NOTE

RETROACTIVE RULEMAKING

INTRODUCTION

Can a federal agency create a new rule and use it to penalize past actions? Can the Department of Health and Human Services change Medicare reimbursement rules and use the new rules to force a hospital to refund amounts it was paid several years in the past?[1] Can the FCC set new rules reducing the scope of cellular telephone frequency licenses that it has already issued?[2] Can an application for Social Security benefits be denied because of a rule change that occurred after the application was made?[3] In *Bowen v. Georgetown University Hospital*,[4] the Supreme Court held that agencies could not adopt retroactive rules without explicit congressional authorization.[5] In the years since *Bowen*, however, courts of appeals have not applied this rule consistently. Consistent application has been difficult because of conflicting definitions of "retroactivity." These conflicting definitions flow from fundamental disagreements about the nature of "fair notice," the extent of the rights and actions that an anti-retroactivity presumption should protect, the temporal scope of such a presumption, and the necessity of reconciling ret-

1. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988).

2. *See* Mobile Relay Assocs. v. FCC, 457 F.3d 1 (D.C. Cir. 2006).

3. *See* Combs v. Comm'r of Soc. Sec., 459 F.3d 640 (6th Cir. 2006) (en banc).

4. 488 U.S. 204 (1988).

5. *Id.* at 208. The Court stated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id*. The facts of *Bowen* provide a concrete example of the kinds of retroactivity issues facing courts. Under the Medicare program, the government reimburses hospitals for services, subject to certain cost limits. In 1981, the Secretary of Health and Human Services (HHS) promulgated a new schedule of cost limits, but that schedule was invalidated by the district court. By 1984, the Secretary had properly re-promulgated essentially the same schedule, but then sought to apply the new schedule to payments HHS had made in the 1981–1984 period. The application to past payments would have resulted in the hospitals returning some of the amounts HHS previously had paid. The Supreme Court held that the Secretary's action constituted invalid retroactive rulemaking. *Id.* at 205–08.

roactivity restraints with the principle of strong judicial deference to agencies.[6]

Twelve years ago the Supreme Court affirmed the long-standing principle that federal legislation should affect future rather than past actions, noting that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[7] The Court noted that the Constitution itself prohibits at least some forms of retroactive action by the government, pointing to the Ex Post Facto Clause, the Contracts Clause, the Takings Clause, and the Bills of Attainder Clause as examples.[8] In addition to these express provisions, Congress is constrained by a judicially-created presumption that *all* laws will be interpreted to have only future effect unless the text of the statute explicitly states otherwise.[9] The Supreme Court remains active in clarifying—and perhaps modifying—this statutory presumption.[10]

Administrative agencies exercise power delegated by Congress and are required to act both within the limits given by their enabling (or organic) act and within the procedural limits established by the Administrative Procedure Act (APA).[11] The APA classifies agency actions into two main categories: rules, which are analogous to legislative acts;[12] and orders, which are

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6. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).

7. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

8. *Id.* at 266–68 (citing U.S. CONST. art. I, §§ 9–10; *id.* amend. V).

9. *See, e.g.*, *Landgraf*, 511 U.S. at 268 (stating that "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness"). The opposite is presumed of judicial decisions: rules discerned by judges apply both to future events and to the past events at issue in a given case. *See* William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 106 (1991).

10. *See, e.g.*, *Landgraf*, 511 U.S. at 268. The concurring Justices characterized *Landgraf* as a change in doctrine that "converts the 'clear statement' rule into a 'discernible legislative intent' rule . . . ." *Id.* at 287 (Scalia, J., concurring in the judgment).

11. 5 U.S.C. §§ 551–59, 701–06 (2000).

12. *See id.* § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.").

analogous to judicial decisions.[13] Agencies are also able to adopt nonlegislative rules that purport to interpret or clarify existing regulations or statutes without following the notice-and-comment procedures required of other rulemaking.[14]

As noted, Congress is subject to certain restraints regarding retroactive action, but it is not immediately clear that identical restraints bind administrative agencies. Two differences between Congress and administrative agencies support an intuition that there must be an administrative retroactivity doctrine distinct from statutory doctrine. First, the APA's definition of "rule" includes the words "future effect," but its definition of "order" does not, which suggests that the APA itself may constrain retroactive rulemaking in the agency context.[15] Second, agencies can act in both a judicial fashion (adjudication resulting in orders) and a legislative fashion (rulemaking resulting in rules), but Congress is capable of acting only legislatively.

