is inapt. In this context the declaratory theory has long been discarded. It is at odds with reality.”); *Kleinwort Benson Ltd. v. Lincoln City Council* [1999] 2 AC 349 (HL) 378 (Lord Goff of Chieveley) (appeal taken from Eng.) (“The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction.”); Lord Mackay of Clashfern, *Can Judges Change the Law?*, 73 PROC. BRIT. ACAD. 285, 287 (1987) (“[F]ew contemporary observers would support the theory that judges merely declare the law that is.”); Lord Reid, *The Judge as Law Maker*, 12 J. SOC’Y PUB. TCHRS. L. (N.S.) 22, 22 (1972) (“There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendor and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.”).

26. See RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 32 (4th ed. 1991).

27. See ATIYAH & SUMMERS, *supra* note 15, at 147.

28. *Kleinwort Benson*, [1999] 2 AC at 379 (Lord Goff).

29. [2005] UKHL 41, [2005] 2 AC 680 (HL) (appeal taken from Eng.).

before it was not.³⁰ Since then, no English court has found it appropriate to decide a case prospectively.³¹

Thus, the English approach to mandatory retroactivity differs sharply from that of American state supreme courts, even though both are similarly situated as expositors of the common law. But the English perspective closely tracks the two rationales offered by the Supreme Court in *Harper* for mandating the retroactive application of federal law—the nature of the judicial function and the need to ensure the equitable treatment of litigants. The practice of English courts demonstrates that state courts can embrace *Harper's* reasoning and significantly limit their use of prospectivity without abandoning their responsibility for developing the common law or indulging in Blackstonian “moonspinning.”

I. PROSPECTIVE DECISIONMAKING IN AMERICA

A. Federal Law

The history of prospective decisionmaking at the federal level traces a distinctive arc: the practice found acceptance in the 1930s, escalated in the 1960s, fell into disfavor in the 1980s, and was strictly curtailed in the 1990s. Although courts very occasionally accepted or used prospective decisionmaking in the nineteenth century,³² the common use of prospectivity in America only began in the early twentieth century. In the 1932 case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*,³³ the Supreme Court held that the federal Constitution does not prohibit prospective decisionmaking by state courts.³⁴ Earlier that year, the Montana Supreme Court ruled that a previous case regarding railway tariffs was wrongly decided.³⁵ Nevertheless, the court held that the previous rule was good

30. *Id.* at [74], [2005] 2 AC at 710 (Lord Hope of Craighead).

31. See Connolly, *supra* note 24, at 48.

32. See *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863) (holding that an Iowa Supreme Court decision retroactively invalidating previously lawful contracts was an unconstitutional impairment); *Bingham v. Miller*, 17 Ohio 445 (1848) (invalidating a legislative divorce as a violation of the Ohio Constitution but recognizing the divorce to decide the current case).

33. 287 U.S. 358 (1932).

34. *Id.* at 364.

35. *Sunburst Oil & Ref. Co. v. Great N. Ry. Co.*, 7 P.2d 927, 929 (Mont. 1932), *aff'd*, 287 U.S. 358 (1932).

law for all those who had acted on it before the 1932 decision.³⁶ Going forward, it would no longer be law.³⁷ In short, the Montana Supreme Court overruled itself purely prospectively.

The U.S. Supreme Court affirmed. The Court, per Justice Cardozo, held that “the federal constitution has no voice” on prospectivity, and that states have the option to decide cases prospectively or retroactively.³⁸ The Court found that the Due Process Clause of the Fourteenth Amendment does not force a particular “juristic philosophy”³⁹ of the common law on the states;⁴⁰ they may choose for themselves “between the principle of forward operation and that of backward relation.”⁴¹ Thus prospective decisionmaking—which came to be known as “sunbursting”⁴²—received the imprimatur of the Supreme Court.

Karl Llewellyn, an advocate of prospectivity as a tool of judicial craftsmanship,⁴³ later stated that “I do not think many opinions gave [Cardozo] greater pleasure” than *Sunburst Oil*.⁴⁴ Prospectivity had long been a subject of interest to Justice Cardozo. He has been described as a “pragmatic conceptualist,” who, in contrast to the Realists, thought that the law consists of meaningful concepts,⁴⁵ yet also believed that judges should adapt those concepts to changing circumstances.⁴⁶ In his 1921 lectures compiled as *The Nature of the Judicial Process*, Cardozo had approvingly noted the use of prospectivity in cases where retroactivity would cause great hardship.⁴⁷ He suggested that the use of prospective decisionmaking in the future should be governed not by “metaphysical conceptions of the

36. *See id.*

37. *See id.*

38. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932).

39. *Id.* at 365.

40. *Id.* at 364.

41. *Id.*

42. *See, e.g., Heritage Farms, Inc. v. Markel Ins. Co.*, 810 N.W.2d 465, 479–80 (Wis. 2012).

43. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 301–05 (1960).

44. *Id.* at 302.

45. *See* John C.P. Goldberg, *The Life of the Law*, 51 *STAN. L. REV.* 1419, 1423–24, 1458–59 (1999) (book review) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113, 119 (1921)).

46. *See id.* at 1458 (citing CARDOZO, *supra* note 45, at 150).

47. *See* CARDOZO, *supra* note 45, at 142–43.

nature of the judge-made law, nor by the fetich [sic] of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice."⁴⁸ Just before his confirmation to the Supreme Court, then-Judge Cardozo advocated even more strongly for the use of prospectivity. In a 1932 address to the New York State Bar Association, Cardozo stated that he saw prospective decisionmaking as a prudent solution in cases where retroactivity would be "for any reason inexpedient."⁴⁹ Prospectivity appealed to Justice Cardozo's pragmatism while not violating his sense of the necessary stability and predictability of the law,⁵⁰ and under his opinion in *Sunburst Oil*, its use became widespread in America.

The Supreme Court began developing its own doctrine of prospectivity in the 1965 case of *Linkletter v. Walker*.⁵¹ In 1959, Linkletter was convicted of burglary based on evidence obtained from his home and business by the police.⁵² A 1961 Supreme Court case, *Mapp v. Ohio*,⁵³ found for the first time that the Due Process Clause of the Fourteenth Amendment requires states to exclude evidence seized in violation of the Fourth Amendment.⁵⁴ After *Mapp*, Linkletter sought a writ of habeas corpus in federal court to challenge his burglary conviction as based on unconstitutionally-obtained evidence.⁵⁵ The Court held that *Mapp* did not operate retroactively on cases finally decided before it came down.⁵⁶

Echoing Justice Cardozo in *Sunburst Oil*, the Court found that the Constitution "neither prohibits nor requires" retrospective effect for the application of new constitutional rules.⁵⁷ The Court found that a change in law had to be given retroactive effect for a case on direct review, but that for a judgment being collaterally attacked, whether a change should have retroactive

48. *Id.* at 144–45.

49. Benjamin N. Cardozo, *Jurisprudence* (1932), reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7, 35 (Margaret E. Hall ed., 1947).

50. Compare *id.*, with *id.* at 18.

51. 381 U.S. 618 (1965).

52. *Id.* at 621.

53. 367 U.S. 643 (1961).

54. *Id.* at 655.

55. *Linkletter*, 381 U.S. at 621.

56. *Id.* at 619–20.

