

# THE RETROACTIVE AND PROSPECTIVE APPLICATION OF JUDICIAL DECISIONS

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## I. INTRODUCTION

Historically, rules of law announced in judicial decisions were applied retroactively<sup>1</sup>—that is, to conduct or events that had occurred prior to the dates of those decisions.<sup>2</sup> Today,<sup>3</sup> the retroactive application of judicial decisions remains the norm.

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1. Frequently quoted in connection with the retroactive (or, as some prefer, the retrospective) application of judicial decisions is the following passage from Justice Holmes's opinion in *Kuhn v. Fairmont Coal Co.*: "I know of no authority in this court to say that . . . decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). See also *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."); Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 205 (1965) ("It is the common-law tradition that judicial precedents normally have retroactive as well as prospective effect."). Indeed, the retroactive application of judicial decisions has been so much the historical norm that the very "concept of retroactivity is a relative newcomer to our jurisprudence." Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1082 (1999).

2. Though there is considerable debate over the definition of retroactivity, compare *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 & 270 n.24 (1994) ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law), and Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 373 (1977) (arguing that a law may be considered retroactive only if it "alters the legal status of acts that were performed before it came into existence") with the definition stated in the main text, a working definition of retroactivity, however imperfect, provides a platform for helping the reader understand some of the problems in this area. The definition articulated above also is that most often employed by the Supreme Court. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-38 (1991) (opinion of Souter, J.); cf. *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in judgments) (arguing that the temporal application of a statute should be analyzed in terms of the "relevant activity that the rule regulates").

Once temporally delimited, a decision's retroactivity may still be either particular (applicable only to the parties in the case in which the legal rule in question is announced), or general (having precedential effect on other cases that similarly involve conduct or events occurring prior to the date of the decision). See, e.g., *Beam*, 501 U.S. at 552 (O'Connor, J., dissenting); John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CAL. L. REV. 12, 60 (1967). This Article engages both particular and general retroactivity.

3. See, e.g., *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 114 (1993) (O'Connor, J., dissenting) ("In the usual case, of course, retroactivity is not an issue; the courts simply apply their best understanding of current law in resolving each case that comes before them."). Linda Meyer observes:

Ordinarily, a court reaches the merits of the question brought before it and

A problem often arises, though, when a court considers the application of a rule of law that seems “new” in some significant way.<sup>4</sup> The problem usually takes the form of reliance; because one or more parties (to the instant case and perhaps to other pending cases that involve events prior to the date of decision) relied on the “old” law, it would be unfair to apply the “new” law to those parties.<sup>5</sup> Recognizing this problem, courts<sup>6</sup> and legal scholars<sup>7</sup> have considered whether and to what extent “new” rules of law should be applied only

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applies its resolution to the parties, even though their dispute arose in the past. In other words, judicial decisions are usually retroactive, at least in the sense that they do not just apply to events in the future, but also to events in the past.

Linda Meyer, “*Nothing We Say Matters*”: *Teague and New Rules*, 61 U. CHI. L. REV. 423, 423 (1994). In fact, because retroactivity is so much the norm, some regard this description (or characterization) of the phenomenon it describes as misleading, or worse. See, e.g., James B. Haddad, “*Retroactivity Should Be Rethought*”: *A Call for the End of the Linkletter Doctrine*, 60 J. CRIM. L., CRIMINOLOGY & POL. SCI. 417, 418 n.5 (1969) (“The word *retroactive* is disfavored because it suggests the phrase *ex post facto*, which, in turn, is pejorative.”). Such objectors might further argue that there is nothing “retroactive” about the application of whatever is determined to be the law applicable to the issues properly before a court, and thus that the use of this term is symptomatic of a certain perspective as to the nature of the adjudicative process. See, e.g., Roosevelt, *supra* note 1, at 1125. See generally Part III.A *infra*. But, because this term has achieved a certain meaning in the literature, it will be used throughout this Article.

4. Indeed, Chief Justice Hughes (speaking for a unanimous Supreme Court) once opined that “[t]hese questions are among the most difficult of those which have engaged the attention of courts, state and federal.” *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

Incidentally, like “retroactivity,” see *supra* note 2, it is difficult to define precisely what “new” means in this context. For present purposes, it is sufficient to recognize that overrulings of prior precedent (particularly if unexpected) and the adoption of a legal rule or standard not previously announced (particularly if its application is significantly disruptive) generally fall into this category. For more on the meaning of “new” law, see *infra* notes 260-261 and accompanying text.

5. According to Candler S. Rogers:

[t]here is one reason perhaps more often suggested than any other for denying retroactive effect to overruling decisions. This is to protect persons who have ordered their affairs in reliance upon what they in good faith perceive to be the law. . . . It is generally believed to be unsound for courts to disappoint expectations based on reasonable and deliberate reliance.

Candler S. Rogers, *Perspectives on Prospective Overruling*, 36 UMKC L. REV. 35, 52-53 (1968). Sometimes this concern is phrased in terms of expectations, foreseeability, notice, or even equity or simple fairness. 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; settled expectations should not be lightly disrupted.”).

6. See, e.g., *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 363-66 (1932) (Opinion of Cardozo, J.); *Griffin v. Illinois*, 351 U.S. 12, 25-26 (1956) (Frankfurter, J., concurring in judgment).

7. See, e.g., Currier, *supra* note 1, at 210 n.22 (referencing “early expositions of the idea” of prospectivity); Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 7-25 (1960) (same); Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 542 n.16 (1977) [hereinafter Traynor, *Prospective Overruling*] (same).

prospectively,<sup>8</sup> that is, only to events transpiring after the date of the precedent-setting decision (often termed pure prospectivity<sup>9</sup>) or only to such future occurrences and to the parties in the precedent-setting case itself (often termed modified or selective prospectivity<sup>10</sup>). This experiment with prospectivity reached its peak in the 1960s and 1970s, when the Supreme Court of the United States applied various forms of prospectivity in certain criminal cases on collateral review,<sup>11</sup> and then in certain criminal<sup>12</sup> and civil<sup>13</sup> cases on direct review. Eventually, the Court reverted to a firm rule of retroactive application in criminal cases on direct review,<sup>14</sup> and it now appears to have done the same in the civil arena.<sup>15</sup>

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8. A judicial decision can be said to apply “prospectively” when it is applied to conduct or events occurring after the date of that decision. *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535-38 (1991) (opinion of Souter, J.). Of course, the definition of “prospectivity” raises conceptual difficulties. *See, e.g.*, Roosevelt, *supra* note 1, at 1081 n.26 (arguing that consistency with the Supreme Court’s concern for the legal rule in effect at the time of the transaction giving rise to the law-changing decision “would require that the law change at the time of the transaction,” but that the Court has “always treated the date of the decision as dispositive”). Nonetheless, as with retroactivity, the definition of “prospectivity” that is consistent with federal court precedent is a starting point for discussion.

9. *See, e.g.*, *Beam*, 501 U.S. at 536 (opinion of Souter, J.) (describing the “purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision”). Under this method, “[t]he case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision.” *Id.*

10. *See, e.g.*, *id.* at 537 (“[A] court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method [may be called] modified, or selective, prospectivity . . .”).

Other variations of prospectivity are possible. *See, e.g.*, MELVON ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 128 (1988). Pure and selective prospectivity, though, are the types of prospectivity most often encountered in federal case law, and they are sufficiently representative for this discussion.

11. *See* *Linkletter v. Walker*, 381 U.S. 618 (1965). *Linkletter* and its progeny are discussed in Part II.A of this Article.

12. *See* *Johnson v. New Jersey*, 384 U.S. 719 (1966).

13. *See* *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Chevron Oil* is discussed in Part II.B of this Article.

14. *See* *Griffith v. Kentucky*, 479 U.S. 314 (1987). *Griffith* is discussed in Part II.C of this Article.

15. *See* *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86 (1993) (rejecting selective prospectivity in civil cases on direct review). Although the *Harper* Court specifically addressed only selective prospectivity, many believe that the Court implicitly has rejected (or at least is likely to reject) pure prospectivity as well. *See* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994) (characterizing *Harper* as having “established a firm rule of retroactivity”); Matthew P. Harrington, *Foreward: The Dual Dichotomy of Retroactive Lawmaking*, 3 *ROGER WILLIAMS U. L. REV.* 19, 23 (1997); Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 *HARV. L. REV.* 32, 94 (1993); Roosevelt, *supra* note 1, at 1102 n.164; Note, *Retroactivity of Civil Decisions: Harper v. Virginia Department of Taxation*, 107 *HARV. L. REV.* 312, 317

Nonetheless, the “controversial jurisprudence of ‘new’ law”<sup>16</sup> seems far from settled. The Supreme Court has yet to resolve definitively the scope of retroactivity in civil cases on direct review.<sup>17</sup> Moreover, though a firm rule of retroactivity appears to be the trend in the federal courts,<sup>18</sup> the Supreme Court remains divided over the appropriate methodology to be employed in this area.<sup>19</sup> The Court’s

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(1993). *Harper* is discussed in greater detail in Part II.G of this Article.

As for the retroactive application of rules of law announced in criminal cases on collateral review, courts now follow the rules set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), its progeny, and the 1996 amendments to 28 U.S.C. §§ 2244, 2254-2255 (2000). Part II.D of this Article discusses these authorities. Except for its relevance to the historical development of retroactivity doctrine in civil and criminal cases on direct review, though, retroactivity on collateral review is beyond the scope of this Article.

16. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735 (1991).

17. See *Ryder v. United States*, 515 U.S. 177, 184-85 (1995) (“But whatever the continuing validity of *Chevron Oil* after [*Harper*] and [*Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995)], there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play.”); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-3, at 226 (3d ed. 2000) (“[T]he [*Harper*] Court did not hold that all decisions of federal law must necessarily be applied retroactively. . . . [T]he Court has not renounced the power to make its decisions entirely prospective, so that they do not apply even to the parties before it.”); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1559 (1998) (“Left unclear are the circumstances under which [the] presumption [in favor of retroactivity] might be overturned—when might the Court reserve such a determination, how would the decision whether to afford retroactive application be made (by what standard) and is pure prospectivity therefore still an option.”).

18. State courts, of course, are free to adopt their own rules regarding retroactivity, see *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), and many (if not most) state courts in fact continue to adhere to some form of prospectivity, at least in certain contexts. See, e.g., *Newman v. Emerson Radio Corp.*, 772 P.2d 1059 (Cal. 1989) (discussing California rule applicable in civil cases); *People v. Guerra*, 690 P.2d 635 (Cal. 1984) (discussing California rule applicable in criminal cases); *People v. Favor*, 624 N.E.2d 631 (N.Y. 1993) (discussing New York rule applicable in criminal cases); *Gurnee v. Aetna Life and Cas. Co.*, 433 N.E.2d 128 (N.Y. 1982) (discussing New York rule applicable in civil cases). Though the focus of this Article is on the retroactive and prospective application of federal judicial decisions, most of the analysis applies equally to state courts.

19. For example, *Harper*, the case in which the Court established the rule currently applicable in civil cases on direct review, included four separate opinions, and only five Justices joined in the Court’s retroactivity analysis (part II). See 509 U.S. at 88, 94-99. That analysis, in turn, relied on Justice Souter’s opinion in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), in which only Justice Stevens joined. *Id.* at 532. *Beam* itself comprised five opinions, none of which commanded more than three votes. *Id.* at 531. The Justices likewise generated four separate opinions in *Griffith*, the case in which the Court established the rule now applied in criminal cases on direct review. See 479 U.S. at 315. Similarly, *Teague v. Lane*, 489 U.S. 288 (1989), inspired five opinions, and only three Justices joined in the portion of Justice O’Connor’s opinion that set forth what has become the retroactivity methodology applicable in habeas corpus cases. See *id.* at 291; see also *Harper*, 509 U.S. at 113 (O’Connor, J., dissenting) (“This Court’s retroactivity jurisprudence has become somewhat chaotic in recent years.”); 1 TRIBE, *supra* note 17, § 3-3, at 254 (“Debates about retroactivity and prospectivity are sometimes evocative of the

reluctance to embrace a firm rule of retroactivity appears to be partly attributable to dissatisfaction with the current theoretical justification for this approach.<sup>20</sup> Indeed, recent legal scholarship has favored some form of prospective application.<sup>21</sup>

The primary purpose of this Article is to make a normative case for a firm rule of retroactivity in civil and criminal cases on direct review. Part II is an outline of the Supreme Court's development of modern retroactivity/prospectivity doctrine. Part III argues for a firm rule of retroactive application based on the adjudicative and precedent-setting functions of courts and on a general critique of retroactivity as a judicial standard. The Article concludes that a firm rule of retroactive application of judicial decisions in all civil and criminal cases on direct review is superior to both prospective and mixed methodologies, and moreover, that any perceived deficiencies in this approach are illusory, or at least are outweighed by its advantages.

## II. A SUMMARY OF SUPREME COURT RETROACTIVITY/PROSPECTIVITY DOCTRINE

Rules of law have traditionally been applied to the parties to the case in which those rules were announced as well as in later cases, without regard to the date of the disputed events or the nature of the rule.<sup>22</sup> Frequently cited as authority for these propositions is *United States v. The Schooner Peggy*,<sup>23</sup> in which Chief Justice Marshall, writing for the Court, opined:

[I]f, subsequent to [a] judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule

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White Queen's explanation to Alice that the rule is 'jam tomorrow, and jam yesterday—but never jam *today*.'" (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE*, chapter 5)).

20. See Stephens, *supra* note 17, at 1516 ("A series of decisions written by a fragmented Court has clearly rejected the theoretical underpinnings of the former approach without formulating a clear theoretical basis for the new approach.").

21. Several legal scholars have expressly espoused some form of prospectivity, at least in certain circumstances. See, e.g., Michael B. Dashjian, *The Prospective Application of Judicial Legislation*, 24 PAC. L.J. 317 (1993); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997); Stephens, *supra* note 17. Others have advanced approaches that seem to apply current law to past conduct or events, but that achieve essentially prospective results through a purported use of the law of remedies. See, e.g., Fallon & Meltzer, *supra* note 16; Roosevelt, *supra* note 1. Yet, as one scholar observed: "The general dissatisfaction with the Court's retroactivity jurisprudence has not produced a corresponding consensus on the appropriate alternative." Roosevelt, *supra* note 1, at 1104.

22. Certainly, there were exceptions, see Fallon & Meltzer, *supra* note 16, at 1780-86, but such exceptions were exceedingly rare.

23. 5 U.S. (1 Cranch) 103 (1801).

which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.<sup>24</sup>

Though the *Schooner Peggy* Court “was speaking of the intervention of a treaty,” by the middle of the twentieth century, these principles had “found acceptance in a variety of situations.”<sup>25</sup> Thus, in *Vandenbark v. Owens-Illinois Glass Co.*, a case decided 140 years after *Schooner Peggy*, the Court reaffirmed “that *nisi prius* and appellate tribunals alike should conform their orders to the . . . law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.”<sup>26</sup>

Against this backdrop stands the Supreme Court’s recent retroactivity/prospectivity analysis, of which Part II presents a summary. Part II concludes by synthesizing these cases for the purpose of explaining how prospectivity has achieved its jurisprudential prominence.

#### A. *Linkletter v. Walker and Its Progeny*

Modern Supreme Court prospectivity doctrine began with *Linkletter v. Walker*,<sup>27</sup> a habeas corpus proceeding in which the Court considered whether its prior holding in *Mapp v. Ohio*,<sup>28</sup> which extended the Fourth Amendment exclusionary rule to the states,

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24. *Id.* at 110. Though the Court also recognized that “in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of parties,” *id.*, the Court did not suggest that such a construction, once settled upon, should not be given retrospective operation.

25. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542 (1941).

26. *Id.* at 543. Similarly, in 1924, Robert von Moschzisker argued:

When, however, . . . the unwritten law is once applied to the decision of a case, the rules acted on, so long as they are adhered to, must be uniformly administered as though the law had always been there as announced; and if the announcement is, itself, a departure from the law as formerly laid down, the rules of conduct as last decided, so long as they stand unimpaired, must be accepted as governing all future cases presenting like facts, without regard to the date of their occurrence.

Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 427 (1924).

27. 381 U.S. 618 (1965). See John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine “As Applied,”* 61 N.C. L. REV. 745, 746 (1983); Meyer, *supra* note 3, at 427; Stephens, *supra* note 17, at 1519.

28. 367 U.S. 643 (1961). In *Mapp*, the Court overruled its prior decision in *Wolf v. Colorado*, 338 U.S. 25 (1949). See *Linkletter*, 381 U.S. at 619.

should be applied to a state conviction that had become final (in terms of direct review) before *Mapp* was decided.<sup>29</sup> The Court observed that “[a]t common law there was no authority for the proposition that judicial decisions made law only for the future,”<sup>30</sup> despite the fact that, on occasion, it had limited the retroactive operation of its rulings.<sup>31</sup> Concluding that “a change in law will be given effect while a case is on direct review, [while] the effect of [a change] on . . . judgments when collaterally attacked is subject to no set ‘principle of absolute retroactive invalidity,’”<sup>32</sup> the Court held that “in appropriate cases the Court may in the interest of justice make the rule prospective.”<sup>33</sup>

To determine when justice required that a rule have retroactive effect, the Court resolved to “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.”<sup>34</sup> The Court went on to reject retrospective application of the *Mapp* decision after considering “the purpose of the [new] rule; the reliance placed upon the [prior] doctrine; and the effect on the administration of justice.”<sup>35</sup>

In *Johnson v. New Jersey*,<sup>36</sup> the Court departed from its earlier statement in *Linkletter* to hold that the three-part test articulated in *Linkletter* with respect to criminal cases on collateral review applied equally to criminal cases on direct review.<sup>37</sup> As a result, in the years

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29. 381 U.S. at 619-20.

30. *Id.* at 622.

31. *Id.* at 624-25.

32. *Id.* at 627 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)). The Court further observed that with respect to the rule applicable to cases on direct review, “no distinction was drawn between civil and criminal litigation.” *Id.* at 627.

33. *Id.* at 628.

34. *Id.* Weighing these considerations with respect to the rule announced in *Mapp*, see *id.* at 629-35, the *Linkletter* Court concluded that “[t]he thousands of cases that were finally decided on *Wolf* cannot be obliterated.” *Id.* at 636.

35. *Id.* at 640. This three-part test was restated in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), as “(a) the purpose to be served by the new standards, (b) the extent of the reliance . . . on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.”

Justice Black, in an opinion joined by Justice Douglas, dissented, severely criticizing the Court’s venture into prospective decision-making: “In our judgment one of the great inherent restraints upon this Court’s departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application.” 381 U.S. at 644 (Black, J., dissenting) (quoting *James v. United States*, 366 U.S. 213, 225 (1961)).

36. 384 U.S. 719 (1966).

37. See *Johnson*, 384 U.S. at 732.

that followed, “a number of new rules of criminal procedure were held not to apply retroactively either to final cases or to cases pending on direct review.”<sup>38</sup>

*B. Chevron Oil Co. v. Huson and the Standard for Civil Cases*

Modern prospectivity doctrine with respect to civil cases on direct review began with the Supreme Court’s decision in *Chevron Oil Co. v. Huson*.<sup>39</sup> In *Chevron Oil*, the issue before the Court was whether its decision in *Rodrigue v. Aetna Casualty & Surety Co.*,<sup>40</sup> which resulted in the imposition of a one-year statute of limitations for personal injury actions, barred Huson’s action even though *Rodrigue* was decided after Huson’s action was commenced.<sup>41</sup> The *Chevron Oil* Court held that the *Rodrigue* holding should not be applied to bar Huson’s action.<sup>42</sup>

The Court interpreted its recent retroactivity precedent to require consideration of three factors:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that “we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the<sup>43</sup> injustice or hardship by a holding of nonretroactivity.

The Court concluded on the basis of these factors that “[b]oth a devotion to the underlying purpose of the Land Act’s absorption of state law and a weighing of the equities requires nonretroactive

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38. *Griffith v. Kentucky*, 479 U.S. 314, 321 (1987).

39. 404 U.S. 97 (1971).

40. 395 U.S. 352 (1969).

41. *Chevron Oil*, 404 U.S. at 98-99.

42. *See id.* at 100. Justice Stewart delivered the opinion of the Court, in which Chief Justice Burger and Justices Brennan, White, Marshall, and Blackmun joined. *See id.* at 98. Justice Douglas only concurred in the judgment, as he would have affirmed the judgment of the court of appeals without reaching the prospectivity question. *See id.* at 109 (Douglas, J., concurring in judgment). There was no dissent.