The Supreme Court explained the agency-specific retroactivity doctrine in *Bowen*, which is commonly cited for the proposition that agency rules are presumed not to have retroactive effect unless Congress has explicitly given the agency such power.[16] Justice Scalia's concurrence[17] and the opinion of the D.C. Circuit[18] in *Bowen* are also frequently cited for the even more restrictive principle that the APA's rule-order dichotomy independently prohibits rules from having retroactive effect.[19] *Bowen*, however, has not been a very powerful tool for plaintiffs: most *Bowen*-based challenges in the courts of appeals fail. Additionally, the federal appeals courts analyzing challenges under *Bowen* have not done so in a uniform way, resulting in a

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13. *See id*. § 551(6) ("'[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.").

14. *See id.* § 553(b).

15. *See id.* § 551(4), (6).

16. *See, e.g.*, Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules absent express congressional authority.") (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988).

17. *Bowen*, 488 U.S. at 216 (Scalia, J., concurring).

18. Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750 (D.C. Cir. 1987) *aff'd*, 488 U.S. 204 (1988).

19. Because Congress possesses the power to act retroactively when it does so explicitly, it presumably has the ability to delegate that power to agencies, overriding the APA in specific statutes, if it chooses to do so. *Cf. Bowen*, 488 U.S. at 223–24 (Scalia, J., concurring) ("It is entirely unsurprising, therefore, that even though Congress wields [the power to act retroactively] itself, it has been unwilling to confer it upon the agencies.").

confusing legal landscape for agencies, regulated parties, and the public.

Part I demonstrates that most post-*Bowen* challenges to agency application of retroactive rules have failed. Part II describes the main theoretical difficulties courts of appeals have had in applying *Bowen*, mainly stemming from problems defining "retroactivity." Part III concludes with two assertions: first, that retroactivity analysis should focus on the existence (or absence) of rights, and second, that the presumption against retroactivity should be applied to all agency action, not just rulemaking.

I. ATTEMPTS TO CONSTRAIN RETROACTIVE APPLICATION OF AGENCY RULES

Given the Supreme Court's holding in *Bowen* and its long history of aversion to retroactive legislation,[20] one might expect a fairly consistent set of lower court decisions rigorously applying the principle. Instead, it appears that most cases challenging agency action under *Bowen* at the appellate level result in agency victories,[21] and

20. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 265–66 (1994) (stating that "the presumption against retroactive legislation is deeply rooted in our jurisprudence").

21. The cases cited in this Note were found by searching Westlaw for cases in which the court cited *Bowen* in analyzing a claim that a rule was impermissibly retroactive. Agency victories include the following: Am. Mining Congress v. EPA, 965 F.2d 759, 770 (9th Cir. 1992) (holding that the EPA's application of a regulation mandating storm water discharge permits for inactive mines was not retroactive as applied to parties who had purchased the inactive mines before the regulation was adopted); Ass'n of Accredited Cosmetology Schs. v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992) (holding that it was not retroactive for the Department of Education to apply new regulations that used past default rates to terminate schools from a student loan program, even when the default rates predated the adoption of the regulation); Adm'rs of the Tulane Educ. Fund v. Shalala, 987 F.2d 790, 798 (D.C. Cir. 1993) (relying upon *Cosmetology Schools* to hold that a reaudit of a medical school's past years' expenses was not retroactive when it was used to modify future reimbursements); DIRECTV, Inc. v. FCC, 110 F.3d 816, 825–26 (D.C. Cir. 1997) (holding that FCC rules changing the method by which reclaimed channels would be distributed from a pro rata distribution among existing permitees to a competitive public auction were not retroactive); Chadmoore Commc'ns, Inc. v. FCC, 113 F.3d 235, 241 (D.C. Cir. 1997) (holding that it was not retroactive for the FCC to apply changes in regulations governing construction of communications systems to applications filed before the new regulations were adopted); Bergerco Can. v. U.S. Treasury Dep't, 129 F.3d 189, 194 (D.C. Cir. 1997) (holding that it was not retroactive to apply new rules regarding collection of frozen Iraqi assets to applications that had been filed before the new rules were adopted); Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (holding that the Bureau of Prisons' changed definition of "nonviolent offense" could be applied to pending petitions for reduction of sentence under a drug abuse treatment program);

that the courts of appeals have used different analytical frameworks to evaluate retroactivity challenges.[22]

It is important to distinguish three categories of cases from the "agency victory" cases. In the first category, the agencies themselves cited *Bowen* to disclaim the power to act as the plaintiff demanded. One recent example is *Sierra Club v. Whitman*, in which the Sierra Club sought to force the EPA to backdate a rulemaking that found St. Louis to be a "nonattainment" area under the Clean Air Act.[23] Another example is *Motion Picture Association of America, Inc. v. Oman*, in which the MPAA sought to force the Copyright Office to apply a rule concerning interest on late royalty payments retroactively.[24] In both cases, the court agreed with the agency that such actions were prohibited under *Bowen*. Although these cases seem to be straightforward applications of *Bowen*, they do not represent an independent constraint on agency power. Even in the absence of *Bowen*, they likely would have resulted in agency victories under principles of deference to agency policymaking.[25]