57. *Id.* at 629.

effect depended on an individualized consideration.⁵⁸ Noting that there was no distinction in terms of retroactivity analysis between civil and criminal cases, the Court stated that “the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective.”⁵⁹ The Court then sketched a three-factor test for determining whether a new rule should be given retroactive effect on collateral review: (1) the purpose of the new rule; (2) the reliance placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule.⁶⁰ Weighing the factors, the Court found that the *Mapp* rule should not be given retroactive effect on collateral review.⁶¹

Justice Black, in a dissent joined by Justice Douglas, called the Court’s use of selective prospectivity “arbitrary and discriminatory.”⁶² Linkletter, who received no relief under *Mapp*, had actually committed his crime after *Mapp* herself.⁶³ When *Mapp*’s conviction was vacated by the new rule in her case, Linkletter was left in prison—a clear instance of unequal treatment under law.⁶⁴ Justice Black reiterated his earlier assertion that the requirement of retroactivity formed “one of the great inherent restraints upon this Court’s departure from the field of interpretation to enter that of lawmaking.”⁶⁵ Shortly after *Linkletter*, the Court decided that the case’s three-factor test could also be used to decide whether new rules should be given retroactive effect on direct review.⁶⁶

In 1971, the Court addressed the prospective application of new rules of civil law in the case of *Chevron Oil Co. v. Huson*.⁶⁷ The Supreme Court had previously decided *Rodrigue v. Aetna Casualty & Surety Co.*,⁶⁸ which held that state law, not admiralty

58. *Id.* at 627.

59. *Id.* at 627–28.

60. *Id.* at 636.

61. *Id.* at 640.

62. *Id.* at 641 (Black, J., dissenting).

63. *Id.*

64. *See id.*

65. *Id.* at 644 (quoting *James v. United States*, 366 U.S. 213, 225 (1961)).

66. *See Stovall v. Denno*, 388 U.S. 293, 300 (1967); *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

67. 404 U.S. 97 (1971).

68. 395 U.S. 352 (1969).

law, applies on oil rigs on the Outer Continental Shelf.⁶⁹ The question in *Chevron Oil* was whether *Rodrigue's* new rule should govern a claim that arose before it was decided. The Court identified three factors for determining whether a new rule of civil law should be applied prospectively: (1) whether the decision establishes a new principle of law; (2) whether retroactive application would further the purposes of the rule; and (3) whether retroactive application would produce inequitable results.⁷⁰ Applying this test, the Court held that *Rodrigue* should not be applied retroactively.⁷¹

After a period of embracing prospective overruling, the Supreme Court came to develop grave doubts about the practice. In a series of forceful dissents, Justice Harlan criticized the use of prospective overruling as contrary to the constitutional function of the federal courts. In 1967, *Katz v. United States*⁷² stated a new rule that a Fourth Amendment search and seizure does not require a physical intrusion into an enclosure.⁷³ The next term, in *Desist v. United States*,⁷⁴ the Court held that *Katz* did not apply retroactively to any cases involving searches conducted before the new rule was promulgated.⁷⁵ In dissent, Justice Harlan declared, "'Retroactivity' must be rethought."⁷⁶ Though Justice Harlan had joined in previous opinions limiting the retroactive effect of new constitutional rules, he had done so to limit the impact of decisions that seemed to him "profoundly unsound in principle."⁷⁷ He further argued that the discretionary availability of prospective overruling in constitutional criminal law had yielded wide doctrinal confusion. Its use also "depart[ed] from th[e] basic judicial tradition" of treating similarly situated defendants the same⁷⁸—*Katz* had received the benefit of the new rule, while *Desist* had not. Justice Harlan would have applied *Katz* retroactively.⁷⁹

69. *See id.* at 366.

70. *See Chevron Oil*, 404 U.S. at 106–07.

71. *Id.* at 107.

72. 389 U.S. 347 (1967).

73. *Id.* at 353.

74. 394 U.S. 244 (1969).

75. *Id.* at 254.

76. *Id.* at 258 (Harlan, J., dissenting).

77. *Id.*

78. *Id.* at 258–59.

79. *Id.* at 269.

Justice Harlan further developed his critique of non-retroactivity in the 1971 case of *Mackey v. United States*.⁸⁰ In 1968, the Court established a new rule in *Marchetti v. United States*⁸¹ that the Fifth Amendment is a valid defense to a prosecution for failure to register as a gambler and pay a gambling tax.⁸² In *Mackey*, the Court held that *Marchetti* did not apply retroactively to a conviction that had occurred before that case and that was being heard on collateral review.⁸³ Justice Harlan, concurring in the judgment, noted that the Court's use of non-retroactivity had been seen by some members of the Court as a way of limiting unsound decisions, and by others as a "technique" for the "implementation of long overdue reforms, which otherwise could not be practicably effected."⁸⁴ Justice Harlan pointedly observed that although he did not subscribe to the Blackstonian declaratory theory, he believed that the decision whether to make a new constitutional rule retroactive had to be informed by the nature of the judicial function and its distinction from the legislative role.⁸⁵ He contended that the Court is limited by Article III to deciding actual cases or controversies,⁸⁶ and cannot apply one constitutional law to one case "fish[ed] . . . from the stream of appellate review . . . as a vehicle for pronouncing new constitutional standards," and not apply the rule to similarly situated cases.⁸⁷ He also noted that prospectivity tended to "cut th[e] Court loose from the force of precedent" and freed it to "restructure artificially" the expectations created by current law.⁸⁸ Justice Harlan would have required retroactivity for all cases on direct review.⁸⁹

Justice Harlan's reasoning was finally adopted by the Court in the 1982 case of *United States v. Johnson*.⁹⁰ *Payton v. New*

80. 401 U.S. 667 (1971).

81. 390 U.S. 39 (1968).

82. *Id.* at 41-42.

83. *Mackey*, 401 U.S. at 669-70, 674.

84. *Id.* at 676 (Harlan, J., concurring in the judgment) (quoting *Jenkins v. Delaware*, 395 U.S. 213, 218 (1969)).

85. *Id.* at 677.

86. *See id.* at 678.

87. *Id.* at 679.

88. *Id.* at 680.

89. *Id.* at 681.

90. 457 U.S. 537 (1982).

York,⁹¹ an earlier case, held that the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest.⁹² The question in *Johnson* was whether *Payton* should be applied retroactively to a case pending on direct appeal when that case was decided.⁹³ The Court held that it should, expressly agreeing with Justice Harlan's admonition that "[r]etroactivity' must be rethought"⁹⁴ and partially adopting his views in *Desist* and *Mackey*.⁹⁵ But the Court limited its holding on retroactivity to the Fourth Amendment, and stated that it did not apply to civil rules, which would continue to be governed by the flexible test from *Chevron Oil*.⁹⁶

In the 1987 case *Griffith v. Kentucky*,⁹⁷ the Court overruled *Linkletter's* three-factor test, holding that new rules of conduct for criminal prosecutions must be applied retroactively to all cases that are pending on direct review or not yet final.⁹⁸ The case involved the application of *Batson v. Kentucky*,⁹⁹ which prohibited racially discriminatory peremptory challenges,¹⁰⁰ to a criminal conviction that was on petition for certiorari to the Supreme Court when *Batson* was decided.¹⁰¹ The Court held that Article III's cases or controversies requirement prohibits the purely prospective application of new constitutional rules in criminal cases, because such decisionmaking is more akin to legislation than adjudication.¹⁰² Furthermore, the Court adopted Justice Harlan's view that "the integrity of judicial review" requires that a new rule be applied not only to the case at hand, but to all similar cases pending on direct review¹⁰³—a rejection of selective prospectivity in the criminal context.

91. 445 U.S. 573 (1980).

92. *Id.* at 576.

93. *Johnson*, 457 U.S. at 541.

94. *Id.* at 548 (quoting *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)).

95. *Id.* at 562.

96. *Id.* at 562–63.

97. 479 U.S. 314 (1987).

98. *Id.* at 328.

99. 476 U.S. 79 (1986).

100. *Id.* at 89.

101. *Griffith*, 479 U.S. at 316–18.

102. *Id.* at 322–23 (citing U.S. CONST. art. III, § 2, cl. 1).

103. *Id.* at 323.