43. *Id.* at 106-07 (citations and final quotation marks omitted) (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

application of the state statute of limitations here.”<sup>44</sup>

In the years following *Chevron Oil*, the Court, at times, purported to follow the rule established in that case without exception.<sup>45</sup> In reality, though, the Court frequently adhered to the rule established in *Schooner Peggy*<sup>46</sup> with respect to changes in the law occurring in civil cases while on direct review.<sup>47</sup>

### C. *United States v. Johnson, Griffith v. Kentucky, and the New Rule for Criminal Cases*

In *United States v. Johnson*,<sup>48</sup> the Supreme Court “shifted course,”<sup>49</sup> and determined that “[r]etroactivity must be rethought.”<sup>50</sup> The *Johnson* Court concluded that its “retroactivity analysis for convictions that have become final must be different from the analysis for convictions that are not final at the time the new decision is issued.”<sup>51</sup> In *Griffith v. Kentucky*,<sup>52</sup> in which the Court considered whether the rule set forth in *Batson v. Kentucky*<sup>53</sup> was “applicable to

44. *Id.* at 109.

45. *See, e.g.,* *United States v. Johnson*, 457 U.S. 537, 563 (1982) (stating (albeit in dicta) that “all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil*”). *Johnson* is discussed in more detail in Part II.C *infra*.

46. *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

47. *See, Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981). *See also* *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987) (recognizing that “[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision,” yet upholding the application of *Chevron Oil* to avoid an intervening shortening of the applicable statute of limitations); *Corr, supra* note 27, at 796 (observing (in 1983) that the Court has “failed to provide any reasonable justification for its distinction between cases subject to *Schooner Peggy* and those governed by *Chevron*” or to provide a “valid explanation of the logic or reason why that rule and *Chevron* should coexist”).

48. 457 U.S. 537 (1982).

49. *Griffith v. Kentucky*, 479 U.S. 314, 321 (1987).

50. *Johnson*, 457 U.S. at 548 (quoting *Desist v. United States*, 394 U.S. 244, 258 (1968) (Harlan, J., dissenting)).

51. *Griffith*, 479 U.S. at 321-22. That was the *Griffith* Court’s characterization, anyway; in actuality, the *Johnson* Court held only that (subject to certain exceptions) decisions construing the Fourth Amendment are to be applied retroactively to all convictions not yet final at the time those decisions were rendered. *Johnson*, 457 U.S. at 562.

52. 479 U.S. 314 (1987). Justice Blackmun delivered the opinion of the Court, in which Justices Brennan, Marshall, Powell, Stevens, and Scalia joined. *Id.* at 315. Justice Powell also filed a concurring opinion. *Id.* at 328. Chief Justice Rehnquist filed a dissenting opinion, *id.* at 329, as did Justice White, with whom the Chief Justice and Justice O’Connor joined, *id.*

53. 476 U.S. 79 (1986). In *Batson*, the Court held:

that a defendant in a state criminal trial could establish a prima facie case of racial discrimination violative of the Fourteenth Amendment, based on the prosecution’s use of peremptory challenges to strike members of the defendant’s race from the jury venire, and that, once the defendant had made the prima facie showing, the burden shifted to the prosecution to come forward with a neutral

litigation pending on direct state or federal review or not yet final when *Batson* was decided,”<sup>54</sup> the Court set forth its new retroactivity analysis for criminal cases on direct review.<sup>55</sup>

The *Griffith* Court determined that the “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”<sup>56</sup> Accordingly, “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final,” even where “the new rule constitutes a ‘clear break’ with the past.”<sup>57</sup>

#### *D. Teague v. Lane and the Standard Applicable to Habeas Corpus Cases*

In *Teague v. Lane*,<sup>58</sup> the Supreme Court was asked to consider whether the Sixth Amendment’s fair cross section requirement applies to a petit jury,<sup>59</sup> but it never resolved that question.<sup>60</sup> Instead, in an opinion authored by Justice O’Connor, a plurality of the Court concluded that “a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review.”<sup>61</sup>

The plurality first considered the *timing* of its retroactivity analysis

explanation for those challenges.

*Griffith*, 479 U.S. at 316.

54. *Griffith*, 479 U.S. at 316.

55. The retroactivity rule established in *Griffith* continues to govern today. *See, e.g.*, *Ring v. Arizona*, 122 S. Ct. 2428, 2449 (2002) (O’Connor, J., dissenting) (discussing the impact of the retroactive application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

56. *Id.* at 322.

57. *Id.* at 328. Though the Court acknowledged that the retroactive application of a “clear break” rule might implicate the second and third *Stovall* factors, factors that “may be useful in deciding whether convictions that already have become final should receive the benefit of a new rule,” such an exception “reintroduces precisely the type of case-specific analysis that Justice Harlan rejected as inappropriate for cases pending on direct review.” *Id.* at 327. The Court also concluded that “the use of a ‘clear break’ exception creates the same problem of not treating similarly situated defendants the same.” *Id.*

58. 489 U.S. 288 (1989).

59. *Id.* at 292. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court held that the Sixth Amendment requires that the jury venire be drawn from a fair cross section of the community.

60. *See Teague*, 489 U.S. at 292. At least not in that case. *See Holland v. Illinois*, 493 U.S. 474 (1990) (answering question in the negative).

61. *Teague*, 489 U.S. at 316 (plurality opinion). Justice O’Connor’s opinion was joined in full only by Chief Justice Rehnquist and by Justices Scalia and Kennedy. *Id.* at 292 (opinion of the Court). Though Parts I-III of Justice O’Connor’s opinion actually consisted of a majority opinion, *id.*, the crux of Justice O’Connor’s retroactivity/prospectivity analysis appeared in Parts IV-V, *see id.* at 299-316 (plurality opinion).

in this context.<sup>62</sup> The plurality concluded that “the question ‘whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.’”<sup>63</sup> “Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue.”<sup>64</sup>

Though the plurality then acknowledged that “[t]his retroactivity determination would normally entail application of the *Linkletter* standard,” it further decided “that our approach to retroactivity for cases on collateral review requires modification.”<sup>65</sup> Considering the nature and function of collateral review, the plurality adopted Justice Harlan’s suggestion “that it is ‘sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final.’”<sup>66</sup> Thus, “new” rules of law—that is, rules of law arising only after the time of conviction—should not be given retroactive effect.<sup>67</sup> According to the plurality, the application of the fair cross section requirement to the petit jury, if adopted, would be such a rule.<sup>68</sup>

62. *See id.* at 299-300 (plurality opinion).

In the past, the Court has . . . often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule. In several cases, however, the Court has addressed the retroactivity question in the very case announcing the new rule. These two lines of cases do not have a unifying theme, and we think it is time to clarify how the question of retroactivity should be resolved for cases on collateral review.

*Id.* (citations omitted).

63. *Id.* at 300 (quoting Paul J. Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 64 (1965)).

64. *Id.* at 300-01.

65. *Id.* at 301. “The *Linkletter* retroactivity standard . . . has been used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced.” *Id.* at 302.

66. *Id.* at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part)).

67. *Id.* at 306-07. Admitting that “new” is difficult to define in this context, the plurality explained:

In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.

*Id.* at 301 (citations omitted). In a dissenting opinion joined by Justice Marshall, Justice Brennan criticized the triggering definition of a “new” rule of law as “extremely broad.” *Id.* at 333 (Brennan, J., dissenting).

68. The plurality therefore declined to “announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated.” *Id.* at 316.

Though the pivotal portions of Justice O'Connor's opinion failed to garner more than four votes, the *Teague* plurality's retroactivity analysis was endorsed by a majority of the Court later that same year in *Penry v. Lynaugh*.<sup>69</sup> In 1996, many of these same concepts were codified in the form of amendments to the federal statutes governing habeas corpus proceedings.<sup>70</sup>

E. American Trucking Associations, Inc. v. Smith and the Beginning of the Demise of Chevron Oil

In 1990, the Supreme Court considered *American Trucking Associations, Inc. v. Smith*.<sup>71</sup> As in *Teague*, there was no majority opinion.<sup>72</sup> As originally framed by the plurality, the issue in *Smith*, which involved an Arkansas highway tax similar to a tax that had recently been declared unconstitutional in *American Trucking Assn 's, Inc. v. Scheiner*,<sup>73</sup> was whether *Scheiner* "applie[d] retroactively to taxation of highway use prior to the date of that decision."<sup>74</sup>

The plurality observed that despite development in the Court's treatment of retroactivity of decisions in criminal proceedings, "retroactivity of decisions in the civil context 'continue[d] to be governed by the standard announced in *Chevron Oil*.'"<sup>75</sup> Therefore, the plurality considered whether "the Arkansas Supreme Court applied *Chevron Oil* correctly."<sup>76</sup> Applying the three *Chevron Oil*

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69. 492 U.S. 302 (1989). The *Penry* majority consisted of the *Teague* plurality plus Justice White. *See id.* at 306.

70. *See* 28 U.S.C. §§ 2244, 2254-2255 (2000). *See also* Williams v. Taylor, 529 U.S. 362 (2000) (interpreting the 1996 amendment to § 2254).

71. 496 U.S. 167 (1990).

72. Justice O'Connor again announced the judgment of the Court and delivered an opinion in which Chief Justice Rehnquist and Justices White and Kennedy joined. *Id.* at 171 (plurality opinion). Justice Scalia filed an opinion concurring in the judgment. *Id.* at 200 (Scalia, J., concurring in judgment). Justice Stevens filed a dissenting opinion, in which Justices Brennan, Marshall, and Blackmun joined. *Id.* at 205 (Stevens, J., dissenting).

73. 483 U.S. 266 (1987). Though American Trucking Associations, Inc., was a party to both the *Smith* and *Scheiner* cases, hereinafter the Article will refer to *Smith* as *American Trucking*, to conform to its citations in later Supreme Court cases.

74. *American Trucking*, 496 U.S. at 171 (plurality opinion).

75. *Id.* at 178 (citation omitted) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 n.8 (1987)).

76. Rejecting the dissent's attempt to recharacterize this analysis as remedial, the plurality argued that:

rules regarding retroactivity, like decisions regarding the mechanics of procedure, are distinct from remedial decisions which govern what a court "may do for the plaintiff and conversely what it can do to the defendant." A decision defining the operative conduct or events that will be adjudicated under old law does not, in itself, specify an appropriate remedy.

factors, the plurality concluded that each weighed in favor of nonretroactivity.<sup>77</sup> The plurality thus concluded that *Scheiner* did not invalidate Arkansas highway taxes imposed on highway use occurring prior to the date of the *Scheiner* decision.<sup>78</sup>

Justice Scalia filed an opinion concurring in the judgment, though his reasons for doing so were distinct from those of the plurality.<sup>79</sup> Most significantly, Justice Scalia agreed with the dissent that “prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.”<sup>80</sup>

*Id.* at 195 (citations omitted) (quoting KENNETH H. YORK ET AL., REMEDIES I (4th ed. 1985)).

The plurality also rejected the dissent’s call for adoption of the retroactivity rule articulated in *Griffith* by justifying the distinction between criminal and civil proceedings in this area:

*Griffith*’s adoption of a *per se* rule of retroactivity can . . . be understood as . . . providing expanded procedural protections to criminal defendants. . . . [A]ny defendant whose conviction had not yet become final should be given the benefit of a new decision regardless of the additional burden this might place on law enforcement authorities.

There are no analogous reasons for adopting a *per se* rule of retroactivity in the civil context. Either party before a court may benefit from the application of the *Chevron Oil* rule, . . . nor is there any policy reason for protecting one class of litigants over another. . . . Nor does *Griffith*’s criticism that nonretroactivity gives the benefit of a new rule to a “chance beneficiary” but then “permit[s] a stream of similar cases subsequently to flow by unaffected by that new rule” have force in the civil context. Although the dissent echoes this criticism, it may fairly be aimed only at those cases in which the Court reversed the conviction of the defendant in the law-changing decision and later determined that the rule would not be applicable retroactively. The dissent has failed to cite a single civil case in which comparable inequitable treatment has occurred. . . .

As *Griffith*’s rationale is unpersuasive in the civil context, we see no reason to abandon the *Chevron Oil* test. . . . The utility of our retroactivity doctrine in cushioning the sometimes inequitable and disruptive effects of law-changing decisions is clear. The “inequities” the dissent alleges are caused by the doctrine are illusory.

*Id.* at 198-200 (citations omitted).

77. See *id.* at 179-83. The plurality seemed most concerned with the third factor: “the equities of retroactive application of *Scheiner*.” *Id.* at 181. Because a ruling declaring the Arkansas highway tax unconstitutional “places substantial obligations on the States to provide relief, the threshold determination whether a new decision should apply retroactively is a crucial one, requiring a hard look at whether retroactive application would be unjust.” *Id.*

78. See *id.* at 183.

79. See *id.* at 200-01 (Scalia, J., concurring in judgment).

80. *Id.* at 201.

Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue in *Scheiner* (which occurred before our decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then *Scheiner* was wrong, and the issue of whether to “apply” that

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented.<sup>81</sup> According to the dissent, the issues before the Court were “whether the flat tax features of the Arkansas HUE tax violate the Commerce Clause of the Federal Constitution and, if so, whether petitioners are entitled to a tax refund.”<sup>82</sup> The dissent concluded that the Court’s decision regarding the constitutionality of the tax in question should be no different here than in *Scheiner*.<sup>83</sup> Finally, after characterizing the *Chevron Oil* standard as remedial (rather than as going to choice of law),<sup>84</sup> Justice Stevens concluded: “I

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decision needs no further attention.

*Id.* at 203-04. Criticizing the Court’s “negative” Commerce Clause jurisprudence, Justice Scalia continued:

Because our “negative” Commerce Clause jurisprudence is inherently unstable, it will repeatedly result in the upsetting of settled expectations. My fellow dissenters in *Scheiner* seek to avoid this consequence in the present case . . . by embracing a rule of prospective decisionmaking. . . . I decline to adopt that solution because, as I have discussed above, such a mode of action is fundamentally beyond judicial power—and although “negative” Commerce Clause decisionmaking is as well, two wrongs do not make a right.

*Id.* at 203-04. Nonetheless, Justice Scalia did not believe that he was required to “conclude that the pre-*Scheiner* Arkansas HUE taxes were unconstitutional.” *Id.* at 204. “I think it appropriate . . . —indeed, I think it necessary—for a judge whose view of the law causes him to dissent from an overruling to persist in that position (at least where his vote is necessary to the disposition of the case) with respect to action taken before the overruling occurred.” *Id.* at 205.

81. *Id.* at 205 (Stevens, J., dissenting).

82. *Id.*

Petitioners are entitled to an adjudication of the constitutionality of the Arkansas tax under our best *current* understanding of federal law regardless of the good faith of the Arkansas legislators. The question of a remedy or refund, on the other hand, . . . should be decided, not by us, but by the state court in the first instance.

*Id.* at 206 (citations omitted). The dissent later added:

A decision may be denied “retroactive effect” in the sense that conduct occurring prior to the date of the decision is not judged under current law, or it may be denied “retroactive effect” in the sense that independent principles of law limit the relief that a court may provide under current law. . . .

This case, which comes to us from state court, requires us for the first time to expressly distinguish between retroactivity as a choice of law rule and retroactivity as a remedial principle.

*Id.* at 209-10.

83. *See id.* at 212.

In my opinion, the Arkansas HUE tax also violated the Constitution before our decision in *Scheiner* and petitioners are entitled to a decision to that effect. . . . In *Scheiner*, we applied our understanding of the Commerce Clause retroactively . . . . We should follow the same course here. The accidental timing of our decisions in two timely filed and currently pending cases should not, and has not in the past, produced such a difference in the law applicable to the respective litigants.

*Id.* (citation omitted).

84. *See id.* at 219-20.

Close examination of *Chevron Oil* and its progeny reveals that those cases establish a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice of law principle applicable to all cases on direct review.

would hold that our decision in *Scheiner* need apply only where, under state law, the time for challenging the tax has not expired, or in cases brought within the time specified by state law for challenging the tax, the decisions are not yet final.”<sup>85</sup>

#### F. James B. Beam Distilling Co. v. Georgia

The Supreme Court’s retroactivity jurisprudence reached the peak of its confusion in *James B. Beam Distilling Co. v. Georgia*,<sup>86</sup> a case that spawned no fewer than five separate opinions.<sup>87</sup> *Beam* involved the question of whether the Court’s holding in *Bacchus Imports, Ltd. v. Dias*,<sup>88</sup> which declared a Hawaiian excise tax on imported alcohol unconstitutional,<sup>89</sup> should apply retroactively to a nearly identical Georgia statute.<sup>90</sup> The Supreme Court of Georgia, citing *Chevron Oil*, held that *Bacchus* applied prospectively only.<sup>91</sup> The Supreme Court of the United States reversed.<sup>92</sup> According to Justice Souter, “*Bacchus* is fairly read to hold . . . that its rule should apply retroactively to the litigants then before the Court.”<sup>93</sup> The question before the Court thus became “whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here

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. . . In [the] special circumstances [of *Chevron Oil*], we ruled that our interpretation that the Act did not incorporate the admiralty doctrine would not apply retroactively to bar the plaintiff’s suit. Remedial considerations were dispositive to our analysis. We stressed that a court considering the retroactive effect of a decision establishing a new principle of law should consider remedial issues such as the purpose and effect of the rule in question and the inequity imposed by retroactive application . . .

*Id.* (citations omitted). The dissent also noted that *Chevron Oil* was “one of a line of cases in which the Court has announced new rules for the future only, refusing to apply them even to the parties before the Court.” *Id.* at 221 n.11.

85. *Id.* at 224-25.

86. 501 U.S. 529 (1991).

87. Justice Souter announced the judgment, but his opinion was joined only by Justice Stevens. *Id.* at 532 (opinion of Souter, J.). Justices White, Blackmun, and Scalia each filed opinions concurring in the judgment. *Id.* at 544 (White, J., concurring in judgment), 547 (Blackmun, J., concurring in judgment), 548 (Scalia, J., concurring in judgment). Justice O’Connor filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 549 (O’Connor, J., dissenting).

Interestingly, *Beam* is the first in a series of significant retroactivity cases in which the most junior member of the Court was tapped to author the lead opinion.

88. 468 U.S. 263 (1984).

89. *See id.* at 273.

90. *See Beam*, 501 U.S. at 532 (opinion of Souter, J.).

91. *See id.* at 533.

92. *See id.* at 544.

93. *Id.* at 539. “Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, it is properly understood to have followed the normal rule of retroactive application in civil cases.” *Id.* (citation omitted).

prevailing over any claim based on a *Chevron Oil* analysis.”<sup>94</sup>

Justice Scalia filed an opinion concurring in the judgment, in which Justices Marshall and Blackmun joined.<sup>95</sup> Justice Scalia relied more directly on the Constitution: “If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted.”<sup>96</sup> For the judicial power, this “must be deemed to be the judicial power as understood by our common-law tradition. That is the power ‘to say what the law is,’ not the power to change it.”<sup>97</sup> Thus, “[f]or this

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94. *Id.* at 540. In so concluding, Justice Souter argued that:

Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of “new” rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases.

*Id.* at 543-44 (citations omitted). Justice Souter then added:

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a new rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*. We do not speculate as to the bounds or propriety of pure prospectivity. Nor do we speculate about the remedy that may be appropriate in this case . . . .

*Id.* at 544.

95. *Id.* at 548 (Scalia, J., concurring in judgment).

96. *Id.* at 549.

97. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Justice Scalia explained:

I think I agree, as an abstract matter, with Justice Souter’s reasoning, but that is not what leads me to agree with his conclusion. I would no more say that what he calls “selective prospectivity” is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.

*Id.* at 548. Justice Scalia then added:

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses “difficulties of a . . . practical sort” when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to “make new law,” and thus to alter in a fundamental way the

reason, and not reasons of equity, I would find both 'selective prospectivity' and 'pure prospectivity' beyond our power."<sup>98</sup>

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, dissented.<sup>99</sup> Addressing first the opinion by Justice Souter, Justice O'Connor opined:

The Court extends application of the new rule announced in *Bacchus Imports, Ltd. v. Dias* retroactively to all parties, without consideration of the analysis described in *Chevron Oil v. Huson*. Justice Souter bases this determination on 'principles of equality and *stare decisis*.' To my mind,<sup>100</sup> both of these factors lead to precisely the opposite result.

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assigned balance of responsibility and power among the three branches.

*Id.* at 549 (quoting *id.* at 536 (opinion of Souter, J.)).

98. *Id.* Justice Blackmun's concurring opinion, in which Justices Marshall and Scalia joined, expounded on Justice Scalia's constitutional analysis. *Id.* at 547-48 (Blackmun, J., concurring in judgment).