The second category is composed of cases in which the agency was not a party to the case and consequently expressed no preference as to whether the rule be applied retroactively. These cases, generally between private parties, do not implicate the same concerns of agency power and discretion that underpin the APA and modern administrative law. Courts typically use other judicially crafted principles of notice and fairness—for example, from tort or contract law—to decide whether the

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U.S. Airwaves, Inc. v. FCC, 232 F.3d 227, 233, 236 (D.C. Cir. 2000) (holding that the FCC's changes to its financial rules were not impermissibly retroactive as applied to bidders for personal communications service licenses); Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 588 (D.C. Cir. 2001) (holding that the alteration of grace periods and late fees for certain license payments was not retroactive when applied to licenses issued before the rule change); Disabled Am. Veterans v. Sec'y of Veterans Affairs, 327 F.3d 1339, 1344–45 (Fed. Cir. 2003) (holding that the Department of Veterans Affairs was not acting retroactively in applying new evidentiary regulations to pending cases); Mobile Relay Assocs. v. FCC, 457 F.3d 1, 10–11 (D.C. Cir. 2006) (holding that the FCC's modification of cellular telephone licenses was not retroactive); Combs v. Comm'r of Soc. Sec., 459 F.3d 640, 648–49 (6th Cir. 2006) (en banc) (holding that the Social Security Administration could remove obesity from a list of presumptive disabilities and apply that change to an application for benefits that had been filed three years before the change).

22. *See infra* Part II.

23. 285 F.3d 63, 67–68 (D.C. Cir. 2002).

24. 969 F.2d 1154, 1155 (D.C. Cir. 1992).

25. For example, courts would probably defer to the agency's interpretation that its own regulation is not meant to be applied retroactively under *Seminole Rock* deference. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).

new rule should be applied retroactively. In *Jahn v. 1-800-FLOWERS.COM, Inc.*, for instance, the Seventh Circuit refused to void a contract for sale of a toll-free number when the FCC later banned the sales of these numbers.[26] Similarly, in *Sweet v. Sheahan*, the Second Circuit refused to apply a duty to warn about lead-based paint in lease agreements that predated the regulation creating the duty.[27] Because the agency was not a party in these disputes, these cases do not involve the same issues of judicial constraints upon agency power.[28]

The final category concerns retroactive application of nonlegislative rules. Under the prevailing jurisprudence in this area, interpretative nonlegislative rules do not create new policy but merely clarify and restate what the law "is and always has been."[29] The general judicial presumption against retroactive rulemaking has no effect against such a restatement. In these cases, the APA-based presumption[30] is also fatally weakened. The APA-based presumption rests on the presence of the term "future effect" in the definition of "rule."[31] Because nonlegislative rules restating or clarifying existing law are either interpretative rules or non-binding general statements of policy,[32] true nonlegislative rules cannot have any exclusively future effect. The effect of a nonlegislative rule exists either in the past and the future, in the case of an interpretive rule, or it does not exist at all, if it is a non-binding statement of policy. Challenges to nonlegislative rules nearly always result in an agency victory because, as stated earlier, courts will generally defer to agency interpretation of statutes and regulations under the principles of *Chevron*[33] and *Seminole Rock*,[34] respectively.[35]

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26. 284 F.3d 807, 811–12 (7th Cir. 2002).

27. 235 F.3d 80, 89 (2d Cir. 2000).

28. On the other hand, these cases support the argument in Part III, *infra*, that retroactivity analysis should be focused on rights (and liabilities), including those created by the common law.

29. Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (citations omitted); *see also* Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103, 113 (3d Cir. 1996) (holding that retroactivity concerns were irrelevant with respect to an interpretative rule because such a rule "merely clarified what . . . existing rights and obligations had always been.").

30. Justice Scalia employed this presumption in his concurring opinion in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (Scalia, J., concurring). The D.C. Circuit employed the same presumption when it decided the case below. Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 753 (D.C. Cir. 1987).

31. 5 U.S.C. § 551(4) (2000).

32. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 917–18 (2004).

33. 467 U.S. 337, 844 (1984).

There are three clear cases, however, in which a *Bowen*-based challenge has succeeded against an agency. In *Cort v. Crabtree*, the Ninth Circuit held that the Bureau of Prisons could not retroactively apply a new definition of "nonviolent offense" to render certain prisoners ineligible for a sentence reduction program.[36] In *Rock of Ages v. Secretary of Labor*, the Second Circuit held that the Federal Mine Safety and Health Review Commission could not hold a mining company liable for actions that violated the requirements of a regulation adopted a year later.[37] Finally, in *National Mining Association v. Department of Labor*, the D.C. Circuit held that the Department of Labor could not apply certain new rules affecting claims under the Black Lung Benefits Act to claims filed before the new rules were adopted.[38]

II. THE VARIOUS THEORETICAL APPROACHES USED IN APPLYING BOWEN

The Supreme Court's sweeping language describing the risks of retroactive legislation and rulemaking clearly indicates that important principles are at stake, even if they are hard to define.[39] It is also evident from the disparate outcomes of the cases in lower courts that these principles are not easily ap-

34. 325 U.S. 410, 413–14 (1945).