Eventually, prospectivity in civil cases also came into question. In the 1991 case of *James B. Beam Distilling Co. v. Georgia*,¹⁰⁴ the Court cast serious doubt on the endurance of *Chevron Oil*. In a 1984 case called *Bacchus Imports, Ltd. v. Dias*,¹⁰⁵ the Court held that a Hawaii excise tax violated the Commerce Clause.¹⁰⁶ After *Bacchus*, Jim Beam brought suit, seeking a refund of taxes it had paid under Georgia's similar law.¹⁰⁷ A state court declared Georgia's law unconstitutional, but refused to apply its ruling retroactively, based on the test from *Chevron Oil*, and the Georgia Supreme Court affirmed.¹⁰⁸ The U.S. Supreme Court reversed, finding that *Bacchus* applied retroactively.¹⁰⁹

There was no majority opinion in the case. Justice Souter found that retroactivity is a choice of law for the Court to make when promulgating a new rule, and that *Bacchus* had been intended to apply retroactively.¹¹⁰ He rejected the use of selectively prospective decisionmaking as inherently inequitable, but did not address the propriety of pure prospectivity.¹¹¹ Justice White concurred in the judgment, agreeing with Justice Souter on the choice of law question, but also defending *Chevron Oil* and the continued use of pure prospectivity.¹¹² Justice Blackmun also concurred in the judgment but concluded that both selective and pure prospectivity violate the judicial function.¹¹³ Justice Scalia concurred in the judgment as well. Agreeing with Justice Blackmun, he found that both selectively and purely prospective decisionmaking are unconstitutional actions beyond the meaning of "[t]he judicial Power."¹¹⁴ Echoing the earlier criticisms of Justices Black and Harlan, Justice Scalia described mandatory retroactivity as "one of the understood

104. 501 U.S. 529 (1991).

105. 468 U.S. 263 (1984).

106. *Id.* at 273.

107. *Beam*, 501 U.S. at 533.

108. *Id.*

109. *Id.* at 532.

110. *Id.* at 534–39 (plurality opinion).

111. *Id.* at 543–44.

112. *Id.* at 544–46 (White, J., concurring in the judgment). Justice White noted that, while he disagreed with *Griffith's* rejection of the use of selective prospectivity in criminal cases, he would follow that principle in civil cases on the grounds of *stare decisis*. *See id.* at 545.

113. *Id.* at 548 (Blackmun, J., concurring in the judgment).

114. *Id.* at 549 (Scalia, J., concurring in the judgment) (quoting U.S. CONST. art. III, § 1, cl. 1).

checks upon judicial law-making; to eliminate [it] is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches."¹¹⁵ With *Beam*, the Court had taken a large step towards overruling *Chevron Oil*, but had not yet found a clear majority to do so.

In 1993, the Court found that majority, overruling *Chevron Oil* in the case of *Harper v. Virginia Department of Taxation*.¹¹⁶ In the 1989 case of *Davis v. Michigan Department of Treasury*,¹¹⁷ the Court declared a state tax on federal retirement benefits unconstitutional.¹¹⁸ The Supreme Court of Virginia, applying the *Chevron Oil* test, found that *Davis* did not apply retroactively to taxes imposed before it was decided.¹¹⁹ The U.S. Supreme Court reversed, holding that a rule of federal law, once announced and applied by the Court, must be given retroactive effect in all cases on direct review by all courts, except where the question has been expressly reserved.¹²⁰ The Court reiterated the "two basic norms of constitutional adjudication" that opposed prospectivity: first, the nature of judicial review as distinct from legislation, and second, the need to treat similarly situated parties the same.¹²¹ To uphold these norms, the Court expressly extended *Griffith's* ban on selective prospectivity to the civil context and intimated, without holding, that pure prospectivity might also be impermissible.¹²²

In a concurring opinion, Justice Scalia elaborated on the criticism of prospectivity he had advanced in *Beam*. He called prospective decisionmaking "the handmaid of judicial activism, and the born enemy of *stare decisis*," developed in the "heyday of legal realism" for the avowed purpose of making it easier to

115. *Id.* at 549 (Scalia, J., concurring in the judgment).

116. 509 U.S. 86, 97 (1993).

117. 489 U.S. 803 (1989).

118. *Id.* at 817.

119. *Harper v. Va. Dep't of Taxation*, 401 S.E.2d 868, 873 (Va. 1991), *rev'd*, 509 U.S. 86 (1993).

120. *Harper*, 509 U.S. at 97.

121. *Id.* at 95.

122. *See id.* at 97 ("Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'" (quoting *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting))). Pure prospectivity entails "disregard[ing] current law"—saying what the law is, and at the same time refusing to apply it.

overrule prior precedent.¹²³ On the other hand, fully retroactive decisionmaking is the tradition of the courts, and forms “a principle distinction between the judicial and the legislative power,” as recognized by Blackstone.¹²⁴ Justice Scalia drew support from an observation of nineteenth-century Michigan Supreme Court Chief Justice Thomas Cooley:

It is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.¹²⁵

Full retroactivity, Justice Scalia argued, is an inherent aspect of the judicial function.¹²⁶

With *Harper*, the Supreme Court came virtually full circle in its approach to prospective decisionmaking. The Court has now decisively rejected selective prospectivity in both the criminal and civil contexts and indicated that pure prospectivity may also be forbidden. The two central reasons the Court has repeatedly cited for rejecting prospectivity are: (1) the nature of the judicial function, and (2) the need for the equitable treatment of litigants. The first reason is that the judicial role is one of deciding cases brought by the parties before the court; the court can say what the law is only in relation to an actual dispute before it. On this understanding, pure prospectivity, by which the court makes a change in the law for the future without applying it to the case at hand, is an illegitimate exercise of legislative power. The second reason is that treating similarly situated parties the same is a central requirement of justice. Selective prospectivity creates two classes of law for two individuals whose cases might have arisen at the same time: the party before the court gets the benefit of the new law, while the party waiting to be heard is shut out. This disparate treatment is in-

123. *Id.* at 105 (Scalia, J., concurring).

124. *Id.* at 107.

125. *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91 (1st ed. 1868)).

126. *See id.*

herently inequitable, and makes selective prospectivity impermissible.¹²⁷

The history of prospectivity at the federal level involves dueling accounts of fairness in adjudication. On the one hand, Justice Cardozo argued for prospectivity by pointing out that retroactive decisionmaking could create great hardship.¹²⁸ Unanticipated legal changes that have retroactive effect create unpredictability, leaving individuals unable to conform their conduct to the law. It is chiefly on this account that retroactive criminal legislation has traditionally been seen as a severe abuse of power in Anglo-American legal history.¹²⁹ Retroactive decisionmaking, particularly when it upsets reliance interests like those in property, contract, or tax cases, causes a similar kind of unfairness.

On the other hand, Justices Harlan and Scalia emphasized the unfairness inherent in prospectivity: that similarly situated litigants would be treated differently based on nothing more than the accident of whose case arrived in court first. For example, in the case of *Molitor v. Kaneland Community Unit District 302*,¹³⁰ the Illinois Supreme Court used selective prospectivity to end school district sovereign immunity.¹³¹ The case involved a school bus that was driven off the road, hit a cul-

127. Though the Supreme Court has never held so, selective prospectivity also appears to be a clear-cut violation of the Equal Protection Clause of the Fourteenth Amendment. See Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CAL. L. REV. 1677, 1690 n.83 (“Giving one person the benefit of a particular rule of law but denying it to another identically situated person: what could be a plainer violation?”).