Justice White likewise concurred in the judgment, *id.* at 544 (White, J., concurring in judgment), though on decidedly different grounds:

I agree with Justice Souter that the opinion in *Bacchus Imports, Ltd. v. Dias* may reasonably be read as extending the benefit of the judgment in that case to the appellant *Bacchus Imports*. I also agree that the decision is to be applied to other litigants whose cases were not final at the time of the *Bacchus* decision. . . . There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated, and *Griffith v. Kentucky* having overruled such a practice in criminal cases (a decision from which I dissented and still believe wrong, but which I now follow on the basis of *stare decisis*), I agree that the petitioner here should have the benefit of *Bacchus*, just as *Bacchus Imports* did. Hence I concur in the judgment of the Court.

Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. . . .

The propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions.

Plainly enough, Justices Scalia, Marshall, and Blackmun would depart from our precedents. Justice Scalia would do so for two reasons, as I read him. First, even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them. Second, Justice Scalia, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.

I am quite unpersuaded by this line of reasoning and hence concur in the judgment on the narrower ground employed by Justice Souter.

*Id.* at 544-47 (citations omitted).

99. *Id.* at 549 (O'Connor, J., dissenting).

100. *Id.* at 549-50 (citations omitted).

As to "equality," . . . had the *Bacchus* Court determined that retroactivity would be appropriate under *Chevron Oil*, or had this Court made that determination now, retroactive application would be fair. Where the *Chevron Oil* analysis

Justice O'Connor then undertook a *Chevron Oil* analysis to determine whether *Bacchus* should be applied only prospectively.<sup>101</sup> Determining that the rule in *Bacchus* “came out of the blue,”<sup>102</sup> Justice O'Connor stressed the “potentially devastating liability without fair warning” on the “blameless and unexpecting citizens of Georgia” caused by the rule’s retroactive application.<sup>103</sup>

G. *Harper v. Virginia Department of Taxation and the New Rule for Civil Cases*

The Supreme Court confronted the retroactivity issue left unresolved in *American Trucking and Beam* in *Harper v. Virginia Department of Taxation*.<sup>104</sup> Like the preceding cases, *Harper* spawned multiple opinions.<sup>105</sup> In *Harper*, the Court considered the retroactive application of its decision in *Davis v. Michigan Department of Treasury*.<sup>106</sup> Unlike in *Beam*, a clear majority of the *Harper* Court

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indicates that retroactivity is not appropriate, however, just the opposite is true. If retroactive application was inequitable in *Bacchus* itself, the Court only hinders the cause of fairness by repeating the mistake. Because I conclude that the *Chevron Oil* test dictates that *Bacchus* not be applied retroactively, I would decline the Court’s invitation to impose liability on every jurisdiction in the Nation that reasonably relied on pre-*Bacchus* law.

Justice Souter also explains that “*stare decisis*” compels its result. By this, I assume he means that the retroactive application of the *Bacchus* rule to the parties in that case is itself a decision of the Court to which the Court should now defer in deciding the retroactivity question in this case. This is not a proper application of *stare decisis*. The Court in *Bacchus* applied its rule retroactively to the parties before it without any analysis of the issue. This tells us nothing about how this case—where the *Chevron Oil* question is squarely presented—should come out.

Contrary to Justice Souter’s assertions, *stare decisis* cuts the other way in this case. At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. . . . If a *Chevron Oil* analysis reveals, as it does, that retroactive application of *Bacchus* would unjustly undermine settled expectations, *stare decisis* dictates strongly against [the Court’s] holding.

*Id.* at 551-52 (citations omitted).

101. *See id.* at 553-59.

102. *Id.* at 556.

103. *Id.* at 558.

104. 509 U.S. 86 (1993). The Court’s opinion in *Harper* was written by Justice Thomas (then the most junior member of the Court) and was joined in full by Justices Blackmun, Stevens, Scalia, and Souter, and in part (though not as to the crux of the Court’s retroactivity analysis) by Justices Kennedy and White. *See id.* at 88.

105. Besides joining in the Court’s opinion, Justice Scalia filed a concurring opinion. *See id.* at 102 (Scalia, J., concurring). Justice Kennedy, joined by Justice White, filed an opinion concurring in part and concurring in the judgment. *See id.* at 110 (Kennedy, J., concurring in part and concurring in judgment). And (predictably), Justice O’Connor, joined by Chief Justice Rehnquist, dissented. *Id.* at 113 (O’Connor, J., dissenting).

106. 489 U.S. 803 (1989). *See Harper*, 509 U.S. at 89-90. In *Davis*, the Court “held that a State violates the constitutional doctrine of intergovernmental tax immunity when it

held “that this Court’s application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.”<sup>107</sup>

The Court observed that “[n]othing in the Constitution alters the fundamental rule of ‘retrospective operation’ that has governed ‘[j]udicial decisions . . . for near a thousand years.’”<sup>108</sup> After reviewing its own retroactivity precedent,<sup>109</sup> the Court specifically relied on *Beam* and *Griffith*:

*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*’s ban against “selective application of new rules.”<sup>110</sup>

Addressing *Davis*, the Court applied the understanding articulated by Justice Souter in *Beam*: “When this Court does not ‘reserve the question whether its holding should be applied to the parties before it,’ . . . an opinion announcing a rule of federal law ‘is properly understood to have followed the normal rule of retroactive application.’”<sup>111</sup> The Court concluded that the *Davis* Court’s holding must have been applied to the parties in that case.<sup>112</sup> Because the Virginia court in *Harper* had held to the contrary, and because it had relied on the *Chevron Oil* test in refusing to apply *Davis* retroactively, the Supreme Court reversed.<sup>113</sup>

Justice O’Connor, joined in dissent by Chief Justice Rehnquist,<sup>114</sup>

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taxes retirement benefits paid by the Federal Government but exempts from taxation all retirement benefits paid by the State or its political subdivisions.” *Id.* at 89.

107. *Harper*, 509 U.S. at 90.

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

109. *See id.* at 94-96.

110. *Id.* at 97 (citation omitted). In a footnote, the Court added:

[O]ur decision today makes it clear that “the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case” and that the federal law applicable to a particular case does not turn on “whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application” of a new one.

*Id.* at 95 n.9 (citations omitted).

111. *Id.* at 97 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991) (opinion of Souter, J.)).

112. *See id.* at 98.

113. *See id.* at 97-100. The Court then remanded the case to the Supreme Court of Virginia for the consideration of an appropriate remedy. *See id.* at 100-02.

114. *Id.* at 113 (O’Connor, J., dissenting).

reiterated her argument from *Beam*: “Because I see no reason to abandon our traditional retroactivity analysis as articulated in *Chevron Oil v. Huson*, and because I believe the Supreme Court of Virginia correctly applied *Chevron Oil* in this case, I would affirm the judgment below.”<sup>115</sup> After observing that the Court’s decision did not foreclose the possibility of pure prospectivity,<sup>116</sup> the dissent criticized the Court’s retroactive application of a “new” rule of law that had never been subjected to a *Chevron Oil*-type analysis.<sup>117</sup> Justice O’Connor further argued in favor of a distinction between civil and criminal cases in this context.<sup>118</sup>

Justice Scalia concurred in the Court’s opinion,<sup>119</sup> and directed most of his opinion toward the dissent. Regarding the difficulties involved in applying the *Chevron Oil* (or any similar) test, Justice Scalia observed:

The *Teague* plurality opinion set forth good reasons for abandoning *Linkletter*—reasons justifying a similar abandonment

115. *Id.* (citations omitted).

116. *See id.* at 114-16.

117. *Id.* at 117.

It is one thing to say that, where we have considered prospectivity in a prior case and rejected it, we must reject it in every case thereafter. But it is quite another to hold that, because we did *not* consider the possibility of prospectivity in a prior case and instead applied a rule retroactively through inadvertence, we are foreclosed from considering the issue forever thereafter. Such a rule is both contrary to established precedent and at odds with any notion of fairness or sound decisional practice. Yet that is precisely the rule the Court appears to adopt today.

*Id.*

118. *See id.* at 121-22. The dissent went on to consider the remedial aspects of the Court’s decision. “The questions of retroactivity and remedy are analytically distinct.” *Id.* at 131. After criticizing the Court’s discussion of the remedy applicable in this case—an issue not “properly before us,” *id.* at 132—the dissent argued that the range of available remedies should be broader than that suggested by the Court, and should include the denial of retroactive forms of relief. *Id.* at 133.

Justice Kennedy, joined by Justice White, concurred in part and concurred in the judgment. *See id.* at 110 (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy began:

I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision. . . . And in my view retroactivity in civil cases continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*. Thus, for the reasons explained by [the dissent], I cannot agree with the Court’s broad dicta that appears to embrace in the civil context the retroactivity principles adopted for criminal cases in *Griffith v. Kentucky*. . . . I also cannot accept the Court’s conclusion that a decision of this Court must be applied in a retroactive manner simply because the rule of law there announced happened to be applied to the parties then before the Court.

*Id.* (citations omitted). Nonetheless, applying *Chevron Oil*, Justice Kennedy concluded that *Davis* did not constitute a new rule of law. *See id.* at 111.

119. *Id.* at 102 (Scalia, J., concurring).

of *Chevron Oil Co. v. Huson*. It noted, for example, that *Linkletter* “ha[d] not led to consistent results;” but neither has *Chevron Oil*. Proof that what it means is in the eye of the beholder is provided quite nicely by the separate opinions filed today: Of the four Justices who would still apply *Chevron Oil*, two find *Davis v. Michigan* retroactive, [and] two find it not retroactive.<sup>120</sup>

After rebutting the dissent’s attempt to distinguish civil and criminal cases,<sup>121</sup> Justice Scalia responded to the dissent’s appeal to stare decisis:

What most provokes comment in the dissent, however, is not its insistence that today a rigid doctrine of *stare decisis* forbids tinkering with retroactivity, which four Terms ago did not; but rather the irony of its invoking *stare decisis* in defense of prospective decisionmaking *at all*. Prospective decisionmaking is the hand-maid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a “technique of judicial lawmaking” in general, and more specifically as a means of making it easier to overrule prior precedent. Thus, the dissent is saying, in effect, that *stare decisis* demands the preservation of methods of destroying *stare decisis* recently invented in violation of *stare decisis*.<sup>122</sup>

“In sum,” Justice Scalia “join[ed] the opinion of the Court because the doctrine of prospective decisionmaking is not in fact protected by our flexible rule of *stare decisis*; and because no friend of *stare decisis* would want it to be.”<sup>123</sup>

#### H. *Reynoldsville Casket Co. v. Hyde: A Postscript*

The Court’s most recent significant foray into the law of retroactivity occurred in *Reynoldsville Casket Co. v. Hyde*.<sup>124</sup> *Hyde* came in the wake of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,<sup>125</sup> in which the Court held unconstitutional an Ohio tolling statute effectively applying different statutes of limitations to claims against in-state and out-of-state defendants.<sup>126</sup> The issue in *Hyde* was “whether the Federal Constitution permits Ohio to continue to apply its tolling statute to pre-*Bendix* torts.”<sup>127</sup> In an opinion delivered by

120. *Id.* at 103 (citations omitted) (quoting *Teague v. Lane*, 489 U.S. 288, 302 (1989)).

121. *Id.* at 104 n.1.

122. *Id.* at 105-06 (citations omitted).

123. *Id.* at 109-10.

124. 514 U.S. 749 (1995).

125. 486 U.S. 888 (1988).

126. *See Hyde*, 514 U.S. at 750.

127. *Id.* at 752.

Justice Breyer, the Court held that it does not.<sup>128</sup>

Attempting to persuade the Court to affirm the Ohio Supreme Court's judgment, Hyde argued (rather cleverly) that the Ohio court's decision should be thought of in terms of remedy rather than retroactivity.<sup>129</sup> After observing that the Ohio Supreme Court itself framed its decision in terms of retroactivity,<sup>130</sup> the Court rejected the notion that essentially prospective results could be achieved through remedial means.<sup>131</sup>

### I. *Why Prospectivity?*

So why prospectivity? We now know, following the foregoing survey of Supreme Court precedent, that the analysis relies on a perception that prospectivity-based approaches help mitigate the costs associated with the implementation of legal change. But how did courts (and others) come to believe that prospectivity was even an option? And why was that option exercised and retroactivity rejected (at least in certain cases)? Before proceeding to Part III—which largely consists of an argument in favor of a firm rule of retroactivity in civil and criminal cases on direct review—it might be useful to consider these questions and to attempt to determine, at a more fundamental level, the reasons why prospectivity came into such prominence and continues to endure, at least as a matter of state (if not federal) law and in the minds of many jurists and legal scholars.

The rise of prospectivity occurred against the legal-philosophical landscape of the 1960s. Following the rise of legal realism and other modern jurisprudential perspectives, courts (including the Supreme Court) were more aware not only of their role in the “making” of law, but also of the possibility of functionally separating the law-making decision (i.e., the determination of what is or ought to be the applicable law) from the application of the product of that decision (whether to the parties then before the court or to later, similarly

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128. *Id.* Joining Justice Breyer (again, the most junior member of that Court) were Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Thomas, and Ginsburg. *Id.* at 750. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. *Id.* at 759 (Scalia, J., concurring). Justice Kennedy filed an opinion concurring in the judgment, in which Justice O'Connor joined. *Id.* at 761 (Kennedy, J., concurring in judgment). There was no dissent.

129. *See id.* at 752.

130. *See id.* at 753.

131. “If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on ‘remedy’ rather than ‘non-retroactivity?’” *Id.* at 754.

situated parties). This separation resulted in more than merely a deeper understanding of what previously had generally been considered a single process; it also resulted in a disinclination to consider the consequences of a law-making decision in the context of that decision. Courts preferred a deferral of such considerations to a later point in the judicial decision-making process.<sup>132</sup> Once this conceptual schism between law-making and law-applying reached some general level of acceptance, it seems almost inevitable that some form of prospective application would emerge. At least in certain “law-changing” cases, to the extent that notice and reliance were not considered in the context of the law-making decision, the “retroactive” application of such a decision might well be perceived by some as intolerable.<sup>133</sup>

Another product of modern legal philosophy that might help explain the rise of prospectivity is the emergence of a more discretionary approach to judicial decision-making.<sup>134</sup> Generally speaking, some consider that greater flexibility with respect to the results of particular cases (whether by substantive means or as a remedial matter) produces a better form of justice. An adherent of such an approach might well embrace prospectivity, for with prospectivity comes greater flexibility in the context not only of the law-making decision, but also of the law-applying decision, thereby greatly expanding the universe of possible results in any given case.<sup>135</sup>

Yet another factor has been what seems to be a growing perception on the part of the Supreme Court (as well as other courts) of the judiciary as a legitimate (and even necessary) institution for effecting

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132. For a more detailed discussion of this phenomenon, see *infra* notes 210-216 and accompanying text.

133. See, e.g., Roosevelt, *supra* note 1, at 1087 (“With the recognition that courts make law came the possibility of prospective overruling.”). Indeed, this shift in perspective regarding judicial law-making led some to equate all forms of law-making for purposes of the retroactivity/prospectivity inquiry. For if the law-making by courts and the law-making by legislatures is, in effect, functionally indistinguishable, and if prospective application is warranted for the latter, should not the same be warranted for the former? See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 262 (1994) (“[L]iberalists realized that judicial decisions could shift legal terrain as radically as statutes, and some argued that such judicial decisions overruling earlier understandings should, like statutes, be given only prospective effect.”).

134. See, e.g., H.L.A. HART, THE CONCEPT OF LAW 244-54, 272-76 (2d ed. 1994). For more on the relationship between discretion and the retroactivity/prospectivity question, see *infra* Part III.D.3.

135. See, e.g., ESKRIDGE, *supra* note 133, at 263 (“[T]he realists believed that judges often made new law, that this fact should be celebrated, and that prospective overruling of prior decisions was a useful device for ameliorating some of the drawbacks of shifts in judicial lawmaking.”).

legal change, particularly through constitutional adjudication.<sup>136</sup> While proponents of legal change in any climate might be expected to embrace judicial decision-making techniques (such as prospectivity) that help facilitate such change, a greater propensity for change likely would lead to more frequent employment of such techniques.<sup>137</sup> At the same time, one also might expect opponents of legal change to embrace prospectivity as a means of slowing the effect of such change.<sup>138</sup>

Ultimately, more salient than the question how prospectivity came to be so widely embraced and adopted is whether prospectivity

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136. See, e.g., *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 109 (1993) (Scalia, J., concurring) (discussing the accelerating rate of overrulings by the Court during the 1960's and 1970's).

137. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (opinion of Souter, J.) (observing that prospectivity "tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures").

138. See, e.g., *Desist v. United States*, 394 U.S. 244, 258 (1968) (Harlan, J., dissenting) (confessing to use of prospectivity as a means of "limit[ing] the impact of constitutional decisions which seemed to me profoundly unsound in principle"). Indeed, considering which justices have tended to support prospectivity over the past thirty years, one might conclude that it is more a tool of the middle, utilized by justices whom we might suspect to be concerned with the pace and effect of legal changes rather than facts. In any event, one wonders how many of these overrulings and other changes that occurred during this period would not have occurred but for the availability of prospectivity.

Undoubtedly, there are other reasons why prospectivity came to such prominence in federal court adjudication. For example, one might recall that the historical development of prospectivity began in the context of a criminal case on collateral review. See *Linkletter v. Walker*, 381 U.S. 618 (1965). This compelled the Court to consider whether its application in that context (arguably, the most sympathetic) could be distinguished from its application to criminal cases on direct review, and then from civil cases on direct review. See generally *supra* Part II.A-B (discussing this development). One is left to wonder what might have occurred had the Court first seriously confronted prospectivity in some other context.

Another reason the Court moved toward prospectivity might be due to a shift in jurisprudential perspective somewhat related to the separation of law-making from law-applying. Under this theory, the Court, beginning with *Linkletter*, shifted from a "decision-time model" (within which the Court simply applied the law in effect at the time of the decision) to a "transaction-time model" (within which the Court presumed that parties should be governed by the law in effect at the time of the occurrence of the underlying conduct or events). See Roosevelt, *supra* note 1, at 1077-79. According to Roosevelt, the Court's return to retroactivity has been hampered by a failure to return to a decision-time perspective. See *id.* at 1079. For more on the idea that courts should apply the law in effect at the time of the decision, see *infra* Part III.A.

Yet another reason might simply be disagreement among members of the Court as to the results reached in particular cases. In other words, the Court's retroactivity analysis might simply mask disagreements that could be resolved on a more substantive basis. This notion also is discussed briefly in Part III.C *infra*.

One last reason for the persistence of prospectivity-based approaches—that a clear theoretical basis for retroactivity has yet to emerge—has already been mentioned. See *supra* note 20 and accompanying text. Of course, the primary purpose of Part III of this Article is to provide such a basis.

represents the best means of resolving the problems associated with judicially induced legal change. The visceral appeal of prospectivity is obvious, but have the proponents of prospectivity fully considered all of the consequences of the approach? And though the drawbacks associated with retroactivity seem equally obvious, have the virtues of retroactivity received adequate attention? These are, broadly speaking, the issues to be discussed in Part III.

### III. AN ARGUMENT FOR A FIRM RULE OF RETROACTIVE APPLICATION IN CIVIL AND CRIMINAL CASES

As Part II indicated, the Supreme Court already has established a firm rule of retroactivity in criminal cases on direct review. Moreover, recent Supreme Court precedent suggests that, were the Court to be formally confronted with the issue, it would also apply a firm rule of retroactivity in civil (non-habeas) cases. Thus, as a practical matter, the retroactivity/prospectivity question appears to have been resolved, at least in the federal system.

The purpose of this Part is normative. It intends to show why federal (as well as state) courts should adopt a firm rule of retroactive application with respect to the law announced in civil and criminal judicial decisions, both in precedent-setting cases and in all other similar, but not yet final, cases. The discussion will not be limited to a criticism of prospectivity; rather, and perhaps more importantly, it will also attempt to address those criticisms of retroactivity that led to the consideration,<sup>139</sup> and to some extent, the adoption of prospectivity-based approaches.