35. *See, e.g.*, Clay v. Johnson, 264 F.3d 744, 749 (7th Cir. 2001); First Nat'l Bank of Chicago v. Standard Bank & Trust, 172 F.3d 472, 478 (7th Cir. 1999). *But see* Univ. of Iowa Hosps. & Clinics v. Shalala, 180 F.3d 943, 951–52 (8th Cir. 1999) (invalidating the retroactive application of a HHS nonlegislative rule). *First National Bank of Chicago* is especially notable because, though the Federal Reserve Board had used notice-and-comment rulemaking, the court deferred to the Board's statement that the resulting rule was merely clarifying and thus nonlegislative. 172 F.3d at 479.

36. 113 F.3d 1081, 1086–87 (9th Cir. 1997). *Cort* is particularly interesting in two other ways. First, it is not clear whether the Bureau's challenged "Change Notice" was adopted after notice and comment or was intended to be a nonlegislative rule. *Cf.* Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 445 (D.C. Cir. 1989) (holding that purported interpretative rules—that had been adopted in orders—were actually legislative rules and were thus invalid because they were not adopted following notice and comment). Second, the court used sweeping language to explain which prisoners were entitled to consideration under the old definition: those who had "entered the substance abuse treatment program" and those who had "received favorable eligibility determinations as of the date of [the change's] issuance." *Cort*, 113 F.3d at 1086–87.

37. 170 F.3d 148, 158–59 (2d Cir. 1999).

38. 292 F.3d 849, 867 (D.C. Cir. 2002).

39. *See* Landgraf v. USI Films Prods., 511 U.S. 244, 266–67 (1994) (describing Congress's ability to "sweep away settled expectations suddenly and without individualized consideration" and to "use retroactive legislation as a means of retribution against unpopular groups or individuals").

plied. This Part describes the way the Supreme Court and courts of appeals have analyzed those principles.

A. The APA

Both Justice Scalia's concurrence in *Bowen*[40] and the opinion of the D.C. Circuit[41] find a presumption against retroactivity in rulemaking inherent in the APA's rule-order distinction. Allowing agencies to act retroactively in rulemaking, absent express congressional authorization, would violate the APA's structure by obliterating the difference between rule and order. By this reasoning, the presumption is a necessary result of the "future effect" restriction in the definition of "rule" and the lack of such a restriction in the definition of "order."[42] This approach, however, depends upon a specific understanding of the meaning of "future effect." As the D.C. Circuit stated in *Bergerco Canada v. Treasury Department*, "until we devise time machines, a change can have its effects only in the future."[43] In *Bowen*, Justice Scalia was forced to go outside of the text of the APA and define a "secondary" retroactivity in order to distinguish between the most salient examples of retroactive application, such as the repayment of Medicare payments to the government that were valid when paid, and more remote, reliance-based examples, such as the changing of tax rules for pre-existing trusts.[44] Because the term "future effect" is unclear under the APA, the APA-based presumption against retroactive rulemaking appears to be a judicial creation.

B. Notice

One of the most frequently cited reasons for the presumption against retroactive application of rules is the principle of fair notice.[45] The principle of fair notice is potentially extremely broad. At a minimum, fair notice prevents the imposition of criminal liability for actions completed before they became ille-

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40. 488 U.S. 204, 216–18 (1988) (Scalia, J., concurring). Justice Scalia's concurrence is frequently cited in place of the majority opinion. *See, e.g.*, Mobile Relay Assoc. v. FCC, 457 F.3d 1, 11 (2006).

41. Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988).

42. 5 U.S.C. § 551(4), (6) (2000).

43. 129 F.3d 189, 192 (D.C. Cir. 1997).

44. 488 U.S. at 219–20 (Scalia, J., concurring).