128. See CARDOZO, *supra* note 45, at 142–43.

129. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (opinion of Chase, J.) (“All [ex post facto criminal laws] are manifestly unjust and oppressive.”); 1 BLACKSTONE, *supra* note 4, at *46 (“[A]ll punishment for not abstaining [from an ex post facto criminal law] must of consequence be cruel and unjust.”); THE FEDERALIST NO. 84, at 418 (Alexander Hamilton) (Terence Ball ed., 2003) (“[T]he subjecting of men to punishment for things which, when they were done, were breaches of no law . . . ha[s] been in all ages [one of] the favourite and most formidable instruments of tyranny.”); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES, 379, 379 (J. Jefferson Looney et al. eds., 2009) (“[E]x post facto laws are against natural right . . .”).

130. 163 N.E.2d 89 (Ill. 1959), *superseded by statute*, Local Governmental and Governmental Employees Tort Immunity Act, 1965 Ill. Laws 2983, *as recognized in* *Murray v. Chi. Youth Ctr.* 864 N.E.2d. 176 (Ill. 2007).

131. *Id.* at 96–97.

vert, exploded, and burned, injuring the eighteen young students inside.¹³² The court's use of selective prospectivity granted relief to the student who brought the suit while protecting the reliance interests of the state's school districts, many of which had chosen not to take out insurance based on the protection afforded them by the immunity rule.¹³³ Yet the court's decision meant that the seventeen other youths in the very same bus crash would be barred from relief, simply because their cases would reach the court after their fellow student's.¹³⁴ This type of arbitrary distinction in the law is also deeply unfair.

The choice between prospectivity and retroactivity, then, appears to involve a choice between two kinds of unfairness. Of the two—(1) unforeseeability of what the law is at any given time, and (2) arbitrary treatment of similarly situated litigants¹³⁵—the first initially seems more troubling. After all, there are few concepts more central to the rule of law than that the law should be known in advance so that citizens can conform their actions to it. Justice Scalia made this point himself when referring to Caligula's practice of posting his pronouncements high on columns so that the people would be unable to read them and therefore easier to condemn for disobedience.¹³⁶ Unforeseeability implicates the great mass of people, while selective prospectivity singles out only one individual for special—typically beneficial—treatment. Thus if a given change

132. *Id.* at 104 (Davis, J., dissenting).

133. *See id.* at 97–98 (majority opinion).

134. *See id.* at 104 (Davis, J., dissenting).

135. Pure prospectivity does not present the problem of arbitrary treatment of similarly situated parties because it draws a distinction in the law based on when the facts of the case occurred rather than when they came before the court. But courts have rarely decided cases purely prospectively, primarily because it denies a litigant the benefit of his own success, results in an advisory opinion, and acts in a frankly legislative fashion (as it does not even connect the change in law it announces to the decision of a particular case). *See Kay, supra* note 21, at 217.

136. *See Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) (comparing the Court's use of legislative history to expand a criminal statute beyond its text to Caligula's practice of putting his laws on high pillars to ensnare the people); *cf. Antonin Scalia, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (incorrectly relating the same story about Nero). This story about Caligula can be found in 4 CASSIUS DIO, ROMAN HISTORY 384–85 (Herbert Baldwin Foster trans., 1905) and Suetonius, THE TWELVE CAESARS 174 (Michael Grant ed., Robert Graves trans., Penguin Books rev. ed. 1979).

is to be implemented, prospective application appears to be the fairer path.

But this comparison presumes what is at issue: the inevitability of a given legal change. This was the point made by Justice Harlan in *Mackey*. While he had previously seen prospectivity as a way of limiting the harmful effects of changes in the law, others had seen it as a way of enacting changes that could never have been imposed retroactively, precisely because it would have been too harmful to do so.¹³⁷ Though prospectivity may be a fairer way to implement a given legal change than retroactivity, a rule of mandatory retroactivity *for that very reason* prevents courts from undertaking disruptive legal changes. Like his fellow Realists, Chief Justice Traynor embraced prospectivity on just this account:

A court usually will not overrule a precedent even if it is convinced that the precedent is unsound, when the hardship caused by a retroactive change would not be offset by its benefits. The technique of prospective overruling enables courts to solve this dilemma by changing bad law without upsetting the reasonable expectations of those who relied on it.¹³⁸

As Traynor's point makes clear, comparing the fairness of retroactive and prospective decisionmaking is largely missing the point of prospectivity. Under the traditional rule of retroactivity, the very unfairness of unforeseeable change acts as a restraint on judicial lawmaking and a prevention of the unfair consequences that would result from it.¹³⁹ Meanwhile the unfair arbitrariness of prospectivity is a regular part of its operation. On this understanding, the Court has ultimately come to

137. See *Mackey v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in the judgment).

138. Traynor, *supra* note 2, at 541–42; see also Levy, *supra* note 10, at 28 (describing prospective overruling as a way of facilitating “more effective and defensible judicial lawmaking”).

139. See Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 226 (1965) (“Forcing courts to overrule retroactively or not at all tends to minimize objectionable judicial legislation—that is, judicial legislation that is in some way disruptive of the harmonious functioning of a multipartite government—by rendering it difficult for a court to overrule a prior decision because of the injury that will result from retroactive application of the newly announced rule to interests that have been created in reliance upon the old rule.”).

the right conclusion in describing prospectivity as the more unfair regime of the two.

In *Harper*, the Court rejected prospectivity because it violates the nature of the judicial function and treats similarly situated litigants differently. While these two reasons for rejecting prospectivity are equally applicable to both federal and state courts, *Harper's* holding applies only to rules of federal law—*Sunburst Oil* still recognizes the freedom of state courts to prospectively apply their own interpretations of state law.¹⁴⁰ In the exercise of this freedom, state supreme courts have largely continued their use of prospectivity during the decades since *Harper* was decided.

B. State Law

Prospective decisionmaking became common at the state level after *Sunburst Oil*.¹⁴¹ Following *Erie Railroad Co. v. Tompkins*¹⁴² in 1938, the federal government ceased to create general common law¹⁴³—leaving to the state courts the development of the bulk of common law doctrine. This responsibility underlies state courts' attachment to prospectivity, because the arguments in favor of nonretroactivity apply with their greatest force to common law decisionmaking. Since time immemorial, common law judges have been accustomed to adapting the law to fit new circumstances.¹⁴⁴ Llewellyn once memorably described the common law as a "quest [that] consists in a constant re-examination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow."¹⁴⁵ In such a system, where judges are positively expected, perhaps even duty-bound, to keep the law in line with policy, the appeal of prospective decisionmaking is intuitive. The retroactivity or prospectivity of a decision is only significant when a court is implementing a change in the law. Pro-

140. See *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100 (1993).

141. See *Kay*, *supra* note 21, at 212–13.

142. 304 U.S. 64 (1938).

143. See *id.* at 78.

144. See, e.g., Oliver Wendell Holmes, Jr., *THE COMMON LAW* 1 (1881) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

145. LLEWELLYN, *supra* note 43, at 36.

spective decisionmaking allows judges to change the law for the future without upsetting reliance interests created by precedent.

Reliance interests weigh particularly heavily in the private law context, especially in the areas of property and contract. In the pre-New Deal era, vested private rights were at times considered to be inviolable by both courts and legislatures.¹⁴⁶ By contrast, public rights, as creatures of government power, were broadly subject to retrospective alteration.¹⁴⁷ The protected status of private rights in this era was the impetus for some of the Supreme Court's earliest endorsements of prospectivity. In *Gelpcke v. City of Dubuque*,¹⁴⁸ the Court held that a vested private right could not be upset by a retroactive overruling.¹⁴⁹ The 1846 Iowa Constitution prohibited the state from creating any debts greater than \$100,000.¹⁵⁰ In 1857, the city of Dubuque issued bonds exceeding that amount to fund the construction of a railroad.¹⁵¹ A series of Iowa Supreme Court cases held that the constitutional debt limit did not apply to municipalities.¹⁵² Then an 1862 Iowa Supreme Court case reversed course and interpreted the constitution to limit municipal debt.¹⁵³ The question before the U.S. Supreme Court was whether the 1862 decision was to be given retrospective effect, thereby invalidating the bonds issued by Dubuque. The Court found that the bonds had created a vested private right, and as such, could not be altered by a retroactive overruling:

However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any

146. See THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTION TO U.S. LAW: PROPERTY* 237 (2010).

147. See Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 *GEO. L.J.* 1015, 1027–36 (2006).

148. 68 U.S. (1 Wall.) 175 (1863).