This Part will present four broad arguments in favor of a firm rule of retroactivity. First, a firm rule of retroactivity is more in accord

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139. This Article will not, though, further discuss in detail the argument that retroactivity should be rejected on the ground that it reflects an adherence to the declaratory theory of law, "according to which the courts are understood only to find the law, not to make it." *Beam*, 501 U.S. at 535-36 (opinion of Souter, J.). As the declaratory theory of law is now largely discredited (so the argument goes), so must be a firm adherence to the retroactive application of judicial decisions. *See, e.g., Levy, supra* note 7, at 2-7; *see also Haddad, supra* note 3, at 427 n.107 ("Generally proponents of the prospective-only technique seek to force opponents into a Blackstonian stance so that in refuting the claim that judges discover law, the proponents will have justified the use of the technique they propose."). But it simply does not follow that acknowledging the demise of the declaratory theory requires that one reject retroactivity, or that any embrace of the latter requires an embrace of the former. *See Haddad, supra* note 3, at 427 n.107; *Mishkin, supra* note 63, at 59-60. Indeed, it is questionable that the debate whether judicially declared law is found, rather than made, has any relevance to this issue. *See RONALD DWORKIN, LAW'S EMPIRE* 225 (1986); *Fallon & Meltzer, supra* note 16, at 1758-63; *Roosevelt, supra* note 1, at 1084 n.42, 1120 n.227.

with the nature of the adjudicative function than alternatives. Second, a firm rule of retroactivity is consistent with traditional understandings of the distinction between holding and dicta. Third, a firm rule of retroactivity is also consistent with traditional understandings of the doctrine of stare decisis. Finally, a firm rule of retroactivity is superior to prospectivity-based approaches because it better furthers private ordering, fair and efficient adjudication, and public confidence in the judiciary. It is to these arguments that this Article now turns.<sup>140</sup>

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140. Neither this list, nor this Part, intends to exhaust arguments in favor of retroactivity. For example, many have argued that prospectivity is unconstitutional. Indeed, as the discussion in Part II indicated, the *Stovall* Court seemed to presume that pure prospectivity would be unconstitutional, see *Stovall v. Denno*, 388 U.S. 293, 301 (1967), and a number of other Justices (including at least one current member of the Court) have expressed similar views, see, 501 U.S. at 548-49 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring in judgment). A number of legal scholars also have argued that prospectivity is unconstitutional, at least in certain forms. Generally speaking, the argument is based on a combination of justiciability-related concerns and the disparate constitutional roles of the legislative and judicial branches. See, e.g., Harrington, *supra* note 15, at 24; Rogers, *supra* note 5, at 46; Roosevelt, *supra* note 1, at 1111-12; Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 933 (1962). See also 1 TRIBE, *supra* note 17, § 3-3, at 222 n.57 (observing that “pure prospectivity is in some tension with article III’s ‘Case’ or ‘Controversy’ requirement”); *infra* notes 157, 189 (discussing this argument in the context of the adjudicative and precedent-setting functions of federal courts).

On the other hand, one also has to acknowledge that “the [Supreme] Court has not fully confronted the issue of whether and to what extent the Constitution limits [federal] judicial . . . ability to define the temporal effect of a new legal rule,” Fisch, *supra* note 21, at 1073, and as a result, “a majority of the Court has never expressly recognized any constitutional limitation on adjudicative nonretroactivity,” *id.* at 1077. Moreover, a number of legal scholars have advanced powerful arguments in opposition to the argument that the retroactive application of judicial decisions is constitutionally mandated. See, e.g., Currier, *supra* note 1, at 216-34; Fallon & Meltzer, *supra* note 16, at 1777-1807; Fisch, *supra* note 21, at 1078-84. For these reasons, and because the full development of such an argument would be an article unto itself, little further consideration will be given here to the constitutionality of prospectivity.

Also promising are arguments based on relative institutional competence, or the idea that “a court is not primarily a law-making institution,” Currier, *supra* note 1, at 272, and a legislature is. See, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 353 (1994) (discussing the “principle of comparative institutional competence, which stands for the proposition that [any given] authority belongs to that branch that, by virtue of its structural characteristics, is best able to [carry out that authority]”). This argument reasons from the differences in the ways in which courts and legislatures ordinarily operate. See Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 951 (1995) (“The division best approximating the ideal separation of judicial from legislative tasks is the distinction between *retrospective* and *prospective* decisions.”); Harold J. Krent, *Should Bouie Be Buoyed: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 85 (1997); Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 34-38 (1969). For reasons similar to those concerning constitutionality-based arguments, an expanded discussion of relative institutional competence is beyond the scope of this Article.

*A. Retroactivity and the Nature of the Adjudicative Function*

American courts, and therefore federal courts, have two primary functions: “One function is to decide the instant case; another is to lay down a rule which may afford some guidance in the future.”<sup>141</sup> This Subpart addresses the decisional, or adjudicative, function of courts; Subparts B and C address their precedent-setting function. This Subpart will argue that the retroactive application of judicial decisions in all civil and criminal cases on direct review is consistent with the nature of the adjudicative function—i.e., that it is consistent with the way in which cases typically are decided. The prospective application of judicial decisions, on the other hand, is inconsistent with the nature of the adjudicative function. This Subpart will also consider and reject a “remedial” approach to prospectivity, whereby prospective results may be achieved in cases purporting to apply rules retroactively through the application of “remedial” principles.

Federal courts are, “first and foremost,” in the business of deciding cases.<sup>142</sup> In carrying out this function, federal courts “must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.”<sup>143</sup> In order to carry out these commands, federal courts must do several things. First, they must identify the issues before the court for resolution. Second, they must ascertain the relevant law—the standard by which the conduct or events at issue is to be evaluated. Finally, they must apply that law to the facts relevant to each issue, thereby deciding the

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141. Levy, *supra* note 7, at 3. See also EISENBERG, *supra* note 10, at 4-7.

142. Gregory v. Ashcroft, 501 U.S. 452, 487 n.1 (1991) (Blackmun, J., dissenting) (“A judge is first and foremost one who resolves disputes . . .”). Accord Currier, *supra* note 1, at 250; Eisgruber, *supra* note 140, at 349; Fisch, *supra* note 21, at 1076 n.127. See also THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) [hereinafter Fuller, *Adjudication*].

Per contra, Fallon and Meltzer assert that “there exists a substantial body of case law, rising almost to the level of a general tradition, in which adjudication . . . functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes.” Fallon & Meltzer, *supra* note 16, at 1800. This assertion appears to represent a minority viewpoint, though, and in any event it does not contradict the fact that courts (including courts of last resort) decide cases in the course of norm pronouncement.

143. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965). Accord K.N. LLEWELLYN, THE BRAMBLE BUSH 42-43 (1951) [hereinafter LLEWELLYN, THE BRAMBLE BUSH]. See also M.D.A. Freeman, *Standards of Adjudication, Judicial Law-Making and Prospective Overruling*, 26 CURRENT LEGAL PROBS. 166, 177 (1973) (“Once [a judge] is seized of a *lis* he must come to a decision. Unlike Parliament he cannot put off the evil day, he cannot compromise, he must pronounce.”).

case. This is often referred to as the adjudicative process.<sup>144</sup>

Ordinarily, the duty to decide litigated issues is considered only positively—i.e., for the purpose of ensuring that those issues are, in fact, decided. But this duty to decide litigated issues also has a negative aspect that comes to the fore in the retroactivity/prospectivity context. Courts *must* confine their inquiry to what is before them; they *cannot* consider issues external to a particular dispute. In other words, courts cannot determine the outcome of future cases prior to their adjudication. As stated by one prominent legal scholar more than 100 years ago: “[T]he court making the decision is under a duty to decide the very case presented and has no authority to decide any other.”<sup>145</sup>

Before turning to the matter of the controlling law, one can make an observation about the underlying facts: It is an unavoidable implication of the adjudicative function that the cases considered by courts almost invariably involve conduct or events that occurred in the past.<sup>146</sup> This means that the resolution of the legal issues virtually always involves the “retroactive” application of some controlling rule of law, at least in the sense that the determination of which law to apply to past conduct or past events is ordinarily post hoc.<sup>147</sup>

And what is the source of that controlling law? Generally speaking, courts do not decide cases based on what is perceived to be the former

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144. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 350-51 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994); see also Fuller, *Adjudication*, *supra* note 142, at 368.

145. EUGENE WAMBAUGH, *THE STUDY OF CASES* 8 (2d ed. 1894). Accord LLEWELLYN, *THE BRAMBLE BUSH*, *supra* note 143, at 42. To some extent, of course, this principle also is expressed (at least in the federal system) in the Article III case-or-controversy requirement. For more on this requirement and its possible implications vis-à-vis the retroactivity/prospectivity question, see *supra* note 140 and *infra* note 189 and accompanying text.

146. See EISENBERG, *supra* note 10, at 7 (“The function of resolving disputes faces toward the parties and the past.”); PAUL J. MISHKIN & CLARENCE MORRIS, *ON LAW IN COURTS* 304 (1965); Traynor, *Prospective Overruling*, *supra* note 7, at 534. This is not to say that adjudication (even aside from whatever precedential effect it might have) never has forward-looking aspects. For example, courts occasionally grant injunctive relief directed toward future conduct or events. See, e.g., FED. R. CIV. P. 65 (“Injunctions”). Still, adjudication in its primary sense virtually always involves conduct or events that occurred in the past.

147. See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 99-100 (2d ed. 1931) (“[C]ourts are constantly making *ex post facto* Law.”); MISHKIN & MORRIS, *supra* note 146, at 304 (“Every society must have some agency for resolving disputes after they have arisen, an agency which must thus decide with retroactive effect. Are not the courts this agency in our society?”); Walter V. Schaefer, *Prospective Rulings: Two Perspectives*, 1982 SUP. CT. REV. 1, 2 [hereinafter Schaefer, *Prospective Rulings*] (“Courts normally look back. They apply rules to conduct that has already occurred.”).

law, nor do they decide cases on the basis of what might become the law in the future. Rather, the usual rule is that “a court is to apply the law in effect at the time it renders its decision.”<sup>148</sup> For “[t]he province of the judiciary is to say what the law is, not what it was,” and “one can maintain a priori that it is the duty of judges to decide cases based on their best understanding of the law.”<sup>149</sup> There is, of course, nothing unusual about such “retroactive” applications of current law; in fact, they occur in the vast majority of cases without discussion or even thought.<sup>150</sup>

Two comments: First, by saying that courts should apply the law in effect at the time of their decisions does not at all suggest that that law is (or should be) materially different from the law in effect at the time the underlying conduct or events occurred. Indeed, because of the doctrine of stare decisis,<sup>151</sup> the law in effect at the time of the decision very likely will be the same law as was in effect when the underlying conduct or events occurred (and very likely will be the same law as will be applied to similar cases in the near future).<sup>152</sup> Thus, the

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148. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (quoting *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974)). *Accord* *Griffith v. Kentucky*, 479 U.S. 314, 326 (1987); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941); Roosevelt, *supra* note 1, at 1117.

Of course, the foregoing must be tempered by the other “axiom” recited by the *Landgraf* Court: that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” 511 U.S. at 272 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). With respect to *judicial decisions*, though, the rule set forth previously—that courts are to apply the law in effect at the time they render their decisions—applies.

149. Roosevelt, *supra* note 1, at 1118-19. See also *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment) (arguing that “the judicial power as understood by our common-law tradition . . . is the power ‘to say what the law is,’ not the power to change it” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

150. See *Beam*, 501 U.S. at 535 (opinion of Souter, J.) (observing that retroactivity “is overwhelmingly the norm, and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law” (citation omitted)); Haddad, *supra* note 3, at 418 n.5 (“Retroactive application is a normal characteristic of judicial decisions, not an unwholesome extension of judicial power.”). Indeed, in none of the cases discussed in the previous Part did the Court consider whether the particular retroactivity/prospectivity rule decided upon should *itself* be applied in any manner other than retroactively.

151. See *infra* Part III.C. Actually, even a judicial system not subject to a “binding” rule of stare decisis is very likely to decide similar cases arising at approximately the same time in the same manner. See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 594 n.106 (2001).

152. See, e.g., *Beam*, 501 U.S. at 534 (“In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar.”); Mishkin, *supra* note 63, at 60 (“[I]t is certainly true that courts in general handle the vast bulk of cases by application of preexisting law.” (citations omitted)).

operation of the doctrine of stare decisis goes a long way toward assuaging the concerns commonly associated with the retroactive application of judge-made law.<sup>153</sup>

Second, the rule that courts should apply the law in effect at the time of their decisions does not assist in the determination of what that law is. Reasonable jurists sometimes differ as to which law should control in a particular case, but there should be no confusion as to the *context* in which that determination is made; the applicable law remains whichever is current at the time the case is decided. There is, therefore, but one applicable law, and though a court might be aware of any number of alternative rules, such alternative rules (regardless of whether they once were “the law,” or some day might become “the law”) typically are not regarded as being “the law” for purposes of deciding the case sub judice.<sup>154</sup>

Based on the foregoing description of the nature of the adjudicative function as it is generally understood by American courts, it should now be apparent that what is often referred to as the retroactive application of judicial decisions is simply the norm. By contrast, prospectivity-based approaches are quite inconsistent with this basic understanding of the nature of the adjudicative function. For one thing, prospectivity (at least in its pure form) is inconsistent in that what is purported to be “the law” is not applied to the issues before the court. Instead, the issues before the court are decided on the basis of what was formerly “the law.”<sup>155</sup> Second, by announcing rules of law that are to be applied only prospectively, pure prospectivity is

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Of course, one must recognize that the law can and does change, meaning that, in general, the greater the period of time between the underlying conduct or events and any related decision (or between any two decisions involving similar underlying conduct or events), the greater the likelihood of legal discontinuity. But statutes of limitation, principles of res judicata, limitations on collateral review, and similar principles of repose limit drastically the opportunity for changes in judicially declared law to produce disparate results between the time of the announcement of such decisions and the occurrence of the conduct and events underlying those decisions. See Note, *supra* note 140, at 915 n.51.

153. In fact, Part III.C, *infra*, will argue that the proper operation of this doctrine goes all the way in assuaging such concerns.

154. This comment regarding the context in which the choice of the applicable law is determined is related to the distinction between holding and dicta and the relationship between those concepts and the announcement of prospective rules of law. For more on these subjects, see *infra* Subpart Part III.B.

155. Compare *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion) (determining that the assignment of federal jurisdiction to the bankruptcy courts by the Bankruptcy Act of 1978 was unconstitutional, yet declaring that this determination “shall apply only prospectively”), with *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment) (“Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.”).

inconsistent with the adjudicative function in that the decisional court, in a very real sense, purports to decide issues other than those before it (i.e., those arising in certain future cases).<sup>156</sup>

Some might argue that, even if the aforementioned inconsistencies were conceded, they do not necessarily prove the impropriety of prospectivity-based approaches. Indeed, some might argue that this is precisely the point—i.e., that there is something about cases involving the announcement of “new” rules of law that call for some nontraditional form of treatment. Subpart C will address these arguments. Some might further argue that courts, in the course of their opinions, can (and often do) include more “law” than is necessary to decide the cases before them, and the fact that some of this “law” is not applied in the particular case (and/or to similar cases involving conduct or events that also predate the issuance of that opinion) does not mean that such statements are not law—i.e., cannot be given the effect prescribed in the opinion in which they are announced. Subpart B will address these arguments. The point here—a point that should not be lost—is that prospectivity-based approaches, when compared with the traditional manner in which cases are decided, are aberrational at best. As a result, the burden of justifying prospectivity should be upon the proponents of such approaches. Any such justification must include arguments for simultaneously applying and not applying “the law” in essentially indistinguishable cases, as well as courts purporting to decide the law applicable in future cases even where such law has not yet served as the basis for any decision.<sup>157</sup>

Before proceeding to Subpart B, some mention should be made of an essentially prospective approach that has come to the fore relatively recently. Apparently because retroactivity again has become the dominant rule in the federal system (or perhaps in concession to the normative force of arguments such as those presented in this Article), some have argued that the issue of the “applicable” rule of law should be separated from the issue of the appropriate remedy

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156. See Note, *Application of New Rules in Civil Cases: James B. Beam Distilling Co. v. Georgia*, 105 HARV. L. REV. 339, 347 (1991) (concluding that “purely prospective application of new rules cannot be reconciled with the nature of the judicial function.”).

In this respect, even selective prospectivity is inconsistent with the nature of the adjudicative function, for though it applies “the law” to the parties before the court, it similarly purports to decide certain future (or more accurately, later-decided) cases on a basis other than that used to decide the decisional case.

157. This assumes, of course, that there are no constitutional constraints on prospectivity. See *supra* note 140.

ultimately awarded to the prevailing party. Thus, in “appropriate” circumstances, the court may effect an essentially prospective result in a case in which a “new” rule is announced by withholding certain remedies to which the prevailing party ordinarily might be entitled.<sup>158</sup>

The most sophisticated version of this approach is that advanced by Richard H. Fallon, Jr., and Daniel J. Meltzer, who advocate the adoption of a “remedial” scheme that approximates the application of the *Stovall/Chevron Oil* factors.<sup>159</sup>

The Supreme Court has indicated that remedial discretion might have a role to play in this context, at least in certain cases. For example, after applying the rule previously announced in *Davis*, the *Harper* Court remanded that case to the Supreme Court of Virginia for the consideration of the appropriate remedy.<sup>160</sup> But the *Harper* Court cautioned that any such remedy still must satisfy certain federal due process requirements.<sup>161</sup> And in *Hyde*, the Court further narrowed the role of remedial discretion, holding that such discretion cannot be used to accomplish what could not be accomplished through “non-retroactivity.”<sup>162</sup> The *Hyde* Court also stressed that some cases involving the retroactive application even of a “new” rule of law might not implicate the matter of remedies at all.<sup>163</sup> Thus, it appears that, as a descriptive matter, the Supreme Court has rejected any remedial scheme that essentially circumvents the retroactive application of the applicable legal rule.<sup>164</sup>

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158. Consider, for example, the evolution of Justice O'Connor's view on this issue. Compare *American Trucking*, 496 U.S. at 194 (plurality opinion) (“[T]he dissent makes the error of equating a decision not to apply a rule retroactively with the judicial choice of a remedy.”), with *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 136 (1993) (O'Connor, J., dissenting) (“[I]f the Court is going to restrict authority to temper hardship by holding our decisions non-retroactive through the *Chevron Oil* factors, it must afford courts the ability to avoid injustice by taking equity into account when formulating the remedy for violations of novel constitutional rules.”).

159. See Fallon & Meltzer, *supra* note 16, at 1796-97.

160. *Harper*, 509 U.S. at 100-02 (opinion of the Court). See also *American Trucking*, 496 U.S. at 205-06 (Stevens, J., dissenting) (arguing in support of the bifurcation of these issues in this context); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991) (opinion of Souter, J.) (same).

161. 509 U.S. at 100-02 (citing *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 44-51 (1990)).

162. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753-54 (1995).

163. *Id.* at 754-55. See also *id.* at 759-61 (Scalia, J., concurring) (questioning particularly the applicability of remedial discretion in this context).

164. See Roosevelt, *supra* note 1, at 1118 n.219 (observing that “[t]his approach was rejected in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 361 (1991), and seems never to have been adopted by a majority of the Court”). See also *United States v. Estate of Donnelly*, 397 U.S. 286, 297 (1970) (Harlan, J., concurring) (“The essential point is that while there is flexibility in the law of remedies, this does not

More fundamentally, many have questioned whether a Fallon and Meltzer-type approach is truly remedial, at least as that term traditionally has been understood.<sup>165</sup> In particular, the argument that remedial law countenances the separation of a “remedy” from a “right” to the point of denying any “remedy” in this context<sup>166</sup> seems particularly dubious.<sup>167</sup> The prevailing view instead is that offered by Dan Dobbs in his *Handbook on the Law of Remedies*,<sup>168</sup> wherein he describes the “congruence” of rights and remedies as follows:

[R]emedy and substance are not wholly unrelated. The remedy is merely the means of carrying into effect a substantive principle or policy. Accordingly it is a first principle that the remedy should be selected and measured to match that policy. It should not be

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affect the underlying substantive principle that short of a bar of *res judicata* or statute of limitations, courts should apply the prevailing decisional rule to the cases before them.”).

165. See 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 1.6, at 20 (2d ed. 1993) [hereinafter DOBBS, *REMEDIES*] (“Some authors have preferred to characterize certain problems as remedial in nature because they associated remedies with flexible balancing of many factors.” (citing Fallon & Meltzer, *supra* note 16, at 1765)); see also *American Trucking*, 496 U.S. at 189 (plurality opinion) (“[T]he Court has never equated its retroactivity principles with remedial principles.”); Haddad, *supra* note 3, at 417 n.3 (“The retroactivity problem is generally not thought of in terms of remedies . . .”).

166. See Fallon & Meltzer, *supra* note 16, at 1777-87; see also Haddad, *supra* note 3, at 417. Haddad observes that:

*Linkletter* represented “the first time the Supreme Court had held that it and the courts whose judgments it reviews possess the power to deny the benefit of a constitutional right to a person equipped with a procedural remedy for challenging the lawfulness of present incarceration attributable to a denial of that constitutional right

*Id.*

167. Certainly, as a historical matter, the equation of rights with remedies has been the rule. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 68 (2001) (“Traditionally, courts equated legal rights with remedies. A right without a remedy was said to be ‘a monstrous absurdity.’” (quoting *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838))). Indeed, even Fallon and Meltzer concede that “the law of remedies is traditionally thought to enter only after a determination that a legal duty has been violated.” Fallon & Meltzer, *supra* note 16, at 1769 n.209.