45. *See, e.g.*, *Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . .").

gal; this type of fair notice is mandated by the Ex Post Facto and Bills of Attainder clauses[46] in the Constitution. The concept of fair notice can also potentially encompass civil liability. The imposition of civil liability, however, is limited only by an interpretative presumption; Congress is able to impose such liability when it clearly states its intent to do so.[47] Further, the concept of fair notice could theoretically preclude altering procedural rules that do not change underlying substantive law but make parties more or less likely to prevail. In practice, however, courts tend to consider fair notice regarding procedure even less important than fair notice regarding civil liability,[48] although this is not always the case.[49] Fair notice, at its extreme, also could encompass the notion of economic reliance and could militate against changing legal rules that individuals have relied upon in making investments of one kind or another. The distinction between expected economic gain and expected civil liability is sometimes difficult to define, but because all legislative action implicates some investment of capital (human or otherwise), no legal system could fully protect the most extreme end of fair notice and still retain the ability to change.[50]

The courts of appeals appear to require fair notice only as far as that principle would protect parties from immediate liability or loss. Courts have protected, for example, parties' rights to regulatory defenses to employment discrimination suits,[51] rights to recover under the Black Lung Benefits Act,[52] and rights to payment under sales contracts before such sales became illegal.[53] On the other hand, courts have not found fair

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46. U.S. CONST. art. I, § 9, cl. 3; *id*. art. I, § 10, cl. 1.

47. *See Landgraf*, 511 U.S. at 272–73 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application . . . .").

48. *See id.* at 275 ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.").

49. *See* Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 865 (D.C. Cir. 2002) (holding several procedural changes impermissibly retroactive because they reduced the opportunity for success under the unchanged substantive rules).

50. Bergerco Can. v. U.S. Treasury Dep't, 129 F.3d 189, 192 (D.C. Cir. 1997) ("[R]ule changes are also generally retroactive, in that they tend to alter the *value* of existing assets and thus the return on past investments. The effect is practically universal when we take human capital into account.").

51. *See* Wastak v. Lehigh Valley Health Network, 342 F.3d 281 (3d Cir. 2003).

52. *See Nat'l Mining Ass'n*, 292 F.3d at 850.

53. *See* Jahn v. 1-800-FLOWERS.COM, Inc., 284 F.3d 807 (7th Cir. 2002). *But see Bergerco Can.*, 129 F.3d at 190 (preventing Bergerco Canada from obtaining frozen assets from Iraq).

notice important enough to protect parties from impairment of value of licenses,[54] or from regulators using past acts to affect future payments.[55]

One fundamental difficulty with applying a principle of fair notice is the distinction between rules and meta-rules. Parties are presumed to be on notice of both substantive rules and the meta-rules that govern changing them. The public is presumed to be aware of the substantive rules regulating their conduct; but at the same time, the Constitution, the APA, and case law also provide notice of meta-rules. Theoretically, if the public knew agencies could act retroactively, it would be on notice that retroactive action is permitted, and the concern over fair notice would disappear. This difficulty is illustrated by *Celtronix Telemetry, Inc. v. FCC*, which held that "it is undisputed that the Commission always retained the power to alter the term of existing licenses,"[56] *Bell Atlantic Telephone Cos. V. FCC*, which held that licensees were on notice because there was legal uncertainty about the regulations,[57] and *Bergerco Canada*, which emphasized regulations in place at the time, but did not mention the fact that the APA and case law were also in effect at the time.[58] Determining when parties are on notice is evidently not an easy proposition.

Background rules are also critically important to determining what constitutes notice. In *Independent Petroleum Ass'n of America v. DeWitt*, the court held that the Department of Interior could modify its lease contracts with petroleum producers because the contracts "recognize Interior's authority to modify them."[59] The court cited the following language from the contracts to support its position: "Rights granted are subject . . . to regulations and formal orders hereafter promulgated *when not inconsistent with lease rights granted or specific provisions of this lease*."[60] The court cut through the inherently circular logic of this self-referential clause by holding that the producers were on notice, regardless of which of its rights were affected. Ulti-

54. *See, e.g.*, Mobile Relay Assocs. v. FCC, 457 F.3d 1, 10–11 (D.C. Cir. 2006); Celtronix Telemetry, Inc., 272 F.3d 585 (D.C. Dir. 2001); Chadmoore Commc'ns, Inc. v. FCC, 113 F.3d 235 (D.C. Cir. 1997).

55. *See* Bell Atl. Tel. Cos. v. FCC, 79 F.3d 1195, 1196 (D.C. Cir. 1996); Adm'rs of the Tulane Educ. Fund v. Shalala, 987 F.2d 790, 791 (D.C. Cir. 1993).

56. 272 F.3d at 589.

57. 79 F.3d at 1207.

58. 129 F.3d at 193.

59. 279 F.3d 1036, 1039 (D.C. Cir. 2002).

60. *Id.* (emphasis added) (internal citations omitted).

mately, because all members of the public have notice that agencies can act in any way that courts allow, it seems impossible to support an anti-retroactivity doctrine upon principles of fair notice.