149. *Id.* at 206.

150. *Id.* at 204.

151. *Id.* at 178.

152. See *id.* at 205.

153. See *State ex rel. Burlington & Mo. River R.R. Co. v. Wapello Cty.*, 13 Iowa 388, 423 (1862).

subsequent action of legislation, or decision of its courts altering the construction of the law.”¹⁵⁴

Thus, to avoid upsetting a vested private contract right, the Court required that the Iowa Supreme Court’s decision be applied prospectively only.

As the Court’s approach in *Gelpcke* indicates, prospectivity is a tool particularly well-suited for dealing with change in the private law. For example, property law generates strong reliance interests, as individuals consciously rely on existing law to order their affairs.¹⁵⁵ At the same time, property law is a field in which ancient common law rules draw little attention from the legislature.¹⁵⁶ This makes prospectivity both useful and necessary if the law is to be kept up to date with the changing conditions of society. The same arguments apply to contract law.¹⁵⁷ Tort law, by contrast, does not typically create such reliance interests, because few people plan to be involved in a tort.¹⁵⁸ As a result, tort cases do not call as regularly for prospectivity as a means of softening the blow of a dramatic change in the law.¹⁵⁹ Nevertheless, as discussed above in *Molitor*,¹⁶⁰ tort cases can also at times benefit from the flexibility made possible by prospectivity.

The argument for prospectivity in common law cases is also stronger on grounds of authority. In the field of statutory law, at least on some accounts, the task of the judiciary is to interpret the preexisting work of the legislature.¹⁶¹ With the ac-

154. *Gelpcke*, 68 U.S. (1 Wall.) at 206 (quoting *Ohio Life Ins. & Tr. Co. v. Debolt*, 57 U.S. (16 How.) 416, 432 (1853)).

155. See *Currier*, *supra* note 139, at 242.

156. See Cody Blake Bartlett, *Prospective Overruling and Property Law*, 18 CASE W. RES. L. REV. 1205, 1205–06 (1967).

157. See ATIYAH & SUMMERS, *supra* note 15, at 146; Paul J. Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70 n.47 (1965).

158. *Currier*, *supra* note 139, at 244.

159. See *id.*

160. See *supra* text accompanying notes 130–34.

161. See, e.g., *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 267 (2010) (statement of Elena Kagan) (“I think [a statement by an Israeli judge] means [he thinks] that the Court can change a statute and I think that that’s wrong.”). But see *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 357 (7th Cir. 2017) (en banc) (Posner, J., concurring) (“I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are im-

ceptance of this secondary role would seem to come a limitation on saying that the law once meant one thing, but now means another. This is at least true for those who argue that judges must give texts the meaning they had when originally adopted.¹⁶² By contrast, even the most conservative jurists accept that judges make the common law.¹⁶³ Within the zone of that well-established responsibility, the assumption of the power to say both what the law is, and when it will be effective, seems much more reasonable.

Even so, advocates for prospectivity have rarely limited their arguments to the domain of private law. Justice Cardozo in *Sunburst Oil* noted that prospective decisionmaking by state courts is constitutional “whether the subject of the new decision is common law or statute.”¹⁶⁴ Chief Justice Traynor made the same point, arguing that “[w]hen a judge does overrule a precedent, it matters little whether it related only to the common law or to the interpretation of a constitution or statute.”¹⁶⁵ And on an empirical basis, prospective decisionmaking may be more common for new statutory interpretations than for new common law rules.¹⁶⁶ Nevertheless, while prospective decisionmaking has never been limited to the private law domain, the common law tradition has been a critical tool in framing the use of prospectivity.¹⁶⁷ Because of the historical concern for vested private rights, the strength of reliance interests in private law domains, and the traditional authority of judges over the development of the common law, the popularity of prospectivity among the common law judges of state courts is unsurprising.

Against this backdrop, the U.S. Supreme Court’s rejection of prospectivity in *Harper* was met with strong disagreement in

posing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted.”)

162. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78 (2012).

163. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 10 (1997).

164. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932) (citations omitted).

165. Traynor, *supra* note 2, at 541.

166. See Kay, *supra* note 21, at 241.

167. See, e.g., Bartlett, *supra* note 156, at 1206 (“[P]rospective overruling is . . . the highest form of the common law tradition.”)

the state courts—what the Montana Supreme Court has called the “Revolt in the Provinces.”¹⁶⁸ *Harper* itself only mandated that courts apply federal rules of law retroactively; it said nothing about applications of state law. At the same time, the case’s reasons for abandoning prospectivity applied with equal force to applications of state law by state courts. This led many state courts to consider whether they should continue their use of prospectivity and the *Chevron Oil* test, or adopt a rule of virtually mandatory retroactivity as *Harper* had for federal law. Almost every state that has considered the question has declined to follow the Supreme Court’s reasoning in *Harper* and retained *Chevron Oil* or a variation thereof.¹⁶⁹

In the 1994 case of *Beavers v. Johnson Controls World Services, Inc.*,¹⁷⁰ the New Mexico Supreme Court offered an extended analysis of *Harper* and its justifications for adhering to the test in *Chevron Oil*. The case involved a classic instance of common law development: the recognition of a new cause of action for prima facie tort.¹⁷¹ The question facing the court was whether the new cause of action, first recognized by the court in 1990,¹⁷² should be retroactively applied to conduct occurring before that time.¹⁷³ The court had to decide whether to follow the approach recently advanced by the U.S. Supreme Court in *Harper* or stick with the *Chevron Oil* analysis it had adopted in 1982.¹⁷⁴ It chose the latter.¹⁷⁵

168. *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483, 488 (Mont. 2004).

169. *See, e.g., Ex parte Capstone Bldg. Corp.*, 96 So.3d 77, 90–95 (Ala. 2012); *Citicorp v. Franchise Tax Bd.*, 100 Cal. Rptr. 2d 509, 525 (Ct. App. 2000); *Findley v. Findley*, 629 S.E.2d 222, 228 (Ga. 2006); *Aleckson v. Vill. of Round Lake Park*, 679 N.E.2d 1224, 1227 (Ill. 1997); *Commonwealth v. Dagley*, 816 N.E.2d 527, 533 n.10 (Mass. 2004); *Bezeau v. Palace Sports & Entm’t, Inc.*, 795 N.W.2d 797, 800–01 (Mich. 2010); *Dempsey*, 104 P.3d at 488–89; *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1380–81 (N.M. 1994); *City of New Bern v. New Bern-Craven Cty. Bd. of Ed.*, 450 S.E.2d 735, 742–43 (N.C. 1994); *DiCenzo v. A-Best Prods. Co.*, 897 N.E.2d 132, 137–39 (Ohio 2008); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 351–52 (W. Va. 2009); *Wenke v. Gehl Co.*, 682 N.W.2d 405, 428–30, 430 n.43 (Wis. 2004). *But see State v. Styles*, 693 A.2d 734, 735 (Vt. 1997) (acknowledging *Harper* as congruous with the court’s own rule of retroactivity).

170. 881 P.2d 1376 (N.M. 1994).

171. *Id.* at 1377.

172. *See Schmitz v. Smentowski*, 785 P.2d 726, 735 (N.M. 1990).

173. *Beavers*, 881 P.2d at 1377.

174. *Id.* at 1377–78. The New Mexico Supreme Court adopted *Chevron Oil* in *Wherry v. Wherry*, 652 P.2d 1188 (1982).