This is not to say that rights and remedies can never be separated in any sense. For example, depending upon the circumstances, one might be said to have a “right” despite not having a *realistic* or *practical* remedy. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 1, 8-9 (2d ed. 1994). But remedial *inadequacy* is distinct from remedial *flexibility* based on factors having nothing to do with the availability of any given remedy.

Finally, one should not conclude from this discussion that it is never appropriate to withhold the *immediate* awarding of any particular remedy. Courts (including the Supreme Court) have done so in a variety of contexts, see, e.g., LAYCOCK, *supra*, at 465 (citing cases), but whether and to what extent such exercises of remedial discretion are proper are questions beyond the scope of this Article.

168. DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* (1973) [hereinafter DOBBS, *HANDBOOK*].

broader than the substantive rule that invoked the remedy in the first place, nor, ideally, should it be narrower.<sup>169</sup>

In sum, not only are attempts to achieve essentially prospective results through the implementation of some purportedly remedial framework (like prospectivity itself) inconsistent with the manner in which legal issues ordinarily are adjudicated,<sup>170</sup> they also are suspect as a normative matter.<sup>171</sup>

### B. *Retroactivity and the Distinction Between Holding and Dicta*

If the most important function of federal courts is to decide cases, then the next most important function is the establishment of precedent.<sup>171</sup> This Subpart will discuss the precedential function of courts in the context of traditional understandings of holding and

169. *Id.* § 1.2, at 3. See also DOBBS, REMEDIES, *supra* note 165, at 21 (“Whether or not a wrong was committed or a right violated is a substantive question, although it is one sometimes easy to confuse with [the] remedial issue. If no legal wrong at all has been done to the plaintiff, there is no case and no remedial issue.”).

Indeed, as Fisch implies, it might be the retroactive application of the *remedy*—not the right—that a claimant actually seeks. See Fisch, *supra* note 21, at 1083 (“From the perspective of the litigant, winning the application of a particular rule of law has little value unless the litigant is entitled to the relief justified by that rule.”). If so, then courts would be advised to consider the constellation of available remedies before settling upon the applicable corresponding rule. See also DOBBS, HANDBOOK, *supra* note 168, § 1.2 at 6 (suggesting that “though the remedy should be congruent with the substantive policy, congruence can be achieved by a shift in substantive rules as well as by a limit on the remedy”).

Yet another problem with “remedial” approaches is the administrative difficulty of implementing them—a difficulty that seems to arise in connection with all prospectivity-based approaches. See, e.g., Fisch, *supra* note 21, at 1084 (concluding that “the remedial approach is subject to the same line-drawing difficulties associated with the *Chevron Oil* test”). For more on this notion, see *infra* Part III.D.

170. It should be emphasized again that the issue here is not whether there should be any remedial discretion in this context; the issue, rather, is one of degree. As summarized by Roosevelt: “Remedial considerations have a large, and perhaps a dominant, role to play in a sound retroactivity doctrine. Remedial analysis, however, must be grounded in a determination of what law applies.” Roosevelt, *supra* note 1, at 1109.

171. See *supra* notes 141-142 and accompanying text. This Article is principally concerned with that aspect of the doctrine precedent that is sometimes referred to as horizontal stare decisis—i.e., the “binding” effect of precedent on later decisions of the same court.

This Article will make no attempt to prove the normative validity of stare decisis. Rather, while acknowledging that some have questioned whether this doctrine should retain any vitality, at least in certain contexts, see, e.g., Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 (2000), this Article recognizes that “the doctrine of stare decisis does in fact have a profound influence on judicial decision making,” to the point that “reliance on precedent is one of the distinctive features of the American judicial system.” Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) [hereinafter, Maltz, *Precedent*]. Certainly, as the cases discussed in Subpart C demonstrate, the Supreme Court at least purports to adhere to stare decisis, even in constitutional cases.

dicta—i.e., the manner by which courts determine those portions of prior decisions worthy of binding precedential force—and consider whether the announcement of prospective rules of law is consistent with these understandings.<sup>172</sup> It concludes not only that prospectivity-based approaches are inconsistent with this aspect of a court's precedent-setting function, but also that most of what prospectivity seeks to accomplish can be achieved through other, more traditional (and legitimate) means.

For precedential purposes, it is still generally accepted that court opinions may be divided between holding and dicta.<sup>173</sup> This distinction between holding and dicta often is critically important, for: “It is a commonplace that holdings carry greater precedential weight than dicta, ‘which may be followed if sufficiently persuasive but which are not controlling.’”<sup>174</sup>

“[N]o universal agreement exists as to how to measure the scope of judicial holdings,” nor, consequently, “is there agreement as to how to distinguish between holdings and dicta.”<sup>175</sup> According to Michael Dorf, “federal courts sometimes treat the question whether a particular judicial statement is holding or dictum as a feature of the

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172. In Part III.C, this Article will discuss the precedent-setting function of federal courts in terms of the more familiar aspect of the doctrine of *stare decisis*—i.e., in terms of the manner by which courts traditionally consider changes to judicially-declared law—and will consider whether and to what extent prospectivity-based approaches are consistent with that doctrine.

173. Most lawyers are aware that the term “holding” “refer[s] to a rule or principle that decides the case,” whereas the term “dicta” “typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court.” Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (footnote omitted).

174. *Id.* at 2000 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935)).

Of course, some have questioned the nature and extent of the distinction between holding and dicta, and whether such a distinction is legitimate. *See, e.g.*, James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 59 (1979) (“The primary difference between holding and dictum seems . . . to be a difference in degree of precedential influence disguised as a difference in kind.”). Such an inquiry, though, is beyond the scope of the present discussion. This Article assumes merely that American courts purport to recognize such a distinction, and that this distinction, once made, unquestionably helps determine the precedential effect given to prior judicial statements. *See id.* (observing that “a rule of law labeled holding is deemed more influential in later decisions than a rule of law labeled dictum”). Only two aspects of the holding/dicta dichotomy are explored here: how the announcement of some prospective rule of law, not applied in the case in which it is announced, properly should be classified, and whether the conscious use of dicta (other than in the form of a prospective rule of law) is a legitimate means of providing notice of possible future legal change.

175. Dorf, *supra* note 173, at 2003; *see also* RICHARD A. POSNER, *THE FEDERAL COURTS* 377 (1996) (“[R]emarkably—considering how fundamental the distinction is to a system of decision by precedent—the distinction [between holding and dictum] is fuzzy not only at the level of application but also at the conceptual level.”).

facts and outcomes of the case, but other times they treat this question as a feature of the rationale of the prior opinion under analysis.”<sup>176</sup> For purposes of the retroactivity/prospectivity question, one need not decide which of these appropriately defines the scope of a holding, though, for it is difficult to see how even the broader, rationale-based view<sup>177</sup> could comprehend rules of law that are only to be applied at some point in the future. Such announcements of prospective rules of law are not simply “those elaborations of legal principle broader than the narrowest proposition that can decide the case.”<sup>178</sup> Rather, prospective announcements of rules of law are more in the nature of asides<sup>179</sup>—asides in some way *related* to those rules of law actually determined to be controlling, to be sure—but asides nonetheless. For even if a court were to announce a different prospective rule of law (or no prospective rule of law), its decision in the underlying case, including the bases therefor, would remain unchanged.<sup>180</sup> Similarly, that same court could not reach a different result as to the same issue in a later case through the adoption of a different rule of law (even if that different rule of law was announced prospectively in the earlier decision) without overruling its earlier decision.<sup>181</sup> Thus, rules of law

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176. Dorf, *supra* note 173, at 1999 (footnote omitted). As a normative matter, Dorf argues that the latter is the better view. *See id.* at 1998, 2040.

177. Certainly, even broader conceptions of holding are conceivable. *See, e.g.*, Fallon & Meltzer, *supra* note 16, at 1818 n.485 (espousing a view of precedent as “a rule, stated in a decision, that is relevant to the issues raised in the case”). But Fallon and Meltzer’s assertion that “something like th[is] broader view clearly prevails,” *id.*, at least with respect to Supreme Court opinions seems questionable as a descriptive matter. *See*, Dorf, *supra* note 173, at 2048 (“Of course, not every legal principle or rule announced in the process of a court’s setting forth of a legal standard necessarily constitutes an essential aspect of the court’s reasoning.”). Moreover, it seems doubtful that many jurists today would be willing to adopt a rule of binding precedent that consists essentially of whatever was said in the course of a court’s opinion.

178. Dorf, *supra* note 173, at 2007. Again, Dorf generally considers such elaborations to be a part of a court’s holding. *See id.* at 2024.

179. *See id.* at 2005-07.

180. *See id.* at 2008.

181. *See* BLACK’S LAW DICTIONARY 1104 (6th ed. 1990) (“A judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, expresses a judgment upon the same question of law directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent.”). Justice Stephens has argued:

It is one thing for a court to address issues that are not indispensable to its judgment or to delay the issuance of its judgment; it is quite another for it to refuse to apply reasoning in one case that is necessary to the judgment in a virtually identical case.

*Am. Trucking Ass’n v. Smith*, 496 U.S. 167, 221 (1990) (Stevens, J., dissenting) (footnote omitted). Of course, following *Teague* and its progeny, this observation probably should be limited to cases on direct review. Indeed, Mishkin attempts to justify the *Linkletter* result on the basis that it was decided in the habeas corpus context. *See* Mishkin,

that are to be applied only prospectively can only be regarded as being what they are: dicta<sup>182</sup> (albeit very strong dicta<sup>183</sup>).

But the problem with prospectively-announced rules of law is not simply that they constitute dicta. The use of dicta is not illegitimate per se,<sup>184</sup> and though (like the issuance of some concurring and dissenting opinions) its inclusion sometimes leads to precedential instability,<sup>185</sup> it is often beneficial.<sup>186</sup> In particular, dicta can

*supra* note 63, at 77-92.

182. With respect to pure prospectivity, see *Stovall v. Denno*, 388 U.S. 293, 301 (1967); Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1615 (1975) ("It is true, of course, that the newly announced rule, since not the *ratio decidendi* of the case in which it is promulgated, constitutes dictum."); Rogers, *supra* note 5, at 46-47 ("Obviously language purporting to overrule a case prospectively only is dictum, for it is inapplicable to the parties or the controversy before the court. In future cases the court will not be bound to follow this dictum, and therefore the overruling is but a myth."); Schaefer, *Prospective Rulings*, *supra* note 147, at 22 ("Since the new rule [that a prospective ruling] announces has no effect whatsoever upon the parties to the case, it is technically dictum and so, theoretically at least, it is not binding upon other courts or even, in future cases, upon the court that announces it.").

Similarly, with respect to selective prospectivity, if a given rule of law is applied in the case in which it is announced, any language in that decision suggesting that this ("new") rule is not to be applied in certain later cases also is dicta. See Rogers, *supra* note 5, at 47; Note, *Limitation of Judicial Decisions to Prospective Operation*, 46 IOWA L. REV. 600, 616 (1961).

Some have argued that a judicial proclamation of some rule of law to be applied in similar, future cases (though not applied in the decision in which it is announced) is nevertheless in some sense essential to the resolution of the decisional cases, and therefore not dicta. See, e.g., Currier, *supra* note 1, at 216-20; Traynor, *Prospective Overruling*, *supra* note 7, at 560. But though it might be true that the inclusion of prospective rules of law would not render such an opinion advisory in a justiciability sense, it is much less clear that this determination has any bearing on the holding/dicta question.

183. See Jonathan Mallamud, *Prospective Limitation and the Rights of the Accused*, 56 IOWA L. REV. 321, 334 (1970) ("Where a dictum has been carefully considered by a court, and where it is stated with the clear intent that it be followed, it is not very likely that a subordinate court would fail to follow it."). It has also been argued:

Although the rule laid down for the future is dictum rather than holding, when the court indicates clearly that this rule will be applied by the court in future cases, it necessarily rises above the stature of *ordinary* dictum; from that time forward, no person would be justified in relying upon the old rule which the court has repudiated.

Note, *supra* note 182, at 613-14 (footnote omitted). This observation might again lead one to explore the "questionable distinction between holding and dictum," as well as the less radical notion that "[w]hether the characterizing language is treated as holding or dictum, that language cannot absolutely prevent a subsequent interpreter from recharacterizing the first case." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 580 (1987). Nonetheless, so long as this distinction is maintained, prospective rules of law still must be regarded as dicta.

184. See, e.g., Dorf, *supra* note 173, at 2005-09 (discussing "legitimate" dicta).

185. See *Harper*, 509 U.S. at 132-33 (O'Connor, J., dissenting) ("When courts take it upon themselves to issue helpful guidance in dictum, they risk creating additional confusion by inadvertently suggesting constitutional absolutes that do not exist."); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 546 (1991) (White, J., concurring in judgment) (criticizing Justice Souter's express declination to "speculate as to the bounds or propriety of pure prospectivity," for to "'speculate' about the issue is only to suggest

communicate the contemplation of legal change, for by providing notice (to potentially interested parties, legislatures, etc.) as to the prospect of change, reliance interests might be diminished.<sup>187</sup>

Instead, the problem with prospectivity is that what is actually dicta is announced *as if it were holding*. In a sense, it is understandable that a judge might want to announce such prospective rules of law, as such statements might then appear to have the force of law. But there are dangers in according dicta the status of holding that relate to the reasons courts recognize a distinction between holding and dicta in the first instance.

According to Dorf, two broad arguments traditionally justify according dicta less precedential weight than holding. The first is accuracy, in that dicta “are less carefully considered than holdings, and, therefore, less likely to be accurate statements of the law.”<sup>188</sup> The second is legitimacy; “[a]ccording to this view, dicta have no precedential effect because courts have legitimate authority only to decide cases, not to make law in the abstract.”<sup>189</sup>

Prospective announcements of judge-made law raise both accuracy and legitimacy concerns. For one thing, because (at least in purely prospective decisions) the prospective rule is not applied in the case in which it is announced, there is less reason to believe that the efficacy of this “new” rule was subjected to extensive briefing and argument by the parties.<sup>190</sup> Moreover, those nonparties to whom the

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that there may come a time when our precedents on the issue will be overturned”).

186. See generally ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 26-33 (1969) (discussing the virtues of dicta).

187. See DWORKIN, *supra* note 139, at 402 (discussing the propriety of warnings in judicial decisions of impending or proposed changes in the law as an alternative to prospectivity).

188. Dorf, *supra* note 173, at 2000.

189. *Id.* at 2000-01 (citing (interestingly enough) *Beam*, 501 U.S. at 549 (Scalia, J., concurring in judgment)). Dorf adds that “[t]his latter function” (making law “in the abstract”) “is seen as the proper province of the political branches.” *Id.* at 2001. Dorf further adds that “both the accuracy and the legitimacy rationales rest ultimately on values that can be traced to the case-or-controversy requirement of Article III,” which “ensures that federal courts will make law only insofar as they are competent to do so and that in making law they do not usurp the proper role of another branch of government.” *Id.* Though Dorf concedes that “[n]either [of these arguments] for giving less weight to dicta than to holdings is unassailable,” *id.* at 2002, he argues that “both the adversary system and the premise that courts have less authority to prescribe general-purpose rules than do legislatures are so firmly rooted in American legal practice as to rank as axiomatic,” and therefore that “in examining the role of the holding/dictum distinction they can be taken as valid starting points,” *id.* at 2003 (footnote omitted).

190. See Rogers, *supra* note 5, at 48; see also Fuller, *Adjudication*, *supra* note 142, at 392 (“Perhaps the most compelling objection to an assumption of [the law-making function by courts] lies in the limited participation in the decision by the litigants who (1) represent generally only themselves and (2) participate in the decision only by proofs and

prospective rule will apply generally have no opportunity to brief and argue the relative merits of that rule.<sup>191</sup>

In addition, because prospective rules of law, by definition, have only future effect, courts making such announcements are forced into the rather strange posture of declaring what the law "shall be." This more emphatic means of establishing precedent violates (again) the traditional notion that the outcome of later cases cannot be dictated prior to their adjudication.<sup>192</sup> Moreover, by transforming the concept of holding from what a court does to what it says, prospective announcements of rules of law also unduly (and unjustifiably) constrain later courts who might seek either to adhere to the rule of law actually applied in the earlier decision or to apply a rule of law other than that announced as applying prospectively.<sup>193</sup> Finally, by separating "rules" from results, prospectivity-based approaches make discerning the scope of precedent more difficult.<sup>194</sup>

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arguments addressed to the arbiter.").

191. See Freeman, *supra* note 143, at 186 ("One of the principal problems encountered by an advocate of prospective overruling is the inability to ensure that all those affected are represented.").

192. See *supra* text accompanying note 145.

193. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 304-06 (1979). According to Candler S. Rogers:

[S]uch dictum has the characteristic of providing a definite, but misleading, basis for reliance. It either invites further litigation to establish the new rule, or it discourages further attempts to proceed under the old rule. Thus, if in future cases the court fails to follow its dictum, expectations are terribly frustrated. Where one has litigated in reliance upon the dictum, his invited efforts and expenses are in vain. Where one has refrained from litigation in reliance upon the dictum, he may have suffered a grave sacrifice.

Rogers, *supra* note 5, at 48-49.

Some have argued that prospective rulings are so obviously dicta that no one could seriously regard them as otherwise. Based on such a theory, the inclusion of prospective rules of law is unproblematic insofar as courts are adept at distinguishing holding from dicta and prospective rules of law create no special difficulties in this regard. It is true that "courts have not always adhered to their predictions" in the prospective overruling context. Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 638 (1967) (citing cases). It is also true that what a precedent-setting court might say is never fully "binding" on a later court, at least in the sense that the later, interpreting court always gets the last word. See, e.g., POSNER, *FEDERAL COURTS*, *supra* note 175, at 374 ("Realistically, a precedent is the joint creation of the court that decides the case later recognized as a precedent and the courts that interpret that case in the later cases."). Still, it seems that the prefacing of an articulated rule with a phrase such as "we hold that" would make it difficult for a later court to disregard such statements as mere dicta. Thus, given the way in which prospective rulings are announced, "[t]o suggest that the same Court would then not apply the new rule [in a later case] is unrealistic." K. David Steele, Note, *Prospective Overruling and the Judicial Role After James B. Beam Distilling Co. v. Georgia*, 45 VAND. L. REV. 1345, 1364 (1992).

194. See EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 578-79 (1953); Cass, *supra* note 140, at 959. Though the "apprehension that the precise scope of the new rule would be difficult to ascertain is applicable as well to any rule formulated

This does not mean, though, that possible future changes in the law should not be communicated by courts in dicta. Often, they should be. But they should be communicated through the use of *ordinary* dicta, rather than by prospective ruling.<sup>195</sup> Indeed, it seems that some desired change in the law (particularly where the purpose of the new rule would not necessarily be served by immediate implementation) could be accomplished almost as surely through the use of ordinary dicta as it could through the use of some prospective announcement.<sup>196</sup> Admittedly, the distinction between ordinary dicta and the sort of language found in prospectivity decisions might seem like a fine one in the minds of many. It is, nonetheless, a distinction that should be preserved.

### C. *Retroactivity and the Doctrine of Stare Decisis*

In this Subpart, the discussion turns to those aspects of a court's precedent-setting function to which the doctrine of stare decisis is most closely linked: namely, when should a precedent-setting court adhere to prior precedent? And what should such courts consider when deciding whether to effect a change in judicially-declared law?

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by a court, whether overruling or otherwise," Levy, *supra* note 7, at 21, the apprehension almost certainly would be greater in the prospective application context.

195. This means, contrary to Justice White's opinion in *Griffith v. Kentucky*, 479 U.S. 314, 334 (1987) (White, J., dissenting), that the choice here is not simply between the retroactive application of some highly disruptive change in the law or some form of prospectivity. There is a third choice.

196. Mishkin and Morris write:

Certainly the former mode of expression is much more in line with accepted techniques of judicial action; it should therefore pose less of a direct threat to the law's symbolism and encounter less violent reactions—both within and outside the courts themselves. Moreover, . . . it can set the stage for a more fully prepared and argued consideration of the substantive issues at the later time, thus tending to facilitate sounder decisions on the merits in the long run. Are these not adequate reasons for adopting this technique, rather than an explicit statement of "prospective overruling", whenever the more restrained formulation is adequate to achieve the desired results?

And will it not be adequate in the vast bulk of cases where explicit "prospective overruling" is urged?