C. Defining a Retroactivity Event

Applying any presumption against retroactivity necessarily depends upon identifying when an agency has acted retroactively, which in turn requires comparing two dates: the effective date of a regulation adopted by an agency, and the date of some other significant or salient event. Justice Scalia describes the significant or salient event as the "retroactivity event."[61] If the regulation attaches significant legal consequences to the event, but the event predated the regulation's effective date, there may be a retroactivity violation. Justice Scalia admitted that it would not always be easy to identify the relevant retroactivity event, but claimed that it would ordinarily be clear.[62]

Even in theory, however, the relevant event is hardly clear. For example, when analyzing new trust tax rules, the court must decide whether the initial establishment of the trust or the continuing existence of the trust in each tax year is the salient retroactivity event.[63] In *Bowen*, Justice Scalia assumed that it was the latter, but absent the text of the regulation or the clear intent of the regulators, it is impossible to know in advance which event courts will choose.[64] Another example is a change in a regulation revoking eligibility for a government medical benefit.[65] Is the retroactivity event the date the medical condition arose? Or the date the application for benefits was filed? Or the date the application was considered on the merits? Or is the retroactivity event merely the monthly arrival of the benefit

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61. *See* Landgraf v. USI Films Prods., 511 U.S. 244, 293 n.3 (1994) (Scalia, J., concurring).

62. *Id.* at 294.

63. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219 (1988) (Scalia, J., concurring).

64. *Id.* For example, the Treasury Department may feel that trust creation fees have been too low in the past. Regulators could recoup that underpayment either by sending a backdated bill (as HHS had done in *Bowen*), or by slightly increasing future taxes on existing trusts. If the regulators know the former is impermissible, they are perfectly able to choose the latter to recoup the same amount—if allowed to do so by the organic act.

65. *See* Combs v. Comm'r of Soc. Sec., 400 F.3d 353, 360 (6th Cir. 2005), *rev'd en banc*, 459 F.3d 640, 642 (6th Cir. 2006).

check? The consequences will be very different depending on which of these dates is taken as the retroactivity event.

To complicate matters further, retroactivity analysis usually considers congressional rather than agency intent. Thus, the language of the agency regulation is irrelevant in identifying the retroactivity event. Congress, however, often does not give much detail in the statute as to what specific actions or events the agency is capable of acting upon.[66] Therefore courts are often forced to decide from a host of plausible retroactivity events, informed only by congressional silence and the self-interested opinion of the agency itself.

In each of the three successful *Bowen* challenges listed above,[67] the court was able to recognize a salient retroactivity event, although none of the decisions used "specific identifying language." In *Cort*, the retroactivity events were enrollment in the program or being informed of eligibility; any prisoner who had crossed either threshold under the old rules was entitled to evaluation under the old rules.[68] In *National Mining Association*, the retroactivity event was filing an application for benefits.[69] In *Rock of Ages*, it was the resumption of mining operations after a misfire.[70]

Other decisions are not obviously consistent in defining the relevant retroactivity event. Many of the licensing cases appear to consider the continued ownership of a license, rather than its initial application or purchase, as the retroactivity event; thus, the agency wins.[71] While the filing of an application for a license is not a retroactivity event,[72] entering a drug rehab program[73] and filing an application for benefits under the Black

66. *See* Manning, *supra* note 32, at 898 ("Congress can pass vaporous statutes that authorize agencies to reject corporate reorganizations that are not 'fair and equitable,' to recoup 'excess profits' from war contractors, to allocate broadcast licenses in conformity with the 'public interest, convenience and necessity,' and so forth.") (citations omitted).

67. *See supra* notes 36–38 and accompanying text.

68. *See* 113 F.3d 1081, 1086 (9th Cir. 1997).

69. *See* 292 F.3d 849, 867 (D.C. Cir. 2002).

70. *See* 170 F.3d 148, 158–59 (2d Cir. 1999).

71. *See* cases cited in *supra* note 21.

72. *See* Bergerco Can. V. U.S. Treasury Dep't, 129 F.3d 189 (D.C. Cir. 1997); Chadmoore Commc'ns, Inc. v. FCC, 113 F.3d 235 (D.C. Cir. 1997).

73. *See Cort*, 113 F.3d at 1086–87. Even here, only entering a program or being informed of eligibility for sentence reduction are retroactivity events. The commission of the crime, the guilty plea, and the sentencing hearing are not.

Lung Act[74] are. Contract formation may[75] or may not be[76] a retroactivity event.