175. *Beavers*, 881 P.2d at 1378.

The New Mexico Supreme Court framed the issue of mandatory retroactivity versus optional prospectivity as “one of the great jurisprudential debates of the twentieth century.”¹⁷⁶ It noted at the outset that *Sunburst Oil* established the question as one that was for state courts to resolve for themselves.¹⁷⁷ The court then made clear that its “juristic philosophy” diverged sharply from that of the *Harper* majority, and particularly from that of Justice Scalia.¹⁷⁸ Accusing Justice Scalia of “hold[ing] (or pretend[ing] to hold) a conception of the nature of law as something fixed and nearly immutable,”¹⁷⁹ the court took issue with his support for retroactivity as a means of restraining judges:

Justice Scalia apparently does not *really* believe that the law is something courts search for, and discover, as if it were so much buried treasure. Rather, he seems to urge that courts should behave in this way so as to maximize restraint on what some might call judicial legislation and minimize temptation to stray from what he conceives to be the proper judicial role—applying settled law to conduct that has already occurred by the time of a lawsuit.¹⁸⁰

The New Mexico high court preferred Justice O’Connor’s *Harper* dissent,¹⁸¹ which endorsed *Chevron Oil* and stated that “when the Court changes its mind, the law changes with it.”¹⁸²

Moving past the debate over the declaratory theory, the court then directly addressed the *Harper* majority’s two stated reasons for mandating retroactivity: (1) the nature of judicial review, and (2) the need to treat similarly situated parties the same.¹⁸³ The court found that the first *Harper* objection was limited to the nature of the federal Constitution and had no relevance to New Mexico courts.¹⁸⁴ Article VI of the New Mexico Constitution vests the “judicial power of the state” in various

176. *Id.* at 1377.

177. *Id.* at 1380.

178. *Id.* at 1380–81.

179. *Id.*

180. *Id.* at 1380 n.5.

181. *Id.* at 1381.

182. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 115 (1993) (O’Connor, J., dissenting) (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550 (1991) (O’Connor, J., dissenting)).

183. *Beavers*, 881 P.2d at 1381.

184. *Id.*

courts, including the state supreme court.¹⁸⁵ Without elaboration, the New Mexico court found that “our conception of the judicial power under Article VI of our constitution does not lead us to conclude” that prospective judgments are prohibited.¹⁸⁶ A more recent decision by the same court has noted that the New Mexico Constitution does not expressly impose a “cases or controversies” requirement like that under Article III of the federal Constitution,¹⁸⁷ but that the exercise of “the judicial power” should still be “guided by prudential considerations,”¹⁸⁸ including concern about “the proper—and properly limited—role of courts in a democratic society.”¹⁸⁹ Nevertheless, in *Beavers* the New Mexico Supreme Court did not consider that prospectivity was inherently foreign to the meaning of “judicial power.”¹⁹⁰

The New Mexico Supreme Court gave greater credence to *Harper*’s second rationale: the inequitable nature of selective prospectivity. Although the need to treat similarly situated parties the same was “quite compelling,” the court found that it was not so powerful as to justify mandatory retroactivity.¹⁹¹ At most, it created a presumption of retroactivity that was rebuttable by an express declaration of prospective effect or “a sufficiently weighty combination of one or more of the *Chevron Oil* factors.”¹⁹² Thus, while formally acknowledging the equity problem identified in *Harper*, *Beavers* ultimately maintained an approach quite similar to the status quo under *Chevron Oil*.

As a representative of the thought process of state courts in the aftermath of *Harper*, *Beavers* is a revealing case. The New Mexico Supreme Court’s choice to address Justice Scalia’s concurrence before it analyzed the majority opinion’s grounds for overruling *Chevron Oil* is telling. The court saw the alternatives of *Harper* and *Chevron Oil* as reflecting “the great jurisprudential debate[]” about the nature of the law.¹⁹³ Fastening on Jus-

185. N.M. CONST. art. VI, § 1, cl. 1.

186. *Beavers*, 881 P.2d at 1382.

187. *New Energy Econ., Inc. v. Shoobridge*, 243 P.3d 746, 752 (N.M. 2010).

188. *Id.* (quoting N.M. *Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 847 (N.M. 1998)).

189. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

190. *Beavers*, 881 P.2d at 1382.

191. *Id.*

192. *Id.* at 1383.

193. *Id.* at 1377.

tice Scalia's quotation of Blackstone, the court attempted to reduce *Harper* to a stealth reassertion of the declaratory theory, and pronounced that New Mexico would have none of it. This move allowed the court to evade the long line of criticism developed by Justices Black, Harlan, and Scalia about the separation of powers problems raised by prospectivity. Rather than engage with these arguments, which apply equally to state courts as to federal, the New Mexico Supreme Court pointed to the different standards prevailing under the state constitution and the court's long history of endorsing prospectivity.

That this discussion took place in a case concerning the application of a new common law cause of action is unsurprising. In common law decisionmaking, where, as discussed above, judges are universally acknowledged to play an important and active role in changing the law, rhetorical cautions about the dangers of judicial legislation carry the least sway. The general reluctance of state courts to reconsider *Chevron Oil* in the aftermath of *Harper* must be seen as linked partially to their desire to maintain the flexibility felt to properly attend the exercise of common law decisionmaking. It is at this point that the comparative tradition of English common law courts becomes instructive.

II. PROSPECTIVE DECISIONMAKING IN ENGLAND

When, in 1960, Llewellyn described the "Grand Style of the Common Law" as one in which judges were responsible as craftsmen for the "on-going renovation of doctrine,"¹⁹⁴ there must have been few left who would have contended otherwise. In the 1960s and 1970s, common law innovation reached a peak in America, with state high courts spearheading radical reforms like strict products liability, the replacement of contributory negligence with comparative fault, and the abrogation of governmental, charitable, and parental immunity.¹⁹⁵ In 1968, Professor Fleming James captured the prevailing academic opinion when he stated, "The proposition that changing the

194. LLEWELLYN, *supra* note 43, at 36.

195. See ATIYAH & SUMMERS, *supra* note 15, at 136.

law is properly and exclusively the function of the legislature runs counter to Anglo-American tradition.”¹⁹⁶

As P.S. Atiyah and Robert S. Summers noted in their landmark comparative study, *Form and Substance in Anglo-American Law*, “Insofar as James included the English tradition in his comments, and insofar as he may have implied that the change in question was the kind of change made by courts in modern times, he was certainly wrong.”¹⁹⁷ While not rejecting the power of courts to modify the common law, English practice has long placed greater restrictions on their ability to do so. Given the common origins of the English and American legal systems and the mutually acknowledged importance of *stare decisis* to both systems, this difference is remarkable. Atiyah and Summers’ general thesis is that the English legal system is more formal and the American more substantive, reflecting deep differences in legal style, legal culture, and visions of law between the two countries.¹⁹⁸ These differences are manifested in the divergent approaches of American state courts and English courts to prospective decisionmaking.¹⁹⁹

From 1861 to 1966, the House of Lords, then the highest English court, entirely disclaimed an ability to overrule its own decisions.²⁰⁰ In the 1861 case of *Beamish v. Beamish*,²⁰¹ the Lord Chancellor had dissented from a previous case that had addressed the same question—whether a marriage not presided

196. Fleming James, Jr., *Comment on Maki v. Frelk*, 21 VAND. L. REV. 891, 892 (1968).

197. ATIYAH & SUMMERS, *supra* note 15, at 137 n.93.

198. *See id.* at 1.

199. Atiyah and Summers’ comparative analysis was published in 1987, before the U.S. Supreme Court strictly limited the use of prospectivity in the civil context in *Beam* (1991) and *Harper* (1993). Thus their work does not address the current congruity between the federal approach to prospective decisionmaking and longstanding English practice.