MISHKIN & MORRIS, *supra* note 146, at 302; *see also* Traynor, *Prospective Overruling*, *supra* note 7, at 537 ("Insofar as a decision remains uncommitted to drastic implications, a court gains time to inform itself further through succeeding cases. It is then better situated to retreat or advance with a minimum of shock to those who act in reliance upon judicial decisions.").

Some have argued that prospective overruling "may force a quiescent legislature into action." Freeman, *supra* note 143, at 201. But it seems that whatever impetus a prospective ruling might provide would be only marginally stronger than that provided by a strong statement in dicta of an inclination toward future legal change. The same should be true with respect to anyone else who might be interested in what courts have to say about the future state of the law. *See also infra* notes 221-229 and accompanying text.

In considering these questions, this Subpart will review recent Supreme Court articulations of the doctrine of stare decisis, then consider whether prospectivity-based approaches are consistent with the manner by which “new” law decisions generally are rendered. It concludes that prospectivity-based approaches are inconsistent with stare decisis in a way that compels either the rejection of these approaches or a major rethinking of traditional precedential doctrine.

The Supreme Court’s most recent elaborations of the doctrine of stare decisis are in *Planned Parenthood v. Casey*,<sup>197</sup> *Payne v. Tennessee*,<sup>198</sup> and *Patterson v. McLean Credit Union*.<sup>199</sup> In *Casey*, the Court explained:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an inexorable command, and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>200</sup>

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197. 505 U.S. 833 (1992).

198. 501 U.S. 808 (1991).

199. 491 U.S. 164 (1989).

200. 505 U.S. at 854-55 (citations and quotation marks omitted). Incidentally, Justices O’Connor and Kennedy, staunch supporters of prospectivity, were prominent members of the majority in *Casey*. *Id.* at 843-44.

The *Casey* Court's explanation of *stare decisis* occurred in conjunction with a purported adherence to that doctrine.<sup>201</sup> In *Payne*, the Court's explanation occurred in conjunction with the overruling of prior precedent.<sup>202</sup> In that case the Court explained:

*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. Nevertheless, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. This is particularly true in constitutional cases, because in such cases<sup>203</sup> correction through legislative action is practically impossible.

Finally, in *Patterson* the Court opined:

The Court has said often and with great emphasis that the doctrine of *stare decisis* is of fundamental importance to the rule of law. Although we have cautioned that *stare decisis* is a principle of policy . . . , it is indisputable that [it] is a basic self-governing principle within the Judicial Branch, which is [engaged in] fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion. [*S*]tare decisis ensures that the law will not merely change erratically and permits society to presume that bedrock principles are<sup>204</sup> founded in the law rather than in the proclivities of individuals.

Two broad principles may be distilled from these cases. The first is

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201. *See id.* at 860-61.

202. *See* 501 U.S. at 830.

203. *Id.* at 827-28 (citations and quotation marks omitted). *See also id.* at 834-35 (Scalia, J., concurring):

[*Stare decisis*,] to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution.

Incidentally, Justices O'Connor and Kennedy not only were members of the majority in *Payne*, *see id.* at 810, they joined as well in the above-quoted portion of Justice Scalia's concurrence, *see id.* at 833.

204. 491 U.S. at 172 (citations and quotation marks omitted).

the more familiar: that courts are to follow their own prior holdings, at least until such time as conditions permit legal change.<sup>205</sup> The second is somewhat more subtle, though more important to this discussion: A governing rule of law should only be overruled (or a novel rule of law created) cautiously and after considerable deliberation, in which reliance interests (and other factors) are fully considered.<sup>206</sup> Central to both of these principles is the idea that courts do not make law (or, as some prefer, announce rules of law) in a vacuum; rather, they do so only in the context of the case at bar. Implicit in this analysis is the idea that the rule of law finally settled upon by the precedent-setting court will be applied to the parties in that case and to all others similarly situated.<sup>207</sup>

Accordingly, it makes no sense to speak in terms of what the law is in relation to a particular case absent the application of that law to the facts of that case and to all other, similar cases.<sup>208</sup> All those considerations that properly inform the determination whether some legal rule should be applied in any particular case are not considerations that apply only after some abstract determination of the relevant law. Rather, those considerations animate the very decision as to what the law is.<sup>209</sup> Judge-made law is nothing without

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205. Cf. von Moschzisker, *supra* note 26, at 423-24 (“[W]herever great hardship may result from the overruling of a prior announcement of . . . law, absence of protection affords a strong argument in favor of adherence to precedent, pending legislative action in the premises.”).

206. See also James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 543 (opinion of Souter, J.) (“[T]he generalized [stare decisis] enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated.”); Stephens, *supra* note 17, at 1572 (“While court decisions, unlike legislative pronouncements, typically have retroactive as well as prospective effect, stare decisis operates to ensure that decisions made by courts will rely upon past decisions with the effect of protecting justified reliance on and expectation interests dependent upon existing law.”).

207. See *Beam*, 501 U.S. at 547 (Blackmun, J., concurring in judgment) (“The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide.”); see also Traynor, *Prospective Overruling*, *supra* note 7, at 541 (“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.”).

208. See, e.g., *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 119 (1993) (O’Connor, J., dissenting) (“It should go without saying that any decision of this Court has wide-ranging applications; nearly every opinion we issue has effects far beyond the particular case in which it issues.”).

209. According to Justice Blackmun:

The present dissent’s view of *stare decisis* would rob the doctrine of its vitality through eliminating the tension between the current controversy and the new rule. . . . Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering

such an application.

By contrast, one of the hallmarks of prospectivity-based approaches is their call for the divorce of the adjudicative function of common law courts from the precedent-setting function.<sup>210</sup> But by separating these functions, proponents of such approaches excise from the analysis many of the factors (such as reliance interests) that ordinarily inform the law-changing decision.<sup>211</sup> (Indeed, it is typically because of a concern for such factors that some form of prospectivity is considered.<sup>212</sup>) In this sense, prospectivity and traditional

the law each time the opportunity presents itself.

*Beam*, 501 U.S. at 548 (Blackmun, J., concurring in judgment); *see also* Schauer, *supra* note 183, at 572 n.4 (“Considering the future implications of today’s decisions is central to the notion of adjudication according to principle.”).

210. *See, e.g.*, Levy, *supra* note 7, at 3 (“To recognize clearly that these two functions are separable would itself be a huge clarification. We would then be in a position to begin—explicitly, analytically, systematically—to develop one set of operating techniques for adjudication and another set for lawmaking.”). As a result, proponents of prospectivity invariably frame the retroactivity/prospectivity issue from the standpoint of a legal change that has already occurred. *See, e.g.*, Fallon & Meltzer, *supra* note 16, at 1736 (“[I]ssues involving the relevance of legal novelty and unpredictability are best understood as addressing a question within the law of remedies: when should standard remedies be withheld in light of a rule or decision’s relative unpredictability?”); Fisch, *supra* note 21, at 1056 (“One of the most complicated questions created by legal change is the temporal one: what limits, if any, should be placed on a new rule’s application to transactions that predate the adoption of the rule?”). Such proponents further view the doctrine of *stare decisis* as a “closely related,” though separable, “temporal parameter[.]” Fisch, *supra* note 21, at 1056 n.1.

211. *See* HART & SACKS, *supra* note 144, at 606 (“Acceptance of the possibility of overruling prior decisions with no more than prospective effect relieves a court of one of the major practical restraints upon free changes of law.”); Mishkin, *supra* note 63, at 70 (“Concern about possible retroactive imposition of harm would thus tend to restrain a court from adopting new law that is neither reflective of current community standards nor adequately foreshadowed by prior judicial developments—circumstances under which a court should feel restrained.”).

212. For example, in determining whether a rule of law should be applied only prospectively, Fallon and Meltzer argue that “legal novelty matters,” though “novelty by itself should count for little or nothing in the absence of reliance, disruption, or some similar reason for denying full remediation.” Fallon & Meltzer, *supra* note 16, at 1796-97. Moreover, “context matters”:

It is important to weight the moral strength of a plaintiff’s claim to relief; to know what incentives and temptations typically affect different kinds of officials in different situations; and to consider, should a particular remedy be withheld, whether other remedies will sufficiently promote adherence to the letter and spirit of the Constitution.

*Id.* at 1797. In other words, Fallon and Meltzer argue that many of the factors that one might ordinarily consider part of the law-changing decision itself instead should be considered only after the fact—that is, after the decision to change the law already has been made. *See also* *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167, 191 (1990) (plurality opinion) (“When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law.”); *United States v. Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring) (“The impulse to make a new decisional rule nonretroactive rests, in civil cases at least, upon the same considerations that lie at the core of *stare decisis*, namely to avoid jolting the expectations of the parties

understandings of the doctrine of *stare decisis* represent fundamentally different means of achieving judicially-made legal change.<sup>213</sup> For, again, proper adherence to the doctrine of *stare decisis* requires that factors such as reliance, to the extent considered at all, must be factors in the law-changing decision *itself*.<sup>214</sup> They cannot be deferred to a later “law-applying” portion of the precedent-setting court’s opinion, nor to a later case similarly involving pre-decision conduct or events.<sup>215</sup> In other words, a proposed rule of law that is dramatically new and would seriously upset the reasonable reliance interests of one or more of the parties should not be regarded as a rule that should not be applied retroactively; rather, such a rule of law should simply be rejected as bad law, or a rule that cannot, as yet, be

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to a transaction.”).

213. See *Harper*, 509 U.S. at 106 (Scalia, J., concurring) (describing prospectivity-based approaches as “methods of destroying *stare decisis* recently invented in violation of *stare decisis*.”). See also *American Trucking*, 496 U.S. at 196 (plurality opinion) (acknowledging the failure “to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law” (quoting *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932))).

Per contra, in *Beam*, Justice O’Connor argued:

At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law.

*Beam*, 501 U.S. at 551-52 (O’Connor, J., dissenting). But as the above analysis suggests, Justice O’Connor is only half right. A decision not to apply some “new” rule of law retroactively certainly is a part of the doctrine of *stare decisis*. But once such a decision is made, any such new rule is *not* the law—prospective or otherwise.

Similarly, some have argued that “if the actual overruling of a prior decision is not condemned as judicial legislation, how can we condemn the practice of giving only a prospective effect to an overruling?” Levy, *supra* note 7, at 17. The easy answer is the loss of restraint resulting from the failure to apply the overruling decision in the case in which it is announced.

214. See, e.g., 1 TRIBE, *supra* note 17, § 3-3, at 240 (“[T]he possibility of a reliance interest on the part of those who structured their activities on the basis of then-prevailing Supreme Court precedent . . . plays a significant role in the Court’s *stare decisis* calculations.”).

215. Of course, some proponents of prospectivity might argue that they are not advocating an abandonment of those values that go into the decision whether to change the law judicially; rather, they are simply saying that, “having decided to make a change . . . in the face of these values, a court should continue to bear them in mind when deciding what effect to give the overruling decision.” Currier, *supra* note 1, at 240. Whether this in fact occurs seems questionable, though, for how could a court consider such values and determine that a change in the law is appropriate, and yet refuse to apply that law in the law-changing case based on these same values? To the extent that this is in fact the analysis employed by such courts, it seems that the latter step would be largely redundant. See Note, *supra* note 156, at 346 (discussing the Court’s “conceptually confusing and redundant two-tiered approach to retroactivity questions”).

the law.<sup>216</sup>

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216. See Meyer, *supra* note 3, at 458 (“[T]o say that a decision does not follow from precedent is, within the practice of adjudication itself, to say that it is wrong.”); Rogers, *supra* note 5, at 51 (“[T]here is still some belief that if the judge is firmly convinced of the incorrectness of the overruled decision, he should be prepared to have the overruling decision apply retroactively; otherwise the strength of his convictions is not sufficiently strong to justify overruling at all.”); see also *Teague v. Lane*, 489 U.S. 288, 332 (1989) (Brennan, J., dissenting) (“We have therefore routinely imposed on those asking us to overrule established lines of cases ‘the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.’”) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)); Fallon & Meltzer, *supra* note 16, at 1810 (justifying the non-retroactivity of *Miranda* in part because “only a clairvoyant” could have anticipated that decision).

In this context, one might consider the approach taken by the Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), a case decided after *Beam* but before *Harper*. *Quill* “involve[d] a State’s attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State.” *Id.* at 301. The Court considered *Quill* essentially indistinguishable from *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967), a case in which the Court “held that a similar Illinois statute violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce.” *Quill*, 504 U.S. at 301. The issue before the *Quill* Court thus was whether to overrule *Bellas Hess*. *Id.* at 301-02. The Court did so with respect to the Due Process Clause holding of *Bellas Hess*, see *id.* at 308, but not with respect to the Commerce Clause holding, see *id.* at 318. Though the Court acknowledged that “contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today,” *id.* at 311, it concluded that “principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law,” *id.* at 317. In so concluding, the Court observed that “we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years, and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound.” *Id.* at 317 (citation omitted). The Court further observed that “the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry.” *Id.* “Many States have enacted use taxes. An overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail-order houses.” *Id.* at 318 n.10 (citation omitted).

Concluding that *Bellas Hess* should be overruled in its entirety, Justice White dissented from the Commerce Clause portion of the Court’s opinion. See *id.* at 321-22 (White, J., concurring in part and dissenting in part). In the penultimate paragraph of his opinion, Justice White opined:

The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability. . . . If indeed fears about retroactivity are driving the Court’s decision in this case, we would be better served, in my view, to address those concerns directly rather than permit them to infect our formulation of the applicable substantive rules.

*Id.* at 332-33. It seems, though, that if the doctrine of *stare decisis* retains any vitality, then the approach taken by the Court is the sounder. See also *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”); Fallon, *supra* note 151, at 570 (“The force of the doctrine [of *stare decisis*] lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.”).

Indeed, an interesting dilemma arises for those (such as Fallon) who argue that the doctrine of *stare decisis* is of constitutional magnitude. For if it is, then it seems that techniques for dealing with precedent that run counter to *stare decisis* (such as

It is in this context that one should consider the criticism that retroactivity seems inadequately to pay heed to reliance interests of the parties involved in the law-changing decision and of all others similarly situated.<sup>217</sup> In other words, once the decision to change the law is made, a firm rule of retroactivity (proponents of prospectivity would argue) seems to make no allowances for those who might have relied on the former law.<sup>218</sup> But one must consider, again, the impact of a properly functioning doctrine of stare decisis and its built-in consideration of reliance interests *as part of* the law-changing decision.<sup>219</sup> Indeed, because the idea that a court's decision, if applied retroactively, will have certain impacts not only on the parties then before that court but also on all others affected by that precedent is so familiar as a matter of American jurisprudence, it is difficult to imagine that a law-changing court, operating under a regime of retroactivity, would fail adequately to consider possible reliance interests.<sup>220</sup> Thus, this is, in the end, not a criticism of retroactivity (or

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prospectivity), unless also of constitutional magnitude (which in the case of prospectivity, is quite doubtful), are on shaky ground. Fallon seems to avoid this dilemma by resort to a subsequent "remedial" analysis, rather than to prospectivity *per se*. See *supra* note 159 and accompanying text. It is unclear how proponents of more "traditional" forms of prospectivity would explain their positions.

217. In fact, this might be its greatest criticism. See Mishkin, *supra* note 63, at 73 ("The most commonly accepted ground for denying retroactive operation to new judicial precedent (when such a power is recognized at all) is that such operation might unjustly inflict harm on those who justifiably relied on preexisting authority.").

218. See, e.g., Stephens, *supra* note 17, at 1570; see also Freeman, *supra* note 143, at 201 ("[S]tability as an inherent value in the legal process is less disturbed by prospective overruling. It is a less traumatic change.").

219. See *supra* notes 206-207. Wasserstrom observes:

The argument based upon the notion of reliance, however, seems meritorious only if it is assumed that there is a *legal system which is already committed to adherence to precedent*. . . . A person's reliance upon a previously announced legal rule would be justifiable if and only if that person was justified in assuming that legal rules would be unswervingly applied.

RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION* 68-69 (1961).

220. This seems particularly true of courts of last resort, where the articulation of legal precedent assumes a greater role *vis-à-vis* the simple adjudication of disputes.

Of course, it certainly is possible that a court (even the Supreme Court of the United States) might inadequately consider reliance (and other, similar) interests in the course of selecting the applicable rule of law. Some might argue (for example) that this is what occurred in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), the substantive precedent upon which the *Harper* Court relied. See *Harper*, 509 U.S. at 89-90. But even if the Court did err in this regard, any such error is not attributable to retroactivity *per se*, but rather is analogous to any other, unrelated error that a court might make in the course of rendering a decision. Thus, it seems that rather than debating whether the law-changing decision should be applied only prospectively, the better course (if firmly convinced of the "wrongness" of that decision) would be simply to overrule it. Cf. Mishkin, *supra* note 63, at 72 (arguing that any "heightened reactions generated by retroactivity of new changes are unlikely to reach significant levels," "unless the given changes are both large and unanticipated").

of stare decisis), but rather of *prospectivity* and its failure to consider reliance interests in the context of the law-changing decision.

Before leaving this Subpart, some consideration should be given to the relationship between the retroactivity/prospectivity question and the ability of courts to effect legal change. In particular, some proponents of prospectivity have criticized retroactivity as impeding legal change.<sup>221</sup>

There are several responses to this criticism. The first goes to the nature of legal change in general. Legal change is not necessarily change for the better.<sup>222</sup> Accordingly, the question of whether impediments to legal change are good or bad can only be analyzed on a case-by-case basis, where the legitimacy of any perceived impediments may be fully analyzed.

Second, to the extent that legal change is desirable, compared with prospectivity, some aspects of retroactivity actually are more conducive of legal change. For one thing, retroactivity provides greater incentive for litigants to argue in favor of legal change, as they know that, if successful, the “new” rule will be applied in their case.<sup>223</sup> By contrast, if a “new” rule of law is applied only

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It seems likely that the problem is often one of appearance, in that the law-changing court has properly considered, but has failed adequately to articulate, its analysis regarding reliance interests, and how those interests were outweighed by other important considerations. One example again might be *Davis*, in which the potential impact on the states was undeniably great, see *Harper*, 509 U.S. at 113 (O'Connor, J., dissenting), and yet reliance interests received virtually no mention in the Court's opinion. But, the solution to this problem lies not in some change in retroactivity doctrine, but rather in the manner in which judicial opinions are written.

In other cases, retroactivity/prospectivity debate might merely mask a debate over the applicable substantive legal rule or the particular result achieved. If this be the case, then it is preferable to take the retroactivity/prospectivity issue out of the equation, and to fight an honest battle over doctrine.

Finally, one also might keep in mind that “[e]ven prospective overrulings, like statutes that apply prospectively, have retrospective, reliance-upsetting effects.” Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 52 n.65 (1989). Thus, there may be a limit to the ability even of prospectivity-based approaches to resolve problems arising as a result of legal change.

221. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 546 (1991) (White, J., concurring in judgment) (“Justice Scalia, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.”); Currier, *supra* note 1, at 226-27. Conversely, prospectivity often is viewed (for better or worse) as facilitating legal change. See *Harper*, 509 U.S. at 105 (Scalia, J., concurring) (“Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a ‘technique of judicial lawmaking’ in general, and more specifically as a means of making it easier to overrule prior precedent.” (quoting Levy, *supra* note 7, at 1)).

222. See, e.g., Currier, *supra* note 1, at 215.

223. See *Stovall v. Denno*, 388 U.S. 293, 300-01 (1967); DWORKIN, *supra* note 139, at 156 (“People litigate [novel] cases (which is both risky and expensive) only because they

prospectively—meaning the “victor” receives no direct benefit thereof—then litigants “will have no stimulus to argue for change in the law.”<sup>224</sup> In addition, retroactivity can facilitate legal change in that, to the extent “such holdings can be reasonably anticipated, some incentive may be provided for those who will be affected in the future to seek to conform in advance to the expected standards.”<sup>225</sup>

Moreover, even assuming that prospectivity-based approaches are more likely to facilitate the *announcement* of legal change, there remains the question whether such approaches actually lead to a swifter *implementation* of that change. For under pure prospectivity, e.g., the change announced is not implemented until some point in the future—typically in a case involving conduct or events arising after the date of the prospective decision. Once that future date arrives, what was a prospectively announced rule is then applied to those

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believe that if they succeed in persuading some judge that a new rule would be in the public interest, that new rule will be applied retrospectively in their own favor.”).

224. Mishkin, *supra* note 63, at 61; *see also Beam*, 501 U.S. at 537 (opinion of Souter, J.) (“In th[e] criminal] context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.”); Freeman, *supra* note 143, at 180 (“[W]ho would litigate if the benefit of the decision were only to apply to *subsequent* litigants?”).