D. Rights

Related to the principles of fair notice and "retroactivity events" is the principle of preservation of rights, particularly vested or private rights. Many cases do not address the existence of rights at all, resting their holdings upon *Bowen* and a finding that agency action is at most "secondary."[77] Secondary retroactivity, a concept used by Justice Scalia in *Bowen* and *Landgraf*, describes agency action that alters the future legal effect of past transactions, as distinguished from "primary" retroactivity, which alters the past legal effect of past transactions.[78] Courts that do mention rights do not treat them consistently. One of the main points of disagreement between the majority and the three concurring Justices in *Landgraf* was the majority's emphasis on rights, and the concurring view that consideration of "vested rights" should not be a part of retroactivity doctrine.[79] Some courts have found *Landgraf* to require only that "rights" are protected against retroactive action.[80] Among these courts, there is no consistent understanding of what creates rights or when they vest. For example, in *Combs*, a panel of the Sixth Circuit originally held that the right to consideration under old Social Security benefit rules vested at the time the plaintiff submitted her application; this panel was later reversed *en banc*.[81] Conversely, in *Chadmoore Communications, Inc. v. FCC*, the D.C. Circuit held that submitting an application for a broadcast license did not create any vested rights to consideration under the regulations in place at the time the application was submitted.[82] But in *Bergerco Canada*, the D.C.

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74. *See Nat'l Mining Ass'n*, 292 F.3d at 850.

75. *See* Jahn v. 1-800-FLOWERS.COM, Inc., 284 F.3d 807 (7th Cir. 2002).

76. *See* Indep. Petroleum Ass'n v. Dewitt, 279 F.3d 1036 (D.C. Cir. 2002).

77. *See, e.g.*, Mobile Relay Assocs. v. FCC, 457 F.3d 1, 11 (D.C. Cir. 2006).

78. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219–20 (1988) (Scalia, J., concurring); Landgraf v. USI Film Prods., 511 U.S. 244, 293 n.3 (1994) (Scalia, J., concurring).

79. *See Landgraf*, 511 U.S. at 292 (Scalia, J., concurring).

80. *See, e.g.*, Chadmoore Commc'ns, Inc. v. FCC, 113 F.3d 235, 240–41 (D.C. Cir. 1997).

81. *See* Combs v. Comm'r of Soc. Sec., 400 F.3d 353, 360 (6th Cir. 2005), *rev'd en banc*, 459 F.3d 640, 642 (6th Cir. 2006).

82. 113 F.3d 235 (D.C. Cir. 1997).

Circuit was willing to hint that such rights may exist in some circumstances:

> We may assume arguendo that 'rights' can sometimes encompass an expectation of a license or permit where the criteria are so clear, simple, and firmly established that issuance of the permit is automatic and ministerial, *cf.*, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158, 2 L. Ed. 60 (1803), or where the agency has explicitly committed itself to grandfathering applications.[83]

The Sixth Circuit in *Orr* explicitly merged retroactivity analysis with Due Process Clause analysis to rule that, because prisoners have no liberty interest in early release, there are no retroactivity concerns when the Bureau of Prisons applies new rules to pending applications.[84] Yet in *Association of Accredited Cosmetology Schools v. Alexander*, the D.C. Circuit criticized the schools' due process argument—that the schools' rights under their agreement with the government constituted "property interests"—as merely a reiteration of their retroactivity argument.[85]

It appears that the common theme of *Bowen*-based cases has been the search for rights, although this search has not been conducted in a consistent or methodical manner. The starting point for the search for rights is often the definition of "retroactivity" found in *Landgraf*: retroactive effects are those that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[86] All of the challenges to the FCC rule changes thus fail because FCC licensees obtain no property rights as a result of the granting of a license.[87] In other words, there was no retroactivity because the licensees never had rights in the first place.

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83. Bergerco Can. V. U.S. Treasury Dep't, 129 F.3d 189, 194 (D.C. Cir. 1997). In an interesting connection to the reliance or expectation principle, the *Bergerco Canada* court perceived the cost of submitting the application as the only investment. *Id.* at 195.

84. *See* Orr v. Hawk, 156 F.3d 651, 653–54 (6th Cir. 1998).

85. *See* Ass'n of Accredited Cosmetology Schs. v. Alexander, 979 F.2d 859, 867 (D.C. Cir. 1992).

86. *Landgraf*, 511 U.S. at 280.

87. *See Mobile Relay Assocs.*, 457 F.3d at 12 ("The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as the result of the granting of a license.") (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)).

When courts do not approach the search for rights in a methodical manner, they are prone to bypass rights that might arise from the Constitution, statutes, or other regulations, and move directly to analysis under reliance theory. For example, the D.C. Circuit in *Bergerco Canada* began to analyze whether the plaintiff had a right that had been impaired, but instead of completing a formal analysis of whether the plaintiff had a right to the frozen funds at issue or a license to access the funds, the court quickly moved to a more informal assessment of reliance-based rights.[88] Similarly, in *Combs*, the court assessed whether the plaintiff had become obese in reliance upon the old Social Security regulation without considering whether there was a non-reliance-based foundation for a right to consideration under the older standards.[89] The *Bowen* regime has led courts to search implicitly for rights; but, to plaintiffs' detriment, they often do so by focusing solely on reliance-based rights without carefully considering rights arising from other sources.