200. *See Beamish v. Beamish* (1861) 11 Eng. Rep. 735 (HL) 761 (appeal taken from Ir.) (the rule was affirmed in *London Tramways v. London County Council* [1898] AC 375 (HL) 381 (appeal taken from Eng.)); Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL) 1234. Following the Constitutional Reform Act of 2005, the Supreme Court of the United Kingdom replaced the House of Lords as the United Kingdom’s court of last resort in 2009. *See* Constitutional Reform Act 2005, c. 4 (Gr. Brit.); The Supreme Court Rules 2009, SI 2009/1603, art. 1, ¶ 1 (Gr. Brit.).

201. (1861) 11 Eng. Rep. 735 (HL) 761 (appeal taken from Ir.).

over by a priest is valid.²⁰² Nevertheless, he found that the House was powerless to overrule its own decision:

The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.²⁰³

This strict standard illustrates the heightened importance with which precedent has traditionally been treated in English law.

In 1966 the House of Lords issued a Practice Statement asserting its power to depart from its own previous decisions.²⁰⁴ The Statement briefly noted that a rigid adherence to precedent could lead to injustice and impede the proper development of the law.²⁰⁵ Even while declaring the House's power to overrule its prior decisions, the Statement also cautioned that creating retrospective changes to the law of contracts, property, and fiscal arrangements would be particularly dangerous.²⁰⁶ Since 1966, the House of Lords has exercised its power to overrule itself sparingly.²⁰⁷ Its most significant use of the power to overrule was in *Miliangos v. George Frank (Textiles) Ltd.*,²⁰⁸ in which the court overruled a 300-year-old precedent that judgments could be given only in pounds sterling.²⁰⁹ Even today, lower courts remain tightly bound to their own precedent: the English Court of Appeal does not have the power to overrule its own decisions, with strictly limited exceptions.²¹⁰

202. *Id.* at 760 (citing *R v. Millis* (1844) 8 Eng. Rep. 844 (HL) (appeal taken from Ir.)).

203. *Id.* at 761.

204. Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (HL) 1234.

205. *Id.*

206. *Id.*

207. ATIYAH & SUMMERS, *supra* note 15, at 139.

208. [1976] AC 443 (HL) (appeal taken from Eng.).

209. *See id.* at 470 (Lord Wilberforce); ATIYAH & SUMMERS, *supra* note 15, at 139–40.

210. *See Davis v. Johnson* [1979] AC 264 (HL) 328 (Lord Diplock) (appeal taken from Eng.) (reaffirming “expressly, unequivocally and unanimously” that the Court of Appeal is bound by its own prior decisions); *Young v. Bristol Aeroplane Co.* [1944] KB 718 (C.A.) 729–30 (Eng.) (identifying narrow grounds on which the Court of Appeal would not be bound by its past decisions); *see also* CROSS & HARRIS, *supra* note 26, at 108–16.

English courts do, of course, change the law. The strict practices regarding overruling by the House of Lords noted above apply only to express overruling, not implicit overruling, the creation of exceptions, and the gradual extension of doctrine. To give only one famous example, the House of Lords' decision in *Donoghue v. Stevenson*²¹¹ radically altered English tort law by establishing a duty of care owed by the manufacturer of a product to the product's end user.²¹² The House of Lords was free to do so, despite its self-imposed ban on overruling, because, as Lord Macmillan noted, there was no prior decision by the House on the precise point at issue.²¹³ Lord Macmillan argued that there was no "unbroken and consistent current of decisions" holding that a manufacturer owed no duty of care to a consumer in the absence of a contract.²¹⁴ He saw the extension of a duty of care to the manufacturer as dictated by "justice and common sense."²¹⁵ Thus the House of Lords was free to fashion a rule of law that was, as Lord Devlin later called it, "revolutionary in the legal world."²¹⁶ The story could be repeated in any area of law—English judges recognize their role as lawmakers and exercise their power to make the law, despite the greater customary restrictions on their ability to do so.²¹⁷

Nevertheless, despite agreeing with American judges and scholars like Cardozo, Llewellyn, and Traynor that the common law judge is a lawmaker, English judges and judicial practice have rejected prospectivity in all but the most extreme circumstances. Lord Reid, while dismissing the declaratory theory as a "fairy tale," at the same time denounced prospective decisionmaking as an abuse of the judicial power:

We cannot say that the law until yesterday was one thing, from tomorrow it will be something different. That would indeed be legislating. I believe that in America some exper-

211. [1932] AC 562 (HL) (appeal taken from Scot.).

212. *See id.* at 599 (Lord Atkin).

213. *Id.* at 609 (Lord Macmillan). The case was a Scottish appeal, which had to be decided according to Scots law, but it proceeded on the assumption that the applicable law was the same in England and Scotland. *See id.* at 618. *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402 (Exch.), was decided in the Exchequer of Pleas.

214. *Donoghue* [1932] AC at 608.

215. *Id.* at 621.

216. PATRICK DEVLIN, *THE JUDGE* 11 (1979).

217. *See supra* note 25 quoting English courts and judges rejecting the declaratory theory and acknowledging the proper role of judges as lawmakers.

iments of this kind have been made and I should like to know more about them. I have some doubt whether we could follow.²¹⁸

Lord Devlin held a similar position: recognizing the essential role of judge as common law maker, while rejecting the propriety of prospectivity as a judicial tool. He stated that “in the common law there is a general warrant for judicial lawmaking,”²¹⁹ and “[i]n the common law development is permitted, if not expected.”²²⁰ But he nevertheless recognized the value in retaining mandatory retroactivity as a check on the scope of judicial change to the law: “If it does become necessary to choose between a change in the law and a real injustice caused by retroactivity in the case at bar, surely the choice must be against change in the law; that puts a limit on judicial activism.”²²¹ On the American adoption of prospective decisionmaking, Lord Devlin stated, “I do not like it. It crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators.”²²² Lord Devlin recognized that although retroactivity was a fiction necessitated by the now-rejected declaratory theory, that fiction played a valuable role:

It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts the power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.²²³

Thus, in Lord Devlin’s view, mandatory retroactivity was essential to preserving the nature of the judicial function, even after the demise of the declaratory theory.

These judicial doubts about non-retroactivity are borne out in practice: no English court has ever prospectively overruled a

218. Reid, *supra* note 25, at 23; *see also* *W. Midland Baptist (Trust) Assoc. (Inc.) v. Birmingham Corp.* [1970] AC 874 (HL) 898–99 (Lord Reid) (appeal taken from Eng.) (“We cannot say that the law was one thing yesterday but is to be something different tomorrow.”).

219. DEVLIN, *supra* note 216, at 10.

220. *Id.*

221. *Id.* at 11.

222. *Id.* at 12.

223. *Id.*

case.²²⁴ In a 2005 case called *In re Spectrum Plus Ltd.*,²²⁵ the House of Lords recognized in dicta for the first time its power to decide cases prospectively, but emphasized that the power should only be used in an altogether exceptional situation.²²⁶ The case involved the question of whether a charge over book debts was fixed or floating.²²⁷ This affected their priority of payment under an insolvency statute that gave priority to preferential creditors for payment out of assets subject to a floating charge.²²⁸ A previous case in the Chancery Division of the High Court, *Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd.*,²²⁹ had defined a fixed charge in such a way that the Spectrum charge qualified as fixed.²³⁰ With this understanding, a large number of banks not involved in the litigation had used similar charging arrangements, believing that under the law they would take priority over other debts.²³¹

Because the case involved these strong reliance interests, the House of Lords examined whether it had the power to overrule *Siebe Gorman* prospectively. All seven Lords on the panel found that it did, but that the present case was not sufficiently exceptional to justify such an action. Lord Nicholls noted what he distinguished as the “practical” and “principled” arguments against prospective decisionmaking.²³² Practically, prospectivity creates problems of discrimination.²³³ A purely prospective decision means that a successful litigant will not receive the benefit of the new law.²³⁴ A selectively prospective decision treats similarly situated individuals differently.²³⁵ Selective prospectivity also makes the law arbitrary: the law applied in a particular litigant’s case depends on the time that person brought suit.²³⁶ The principled argument against prospectivity

224. See Connolly, *supra* note 24, at 48.

225. [2005] UKHL 41, [2005] 2 AC 680 (HL) (appeal taken from Eng.).