Some have criticized this “reward” argument, arguing that: (1) even a litigant (at least a civil litigant) who is deprived of the full benefit of the purported change in the law may nevertheless be entitled to some relief, *see Beam*, 501 U.S. at 540-41 (opinion of Souter, J.); (2) because even what is viewed as a change in the law usually is applied in the decision in which it is announced, the possibility that it will not be so applied is, at most, only a risk, *see Currier*, *supra* note 1, at 215; (3) “there are litigants with recurring interests in particular rules of law,” who can be expected to seek changes even where it is only of future effect, *id.*; (4) even litigants with nonrecurring interests “would appeal in order to convince the court that there should be a full overruling rather than merely a prospective overruling,” Levy, *supra* note 7, at 19; and (5) litigation aimed at effecting change in the law is something that is not necessarily desirous in any event, *see Currier*, *supra* note 1, at 215. But it seems, in response to these arguments, that (1) the prospect of complete relief (or nearly complete relief) would provide greater incentive to seek a change in the law than partial relief; (2) even a risk that a change will not be applied in the change-producing decision would act as a disincentive for seeking the change; (3) as an empirical matter, many (probably most) opportunities for change do not arise in recurring, or “institutional” contexts, *see Harper*, 509 U.S. at 104 n.1 (Scalia, J., concurring) (expressing doubt that either civil or criminal litigants “will often receive some benefit from a prospective decision”); (4) a certain rule of retroactive application would provide greater incentive to litigate than would the mere possibility of obtaining similar relief from an appellate court, and there is little or no opportunity to appeal from a judgment of a court of last resort; and (5) though some criticism of litigation seeking to effect legal change seems valid, it seems that, for reasons similar to those made in response to arguments in favor of legal change, *see supra* text accompanying note 222, an argument in opposition to legal change cannot be made *carte blanche*, but rather requires a case-by-case analysis.

225. Mishkin, *supra* note 63, at 72. *See also* DWORKIN, *supra* note 139, at 156 (“If people know that a new rule will be applied retrospectively they will behave in accordance with whatever rules they imagine courts would think in the general interest, and this will provide a great part of the advantage of such rules without the need actually to enact or adjudicate them.”).

future litigants, at which point the law might have changed even under a traditional *stare decisis* analysis, under which announcement and implementation are simultaneous. For these (and perhaps other) reasons, though there undoubtedly are aspects of a firm rule of retroactivity that make it more difficult for a court to overrule prior precedent in certain contexts, it seems doubtful that retroactivity significantly impedes legal change in most areas.

Finally (and more fundamentally), we now know that it is not simply retroactivity, but rather the doctrine of *stare decisis* as a whole, that serves as an impediment to legal change. Thus, the battle in this regard is not (as many seem to believe) between prospectivity and retroactivity; rather, it is between prospectivity and *stare decisis*.<sup>226</sup>

Subpart D asks which of these two means of effecting (or at least dealing with the possibility) of legal change is superior. Nonetheless, two points relating to that discussion are relevant here. First, proponents of legal change must consider the *manner* by which such change should occur, at least to the extent that ill-considered change is worse than no change. To the extent that prospectivity-based approaches alter the manner by which judge-made legal change occurs, one must question whether and to what extent the quality of the law-changing analysis employed by a court operating under such an approach has been impaired. One also must consider that, to the extent that prospectivity-based approaches result in inferior law-changing decisions, the proliferation of such decisions will only exacerbate the problem.

Secondly, prospectivity is not the only means of effecting legal change. According to Mishkin:

If a broadly declared power of prospective limitation were the only effective or fair means of achieving renovation of judge-made law (or even if it were substantially better than any other), its costs would have to be borne. But that is certainly not the case—as demonstrated by the history of the Supreme Court, if by nothing else. Actually, there is a wide range of less drastic techniques for achieving or facilitating change in the law and the Court has shown

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226. For example, Tribe states: “Retroactivity doctrine also has a close pragmatic relationship to *stare decisis*: if new decisions are applied retroactively as a matter of course, then the costs of overruling past precedents are raised and the Court will be more reluctant to depart from prior cases.” 1 TRIBE, *supra* note 17, § 3-3, at 235. As the above discussion indicates, the last part of this sentence almost certainly is true. The problem with this statement, though, is that the relationship between retroactivity and *stare decisis* is more than “pragmatic,” and to suggest otherwise (i.e., to imply that there is such a thing as non-retroactive *stare decisis*) is misleading at best. See *supra* note 213 and accompanying text.

ingenuity in this regard in the past.<sup>227</sup>

Thus, perhaps the solution (if one is needed) lies in the adoption of a more relaxed doctrine of stare decisis, under which certain restraining factors (such as reliance) would receive less weight.<sup>228</sup> Additionally (or alternatively), it seems, again, that conscious and forceful use of ordinary dicta to announce possible future legal change<sup>229</sup> would accomplish essentially the same result as pure prospectivity, without the problems associated with the latter approach.

#### D. Retroactivity as a Judicial Rule

Subparts A through C were primarily concerned with showing that retroactivity is consistent, and prospectivity inconsistent, with traditional understandings of the adjudicative and precedent-setting functions of federal courts. This Subpart focuses on the reasons why the disparate treatment given to “new” law cases under various prospectivity-based approaches also reveal prospectivity to be an inferior means of effecting legal change.

As shown in Subpart C, prospectivity-based approaches may be viewed as altering the means by which courts traditionally effect legal change. Under the doctrine of stare decisis, a decision whether to change the law includes a consideration of how that change might affect the parties in that law-changing case and in all other, similar cases. By contrast, prospectivity-based approaches consider the decision whether to change the law only in the abstract. Should the court decide that the law should be changed, prospectivity-based approaches then require further consideration of whether that change should apply in some manner only prospectively. Viewed in this manner, the question becomes which means of effecting legal change—the traditional application of the doctrine of stare decisis (coupled with the retroactive application of the result of that analysis) or some prospectivity-based approach—represents the superior means.

One way to answer this question is to consider each approach in terms of the justifications traditionally supporting the doctrine of stare decisis. Perhaps the most ambitious articulation of those justifications

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227. Mishkin, *supra* note 63, at 66 (footnote omitted).

228. See, e.g., Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

229. See *supra* notes 195-196 and accompanying text.

is that offered by Henry Hart and Albert Sacks.<sup>230</sup> According to the “tentative formulation” devised by Hart and Sacks, the doctrine of stare decisis may be justified based upon its “furtherance of private ordering,” of “fair and efficient adjudication,” and of “public confidence in the judiciary.”<sup>231</sup> Do prospectivity-based approaches hold the same promise? It is to this question that this Article finally turns.

### 1. The Furtherance of Private Ordering

According to Hart and Sacks, one justification for the doctrine of stare decisis relates to its role in ensuring legal stability. Private ordering is facilitated as a result of a reasonably static (or at least predictable) system of judicially declared law.<sup>232</sup> Of course, even under the doctrine of stare decisis, judicially declared legal change is not entirely predictable. But even aside from what might be a greater incidence of legal change, there are several predictability-related problems with prospectivity-based approaches that do not arise in connection with more traditional applications of the doctrine of stare decisis.

One such problem concerns the *timing* of prospectivity

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230. See HART & SACKS, *supra* note 144, at 568-69.

231. *Id.* Many other jurists and legal scholars have attempted to justify the doctrine of stare decisis on similar bases. See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (“Adherence to precedent promotes stability, predictability, and respect for judicial authority.”); *Teague v. Lane*, 489 U.S. 288, 332 (1989) (Brennan, J., dissenting) (arguing that stare decisis “enhances the efficiency of judicial decision making” and “fosters predictability in the law”); see also Von Moschzisker, *supra* note 26, at 410.

If not already obvious, it bears mentioning that the foregoing justifications, which are most commonly associated with that aspect of stare decisis relating to a court’s obligation to follow its own precedents, apply as well to that aspect of stare decisis relating to a lower court’s obligation to follow a higher court’s precedents. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 n.2, (1994) (referring to the latter concept as “hierarchical precedent”); *id.* at 850-54.

Though some have questioned whether the doctrine of stare decisis truly furthers these various justifications, most seem to agree that the doctrine of stare decisis is justifiable on some basis. See WASSERSTROM, *supra* note 219, at 56-81; Maltz, *Precedent*, *supra* note 171, at 368-72; Schauer, *supra* note 183, at 595-602. But, as noted previously, an evaluation of normative validity of the doctrine of stare decisis is beyond the scope of this article.

232. See HART & SACKS, *supra* note 144, at 568; see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994) (“In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.”); Cass, *supra* note 140, at 763 (arguing that “the decision maker should have incentives to follow rules that (i) are ascertainable prior to commitment to the decision mechanism and (ii) yield predictable outcomes, so far as possible, without reference to facts that cannot be known prior to commitment”).

determination. If precedent-setting courts always made the prospectivity determination in conjunction with the legal change, the problems associated with prospectivity would not be as great. A difficulty arises, though, in that the prospectivity determination often (almost always, historically) is made in a later case.<sup>233</sup> Until that later, prospectivity-determining case is decided, all other, later courts are in a quandary: is the rule of law announced in the precedent-setting decision subject to the usual rule of retroactive application, or is that rule of law of sufficient “newness” to require some form of prospectivity analysis?<sup>234</sup>

A second problem with prospectivity vis-à-vis predictability concerns the *nature* of the prospectivity test employed. If the proponents of prospectivity were to adopt something close to a *per se* approach, predictability (again) would be less of a concern. Regrettably, none of the leading prospectivity approaches utilize a test that leads to definitive results.<sup>235</sup> As a result, whether any given rule of law should be applied prospectively is difficult to predict.<sup>236</sup>

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233. See, e.g., *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 190 (1990) (plurality opinion) (“In the civil arena, we have generally considered the question of retroactivity to be a separate problem, one that need not be resolved in the law-changing decision itself.”). Indeed, this was true with respect to each of the cases (civil and criminal) principally discussed in Part II of this Article.

234. See Fallon & Meltzer, *supra* note 16, at 1742 n.46 (observing that “because the Supreme Court did not decide the retroactivity of a new decision until a second case came before the Court, lower courts had to grapple with the uncertainties”).

235. Compare, e.g., *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 111 (1993) (Kennedy, J., concurring in part and concurring in judgment) (concluding, based on the test established in *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971), that the rule of law at issue in *Harper* did not constitute a new rule of law and therefore should be applied retroactively), with *id.* at 122-31 (O'Connor, J., dissenting) (applying the same test with respect to the same rule of law, but reaching the opposite conclusion). See also *id.* at 103 (Scalia, J., concurring) (discussing this inconsistency).

The difficulty of applying the various prospectivity-based approaches is discussed in further detail in Part III.D.2 *infra*.

236. See Fallon & Meltzer, *supra* note 16, at 1742 (discussing the unpredictability of the *Stovall v. Denno*, 388 U.S. 293 (1967), regime due to the vagueness of the factors and the difficulty of balancing conflicting criteria); Note, *supra* note 15, at 319. Somewhat surprisingly, despite these criticisms, Fallon and Meltzer have more or less embraced the *Stovall* Court's approach. See *supra* note 159 and accompanying text.

Some might argue that predicting legal change under some prospectivity-based approach is no more difficult than predicting legal change under the application of the doctrine of *stare decisis*. The key difference, though, is that prospectivity-based approaches add a second, law-applying analysis, because proponents of prospectivity view “the temporal scope of judicial lawmaking” as “a function of two interrelated doctrines, retroactivity and *stare decisis*.” Fisch, *supra* note 21, at 1082. Obviously, if each of the factors comprising this function are variable or indeterminate, the determination of the temporal scope of judicial decisions becomes more complex. Alternatively, if one of these factors (retroactivity) is more static, then the temporal scope of judicial decisions becomes more determinate (and predictions become much more certain).

A third predictability problem concerns the relative instability of the various approaches to prospectivity. Though virtually every area of the law can expect to experience some change, the Supreme Court (to name just one court) has had considerable difficulty arriving at an approach to prospectivity that holds up over time.<sup>237</sup> Even those legal scholars who support prospectivity appear to have little consensus as to the precise approach that should be adopted.<sup>238</sup>

A final predictability-related problem with prospectivity is the difficulty associated with determining whether the conduct or events at issue occurred before or after the date of a precedent-setting decision. Though determining whether conduct or events occurred before or after some certain date might seem as though it would lead to unambiguous results, in practice, this determination is not so clear cut.<sup>239</sup>

## 2. The Furtherance of Fair and Efficient Adjudication

The second broad justification for the doctrine of stare decisis offered by Hart and Sacks relates to its contribution to fair and efficient adjudication.<sup>240</sup> This justification has several aspects.<sup>241</sup> The first is concern for reliance interests, or the rational expectations of the party litigants.<sup>242</sup> As discussed previously, this is unquestionably a goal of prospectivity-based approaches,<sup>243</sup> but because the doctrine of stare decisis also incorporates such considerations,<sup>244</sup> there is little reason to believe that prospectivity-based approaches do a better job of protecting such interests than does the retroactive application of judicial decisions.<sup>245</sup>

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237. See *Harper*, 509 U.S. at 113 (O'Connor, J., dissenting) ("This Court's retroactivity jurisprudence has become somewhat chaotic in recent years."); Corr, *supra* note 27, at 761; Paul M. Barrett, *High Court Cases Hold Big Risks for State Finances*, WALL ST. J., Feb. 6, 1992, at B6 (referring to this area of the law as the "retroactivity quagmire").

238. See *supra* note 21.

239. See Fisch, *supra* note 21, at 1067-73.

240. See HART & SACKS, *supra* note 144, at 568-69.

241. Some of the aspects listed by Hart and Sacks under this heading (specifically, those relating to changes in court personnel, the role of discretion, and respect for predecessor judges, see *id.* at 568-69) will be dealt with in Part III.D.3 *infra*.

242. See *id.* at 569.

243. See *supra* note 212 and accompanying text. See also Fisch, *supra* note 21, at 1085 ("Fairness concerns are typically raised in support of prospective application of new legal rules.").

244. See *supra* note 219 and accompanying text.

245. The same is true of the concept of notice as it relates to fairness. Though notice of applicable legal standards is undoubtedly an element of fairness, see, e.g., Fisch, *supra* note 21, at 1084, notice of the prospect of legal change could be accomplished through a

A second aspect of the “fair and efficient adjudication” justification for stare decisis is uniformity,<sup>246</sup> or what some others refer to as the aspect of equality, or the “equal treatment of persons similarly situated.”<sup>247</sup> “The value of equality is, of course, unavoidably impaired to some extent whenever precedent is rejected,”<sup>248</sup> and the occasional rejection of precedent certainly is within the contemplation of the doctrine of stare decisis. But a change in the law that is applied “retroactively” at least has the virtue of achieving equality in the sense that it calls for the application of the same rule of law in all similar cases not yet final.<sup>249</sup> “Prospective limitation, on the other hand, requires a court simultaneously to apply different rules—one of them acknowledged to be ‘wrong’ in at least some types of cases—to persons whose situations may be indistinguishable on any relevant basis.”<sup>250</sup> And selective prospectivity, of course, represents the height of inequality, in that it calls for the application of different legal rules to persons distinguishable only on the basis who was first able to persuade a precedent-setting court of the need for change.<sup>251</sup>

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judicious use of dicta as aptly as through prospective rulemaking.

246. See HART & SACKS, *supra* note 144, at 569 (discussing “[t]he desirability, from the point of view of fairness to the litigants, of securing a reasonable uniformity of decision throughout the judicial system, both at any given time and from one time to another”).

247. Currier, *supra* note 1, at 237. Currier adds: “It is a fundamental ethical requirement that like cases should receive like treatment, that there should be no discrimination between one litigant and another except by reference to some relevant differentiating factor.” *Id.* See also Traynor, *Prospective Overruling*, *supra* note 7, at 559 (“Equal justice before the law has been the proud boast of Anglo-American judges for generations.”). Some have questioned what equal treatment in this context actually means, and whether and to what extent it is actually achieved. See, e.g., Schauer, *supra* note 181, at 596. Putting aside such potential theoretical difficulties, which seem to be problems mainly at the periphery, presumably most would agree that a reasonable uniformity of decision as described by Hart and Sacks is desirable.

248. Currier, *supra* note 1, at 241.

249. See *id.* at 241 (“[B]oth before and after the overruling decision, all litigants have their disputes resolved in accordance with what is then regarded as the proper rule of law.”); see also *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (“Our approach to retroactivity heeds the admonition that ‘the 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 v. Smith*, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting))).

250. Currier, *supra* note 1, at 241 (citation omitted).

251. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) (concluding that selective prospectivity “breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally”); *id.* at 538 (suggesting that it was for “this reason” that the Court “abandoned the possibility of selective prospectivity in the criminal context in [*Griffith*], even where the new rule constituted a ‘clear break’ with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review”).

Note that a delay in the prospectivity determination (which occurs, for example, when

The final aspect supporting stare decisis relates more to the efficiency justification for stare decisis than to the fairness justification. This efficiency aspect has several components. The first relates to the effect of stare decisis on the need for parties to relitigate, and for courts to reconsider, every legal issue.<sup>252</sup> As discussed previously, it seems unlikely that, even if stare decisis were to be abolished altogether, such wholesale relitigation and reconsideration would occur.<sup>253</sup> Nonetheless, a regime of prospectivity is likely to bring about some marginal increase in the rate of legal change.<sup>254</sup> Thus, it seems likely that a regime that incorporates some relaxed adherence to precedent would result in more frequent calls for legal change and more frequent consideration of those arguments.<sup>255</sup>

Moreover, unlike traditional applications of the doctrine of stare decisis (under which the law announced is applied to the facts underlying that decision as to all similar cases without further discussion or analysis),<sup>256</sup> a regime of prospectivity requires that the parties to brief (and the courts to consider) not only whether the law should change, but also whether that change should be limited prospectively.<sup>257</sup> In addition, unless the law-changing decision

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this issue is not resolved in the context of the law-changing decision itself; see *supra* note 234) effectively converts what might purport to be a purely prospective application into a selective one. See, e.g., Mishkin, *supra* note 63, at 72 (observing that *Linkletter*, “the case in which the Court made its first pronouncement of a general power of prospective limitation did not actually involve giving a new rule purely prospective effect,” “for the opinion accepted without question the prior Court holdings giving the *Mapp* rule retroactive effect in *Mapp* itself”).

252. See HART & SACKS, *supra* note 144, at 568 (discussing “[t]he desirability, from the point of view of the litigants, of expediting litigation and minimizing its costs by sparing them the necessity of relitigating every relevant proposition in every case” and “[t]he need, from the point of view of the judicial system, of facilitating the dispatch of business—indeed, the sheer impossibility of reexamining *de novo* every relevant proposition”).

253. See *supra* note 151.

254. See *supra* note 221.

255. Again, it is beyond the scope of this Article to suggest an optimum rate of legal change. The point here is that those advocating a regime of prospectivity must be prepared to deal with an increase in the number of arguments along these lines and to recognize that many (probably most) of these arguments will not be successful.

256. See, e.g., Paul E. McGreal, Comment, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'Y 595, 596 (1992) (“Under common-law jurisprudence, retroactivity is quite simple: always and absolute.”).

As some courts have indicated, there might be some further consideration of remedies in this context. See *supra* note 160 and accompanying text. This does not seem to be a particular feature of retroactivity, though, as one similarly could envision a further consideration of remedies under a prospectivity-based approach.

257. See 1 TRIBE, *supra* note 17, § 3-3, at 218-19 (“The [*Linkletter*] Court essentially treated the question of retroactivity in criminal cases as purely a matter of policy, to be decided anew in each case.”); Stephens, *supra* note 17, at 1574 n.423 (noting that if a “party wishes to make the argument that any newly announced rule not apply to her, she

answers the question, parties in later cases involving conduct or events that predate such a decision also will be forced to brief (and courts will be forced to consider) whether the arguably “new” law announced in the earlier decision should be applied to such later cases. Depending upon the approach, this could implicate a large number of cases.<sup>258</sup>

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must be prepared to support that with evidence of reliance, presumably at every stage of the appeal—or to raise sufficient arguments for a remand for and evidentiary hearing on reliance issues.”).

Moreover, in those cases in which a “new” prospectivity standard is announced, it seems that the court must consider whether that new standard *itself* should be applied only prospectively. See John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 354-56 (1991). See also Meyer, *supra* note 3, at 427 (observing that “*Teague*’s rule of non-retroactivity was itself a new rule”). *But cf.* Planned Parenthood v. Casey, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (arguing that “*stare decisis* ought to be applied even to the doctrine of *stare decisis*”).