III. RECOMMENDATIONS AND CONCLUSION

The previous Parts have demonstrated that courts of appeals have not analyzed retroactivity challenges consistently. It does appear that courts are implicitly searching for vested rights, but they are not doing so with a careful methodology. A better approach would conduct an explicit search for rights—searching in the Constitution, statutes, and regulations, as well as in the common law, contract law, and principles of reliance.[90] Retroactivity doctrine would be far clearer if courts discussed rights in explicit terms and searched for rights and vesting dates more methodically. The key recurring question in these challenges is whether the plaintiff had a right that the agency attempted to eliminate or impair; answering this question explicitly would provide more guidance both to lower courts and agencies. Courts currently operate in the less concrete realm of comparing future and past effects,[91] determining

88. *Bergerco Can.*, 129 F.3d at 193–94.

89. *Combs*, 459 F.3d at 646.

90. Of course, if no right is identified, as often happens in licensing of highly regulated industries, no retroactivity violation has occurred.

91. *See, e.g.*, Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 588 (D.C. Cir. 2001) ("It seems impossible to characterize the rule change here as 'alter[ing] the past legal consequences' of a past action. It altered the *future* effect of the initial license issuance, to be sure, but that could not be viewed as 'past legal consequences.'" (citing *Bowen*, 488 U.S. at 219 (Scalia, J., concurring))).

primary or secondary retroactivity,[92] or skipping directly to reliance-based arguments.[93] A methodical and explicit search for rights rooted in the Constitution, statutes, and regulations, as well as civil and common law, would have a greater chance of producing clear, bright-line rules. Better-articulated rules, in turn, would create clearer expectations concerning the rights parties possess, at what point they possess them, and, thus, what action is off-limits to agencies in rulemaking.

Insofar as *Bowen* has been successful in increasing the public's power to protect its rights, however, the doctrine may create an incentive for agencies to use other means to achieve the same results. That is, agencies are normally free to choose between rulemaking and adjudication when creating and implementing new policies.[94] Additionally, agencies may clarify and explain statutes and regulations with nonlegislative rules, without the cumbersome requirements of notice-and-comment rulemaking.[95] The existence of an anti-retroactivity doctrine in notice-and-comment rulemaking, especially one that is ill-defined and implemented inconsistently, will have the effect of channeling agency action toward the less formal adjudication or nonlegislative processes. This effect directly subverts the customary judicial goal of encouraging agencies to use the more formal procedures.[96] To eliminate this incentive, the Supreme Court could either limit agency power in adjudication and nonlegislative rulemaking, or eliminate the *Bowen* presumption altogether, thereby increasing agency power in rulemaking. But eliminating the *Bowen* presumption is all but impossible to envision, since, under *Landgraf*, Congress itself is under a similar anti-retroactivity presumption. Limiting agency adjudicative and nonlegislative rulemaking power is all that remains, although this may be a radical suggestion.[97]

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92. *See, e.g.*, U.S. Airwaves, Inc. v. FCC, 232 F.3d 227, 233 (concluding without explanation that the challenged rulemaking was merely secondarily retroactive and subject only to a reasonableness test).

93. *See, e.g.*, *Combs*, 459 F.3d at 646 ("The factors articulated in *Landgraf*—fair notice, reasonable reliance, and settled expectations—weigh against finding a retroactive effect.").

94. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947); *see also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

95. *See* Manning, *supra* note 32, at 914.

96. *See id.* at 940 (making a similar channeling argument with respect to the *Mead* doctrine, United States v. Mead Corp., 533 U.S. 215 (2001)).

97. The fundamental question is whether the proposed approach could be reconciled with *Chenery* and *Bell Aerospace*. Two tentative replies are possible: first, Congress would still retain the capacity, under *Landgraf*, to destroy rights if it does

In conclusion, as the D.C. Circuit has stated, *Bowen*'s presumption against retroactive rulemaking is "easy to state, although not as easy to apply."[98] Retroactivity doctrine would be clarified if courts explicitly stated a rule that agencies may not remove or impair vested rights in rulemaking or adjudication absent congressional authority. Application of this rule would create clear precedents regarding rights and when they vest, which current doctrine does not provide. This new approach would guide agencies and members of the public, allow courts to develop and explain rights doctrine using shared language, and avoid channeling agencies toward the less accountable methods of informal adjudication and nonlegislative rulemaking.

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so explicitly, and, under *Bowen*, to confer such power to agencies. Second, applying an anti-retroactivity doctrine to adjudication may force agencies into a more fact-bound method of adjudication, more similar to common law judges. The second reply actually fits with the Court's language in *Bell Aerospace*, which stated that the NLRB "ha[d] reason to proceed with caution, developing its standards in a case-by-case manner with attention" to the specifics of the case. 416 U.S. at 294.

98. Nat'l Mining Ass'n. v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002).