226. *See id.* at [41], [2005] 2 AC at 699 (Lord Nicholls).

227. *See id.* at [76], [2005] 2 AC at 710–11 (Lord Scott of Foscote).

228. *See id.* at [76], [2005] 2 AC at 711.

229. [1979] 2 Lloyd’s Rep. 142 (Ch).

230. *See In re Spectrum* [2005] UKHL 41, [86], [2005] 2 AC at 713 (Lord Scott).

231. *See id.* at [43], [2005] 2 AC at 700 (Lord Nicholls).

232. *Id.* at [26], [2005] 2 AC at 695.

233. *See id.* at [26], [2005] 2 AC at 696.

234. *See id.* at [27], [2005] 2 AC at 696.

235. *See id.*

236. *See id.*

is that it is “outside the constitutional limits of the judicial function,” “usurp[s] . . . the legislative function,” and “robs a ruling of its essential authenticity as a judicial act.”²³⁷ A purely prospective judgment does not decide an actual dispute between parties based on the court’s statement of what the law is—the hallmark of the judicial function.

Lord Nicholls saw the principled argument as needing the qualification that judges have a legitimate role to play as makers of the common law within their appropriate bounds. He noted that prospective decisionmaking might in some cases be a “proper exercise of judicial power.”²³⁸ Lord Nicholls adopted the approach of “[n]ever say never,” admitting the possibility of using prospectivity in a future case under “altogether exceptional[]” circumstances.²³⁹ He then ended by noting that the present case was “miles away from the exceptional category in which alone prospective overruling would be legitimate.”²⁴⁰

Lord Hope agreed with Lord Nicholls that prospectivity might be appropriate in some future case, but was not in the present one. He stated that “in almost every case that can be imagined the exercise of the judicial power will require the House simply to declare what the law is, with the inevitable result that it will apply to other comparable cases whenever the events occurred.”²⁴¹ He would not rule out prospective application of a decision, but only “in a wholly exceptional case.”²⁴² Lord Scott agreed with Lord Nicholls’s “never say never” approach, while remarking that an instance where prospective application of a new interpretation of a statute would be appropriate was inconceivable to him.²⁴³ The remaining Lords agreed that prospective decisionmaking might be appropriate, but was certainly not in the present case.²⁴⁴

237. *Id.* at [28], [2005] 2 AC at 696.

238. *Id.* at [39], [2005] 2 AC at 699.

239. *Id.* at [41], [2005] 2 AC at 699.

240. *Id.* at [43], [2005] 2 AC at 700.

241. *Id.* at [71], [2005] 2 AC at 709 (Lord Hope).

242. *Id.* at [74], [2005] 2 AC at 710.

243. *See id.* at [126], [2005] 2 AC at 726 (Lord Scott).

244. *See id.* at [45], [2005] 2 AC at 700 (Lord Steyn); *id.* at [161], [2005] 2 AC at 736 (Lord Walker of Gestingthorpe); *id.* at [162], [2005] 2 AC at 736–37 (Baroness Hale of Richmond); *id.* at [165], [2005] 2 AC at 737 (Lord Brown of Eaton-under-Heywood).

Following *Spectrum*, the Supreme Court of the United Kingdom has reiterated in dicta its belief in that court's inherent power to limit the retrospective effect of its decisions,²⁴⁵ but has never found occasion to do so. Thus, England's "very cautious approach" to prospectivity remains in place.²⁴⁶

Spectrum's analysis of the perils of prospectivity tracks closely with that given by the Supreme Court in *Harper*. Both courts focused on the problem of treating similarly situated litigants differently, a violation of one of the most fundamental principles of justice. And both courts identified that prospectivity takes the court out of the judicial role and into the legislative. They both identified prospectivity as contrary to the judicial function, apart from the particular doctrinal confines of Article III. Though the House of Lords asserted its authority to use prospectivity in the future, neither it nor the U.K. Supreme Court has ever actually employed the technique—demonstrating English courts' hesitancy to use a measure that cuts so sharply against the grain of the judicial office. This posture, which combines a very cautious acceptance of the power to decide cases prospectively with a great reluctance to actually do so, aligns closely with the Supreme Court's holding in *Harper*. There, the Court created an exception for itself that allowed it to make an express reservation of the question of retroactivity when adopting a new rule,²⁴⁷ though with the practical effect that virtually no new rules in federal law are now applied prospectively.²⁴⁸

On the other hand, *Spectrum's* treatment of prospectivity forms a sharp contrast with that of the New Mexico Supreme Court in *Beavers*. *Beavers* noted the two rationales provided in *Harper*, but summarily dismissed the idea that the judicial function created any impediment to the use of prospectivity. The New Mexico court asserted that *Harper's* rationale on that count applied only to Article III of the federal Constitution, not to the nature of the judicial function more generally. But *Spectrum*, and the broader English tradition, is strong evidence that this is not the case. As Lord Nicholls noted, it is America, not

245. See *Cadder v. Her Majesty's Advocate* [2010] UKSC 43, [58] (Lord Hope DP) (appeal taken from Scot.).

246. Connolly, *supra* note 24, at 47.

247. See *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97–98 (1993).

248. See BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 312 (2016).

England, that is the outlier among common law jurisdictions in its casual embrace of prospectivity.²⁴⁹ English courts are not limited by a written “cases or controversies” requirement, yet the tradition of stating the law only in conjunction with deciding actual cases is so deeply rooted in English legal culture as to make prospectivity conceivable only in a “wholly exceptional case.”²⁵⁰ The English experience proves that a common law court, fully recognizing and embracing its responsibility for developing the common law,²⁵¹ can also identify the dangers posed by prospectivity and deliberately limit its use to truly exceptional circumstances. In this way, *Spectrum* demonstrates the viability of the *Harper* approach to retroactivity for American state courts.

III. CONCLUSION

American support for prospective decisionmaking has waxed and waned since the demise of the declaratory theory in the early twentieth century. The treatment of prospectivity at the Supreme Court tells the tale: acceptance, embrace, doubt, and ultimately, denial. A doctrine that at first seemed intuitively compatible with the demands of the judicial craft in the end proved both illegitimate and inequitable—a violation of the inherent nature of the judicial function and the need to apply the laws equally. Yet in many state courts, prospective decisionmaking remains as popular as ever, and mandatory retroactivity is still regarded as an outmoded Blackstonian holdover.

Insofar as state courts have declined to rein in their use of prospectivity after *Harper*, they are wrong to do so. The very problems that animated *Harper* apply with equal force to the state courts. Nor does the unique position of the state courts as developers of the common law diminish the force of *Harper*'s arguments. English courts recognize their role as developers of the common law yet, largely for the same reasons that motivated *Harper*, sharply limit prospectivity. The practice of English

249. *In re Spectrum* [2005] UKHL 41, [18], [2005] 2 AC at 693 (Lord Nicholls) (“In other common law countries prospective overruling has taken root as such only in the United States of America and India.”).

250. *Id.* at [74], [2005] 2 AC at 710 (Lord Hope).

251. *See id.* at [32], [2005] 2 AC at 697 (Lord Nicholls).

courts demonstrates that state courts can follow *Harper's* lead without falling back under the sway of Blackstone's beguiling "fairy tale."

Stephen J. Hammer