258. See MISHKIN & MORRIS, *supra* note 146, at 297 (“Making reliance upon the old law a defense to liability would tend to make a litigable issue out of specific knowledge of the law at the time action was taken.”); Beytagh, *supra* note 182, at 1618 (“Indeed, the question is potentially a collateral issue in every lawsuit in which a change in the existing law is sought by a litigant and every time a litigant relies on a law-changing decision for which the issue has not yet been settled.”); Fisch, *supra* note 21, at 1114 (“[R]etroactivity concerns are implicated in a much broader range of cases than the Supreme Court has recognized.”); Mishkin, *supra* note 63, at 65 (“It is worth noting that the adoption of such a general practice might well create problems beyond the effective capacity of the regular judicial machinery.”).

Some have argued that, in practice, prospectivity-based techniques should be utilized only rarely. See, e.g., James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) (“Assuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small number of cases; its possibility is therefore unlikely to deter the broad class of prospective challengers of civil precedent.” (citing Currier, *supra* note 1, at 215)). Indeed, many of the recent proponents of prospectivity almost seem to go out of their way to make this point. For example, Fallon and Meltzer opine that “[a]bsent powerful countervailing considerations, the normal complement of legal and equitable remedies should be available.” Fallon & Meltzer, *supra* note 16, at 1791. See also *id.* at 1796-97 (arguing that “it ought to take rather extreme unpredictability to overcome the presumption in favor of standard remedies”).

Still, given the enormous number of federal and state cases decided in the United States every year, the number of “new” law cases could be larger than some might suspect. For a rough approximation, consider the number of federal and state cases that have utilized a *Linkletter*-type analysis since that case was decided. See Beytagh, *supra* note 182, at 1558-96 (summarizing Supreme Court prospectivity cases decided through June 1975); Corr, *supra* note 27, at 748-95 (summarizing Supreme Court prospectivity cases decided between June 1975 and June 1982, and other federal court prospectivity cases decided between 1972 and 1982); see also Corr, *supra* note 27, at 797 (criticizing, as an administrative matter, the Court’s inadequate “supervision of the application of [prospectivity] doctrine in the lower courts”).

Furthermore, it has been argued that prospectivity-based analyses may not legitimately be limited to those cases in which a legal rule is to be applied in some manner only prospectively (or even those cases where the question is close). The appearance of justice might require that any such analysis be conducted in a much broader class of cases. Mallamud argues:

The difficulty [caused by those cases in which new rules are applied retroactively] lies not in the decisions, but in the neglect of the *Stovall* criteria. It

Another efficiency-related problem with prospectivity-based approaches is that they tend to be very difficult to apply, because the standards they employ tend to be multi-faceted and (even in comparison to the doctrine of *stare decisis*) somewhat vague.<sup>259</sup> Unlike a typical *stare decisis* analysis (where the question is whether to change the law in the first instance), prospectivity-based approaches must operate in a context where the change has already occurred. Accordingly, such approaches tend to incorporate factors beyond those that would be considered under *stare decisis*. In particular, most of these approaches consider whether the rule of law in question should be characterized as “new.”<sup>260</sup> Regrettably for

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is not that those criteria would have led the Court to better decisions in those cases. Rather the problem is that, because the Court fails to discuss those criteria when applying newly declared rights retroactively, but carefully applies those criteria in support of decisions to limit new rights to prospective operation, it appears that the criteria serve as justifications rather than reasons for the decisions.

See Mallamud, *supra* note 183, at 347 (citation omitted).

259. See generally Cameron S. DeLong, Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions*, 1985 U. ILL. L. REV. 117. This seems to be true regardless of how the approach is characterized. For example, though Fallon and Meltzer describe their approach to prospectivity under the guise of a theory of constitutional remedies, Fallon & Meltzer, *supra* note 16, at 1777-1807, they ultimately conclude that those “values” that might lead to a prospective application of some new rule of law are “captured” in the retroactivity formulations set forth by the Court in *Stovall* and *Chevron Oil*, “which call for a weighing of: (i) the relative unpredictability of a decision, (ii) the nature and purpose of the newly recognized right, and (iii) the disruption of the administration of justice that would arise from retroactive application of the new standard,” *id.* at 1797.

Similarly (at least for vagueness purposes), Fisch argues that whether a law-changing legal rule is applied retroactively or prospectively depends on whether the rule arises in a stable or an unstable legal context, or equilibrium. Fisch, *supra* note 21, at 1105-11. Fisch argues that “in the context of a stable equilibrium, the lawmaker should avoid retroactivity.” *Id.* at 1106. Precisely how one is to determine the relative stability of any given legal equilibrium, though, does not seem to be amenable to a simple, bright-line analysis. See Roosevelt, *supra* note 1, at 1109 n.190 (“The metaphor of equilibrium, however, is of limited utility, since it is just as hard to apply as the concept it is to replace.”).

Multi-factor standards, of course, often lead to further questions, such as the relative weight of the factors to be applied, *see, e.g.*, Corr, *supra* note 27, at 766-69, and whether the list of factors articulated is exhaustive. Regrettably, the proponents of such standards frequently fail to provide the answers to these questions, leading to additional argument on these points. Finally, advocates of prospectivity often call for different approaches with respect to different types of cases, which naturally further complicates matters.

260. See *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion):

In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.

*Id.* (citations omitted); *see also* *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (holding that consideration be given to whether “the decision to be applied . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was

proponents of prospectivity, this “newness” factor has proven extraordinarily difficult to apply.<sup>261</sup> The additional time and money

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not clearly foreshadowed” (citation omitted); see also Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1, 17-18 (1992) (cataloging, in an almost humorous fashion, the various tests employed by the Supreme Court for determining whether a rule of law is “old” or “new” for purposes of applying *Teague*).

261. One need only look at the Supreme Court's recent habeas corpus jurisprudence for validation of the difficulty of applying such tests. See *O'Dell v. Netherland*, 521 U.S. 151, 173 (1997) (Stevens, J., dissenting) (“Distinguishing new rules from those that are not new under our post-*Teague* jurisprudence is not an easy task . . .”); *Teague*, 489 U.S. at 301 (plurality opinion) (“It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes.”). For a particularly graphic example of the difficulty of applying a “new rule” standard, see *Stringer v. Black*, 503 U.S. 222 (1992).

And why is this “newness” factor so difficult to apply? For one thing, many, if not most, judicial decisions result in some disruption of the expectations of at least one of the parties. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (“The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation.”); *Teague*, 489 U.S. at 333 (Brennan, J., dissenting) (“Few decisions on appeal or collateral review are ‘dictated’ by what came before.”).

At the same time, very few judicial decisions result in a rule of law that could be characterized as “new” in a dramatic sense. According to Eisenberg:

[A]lmost any rule employed in a common law decision is new in the sense that the court must choose in every case whether to apply, extend, reformulate, or radically reconstruct relevant doctrinal propositions. As long as the courts follow a replicable process this feature of the common law is not unfair. Since every member of society has reason to know that the society's legal rules will reflect policies, and reason to know that a policy has the requisite social support, neither the policy nor judicial action reflecting the policy should normally involve unfair surprise.

EISENBERG, *supra* note 10, at 36.

Indeed, as the discussions in this and earlier Subparts suggest, there also might be institutional impediments to the proclamation of “new” judicially-created law. See, e.g., Fallon & Meltzer, *supra* note 16, at 1794:

[T]here are symbolic reasons to minimize the number of occasions on which courts, in recognizing a right, must hold themselves out to the public as having broken with precedent and rendered a creative and unpredictable decision. . . . [S]ymbolic representations of the ties that bind judges should not lightly be undermined by frequent characterizations of rules and decisions as new.

*Id.* Such impediments are discussed in greater detail in Part III.D.3 *infra*.

Moreover, the vast majority of those cases that might be characterized as announcing “new” law do so in the context of an uncertain legal climate. See Fisch, *supra* note 21, at 1109 (arguing that “fewer expectations are upset by a large change when the law is in flux than by a small change to a stable equilibrium.”). Indeed, this seems to be one of the main reasons why people litigate. See Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 789 (“Good lawyers recognize that legal predictions are rough and approximate and that care must be taken not to formulate general principles as if they were based on anything more than actual results in particular cases.”).

As a result, it is frequently unclear whether the application of such a “new” rule to the parties in that case (and all similar parties) is any less fair than would be the application of any other alternative rule. See Fallon & Meltzer, *supra* note 16, at 1794 (“It would take

expended by parties and courts to deal with such analyses in cases where such an analysis is arguably implicated would be considerable.<sup>262</sup>

Finally, efficiency in this context can be considered in terms of the effect of one's retroactivity/prospectivity policy on the market. According to this perspective, "efficiency is generally viewed as favoring retroactivity,"<sup>263</sup> in that it results in a broader implementation of what is presumptively a superior rule of law.<sup>264</sup> By contrast, the amelioration of the effects of a transition to a "new" legal rule through judicial means (such as might be accomplished through some form of prospective application) generally is regarded as inefficient.<sup>265</sup>

### 3. The Furtherance of Public Confidence in the Judiciary

The final justification for the doctrine of stare decisis offered by Hart and Sacks relates to "public confidence in the judiciary."<sup>266</sup> Like the fair and efficient adjudication justification, this justification also has several different aspects, including the need to consider courts institutionally (and the related need for "according respect to the conclusions of predecessor judges"<sup>267</sup>), and the need for impersonal decision-making (and the related need for "minimizing the elements of personal discretion"<sup>268, 269</sup>).

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rather extreme unpredictability to upset the sort of reliance that would, independent of other considerations, deserve protection. In cases of reasonable doubt, reliance is unjustified, while the victim's interest in redress may be strong."); Fisch, *supra* note 21, at 1109 ("The likelihood of legal change in an unstable equilibrium makes reliance on the legal status quo unreasonable and thereby mitigates potential fairness problems arising out of retroactivity.").

262. See Fisch, *supra* note 21, at 1089 ("Even in circumstances in which the objectives of a new rule do not require retroactive application, engaging in the line-drawing associated with nonretroactivity may be inefficient."); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 524-25 (1995); Note, *supra* note 15, at 319.

On the other hand, if the proponents of prospectivity-based approaches are correct in their prediction that such an aberrant result would be called for only rarely, see *supra* note 258, one might wonder whether these few exceptional cases are worth the added trouble.

263. Fisch, *supra* note 21, at 1088.

264. See *id.*

265. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 551-52, 598-602 (1986) (arguing that even "new" legal rules announced in judicial decisions generally should be applied retroactively, and without transitional relief by the government, which results in economic inefficiency). Though these conclusions seem to be the consensus, it should be noted that not all economists agree. See, e.g., Fisch, *supra* note 21, at 1090-91 (discussing arguments to the contrary).

266. HART & SACKS, *supra* note 144, at 569.

267. *Id.*

268. *Id.*

The doctrine of stare decisis and the retroactive application of judicially declared rules of law further public confidence in the judiciary more than prospectivity-based approaches do. Again, the doctrine of stare decisis does not preclude legal change, but it does dictate that reliance interests (among other factors) inform the law-changing decision.<sup>270</sup> Consideration of reliance interests and the retroactive application of the governing rule of law slow the pace of legal change, which results in greater adherence to precedent, and in turn enhances public confidence in the wisdom of the judges who established that precedent.<sup>271</sup>

By contrast, under prospectivity-based approaches, the need for legal change frequently is regarded as superseding those restraining considerations, such as reliance, that usually inform the law-changing decision.<sup>272</sup> Such relatively unbridled approaches to judicial decision-making tend to result in a relatively “unceremonious ‘heave-ho’” of precedent.<sup>273</sup> At the same time, prospectivity-based approaches also show disrespect for future judges. For by purporting to proclaim what the law “shall be” in the future, later courts might well feel more constrained (however unjustifiable that constraint might be) in applying prior prospective rulings.<sup>274</sup>

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269. See also *id.* at 568 (discussing “[t]he need of discouraging a rush of litigation whenever there is a change of personnel on the bench”). Hart and Sacks also discuss “[t]he desirability of maximizing the acceptability of decisions . . . as manifested both by the respect accorded to them by successor judges and by their staying power,” *id.* at 569, and:

The necessity, considering the amorphous nature of the limits upon judicial power and the usual absence of an effective political check at the ballot box, that judges be subject to the discipline and the restraint of an obligation to build upon the prior law in a fashion which can withstand the test of professional criticism.

*Id.* Cf. Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (arguing generally that the Supreme Court should strive to appear principled in its decision-making).

270. See *supra* note 219 and accompanying text.

271. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 548 (1991) (Blackmun, J., concurring in judgment) (“Nearly a half century ago, Justice Roberts cautioned: ‘Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.’” (quoting *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting))); see also Schauer, *supra* note 183, at 600 (“If internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution.” (footnote omitted)).

272. See *supra* notes 210-211 and accompanying text.

273. *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 109 (1993) (Scalia, J., concurring); see also Currier, *supra* note 1, at 241 (“[T]he scars inflicted by overruling are always deeper and more extensive if the overruling is denied retroactive application, and the impairment of equality thus more pronounced.”). For a thoughtful discussion of these and related considerations, see generally Mishkin, *supra* note 63, at 58-72.

274. See *supra* note 193 and accompanying text.

But perhaps the greatest criticism of prospectivity in the context of judicial legitimacy relates again to the vagueness of these approaches.<sup>275</sup> Because many of the factors utilized by these various approaches are not amenable to consistent and predictable application, they are inherently subject to the discretion of the decision-maker.<sup>276</sup> The discretionary nature of prospectivity-based approaches does not, on balance, further public confidence in the judiciary. In contrast to the doctrine of *stare decisis*, where there is but one law, and the law announced is the law applied, the discretion inherent in prospectivity-based approaches includes not only the ability to decide a case according to “incorrect” law, but also the ability to decide when such a decision is tolerable, or desirable. As Hart and Sacks asked more than forty years ago, “Do we have a working theory of the judicial function which would be adequate to prevent judges [from] assuming political functions and to avoid a disintegrating chaos of doctrine if the propriety of [such approaches] were universally accepted?”<sup>277</sup> Besides resulting in a greater politicization of the judicial decision-making process (and creating a “disintegrating chaos of doctrine”), prospectivity-based approaches, being highly subject to the discretion of the decision-maker, also have a great potential for abuse.<sup>278</sup>

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275. See *supra* notes 259-262 and accompanying text.

276. See Fallon & Meltzer, *supra* note 16, at 1769 n.209 (observing that “the law of remedies,” which is the basis for their approach, “has traditionally vested considerable discretion in trial courts”); see also POSNER, *FEDERAL COURTS*, *supra* note 175, at 178 (arguing that a lack of precise rules in any given area of federal law requires the Supreme Court either “to intervene on an essentially ad hoc basis . . . in all but the clearest cases” or “to allow the lower courts to exercise an essentially untrammelled discretion in these matters”).

277. HART & SACKS, *supra* note 144, at 606. For example, in *Beam*, Justice O’Connor argued that *Bacchus* (the precedential case in which the Court declared an essentially identical state tax unconstitutional) should not be applied retroactively in part because such an application could result in “potentially devastating liability” to the “blameless and unexpected citizens of Georgia[.]” “at a time when most States are struggling to fund even the most basic services.” *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 558 (1991) (O’Connor, J., dissenting). Does this mean that poorer (or less fiscally responsible, or less risk-averse) states are to be given preferential treatment vis-à-vis richer (or more fiscally responsible, or more risk-averse) states? That governmental entities are somehow deserving of better treatment than are corporations or other private persons? Again, where does one draw the line? Cf. Fallon & Meltzer, *supra* note 16, at 1829 (“A standard that weighs fiscal distress would be extremely difficult for courts to administer. Complex calculations are sometimes necessary within a remedial calculus, but sometimes too the balance tips in favor of a rule, rather than ad hoc decisionmaking.”); Fisch, *supra* note 21, at 1094 (“Retroactive application has the further advantage of avoiding differential treatment based on subjective factors, such as the degree of individual plaintiffs’ knowledge or reliance.”).

278. See, e.g., Corr, *supra* note 27, at 796 (“Justice Harlan candidly acknowledged that he had viewed prospectivity less as a principled doctrine to be developed than as an

In fairness, proponents of prospectivity might argue that the discretion inherent in such approaches enables courts to craft more individualized, and therefore more just and fair, results.<sup>279</sup> Still, the damage such approaches inflict on public confidence in the judiciary simply is not worth the price.<sup>280</sup>

#### IV. CONCLUSION

The resolution of the question whether judicial decisions should be applied retroactively, or may, in certain circumstances, be applied only prospectively, involves a balancing of a number of different considerations.<sup>281</sup> Ultimately, the question comes down to whether the net benefits of one approach outweigh the net benefits of the alternatives. Though prospectivity has a certain attractiveness, its cost, in terms of its impact on the adjudicative and precedent-setting functions of federal courts, is simply too high.

Courts make law, but they do so only through the adjudication of cases. The focus must remain on the parties and the issues before the court, and the law announced must be the law that is applied to those parties in resolution of those issues. Prospectivity is inconsistent with these attributes of judicial decision-making, in that it fails to apply current law to the case in which it is announced (and/or in other, essentially indistinguishable cases).

Courts also cannot dictate, through words alone, which portions of

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opportunity to restrict the influence of substantive decisions with which he disagreed." (citing *Desist v. United States*, 394 U.S. 244, 258 (1968) (Harlan, J., dissenting)). Corr suspected that Justice Harlan might not have been alone among the Justices. *See id.* Of course, what might be considered "judicial activism" can cut across ideological lines—meaning that this device probably is capable of resurrection in any era.

279. *See, e.g.*, Note, *supra* note 156, at 348 ("One advantage of considering reliance as part of the remedial calculus is that, when appropriate, courts may award partial relief to vindicate the rights of the prevailing party while still accommodating the reliance interests of the unsuccessful litigant."). On the other hand (or so the argument goes), "if retroactivity issues were decided exclusively at the adjudication stage, courts would face an all-or-nothing decision: reliance interests would receive full protection or no protection at all." *Id.*

280. By raising these questions, this author does not mean to become embroiled in a general process-versus-results debate. For the purposes of this Article, it is sufficient to recognize that a blind adherence to process can lead to injustice just as surely as can a blind adherence to results. This author also does not intend to engage in a general rules-versus-standards debate. It is not necessary to argue that "standards" are never appropriate in order to weigh the relative merits of prospectivity and retroactivity approaches. The purpose of this discussion is simply to consider the full ramifications of a system of prospectivity, which tolerates overt refusals to apply what is deemed the correct legal principle, thereby denying a party the relief to which he would otherwise be entitled.

281. *See, e.g.*, RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 333 (1990) ("The avoidance of retroactivity is just one other consideration to weigh in the social balance; it is not an indispensable condition of justice under law.").

their opinions are worthy of binding precedential effect. Rather, the “law” that comes from courts is that law that comes from the application of some rule of law to the parties in the case in which it is applied. Everything else a court says must be regarded as dicta, lest cases become nothing more than a platform from which to legislate. Prospectivity runs afoul of these notions as well. Indeed, as Justice Cardozo, an outspoken proponent of prospectivity-based approaches, himself observed, prospectivity represents “a different conception either of the binding force of precedent or of the meaning of the judicial process.”<sup>282</sup>

Moreover, courts cannot decide what the law ought to be in the abstract and then, only as an afterthought, consider whether and to what extent the law announced should apply to the parties in the case and to all others similarly situated. If some particular change in the law would be so disruptive that it may not be justly implemented retroactively, that is not an argument in favor of prospectivity; rather, it is an indication that the law should not be changed, at least not in the current case. Considerations such as reliance interests must therefore be balanced as part of the decision whether to change the law in the first instance. If a change is desirable but should not be applied retroactively, the solution lies not in a prospective announcement, but rather in the communication of possible change through the use of ordinary dicta.

Finally, the flexibility of prospectivity does not make it a desirable alternative to *stare decisis*. The advantages of such discretionary means of effecting legal change are outweighed by their disintegrating effects on private ordering, fair and efficient adjudication, and public confidence in the judiciary.

Thus, it appears that “[a] general theory of prospective limitation is [neither] the only way—nor [is it] a wise way—to adapt the normal modes of judicial operation to the requirements of reality.”<sup>283</sup> While retroactivity “comports with our received notions of the judicial role,”<sup>284</sup> prospectivity “is not a judicial technique which is compatible with standards of adjudication expected by the legal profession or with values in the legal order which the layman looks to the judiciary to uphold.”<sup>285</sup> As this Article hopefully has demonstrated, the

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282. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366 (1932).

283. Mishkin, *supra* note 63, at 77 n.70.

284. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (opinion of Souter, J.).

285. Freeman, *supra* note 143, at 202.

“difficulties” inherent in a general judicial power of prospective limitation “outweigh any benefits that such a general power might be thought to provide.”<sup>286</sup> Prospectivity—at both the federal and state level—should be rejected in favor of a firm rule of retroactivity.

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286. Mishkin, *supra* note 63, at 102.